An Application for Reconsideration

- by -

Jordan Enterprises Limited
("Jordan Enterprises")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBERS: Kenneth Wm. Thornicroft (Member & Panel Chair)
Carol L. Roberts (Member)
David B. Stevenson (Member)

FILE No.: 2016A/142

DATE OF DECISION: April 11, 2017

DECISION

SUBMISSIONS

Donald L. Richards	counsel for Jordan Enterprises Limited
Adele J. Adamic	counsel for the Director of Employment Standards

INTRODUCTION

1. This is an application filed under section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D114/16, a decision issued by Tribunal Member Gandhi on September 13, 2016 (the "Appeal Decision"). By way of the Appeal Decision, Tribunal Member Gandhi (the "Appeal Panel") confirmed in part, and cancelled in part, a determination issued under section 79 of the *Act* and also referred a specific issue back to the Director for further investigation. The correctness of this latter order is the issue now before us.

2. The present applicant, Jordan Enterprises Limited ("Jordan Enterprises"), and three other individuals all filed reconsideration applications concerning the Appeal Decision. On December 6, 2016, Tribunal Member Thornicroft issued reasons for decision with respect to each of these reconsideration applications (see BC EST # RD154/16). Member Thornicroft dismissed the reconsideration applications filed by the three individuals on the basis that none passed the first stage of the *Milan Holdings* test (see (*Director of Employment Standards*, BC EST # D313/98). Member Thornicroft was satisfied that Jordan Enterprises' application passed the first stage of the *Milan Holdings* test and, accordingly, ordered that the respondent parties be given an opportunity to respond to the application and that Jordan Enterprises be given a right of final reply.

3. Subsequently, a 3-member panel was convened to hear and decide Jordan Enterprises' application and the panel is now issuing its final reasons for decision in this matter. In adjudicating this application, we have reviewed the written submissions filed by legal counsel for Jordan Enterprises and legal counsel for the Director of Employment Standards. Although invited to do so, none of the 24 respondent employees filed a submission in this matter. We have also reviewed the extensive record that was before the Tribunal when the Appeal Decision was issued.

4. Before addressing the merits of this application, it will be helpful to summarize the adjudicative history of this matter.

PRIOR PROCEEDINGS

The Section 95 Determinations

5. On October 28, 2015, a delegate of the Director of Employment Standards (the "delegate") issued a section 95 determination declaring three firms – W. Kreykenbohm Corporation, Nordstar Kitchens Ltd. and International Modern Laminate Ltd. – to be one employer for purposes of the *Act*. We shall refer to these three firms as the "Kreykenbohm Group" and to this determination as the "First Section 95 Determination". By way of the First Section 95 Determination, the three associated firms were ordered to pay a total of $496,898.14 on account of unpaid wages and section 88 interest to 22 named individuals. The delegate also levied a single $500 monetary penalty (see section 98) thus bringing the total amount of the First Section 95 Determination to $497,398.14. This determination was never appealed and it stands as a final order.

6. By way of a second section 95 determination issued on January 27, 2016, the three Kreykenbohm Group firms named in the First Section 95 Determination were declared to be associated with Jordan Enterprises. We shall refer to this determination as the "Second Section 95 Determination" and it is in the total amount of $525,344.39 representing unpaid wages and interest ($524,844.39) and one $500 monetary penalty. It appears that the unpaid wage amounts for 22 of the 24 individuals named in the Second Section 95 Determination are identical to those fixed in the First Section 95 Determination; the modestly higher figure reflects the wages owed to the two additional individuals named in it (who filed complaints after the First Section 95 Determination was issued), as well as further accrued interest. The delegate also issued lengthy "Reasons for the Determination" concurrently with the Second Section 95 Determination (the "delegate's reasons").

7. The First Section 95 Determination and the Second Section 95 Determination were both issued following an investigation (rather than an oral complaint hearing), thus triggering the delegate's obligation to comply with 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." Whether the delegate fully complied with this provision was one of the two central issues in the appeal filed by Jordan Enterprises.

The Appeal Decision

8. On appeal, Jordan Enterprises argued that the section 95 declaration associating it with the Kreykenbohm Group firms should be cancelled because there never was any common business enterprise involving all four firms. Jordan Enterprises maintained that, at all times, it only acted in an independent capacity *vis-à-vis* the Kreykenbohm Group as a lender and landlord. It is not disputed that there were no common officers, directors or shareholders as between Jordan Enterprises and any of the Kreykenbohm Companies. Further, there was no evidence of a familial or similar personal relationship between the principals of the Kreykenbohm Group and the principals of Jordan Enterprises.

9. Jordan Enterprises also asserted that the delegate's investigation fell short in fully complying with section 77 of the *Act*. The Appeal Panel held that there was a contravention of section 77 flowing from the delegate's failure to disclose certain evidence to Jordan Enterprises so that it could reply to it (see Appeal Decision, paras. 39 – 49). The Director of Employment Standards did not apply for reconsideration of the Appeal Decision, and none of the three section 116 applications filed by former Kreykenbohm Group employees addressed the Appeal Decision as it related to the section 77 issue. Thus, this latter finding – that the delegate failed to comply with section 77 *vis-à-vis* Jordan Enterprises – stands unchallenged.

10. The Second Section 95 Determination was cancelled, but only insofar as it concerned Jordan Enterprises, on the basis that the section 95 declaration was not factually or legally supportable as against Jordan Enterprises and due to the delegate's failure to meet her section 77 obligation to Jordan Enterprises.

11. The crux of the Appeal Decision regarding section 95 is set out below (at paras. 23 – 26; 32 – 33):

> [Jordan Enterprises] was incorporated some fourteen years before NKL, eighteen before WKL, and fifty-three before IMLL. Evidence demonstrating that [Jordan Enterprises] had any real involvement in the design, construction, or sale of kitchen cabinets, laminates, or stone facades is lacking and, as noted previously, [Jordan Enterprises] has other business interests independent of acting as a lender, for eleven years, and as landlord, for six, to the Kreykenbohm Companies.
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> In my view, the evidence before the Director does not sufficiently confirm, on a balance of the probabilities, a common business between [Jordan Enterprises] and the Kreykenbohm Companies. On the contrary, evidence included in the Record establishes that the [Jordan Enterprises] carries on a business that is entirely different from, and independent of, the Kreykenbohm Companies.

> Whether or not there is common control and direction is less certain. Certainly, there is no commonality between the directors or shareholders of [Jordan Enterprises] and any of the Kreykenbohm Companies. There is no evidence of joint ownership of key assets, or joint financing of debts.
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> There is evidence of economic dependence (at least on the part of the Kreykenbohm Companies) and, in the months leading to the insolvency of the Kreykenbohm Companies, some operational control. However, I believe that this is attributable not to a common business but, rather, to a creditor aggressively seeking to secure one or more loans made, or to be made, to a troubled business, and a defaulting debtor on the brink of bankruptcy.
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> In my view, the evidence shows only that steps were taken by a creditor to force a troubled debtor to make several concessions, many unpalatable, in order to protect the creditor's past loans and to justify the advance of new loans, all under the authority of the Letter of Understanding, a forbearance, and one or more registered security interests.
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> Accordingly, I conclude that in associating [Jordan Enterprises] with the Kreykenbohm Companies, the Director acted on a view of the facts that cannot reasonably be entertained.

12. The correctness of the cancellation of the section 95 declaration, insofar as it binds Jordan Enterprises, is not at issue in this application. However, the Appeal Panel referred back to the Director "for further investigation the question of whether or not [Jordan Enterprises] should be associated with the [Kreykenbohm Group firms] under section 95 of the *Act*" (para. 68). Jordan Enterprises seeks an order cancelling this aspect of the Appeal Decision.

JORDAN ENTERPRISES' RECONSIDERATION APPLICATION

13. Section 115 of the *Act* states:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
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> (a) confirm, vary or cancel the determination under appeal, or
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> (b) refer the matter back to the director.

Jordan Enterprises submits the Appeal Panel erred by, in effect, reading "or" as "and" in subsection 115(1) of the *Act*, and that having cancelled the Determination as it concerned Jordan Enterprises, the panel did not have the statutory authority to then issue a "referral back" order. Jordan Enterprises submits: "An interpretation that allows the Tribunal to both confirm, vary or cancel a determination and refer the matter back to the director is not the correct interpretation of the statute" (underlining in original text).

14. In any event, Jordan Enterprises submits that a "referral back" order should not have been issued in this case since the Appeal Panel made "conclusive findings" that rendered a referral back order "pointless". Jordan Enterprises further submits: "The Director and the complainants should not be afforded another opportunity to re-try their case by the Tribunal [*sic*] simply because they are seeking to supplement what was already provided and acquired by the Director during the complaint process itself".

ANALYSIS

Interpretation of Section 115(1)

15. In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, a case concerning the proper interpretation of the Ontario *Employment Standards Act*, the Supreme Court of Canada endorsed Elmer A. Driedger's text, *Construction of*

Statutes (2nd ed., 1983), and his conclusion that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (para. 21). In *Rizzo*, the high court held that loss of employment, due to the employer having been petitioned into bankruptcy by a creditor, constituted a "termination by an employer" given that the "benefits-conferring" statute should be interpreted in a broad and generous manner so as "to protect the interests of as many employees as possible" (para. 40). The court also observed (at para. 27):

> …It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

16. With these comments in mind, we now turn to the interpretative issue regarding section 115(1) of the *Act* raised by Jordan Enterprises. Three important points should be noted. First, there is ample legal authority, including leading treatises and appellate court decisions, for interpreting "or" as "and" where it is sensible to do so – see, for example, *Sullivan on the Construction of Statutes* (5th ed., LexisNexis Canada Inc., 2008) at pp. 81-84; *Village of Balmoral v. Bernard and Bernard*, 2003 NBQB 40; *Royal & Sun Alliance Insurance Company of Canada v. Guest*, 2004 NLCA 13; *Graham v. Saskatchewan Government Insurance*, 2006 SKQB 301; *Aucoin v. Shepherd*, 2013 YKCA 1; *Re Lubberts Estate*, 2014 ABCA 216. Second, section 8 of the B.C. *Interpretation Act* states: "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Third, the stated purposes of the *Act* include section 2(d): "The purposes of this Act are as follows: …(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act".

17. The Director of Employment Standards – acting through his delegates – conducts investigations and evidentiary hearings regarding unpaid wage complaints to determine if there has been compliance with the *Act*: see Part 10 of the *Act*. Under Parts 12 and 13 of the *Act*, the Tribunal has exclusive jurisdiction to hear appeals of Director's determinations. The Tribunal is, by statute, an appellate body and does not conduct *de novo* hearings where it receives evidence and makes original factual findings regarding unpaid wage complaints filed under section 74 of the *Act*. As a result, there are many circumstances where the Tribunal will find it necessary, after having cancelled or varied some aspect of a determination, to then issue a referral back order, so that a complaint or other dispute arising under the *Act* can be adjudicated by the Director of Employment Standards. The parties, of course, may appeal any resulting decision to the Tribunal under section 112 of the *Act*.

18. A referral back order would be appropriate, for example, where a delegate determined that an employee was a "manager" and thus excluded from the overtime provisions of the *Act* (and, accordingly, the delegate did not make any findings regarding the number of overtime hours worked or the employee's overtime pay entitlement). If the Tribunal cancelled that aspect of the determination, finding that the employee was not a "manager", the Tribunal would typically issue an order referring this issue back to the Director for the purposes of determining the employee's overtime pay entitlement.

19. Another example: the delegate may have determined that an employee was terminated for just cause and thus did not make any findings regarding the employee's section 63 entitlement. In the absence of an evidentiary record with respect to the "employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work" (subsection 63(4)(a) of the *Act*), how would the Tribunal determine the employee's section 63 entitlement? In addition, the Tribunal may not even have evidence

before it regarding the employee's continuous service period – this information is critical in order to determine the number of weeks' wages to which the employee is entitled. In such a case, the Tribunal must refer these questions back to the Director for determination.

20. Although we could identify many more examples, we will provide one final one: the delegate determines that the complainant is an "independent contractor" and, as such, the *Act* does not apply; the Tribunal reverses that finding, concluding that the complainant is an employee. Once again, the matter must be referred back to the Director for purposes determining the individual's entitlements under the *Act* and for the assessment of appropriate section 98 penalties (in this latter regard, the Tribunal has no statutory authority to levy monetary penalties under section 98).

21. In each of the above examples, the Tribunal would issue an order varying or cancelling the determination, and if the Tribunal did not issue a concomitant "referral back" order, there would follow the absurd, illogical, unfair and even Kafkaesque situation whereby, despite the finding of a contravention of the *Act*, no mechanism would be available to ensure an appropriate remedy for that contravention.

22. Jordan Enterprises argues that the Tribunal's decision in *Hub-City Boat Yard Ltd.* (BC EST # D027/04) ("*Hub City*") supports its position that once the Second Section 95 Determination was cancelled (as against Jordan Enterprises), a further "referral back" order should not have been issued. Jordan Enterprises also says that to the extent *Old Dutch Foods Ltd.* (BC EST # RD115/09), a decision not referenced in *Hub-City*, supports the referral back order issued in this case, that decision should be disregarded because "the Tribunal's jurisprudence that follows *Old Dutch* is in error".

23. In *Hub-City*, a delegate issued a corporate determination ordering payment of the complainant's unpaid wages and two further section 96 (director/officer liability) determinations against the corporation's two principals. The entire matter had previously been referred back to the Director "on the basis that breaches of natural justice had occurred" (see *Hub-City Boat Yard Ltd. et al.*, BC EST # D295/03). The basis for the referral back order was described (at page 2 of the 2004 decision) as follows:

> The [complaint] hearing was held on May 12, 2003, but no one appeared for Hub City or the Roses…As I found in my referral-back decision, the Roses (and Hub City) were not given proper notice of the hearing, and the delegate proceeded with the hearing knowing the Roses wished to be contacted by him. I also held the delegate provided inadequate reasons for his initial Determination, first because no analysis was undertaken as to whether Skilton was an employee, and second because there appeared to be a successorship issue here which the delegate had not considered.

Thus, and on the basis of what is known as the *audi alteram partem* rule (roughly translated as "let the other side be heard"), the original determinations were tainted by the delegate's failure to adhere to the principles of natural justice and, on that basis were, essentially, nullities (see, for example, *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311 and *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; see also *Old Dutch Foods Ltd. and the Director of Employment Standards*, BC ESTS # D115/09 at para. 68). However, Tribunal Member Lawson did *not* explicitly cancel the determinations under section 115(1)(a) of the *Act*; rather he issued the following order: "I find the first Determination…fails to observe the principles of natural justice [*sic*] and the appeal should be allowed [and since] the second and third Determinations impose personal liability as a result of the first Determination, they are tainted by the same errors. Pursuant to s. 115 of the *Act*, I order that all three Determinations…be referred back to the Director."

24. As part of the referral back process, the Director prepared a report that, in turn, was provided to the parties for their response. With the delegate's report and the parties' reply submissions in hand, Member Lawson

was then in a position to issue a final order. Member Lawson was highly critical of the delegate's report, characterizing it as an attempt "to defend the correctness of the Determination I found to have been in error" and that "instead of conducting a proper investigation into whether Skilton is an employee and whether a successorship issue arises with the new company, the delegate states glibly that no such investigation is necessary because Hub City raised no such issues" (page 4). Member Lawson explained that he expected that another complaint hearing would have been conducted – with proper notice to all parties – and the delegate's "failure or refusal to cure the problem and conduct a Complaint Hearing that does not breach the rules of natural justice is unexplained, and perhaps unexplainable" (pages 4 – 5). Member Lawson cancelled all three determinations (at page 5):

> In short, the Director's flawed and unfairly conducted investigation remains flawed and unfairly conducted, despite my effort to administer a cure. This Tribunal has held that where a Determination is flawed on the major issue, it may be more appropriate to cancel the Determination than to refer to back with directions (see *Re Thomas*, BC EST #D115/03). A second referral back in this case would not only be undignified, but it would be contrary to the fairness and efficiency principles in the Act. This is therefore one of those (hopefully) rare cases in which the flaws in the Determination are incurable and it must be cancelled.

25. As noted, the form of order issued in the *Hub-City* "referral back" decision was not an explicit cancellation of the three determinations. Member Lawson "allowed the appeal", having found that all three determinations were "tainted" by natural justice errors (likely rendering them, as a matter of law, nullities). Under the terms of Member Lawson's order, the legal effect of the determinations was, in essence, suspended pending the new investigation or hearing regarding the complaint. The order required the Director to consider the complainant's unpaid wage complaint anew. Once the referral back report was in hand, together with the parties' responses to that report, Member Lawson was in a position to issue a final order with respect to the three determinations.

26. We cannot conclude that *Hub-City* assists Jordan Enterprises' argument regarding the "or/and" issue. Counsel for Jordan Enterprises submits: "…the Tribunal in *Hub-City* held that the legislature empowered the Tribunal to refer a matter back in cases <u>where the determination under appeal could not be properly confirmed, varied or cancelled</u> [and] an interpretation that allows the Tribunal to both confirm, vary or cancel a determination <u>and</u> refer the matter back to the director is not the correct interpretation of the statute" (<u>underlining</u> in original text). This submission appears to be based on the following excerpt from the second *Hub-City* decision (at page 4) but it is an incomplete reference:

> The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, *and where a reinvestigation or reconsideration is required, with directions* (see *Re Zhang*, BC EST # D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal). (our *italics*)

27. The above excerpt principally addresses the situation where the Tribunal refers a matter back to the Director because the Tribunal does not have a sufficient evidentiary record that would enable it to issue a final order. In *Hub-City*, Member Lawson could have cancelled the Determinations and then refer the complaint back to the Director to be considered anew. If a "new determination" is contemplated as part of the referral back

order, by necessary implication, the determination under appeal must have been cancelled otherwise there is the distinct possibility that there could be two conflicting determinations. The principal distinction between these two processes ("refer back and report" versus outright cancellation and a referral back for a fresh review of the complaint) is that in the former situation, the determination is not the subject of a final order and the Tribunal retains its section 115(1) jurisdiction to "confirm, vary or cancel" it, whereas in the latter situation, the matter would only return to the Tribunal by way of a new appeal of any further determination that the Director might issue.

28. Since counsel submits that *Old Dutch* was wrongly decided, we now turn to that decision. In *Old Dutch*, the Tribunal cancelled a determination and referred it back to the Director for rehearing (but not necessarily before a new delegate – that choice was left to the Director's discretion (see BC EST # D057/09). This decision was cited, seemingly with approval, by the B.C. Court of Appeal in *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97). On reconsideration, both the Director and Old Dutch Foods Ltd. (the employer) applied for reconsideration. The Director's objection was twofold, first, the Director objected to an order for a new "hearing" "because it constituted an attempt to fetter the Director's statutory discretion to choose the appropriate procedure for determining the validity of a complaint"; second, the Director asserted "that the Member acted in excess of his jurisdiction in cancelling the Determination and referring it back to the Director for rehearing" (para. 18). Old Dutch's position was "that the Member erred in law in failing to refer the matter back to a different delegate" because of a concern that the delegate had seemingly made certain credibility findings adverse to Old Dutch thereby raising a concern regarding possible bias on the delegate's part (para. 19).

29. The reconsideration panel concluded that there was a legitimate concern regarding apprehension of bias and, as such, varied the original order to provide that the "complaint be re-visited by a different delegate" (para. 87). The reconsideration panel held that neither of the Director's objections to the form of the order were well founded. With respect to the Director's second objection regarding a "cancellation and referral back" order, the panel observed (at paras. 66 – 69):

> In our view, section 115 permits the Tribunal to employ its remedial powers cumulatively as well as exclusively, so as to enable it to fashion a remedy which best suits the circumstances presented in the particular case. The legislation nowhere expressly prohibits such an approach and such an interpretation is more apt to permit a result that is fair and efficient.
>
> It follows that it was not improper for the Member to cancel the Determination under section 115(1)(a) and refer the matter back under section 115(1)(b).
>
> Both the Director and Old Dutch acknowledge that when a determination, or a part of it, is cancelled by the Tribunal pursuant to its jurisdiction under section 115(1)(a), the determination, or the part of it that is cancelled, is a nullity.
>
> If the Tribunal orders that a determination be cancelled and that the matter be referred back, the Director must consider the complaint afresh in light of the errors identified by the Tribunal. If the Director makes a new determination, that determination attracts the same rights of appeal under the *Act* as the original determination.

Thus, the reconsideration panel in *Old Dutch* interpreted section 115(1) as allowing the Tribunal to both cancel or vary a determination and remit a matter back to the Director to make a fresh determination.

30. While counsel for Jordan Enterprises correctly asserts that the *Old Dutch* reconsideration panel did not address *Hub-City* in its decision, in our view, there was no need to do so since *Hub-City* did not concern the scope of the Tribunal's powers under section 115(1). As discussed above, the "referral back" order issued in *Hub-City* was not a "cancellation and referral back" order but rather, a "referral back and report" order.

There is a significant distinction between the two forms of orders particularly inasmuch as the Tribunal retains jurisdiction over the appeal in the latter (since no final order has been issued) but is *functus officio* in the former (the dispute would only return to the Tribunal if a new appeal were filed regarding a subsequently issued determination).

31. It follows that we reject Jordan Enterprises' first submission that the Tribunal does not have the statutory authority to both cancel a determination *and* refer the matter back to the Director for a fresh consideration.

32. We now turn to Jordan Enterprises' second argument, namely, whether in the all circumstances of this case, it was appropriate to refer the section 95 issue back to the Director "for further investigation".

Should the referral back order in this case be cancelled?

33. The Appeal Decision confirmed the Kreykenbohm Group's original liability and, in addition, imposed a further liability on the Kreykenbohm Group regarding two other employees who were not named in the First Section 95 Determination, but were named in the Second Section 95 Determination.

34. Prior to the issuance of the Second Section 95 Determination, the record shows that the delegate had either spoken to, or corresponded with (or both), individuals representing Jordan Enterprises including its legal counsel and its CEO/President and had also spoken to, or otherwise corresponded with (or both), many Kreykenbohm Group former employees including Mr. Richard Hall (who was the interim CEO of one or more of the Kreykenbohm Group firms for about a 15-month period prior to their bankruptcy), Ms. Gail Cote, Mr. Seamus Farnan and Mr. Ingo Harders. Mr. Farnan and Ms. Cote both filed submissions in the appeal proceeding and Messrs. Farnan and Harders (as well as Mr. Wook Jang) each filed separate applications for reconsideration of the Appeal Decision that were summarily dismissed in Member Thornicroft's December 6, 2016, decision (BC EST # D154/16) because all three applications failed to pass the first stage of the *Milan Holdings* test.

35. Mr. Hall's evidence was critical to the Second Section 95 Determination as the delegate primarily relied on Mr. Hall's evidence for her conclusion that there was, in the language of section 95, "common direction or control" with respect to the Kreykenbohm Group and Jordan Enterprises (see delegate's reasons at pages R11 – R12). The delegate's failure to afford Jordan Enterprises a reasonable opportunity to refute Mr. Hall's evidence was the sole basis for the Appeal Panel's second finding[1] that the Second Section 95 Determination must be cancelled because there was breach of the principles of natural justice (see Appeal Decision, paras. 39 – 49).

36. The delegate's unilateral decision to conduct a second investigation concerning whether Jordan Enterprises might also be liable for the former Kreykenbohm Group's employees' unpaid wages – a decision apparently made sometime in the early fall of 2015 – was seemingly triggered by the delegate's realization that there was likely little, if any, realistic possibility of recovering the employees' unpaid wages from the Kreykenbohm Group (see delegate's reasons, pages R3 – R4).

37. As noted in the Appeal Decision (paras. 20 – 21), a section 95 declaration can only be made where, *inter alia*, there is evidence of *both* a common business enterprise and common control or direction. Regarding the former criterion, the Appeal Panel concluded that there was legally insufficient evidence of a common business enterprise and that "…evidence included in the Record establishes that [Jordan Enterprises] carries

[1] The first finding being that the delegate erred in law in making a section 95 declaration as against Jordan Enterprises (see Appeal Decision, para. 33).

on a business that is entirely different from, and independent of, the [Kreykenbohm Group] companies" (para. 24). Further, with respect to the "common direction or control" criterion, there was no evidence whatsoever of common shareholdings, officers or directorships as between Jordan Enterprises and the Kreykenbohm Group firms (para. 25; see also delegate's reasons, pages R2 – R3). "There is no evidence of joint ownership of key assets, or joint financing of debts" (Appeal Decision, para. 25).

38. The delegate's finding regarding the scope the Kreykenbohm Group's indebtedness to Jordan Enterprises is set out at page R11 of her reasons. The delegate then concluded, at page R11 of her reasons: "The facts clearly establish that [Jordan Enterprises] had a *financial investment* in [the Kreykenbohm Group firms]" (our *italics*). However, this conclusion fundamentally misconceives the difference between debt and equity. Jordan Enterprises was a *lender* to (thereby creating a debtor/creditor relationship) rather than an *investor* in (such as a shareholding interest) the Kreykenbohm Group. The Appeal Panel concluded that the relationship between Jordan Enterprises and the Kreykenbohm Group did not indicate a common business enterprise but, rather, "a creditor aggressively seeking to secure one or more loans made, or to be made, to a troubled business, and a defaulting debtor on the brink of bankruptcy" (para. 26) and that in making a section 95 declaration as against Jordan Enterprises, "the Director acted on a view of the facts that cannot reasonably be entertained" (para. 33).

39. The Director does not argue, and there is nothing in the extensive record before us to demonstrate, that the cancellation of the section 95 declaration as against Jordan Enterprises constituted an error in law. Notwithstanding the cancellation of the section 95 declaration (but only insofar as it concerned Jordan Enterprises), the Appeal Panel issued a further order referring "the question of whether or not [Jordan Enterprises] should be associated with the [Kreykenbohm Group firms] under section 95 of the *Act*" back to the Director for further investigation (para. 68).

40. Two former Kreykenbohm Group employees, Seamus Farnan and Gail Cote, filed submissions in the appeal proceedings and the Appeal Decision notes, with respect to those submissions, that they "appear[ed] to include 'new' evidence in the sense that it was not, from what I can see, before the Director during the period of investigation" (para. 7). This evidence was not considered and the Appeal Panel did not "make any findings with respect to any 'new' evidence submitted by [Jordan Enterprises] or any other party" (para. 50). In the Appeal Decision, this "new evidence" was characterized as being "evidence…that…the submitting party…would have put before the Director, given the opportunity, in order to answer the evidence or argument of an opposing party" (para. 8). The Appeal Decision continues: "Based on the submissions received in this appeal, I think it fair to say that some of the parties have more evidence to adduce and would have done so during the original investigation given the opportunity" (para. 60). Accordingly, a referral back order was issued requiring the Director to conduct another investigation into the very same issue that was addressed in the Second Section 95 Determination, namely, "whether or not [Jordan Enterprises] should be associated with the [Kreykenbohm Group] Companies under section 95 of the *Act* and therefore jointly liable with the [Kreykenbohm Group] Companies…to the twenty-four former employees of the [Kreykenbohm Group] Companies" (para. 63).

41. In our view, this referral back order is problematic. No party, other than Jordan Enterprises, argued for a cancellation of the Determination based on natural justice grounds. No complainant alleged that he or she was denied a fair and reasonable opportunity to provide relevant evidence during the course of the investigation which led to the Second Section 95 Determination. The record only shows that two complainants later suggested, during the appeal process, that they had "new" or further evidence they wished to provide to the Tribunal.

42. During the course of the delegate's investigation, she personally spoke with Mr. Farnan and there were other written communications between them. Mr. Farnan submitted several documents to the delegate. As for Ms. Cote, the record similarly shows that the delegate had several communications with her (and Ms. Cote also submitted several documents to the delegate) during the course of the investigation. This is not a case where a complainant was denied a fair and reasonable opportunity to provide relevant evidence during the course of an investigation into their unpaid wage complaint.

43. In our view, it may have been appropriate to issue a referral back order in this case if the Appeal Panel concluded that the original investigation constituted a denial of natural justice for one or more of the *complainants*. However, no such finding was made, and we cannot find any evidence in the record demonstrating that the delegate, during the course of her investigation, failed to afford either Mr. Farnan or Ms. Cote, or any other complainant, a reasonable opportunity to provide their evidence to her. In these circumstances, we find it was not appropriate to remit the section 95 issue back to the Director for a new investigation. This question was properly investigated insofar as the complainants were concerned and a determination was issued. The Appeal Panel found that the delegate breached the principles of natural justice *vis-à-vis* Jordan Enterprises but that, in any event, the Delegate erred in law in associating Jordan Enterprises with the Kreykenbohm Group under section 95 of the *Act*. We are of the view that there is simply no basis for remitting the section 95 question back to the Director for a new investigation.

44. Quite apart from there being no evidence of a flawed investigation in the sense that the *complainants* were denied a reasonable opportunity to present their evidence, even if one were to consider the appeal submissions filed by Mr. Farnan and Ms. Cote, we do not see how those submissions seriously call into question the fundamental correctness of the decision to cancel the Second Section 95 Determination as it concerned Jordan Enterprises. Much of Mr. Farnan's submission consists of speculation and hearsay and, for the most part, the submission is not particularly relevant to section 95 of the *Act*. Crucially, Mr. Farnan's submission does not provide cogent evidence that addresses the fundamental problems with respect to the Second Section 95 Determination, namely, the absence of evidence relating to a common business enterprise and common direction or control. Similarly, Ms. Cote's submission does not provide cogent evidence insofar as the section 95 issue is concerned. This latter submission focuses almost exclusively on actions undertaken by Jordan Enterprises' CEO/President and none of these actions is inconsistent – indeed they all strongly corroborate – the Appeal Panel's finding that at all times this individual was acting as a principal of *Jordan Enterprises* which, in turn, was a "creditor aggressively seeking to secure one or more loans made, or to be made, to a troubled business, and a defaulting debtor on the brink of bankruptcy" (para. 26).

45. The effect of the referral back order is to provide the Director with a new opportunity to conduct another investigation and possibly issue another section 95 determination against Jordan Enterprises even though there is no cogent evidence demonstrating that Jordan Enterprises and the Kreykenbohm Group were involved in a common business enterprise subject to common control or direction. Further, there is nothing in the record that seriously calls into question the order cancelling the section 95 declaration insofar as it extends to Jordan Enterprises.

46. One of the purposes of the *Act* is "to promote the fair treatment of employees and employers" (section 2(d)) and another is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (section 2(d)). In our judgment, it is fundamentally unfair to order another investigation into the section 95 issue when there is no evidence before us demonstrating that the cancellation order was legally or factually incorrect, or that there is other, previously unconsidered, evidence that would support a new section 95 declaration requiring Jordan Enterprises to pay the Kreykenbohm Group's former employees' unpaid wages.

47. The Director's legal counsel, noting that the Kreykenbohm Group firms are bankrupt while Jordan Enterprises is not, says: "Practically, the cancellation of the determination against, Jordan, with nothing further, means all hope of any wage recovery is effectively extinguished". While that may be true, it is not a legitimate justification for making a referral back order.

48. The Director's counsel further says: "…[the Tribunal] reviews decisions of the Director to decide, among other things, whether there is sufficient evidence in the record produced…to support the findings of the Director". While we agree with that statement, we must also observe that this is precisely what occurred here – the Appeal Panel was not satisfied, based on the evidence properly before it, that the section 95 declaration issued against Jordan Enterprises could stand.

49. With respect to Jordan Enterprises' position that the "referral back" order ought not to have been issued, the Director's counsel says: "When Jordan asks that the Tribunal make its own decision on the section 95 association, by cancelling the determination and not referring it back to the Director, Jordan is asking the Tribunal to exercise an equitable jurisdiction, that it does not possess". We are unable to accede to this submission. First, the Tribunal is under no statutory obligation to refer the matter back to the Director whenever it cancels a section 95 declaration. Second, the Tribunal's authority to cancel is not an "equitable" jurisdiction – it is purely statutory as provided for in section 115(1)(a) of the *Act*. In our view, a "referral back" order should not be issued as a matter of course whenever a section 95 declaration is cancelled. We cannot conclude that this case presents unusual circumstances that justify a referral back order for the purposes of conducting a *de novo* investigation.

50. The Appeal Panel held that the investigation was flawed insofar as *Jordan Enterprises* was concerned but the panel made no such similar finding with respect to any of the *complainants*. We are satisfied, having reviewed the relatively voluminous section 112(5) record (approximately 380 pages), that the complainants were afforded a fair and reasonable opportunity to present their evidence and argument to the Director. Absent unusual circumstances that are not present here, Jordan Enterprises is entitled to the benefit of a final order subject only to the parties' right to seek judicial review.

51. We find that the referral back order, issued solely for the purposes of conducting a new investigation, in circumstances where there was no natural justice failing tainting the investigation insofar as the complainants were concerned, and in the absence of any cogent evidence that seriously calls into question the correctness of the cancellation order, should not, as a matter of law, have been issued. That being the case, the Appeal Decision should be varied to cancel that particular order.

52. We wish to address one final matter that arises from the Kreykenbohm Group's legal counsel's reply submission. This submission concerns an application filed with the B.C. Labour Relations Board by the union certified to represent certain former employees of one of the Kreykenbohm Group firms, W. Kreykenbohm Corporation ("WKC"). The union applied under sections 35 (the "successorship" provision) and 38 (the "common employer" provision) of the B.C. *Labour Relations Code* to, firstly, have Jordan Enterprises designated as a successor employer to WKC or, alternatively, have the two firms declared to be one employer for purposes of the *Code*. Although section 38 of the *Code* is framed in similar language to section 95 of the *Act*, the statutory purposes underlying each section are legally distinct. The Labour Relations Board dismissed the applications and the union's application for leave to have this decision reconsidered was also refused.

53. In our view these decisions do not raise a *res judicata* or issue estoppel issue. Despite the similarity of language between section 38 of the *Code* and section 95 of the *Act*, we have not taken into account, in any fashion, the Labour Relations Board decisions because: i) these decisions were not before the Appeal Panel and, more

importantly, ii) they address a situation under a separate statutory regime, and iii) these decisions were based on the evidentiary record that was before the Board whereas we must make a decision based on the evidentiary record that was before the Tribunal when the Appeal Decision was made.

ORDER

54. Pursuant to section 116(1)(b) of the *Act*, the Appeal Decision is varied by cancelling the order remitting the matter back to the Director for further investigation. In all other respects, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft **Member and Panel Chair** **Employment Standards Tribunal**	**Carol L. Roberts** **Member** **Employment Standards Tribunal**	**David B. Stevenson** **Member** **Employment Standards Tribunal**