
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

Investigative Discretion

There was a time when some regulators believed that if there were reasonable grounds to believe that a member had engaged in professional misconduct, the allegations had to be fully investigated and referred to a discipline hearing. Few regulators still hold that view today, but many are uncomfortable with the concept of how to exercise its discretion not to investigate or refer allegations of professional misconduct.

In *R. v. Beaudry*, 2007 SCC 5, the Supreme Court of Canada considered this very issue in the context of criminal investigations. Sgt. Beaudry stopped a vehicle that was being driven erratically. He found that the driver was behaving bizarrely. Sgt. Beaudry came to believe that the driver was impaired. The driver, Mr. Plourde, identified himself as a police officer. Sgt. Beaudry recognized him as an officer who was going through some personal difficulties. Sgt. Beaudry decided not to administer a breathalyser test, effectively preventing a prosecution for impaired driving.

His superiors questioned whether that decision was based on a desire to give preferential treatment to another officer. Sgt. Beaudry was charged with obstructing

Justice and was found guilty. The majority of the Supreme Court agreed and upheld the finding.

Four of the Justices reviewed the concept of “police discretion” (i.e., the discretion whether or not to investigate an allegation and the discretion whether or not to lay a charge). This “investigatorial” discretion is separate and distinct from prosecutorial discretion. Prosecutorial discretion relates to various decisions made by the prosecution team once an allegation has been sent to a hearing (e.g., to withdraw the allegations, to not introduce certain evidence, what finding to ask for and what order to seek). In the regulatory field, investigatorial discretion relates to the choices made by the investigator or screening body whether to investigate an allegation and whether to refer the matter to a discipline or other hearing.

The Justices said:

There is no question that police officers have a duty to enforce the law and investigate crimes. The principle that the police have a duty to enforce the criminal law is well established at common law.... Nevertheless, it should not be concluded automatically, or without distinction, that this duty is

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applicable in every situation. Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and are part of the very essence of the proper administration of the criminal Justice system.... The ability — indeed the duty — to use one's judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion.

However, there are limits to the discretion available to investigators. The Justices stated:

Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. Far from having *carte blanche*, police officers must justify their decisions rationally. The required justification is essentially twofold.

First, the exercise of the discretion must be justified subjectively, that is, the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds.... Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion. However, the officer's sincere belief that he properly exercised

his discretion is not sufficient to justify his decision. Hence, the exercise of police discretion must also be justified on the basis of objective factors.

The Justices also commented on the policies published by the police force on how to handle certain matters. For example, in Sgt. Beaudry's case there were specified guidelines about impaired driving investigations that he did not follow. The Justices concluded that evidence of the guidelines was relevant to the issue and could be considered at the hearing. However, the guidelines were not law and were not determinative of whether the discretion was properly exercised.

The Justices concluded that on the facts of this case the trial Judge had sufficient evidence to conclude that Sgt. Beaudry was showing favouritism to the a fellow police officer. For example, the suspected crime (impaired driving) is very serious and while there is discretion to refrain from investigating even that allegation, an investigator had to be able to justify any such inaction. In this case the trial Judge was not wrong in rejecting Sgt. Beaudry's explanations for his conduct. Showing favouritism to a fellow officer was not the proper exercise of investigatorial discretion.

Of the remaining five Justices, one sided with the four Justices mentioned above without going into the issue of police discretion. The remaining four would have ordered a new trial because the trial Judge had not given sufficient reasons for his key findings.

The principles of this case can be applied to regulators. Regulators have the right (absent statutory provisions to the contrary) to decline to investigate allegations or to

decline to refer an apparent allegation of professional misconduct to a discipline hearing. However, the reasons for exercising such discretion should either be obvious (e.g., giving a warning in light of a minor advertising infraction) or should be clearly justified (e.g., giving sound reasons as to why a potentially significant allegation of professional misconduct is not referred to a hearing).

Since many professions and industries are “small worlds”, this places a heightened duty on investigators or screening committees when dealing with someone who is known to them or who is prominent in the profession or industry. The reasons for not taking action should be transparent and well expressed. Any hint of favouritism is inappropriate.

While there can be guidelines for investigators and screening bodies, they are not binding. It is still open to the investigator not to proceed with an investigation in an appropriate case. Similarly, a guideline as to when to refer a matter to discipline (e.g., a third rudeness complaint will result in enforcement action) is not binding on the screening body.

Investigatorial discretion must be exercised very cautiously when dealing with serious allegations of professional misconduct. Sound reasons consistent with the public interest mandate of the regulator is required.

The *Beaudry* case does not conclusively determine one controversial issue: where the legislation imposes a severe, mandatory sanction for certain conduct, can the regulator decline to refer the serious allegation to discipline out of concern about the mandatory sanction. *Beaudry* raises

doubts as to the appropriateness of not taking action on that basis.

Regulators also need to be aware of any provisions in their enabling legislation that may limit investigatorial discretion. For example, many complaints committees are bound to investigate a properly made complaint. However, the committee usually has discretion not to refer complaints to discipline even if the investigation demonstrates that the conduct can likely be proved.

A copy of *Beaudry* can be found at:

<http://scc.lexum.umontreal.ca/en/2007/2007scc5/2007scc5.html>