BCLRB No. B67/2015

BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

(the "Government")

-and-

PROFESSIONAL EMPLOYEES' ASSOCIATION

(the "PEA")

-and-

PUBLIC SERVICE NURSES BARGAINING ASSOCIATION

(the "PSNBA")

PANEL:	Jitesh Mistry, Vice-Chair
APPEARANCES:	Peter A. Gall, Q.C., for the Government Sonya Sabet-Rasekh, for the PEA Theodore C. Arsenault, for the PSNBA
CASE NO.:	67862
DATE OF DECISION:	April 16, 2015

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Government applies under Section 99 of the *Labour Relations Code* (the "*Code*") for review of an arbitration award issued by Arbitrator John B. Hall (the "Arbitration Board") dated October 20, 2014 (Ministry No. A-093/14) (the "Award").

2 I find I am able to decide this matter on the basis of the written submissions provided by the parties and attached material, which includes the Award, and sworn evidence in the form of statutory declarations.

II. THE AWARD

3 The background to this matter, as well as the parties' basic positions at arbitration, are well-summarized in the opening pages of the Award:

> 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 More specifically, they maintain that the Government is no longer the employer, and has been replaced by the Facilities themselves and/or the Health Authorities to which two of the Facilities have been assigned under the applicable legislation and bargaining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.** (Award, pp. 2-3, emphasis added)

4 The issues identified by the Arbitration Board in its analysis and decision are set out below:

a) "[W]hether there has been a change in the identity of the employer(s) of the Unions' members who work at the Facilities" (Award, p. 17) (the "Employer Status Issue").

b) Are "*Verrin*" rights applicable? (the "*Verrin* Rights Issue"). That is, do the following principles, summarized in *Granville Island Brewing Company Ltd.*, BCLRB No. B322/96, 34 C.L.R.B.R. (2d) 102 ("*Granville Island*") at paragraph 24, apply to the employees at the Facilities in question:

i. A transfer of employment from a predecessor to a successor employer is not automatic under Section 35 of the *Code*. 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*.

ii. 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 the disposition, including severance payment.

iii. 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.

c) If *Verrin* rights are applicable to the employees at the Facilities in question, do the layoff provisions in the PEA and PSNBA (collectively, the "Unions") collective agreements apply in the circumstances? (Award, p. 25) (the "Collective Agreement Interpretation Issue").

5 With respect to the Employer Status Issue, the Arbitration Board's conclusions are captured in the following passages from the Award:

> **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 [orders-in-council] 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 [*Columbia Hydro Constructors*, BCLRB No. B36/94, 22 C.L.R.B.R. (2d) 161], "[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.
>
> [...]
>
> **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. (Award, pp. 19-20, emphasis added)

6 With respect to the *Verrin* Rights Issue, the Arbitration Board engaged in a detailed analysis of the concept of *Verrin* rights and ultimately held:

> 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. (Award, p. 24, emphasis added)

7 With respect to the Collective Agreement Interpretation Issue, the Arbitration Board's conclusions are set out in the following passages from the Award:

> [...] 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.

[...]

[...] **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 [*Canadian Broadcasting Corp. and Communications, Energy & Paperworkers Union of Canada*, [2001] C.L.A.D. No. 294 (Freedman)] 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). [...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.

[...]

[...] 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. [...]

> [...]
>
> 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. [...]
>
> [...]
>
> **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.** (Award, pp. 30-32, 34 and 39, italics in original, boldface added)

8 The Arbitration Board summarized its conclusions at page 40 of the Award:

> 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.

III. THE PARTIES' POSITIONS

The Government's Position

9 The Government's position with respect to the Employer Status Issue is captured in the following passages from its Section 99 application:

> The removal of these facilities from the *Public Service Act* did not result in a change of the actual employer of the employees of the Facilities, as the evidence before the Arbitrator proved.
>
> The Government did not direct or control, pay, discipline, hire, dismiss or in any way manage the employees, nor did the Government have any involvement in the operations of the Employer.
>
> The Facilities managed their operations with their own funds.

> The employees of these Facilities were on the payrolls of the Facilities, not the Government, and were managed and paid by the Facilities, not the Government.
>
> That was the uncontradicted evidence before the Arbitrator.
>
> Nevertheless, the Arbitrator held that the Government had been the "true employer" of the employees of the Facilities.
>
> The Arbitrator based this decision on the fact that the Facilities were included under the *Public Service Act* which provides for the management of public service employees by the Government, despite the evidence that these "management" provisions were not applied to [the] Facilities.
>
> By focusing his "true employer" analysis on the form of the relationship between the employees of the Facilities and the Government under the *Public Service Act*, and not the substance of the employment relationships, the Arbitrator failed to follow a fundamental principle of the *Code* that substance and not form should govern.

10 The Government's position concerning the *Verrin* Rights Issue and the Collective Agreement Interpretation Issue is set out below:

> [I]t is a principle of the *Code* that where employment has been terminated by a previous employer, employees cannot be forced to accept employment with a *different* entity or person (the "*Verrin*" principle).
>
> That did not happen here. The employment of the employees was not terminated by the Facility, and they were not being asked, let alone forced, to accept employment with a different employer. They were seamlessly employed throughout by the Facilities.
>
> Nevertheless, the Arbitrator held that the "*Verrin*" principle of the *Code* applied, because the Facilities were no longer covered by the *Public Service Act*.
>
> That is a further error of principle under the *Code*.
>
> The *Verrin* principle does not apply in situations where employees in an operation are merely removed from a particular statutory scheme dealing with their collective bargaining relationship with their employers.
>
> There has to be an actual termination of employment and an offer of new employment by a different entity for this principle to apply.

> Removing the employees from the ambit of the *Public Service Act* produced no change in the employment status of the employees or their employment relationship with the three Facilities.
>
> The Arbitrator also erred as a matter of principle under the *Code* by effectively rewriting the layoff provisions of the collective agreements to allow employees of the Facilities to claim severance pay because they were no longer included under the *Public Service Act*, even though there was no actual termination of employment or loss of a job as required under the layoff provisions. (emphasis in original)

11 The Government also submits that it was denied a fair hearing because the Arbitration Board's Employer Status Issue analysis was based on a disregard of relevant evidence, or a failure to seek clarification on the relevant evidence (the "Fair Hearing Issue").

12 With respect to remedy, the Government submits the Award should be set aside. The Government further submits that "[t]his is not a case where remission to the [Arbitration Board] is appropriate. The correct application of *Code* principles leads to only one possible conclusion – that the grievances must be dismissed".

The PEA's Position

13 The PEA's position is essentially that the Government is attempting to reargue its submissions, supplemented with fresh case law, in order to seek a better result.

14 With respect to the Employer Status Issue, the PEA submits:

> The [Arbitration Board] considered the effect of the certifications, the Master Agreements and the legislation defining and designating the Government as the "employer" of employees working at the three facilities (Award, pg. 19). These items demonstrate the Government's ability to negotiate the terms of the collective agreement, which is the "hallmark in any collective bargaining analysis" and which demonstrate the intention to create a contractual employer-employee relationship with the Government (Award, pg. 19). This finding is entirely consistent with the jurisprudence.
>
> [...]
>
> The [Arbitration Board] considered that the absence of the *York Condominium* factors such as direction and control and the burden of remuneration on the part of the Government does not preclude employer status (Award, pg. 18). Further, the [Arbitration Board] considered that, given the collective bargaining relationship, the certifications and the relevant legislation, *ultimate* authority in the employment relationship and the ability to negotiate the terms of the collective agreement fell on the Government. The [Government

> is] merely rearguing [its] submissions in order to seek a desirable outcome. (emphasis in original)

15 The PEA submits the Arbitration Board's conclusions concerning the *Verrin* Rights Issue are entirely consistent with the relevant jurisprudence. The PEA says all of the arguments on this point from the Government were made to the Arbitration Board. The Government is simply rearguing the issue to obtain a better result.

16 With respect to the Collective Agreement Interpretation Issue, the PEA submits:

> [...] The [Government] simply disagree[s] with the conclusion the [Arbitration Board] reached and his interpretation of the Collective Agreement. The [Government] now seek[s] a second chance. However, that is not a basis for seeking review under section 99 of the *Code*. [...]

17 With respect to the Fair Hearing Issue, the PEA submits:

> First, the Union submits that there is a distinction between whether having not considered the documents and having reviewed them. The fact that the [Arbitration Board] states that he has not considered the documents in his deliberation is not tantamount to having ignored them, disregarded them or not reviewed them. Further, an arbitration board's conclusions as to the weight to be given to evidence presented is not reviewed under Section 99.
>
> Second, the [Government] at the hearing did not directly refer to these documents in [its] written submissions and did not take the [Arbitration Board] directly to them. If the enclosed documents were relevant and significant to such a degree that they would have had a determinative effect on the outcome of the grievances, one would have thought that they would have directly referred to them in the hearing or written submissions.
>
> Third, if asserting that the [Arbitration Board] erred in not considering certain evidence, the [Government] must establish that the [Arbitration Board] made a palpable and overriding error that would likely have had a determinative effect on the outcome of the Award [...]. The [Government has] not done so.
>
> The [Government] argues [it was] denied a fair hearing *if* the [Arbitration Board]'s error about who was the true employer was based on a failure to consider the relevant evidence and the [Government's] arguments. This is an entirely speculative assertion with no basis in the arguments or the Award. Further, the [Arbitration Board]'s reasoning is not completely reflected in the Section 99 Application. (emphasis in original)

The PSNBA's Position

18 The PSNBA submits that:

a) the Award provides a well-reasoned analysis of the real substance of the issues presented by the grievance and the relevant legislation, collective agreement provisions and Board certification orders;

b) the Award shows the Arbitration Board clearly considered the submissions of the parties in a detailed manner; and

c) in the Conclusion section of the Award, at page 40, the Arbitration Board set out its conclusions in a succinct fashion.

19 The PSNBA submits the Government is not entitled to a full-fledged appeal of the Award under Section 99 of the *Code*. The PSNBA says the real substance of the issues raised by the grievance before the Arbitration Board, were issues of contract interpretation. The PSNBA submits that the case at bar presents a classic situation for the Board to apply a deferential standard of review. In particular, where an arbitration board has made a genuine effort to reach its conclusions on the basis of the relevant provisions of the collective agreement, its interpretation of those provisions is beyond review by the Board under Section 99. The Government says the test is not whether the interpretation is one which the language of the collective agreement can reasonably bear and the fact that the Board may disagree with the interpretation of the collective agreement is not a ground for a review of an arbitration board's award.

20 The PSNBA further submits there was no denial of a fair hearing to the Government before the Arbitration Board. All of the evidence before it was entered by the agreement of the Employer and the PSNBA, which the Arbitration Board accepted to be true, for purposes of adjudicating the real substance of the issue before it. The Government was clearly given the opportunity to present relevant evidence and meet the position of the PSNBA. The Government says the Board should not make a finding that a fair hearing has been denied merely because an arbitration board has not specifically mentioned certain evidence, argument of counsel, or a provision of the collective agreement in an award.

The Government's Position in Final Reply

21 In final reply, the Government says the Unions have applied the wrong analytical approach to the Section 99 application. The Government submits that the "'genuine effort' standard is applicable to 'pure' issues of interpretation under collective agreements – that is, issues relating to the parties' mutual intentions as reflected in the language they have chosen to record their bargain and the extrinsic evidence pertaining to the bargain".

22 In the Government's view, where the interpretative issue requires the application of principles of the *Code*, as is the case here, the Arbitration Board must correctly apply those principles; it is not enough to say that there was a genuine attempt to do so. The Government submits that, for the reasons set out in its initial application to the Board, the Award does not meet the standard of correctness.

23 With respect to the PSNBA's position about the continued employment of the employees of the Facilities, the Government submits that its point is the employees of the Facilities were never terminated, rather, they were simply no longer included under the *Public Service Act*, R.S.B.C. 1996, c. 385 (the "Act").

IV. ANALYSIS AND DECISION

The Employer Status Issue

24 Section 99(1) of the *Code* provides the Board limited jurisdiction to review labour arbitration awards on the following narrow grounds:

- a party to the arbitration has been or is likely to be denied a fair hearing (Section 99(1)(a)); or
- the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this *Code* or another statute dealing with labour relations (Section 99(1)(b)).

As such, Section 99 is not a full-fledged avenue of appeal: *Simon Fraser University*, BCLRB No. 16/76, [1976] 2 Canadian LRBR 54, p. 61.

25 Within this limited review jurisdiction, the Board requires that an arbitration board apply the correct *Code* principles and policies. In the case at hand, there does not appear to be any dispute that the Arbitration Board applied the correct *Code* principles, policies and legal test with respect to making a determination of the "true employer" of the affected employees, specifically the factors set out in *York Condominium Corp. No 46*, [1977] OLRB Rep. October 645 ("*York Condominium*").

26 As long as the correct principles, policies and legal tests are applied, the "Board is deferential to an arbitrator's judgments and evaluations regarding such matters as the weighing of evidence in the determination of the facts and the weighing of the facts and respective factors in regard to the legal tests to be applied": *Overwaitea Food Group*, BCLRB No. B278/2012 (Leave for Reconsideration of BCLRB No. B180/2012), para. 15, citing *British Columbia Transit*, BCLRB No. B54/97, paras. 34 and 41-42. That is the case even in respect to fundamental *Code* principles, such as just and reasonable cause and the true employer doctrine.

27 Put another way, while the Arbitration Board was required to apply the correct legal test in determining the Employer Status Issue, the judgments and evaluations necessary to the application of that legal test are subject to the Board's deferential approach to review of arbitration awards.

28 Applying this approach to the Arbitration Board's application of the *York Condominium* test, I do not find, as the Government suggests, that the Arbitration Board's determination on this issue was erroneously based upon form, rather than substance.

29 The Arbitration Board expressly acknowledged that some of the evidence related to the *York Condominium* factors leaned towards the Facilities as the true employers (e.g., direction and control, and burden of remuneration) or were neutral in their impact on the true employer issue (e.g., the perception of who is the employer): Award, p. 18.

30 In concluding that the Government (not the Facilities) was the true employer prior to divestment, the Arbitration Board weighed the complete evidentiary landscape relevant to the *York Condominium* test including the above-noted factors, but also the unique combination of legislation, orders-in-council, certifications and collective agreement provisions. For example, the Arbitration Board did not ignore evidence of day-to-day operations, rather, it also took into account the *ultimate* authority with respect to *York Condominium* factors 3-5, in light of the entirety of the evidence before it, including the atypical evidence found in the relevant statutes and orders-in-council: Award, pp. 5-7 and 18.

31 Similarly, the Arbitration Board examined the entire web of evidence with respect to the seventh *York Condominium* factor (the intent to create the relationship of employer and employee) and concluded that "the potentially unique combination of the certifications, the Master Agreements and the enactments" overwhelmingly established an unequivocal intent to define and/or designate the Government as the "employer" of employees working at the Facilities prior to the divestment: Award, p. 19.

32 The Government's dispute with respect to the Arbitration Board's application of the *York Condominium* factors is essentially with the Arbitration Board's decision to give greater weight to the combination of legislation, orders-in-council, certifications and collective agreement provisions over the alleged practice at the workplaces. Under the deferential approach noted above, the Board will generally not question the weight given to conflicting evidence by an arbitration board. Provided the principles of the *Code* are respected and there is no denial of a fair hearing, evidentiary determinations are left to the arbitration board: *Office and Professional Employees' International Union, Local 378*, BCLRB No. B160/99.

33 I conclude that the Arbitration Board did not err in finding the Government to be the true employer prior to divestment.

The *Verrin* Rights Issue

34 *Verrin* rights do not only arise where there is a successorship: Award, p. 24 applying *Norske Skog Canada Limited*, BCLRB No. B469/2001, 79 C.L.R.B.R. (2d) 302 ("*Norske*"), para. 4. The Government does not dispute this principle.

35 The Government submits that "all that occurred here was that the operations of the [F]acilities were no longer included under the [Act]". The Government says the Arbitration Board's finding that this fact was sufficient to trigger the application of *Verrin* rights is inconsistent with the purpose and rationale of that principle. The Government notes that the *Verrin* principle is based on the concept of forced employment and "[that] never happened here". Rather, in the Government's view, all that happened here was "[a] change in the governing collective bargaining context, or a change in collective agreement terms".

36 In its Section 99 submission, after summarizing the *Verrin* principle and the *Norske* decision, the Government submits:

> Thus, ***Norske* was entirely consistent with the *Verrin* principle** – that upon the actual termination of their employment by their current employer, **employees cannot be forced to accept employment with a different employer**.
>
> **Here, however, unlike in *Norske*, there was no transfer of the employees to a different entity**, and therefore the employment of the employees of the Facilities was not terminated and the employees were not being asked, let alone forced, to accept employment with a different entity. (emphasis added)

37 As these passages illustrate, the Government's position rests upon the proposition that there has, in fact, been no change of employers here. However, I note that in its submissions before the Arbitration Board, the Government took the contrary position that "*nothing turns on whether there has technically been a change in employers*": Award, p. 2, emphasis added.

38 I further note the Government's position is contingent upon this Panel first concluding that the Arbitration Board erred in finding the Government to be the true employer prior to divestment. However, I have already found the Arbitration Board properly decided the Employer Status Issue and, by extension, did not err in concluding that the employer had changed after the divestment from the Government to the Facilities and/or their health authorities.

39 In these circumstances, I find the Arbitration Board correctly determined that *Verrin* rights apply to the employees affected in this case. Before proceeding to my analysis on this point, it is useful to outline the procedural history of the *Verrin* case (discussed in detail at pages 20-23 of the Award):

- Initially, the arbitration board held that Verrin had not been laid off, and that his employment had continued without interruption: *British Columbia and British Columbia Government Employees' Union (Verrin Grievance)*, Ministry No. A-182/85, [1985] B.C.C.A.A.A. No. 410 (Bird).

- The Board overturned the award on review. It found 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)*, BCLRB No. 117/87, 16 CLRBR (NS) 93 ("*Verrin BCLRB*").

- A reconsideration panel of the newly constituted Industrial Relations Council overturned the original panel of the Board: *Government of British Columbia (Ministry of Health)*, IRC No. C82/87 (Appeal of BCLRB No. 117/87), 19 CLRBR (NS) 1.

- The reconsideration decision was subsequently quashed on judicial review before the British Columbia Supreme Court: *B.C.G.E.U. v. British Columbia (Industrial Relations Council)*, 23 B.C.L.R. (2d) 306, [1988] B.C.J. No. 234 (B.C.S.C.) ("*Verrin BCSC*").

- That decision was upheld on appeal before the British Columbia Court of Appeal: *B.C.G.E.U. v. British Columbia (Industrial Relations Council)*, 33 B.C.L.R. (2d) 1, [1988] B.C.J. No. 2009 (B.C.C.A.) ("*Verrin BCCA*").

40 The "rules" resulting from the Verrin decision were summarized by the Board in *Granville Island*:

> - A transfer of employment from a predecessor to a successor is not automatic under Section 35 of the Code: [*Verrin BCCA*] 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*].
>
> - 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*]. (para. 24)

41 The facts underlying the *Verrin* case are quite similar to those facing the employees in the matter at hand, as noted in the Award at page 20:

> 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. [...] (emphasis added)

42 More importantly, the reasoning underlying *Verrin BCLRB*, *Verrin BCSC* and *Verrin BCCA* is applicable to the circumstances at hand. As noted at pages 21-22 of the Award, in *Verrin BCSC* the Court held:

> 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. (emphasis added)

43 In the case at hand, the employees in question would not only face a loss of significant collective agreement rights from quitting, they have *already lost those rights*. Unlike a typical successorship (where the existing collective agreement passes from the predecessor to the successor), the employees at issue have been transferred to a new collective agreement with potentially different terms and conditions of employment. To paraphrase the Court in *Verrin BCSC*, the forcing of employees to work for employers *and* under a collective agreement not of their choice is too important a matter to infer, as well as contrary to the Board's duty to respect employee free choice under Section 2(c) of the *Code*. This greater adverse impact on the employees at hand, as compared to employees in many typical successorships, was taken into account by the Arbitration Board:

> 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).** (Award, p. 32, emphasis added)

44 I find that the policy rationale underlying *Verrin* rights applies to the employees at hand. The fact that the mechanism for effecting the transfer of employees was the Government divesting itself by statute and orders-in-council, as opposed to a traditional commercial transaction, is a distinction without a difference. From the employees' perspective, the same labour relations consequences flow from the divestment. I find that the Arbitration Board did not err in finding *Verrin* rights applied to the employees in question.

The Collective Agreement Interpretation Issue

45 With respect to collective agreement interpretation issues in Section 99 applications, the Board does not review an award to determine whether it agrees with the arbitration board's interpretation or not. Rather, the Board will give an award a sympathetic reading and will review an arbitration board's interpretation of a collective agreement on the basis of whether the arbitration board made a genuine effort to interpret the collective agreement provision in dispute based upon the relevant provisions of the bargain struck by the parties: *British Columbia Public School Employers' Association*, BCLRB No. B73/99 ("*BCPSEA*"), para. 7 and *Lornex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Canadian LRBR 377, p. 381.

46 The Government begins its submission on this issue by correctly stating that arbitration boards have no jurisdiction to amend collective agreement provisions, and that *Vernin* rights do not automatically entitle an employee to severance unless such an entitlement is found in the terms of the collective agreement: *Kelly Douglas & Company Limited*, BCLRB No. 43/74 (Appeal of No. 8/74), [1974] 1 Canadian LRBR 426 and *Weyerhaeuser Canada Ltd.*, BCLRB No. B134/2007.

47 The Government further submits the Arbitration Board wrongly concluded that because of its initial finding that the employees had changed employers, it necessarily meant the employees were entitled to severance. The Government says the Arbitration Board wrongly decided that the layoff provisions in the collective agreement applied even though there was no termination of employment or loss of a job. The Government further says this is contrary to the plain language of the collective agreement and the mutual intention of the parties.

48 However, the Government's subsequent submissions make it clear that its dispute regarding the Collective Agreement Interpretation Issue is again contingent upon this Panel concluding the Arbitration Board incorrectly decided the Employer Status Issue. The Government says that layoff and severance provisions of the collective agreements do not apply where, as here, the employees have not lost their jobs, been terminated, or where there has not been a lack of work or discontinuation of a program but rather, "where the workers continue to be paid, managed, directed and controlled by the **very same entity**" (emphasis added). The Government submits that "[h]ere there was no actual termination of employment only, at most, a notional change of employer resulting from the fact that the Facilities were no longer included in the [Act]".

49 Section 99 "does not allow parties to re-argue their case in order to achieve a more desirable result" and the Board "will defer to an arbitrator's decision as long as it does not violate the narrow grounds for review under Section 99": *BCPSEA*, para. 8. I agree with the PEA that the Government put this position before the Arbitration Board and is essentially rearguing its case on the Collective Agreement Interpretation Issue to obtain a better result. This is evident from the following passages from pages 27 and 31-32 of the Award, which mirror the Government's Section 99 application.

50 I further find that the Arbitration Board's reasoning with respect to the applicability of the severance provisions of the relevant collective agreements exhibited a genuine effort to interpret the collective agreement provisions in dispute and did not otherwise run afoul of the Board's standard of review with respect to arbitration awards. The Arbitration Board directly addressed the Government's arguments and noted that a similar argument had been made in *Verrin* and was eventually rejected: Award, pp. 33-35.

51 The Arbitration Board then went on to distinguish the different outcome reached in *Nigel Services for Adults with Disabilities Society and Construction and Specialized Workers' Union, Local 1611*, Ministry No. A-016/13, [2013] B.C.C.A.A.A. No. 24 (McPhillips) on three bases:

> 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. [...] (Award, pp. 37-38, emphasis in original)

52 The Arbitration Board clearly grappled with the relevant collective agreement language and the Government's argument and provided a reasoned argument as to why it disagreed. I conclude that the Arbitration Board's decision with respect to the Collective Agreement Interpretation Issue does not suggest any reviewable error under Section 99 of the *Code*.

The Fair Hearing Issue

53 At page 3 of the Award, the Arbitration Board commented upon how it dealt with the evidence before it:

> 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. (emphasis added)

54 The Government submits that:

> To the extent that the [Arbitration Board] based [its] finding on not considering the documents tendered by the facilities or the uncontradicted written and oral submissions that management of the employees rested entirely with the facilities and not the Government, our clients were denied a fair hearing.
>
> [...]
>
> Oak Bay, Broadmead and Forensics tendered documents as examples of the selection, management and discipline by them of their employees.
>
> Given the informal nature of the evidence gathering part of the arbitration proceeding, if there were any doubt in the Arbitrator's mind about who exercised actual control and direction over the employees of the Facilities, including the selecting, disciplining, and firing of the employees, our clients respectfully submit that he should have sought clarification.
>
> Thus, if the [Arbitration Board's] error about who was the true employer was based on a failure to consider the relevant evidence, or uncertainty about the relevant evidence and a failure to seek clarification, the Government and Facilities respectfully submit that they were denied a fair hearing.

55 The evidence that the Government alleges the Arbitration Board failed to consider relates to the identity of the true employer prior to the divestment (i.e., the Employer Status Issue). However, as noted above, in its submissions before the Arbitration Board, the Government took the position that "*nothing turns on whether there has technically been a change in employers*": Award, p. 2, emphasis added. Given that the alleged failure to consider evidence solely concerns a matter that the Government itself has conceded "nothing turns on", I find there is no basis to find a denial of fair hearing.

56 Furthermore, I find this matter concerns the weight given to evidence. The spectrum of evidentiary weight may include a decision not to give any weight at all, as was the case with respect to the documentary evidence in dispute. I agree with the PEA that it would not be appropriate to intervene with respect to the Arbitration Board's conclusions as to the weight to be given to evidence before it.

V. CONCLUSION

57 For the reasons set out above, the Government's Section 99 application is dismissed.

LABOUR RELATIONS BOARD

JITESH MISTRY
VICE-CHAIR