HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: A Complaint by JASON WALMSLEY against BROUSSEAU BROS. LTD. operating as SUPER LUBE alleging a breach of Section 19 of *The Human Rights Code*;

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175, as amended.

BETWEEN

JASON WALMSLEY,

Complainant,

- and -

BROUSSEAU BROS. LTD.
operating as SUPER LUBE,
and SUPER LUBE LTD.

Respondent.

DECISION

Appearances:

Jason Walmsley, in person, Complainant

Jim Brousseau, in person for the Respondents

For the Human Rights Commission: Ms. Isha Khan

Panel: Lawrence Pinsky, adjudicator

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Decision August 8, 2014

[1] Following the hearing of this matter and after the release of my decision on June 11, 2014, I received a request from counsel for the Human Rights Commission to delete the Complainant's name from the decision and replace it with his initials. Notwithstanding the pre-hearing conference held in this matter, the multiple days of hearings, and invitations to make any procedural requests previously, this is the first time the issue was raised before me.

[2] The request being made is pursuant to Section 46(3) of *The Human Rights Code.*

[3] Section 46(3) of *The Human Rights Code* states that:

> *The adjudicator may direct the Commission to delete any information that would disclose the identity of a party or a witness at the hearing from a decision, order, or statement of reasons made available to the public under subsection (2) if the adjudicator believes that the disclosure would cause undue prejudice or hardship to the party or witness.*

[4] Upon receipt of the request from counsel for the Commission, I asked that the Respondents and the Complainant set out their positions. I offered all of the parties the opportunity to convene a formal hearing to consider oral arguments. I also requested that a brief or briefs be filed.

[5] On July 8, 2014, I received confirmation from the Respondents that they consented to the Commission's request. I subsequently received confirmation from The Human Rights Commission's counsel that Mr. Walmsley was in agreement as well. None of the parties requested an opportunity to present their arguments at an oral hearing.

[6] Notwithstanding the consents I eventually received, I requested that the course I had previously set be followed and that a brief or briefs be filed addressing the issue. On July 22, 2014, I received via email a letter form of brief setting out the Commission's position with reference to several cases. No other submissions were received.

[7] I begin by noting that in my role as an adjudicator, my authority is entirely derived from and contained in the statute. I am, as the expression goes, entirely a "creature of

statute", and have no inherent jurisdiction. I cannot pronounce Orders or give directions simply based on consent insofar as jurisdiction cannot be conferred by the parties; it must be based in the statute. Therefore, to grant the Commission's request, I must find that the requirements set out in the applicable section of *The Human Rights Code* have been met.

[8] The question is whether I believe that undue prejudice or hardship to the Complainant would result if his name remains as set out in the decision. The test is not mere prejudice, but rather undue prejudice or hardship. That equates to prejudice that is outside of the norm, and is more than mere awkwardness or inconvenience.

[9] The term "undue" has been defined repeatedly over the years in multiple contexts including respecting the duty to accommodate in human rights law, labour law, and in numerous family law decisions in reference to claims of undue hardship arising under Section 10 of the Child Support Guidelines (among other places). In the latter context, "undue" has been defined as being synonymous with terms such as "excessive, extreme, improper, unreasonable, or unjustified". (Langlois v. McManus, 2006 Carswell Man 462; 2006 MBQB 291 (CanLII); Poirier v. Poirier, 2004 NSSC 23 (CanLII); Skorulski v. Zupan, 2012 MBQB 98 (CanLII); Fritschij v. Bazan, 2004 Carswell Man 139; 2004 MBQB 91 (CanLII); Schenkeveld v. Schenkeveld, 2002 MBCA 9 (CanLII)).

[10] To the extent that the aforementioned definition is applicable to this matter, the prejudice complained at must be excessive or extensive and beyond that which might be expected to arise from the Complaint and the decision that followed. From a

purposeful perspective, I see no material inconsistencies between the definition of "undue" described above and that which is applicable in this instance. I therefore see no reason why the definition above should not apply here and accordingly import the definition of "undue" described above to this analysis.

[11] Beyond or in addition to "undue prejudice", if I find that the disclosure would cause hardship, that may suffice to grant the relief requested. The term "hardship" is defined in Black's Law Dictionary (6th edition) as:

> In general, privation, suffering, adversity. As used in zoning statutes as grounds for variance, it refers to fact that zoning ordinance or restriction as applied to a particular property as unduly oppressive, arbitrary or confiscatory.

[12] A similar definition of hardship was employed in Ness v. Ness [1986] 6 W.W.R. 2011 (Man QB) as being related to privation inter alia (albeit in another context). In other decisions, in other situations, hardship has referred to a "hard condition of living" or "difficult, painful, suffering" (Ellis v. Ellis (1998), 176 NSR (20) 248 (SC), varied 45 RFL (4th) 234 (N.S.C.A.); Barrie v. Barrie (1998) 230 AR 379 (QB), supplemental reasons 86 A.C.W.S. (3d) 755 (Alberta Q.B.)). I see no reason not to employ the foregoing definitions of hardship in this context as well.

[13] Accordingly, in the event that I believe that disclosure of the Complainant's name would cause excessive, extreme, or unjustified prejudice; or privation, suffering, or a hard condition of living, I may direct the Commission to substitute the Complainant's initials for his name. I must however find some causal nexus between the undue prejudice or hardship on the one hand, and the release of the Complainant's name on the other, in order to grant the requested relief.

[14] Counsel for the Commission has referenced the decision in Garland v. Tackaberry o/a Grape & Grain 2013 M.H.R.B.A.D. In particular, reference was made to the reasons of Adjudicator Dawson in refusing the request to delete reference to the name of the Complainant under the said section made at the beginning of the hearing. As I read his decision, Adjudicator Dawson's reasons for doing so were that there would not be undue prejudice or hardship to the Complainant based on the fact that the Complainant changed her name and the decision did not reference her new identity. Adjudicator Dawson also commented that the decision did not deal in detail with any of the "personal and intimate" evidence to which the Commission referred.

[15] While no issue is taken with my colleague's reasoning, the fact that these factors may not be present here does not lead to the conclusion that absent their presence, the relief requested should be granted. In other words, the presence of personal and/or intimate evidence does not necessarily lead to the conclusion that the relief must be granted. The Commission must still meet the test set out in the Act of satisfying me that undue prejudice or hardship would result from disclosure of the Complainant's name.

[16] Unlike in Tackaberry where the request was made early in the hearing, here the request was made following the release of the decision. It has come to my attention that since its release, the decision in this matter was covered by various media outlets across the country. In some of the press reports, one of the witnesses' names was made public, though not the Complainant's. All of this information is widely available on the internet. I pause here to note that at no time did I receive a request to delete the names of any of the other individuals involved.

[17] Regardless of how I decide this matter, I suspect that information respecting the Complainant is readily available on the internet outside of this matter regarding several of the issues that counsel for the Commission now suggests would cause undue prejudice or hardship if the Complainant's name is not redacted. To the extent that such matters have already been reported and are readily available, I cannot conclude that undue prejudice or hardship would be caused to the Complainant in this context. Indeed nothing was put before me to support the assertion that undue prejudice or hardship would be caused to the Complainant if his name was not redacted from the decision.

[18] In reality, if there is any significant prejudice or hardship experienced by the Complainant, it is not the decision or its disclosure that might be its cause, but rather the Complainant's previous actions. To that extent, it may be that the ship of prejudice left port long ago under the steam of previous incidents involving the Complainant.

[19] With respect and without denigrating from the positive advancements the Complainant described making in his life more recently, any such self-inflicted prejudice cannot be described as undue or a hardship. Actions have consequences. That does not lead to the conclusion that undue prejudice or hardship would be caused to the Complainant from the release or publication of the decision in its present form. If in the future the Complainant suffers any wrongful discrimination due to anything described in the decision, which obviously ought not occur, it will be actionable and may be remediated. That does not justify the relief sought by counsel for the Commission.

[20] In support of her request, counsel for the Commission referred to paragraphs 74, 75, 76, 105, 106, and 213 of my decision as disclosing personal information that might lead to undue hardship or prejudice. Counsel suggested that the aforementioned paragraphs dealt with detailed and specific personal information not directly related to the subject matter of the complaint of harassment under the Code. With respect, I disagree.

[21] These paragraphs were a reflection of evidence led by counsel for the Commission and the Complainant. They were directly related to the Complainant and the Complainant's credibility. Counsel for the Commission and the Complainant ought to have known or anticipated what evidence was being adduced; after all the Commission had carriage of the Complaint and the Complainant knew of the facts and matters involved.

[22] Counsel for the Commission and the Complainant ought to have realized that the evidence was of a personal nature. They knew at the outset that credibility was a major issue, as shown by the opening statement made by counsel for the Commission. In the circumstances of this case and considering the conclusions I reached, leaving out that information would have made it difficult to permit the parties or the public to appreciate the nature of the issues, the credibility challenges that were before me, and all of the evidence I considered in reaching my decision.

[23] Counsel for the Commission suggested that the detail of the incidents set out in the decision would likely prejudice a future employer or anyone else who may wish to engage the Complainant in the future. I cannot agree. The Complainant may or may

not need to address a number of issues not arising from the decision. He may or may not need to address his history and whereabouts over the last several years. In addition, the Complainant may or may not need to address his past behaviour at various places of employment, among other issues. That said, as alluded to above, no future employer or other person who may wish to engage the Complainant will be entitled to breach the Code or any other applicable statutes in considering engaging the Complainant.

[24] On the facts of this case, if there is prejudice caused by the inclusion of the Complainant's name in these paragraphs, it is not undue. The Commission has not shown any causal link between the undue prejudice or hardship and the release of the Complainant's name. I do not find that when looking at the Complainant as a whole, that any undue prejudice or hardship would be caused by leaving the Decision as it stands, especially when balanced against the principles of open quasi-judicial and judicial processes so essential to our system of justice.

[25] Counsel for the Commission put before me that British Columbia Human Rights Tribunal Decision in Low v. MacKinnon and others, 2004 BCHRT 347. In particular, the following quote was brought to my attention:

> Ms. Low has chosen to access the human rights system, a publicly funded redress mechanism for the resolution of human rights disputes. Part of that system contemplates that the public has an interest in human rights complaints and their outcomes. The Tribunal makes it well known that our process is a public one. Ms. Low is in no different position than many human rights complainants who file complaint against their current and former employers. By choosing to access a public process Ms. Low has to understand, absent evidence that her interest in protecting her

> identity outweighs the public interest, there will be a loss of privacy with respect to the matters in issue between her and her employer.

[26] I agree with the British Columbia Human Rights Tribunal's comments that it is well known that the complaint process is a public one. I also concur that there is a public interest in maintaining the openness of the adjudication process. The Complainant in this case, like Ms. Low, is in no different position than many other human rights complainants who file complaints against current or former employers. Such complainants should understand that absent evidence that protecting their identity outweighs the public interest, there will be a loss of privacy with respect to the matters in issue, as is true in most quasi-judicial and judicial proceedings.

[27] In the case before me, the Complainant and the Commission ought to have understood that given the Complainant's credibility issues, the nature of the Complaint, and the manner in which his evidence was put before me, that my decision might address these issues. To expect the adjudicator not to address the evidence put before him or her, without bringing to the adjudicator's attention in advance (or at least prior to the release of the decision itself) a request to delete names is not reasonable.

[28] In this respect, the Commission's request is too late to be successful. Beyond that, in the unique circumstances of this case, I do not find that undue prejudice or hardship would result from leaving the Complainant's name in the decision as written.

[29] In the future, any requests to trigger the application of Section 46(3) of *The Human Rights Code* ought to be made on a timely basis. That means that the issue should be canvassed at the pre-hearing conference, if there is one, or in the alternative, as soon as the possible applicability of such relief becomes apparent, whether at the

opening of the hearing, at the time that such evidence is adduced, or otherwise before the release of the decision. In such circumstances, consideration ought also be given to any notice requirements to third parties given the public interest in human rights complaints and their adjudication. Finally, where such issues are raised, evidence should be adduced as to the undue prejudice or hardship that may be caused by the release of that information. I hope my comments in this regard are helpful for the future conduct of such matters.

[30] In conclusion, in the unique circumstances of this case, I cannot grant the relief sought by the Commission (notwithstanding the consent of the Respondents) and therefore dismiss the request.