Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Complaints Screening Criteria

by Natasha Danson
September 2021 - No. 259

What criteria should be used to screen complaints for a possible referral to discipline? Decades ago most screening bodies simply referred a complaint where there was a *prima facie* case. Restated, the test was whether, if the evidence were believed, a finding could be made.

Following the 1993 *G. Arthur Martin report* on charge screening in criminal cases, most screening bodies felt they could scrutinize the evidence somewhat to ensure that there was a reasonable prospect of a finding before making a referral. This represented a change from the previous test, permitting screening bodies to do some weighing of the evidence.

With the advent of educational and remedial alternatives to a referral to discipline, screening bodies began to consider a second criterion in addition to the strength of the evidence as part of the reformulated test: whether the allegations warranted a discipline hearing. See *Re Matheson and College of Nurses of Ontario*, 1980 CanLII 1614 (ON CA), https://canlii.ca/t/g1hzj.

The Alberta Court of Appeal has recently conducted a detailed review of the criteria for referral to discipline in the context of police discipline cases in *Conlin v Edmonton (City) Police Service*, 2021 ABCA 287 (CanLII), https://canlii.ca/t/jhksl.

The *Conlin* case involved a number of appeals of screening decisions made by the Chief of Police (the screening body under that legislation). The Court identified the primary issue before it of whether previous cases had conflated the two tests for assessing the evidence (i.e., the evidence if believed test or the reasonable prospect of a finding test).

The Court said that it was inappropriate to conflate the two tests. The proper reasonable prospect of a finding test has three components to it:

> (a) The test, overall, is whether there is a "reasonable prospect of establishing the facts necessary for a conviction" at a hearing. This test only requires "a reasonable basis in the evidence" that would support a conviction, not that a conviction be probable or likely. The alternative formulation of the test in *Land* as being "enough evidence that, if believed, could lead to conviction" has turned out to be less helpful, and it should be avoided.
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> (b) In performing this screening role, the chief of police is entitled to consider, as a whole, all of the evidence that has been gathered by the investigation, both direct and circumstantial, and inculpatory and exculpatory. While a limited weighing of the evidence is appropriate, the chief of police is not to determine if the charges are "proven", nor the comparative reliability of parts of the evidence. This limited weighing of the evidence can include an assessment of plausibility, reliability and credibility ….
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> (c) … The chief is entitled to take a realistic view of the evidence using the lens of his experience with policing.

The Court added, however, that this test does not mean that a "he said, she said" case should not be referred to a hearing. Even without corroboration, there could be a reasonable prospect of a finding:

> For example, a recurring scenario in sexual assault prosecutions is that the complainant testifies there was "no consent", whereas the accused testifies there was "consent". Since sexual assault tends to be a crime committed in private, there are rarely any independent

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> witnesses or corroborating evidence on the issue of consent. Yet convictions result with some frequency in this situation. The explanation is simply that the complainant is believed at trial, and her evidence is of sufficient weight to allow the Crown to prove the case beyond a reasonable doubt. That eventuality is what can show a reasonable prospect of conviction.
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> At a hearing, the law does not require proof based on uncontradicted evidence….
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> While a chief of police is entitled to engage in some weighing of the evidence in performing the gatekeeping function, it would be an error for the chief to proceed on the assumption that complainants generally are not believable or that the evidence of the police officer will always be preferred. Such assumptions undermine the need to hold police officers to account for their conduct.

The Court accepted that there was a second part of the screening process, namely whether the allegations were serious enough to warrant a discipline hearing:

> Further, the chief of police is entitled to consider the seriousness of the allegations, the need to maintain discipline within the police service, and the need to maintain the reputation of the police service.

Somewhat perplexing was the Court's suggestion that this second part of the test could affect the first, reasonable prospect of a finding, test. One would think that the two parts of the test for referral should be applied independently.

Another perplexing comment by the Court was reference to policy reasons for not holding a hearing even where there is a reasonable prospect of a finding: "The "policy reasons" for not holding a hearing arise in 'unusual circumstances'". It is unclear whether this comment relates to the second part of the test (whether a referral to discipline is warranted) or whether there is a third criterion where even serious allegations might not be referred to a hearing (e.g., compassionate grounds such as where the practitioner is seriously ill).

Care should be taken in applying this case to professional regulators. The Court indicated that different considerations may apply because the Police Chief was not an external regulator and the police officers involved were employees, among other considerations. However, the emphasis on clarity of screening criteria should be relevant to all regulators.

In addition, the breadth of the types of factors that should be taken into account when screening a complaint in police matters has analogies to other professions:

> In the policing context, the range of reasonable outcomes justified by the relevant constellation of law and facts anticipates consideration of the factors previously mentioned, including: the evidence uncovered in the investigation; the strength of the evidence; the validity or appropriateness of any explanation given by the police officer for the impugned conduct; the Chief of Police's experience as a police officer; the chief's knowledge of the police service and its policies; the Chief's general knowledge about policing standards; the seriousness of the allegations; the need to maintain discipline within the police service; the need to maintain the reputation of the police service; the overall context in which the events happened; the event itself; the complainant's and the police officer's perceptions of what occurred; and the perception that an objective observer would have of the events.

While perhaps not providing the clarity a regulator might desire, this case does contribute to the discussion. The case can be found at: https://canlii.ca/t/jhksl.