Applications for Reconsideration

- by -

Wook Jang
("Jang")

- and by –

Seamus Farnan
("Farnan")

- and by –

Jordan Enterprises Limited
("Jordan Enterprises")

- and by –

Ingo Harders
("Harders")

- 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 MEMBER: Kenneth Wm. Thornicroft

FILE Nos.: 2016A/140, 2016A/141, 2016A/142, 2016A/143

DATE OF DECISION: December 6, 2016

INTERIM DECISION

SUBMISSIONS

Wook Jang	on his own behalf
Seamus Farnan	on his own behalf
Donald L. Richards	counsel for Jordan Enterprises Limited
Ingo Harders	on his own behalf

INTRODUCTION

1. I have before me four separate applications for reconsideration filed under section 116 of the *Employment Standards Act* (the "*Act*"). In each case, the applicant applies for reconsideration of BC EST # D114/16 issued by Tribunal Member Gandhi on September 13, 2016 (the "Appeal Decision"). The applicants are: Wook Jang ("Jang"; Tribunal File No. 2016A/140); Seamus Farnan ("Farnan", Tribunal File No. 2016A/141); Jordan Enterprises Limited ("Jordan Enterprises"; Tribunal File No. 2016A/142); and Ingo Harders ("Harders"; Tribunal File No. 2016A/143).

2. By way of the Appeal Decision, Tribunal Member Gandhi confirmed in part, and cancelled in part, a determination issued under section 79 of the *Act*. He also referred a specific issue back to the Director for further investigation. In essence, three of the section 116 applicants (Messrs. Jang, Farnan and Harders) say that Member Gandhi should not have cancelled any portion of the determination in question while the fourth applicant, Jordan Enterprises, says that although the cancellation order was appropriate, the referral back order was not.

3. Before I turn to the substance of the various applications, I shall first set out the factual and adjudicative background.

BACKGROUND FACTS AND PRIOR PROCEEDINGS

The Section 95 Determinations

4. On October 28, 2015, a delegate of the Director of Employment Standards (the "delegate") issued a determination declaring three firms – W. Kreykenbohm Corporation, Nordstar Kitchens Ltd. and International Modern Laminate Ltd. – to be a single employer for purposes of the *Act*. I shall refer to this determination as the "First Section 95 Determination". Section 95, the so-called "common employer" provision, provides as follows:

> 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. On September 4, 2015, the three firms named in the First Section 95 Determination ceased operating and all employees were terminated as of that date. As of this latter date, the total staff complement included 52 unionized employees (represented by UNIFOR, Local 1928) and 29 non-bargaining unit employees. The three firms all apparently filed for bankruptcy on December 23, 2015 (recall that the First Section 95 Determination was issued on October 28, 2015). The various bank accounts of the three firms named in the First Section 95 Determination were frozen as of September 10, 2015.

6. 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 including three of the current applicants, Messrs. Farnan, Harders, Jang. The bulk of this latter unpaid wage award ($361,100.95) was for compensation for length of service (see section 63) although the award also included vacation pay ($87,166.17), regular wages ($40,234.39) and overtime pay ($6,401.18). 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.

7. I understand that the First Section 95 Determination was never appealed and thus it now stands as a final order.

8. On January 27, 2016, the same delegate issued another determination, also under section 95 of the *Act*, declaring the three firms named in the First Section 95 Determination to be associated with the fourth applicant in these proceedings, Jordan Enterprises. I 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. So far as I can determine, the unpaid wage amounts for 22 of the 24 individuals named in the Second Section 95 Determination are identical to that fixed in the First Section 95 Determination; the modestly higher figure reflects the wages owed to the two additional individuals named (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").

9. Both the First Section 95 Determination and the Second Section 95 Determination were issued following an investigation, 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." Section 77 was one of the two central issues in the appeal filed by Jordan Enterprises which resulted in the Appeal Decision.

The Appeal Decision

10. On March 7, 2016, Jordan Enterprises, through its legal counsel, appealed the Second Section 95 Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice (see subsections 112(1)(a) and (b) of the *Act*).

11. Although the factual matrix is somewhat complicated, the essence of Jordan Enterprises' position was that, at all times, it acted in an independent capacity as a lender and landlord. Jordan Enterprises asserted that the delegate erred in law by associating it with the three firms named in the First Section 95 Determination.

12. The three firms named in the First Section 95 Determination have been referred to as the "Kreykenbohm Companies" and I will continue with that nomenclature. The Kreykenbohm Companies operated from common business premises and there are common directors/officers. "The Kreykenbohm Companies collectively engage in the design, fabrication, and sale of kitchen cabinets, laminates, and stone facades" (Appeal Decision, para. 9(d)). Jordan Enterprises "carries on a number of businesses, including lending money, owning and managing real estate, property development, and the operation of several restaurants" (Appeal Decision, para. 9(f)). There are no common officers, directors or shareholders as between Jordan Enterprises and any of the Kreykenbohm Companies, nor is there any evidence of a familial or other personal relationship between the principals of the Kreykenbohm Companies and the principals of Jordan Enterprises.

Error in Law – The Section 95 Declaration

13. Tribunal Member Gandhi concluded that the delegate erred in law in making a section 95 declaration associating Jordan Enterprises with the Kreykenbohm Companies. The relevant excerpts from the Appeal Decision regarding this latter finding are set out, below (Appeal Decision, paras. 20 – 26):

> My understanding is that these requirements are not disjunctive – associating companies under the *Act* requires evidence of a common business and common control and direction.
>
> With respect to the first, the Tribunal and the Court of Appeal agree that, in considering the phrase "businesses, trades or undertakings", it is not sufficient to say that the parties to be associated are carrying on business. They must be carrying on business together.
>
> I accept the Director's finding that the Appellant was carrying on business as the financier and lender to the Kreykenbohm Companies. However, in view of both *Remko'B Investments Ltd.* [1994 CanLII 168 (BCCA)] and *0708964 B.C. Ltd.* [BC EST # D015/11], this does not mean that the Appellant and the Kreykenbohm Companies were carrying on a common business enterprise.
>
> The Appellant was incorporated some fourteen years before NKL, eighteen before WKL, and fifty-three before IMLL. Evidence demonstrating that the Appellant had any real involvement in the design, construction, or sale of kitchen cabinets, laminates, or stone facades is lacking and, as noted previously, the Appellant has other business interests independent of acting as a lender, for eleven years, and as landlord, for six, to the Kreykenbohm Companies.
>
> In my view, the evidence before the Director does not sufficiently confirm, on a balance of the probabilities, a common business between the Appellant and the Kreykenbohm Companies. On the contrary, evidence included in the Record establishes that the Appellant 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 the Appellant and any of the Kreykenbohm Companies. There is no evidence of joint ownership of key assets, or joint financing of debts.
>
> 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.
>
> (underlining in original text)

14. In issuing the section 95 declaration associating Jordan Enterprises and the Kreykenbohm Companies, the delegate relied on the evidence of Richard Hall who was the "interim chief executive officer of the Kreykenbohm Companies from the end of June 2015 to the end of August 2016" (Appeal Decision, para. 27) and, in particular, his evidence concerning his dealings with Jeff Bickerstaff (one of Jordan Enterprises' two

directors/officers; the other being Ralph Jordan). In brief, Mr. Hall's evidence concerned the extent to which Mr. Bickerstaff was involved with the management of the Kreykenbohm Companies.

15. The delegate clearly relied on Mr. Hall's evidence regarding Mr. Bickerstaff's activities in determining that it was appropriate to associate Jordan Enterprises with the Kreykenbohm Companies under section 95 of the *Act*. The delegate, at page R12 of her reasons, stated:

> Accordingly, I find that [Jordan Enterprises] had common control of the businesses for which the Complainants performed work as evidenced by:
>
> - Mr. Bickerstaff hiring Mr. Hall as CEO for [the Kreykenbohm Companies];
> - Mr. Bickerstaff, directing Mr. Hall with respect to the affairs of the business;
> - Mr. Bickerstaff directing Ms. Weatherly [the Human Resources Manager for the Kreykenbohm Companies] to continue working after the business closed in order to prepare the payroll records for the affected employees and [Jordan Enterprises] paying Ms. Weatherly for this work; and
> - The operation of the business being dependent on the financing provided by [Jordan Enterprises].

16. Tribunal Member Gandhi noted that Mr. Hall's evidence regarding Mr. Bickerstaff's role and function *vis-à-vis* the Kreykenbohm Companies "at face value, and in a vacuum" could lead one to conclude "there was evidence of common control and direction, at least in the period after June 2015" (para. 30). However, he also held "in context, I do not think that interpretation is a reasonable one" (para. 30) for the following reasons (paras. 31 – 33):

> The involvement of [Jordan Enterprises'] chief financial officer and [Jordan Enterprises'] demand that the companies rein in costs are clearly tied to the need for a further advance of funds from creditor to debtor, as contemplated by the Letter of Understanding and the Forbearance Agreement. Direction given to the Human Resources Manager post shutdown cannot stand as evidence of common control or direction of a business operated by the Kreykenbohm Companies, when that business is no longer operated.
>
> 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.
>
> 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.

17. Having found that the delegate erred in law – "acting on a view of the facts that cannot reasonably be entertained" – it follows that the Second Section 95 Determination cannot stand at least to the extent that the determination includes Jordan Enterprises within a section 95 declaration as between that latter firm and the Kreykenbohm Companies. Indeed, Member Gandhi stated (at para. 58): "I have concluded that the Director erred, based on the evidence in hand, in finding that there was a common business enterprise conducted under common control or direction". However, and this is the crux of Jordan Enterprises' section 116 application, Member Gandhi did not cancel the Second Section 95 Determination but rather issued a "referral back" order under subsection 115(1)(b) of the *Act*: "After considering whether the grounds for appeal have been met, the tribunal may, by order…(b) refer the matter back to the director."

18. At para. 63 of the Appeal Decision, Member Gandhi stated: "I am referring back to the Director, for further investigation, the question of whether or not [Jordan Enterprises] should be associated with the Kreykenbohm Companies under section 95 of the *Act* and therefore jointly liable with the Kreykenbohm Companies under the Original Determination or the current Determination, as the case may be, to the twenty-four former employees of the Kreykenbohm Companies." The formal referral back order reads as follows (para. 68): "Pursuant to section 115(b) [*sic*, the correct provision is subsection 115(1)(b)] of the *Act*, I am referring back to the Director for further investigation the question of whether or not the Appellant should be associated with the Kreykenbohm Companies under section 95 of the *Act*."

Breach of Natural Justice – Section 77

19. As noted above, Jordan Enterprises also appealed the Second Section 95 Determination on the ground that the delegate failed to observe the principles of natural justice. There were two elements to Jordan Enterprises' "natural justice" argument. First, Jordan Enterprises suggested that the delegate was, or appeared to be, biased against it – this argument was rejected (see Appeal Decision, para. 38). Second, Jordan Enterprises suggested that the manner in which the delegate's investigation unfolded put it in the position of not being able to know, and thus respond to, certain evidence provided by Richard Hall.

20. As noted above, Mr. Hall provided evidence to the delegate regarding the scope of Mr. Bickerstaff's involvement in the management of the Kreykenbohm Companies. Member Gandhi noted (para. 43) "the Director clearly prefers the summary of the unsworn evidence of Mr. Hall over the statutory declarations of Mr. Bickerstaff and Mr. Kreykenbohm". As set out in para. 45 of the Appeal Decision, the delegate sent a comprehensive letter to Jordan Enterprises setting out the evidence relating to a possible section 95 declaration including evidence from Mr. Hall. By way of reply, Jordan Enterprises' legal counsel submitted a lengthy written submission that included comprehensive "statutory declarations" (i.e., affidavits) from Mr. Bickerstaff and two other individuals. The delegate then contacted Mr. Hall in order, presumably, to obtain his response to the material filed by Jordan Enterprises' legal counsel but the delegate "did not share that evidence with [Jordan Enterprises]" even though "Mr. Hall's evidence differed from the evidence of Mr. Bickerstaff".

21. Member Gandhi concluded that this chain of events constituted a breach of the principles of natural justice and, in particular, a breach of 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."

22. Member Gandhi's reasons with respect to the section 77 issue are as follows: (paras. 44; 46 – 49):

> The problem, as I see it, is that the Director's failure to put Mr. Hall's evidence to [Jordan Enterprises] amounts to a *prima facie* contravention of section 77 of the *Act*. Had the Director conducted a hearing, rather than investigation, [Jordan Enterprises] would have had an opportunity to challenge the accuracy of Mr. Hall's evidence by way of cross-examination. At the very least, the Director should have disclosed Mr. Hall's evidence to [Jordan Enterprises]…
>
> [Jordan Enterprises] has the right to know the case against it. Mr. Hall's evidence is central to the Director's determination that the Appellant should be associated with the Kreykenbohm Companies under section 95. I do not see how it is appropriate to say that disclosure of Mr. Hall's evidence was unnecessary.
>
> In the context of a hearing, each side would have an opportunity to hear all of the evidence of the other side, and to test it by way of rebuttal evidence or cross-examination. In the context of an investigation, there is no mechanism to directly cross-examine a witness. For that reason alone, it is imperative that the

> Director discloses all evidence received, particularly when, as in this case, it goes at least in part to credibility, and is determinative of a material issue.
>
> If the Director does not do that, I do not see how the objective of section 77 has been satisfied.
>
> Accordingly, I accept [Jordan Enterprises'] argument. Mr. Hall's evidence should have been disclosed to [Jordan Enterprises]. The Director's failure to do so, in my opinion, amounts to a procedural unfairness and a material breach of the principles of natural justice.

The Appeal Decision - Summary

23. In the end result, Member Gandhi, firstly, concluded that the section 95 declaration, but only as it related to Jordan Enterprises, could not stand as a matter of law since there was no proper factual foundation for such a declaration to be issued. Secondly, Member Gandhi concluded that the delegate did not fully comply with section 77 of the *Act*, particularly as it related to her failure to disclose Mr. Hall's evidence to Jordan Enterprises so that it could respond to that evidence. Having found that the delegate erred in law and breached the principles of natural justice, the usual order would be one cancelling the Second Section 95 Determination. However, such an order – full stop – was not issued in this case.

24. As noted at the outset of these reasons, the delegate issued two separate section 95 determinations although the Appeal Decision involved only the second determination issued on January 27, 2016. The First Section 95 Determination, issued on October 28, 2015, concerned only the Kreykenbohm Companies and 22 former employees. By way of the Second Section 95 Determination, the present applicant, Jordan Enterprises, was declared to be an "associated employer" with the Kreykenbohm Companies and, as such, was held jointly and separately (or severally) liable for the unpaid wages owed to the 22 individuals named in the earlier determination as well as for the unpaid wages of two additional individuals who were not named in that latter determination.

25. Since the First Section 95 Determination was never appealed, that determination stands as a final order binding the Kreykenbohm Companies with respect to their joint and several liability for the 22 former employees' unpaid wages as fixed in that determination. Member Gandhi expressed a concern regarding the delegate's procedural approach, observing that there were "two equally enforceable, yet independent determinations, covering the same subject matter, against the same parties, for effectively the same wages" (para. 55) and that, on this account, the Second Section 95 Determination was "technically flawed" (para. 56). At para. 57 of the Appeal Decision, Member Gandhi set out what he considered to be a preferable procedural protocol:

> In my view, after associating the Kreykenbohm Companies with [Jordan Enterprises] under section 95 of the *Act*, the Director should have:
>
> (a) declared [Jordan Enterprises] liable under the Original Determination according to section 95(2) of the *Act*, instead of undertaking a fresh calculation of amounts due to each of the original complainants; and
>
> (b) declared both [Jordan Enterprises] and the Kreykenbohm Companies jointly and severally liable, as associated companies, for wages, vacation pay, compensation for length of service, and interest due to the two additional employees not named in the Original Determination.
>
> The result would have been a unified requirement for payment against [Jordan Enterprises] and the Kreykenbohm Companies, in favour of each of the affected employees, and two determinations readable and enforceable (subject only to this appeal) as a cohesive order of the Director. While I am sure that is what the Director intended, that was not, in my humble opinion, the outcome.

26. I do not express any view regarding the approach taken by the delegate or whether the approach suggested in the Appeal Decision would have been preferable. However, I do not necessarily endorse Member Gandhi's suggestion that the Second Section 95 Determination is "technically flawed". It may be that the delegate, given that the First Section 95 Determination was never appealed, could have issued a section 86 variance order expanding the section 95 declaration to include Jordan Enterprises, and adding the two employees' unpaid wage claims (although, again, I do not express any firm view regarding this possible procedural approach).

27. I now turn to the matter that is the basis of Jordan Enterprises' reconsideration application, namely, the form of order issued by Member Gandhi. As previously noted, there was a clear finding that the delegate erred in law in issuing a section 95 declaration as against Jordan Enterprises. Of course, the section 95 declaration as it relates to the Kreykenbohm Companies, not having been appealed, stands as a final order and is wholly unaffected by Jordan Enterprises' appeal or the present reconsideration proceedings.

28. Member Gandhi also found that the delegate breached the principles of natural justice (and, more specifically, failed to comply with section 77 of the *Act*). Since Member Gandhi held that the section 95 declaration could not stand as against Jordan Enterprises because there was no proper factual foundation for such a declaration (Appeal Decision, para. 33), his further finding regarding section 77 was, at least in some sense, superfluous since the *only* basis for Jordan Enterprises' liability to any of the 24 named individuals in the Second Section 95 Determination was its status as an "associated firm" with the Kreykenbohm Companies.

29. Two of the 24 named individuals filed submissions in response to Jordan Enterprises' appeal (one of whom, Mr. Farnan, is also an applicant in the present reconsideration proceedings) and it would appear that these two individuals, as well as Jordan Enterprises, apparently included "'new' evidence in the sense that it was not, from what I can see, before the Director during the period of investigation" (Appeal Decision, para. 7). In rendering his decision, Member Gandhi did not consider this evidence nor did he evaluate whether it was even admissible in light of the criteria set out in *Davies et al.*, BC EST # D171/03 (Appeal Decision, para. 8). Member Gandhi characterized this evidence as follows (para. 8): "It is, simply, evidence that I interpret the submitting party to say that it, he, or she would have put before the Director, given the opportunity, in order to answer the evidence or argument of an opposing party." Later on in his reasons, Member Gandhi presumably returned to this "new evidence" when he commented: "Based upon 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). Member Gandhi further noted that the appeal process is not a factfinding exercise or a hearing *de novo* and, as such, he observed (para. 61): "I am not in a position to assess how any additional evidence submitted with [Jordan Enterprises'] appeal materials, or anything that might be construed as new evidence from [the two former employees], or any other complainant, is relevant, admissible, or would otherwise affect a declaration under section 95".

30. With respect to the form of the final order, Member Gandhi noted that no appeal had ever been filed with respect to the First Section 95 Determination and that none of the Kreykenbohm Companies appealed the Second Section 95 Determination (pursuant to which the Kreykenbohm Companies were held jointly and separately liable for the unpaid wages owed to the two additional employees named in that determination). Member Gandhi then set out the basis for his ultimate orders (at paras. 63 – 65):

> I am referring back to the Director, for further investigation, the question of whether or not [Jordan Enterprises] should be associated with the Kreykenbohm Companies under section 95 of the *Act* and therefore jointly liable with the Kreykenbohm Companies under the Original Determination or the current Determination, as the case may be, to the twenty-four former employees of the Kreykenbohm Companies.

> Except as noted above, I am cancelling the current Determination. For clarity, the Kreykenbohm Companies remain liable to the remaining twenty-two complaints under the Original Determination.
>
> I am proceeding in this fashion because fairness to all interested parties demands that each has a full opportunity to consider the evidence and where appropriate to make submissions or offer rebuttal. I am not satisfied that has happened.

31. By way of his final order, Member Gandhi confirmed the Second Section 95 Determination insofar as it ordered the Kreykenbohm Companies to pay wages to the two additional employees not named in the First Section 95 Determination. The following two provisions of the final order are at issue in the present reconsideration proceedings:

> Pursuant to section 115(a) [*sic*, subsection 115(1)(a)] of the *Act*, the balance of the Director's determination issued on January 27, 2016, is cancelled.
>
> Pursuant to section 115(b) [*sic*, subsection 115(1)(b)] of the *Act*, I am referring back to the Director for further investigation the question of whether or not [Jordan Enterprises] should be associated with the Kreykenbohm Companies under section 95 of the *Act*.

THE APPLICATIONS FOR RECONSIDERATION

32. There are four separate applications for reconsideration before me, three filed by former employees of the Kreykenbohm Companies and the fourth filed by Jordan Enterprises. Each of the three former employees filed a Reconsideration Application Form (Form 2) to which was appended a separate document setting out their "reasons" (as directed by Part 4 of the form) for filing the application. I propose to address each application in turn.

33. Mr. Jang's reason for applying for reconsideration is extraordinarily brief: "I feel the appeal by Jordan Enterprises should be denied and the Determination should stand". Mr. Jang does not provide any justification for his espoused position.

34. Mr. Farnan's reasons are more detailed and I have reproduced them, in full, below:

> 1. The law has been misinterpreted in relation to Section 95. Please review wording of Section 95.
>
> 2. In the Tribunal decisions the member states that both JEL and WK [presumably, referring to Jordan Enterprises and W. Kreykenbohm Corporation] should be names in the Determination. This is not possible when WK had filed for bankruptcy. [*sic*]
>
> 3. Statutory Declaration #1 Bill Kreykenbohm and #2 Jeff Bickerstaff:
> - Richard Hall has made it very clear who appointed him to NK [presumably, Nordstar Kitchens Ltd.] and that he reported to Jeff Bickerstaff. Not Bill Kreykenbohm.
>
> 4. New evidence presented on June 8th 2016 by Seamus Farnan
> - This evidence has not been taken into account. Especially in regards to Katy Peterson statutory declaration statement that she "was only worked on AP/AR review for NK". Its very clear in the new evidence thank Katy Peterson was working on a lot more then AP/AR with in the walls of NK. [*sic*]
>
> I do not see why the information provided by me Seamus Farnan on June 8th 2016 has not been taken into account as this evidence clearly shows, evidence contradicting Statutory Declarations given by employees of the JEL. [*sic*]

35. In his application, Mr. Harders states "I want the ruling overturned" and his reasons justifying such an order are as follows:

> Any meetings I had with Mr. Hall and Mr. Farlan [*sic*, Farnan?] clearly indicated that Jordan Enterprises was driving the decisions to run/improve the Company. This included talk of physical changes within the building to possible new organizational structures constantly accompagnied [*sic*] by comments like "Mr. Bickerstaff won't like that and Mr. Bickerstaff wants this. [*sic*]
>
> Unfortunately there were no minutes kept in these meetings so there are no documents to support this.
>
> It is my opinion however that Mr. Bickerstaff was the force behind decisions on a daily basis and thus ran the company. [*sic*]

36. Jordan Enterprises' application is quite detailed, consisting of 23 single-spaced pages of argument and sixteen attachments (consisting, for the most part, of Tribunal decisions). However, Jordan Enterprises' application is predicated on two fundamental assertions. First, it says since subsection 115(1) of the *Act* states that the Tribunal, on appeal, can either "confirm, vary or cancel" a determination *or* "refer the matter back to the director", Member Gandhi erred when he cancelled the Second Section 95 Determination (save for that portion of the determination relating to the Kreykenbohm Companies' unpaid wage liability to the two additional employees, which was confirmed) but also made a referral back order regarding "whether or not [Jordan Enterprises] should be associated with the Kreykenbohm Companies under section 95 of the *Act*".

37. Jordan Enterprises submits that once Member Gandhi ruled that the section 95 declaration had to be cancelled (because, as a matter of fact and law, it could not stand), the only appropriate order was one cancelling the determination (at least with respect to the section 95 declaration) and that an additional referral back order, that effectively afforded the complainants a second opportunity to "re-try" their case and/or afforded the delegate an opportunity to rehabilitate and otherwise reinstate the original section 95 declaration, should not have been made.

RECONSIDERATION – THE LEGAL FRAMEWORK

38. Section 116 gives the Tribunal a discretionary authority to reconsider an appeal decision. An applicant does not have an unfettered right to have a particular appeal decision reviewed on its merits. The Tribunal has established a two-stage process governing reconsideration applications and the leading authority in this regard is the so-called *Milan Holdings* decision (*Director of Employment Standards*, BC EST # D313/98). At the first stage of the analysis, the focus is on the presumptive merit of the application – at this first stage, the Tribunal does not make a final determination regarding the merits of the application but rather assesses whether the application, on its face, raises a presumptively meritorious issue. If the application does not pass this first threshold stage, the application is dismissed. If the application does raise a serious issue, the respondent parties are invited to file submissions (and the applicant is given a right of reply) following which the Tribunal renders a decision addressing the merits of the application.

39. In assessing whether the application passes the first stage of the *Milan Holdings* test, the Tribunal will, among other things, consider whether the application is timely, concerns a preliminary ruling, or simply asks the Tribunal to re-weigh findings of fact and render a different decision.

40. In *Milan Holdings*, the reconsideration panel observed (at page 7):

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing

> the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law"…As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons".

41. With these principles in mind, I now turn to each of the four applications now before me.

MILAN HOLDINGS – THE FIRST STAGE

42. As noted above, three of the four section 116 applications have been filed by former employees of the Kreykenbohm Companies. I reproduced, in full (above), the basis upon which each of these three applications is grounded.

43. At the outset, I should note that reconsideration applications are principally predicated on legal arguments regarding the correctness of the appeal decision being challenged. Consistent with the approach taken by the Tribunal in cases such as *Triple S Transmission Inc.*, BC EST # D141/03, in my view, reconsideration applications should be interpreted in a large and liberal manner, particularly when the applicant does not have any legal training. The benefit of any doubt regarding whether the application passes the first stage of the *Milan Holdings* test should be resolved in favour of the applicant. However, where the application, even on a generous and liberal interpretation of the allegations contained in it, clearly fails to raise a presumptively meritorious case, the application must be summarily dismissed.

Wook Jang's Application for Reconsideration

44. The applications filed by Mr. Jang and Mr. Harders are very cursory. Mr. Jang simply says that he feels the "appeal" should be denied and that the Second Section 95 Determination should be confirmed. He is, apparently, unhappy with the form of order issued by Member Gandhi, but does not even purport to suggest *why* the Appeal Decision should, in any fashion, be varied. In essence, Mr. Jang's "application" is simply a request – without *any* supporting reasons – that Jordan Enterprises' appeal should have been summarily dismissed and that the Tribunal now issue an order varying the Appeal Decision such that the Second Section 95 Determination is confirmed in its entirety.

45. In my view, Mr. Jang's application is fundamentally deficient and, as such, does not pass the first stage of the *Milan Holdings* test.

Ingo Harders' Application for Reconsideration

46. Mr. Harders also expresses dissatisfaction with the Appeal Decision – he asks that the decision be "overturned", presumably in favour of an order confirming the Second Section 95 Determination. Mr. Harders' application includes a rather brief summary of some facts that, he says, supports the notion that Jordan Enterprises – through Mr. Bickerstaff – was directing and controlling the business affairs of the Kreykenbohm Companies. There is no suggestion anywhere in the delegate's reasons that the delegate relied on Mr. Harders' evidence. The delegate, at pages R4 – R6, summarized the evidence provided by only three of the 24 complainants including one of the present applicants, Mr. Farnan (as well as, at page R7, the evidence of Mr. Hall). It appears from the material before me that the delegate did not interview all of the other complainants. The record indicates that the delegate had brief telephone interviews with only the three complainants identified in her reasons (*i.e.*, Mr. Farnan, Gunter Holzmann and Glynis Weatherly) and also

had brief telephone and/or email communications with three other complainants (Brad Elding, Alireza Muzaffari and Tai Nguyen).

47. I have reviewed the 379-page subsection 112(5) record that was before Member Gandhi and I cannot find a single reference in that document to Mr. Harders providing any sort of evidence to the delegate during the course of her investigation other than his letter of termination and one wage statement. Mr. Harders did not, despite being invited to do so, file a submission in the original appeal proceeding. The "evidence", brief as it is, that Mr. Harders now wishes to introduce on reconsideration is simply not admissible since this evidence could have been provided to the delegate and was never tendered in the course of the appeal proceedings. I might also add that Mr. Harders' evidence is very marginally relevant and probative with respect to the section 95 issue. In sum, Mr. Harders asks that the Appeal Decision be "overturned" but he has not advanced any, even on a *prima facie* basis, proper justification for such an order.

48. In my view, Mr. Harders' application does not pass the first stage of the *Milan Holdings* test and thus must be summarily dismissed.

Seamus Farnan's Application for Reconsideration

49. Although he has not expressly asked for such an order in his application, it would appear that Mr. Farnan similarly argues in favour of an order confirming the Second Section 95 Determination as issued. He says that Member Gandhi "misinterpreted" section 95 and, in that regard, refers to "new evidence" that he submitted on June 8, 2016 (in fact, although dated June 8, 2016, this latter document was filed with the Tribunal on June 9, 2016). Member Gandhi noted, at para. 7 of the Appeal Decision, that Mr. Farnan's (as well as another complainant's) submission appeared to include "new evidence" – "new" in the sense that it was not submitted to the delegate during the course of her investigation. Member Gandhi stated, at para. 8 of the Appeal Decision, that he was not ruling on the admissibility of this new evidence under the *Davies et al.* (see above) criteria, but was simply noting that this evidence existed and that the party submitting it might "have put [it] before the Director, given the opportunity, in order to answer the evidence or argument of an opposing party".

50. Mr. Farnan's June 9th submission was filed in response to a request for submissions from the Tribunal in relation to Jordan Enterprises' appeal of the Second Section 95 Determination. Mr. Farnan did not appeal this latter determination and, accordingly, whether any "new evidence" is admissible under the *Davies* criteria is not particularly relevant – the *Davies* criteria govern whether "new evidence" submitted by an *appellant*, in the context of a subsection 112(1)(c) appeal, should be received and considered.

51. During the course of the investigation preceding the issuance of the Second Section 95 Determination, Jordan Enterprises submitted three so-called "statutory declarations" (simply, affidavits) from Mr. Bickerstaff, Wilhelm Kreykenbohm and Kathy Petersen. These affidavits were submitted to the delegate along with Jordan Enterprises' legal counsel's written submission dated November 27, 2015. These latter documents were submitted in response to the delegate's November 12, 2015, letter in which she indicated she was considering issuing a further section 95 declaration binding Jordan Enterprises and the Kreykenbohm Companies and, accordingly, was seeking Jordan Enterprises' position regarding that matter. The delegate spoke with Mr. Hall on December 2, 2015, and then sent a follow-up e-mail the next day confirming the substance of Mr. Hall's evidence as it related to the information contained in the affidavits and asked Mr. Hall to "please check for accuracy and if you have anything else to add please do".

52. It appears from the record that the delegate again spoke with Mr. Hall in early January 2016 during which conversation Mr. Hall clarified a number of points. The Second Section 95 Determination was issued on

January 27, 2016. It does not appear that the delegate spoke with Mr. Farnan after receiving Jordan Enterprises' November 27, 2015, submission although it is clear from his June 9, 2016, submission in the appeal proceedings that he had several substantive points to make with respect to each of the three affidavits filed concurrently with Jordan Enterprises' November 27 submission.

53. The record shows that the delegate spoke with Mr. Farnan, who was the "Business Development Manager" for the Kreykenbohm Companies, on October 6, 2015, but had no other direct communications with him. Thus, although Member Gandhi correctly noted in the Appeal Decision (at para. 7) that Mr. Farnan's June 9, 2016, submission included "new evidence", it must also be recognized that during the course of the delegate's investigation, Mr. Farnan was simply not afforded an opportunity to review – and respond to – the evidence provided by Jordan Enterprises via its counsel's November 27, 2015, submission. I wholly endorse Member Gandhi's statement (para. 8) to the effect that Mr. Farnan's June 9th submission included "evidence…that…he…would have put before the Director, given the opportunity, in order to answer evidence or argument of an opposing party".

54. Given that the Second Section 95 Determination resulted in an order in favour of Mr. Farnan (namely, that Jordan Enterprises would be equally liable for his unpaid wages, determined to be in an amount exceeding $56,000, along with the Kreykenbohm Companies), it is hardly surprising that Mr. Farnan did not appeal that determination. However, once Jordan Enterprises appealed, seeking to have the determination cancelled on the basis that there was no factual or legal basis for a section 95 declaration as between Jordan Enterprises and the Kreykenbohm Companies, Mr. Farnan obviously wished to provide evidence to support that latter declaration and to rebut the evidence submitted by Jordan Enterprises. Mr. Farnan was never given an opportunity to provide this evidence to the delegate during the delegate's investigation since, so far as I can determine, Jordan Enterprises' November 27 submission and the accompanying affidavits were never provided to Mr. Farnan so that he could file a response.

55. As noted above, the section 95 declaration was set aside on appeal because, based on the evidence that was before the delegate, there was insufficient evidence of a common business enterprise as between Jordan Enterprises and the Kreykenbohm Companies (Appeal Decision, para. 24). Further, Member Gandhi was not fully satisfied that there was the requisite proof of common control and direction (paras. 25 and 31 – 33).

56. The effect of the Appeal Decision is to cancel Jordan Enterprises' unpaid wage liability to Mr. Farnan – and to any other former employee of the Kreykenbohm Companies – and this order was issued based on the deficiencies in the evidentiary record before the delegate.

57. Insofar as Jordan Enterprises' "natural justice" argument was concerned, Member Gandhi held that the delegate should not have proceeded to make a section 95 declaration – principally relying on Mr. Hall's evidence – without first giving Jordan Enterprises an opportunity to review and respond to Mr. Hall's evidence (paras. 44 – 49). In other words, the record before the delegate was incomplete and that deficiency was in no way attributable to anything Jordan Enterprises did, or failed to do. One might equally say that the record was also deficient because Mr. Farnan, who obviously had evidence to give regarding a possible section 95 declaration (especially in response to Jordan Enterprises' submission and the three affidavits), was not afforded an opportunity to provide his evidence during the course of the delegate's investigation. He wished to provide this latter evidence (and did so) in response to Jordan Enterprises' appeal, but his June 9, 2016, submission was not considered in any way (Appeal Decision, para. 8).

58. With respect to this latter point, Member Gandhi was clearly concerned about conducting, in essence, a *de novo* evidentiary hearing regarding whether a section 95 declaration should be issued (para. 6). I might also note that *only* the Director (through her delegates) is empowered under the *Act* to issue a section 95

declaration. The Tribunal's role is limited to reviewing such a declaration to ensure that it is, for example, legally correct in the sense that there is a proper factual foundation for it and that it is otherwise in accord with the governing legal principles. Therefore, in my view, it would have been improper (and beyond the Tribunal's jurisdiction) for Member Gandhi to undertake a new evidentiary hearing – with all parties submitting their additional evidence – with a view to deciding afresh whether a section 95 declaration should be issued.

59. Member Gandhi faced the following conundrum: the section 95 declaration could not stand based on the evidentiary record before the delegate but, at the same time, that record was deficient. It seems to me that Mr. Farnan was rightly concerned that his evidence was not considered on appeal. Nevertheless, it would not have been appropriate for Member Gandhi to conduct a new evidentiary hearing regarding whether a section 95 declaration should be issued. Thus, in my view, he sensibly concluded that the best course to follow would be to refer the matter back to the Director for a fresh consideration of the matter taking into account all parties' relevant evidence (paras. 59 – 60).

60. Mr. Farnan's objection to the Appeal Decision is that his June 9, 2016, submission was not considered in the appeal proceeding. However, for the reasons stated above, I fully endorse Member Gandhi's decision not to undertake a new evidentiary hearing with respect to whether a section 95 declaration should be issued. In my view, he correctly determined that the declaration could not stand based on the evidence set out in the delegate's reasons but, at the same time, he acknowledged that there was more evidence to be considered than was set out in the delegate's reasons. Thus, he cancelled the section 95 declaration but also referred the entire matter back to the Director for further investigation. It follows that if the Appeal Decision stands as issued, Mr. Farnan will be given the opportunity to present his evidence regarding whether a section 95 declaration should be made binding Jordan Enterprises with the Kreykenbohm Companies. On that basis, I am not satisfied that Mr. Farnan's application passes the first stage of the *Milan Holdings* test.

61. Further, to the extent that Mr. Farnan is asserting that Member Gandhi should not have cancelled the Second Section 95 Determination on the basis that there was no cogent evidence of a common business enterprise, I can only observe that, in my view, Member Gandhi's decision is unassailable on that point. Mr. Farnan has not provided *any* argument as to how or why Member Gandhi erred in finding that there was no evidence of a common business enterprise and, as such, the application similarly fails to pass the first stage of the *Milan Holdings* test.

Jordan Enterprises' Application for Reconsideration

62. Jordan Enterprises does not challenge the Appeal Decision insofar as it resulted in the cancellation of the section 95 declaration. Jordan Enterprises submits, however, that under subsection 115(1) of the *Act*, the Tribunal does not have the statutory authority to both cancel a determination *and* refer the subject the matter of that determination back to the Director for further investigation.

63. The express term in subsection 115(1) of the *Act* linking subsections 115(1)(a) and 115(1)(b) is the disjunctive "or" rather than the conjunctive "and":

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

64. Jordan Enterprises submits that "the Tribunal's jurisprudence reveals no principled basis to justify reading 'or' as 'and' in section 115 of the *Act*" and that the term *or* "must be read in its normal and disjunctive sense given the Tribunal's jurisprudence in *Hub-City*".

65. Jordan Enterprises says "that any jurisprudence from the Tribunal to the effect that it may employ its remedial powers cumulatively as well as exclusively is incorrect" and that Member Gandhi's "decision to refer the matter back to the Director despite cancelling the Determination constitutes a legal error". Jordan Enterprises seeks an order under subsection 116(1)(b) of the *Act*, varying the Appeal Decision such that the Second Section 95 Determination is simply cancelled (at least as it concerns its own liability).

66. Jordan Enterprises alternatively submits that, aside from the correct approach to the interpretation of subsection 115(1) of the *Act*, Member Gandhi "ought not to have referred the matter back to the Director in the circumstances of this case".

67. Jordan Enterprises suggests that there is an inconsistency in the approach taken by the Tribunal to referral back orders in its decisions including, particularly, the "*Old Dutch*" line of cases (BC EST # RD115/09) versus the *Hub-City* line of cases (BC EST # D027/04).

68. In addition, Jordan Enterprises says that Member Gandhi found, as a "threshold issue", that the evidence before the delegate did *not* show that Jordan Enterprises and any of the Kreykenbohm Companies carried on a common business enterprise. Rather, Member Gandhi found (para. 24) that "evidence included in the Record establishes that [Jordan Enterprises] carries on a business that is entirely different from, and independent of, the Kreykenbohm Companies". That being the case, and since neither Mr. Farnan's submission, nor that of the other former employee who also filed a submission in the appeal proceedings, contained any evidence demonstrating that Jordan Enterprises was engaged in a common business enterprise with the Kreykenbohm Companies, Jordan Enterprises says "it is pointless to send the matter back to the Director only to apply the law pronounced by the Tribunal and produce the same result" and thus "there was no need for a referral back to the Director in the circumstances".

69. In my view, Jordan Enterprises' application passes the first stage of the *Milan Holdings* test inasmuch as it raises a serious question about the proper approach to the Tribunal's powers under subsection 115(1) of the *Act*. This question obviously has immediate importance for the parties but, in my view, also has significance for future cases. In my view, the application also raises a serious question regarding whether, regardless of the proper interpretive approach to subsection 115(1), a referral back order should have been made in this particular case. While I am not finding that Jordan Enterprises' position is bound to succeed, I am satisfied, at this stage, that it has raised an arguable case of sufficient merit to justify a full and complete hearing of its application.

ORDERS

70. The section 116 applications for reconsideration filed by Wook Jang (Tribunal File No. 2016A/140), Seamus Farnan (Tribunal File No. 2016A/141) and Ingo Harders (Tribunal File No. 2016A/143) are all dismissed.

71. The respondent parties will be given an opportunity to respond to Jordan Enterprises' section 116 application, following which Jordan Enterprises will be given a right of final reply. Upon receipt of these further submissions, I will issue a final decision with respect to Jordan Enterprises' reconsideration application.

72. The Tribunal will notify the parties with respect to the timetable for the delivery of their further submissions.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal