

An appeal

- by -

Adam Joshua Noel-Steeves,
also known as AJ Steeves, also known as AJ Hummel,
a Director of Jiffy Worldwide Inc. and Jiffy Hospitality Inc.
("Mr. Noel Steeves")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2015A/134

DATE OF DECISION: January 11, 2016

DECISION

SUBMISSIONS

Thomas F. Beasley	counsel for Adam-Joshua Noel-Steeves, also known as AJ Steeves, also known as AJ Hummel, a Director of Jiffy Worldwide Inc. and Jiffy Hospitality Inc.
Andrew Birchall	on his own behalf
Micah Carmody	on behalf of the Director of Employment Standards

OVERVIEW

1. I have before me an appeal filed by Adam-Joshua Noel-Steeves, also known as AJ Steeves, also known as AJ Hummel, a Director of Jiffy Worldwide Inc. and Jiffy Hospitality Inc. (“Mr. Noel-Steeves”) concerning a determination issued against him on September 10, 2015 (discussed in greater detail, below). These reasons for decision address two issues: first, whether the appeal period should be extended; and, second, assuming an extension is granted, whether the appeal should succeed on its merits. The respondent parties have filed submissions relating to both issues. In addition to considering those submissions, I have also reviewed the record that was before the delegate who issued the determination against Mr. Noel-Steeves.
2. Prior to turning to addressing these two issues, I wish to briefly summarize the prior proceedings that are relevant to this appeal.
3. On July 16, 2015, a delegate of the Director of Employment Standards issued a determination pursuant to section 79 of the *Employment Standards Act* (the “*Act*”), against “0958572 B.C. Ltd. carrying on business as Jiffy Apps, also known as Jiffy Software, also known as Jiffy” (I shall refer to this party as “Jiffy Apps”). By way of this determination, Jiffy Apps was ordered to pay the total sum of \$23,602.67 to Mr. Andrew Birchall (“Mr. Birchall”). This latter sum included regular wages (\$21,260.76), compensation for length of service (\$1,663.46), concomitant vacation pay (\$116.65) and section 88 interest (\$561.80). Further, and also by way of this determination, the delegate levied two separate \$500 monetary penalties (see section 98 of the *Act*) against Jiffy Apps based on its contraventions of sections 17 (regular payment of wages) and 18 (payment of wages on termination of employment) of the *Act*. Thus, the total amount payable under this determination is \$24,602.67. I shall refer to this determination as the “Jiffy Apps Determination”.
4. On September 1, 2015, the delegate issued another determination, also in favour of Mr. Birchall, in the virtually the same amount as the Jiffy Apps Determination save for some additional interest (the total amount being \$24,685.42). By way of this determination, the delegate declared that five separate corporations, together with Jiffy Apps, constituted “one employer” pursuant to section 95 of the *Act*:
 95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
 - (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
 - (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

5. The five corporations associated with Jiffy Apps pursuant to section 95 were Jiffy Worldwide Inc. (“Jiffy Worldwide”), Jiffy Mobile Inc. (“Jiffy Mobile”), Jiffy Hospitality Inc. (“Jiffy Hospitality”), Jiffy Telecommunications Inc. (“Jiffy Telecommunications”) and Atlas Intellectual Property Management Co. (“Atlas Intellectual”). I shall refer to this determination as the “Section 95 Determination” and to these five corporations collectively as the “Jiffy firms”.
6. I understand that Jiffy Worldwide and Jiffy Hospitality were incorporated in British Columbia. Jiffy Telecommunications was incorporated under the *Canada Business Corporations Act*. Jiffy Mobile and Atlas Intellectual were both incorporated in the state of Delaware, U.S.A.
7. According to corporate searches conducted by the delegate, the present applicant/appellant, Mr. Noel-Steeves, was the sole director of Jiffy Worldwide and Jiffy Hospitality when Mr. Birchall’s unpaid wage claim crystallized. Mr. Noel-Steeves was also recorded as one of two directors of Jiffy Telecommunications.
8. The present application/appeal concerns a determination issued against Mr. Noel-Steeves, and in favour of Mr. Birchall, on September 10, 2015, pursuant to subsection 96(1) of the *Act*: “A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.” I shall refer to this determination as the “Noel-Steeves Determination”.

THE NOEL-STEEVES DETERMINATION

9. The Noel-Steeves Determination, issued concurrently with the delegate’s “Reasons for the Determination” (the “delegate’s reasons”), is in the total amount of \$15,363.80 reflecting regular wages (\$14,359.96) as well as concomitant vacation pay (\$574.40) and section 88 interest (\$429.44). Mr. Noel-Steeves was not held liable for any monetary penalties under subsection 98(2) of the *Act*.
10. In his reasons, the delegate summarized the history of the matter including the issuance of both the Jiffy Apps Determination and the Section 95 Determination. Neither determination was ever appealed and the amount due to Mr. Birchall had not yet been paid. The delegate conducted corporate registry searches that indicated “Mr. Steeves was a director [of Jiffy Worldwide and Jiffy Hospitality] between March 17, 2014 and September 16, 2014, when [Mr. Birchall’s] wages were earned or should have been paid” (delegate’s reasons, page R3).
11. The delegate stated that by letter dated February 4, 2015, sent by registered mail, the Employment Standards Branch notified Mr. Noel-Steeves “of his personal liability pursuant to section 96” and that again, on March 18, 2015, he was notified “by email”. Mr. Noel-Steeves responded stating that although he was aware of the director/officer liability provisions of the *Act*, he was not concerned about his potential liability exposure (delegate’s reasons, page R3).
12. With respect to these latter communications, the subsection 112(5) record before me includes an e-mail dated March 18, 2015, from a delegate (not the delegate who issued the three determinations) to Mr. Noel-Steeves. Mr. Noel-Steeves responded to this e-mail a few minutes after receiving it. In her e-mail, this other delegate referred to a complaint hearing that was scheduled for March 24, 2015, at 9 AM at the Richmond office of the Employment Standards Branch. This complaint hearing was in regard to Mr. Birchall’s complaint against Jiffy Apps and, following the hearing, the Jiffy Apps Determination was issued. The complaint hearing notice, dated February 4, 2015, was sent to Jiffy Apps and various other persons including Mr. Noel-Steeves who was identified in the hearing notice as a “Director/Officer” although of what particular firm or firms is not stated. The hearing notice relating to the Birchall/Jiffy Apps complaint hearing was sent to Mr. Noel-

Steeves c/o the Vancouver registered and records office of Jiffy Apps and also to him c/o a King Street West address in Toronto.

13. The delegate's March 18 e-mail to Mr. Noel-Steeves prior to the March 24, 2015, complaint hearing stated, in part:

Please be advise [sic] if this matter goes to a hearing, all listed directors/officers of the company and anyone found to have been acting as a director/officer of the company at the time the wages were earned or should have been paid (even if not listed) will be held liable for up to a maximum of 2 months' wages.

At this time, both parties are free to continue to negotiate a voluntary settlement and I will gladly assist. However, in the meantime, please be advised the hearing will proceed on March 24, 2015 at 9:00 am if the matter does not voluntarily resolve.

14. Mr. Noel-Steeves responded, in part, as follows:

I am well aware of the legislation, however the test for naming a *De facto* director is a steep burden for the Director [of Employment Standards] to meet. I am confident that since these events took place outside of the time I was a Director or even present at the company, I am not concerned about myself being liable for unpaid wages by the Director.

If the Director intends to take this position at the hearing and proceed against me, I need to be served and notified accordingly, which I have not been. I would also need to be given an opportunity to submit and supply witnesses and documentation in accordance with the Act. Please ensure that if the assigned haring [sic] officer takes that position, they should advise me in advance.

15. Returning to the delegate's reasons accompanying the Noel-Steeves Determination, the delegate calculated Mr. Birchall's monthly wage at \$7,179.98 thus fixing the 2-month liability ceiling at \$14,359.96 together with 4% vacation pay (\$574.40) and section 88 interest (\$429.44) for a total liability of \$15,363.80.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

16. The deadline for appealing the Noel-Steeves Determination to the Tribunal, presumably calculated in accordance with the provisions of section 122 of the *Act*, is set out in a text box at the bottom of the second page of the determination. The deadline was indicated as "4:30 pm on October 19, 2015". This appeal was filed, by fax, by legal counsel for Mr. Noel-Steeves. According to counsel, the fax transmission "was faxed before the 4:30 pm deadline and was received by your office a few minutes after that deadline". Counsel further advises that the appeal documents, 124 pages in total, were faxed in two "batches" with a 43-page batch sent at 4:24 PM and a second 79-page batch sent at 4:29 PM. Counsel says that the first batch was fully transmitted as of 4:34 PM and the second as of 4:51 PM and these sent/received times are confirmed by "communication result reports" presumably generated from the fax machine in counsel's office. The Tribunal's fax records indicate that the first batch was transmitted as of 4:25 PM and the second at 4:35 PM on October 19, 2015.

17. Under the Tribunal's *Rules of Practice and Procedure*, parties are entitled to file documents by fax (Rule 15(3)). However, Rule 15(3)(c) states that if the fax transmission exceeds 50 pages, the party must first obtain the Tribunal's permission – there is nothing in the record before me to indicate that such permission was ever obtained. Further, Rule 15(11) states: "Unless otherwise specified, when a date is given for serving of a document or for doing some other act, the complete document, including those transmitted via fax or e-mail, must be received by the Tribunal or the relevant party by 4:30 pm on that date. Any document or part of a

document received after 4:30 pm will be deemed to have been filed on the next business day.” Accordingly, this appeal was not formally filed until October 20, 2015 – one day after the appeal period expired.

18. The Tribunal has the statutory authority to extend the appeal period (subsection 109(1)(b) of the *Act*) and when considering an application to extend the appeal period in a particular case will consider a number of factors including the length of the delay, the reasons why the appeal was not filed within the appeal period, whether there has been an ongoing *bona fide* intention to appeal, whether extending the appeal period would visit unique prejudice on one or more of the respondent parties, and the presumptive merit of the appeal (see *Niemisto*, BC EST # D099/96).
19. Mr. Birchall filed a submission that speaks, rather obliquely, to the merits of the appeal but, other than stating that he opposes an extension of the appeal period, his submission does not address any of the *Niemisto* criteria. He does not assert that he would suffer unique prejudice if the appeal period were to be extended by one day. In this latter regard, I note that the Director has garnished the full amount of the determination and currently holds the funds in trust. The delegate says that “the Director takes no position with respect to the application for an extension for filing the Appeal” but he did provide some further information relating to the service of the determination.
20. Given the fact that this appeal was filed only a few minutes after the appeal deadline expired, the fact that no party will suffer any unique prejudice if the appeal period were to be extended by one day, and that the appeal is not clearly lacking merit, I am extending the appeal period to October 20, 2015. Thus, this appeal is properly before the Tribunal and I will now turn to the merits.

THE PARTIES’ SUBMISSIONS

21. The Noel-Steeves Determination was issued on September 10, 2015. As noted above, the determination was issued under subsection 96(1) of the *Act* on the basis that Mr. Noel-Steeves was a director of Jiffy Worldwide and Jiffy Hospitality when Mr. Birchall’s unpaid wage claim crystallized (*i.e.*, during the period from March 17, 2014, to September 16, 2014, when Mr. Noel-Steeves was listed in the BC Corporate Registry as the sole director of Jiffy Worldwide and Jiffy Hospitality).
22. Mr. Noel-Steeves appeals the determination on all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice in making the determination, and on the ground that he now has new and relevant evidence (see subsections 112(1)(a), (b) and (c) of the *Act*).

Mr. Noel-Steeves’ Submissions

23. Mr. Noel-Steeves says that he was not aware of this determination until October 9, 2015, when he learned that his bank accounts had been “frozen” and that the Director had garnished the full amount of the determination. He maintains that he was never properly served with the determination and never actually received a copy of it until October 16, 2015, when his legal counsel provided a copy to him.
24. According to Mr. Noel-Steeves’ counsel’s submission:
 - Jiffy Apps produces software for mobile telephones and its two principals are Debra Anderson and her husband Richard Williams who both live and work in the United States.
 - Mr. Noel-Steeves became the branch manager of Jiffy Apps’ Vancouver office in November 2012 and Ms. Anderson promised him a future equity stake in the company.

- By 2014 the “Jiffy” companies had about 500 employees worldwide with about 30 working in British Columbia.
- “Since November 5, 2012 [Mr. Noel-Steeves] billed [Jiffy Software] for his services through his consulting company, Steeves Investments Corporation”.
- Mr. Steeves was a director and assisted in the formation or with the administration of the following Jiffy companies;
 - a) Jiffy Apps Inc.;
 - b) Jiffy Mobile Inc. (USA);
 - c) Jiffy Worldwide Inc.;
 - d) Jiffy Telecommunications Inc.;
 - e) Jiffy Hospitality Inc.;
 - f) 0958572 B.C. Ltd.;
 - g) Jiffy Software Inc. (now dissolved)

25. The numbered company is the only party held liable under the original Jiffy Apps Determination. Jiffy Mobile, Jiffy Worldwide, Jiffy Telecommunications and Jiffy Hospitality are all named in the Section 95 Determination. So far as I can determine, no determination was ever been issued against Jiffy Apps Inc. or Jiffy Software Inc. In any event, and returning to counsel’s assertions:

- “In or about 2013 to 2014, Ms. Anderson had financial issues and was not able to pay the bills of the Jiffy companies”.
- By May 2014, Steeves Investments Corporation had billed Jiffy Software Inc. approximately \$1.3m [million?] in fees that remained unpaid and “On May 12, 2014, the Jiffy Group of Companies and [Steeves Investments Corporation] entered into a Loan and Settlement Agreement, converting Jiffy’s outstanding indebtedness into a revolving line of credit”.
- “On June 4, 2014, Mr. Steeves delivered a Notice of Resignation, by email, and in person to the Registered and Records office, to Ms. Anderson, the Board of Directors, and all Jiffy staff and employees in Jiffy’s Vancouver office resigning as a director of all Jiffy organizations including Atlas Intellectual Property Management Co., Colabs Café & Bake Shop (New Westminster) Inc. and all affiliated companies, effective 30 days from June 4, 2014. Mr. Birchall the complainant received that Notice of Resignation.”
- “Mr. Steeves received hundreds of emails from Jiffy staff acknowledging the Notice of Resignation and wishing him well. Following his resignation, any email to him at Jiffy received a reply that ‘I am no longer with Jiffy Apps.’”
- “That Notice of Resignation was effective on July 14 [sic], 2014. He has not had any roles or duties or undertaken any tasks as a Director of any Jiffy company including [Jiffy Worldwide] and [Jiffy Hospitality] since then.”

26. Mr. Noel-Steeves’ counsel submitted a document that purports to be Mr. Noel-Steeves’ resignation dated June 4, 2014. This document, which is not contained in the subsection 112(5) record, reads as follows:

Pursuant to our meeting today, I hereby resign as a director from all Jiffy organizations, including Atlas Intellectual Property Management Co., Colabs Café & Bake Shop (New Westminster) Inc. and all affiliated companies, effective 30 days from today's date.

I continue to be employed by [Steeves Investment Corporation] and will continue to provide assistance in the transition as necessary at my regular rate. This registration [*sic*] does not terminate or affect any other contractual obligations we may have with each other.

I wish you luck in the future.

27. Mr. Noel-Steeves' counsel also submitted a series of e-mail messages, similarly none of which was contained in the subsection 112(5) record, that includes an e-mail from Mr. Noel-Steeves dated July 4, 2014, to the "team" stating, *inter alia*, that he is "leaving the Apps division effective immediately" and "I will no [*sic*] be at our office in Vancouver". This e-mail stream also includes a reply from Mr. Birchall acknowledging Mr. Noel-Steeves' departure and stating "thanks for all your help and direction".
28. Mr. Noel-Steeves maintains that sometime in mid-March 2015 he first learned that he was still listed in the B.C. Corporate Registry as a director of both Jiffy Worldwide and Jiffy Hospitality although he had apparently been removed as a director of all other Jiffy companies. The subsection 112(5) record includes two B.C. Corporate Registry searches conducted on August 28, 2015, relating to both Jiffy Worldwide and Jiffy Hospitality as of July 31, 2015, and showing Mr. Noel-Steeves as the sole director of each firm and his mailing and delivery address as 1500-1199 West Hastings Street, Vancouver, which was the location of the various Jiffy firms' former business offices as well as the firms' registered and records office.
29. The Noel-Steeves Determination was addressed to Mr. Noel-Steeves c/o a residential address on Government Street in Burnaby as well as to the Jiffy companies' registered and records office. Mr. Noel-Steeves says that this former address is a condominium apartment he owns and now leases to a tenant and that he has not resided at this address since October 2014. Mr. Noel-Steeves filed an affidavit in which he states that "commencing on October 10, 2014, I went travelling for 3 months outside of Canada" and he was apparently living in California in the early part of 2015.
30. Finally, counsel for Mr. Noel-Steeves makes the following assertions:
 - "[Mr. Noel-Steeves] was not notified of a hearing or of an Investigation which lead to the Determination. [The delegate] did not contact him before issuing the Determination. [A delegate who previously had conduct of Mr. Birchall's complaint] knew his phone number and his email address. She also knew his position was that he had resigned as a director of all Jiffy companies on June 4, 2014 and that he wanted to be notified if the Director was considering him to be a director of Jiffy companies."
 - "[Mr. Noel-Steeves] was not notified that the office of the Director was considering liability for any Jiffy companies beyond 0958572 [Jiffy Apps]. On March 18, 2015 and earlier, the office of the Director through [the previous delegate] advised Mr. Steeves that a hearing would be held against 0958572 operating as Jiffy Apps and Jiffy Software."
31. Counsel for Mr. Noel-Steeves says that the delegate "erred at law in holding that Mr. Steeves was a director of [Jiffy Worldwide and Jiffy Hospitality] and that [these two firms] were associated with [Jiffy Apps]". As for the "new evidence" ground of appeal, counsel says that he intends to show that Mr. Birchall was an independent contractor and that the Section 95 Determination was improperly issued. With respect to the "natural justice" ground of appeal, counsel says that Mr. Noel-Steeves "did not have an opportunity to be heard on the [Noel-Steeves] Determination or on [the Section 95 Determination] upon which the

Determination was based”. Counsel further says: “The Steeves Determination was not issued as a result of a hearing. Therefore, it must have been adjudicated based on an investigation. [The delegate] did not contact or attempt to contact Mr. Steeves, in breach of s. 77 of the [Act].”

32. Finally, counsel says that the delegate “failed to follow the principles of Natural Justice:
- a) in relying on evidence from the mediator, [the previous delegate];
 - b) issuing a Determination when the office of the Director knew that Mr. Steeves disputed his liability, knew his contact information and failed to contact him;
 - c) not allowing Mr. Steeves an opportunity to be heard; and
 - d) not making reasonable efforts to contact Mr. Steeves;
 - e) not giving notice of hearing to the Jiffy companies including [Jiffy Worldwide] and [Jiffy Hospitality] and their directors, and then finding Mr. Steeves liable as a director of [Jiffy Worldwide] and [Jiffy Hospitality].”

Andrew Birchall

33. Mr. Birchall filed a brief (slightly more than one page) submission that does not specifically address the grounds of appeal advanced by Mr. Noel-Steeves. Mr. Birchall’s submission almost exclusively addresses issues relating to the Jiffy Apps Determination. In that regard, Mr. Birchall asserts that Mr. Steeves was involved in an earlier unsuccessful mediation process that preceded the issuance of the Jiffy Apps Determination. Mr. Birchall incorrectly identified the lawyer who was also apparently involved in this mediation conducted by teleconference on March 18, 2015, as Mr. Noel-Steeves’ counsel when, in fact, this lawyer represented only Jiffy Apps. Mr. Birchall thus wrongly asserts that any notice to Jiffy Apps’ counsel was equally notice to Mr. Noel-Steeves.
34. The Jiffy Apps Determination was apparently issued following a complaint hearing held on March 24, 2015, at the Richmond office of the Employment Standards Branch and Mr. Birchall maintains that even though Mr. Noel-Steeves did not attend this hearing, he should have been aware that the hearing was proceeding.
35. I should note that Mr. Noel-Steeves disputes the suggestion that he actually received a copy of the hearing notice relating to the March 24, 2015, complaint hearing although I am satisfied that he was well aware of the hearing date and that the hearing would proceed whether or not he attended (see the March 18, 2015, e-mail stream discussed, above at paras. 12 to 14).

The Director of Employment Standards

36. At the outset, I should note that Mr. Noel-Steeves’ legal counsel strongly objects to the delegate even filing a submission and, apart from that fundamental objection, argues that much of the delegate’s submission “goes beyond the permissible limits” for a submission filed on behalf of the Director of Employment Standards. I will address counsel’s objections later on in these reasons. At this juncture, I am simply summarizing the delegate’s submissions.
37. With respect to the service of the Noel-Steeves Determination, the delegate notes that it was sent by registered mail to Mr. Noel-Steeves c/o two addresses – the Burnaby address which was discovered through a search of the B.C. Assessment Authority’s property database and to the registered and records office of the Jiffy firms on West Hastings Street in Vancouver. The delegate says that “at no time did Mr. Steeves provide the [Employment Standards] Branch with a different address” and that, for purposes of the section 122

“deemed service” provisions, one or both of these two addresses was Mr. Noel-Steeves’ “last known address”.

38. The delegate says that the Noel-Steeves Determination was issued based on the B.C. Corporate Registry records showing Mr. Noel-Steeves to be the sole director of both Jiffy Worldwide and Jiffy Hospitality “for the duration of Mr. Birchall’s employment” and that “Mr. Steeves provided no evidence at the time the Determination was made to rebut the presumption [that the B.C. Corporate Registry’s records are accurate] because he chose not to participate in the investigation”.
39. One of Mr. Noel-Steeves’ fundamental points is that the delegate failed to comply with his obligations under section 77 of the *Act*: “If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.” By way of reply to this argument, the delegate refers to the February 4, 2015, “Notice of Complaint Hearing” scheduling the hearing that resulted in the issuance of the Jiffy Apps Determination. This notice was also apparently sent to Mr. Noel-Steeves c/o the Jiffy Apps’ registered and records office on West Hastings Street in Vancouver and to another address on King Street West in Toronto (I note that the delegate does not assert that this latter address was a “last known address” for purposes of section 122 of the *Act*). This hearing notice was sent to Mr. Noel-Steeves presumably because he was a Jiffy Apps director but the delegate also notes that “Mr. Steeves ceased to be a director of 0958572 B.C. Ltd. [Jiffy Apps] as of October 3, 2013”. In any event, the delegate says that “prior to the date of the hearing, Mr. Steeves participated in the Branch’s dispute resolution process”. Presumably, this is a reference to the failed mediation process – as noted above, Mr. Noel-Steeves participated, by teleconference, in a March 18, 2015, mediation meeting.
40. The delegate further notes that the February 4 hearing notice also contained statements concerning “the possible association of [various Jiffy companies]”. The following is the actual notice that appears on the third page of the February 4, 2015, Notice of Complaint Hearing:

Notice of investigation on the possible association of 0958572 B.C. Ltd., Jiffy Hospitality Inc., Jiffy Apps Inc, [sic] Jiffy Telecommunications Inc., Jiffy Software Inc. and all Jiffy affiliated companies (herein “Jiffy”) under section 95 of the Employment Standards Act.

In addition to the issue included on the Complaint and Information Form submitted by the complainant, the Branch Adjudicator may also determine whether there is a possible association between [sic] 0958572 B.C. Ltd., Jiffy Hospitality Inc., Jiffy Apps Inc, [sic] Jiffy Telecommunications Inc., Jiffy Software Inc. and all Jiffy affiliated companies under section 95 of the Act. A finding of association may result in the Employment Standards Branch [sic, missing text] 0958572 B.C. Ltd., Jiffy Hospitality Inc., Jiffy Apps Inc, [sic] Jiffy Telecommunications Inc., Jiffy Software Inc. and all Jiffy affiliated companies as one employer for the purposes of collecting wages under the Act. Accordingly, the liability for unpaid wages and penalties may be applied to 0958572 B.C. Ltd., Jiffy Hospitality Inc., Jiffy Apps Inc, [sic] Jiffy Telecommunications Inc., Jiffy Software Inc. and all Jiffy affiliated companies. Please provide any and all evidence you wish to be considered in this issues [sic] of whether 0958572 B.C. Ltd., Jiffy Hospitality Inc., Jiffy Apps Inc, [sic] Jiffy Telecommunications Inc., Jiffy Software Inc. and all Jiffy affiliated companies are/are not associated under the Act. [bold in original text]

41. The February 4, 2015, “Notice of Complaint Hearing”, five pages in all, also included, on the last two pages, excerpts from the *Act*, namely, sections 96 and 98 (monetary penalties). Although, as is clear from the above-quoted “Notice of investigation...”, that the delegate presiding at the complaint hearing would be considering whether to issue a section 95 declaration, there was no such notice regarding the possible fixing of personal liability on the four individuals (Mr. Noel-Steeves, Leslie Michael, Matthew Sullivan and Earl Flormata) to whom the hearing notice was also apparently mailed other than the inclusion of section 96 as an attachment to the hearing notice.

42. However, there were a number of other documents also apparently attached to the hearing notice including several Employment Standards Branch “Factsheets” one of which was entitled “Enforcement Measures”. This latter document contains a brief discussion about the various enforcement mechanisms open to the Director of Employment Standards under Part 11 (“Enforcement”) of the *Act* including a short summary under the heading “Corporate Officer Liability”. Nevertheless, it bears repeating that the February 4 Notice of Complaint Hearing was only formally addressed to two parties: Jiffy Apps and Mr. Birchall.
43. The delegate’s concluding point with respect to the “natural justice” issue is as follows:
- On March 18, 2015 a delegate advised Mr. Steeves that if the complaint was not resolved, then as a Director (whether on the Corporate Registry or not) he may be found liable for up to two months’ wages (Record, p. 15). Mr. Steeves confirmed receipt of that email and chose not to attend the hearing or provide evidence in support of his position (p. 37).
44. The “new evidence” ground of appeal is not fully explicated in the material before me as counsel for Mr. Noel-Steeves maintains that he has not had “sufficient time to prepare substantive new evidence or arguments on that evidence”. However, counsel has filed evidence relating to Mr. Noel-Steeves’ status as a director of Jiffy Worldwide and Jiffy Hospitality. The delegate’s position is that any “new evidence” that Mr. Noel-Steeves wishes to submit must only relate to his status as a Jiffy Worldwide/Jiffy Hospitality director and that any evidence relating to any other issue (for example, concerning whether Mr. Birchall was an employee or independent contractor or the correctness of the delegate’s section 95 declaration) is not properly before the Tribunal in this appeal. Further, the delegate says that any “new evidence” tendered with respect to Mr. Noel-Steeves’ status as a director of Jiffy Worldwide or Jiffy Hospitality is not admissible in light of the criteria for admissibility established in *Davies et al.*, BC EST # D171/03.
45. Finally, the delegate says that even on Mr. Noel-Steeves’ own evidence, he *was* a Jiffy Worldwide/Jiffy Hospitality director at least until July 4, 2014, when his purported resignation took effect, and thus he is personally liable for a portion of Mr. Noel-Steeves’ wage claim that spans the section 80 wage 6-month wage recovery period from March 19 to September 18, 2014. The delegate says that if the Tribunal is otherwise persuaded that Mr. Noel-Steeves resigned his directorships in these two firms effective July 4, 2014, “the appropriate remedy is to refer the matter back to the Director [of Employment Standards] to determine the amount of wages owed based on Mr. Steeves’ liability pursuant to section 96 of the Act”.

FINDINGS AND ANALYSIS

46. Mr. Noel-Steeves’ legal counsel objects to several aspects of the delegate’s submission. First, he says that since the delegate was the decision-maker, “he cannot participate in the Appeal”. I am not aware of any Tribunal decision that has espoused such a blanket rule and counsel did not provide any such authority. The participation of the delegate in the appeal process can be very helpful particularly where, as here, the determination was issued following an investigation. The delegate can provide useful information and I do not think that a blanket ban prohibiting the delegate who issued the determination under appeal from any and all participation in the appeal process is in keeping with the purposes of the *Act* and, in particular, section 2(d) (see also *BWI Business World Incorporated*, BC EST # D050/96, and *British Columbia Securities Commission*, BC EST # RD121/07, judicial review refused 2008 BCSC 1244).
47. However, the delegate filing a submission in an appeal relating to a determination that he or she issued must be careful not to inappropriately advocate for any particular party or, indeed, for the determination itself. The delegate can properly respond to specific assertions about what he or she did or did not do during the course of an investigation but there is a line between permissible *explanation* and impermissible *advocacy*. In particular,

in this case, counsel for Mr. Noel-Steeves objects to the delegate's attempt to, in effect, bootstrap his reasons for appeal by including information in his submission (but not in the subsection 112(5) record) that is intended to supplement his original reasons in an effort to have the determination sustained. I consider this sort of conduct to be improper. In my view, the delegate's submission, at least in part, crosses the line into impermissible advocacy (this point is discussed in greater detail, below, regarding what I consider to be the crux of this appeal, namely, whether there was adequate compliance with section 77 of the *Act*).

48. Absent extraordinary circumstances, in an appeal of a director/officer determination issued under subsection 96(1) of the *Act*, the only issues that may be properly raised concern the appellant's status as a director or officer of the employer firm, whether any particular subsection 96(2) defence applies, or whether the individual's personal liability "for up to 2 months' unpaid wages for each employee" has been correctly calculated. Issues that directly relate to the underlying determination issued against the corporation that have been finally adjudicated are not to be re-litigated, or subject to a collateral attack, through an appeal of a determination issued under subsection 96(1): see *Steinemann*, BC EST # D180/96; *Neudorf*, BC EST # D076/07.
49. Mr. Noel-Steeves' fundamental position is that he is not now, and has not been since he delivered his resignation on June 4, 2014, effective July 4, 2014, a director "of [any] Jiffy organizations including Atlas Intellectual Property Management Co., Colabs Café & Bake Shop (New Westminster) Inc. and all affiliated companies". In his affidavit filed in support of his appeal, Mr. Noel-Steeves states (para. 29): "That Notice of Resignation was effective on July 14 [*sic*], 2014 [and] I have not had any roles or duties or undertaken any tasks as a Director of any Jiffy company including [Jiffy Worldwide] and [Jiffy Hospitality] since then".
50. The Jiffy Apps Determination was issued on July 16, 2015, over one year after Mr. Noel-Steeves – on his own evidence – ceased to have any involvement with that firm, and the Section 95 Determination (issued against other "Jiffy" firms) was issued about 6 ½ weeks' later, on September 1, 2015. Accordingly, and apart from prohibitions arising from the application of legal doctrines such as *res judicata*, issue estoppel or collateral attack, Mr. Noel-Steeves, by his own admission, has no present legal status to challenge either the Jiffy Apps Determination or the Section 95 Determination and there is no evidence in the record before me that any of these firms have authorized him to apply for an extension of the appeal period relating to either determination.
51. As noted above, the deadlines for appealing the Jiffy Apps and Section 95 determinations have now passed and, as such, these determinations stand as final orders. That being the case, I am of the view that Mr. Noel-Steeves' arguments relating to Mr. Birchall's status (*i.e.*, was he an employee or independent contractor?) or whether the delegate erred in finding the various "Jiffy" firms to be "one employer" under section 95 of the *Act* (*i.e.*, the correctness of the Section 95 Determination) are issues that are not properly before the Tribunal in this appeal. I should add, simply for the sake of completeness, there is absolutely nothing in the record before me that indicates, even on a *prima facie* basis, the delegate erred in finding Mr. Birchall to be an employee as defined in section 1 of the *Act* or in determining that the various "Jiffy" firms should be declared "one employer" under section 95 of the *Act*.
52. I am satisfied, however, that the delegate did not adequately comply with section 77 of the *Act* prior to issuing the Noel-Steeves Determination. For ease of reference, I will again set out this provision: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."
53. There was no oral hearing prior to the Noel-Steeves Determination being issued on September 10, 2015. This determination was issued following an investigation and, of course, the person under investigation was

Mr. Noel-Steeves. As discussed above, the Jiffy Apps Determination *was* issued after a complaint hearing that was held on March 24, 2015. The delegate says that Mr. Noel-Steeves “participated in the Branch’s dispute resolution process”. This is a reference to the failed mediation process that preceded the March 24, 2015, complaint hearing that ultimately resulted in the Jiffy Apps Determination being issued on July 16, 2015. The only party held liable under the Jiffy Apps Determination was Jiffy Apps.

54. The delegate says that another delegate contacted Mr. Noel-Steeves on March 18, 2015, and advised him that if Mr. Birchall’s unpaid wage complaint “was not resolved, then as a Director (whether on the Corporate Registry or not) he may be found liable for up to two months’ wages”. The delegate further says that “Mr. Steeves confirmed receipt of that email and chose not to attend the hearing or provide any evidence in support of his position”.
55. In my view, the delegate’s submission with respect to the March 18, 2015, e-mail communications between the former delegate and Mr. Noel-Steeves fundamentally misstates the nature of those communications. The former delegate’s and Mr. Noel-Steeves’ March 18 e-mails are contained in the record. The former delegate’s e-mail identifies a communication apparently between Mr. Birchall and Mr. Leslie Michael relating to the mediation process. The former delegate was repeating what Mr. Birchall had told her, namely, that Mr. Michael’s position was “he did not know he was a Director of the company and will not sign the settlement agreement”. The former delegate further stated that “both parties are free to continue to negotiate a voluntary settlement and I will gladly assist” but that “in the meantime, please be advised that the hearing will proceed on March 24, 2015 at 9:00 am if the matter does not voluntarily resolve”.
56. It must be remembered, however, that the March 24 hearing was in regard to the possible liability of Jiffy Apps to Mr. Birchall. Although the various other “Jiffy” companies were not named as parties for purposes of that hearing – the only two named parties set out on the first page of the notice were Jiffy Apps and Mr. Birchall – the hearing notice was sent to the other “Jiffy” companies and the hearing notice did put these firms on notice regarding the possibility of their inclusion in a section 95 declaration and that this issue might be explored at the complaint hearing. Although section 96 was attached to the hearing notice, in my view, there is nothing in the hearing notice that adequately notified any of the four individuals named in it that the March 24, 2015, hearing would be in relation to their possible liability under section 96 of the *Act*.
57. The former delegate’s brief March 18 e-mail to Mr. Noel-Steeves also contained the following paragraph:
- Please be advise [sic] if this matter goes to a hearing, all listed directors/officers of the company and anyone found to have been acting as a director/officer of the company at the time the wages were earned or should have been paid (even if not listed) will be held liable for up to a maximum of 2 months’ wages.
58. In my view, this communication cannot be taken as superseding the actual hearing notice which, as I have already noted, did *not* formerly notify any of the four individuals to whom it was apparently also mailed that the March 24, 2015, hearing would be in relation to their possible liability to Mr. Birchall under subsection 96(1) of the *Act*. More importantly, Mr. Noel-Steeves’ response was clear and unequivocal – he advised that of the four individuals, only Mr. Michael was authorized to act on behalf of Jiffy Apps; he reiterated his position that he was not a Jiffy director when Mr. Birchall’s unpaid wage claim crystallized; and, most critically, he unequivocally stated that if the Director of Employment Standards wished to pursue him under section 96 of the *Act*, he expected to be formally notified and given an opportunity to present his evidence and argument with respect to that matter:

If the Director intends to take this position at the hearing and proceed against me, I need to be served and notified accordingly, which I have not been. I would also need to be given an opportunity to submit

and supply witnesses and documentation in accordance with the Act. Please ensure that if the assigned hearing [sic] officer takes that position, they should advise me in advance.

59. The March 24 complaint hearing did *not* address the possible application of section 96 to any of the four individuals and the subsequent determination only dealt with Jiffy Apps' liability to Mr. Birchall.
60. I reject the delegate's submission that the foregoing events in some fashion constituted proper notice to Mr. Noel-Steeves, as mandated by section 77 of the *Act*, regarding his possible liability to Mr. Birchall under section 96. The delegate seemingly concedes that there was no other notification to Mr. Noel-Steeves regarding his possible section 96 liability to Mr. Birchall prior to the issuance of the Noel-Steeves Determination on September 10, 2015. I have carefully scrutinized the record and it does not contain any indication that prior formal notice was given to Mr. Noel-Steeves advising him that he was under investigation and inviting him to present his evidence and argument regarding his possible section 96 liability to Mr. Birchall. In my view, the failure to comply with section 77 in this matter renders the Noel-Steeves Determination void *ab initio*.
61. The material before me suggests that Mr. Noel-Steeves was, by his own admission, a director of Jiffy Worldwide and Jiffy Hospitality at least until his resignation effective July 4, 2014. On this view of the evidence, Mr. Noel-Steeves would still have some liability to Mr. Birchall under section 96 since Mr. Birchall's unpaid wage claim spans the period from March 17 to September 16, 2014. I am not passing any judgment as to whether there was a *bona fide* resignation effective July 4, 2014, or at any other time. Further, I am not deciding whether Mr. Noel-Steeves has effectively rebutted the presumption that the B.C. Corporate Registry records – which showed him to be director of these two firms throughout the entire wage recovery period – are accurate.
62. In my view, the most appropriate order to issue in this appeal is one referring the entire matter of Mr. Noel-Steeves' liability under section 96 back to the Director for further investigation. If it is determined to be appropriate, and assuming the parties are not otherwise able to resolve their differences through a settlement agreement, a new determination may be issued and, of course, all parties will retain their appeal rights with respect to any new determination that might be issued.
63. In light of this disposition, I do not find it necessary to address whether the “new evidence” submitted in this matter is admissible. Although I have summarized this evidence in my reasons, I have not relied on it in rendering my decision with respect to section 77 of the *Act* and I am not passing any judgment as to whether it would otherwise be admissible.

ORDER

- ^{64.} Pursuant to subsection 109(1)(b) of the *Act*, the appeal period in this matter is extended to October 20, 2015.
- ^{65.} Pursuant to subsections 115(1)(a) and (b) of the *Act*, the Noel-Steeves Determination is cancelled and the issue regarding Mr. Noel-Steeves possible liability to Mr. Birchall under section 96 of the *Act* is referred back to the Director to be heard and adjudicated.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal