IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

GOVERNMENT OF BRITISH COLUMBIA,
represented by the BC PUBLIC SERVICE AGENCY

(the "Government")

-and-

PUBLIC SERVICE NURSES BARGAINING ASSOCIATION

(the "PSNBA")

-and-

PROFESSIONAL EMPLOYEES ASSOCIATION

(the "PEA")

(Grievances re: Oak Bay Lodge, Broadmead Care Society and Forensic Psychiatric Services Commission)

ARBITRATOR:	John B. Hall
APPEARANCES:	Peter A. Gall, QC, for the Government Theodore Arsenault, for the PSNBA Sonya Sabet-Rasekh, for the PEA
HEARING:	August 26, 2014 Vancouver, BC
AWARD:	October 20, 2014

AWARD

I. INTRODUCTION

This award concerns two separate grievances filed by the PSNBA and the PEA over three "divestments" implemented unilaterally by the Government. A third grievance filed by the British Columbia Service and Employees' Union (the "BCGEU") concerning the same events was initially part of this proceeding, but was resolved by the parties involved short of arbitration.

The remaining grievances arise at three different health facilities: Oak Bay Lodge Continuing Care Society ("Oak Bay"), Broadmead Care Society ("Broadmead") and the Forensics Psychiatric Services Commission ("Forensics"). These entities (collectively referred to as "the Facilities") were divested from the Public Service on June 1, 2013 pursuant to Orders in Council and amendments to the *Forensic Psychiatry Act*. The PSNBA and the PEA (collectively "the Unions") claim that, as a result of these divestments, the employer (sometimes called the "true employer") of their members at the Facilities has changed. More specifically, they maintain that the Government is no longer the employer, and has been replaced by the Facilities themselves and/or the Health Authorities to which two of the Facilities have been assigned under the applicable legislation and bargaining structure. As a consequence, the Unions seek declarations that their members are entitled to exercise the options and rights under various collective agreement provisions which apply to layoffs.

The Government maintains the actual or true employers of the employees working at the Facilities have always been Oak Bay, Broadmead and Forensics. It says the only change brought about by the divestments is that the Facilities and their employees are no longer part of the Public Service. In any event, the Government submits nothing turns on whether there has technically been a change in employers. That is because all of the Unions' members remained employed in their same jobs at the Facilities. Under the terms of the Public Service collective agreements, the layoff provisions only apply when there has been a cessation of employment or a loss of a job. Nor, says the Government, do the layoff provisions apply where an Order in

Council that previously included employees in the Public Service has been rescinded, and where there has been no actual termination of employment.

The parties' positions thus raise two broad issues. First, in the circumstances described more fully below, has there been a change in employers? Second, and regardless, do the layoff provisions in the Unions' Public Sector collective agreements apply?

II. BACKGROUND

The arbitration hearing proceeded by way of written submissions from the parties, together with "will say" statements and numerous supporting documents. Many of the documents were not referred to during the hearing or in the written submissions, and have thus not been considered in my deliberations. Few of the factual assertions in the written submissions were disputed, although the parties have differing positions on the resulting implications. For purposes of the background which follows, I have drawn extensively from the PSNBA's submission, supplemented by those of the PEA and the Government where appropriate.

(a) The Three Facilities

Oak Bay is a residential care facility located in Victoria. It is 15,000 square feet and consists of two buildings connected by a centralized support area. It has 150 rooms with furnishings, including beds, bedside tables, closet and chairs. There are 24 nurses working there who are affected by the PSNBA's grievance. The PEA does not have members working at Oak Bay.

Broadmead is a 299 bed residential care facility located in the Greater Victoria community of Saanich. The facility includes 115 priority access beds for veterans, 100 beds for seniors in the community and four respite care beds for veterans on Vancouver Island. Broadmead also operates the Veterans Health Centre and the Nigel Program for Adults with Disabilities. There are 22 nurses working at Broadmead affected by the PSNBA's grievance.

The PEA is no longer pursuing its grievance in respect of Broadmead due to a recent decision by the Labour Relations Board[1].

Forensics is a multi-site health organization providing specialized hospital and community-based assessment, treatment and clinical case management services for adults with mental illness who are in conflict with the law. The Forensic Psychiatric Hospital is located in Coquitlam. In addition to the services provided at the Hospital, services are provided on an outpatient basis through regional programs coordinated by six community clinics in Vancouver, Victoria, Nanaimo, Prince George, Kamloops and Surrey. There are 230 nurses working at Forensics affected by the PSNBA's grievance. There are 17 PEA positions at Forensics, seven of which are currently vacant for various reasons.

(b) The Joint PSNBA Certification

The Union of Psychiatric Nurses (the "UPN") and the British Columbia Nurses Union (the "BCNU") hold a joint certification for the Government of the Province of British Columbia for a bargaining unit composed of:

> … employees licensed or registered under the Registered Psychiatric Nurses Act, or the Registered Nurses Act, including those employees who are eligible for licenses or registration except those excluded by the Code, *employed by* [the] *Government of the Province of British Columbia*. (italics added)

This certification covered all three Facilities at all material times prior to the divestments.

(c) The PEA Government Certification

The PEA holds a certification for the Government of the Province of British Columbia for a bargaining unit composed of:

> … employees in a professional classification in the Public Service Classification structure who are members of an association that has statutory authority to license

[1] The Board's decision in *Broadmead Care Society*, BCLRB No. B116/2014, is summarized in Part II(g) below.

> a person to practice that profession, other than those persons described in clause 4(a) of the Public Service Labour Relations Act and those excluded by the Code, *employed by The Government of the Province of British Columbia.* (italics added)

This certification covered Broadmead and Forensics at all materials times prior to the divestments.

(d) The *Public Service Act* and Bargaining Structure

Prior to divestment, Oak Bay, Broadmead and Forensics were subject to the *Public Service Act* (the "*Act*") which sets out the legal requirements for the Public Service. Section 3 of the *Act* deals with its application, and states:

> **Application of Act**
>
> **3.** Except as otherwise provided in this Act or in another Act, this Act applies
>
> (a) To all ministries of the government, and
> (b) To any board, commission, agency or organization *of the government* and its members or employees, to which the Lieutenant Governor in Council declares this Act, or a provision of this Act, to apply. (italics added)

The three Facilities were all subject to the *Act*. This was true of Forensics by virtue of Section 7 of the *Forensic Psychiatry Act*. The *Public Service Act* was made applicable to Oak Bay by Order in Council 812 dated July 22, 2004; it was made applicable to Broadmead by Order in Council 180 dated March 31, 2010. Thus, prior to divestment, Oak Bay, Broadmead and Forensics were all a "board, commission, agency or organization of the government" pursuant to Section 3(b) of the *Act*.

Further, the Facilities were covered by the joint certification noted above and by the 15th Nurses Master and Component Agreement (the "Nurses Master Agreement"). The Nurses Master Agreement defines the Employer in Article 1.02 as:

"Employer" means the Government of British Columbia represented by the BC Public Service Agency (BCPSA) including any agency or person authorized to exercise the authority of the BCPSA.

The BC Public Service Agency is continued by Section 5 of the *Act*, which states:

BC Public Service Agency

5. (1) *The division of the government known as the Public Service Employee Relations Commission is continued as the BC Public Service Agency* under the administration of the minister.

(2) The Lieutenant Governor in Council must appoint, under section 12, an individual to be the agency head.

(2.1 to 2.5) [Repealed 2005-35-26]

(3) *The agency head is responsible for personnel management in the public service* including but not limited to the following:

(a) advising the minister respecting personnel policies, standards, regulations and procedures;
(b) providing direction, advice or assistance to ministries in the conduct of personnel policies, standards, regulations and procedures;
(c) recruiting, selecting and appointing, or providing for the recruitment, selection and appointment of, persons to or within the public service;
(d) developing, providing, assisting in or coordinating staff training, educational and career development programs;
(e) developing, establishing and maintaining job evaluation and classification plans;
(f) *acting as bargaining agent for the government* in accordance with section 3 of the *Public Service Labour Relations Act*;
(g) developing, establishing and maintaining occupational health and safety programs;
(h) developing and implementing employment equity policies and programs;
(i) conducting studies and investigations respecting staff utilization;
(j) carrying out research on compensation and working conditions;
(k) developing and implementing mechanisms to ensure effective human resource planning and organizational structures;
(l) developing, implementing and maintaining a process to monitor, audit, and evaluate delegations under section 6, to ensure compliance with this Act and the regulations;
(m) establishing and maintain a personnel management information system;
(n) Performing other duties assigned by the minister respecting personnel, consistent with this Act and the regulations.

> (4) Subject to this Act and the regulations and on the recommendation of the agency head, the minister may issue policies respecting the matters referred to in subsection (3). (italics added)

Thus, under the terms of the *Act* and the Nurses Master Agreement, the Government was responsible through its division known as the BC Public Service Agency for all personnel management at the Facilities, including: recruitment, selection and appointment of employees; training and career development; job evaluation and classification plans; acting as bargaining agent; OH&S programs; and employment equity.

Section 5.01 of the *Act* deals with the appointment of a Merit Commissioner. Section 5.1 covers the role of the Merit Commissioner, who is responsible for monitoring the application of the merit principle under the *Act*. The Merit Commissioner's jurisdiction included the three Facilities. Section 8 of the *Act* deals with hiring. It provides that appointments must "be based on the principle of merit, and be the result of a process designed to appraise the knowledge, skills and abilities of eligible applicants". On November 16, 2009, the Merit Commissioner released a Service Plan for 2010/11 to 2012/13 which indicated that the hiring system would be changing from a delegated model to a centralized model. Under this new model, the BC Public Service Agency was to become the Government's corporate hiring centre. The Hiring Centre would recruit, assess and pre-qualify candidates and refer them to the manager of the position. Promotions would also be managed centrally. Appendix 2 of that Service Plan listed all three Facilities as organizations within the jurisdiction of the Office of the Merit Commissioner.

Section 9 of the *Act* deals with probation and probationary employees, and states that a Deputy Minister or agency head may reject a probationary employee during probation if they consider the employee to be unsuitable.

Section 22 of the *Act* deals with the suspension or dismissal of employees. Section 22(1) makes it clear that a suspension must be given by the agency head, Deputy Minister or an employee authorized by a Deputy Minister. The agency head, Deputy Minister or an individual with delegated authority under Section 6(c) may dismiss an employee for just cause.

(e) The PSNBA Master Agreement

The Nurses Master Agreement is consistent with the *Act*, and reinforces the role of the Government as the employer as represented by the BC Public Service Agency. The starting point is the definition in Article 1.02 quoted above. Article 1.03 deals with the misuse of managerial/supervisory authority and states that a complaint can be referred to the Deputy Minister to consider or investigate. Article 1.04 deals with the *Human Rights Code*, and states:

> *The Government of British Columbia* in cooperation with the Union, will promote a work environment that is free from discrimination where all employees are treated with respect and dignity. (italics added)

Article 1.06 deals with discrimination and sexual harassment complaint procedures, and states that a complaint can be referred to the Deputy Minister or their designate to investigate. The Employer Policy which supports the process is described at Article 1.06(f):

> (f) Where the matter is not resolved pursuant to (e), the Union may refer the matter to adjudication in accordance with BC Public Service Agency Policy Directive 3.1: Human Rights in the Workplace – Discrimination and Sexual Harassment, which is attached as Information Appendix J.

Article 2.14 states that the Deputy Minister of the BC Public Service Agency shall advise the Union of any proposal to amend, repeal or revise the statutes that would affect the terms and conditions of employment of those employees covered by the Nurses Master Agreement.

Article 8 deals with grievances and indicates that matters of dismissal, suspension or a general application dispute are to be handled by the BC Public Service Agency. Notices to arbitrate are directed to the BC Public Service Agency.

Article 10 of the Nurses Master Agreement deals with dismissal and suspension, and states that the Deputy Minister or person authorized by the *Act* may dismiss or suspend an employee for just cause. Article 10.03 gives the Deputy Minister authority to reject a probationary employee for just cause. Article 10.04 deals with return to former classification

and lays out the procedure if a promotion is rejected by the Deputy Minister or person authorized under the *Act*.

Article 11 is the Seniority article. It defines service seniority as "the length of continuous service in the Public Service of British Columbia". The seniority lists required to be produced and posted each calendar year by the Employer must include employees' start dates in the Public Service.

Article 12 deals with postings, transfers and secondment. Selection panels are mandated to be convened in accordance with the *Act* and regulations. Article 12.07 sets out an appeal procedure, allowing an unsuccessful applicant for an appointment to the Public Service to seek a review by way of inquiry by the Deputy Minister and then by further review to the Merit Commissioner pursuant to a process under the *Act.*

The Facilities are referred to by name in Article 13.03 of the Nurses Master Agreement, which defines jurisdictional units and seniority blocks. The Facilities are listed in the Hospital Jurisdictional Unit under Article 13.03(e). The two components of the bargaining unit covered by the agreement are further defined in Appendix 1, where the Facilities are again listed by name. The *Act* is referenced throughout Article 13. Under Article 13.03(c), movement of an employee from one jurisdictional unit to another is pursuant to the *Act* requirements.

Article 13.05 provides for a pre-lay-off canvass with options including voluntary resignation with severance. Article 13.10 deals with severance pay. In this grievance, the PSNBA seeks an Order that the bargaining unit employees under the Nurses Master Agreement are entitled to the option of exercising their Article 13 rights, including the option of severance pay under Article 13.10, as a result of the divestments and the change of the employer from the Government to the Facilities.

Other collective agreement articles which place effective control of labour relations with the Government through the Deputy Minister or the BC Public Service Agency are:

(a) Article 19.02 – Rehabilitation Committee;

(b) Article 22.13 – Violence in the Workplace – Preventing Workplace Violence: A Guide for the B.C. Public Service Policy Handbook;

(c) Article 25 – Public Service Medical Plan;

(d) Article 28 – Classification and Re-Classification is subject to the *Public Service Labour Relations Act* and the *Public Service Act* terms. Classification Grade descriptors are specified within the *Public Service Labour Relations Act*. Under 28.03, new classifications or changes to existing classification standards proposed by the BCPSA must be communicated in writing to the Union.

(e) Article 30.03 – Standing Joint Committee – Master rotation, hours of work schedules developed by a Joint Committee must be sent to the B.C. Public Service Agency for review.

Following Article 31, which is the last article, the Nurses Master Agreement is signed by the authorized signatories of the BC Public Service Agency as bargaining agent of the Employer.

(f) The PEA Master Agreement

Analogous provisions are found throughout the PEA's Master Agreement with the "Government of the Province of British Columbia represented by the BC Public Service Agency". For instance, Appendix A (which sets out various terms used throughout the PEA Master Agreement) contains the following definition of "Employer":

> EMPLOYER means either the Government of British Columbia represented by the BC Public Service Agency or a ministry of the Government of British Columbia, as the context may require.

The definition of "Employee" in Appendix A reads as follows:

> EMPLOYEE means a person who is appointed to office under the *Public Service Act*, who is included in the bargaining unit, and who is covered by this Agreement.

Other analogous provisions include those relating to: notification to amend, repeal or review the *Public Service Labour Relations Act* or the *Public Service Act*; discrimination and harassment; rejection of probationary employees; selection panels for postings, transfers and relocations; and the grievance procedure. Article 11 deals with seniority, which is defined as "the length of continuous service as a regular employee in the Public Service of British Columbia". Appendix D sets out seniority blocks and refers expressly to the "Forensics Psychiatric Services Commission". Finally, the PEA Master Agreement is signed by authorized representatives of the BC Public Service Agency "on behalf of the Employer".

(g) Divestment of the Facilities

The UPN and the PEA each received identically worded letters dated March 28, 2013 from Bert Phipps, Assistant Deputy Minister of Employer Relations with the BC Public Service Agency, advising of changes impacting the three Facilities:

> Our office has previously been in contact with you regarding Bill 8, the *Miscellaneous Statutes Amendment Act, 2013*. As you are aware, Bill 8 received Royal Assent on March 14, 2013. The *Miscellaneous Statutes Amendment Act* removes the requirement in the *Forensic Psychiatry Act* that the Forensic Psychiatric Services Commission be subject to the *Public Service Act* for staffing related matters. As we have previously indicated, the changes to the labour law statutes and regulations governing the Forensic Psychiatric Services Commission are being carried out in conjunction with similar changes that will impact Oak Bay Lodge and Broadmead Care Society.
>
> This letter is to officially inform you of all of the actions that the Province is taking in relation to the Forensic Psychiatric Services Commission, Oak Bay Lodge and Broadmead Care Society and provide notice of the effective date for those actions. Please be advised that, by Order in Council and effective June 1, 2013, the Forensic Psychiatric Services Commission and Oak Bay Lodge are to be designated as health care employers under the Health Care Employers Regulation to the *Public Sector Employers Act*. Also effective June 1st, the *Public Service Act* will no longer apply to Oak Bay Lodge and Broadmead Care Society. Broadmead Care Society will no longer be subject to the *Public Sector Employers Act*.
>
> We recognize that employees of these three employers may be concerned about how the above noted changes will impact them personally. As such, the BC

> Public Service Agency is committed to begin working immediately with all impacted parties to ensure an orderly June 1, 2013 transition.

The PSNBA filed a grievance, or notice of a general application dispute, on April 24, 2013 due to the Government's refusal to allow employees to exercise their rights under Article 13 (Layoff and Recall of Regular Employees) of the Nurses Master Agreement. The grievance read in part:

> This letter will serve as official notice of a general application dispute in accordance with the provisions of Article 8.13 of the Nurses Master Agreement. Per our discussions on several occasions, you have advised that the Government is of the opinion that the transfer of the above captioned groups out of the Public Service does not constitute a change of employer and therefore does not trigger the displacement rights as described in Article 13 of the collective agreement. We are not in agreement with this and contend that each employee has the option to request their Article 13 rights.

The PEA's general interpretation grievance was filed on April 30, 2013 and read in part:

> Please consider this letter as notice, as per 8.09 of the collective agreement between the parties (Professional Employees Association and the BC Government), of the PEA's general interpretation and application grievance on the above-mentioned matter. Through discussions with you it has become clear that the employer's position is that the existing collective agreement rights will not be applied because of the view that the transfer to the PHSA from the Public Service does not constitute a change of employers. We dispute this view and assert that successor rights, including terms and conditions of the collective agreement, such as Article 37, should apply.

Article 37 of the PEA Master Agreement is headed "Layoff and Recall". The PEA also invokes Article 35.11 which concerns the layoff and recall of auxiliary employees.

The divestments of the Facilities were finalized by *Bill 8 - Miscellaneous Statutes Amendment Act, 2013* ("Bill 8"), along with Orders in Council 198 and 199 which came into effect on June 1, 2013. Bill 8 made the following amendments to the *Forensic Psychiatry Act*:

> **33. Section 7 of the Forensic Psychiatry Act, R.S.B.C. 1996, c.156 is amended**

(a) **in subsection (1) by striking out** "Subject to the *Public Service Act*, the commission" **and substituting** "The commission",

(b) **in subsection (2) by striking out** "and may declare that some or all of the *Public Service Act* applies to the executive director", **and**

(c) **in subsection (3) by striking out** "Despite the *Public Service Act* but with the approval of the minister, the commissioner" **and substituting** "The commission".

The Orders in Council provided:

ORDER IN COUNCIL 198
Ministry Responsible: HEALTH
Statutory Authority: Miscellaneous Statutes Amendment, 2013, s.50; Public Sector Employers, s.15
Effective June 1, 2013

a) Section 33 of the *Miscellaneous Statutes Amendment Act, 2013*, is brought into force,

b) The list in section 2 of B.C. Reg. 427/94, the Health Care Employers Regulation, is amended by adding "Forensic Psychiatric Services Commission".

ORDER IN COUNCIL 199
Ministry Responsible: FINANCE
Statutory Authority: Public Service, s. 3(b); Public Sector Employers, s.15
Effective June 1, 2013,

a) the list in section 2 of B.C. Reg 427/94, the Health Care Employers Regulation, is amended by adding "OBL Continuing Care Society",

b) OIC 812/2004 and 180/2010 are rescinded,

c) The designation of Oak Bay Lodge Society, made by OIC 1439/89 is rescinded.

Orders in Council 812/2004 and 180/2010 (referred to in paragraph (b) of OIC 199 above) had previously made Oak Bay and Broadmead subject to the *Act*.

As a result of the foregoing changes, Oak Bay and Forensics are now Health Care Employers within the meaning of the *Public Sector Employers Act* and its Health Care Employers Regulation; they are no longer part of the Public Service under Section 3(b) of the *Act*. Broadmead is now an independent, non-profit health care provider outside of the Public Service. Aside from no longer being subject to the *Act*, Broadmead is not covered by the *Public Sector Employers Act* and is not part of a Regional Health Authority. Rather, it is subject to a

new poly-party certification issued by the Labour Relations Board on various terms found in BCLRB No. B116/2014. The certification is held by the Broadmead Employees' Association which is comprised of the BCGEU and the BCNU. The PEA is not part of the new Association.

(h) The Health Sector

As a further consequence of the changes described above, the Unions characterize Oak Bay and Forensics as now being "related to" the applicable Health Authorities. More particularly, Oak Bay is related to the Vancouver Island Health Authority ("VIHA"), and Forensics is related to the Provincial Health Services Association ("PHSA"). As indicated, Broadmead has been certified by the Labour Relations Board as a separate employer.

Regardless of the precise relationships between Oak Bay and VIHA, and between Forensics and PHSA, those two Facilities are now by virtue of the Orders in Council listed in Section 2 of the Health Care Employers Regulation. This means they fall within paragraph (f) to the definition of "public sector employer" found in the *Public Sector Employers Act*:

> (f) a hospital as defined in the Hospital Act *or an employer that is designated in the regulation as a health care employer* … (italics added)

The Government is separately defined as a public sector employer under paragraph (a) of the same definition.

Further, Oak Bay and Forensics have been (or will be) added as separate lines on the list of employers attached to the multi-employer certifications held by the UPN and the BCNU in the nurses bargaining unit of the Health Sector. The terms of Provincial Collective Agreement between the Health Employers Association of BC ("HEABC") and the Nurses Bargaining Association (the "NBA") now apply to all employees and auxiliary employees of Oak Bay and Forensics working in the applicable positions. The NBA is obviously a different bargaining association than the PSNBA, and includes other member unions. The Provincial Collective Agreement at Article 1.02 contains the following definition of "Employer":

> EMPLOYER means the corporation, society, person(s), organization, facility, agency or centre (represented by the Health Employers Association of B.C.) as listed in the appendix attached to the certification issued by the Labour Relations Board of British Columbia.

Other terms and conditions of the NBA Provincial Collective Agreement differ in several respects from the Nurses Master Agreement. However, there is no need to explore the relative comparisons prepared by the PSNBA.

Employees at Forensics who were previously represented by the PEA are now covered by the Provincial Agreement between HEABC and the Health Sciences Professional Bargaining Association (the "HSPBA"). The latter is a bargaining association consisting of multiple union members including the PEA, the BCGEU, the Health Sciences Association, the Canadian Union of Public Employees, and the Hospital Employees' Union. Once again, there are differences between the terms and conditions in the PEA's Master Agreement with the Government and the HSPBA Provincial Agreement that need not be explored at present. I note, however, the following assertion by the PEA:

> The movement of the affected employees to the HSPBA bargaining unit and [the Provincial] Collective Agreement required them to be reclassified under the Health Sector Collective Agreement classification system pursuant to the terms of the Memorandum of Agreement effective June 1, 2013. The affected employees have yet to be reclassified. However, there is a strong likelihood that their classification under the HSPBA Collective Agreement would involve a lower salary and would result in red circling of their current salary for several years. (Written Submission at para. 41)

Further, according to the uncontested Will Say Statements of two PEA members, the terms of employment and benefits provided under the PEA Master Agreement that were lost through the application of the HSPBA Provincial Agreement were significant factors in their acceptance and continuance of employment with Forensics.

(i) Funding, Remuneration and Day-to-Day Control

While the Unions' case on the first issue rests predominantly on the changes described above, the Government points to other considerations. It says non-governmental agencies can be included in the Public Service through an Order in Council. Those Orders in Council can be rescinded, which then takes the agencies out of Public Service. But, submits the Government, including an agency in the Public Service does not make it the employer of the agency's employees; rather, they remain employees of the agency. When an agency is removed by Order in Council, the only difference is that the agency and its employees are no longer treated as being part of the Public Service.

In the circumstances here, the Government says the actual and true employers of the employees working at the Facilities have always been Oak Bay, Broadmead and Forensics. It relies on the following unchallenged points:

- Oak Bay, Broadmead and Forensics have never been funded by the Government and their employees have never been paid by the Government.
- Nor did the Government have any involvement in the selection or management of the employees of Oak Bay, Broadmead and Forensics.
- When the OIC's were rescinded, the employees at Oak Bay, Broadmead and Forensics were not terminated by the Government and rehired by the Facilities.

In reference to the statutory framework under the *Act*, the Government says it was "nothing more" than a bargaining agent for the Facilities, and was not the employer of the Unions' members.

(j) Past Practice

All three parties included examples of past devolutions from Government in their written submissions. I have considered all of those circumstances, but am not persuaded that the practice evidence points unambiguously towards one meaning that might be attributed to the

layoff provisions in the Unions' agreements: see *John Bertram & Sons Co*. (1967), LAC 362 (P. C. Weiler). Moreover, in situations where the layoff provisions have been applied, the parties have typically entered into a discrete memorandum of agreement. Absent evidence to explain the basis for those memoranda, it cannot be ascertained whether the agreements were concluded in furtherance of the layoff provisions in the Master Agreements, or whether the parties simply elected to adopt those terms by reference in circumstances where they would not otherwise have applied. Nor am I persuaded by the Government's submission that the absence of a past example where an Order in Council was rescinded reveals a mutual intention to not apply the layoff provisions in this instance. Whatever meaning might be given to the layoff provisions in the Unions' Master Agreements, they do not differentiate between "ministry" and "OIC" Public Service employees.

III. ANALYSIS

The parties' central positions were briefly identified in the first part of this award, and have been amplified somewhat in the immediately preceding section. Their more detailed submissions will be incorporated into the ensuing analysis.

(a) Employer Status

The first issue is whether there has been a change in the identity of the employer(s) of the Unions' members who work at the Facilities.

The issue of employer or "true employer" status can at times be vexing. As noted in *Re Fraser Burrard Hospital Society and HSA* (1988), 35 LAC (3d) 257 (Munroe), there can be many different purposes for which a resolution of the issue may be required (QL para. 41). Further, there is no single criterion and it is common to find competing criteria within a given fact pattern (*ibid*, at QL para. 63).

The issue was comprehensively addressed for labour relations purposes by the Labour Relations Board in *Columbia Hydro Constructors*, BCLRB No. B36/94. That case admittedly arose in the "distinct or unique" circumstances of the construction industry, but the panel headed by then Chair Stan Lanyon set out a multi-faceted test of general application designed to address two related questions: (i) into which organization or undertaking are the employees integrated; and (ii), which organization or undertaking holds fundamental control over the employees? (p. 48). The first question focuses on the employees, while the second focuses on the alleged employer. In order to answer these questions, the Board adopted the seven factors compiled in *York Condominium Corporation*, [1977] OLRB Rep October 6/95.

An application of the *York Condominium* factors to the present facts predictably yields conflicting results. The factors of direction and control, along with the burden of remuneration, point to the Facilities as the employers. However, as subsequently held in *JJM Construction Ltd.* (1996), 29 CLRBR (2d) 266 (BCLRB No. B16/96), the absence of these criteria does not preclude employer status (at QL para. 151). In my view, the authority to discipline, hire and fire -- being the third, fourth and fifth factors -- ultimately rests with the Government under the *Act*, especially when one recalls the applicable statutory provisions set out earlier in this award, including those assigning responsibility to the BC Public Service Agency. The perception of who is the employer (the sixth factor) must be regarded as a neutral consideration given the state of the record. But there can be no doubt regarding the remaining factor; i.e., the intent to create the relationship of employer and employee. The majority of the *CHC* panel stated as follows regarding this relationship:

> Finally, there is clearly the existence of an intention to create the relationship of employer and employee. By virtue of the contract between CHC and the contractor, each contractor agrees CHC is the employer. Every employee will fill out an application form agreeing to work for CHC as the employer. Prior decisions have attached importance to the element of contract; *Loblaw Groceterias Co. Ltd. et al.*, 66 CLLC 16, 078; *Kelowna Centennial Museum Association, supra*; *Comox-Strathcona Youth-Chance Society*, BCLRB No. 33/82. Contractual relationships will be respected unless there are clear reasons to believe they do not reflect the true facts or violate the Code. … (p. 54)

In later commenting on "the combination of the factors" in *CHC*, the majority observed that the putative employer "… has the ability to negotiate the terms of the collective agreement; *that is a hallmark in any collective bargaining analysis*" (p. 56; italics added)

In this case, there is the potentially unique combination of the certifications, the Master Agreements and the enactments (i.e., the *Forensic Psychiatry Act* before it was amended, as well as OICs 812/2004 and 180/2010) which all effectively define and/or designate the Government as the "employer" of employees working at the Facilities. I have not been directed to any authority where a labour relations tribunal has failed to give effect to such an unequivocal intent to create the relationship of employer and employee. To repeat what was stated in *CHC*, "[c]ontractual relationships will be respected unless there are clear reasons to believe they do not reflect the true facts or violate the Code" (p. 54). There is no suggestion before me that either the former or the current regimes governing the Facilities were put in place by the Government for an improper purpose.

I do not accept the Government's submission that its role *vis-a-vis* the Facilities prior to divestment was no different than the role of HEABC in the Health Sector. HEABC is an accredited bargaining agent, and it has exclusive authority under its Bylaws to resolve disputes regarding the interpretation of collective agreements it negotiates on behalf of its member employers; however, it is not the employer of any employees represented by the various trade unions certified for the multi-employer bargaining units in the Health Sector. And, even accepting the Government's argument that it delegated responsibility for day-to-day operations to the Facilities (including the management and direction of employees), this does not remove the facts that until divestment it was the employer under the *Act*, the Board's certifications and the Master Agreements, and it held ultimate control for labour relations purposes in that capacity.

In summary on the first issue, I have little hesitation concluding that the Government was the true employer of the Unions' members working at the Facilities prior to the divestments. For similar reasons, the changes which came into effect on June 1, 2013 point with equal clarity to Oak Bay and Forensics (and/or their respective Health Authorities) being the true employers of the Unions' members at those operations, and to Broadmead being an independent, non-profit

health care employer. Put simply, the changes implemented unilaterally by the Government resulted in the jobs of the Unions' members being transferred to different employers.

(b) Applicability of *Verrin* Rights

The concept of what are sometimes referred to as "*Verrin* rights" emanates from a series of decisions in this Province. Mr. Verrin was a truck driver for a hospital laundry operated by the Ministry of Health. The laundry was transferred as a going concern to a newly incorporated society controlled by the hospitals it served. Mr. Verrin preferred to stay with the Government, and claimed the transfer of the operation meant he had been laid off under the terms of the collective agreement between the Government and the BCGEU. The arbitrator held in the first instance that Mr. Verrin had not been laid off, and that his employment had continued without interruption: *British Columbia v. British Columbia Government Employees' Union (Verrin Grievance)*, (1985), 21 LAC (3d) 136 (Bird).

The Labour Relations Board overturned the award on review. It found Mr. Verrin's employment had been severed by the sale, meaning he could exercise collective agreement rights against the Government: *Government of British Columbia (Ministry of Health) -and- B.C. Government Employees' Union*, BCLRB No. 117/87. The original panel reasoned in part as follows:

> … [W]e disagree with the arbitrator's conclusion of law that a "cessation of employment or elimination of job resulting from a reduction of the amount of work required to be done by the employer, a reorganization, program termination, closure or other material change in organization", did not take place "because [as a result] of Section 53 the grievor's employment has continued, not ceased, and the grievor's job has continued".
>
> With the greatest of respect to the learned arbitrator, Section 53 did not maintain the Grievor's job with the original employer. That enterprise which created employment for the Grievor, namely, the Government's hospital laundry, was sold to a third party. The Grievor's employment with the Government has been severed. Employees are not sold or otherwise transferred with the business rather, at the time of their cessation of employment with the vendor, employees may pursue their existing claims, if any, under the collective agreement against the vendor. However, the employees' rights are defined by the collective

> agreement. Whether the cessation of employment with the vendor results, for example, in a discharge or layoff, or gives rise to bumping rights, to severance or to certain rights under a technological change provision, is a matter of contract interpretation.
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> V
>
> For the reasons set out above, we are satisfied that the arbitrator in this case made an error of law and policy in his interpretation of Section 53 of the Code. We are satisfied that when the Government sold its laundry service, the Grievor ceased to be employed by the Government and was entitled to exercise his rights, if any, under the collective agreement against the Government. In this case, we express no opinion as to whether the Grievor had any right to treat the elimination of his position with the Government as a "layoff' within the meaning of the collective agreement or entitled to exercise any other rights under the collective agreement which may arise on "layoff' or other types of "severances" of employment. It may be that the collective agreement does not provide a remedy to the Grievor in these circumstances, but that is a matter of contract interpretation for the arbitrator.

A reconsideration panel of the Industrial Relations Council overturned the original panel, but the reconsideration decision was subsequently quashed on judicial review: *BCGEU v. British Columbia (Industrial Relations Council),* [1988] BCJ No. 234, 23 BCLR (2d) 234; upheld on appeal by [1988] BCJ No. 2009, 33 BCLR (2d) 1. The reasons of Mr. Justice Shaw were quoted extensively by the majority in the Court of Appeal, and were expressly approved insofar as they concerned labour relations principles. The following excerpts are taken from the lower court judgment:

> One of the most fundamental rights we possess as free people is to choose the employer for whom we will work. The importance of this is self-evident; most working people occupy at least half their working hours in their employment. A law which requires a person to be contractually bound to an employer not of his choosing is directly contrary to this basic freedom of choice. In *Nokes v. Doncaster Amalgamated Collieries Limited,* [1940] A.C. 1014 (H.L.), Viscount Simon, L.C., said at p. 1020:
>
> > It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law - the principle, namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right

> to his services cannot be transferred from one employer to another without his assent.
>
> * * *
>
> In my view the taking away of this individual freedom should not be inferred from a statute unless no other reasonable construction of that statute is possible. …
>
> * * *
>
> Counsel for the Government submitted that an employee involved in the transfer of a business has an option: either he becomes an employee of the new owner, or he can quit. I do not accept this as a real choice. Quitting means both loss of job and loss of rights under the collective agreement. Seniority rights are gone; severance pay has gone; and so has the job that provides support for the worker and the worker's family.
>
> * * *
>
> In summary, if s. 53 is interpreted as requiring employees to be contractually bound under the Collective Agreement to the purchaser of a business, whether the employees choose to or not, that construction can only be achieved by reading into s. 53 words that are simply not there. The forcing of human beings to work for employers not of their choice is, in my view, too important a matter to be left to reading words into a statutory provision where those words have been carefully left out. Such an interpretation of s. 53 by inference only, is in my opinion patently unreasonable. It is also so fundamentally erroneous as to call for judicial intervention.

The majority in the Court of Appeal determined that "[t]here is no logical or rationale basis for holding that Verrin ceased to be an employee of the Government or that he ever became an employee of the purchaser", and continued:

> When Verrin became an employee of the Government both he and the Government became bound by the provisions of the collective agreement in accordance with s. 64. When the business was sold the purchaser became subject to the terms of the collective agreement in accordance with s. 53. The employees of the purchaser also became bound in their relations with the purchaser by the terms of the collective agreement. Verrin never became an employee of the purchaser and hence he never had any contractual relationship with the purchaser. His only contractual relationship was with the Government. In order to make Verrin an employee of the purchaser one must, as Shaw J. said, read words into

> the statute which are not there. The statute may, in a sense, have provided for the assignment of the employees from the Government to the purchaser.
>
> Both the arbitrator's decision and the decision of the Council are founded on the proposition that Verrin continued to be employed and, therefore, his employment was not terminated within the meaning of the collective agreement. As Verrin was never employed by the purchaser he did not become subject to any relationship with the purchaser. His relationship was with the Government only had he had the right to grieve pursuant to the collective agreement that the Government had wrongly attempted to terminate his employment.

The "rules" resulting from the *Verrin* decision were summarized by the Labour Relations Board in *Granville Island Brewing Company Ltd.* (1996), 34 CLRBR (2d) 102 (BCLRB No. B322/96), in part as follows:

> - A transfer of employment from a predecessor to a successor is not automatic under Section 35 of the Code: *Verrin*, Court of Appeal, pp. 22, 23. Employees cannot be transferred against their will by a predecessor employer to a successor employer when a sale, lease, transfer or other disposition of a business, or part of it, occurs within the meaning of Section 35 of the Code: *Verrin*, BCLRB No. 117/87, upheld by the Court of Appeal, *supra*.
> - When a business or part of it is sold, leased, transferred or otherwise disposed of, the predecessor employer's employees may be terminated or laid off by the predecessor employer as a result and may choose to exercise whatever rights they have against the predecessor employer under the collective agreement in force at the time of sale, lease, transfer or other disposition: *ibid*.
> - If the predecessor's employees wish to continue employment with the successor, they may exercise that option and their employment will continue to be governed by the terms and conditions of their collective agreement to which the successor becomes bound: *Verrin*, BCLRB No. 117/87, at page 14. (para. 24)

As the foregoing "rules" have been articulated by both the Court of Appeal and the Labour Relations Board, they are binding on me as an arbitrator under the British Columbia *Labour Relations Code*. The same approach has not been adopted universally in other Canadian jurisdictions, but represents the prevailing view: see, for instance, *Canadian Broadcasting Corp. v. Communications, Energy & Paperworkers Union of Canada*, [2001] CLAD No. 294 (Freedman), at para. 62; and *Pembroke Regional Hospital v. Canadian Union of Public Employees*, [2009] OLAA No. 387 (R. Brown) at paras. 8 - 9. The latter award includes the following statement of law:

> Like the Court of Appeal in *Government of British Columbia*, I accept the premise that clear statutory language is required to terminate an employment relationship. In the absence of a transparent expression of legislative intent, I conclude section 15(3) [the Ontario successorship provision] binds the successor employer to the predecessor's collective agreement but does not extinguish employee rights against the latter employer. This conclusion is consistent with the outcome in seven of the eleven cases reviewed in the second part of this award. (para. 26)

The Government correctly observes that *Verrin* was a successorship case. However, the Labour Relations Board has rejected the proposition that the right of employees to elect whether to remain with their employer only arises in the context of a successorship: *Norske Skog Canada Limited*, BCLRB No. B469/2001, at para. 4. The panel there concluded that, regardless of how one approached the issue, "[t]he maintenance employees [affected by a corporation reorganization] would be working for a different employer" (para. 45). Nor, in my view, is there any basis in law for limiting *Verrin* to successorship cases as the Government suggests. While the statutory provision is directed to preserving collective bargaining rights, the essence of the Court decisions was the common law right to individual freedom. It was held that the successorship language did not override or otherwise remove Mr Verrin's common law right to choose his employer -- a right which existed independent of the successorship.

It is my further view that the underlying principles which informed the outcome in *Verrin* apply to the present circumstances. That is to say, there is no language in the legislative amendments to the *Forensic Psychiatry Act*, or in the Orders in Council which removed the Facilities from the Public Service, that purports to transfer the affected employees or otherwise remove their fundamental right "to choose the employer for whom [they] will work": *Verrin*, BCSC. Nor is there any language terminating the employment of the Unions' members with the Government and/or extinguishing collective agreement rights against their former employer. Further, such consequences should not be inferred given the importance of the subject. In short, the Unions' members who were affected by divestments of the Facilities were entitled to remain employees of the Government.

(c) Applicability of the Layoff Provisions

As established by the *Verrin* line of decisions, employees who do not wish to transfer to a new employer may exercise whatever rights they have under the collective agreement with their existing employer. This leads to the second question raised by the grievances, and it is perhaps the most challenging: Do the layoff provisions in the Unions' Master Agreements apply in the circumstances?

Article 13 of the PSNBA Master Agreement deals with the "Layoff and Recall of Regular Employees". Article 13.09 sets out various options, and Article 13.10 provides for severance pay. The term "layoff" is defined in Article 1.02:

> "layoff" means the termination of an employee's employment because of lack of work or because of a discontinuation of a function or program.

The "Layoff and Recall" of regular employees is dealt with in Article 37 of the PEA Master Agreement. Article 35.11 addresses those subjects in respect of auxiliary employees. The term "layoff" is not defined; however, Article 37 opens with this statement:

> The parties recognize that due to the changing needs and requirements of society and to the provision of service to the public, position classifications and positions may be added, or deleted from time to time.

I have stated already that the past practice evidence cannot be used to shed light on what the parties mutually intended by these provisions. The Government relies as well on negotiation history. The Unions argues this evidence is inadmissible or, alternatively, should be given no weight.

The negotiation history put forward by the Government emanates from its collective bargaining relationship with the BCGEU. Article 13 of that Master Agreement addresses "Layoff and Recall", while what is now Article 32.10 (previously Article 32.11) is headed "Transfer of Employees Out of the Public Service Bargaining Unit". The Government submits that "[t]he very existence of [the latter] provision indicates that the parties did not consider the

transfer of employees out of the Public Service bargaining units to some other entity to constitute a layoff under Article 13, because it provides separate rights for employees who have been transferred out of the Public Service" (para. 87). Further, it notes the BCGEU sought to amend then Article 32.11 of its Master Agreement during the 1986 round of negotiations by giving Article 13 rights to employees transferred out of the Public Service. The BCGEU proposal read:

> 32.11 Transfer of Employees out of Public Service Bargaining limit
>
> When the parties are made aware that employees may be transferred out of the Public Service Bargaining limit to a corporation, board, agency or commission, a Joint Employer - Union committee shall immediately be established. *The committee shall be established to facilitate the orderly exercise of employee rights pursuant to Article 13 and/or the transfer of employees*. This clause does not cover the secondment of employees. (italics added)

Later in the 1986 negotiations, the BCGEU accepted that employees should not be allowed to "opt for severance when there's a job available" (bargaining notes from April 8, 1986). It therefore tabled a proposal limiting the "orderly selection" by employees to the options of vacancy selection, early retirement or transfer. In the end, the clause was amended to allow transferred employees to be recognized as in-service applicants when applying for regular positions in Government for a period of one year from the effective date of transfer. The language in the BCGEU Master Agreement has essentially remained unchanged except for increasing the one year "in-service" period to two years. Then, in the last round of bargaining, the parties added the following sentence to what is now Article 13.10: "This provision applies where coverage of the Employer in the Public Service Act is revoked by Order-in-Council or legislation".

I am unable to attach any significance to the negotiation history between the Government and the BCGEU. The first reason is obvious: the Unions were not privy to those negotiations, and there is no evidence to show that what transpired in bargaining with the BCGEU reflects the mutual intent of the parties signatory to the Master Agreements at issue before me. Second, the exchanges relied upon by the Government occurred during the 1986 round of negotiations with the BCGEU. At that time, Arbitrator Bird had issued his 1985 award finding that Mr. Verrin's employment had continued without interruption when the laundry service was transferred to the

new society. The Labour Relations Board had yet to rule on the subject (the original panel's decision was issued on April 6, 1987), and the Court of Appeal would not resolve the issue definitively until October of the following year. Thus, the BCGEU was putting forward proposals to address what is no longer the state of the law in British Columbia. Moreover, it is apparent from the bargaining notes that the BCGEU was not conceding its layoff language did not apply to a transfer from the Public Service. The April 8, 1986 minutes tendered by the Government also contain this statement of position:

> As you know court case [sic] outstanding re Verrin arbitration. We believe we have right to Article 13 but we are changing our position on this matter here.

It is convenient at this juncture to address the Government's arguments that authorities following the *Verrin* principle do not apply here because there has been no "actual termination" of employment. It submits that "[i]n all the cases [including *Norske Skog Canada*] in which *Verrin* has been applied, there has been a termination of employment by one entity and a rehiring by another entity, which triggered the legal right of an affected employee to refuse to accept employment with the new entity" (Memorandum of Argument at para. 108). In this case, the affected employees were not terminated by the Government and rehired by Oak Bay, Broadmead and Forensics (as applicable). Rather, submits the Government, the employees have always been, and continue to be, employed by and remunerated by those Facilities.

It is unquestionably accurate, as a matter of form, to say that the affected employees were not "terminated" by the Government and "hired/rehired" by the Facilities. Nonetheless, as found in the first part of my analysis, the Government is no longer their employer and they are now employed by different entities. The Government was able to accomplish this change through legislation and the Orders in Council (options not available, obviously, to private sector employers). Further, it appears to have been necessary for the Government, the Unions and others (including HEABC) to conclude two comprehensive multi-party Memoranda of Agreement in order to "implement the legislated transition of both [Oak Bay and Forensics] from the Public Service to the Health Sector, effective June 1, 2013". These Memoranda are headed "Without Prejudice and Without Precedent", although the parties agreed they are properly before me in this proceeding, and constitute the mechanism by which the Unions' members were

transferred. I am not persuaded that the technical form of the change is determinative. The substantive result as a matter of law is that the Unions' members have lost their employment with the Government in the Public Service and are now working for new employers in the Health Sector.

Nor am I persuaded by the Government's reliance on the transfer clause in the PEA Master Agreement. Article 36.07 (which the Government argues "parallels" Article 32.10 of the BCGEU agreement) provides:

> **36.07 Transfer of Employees Out of the Bargaining Unit**
>
> When the parties are made aware that employees will be transferred out of the Public Service bargaining unit to a corporation, board, agency, or commission, a joint Employer/Union Committee shall immediately be established. The Committee shall be established to facilitate the orderly transfer of employees. Where such transfers occur, those transferred employees will be recognized as in-service applicants when applying for regular positions in Government for a period of two years from the effective date of the transfer. This Clause does not cover secondment of employees.

The Government relies further in a proposed amendment to Article 36.07 tabled by the PEA in those parties' ongoing negotiations. The amendment mirrors the language added recently to the BCGEU Master Agreement; i.e., "This provision applies where coverage of the Employer in the Public Service Act is revoked by Order-in-Council or legislation". The Government submits this proposed amendment shows the PEA acknowledges the Government is not the employer of employees included in the Public Service under an Order in Council, and that rescission of an Order in Council does not constitute a layoff under provisions of the PEA Master Agreement. The Government proceeds to argue as follows in its written sur-reply:

> The importance of this fact [the proposed amendment to Article 36.07] for the purposes of this case is that this shows that the parties consider revocation of OICs to be a different situation than what is presently included in Article 36.07, that is, the transfer of employees out of the Public Service bargaining unit to a corporation, board, agency or commission. There can be no reason for including the revocation of OICs in Article 36.07 other than that the PEA, like the BCGEU, considers the revocation of OICs to not be the same situation as the transfer of employees from the Public Service bargaining unit to another entity. (p. 1)

There is no need for me to determine whether there is a distinction between the transfer of "employees from the Public Service bargaining unit to another entity" and the transfer of employees through the "revocation of OICs" as propounded by the Government. The more immediate question is whether the transfer language in Article 36.07 precludes resort to the layoff provisions in Articles 35 and 37 of the PEA Master Agreement. There is no equivalent language regarding transfers in the PSNBA Master Agreement.

Taken literally, Article 36.07 would seemingly allow for the transfer of employees "out of the Public Service bargaining unit to a corporation, board, agency or commission"; that is, it would permit a forced transfer. The Government's sur-reply effectively concedes this is not the intent, as the paragraph quoted immediately above is followed by these passages:

> When employees are transferred from the Public Service bargaining unit to a corporation, board, agency or commission, there is a change of employer and hence a successorship. This triggers so-called "*Verrin* rights".
>
> Article 36.07, as currently written, deals only with this true *Verrin* situation - where part of the Government's business is transferred to another entity. This results in the termination of employment by the predecessor employer and the hiring of the employees by the successor employer. However, as a result of the *Verrin* decision, employees can refuse employment with the new employer.

In my view, and consistent with the Government's submission, Article 36.07 must be read as having application only where employees *elect* to be transferred out of the Public Service when their job is transitioned as contemplated by that provision. A similar conclusion was reached by Arbitrator Freedman in the *CBC* award:

> There is a reference in Appendix L to "Corporation employees … transferred as a result of the sale of business". At the least that provision is ambiguous. Arguably it could mean, as the Corporation suggested, that on a sale of a business Corporation employees are transferred, i.e., automatically. I do not think it means that. It could mean, as the Union argued, that on a sale of a business some Corporation employees may be transferred, and some may not be transferred (*in each case with their concurrence*). That is what I think it means. (para. 83; italics added)

However, the fact that Article 36.07 applies to employees who elect to transfer out of the Public Service bargaining unit when their jobs are transitioned "to a corporation, board, agency or commission" does not necessarily preclude the application of other provisions in the PEA Master Agreement to those employees who do not wish to transfer. This appears to have been acknowledged in Memorandum of Agreement #6 to the PEA Master Agreement which deals with the devolution/transfer of programs from the Ministry of Children and Family Development to authorities created by statute. It provides that "[a] regular employee who transfers to an authority will be recognized as having in-service status for the purpose of applying on postings for regular positions in the Province" for a period of two years after the effective date of the transfer (Clause 5). This language obviously reflects Article 36.07 of the Master Agreement. Clause 9 provides expressly that "[t]he provisions of Master Agreement Articles 35 and 37 … will apply to employees who are offered and decline employment with an authority". The latter applies as well to an employee displaced due to the operation of Article 37. In other words, Memorandum of Agreement #9 contemplates both Article 35.07 and Articles 35 and 37 applying in the same circumstances, depending on whether employees transfer to an authority or remain with the Government.

As noted already, there is no transfer language comparable to Article 36.07 of the PEA Master Agreement in the Nurses Master Agreement to potentially complicate the present discussion. Thus, the question under both agreements is ultimately one and the same: Are the Unions' members who elect not to transfer to the new employers at the Facilities entitled to exercise rights under the layoff provisions of the Master Agreements?

The definition of "layoff" in Article 1.02 of the Nurses Master Agreement and the opening statement in the PEA Master Agreement are repeated for proximate reference:

> "layoff" means the termination of an employee's employment because of lack of work or because of a discontinuation of a function or program. (Nurses Master Agreement)
>
> The parties recognize that due to the changing needs and requirements of society and to the provision of service to the public, position classifications and positions may be added, or deleted from time to time. (PEA Master Agreement)

I am unable to detect in either provision a distinction between what might be described as "ministry" Public Service employees and those included in the Public Service by Order in Council or statutory direction such as existed previously under the *Forensic Psychiatry Act* (again, see Section 3(a) and (b) of the *Act*). All of the Unions' members, while they were employed by the Government, fell within the definitions of "employee" for purposes of the relevant terms and conditions of the Master Agreements.

This brings me squarely to the nub of the Government's position. Relying in part on an award known as *Nigel Services* (cited and examined in greater detail below), the Government maintains that cessation of employment or loss of a job is a precondition to application of the layoff provisions in the Master Agreements. It submits more completely:

> … even if in some technical sense, based on a new certification being issued as a result of the removal of the facilities from the public service, there could be said to be a change in employer (as argued by the Union and which is denied), it can't be validly claimed that it was the mutual intention of the parties that the layoff provisions in the Public Service Agreements would be triggered in this situation: that is, where the employees remain in their very same jobs in the same facility under the same management, and continue to be paid by the same entity.
>
> * * *
>
> … a change in terms and conditions of employment under a collective agreement does not constitute a layoff for the purposes of Article 13 of the Public Service Collective Agreements; there must be a cessation of employment or loss of a job for the layoff provisions in the Public Service Agreements to apply. (Memorandum of Argument at paras. 101 and 103)

The Government concludes its argument by asserting that rescission of the Orders in Council "for Oak Bay, Forensics and Broadmead" (sic) did not result in the cessation of employment or loss of a job for any of the Unions' members at those Facilities, and reiterates its position that the employees "have continued in the same jobs with the same entities" (*ibid* at paras. 125-126).

The Government's position has already been rejected to the extent that the Unions' members can be said to have continued with "the same entities" in the sense that they are still

working for the same employers. But beyond this, the Government's position would in practical terms override the fundamental premise of *Verrin*. In order to find that there has *not* been a "cessation of employment or loss of a job" for the affected employees, one must infer that they have been transferred to the Facilities, or are otherwise obliged to accept continued employment with one of the new employers. If *Verrin* is applied consistent with my determination that there has been a change in the true employer, there has indeed been a cessation of active employment or loss of a job with the former employer; i.e., with the Government.

Most of the decisions applying *Verrin* have admittedly arisen in the context of a successorship. Nonetheless, I am not persuaded that the same "rules" do not have application to the immediate grievances. In addition to having new employers, the Unions' members have been transferred from the Public Service to the Health Sector; are now part of a different bargaining unit structure; and, in the case of Oak Bay and Forensics, their continued employment is governed by different terms and conditions of employment (i.e., the Health Sector collective agreements). In many successorships, the consequences will be considerably less dramatic (e.g. the employees may continue with the new employer under the same collective agreement).

As stated in *CBC*, in the absence of a very clear statutory or collective agreement provision, an employer cannot terminate the employment relationship and eliminate its obligations to employees "by the expedient of selling a business" (para. 75). That would be "inconsistent with some fundamental principles" (*ibid*). In a passage from the trial judgment in *Verrin* adopted by the Court of Appeal, the option of an employee quitting was rejected "as a real choice" because that would mean "both loss of a job and loss of rights under the collective agreement". There is no suggestion here -- nor could there be -- that the Unions' members may be terminated by the Government for just and reasonable cause. Thus, the one remaining alternative, and the one which most accords with terms of the Master Agreements, is that the affected employees have lost their employment with the Government in circumstances which trigger the layoff provisions.

In the language of the Nurses Master Agreement, those affected have seen their employment terminated "because of a lack of work or because of a discontinuation of a function

or program" by the Government. Similarly, under the PEA Master Agreement, "position classifications and positions" have been deleted by the Government and are no longer part of the Public Service. Once again, to say that the employees' jobs or positions have continued in a broader sense (i.e., with the new employers) would inherently run afoul of the principles in *Verrin* and require the employees to "work for employers not of their choice" (*Verrin,* BCSC as adopted by the BCCA).

In the passage quoted earlier from Board's decision in *Verrin* (which, of course, was ultimately restored by the Court of Appeal), the original panel explicitly disagreed with the arbitrator's conclusion that there had not been a "… cessation of employment or elimination of a job resulting from a reduction of the amount of work required to be done by the employer …" when the laundry was transferred to the new society. This effectively overruled the arbitrator's conclusion that there had not been a layoff, although the panel later professed to offer no opinion on whether Mr. Verrin had the right to treat the elimination of his position with the Government as a "layoff" under the collective agreement or was entitled to exercise any other rights. The applicability of layoff provisions following a successorship has been addressed directly in several subsequent arbitration awards, and was canvassed comprehensively by Arbitrator Brown in *Pembroke Regional Hospital*:

> … These observations lead to the question of what contractual entitlements employees have against the predecessor and whether these rights are affected by the decision they make about changing employer.
>
> The predecessor employer's obligations to employees who wish to remain employed by it were squarely addressed in two of the seven cases. In [*Silverwood Dairies and Milk & Bread Drivers' Union* (1976), 12 L.A.C. (2d) 225] Arbitrator Weatherill concluded "employees who preferred to stay with their original employer" (page 227) retained bumping and recall rights. Likewise in [*Macdonalds Consolidated Ltd. and Retail Wholesale Union* (1997), 61 L.A.C. (4th) 129], Arbitrator McKee decided employees who did not transfer to the buyer were entitled to collect severance pay under the collective agreement.
>
> The extent of the predecessor's obligations was not a central issue in the remaining five of seven cases, but the reasoning in most of them suggests employees who elected not to switch employers could avail themselves of the safeguards normally available to redundant workers. In [*Computing Devices Canada Ltd. and Employees Association of Computing Devices Canada,* [1995]

> O.L.A.A. No. 332 decision dated December 19, 1995 (Keller)], [*Canadian Broadcasting Corp. and Communications, Energy and Paperworkers Union*, [2001] C.L.A.D. No. 294 (Freedman)] and [*MTS Allstream Inc. and Communications Energy and Paperworkers Union* (2007), 158 L.A.C. (4th) 353 (Peltz)], the arbitrator was asked to decide only whether the sale terminated employment with the predecessor employer. In the event this question was answered in the union's favour, the arbitrator was not requested to determine precisely what rights employees had against that employer. … The reasoning in these four cases suggests employees electing not to transfer retained, not only their employment with the predecessor, but also the contractual rights normally available in the context of redundancy. *It would make little sense for an adjudicator first to decide successor legislation did not terminate employment with the predecessor employer, because the sole legislative purpose was to give employees rights against the successor, and then to read the predecessor's collective agreement to mean the benefits normally available to surplus employees did not apply in a sale-of-a-business scenario. The second ruling would rob the first of any practical significance.*
>
> The force of these observations is buttressed by the following comments made by Arbitrator Freedman in *CBC*:
>
> > Many of the employees who work in the transmitter service business have considerable seniority. That seniority is not with the transmitter service, but rather it is with the CBC. They are employed by the CBC, not by the transmitter service. There is no policy rationale which should lead to a result where, on the sale by the CBC of the transmitter service, those employees lose their ability to exercise their seniority rights as against their employer, among a large bargaining unit, and instead are force to move into a situation where in practical terms they have restricted rights. That is inconsistent with the underlying policy of the successorship provisions in the law, which is to protect employees ... (para. 86)
>
> As this passage demonstrates, one of Mr. Freedman's reasons for concluding the sale did not terminate employment with the seller was that the contrary conclusion would have prevented employees from utilizing seniority rights to bump into another job in the selling enterprise. *This reasoning leaves no doubt that employees who elect to remain with the seller would retain bumping rights*. (paras. 9 - 12; italics added)

Once again, I see no basis for departing from this line of reasoning simply because the Government has been able to divest itself of the Facilities through legislation and Orders in Council, rather more than by a conventional commercial transaction. The outcome is for all intents and purposes identical having regard to the labour relations consequences, and the same

policy rationale should apply. Arbitrator Brown later applied the reasoning to the facts in *Pembroke Regional Hospital*:

> On this interpretation of [the *Public Service Labour Relations Transitions Act*], laboratory employees may elect either to remain in the employ of the hospital or to transfer to [the Regional Laboratory Hospital, the new employer]. Those who decide to stay will be laid off within the meaning of the collective agreement because the transfer of laboratory services will render them redundant at the hospital. The work they have been doing will no longer be done by their original employer. In order to continue doing that work, they would have to change employers which they have elected not to do. The hospital has not offered them any other work. In short, their employment with the hospital will be terminated because they are surplus to its needs. Those facts constitute a layoff within the generally accepted meaning of that term. (para. 27)

It was subsequently stated that "… none of the cases cited support the contrary conclusion that the termination of an employment relationship because of redundancy is not a layoff" (para. 28).

I am aware that Arbitrator McPhillips seemingly reached a different conclusion in *Nigel Services for Adults with Disabilities Society -and- CSWU, Local 1611*, unreported (February 12, 2013). Nigel Services was a non-profit society that began having financial difficulties. It first contracted (coincidentally) with Broadmead, and eventually decided to cease operations and transfer its assets to Broadmead. All of the employees were offered, and virtually all of them accepted, employment with Broadmead. They continued working in the same jobs under the same supervisors. The union filed a grievance asserting there were ten employees with sufficient service to claim severance pay under the prior collective agreement. It maintained the severance allowance and other entitlements were vested rights which could not be taken away from the employees. The employer argued there had been a "successorship-like" situation, and employment had continued "in a seamless way" (there could not be a formal successorship because Broadmead was still at the time a designated employer under the *Act*, and its employees were statutorily included in bargaining units represented by the BCGEU, the PSNBA and the PEA). Arbitrator McPhillips began his analysis by framing the issue in these terms:

> In this case, the core issue to be determined is what is the meaning to be given to the phrase in Article 43.01(a)(3) "is terminated because the employee's

services are no longer required due to closure of the health care facility, job redundancy, etc…" (p. 9)

The Government relies extensively on later passages in *Nigel Services*, including this extract:

> Therefore, to begin, what is the plain and ordinary meaning to be given to all the words in the phrase "terminated because the employee's services are no longer required due to closure of the health care facility, job redundancy, etc..." ? The first point to be made in that regard is that if the parties contemplated that the Severance Allowance would be paid out as the result of any type of termination, they could have simply worded Article 43.01(a)(3) to read "is terminated other than for just cause". Therefore, it is clear that some limitations were contemplated by the parties.
>
> It is also worthwhile to note that the phrase at issue indicates that the employee's services are "no longer required". In *HEABC (Port Alice Hospital), supra,* Arbitrator Kelleher (as he then was) was dealing with the identical provision (Article 49) to the one in dispute here although it was in the context of a Section 103 Investigation. One of the employees had been given displacement notice and she could have applied for other positions with the employer but chose not to do so. Arbitrator Kelleher concluded that the grievance would not be successful as that employee would not be entitled to the severance. In recommending the Union not pursue the grievance, he stated, at p. 5:
>
> > I turn to Article 49.01(a)(3). Although this language is not a model of clarity, I conclude that Ms. Wing's situation does not come within it.
> >
> > Ms. Wing had the opportunity to apply for, and presumably obtain, a position which was substantially similar to the one she previously held. Under the Maintenance Agreement, she would have been entitled to red circling.
> >
> > In these circumstances I am unable to say that Ms. Wing's services were "no longer required" or that there was a "job redundancy".
> >
> > The Employer's position goes further than this: Counsel maintains that if there is any position in the facility which the employees can reach through the bumping procedure, severance pay is not available. Thus an employee in a highly paid classification would not be entitled to severance pay if the employee could exercise bumping rights into an entry level position.

> It is not necessary and therefore not appropriate to address that issue in this context. Here, Ms. Wing could have held a position similar to her own. My view is that severance pay is not available to her.
>
> The wording of the provision in question here indicates it was likely intended to apply to situations where employees lose their job rather than where there has been a termination of employment only in a technical sense. The wording appears to address a discontinuation of an operation as a whole or in some of the positions therein and not simply a transfer to another employer without loss of collective agreement protection. On its face, when one looks at the terms used by these parties, it is not at all clear that they intended this obligation would apply where there was simply a transfer of corporate assets. (pp. 11-12)

In the result, Arbitrator McPhillips determined that the wording in Article 43 could not have application as suggested by the union, and he denied the grievance. The Government submits here that "[i]t makes no sense that the former Nigel Society employees, who were held not to be entitled to severance pay when they moved into the Public Service bargaining units, should now be able … [to] claim entitlement against the government to severance pay, when they move out of the Public Service bargaining units" (Summary of Position at para. 59).

There is, on the surface, a potential inconsistency between the outcome in *Nigel Services* and upholding the Unions' claim in the grievances before me. Nonetheless, *Nigel Services* can readily be distinguished from, and yet reconciled with, a determination that the layoff provisions in the Unions' Master Agreements apply in the present circumstances.

Leaving aside obvious linguistic distinctions between the collective agreement terms in dispute, I begin with the observation that Arbitrator McPhillips found there had been "a termination of employment only in a technical sense" (p. 12). I have reached a different assessment of the present circumstances; namely, there has been a substantive shift caused by the change in the identity of the true employer of those employees working at the Facilities.

Second, there was no argument in *Nigel Services* based on "*Verrin* rights" which, of course, is the essence of the Unions' plea here. In fact, Arbitrator McPhillips potentially opened the door to a successful claim based on the principle:

> … if the Union here was arguing that a "Verrin" type of rule, which is applied in successorship situations, should have application, *there may have been some basis for that* although I am not drawing any conclusions on that point. … (p. 13; italics added)

I note as well that the Section 103 investigation by Arbitrator Kelleher (as he then was) quoted by Arbitrator McPhillips was inherently not a *Verrin* situation, as the grievor had continued her employment with the same employer and could have exercised bumping rights.

This brings me to the third and most fundamental reason for not applying the outcome in *Nigel Services* to the present facts. In that award, three employees who had not transferred to Broadmead were not part of the grievance, and it had been filed instead on behalf of employees who had "continued in the same jobs under the same supervisors" (p. 3). In other words, the grievors had transferred "seamlessly" to the new employer *and were claiming severance pay as well*. Such a dual entitlement has not been countenanced by arbitrators under the *Verrin* analysis. For instance, Arbitrator Brown observed in *Pembroke Regional Hospital* that employees who elect to transfer to a new employer are in a different position that those who opt to remain, and will not be laid off. He based this conclusion on a purposive interpretation of the term "layoff", and wrote: "The collective agreement was not designed to allow employees to claim the benefit of [layoff provisions] while also following their work to a successorship employer bound by the same agreement" (para 29). Other awards such as *CBC* (citing *Re MacDonalds Consolidated Ltd. and Retail Wholesale Union, Local 580* (1997), 61 LAC (4th) 129 (McKee), as "unambiguous and compelling"), confirm that employees may exercise a right of choice; namely, to remain with their employer and choose to exercise seniority rights, or to start work with the new employer (*CBC* at para. 91). See also *Re MTS Allstream Inc. and Communications, Energy & Paperworkers Union of Canada, Local 7* (2009), 158 LAC (4th) 353 (Peltz), where the right of election was similarly recognized with the caveat that "there should not be double benefits" (para. 104).

Thus, when examined more closely, *Nigel Services* is completely consistent with an established series of Canadian awards, and it does not preclude access to layoff provisions in a

collective agreement by employees who exercise their right to decline the option of transferring to a new employer.

Finally, I do not accept the Government's argument that one can infer a mutual intent by the parties to not apply the layoff provisions to the divestments. This case is quite unlike *British Columbia -and- British Columbia Government and Service Employees' Union*, [1994] BCCAAA No. 371, where Arbitrator Munroe was not prepared to find that the definition of "layoff" in the BCGEU Master Agreement was mutually intended to preclude the proposed closure of the Government Air Services and a resulting contracting with the private sector for air travel requirements. He concluded further, based on evidence of prior negotiations, that upholding the union's interpretation of the Master Agreement would have produced an "unintended result" (para. 36). There is no bargaining history before me to shed light on how the parties might have intended the layoff provisions to apply to a divestment from the Public Service. However, I am persuaded by the PSNBA's argument that allowing access to severance pay through the layoff provisions in the Master Agreements would be entirely consistent with the commonly accepted purpose of this earned benefit. As stated in Brown & Beatty, *Canadian Labour Arbitration* (Fourth Edition):

> Severance pay is generally understood as a benefit that is earned for past service, intended to compensate employees for the investment they have in their employer's business (e.g., their seniority) that is lost when the employment relationship is terminated. …
>
> Whether it is grounded in legislation or a collective agreement, severance pay is typically payable when a person's employment is terminated because he or she has become redundant or because of a permanent cessation of operations by the employer. … (para. 8:3800)

In the present case, the Unions' members who work at the Facilities have become redundant to the Government, and they have lost their seniority rights in the Public Service bargaining unit. If they elect not to transfer to new employers in the Health Sector, the prevailing arbitral view is that they should be compensated for the loss of those rights.

V. CONCLUSION

In summary, I have determined that the Government's divestment of the Facilities as of June 1, 2013 resulted in a change of employers for labour relations purposes. The Government is no longer the employer of the Unions' members working in those operations, and the new employers are the Facilities themselves and/or the applicable Health Authority in the case of Oak Bay and Forensics. This substantive change triggered "*Verrin* rights" for the affected employees. As a consequence, I hereby declare that members of the PSNBA at the Facilities are entitled to exercise rights under Article 13 of the Nurses Master Agreement, and members of the PEA at Forensics are entitled to exercise rights under Articles 35 and 37 of the PEA Master Agreement. In both cases, the entitlement includes the option of severance pay if employees otherwise qualify under the applicable terms.

I retain jurisdiction to resolve any issues over implementation, including the entitlement of individual employees subject to this award.

DATED and effective at Vancouver, British Columbia on October 20, 2014.

JOHN B. HALL
Arbitrator