COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Police Complaint Commissioner) v. Sandhu,* 2024 BCCA 17

Date: 20240119
Docket: CA48026

Between:

The Police Complaint Commissioner of British Columbia

Appellant
(Respondent)

And

Sgt. Ajmer Sandhu

Respondent
(Petitioner)

And

Les Sylven, in his capacity as a Disciplinary Authority under the *Police Act*

Respondent
(Respondent)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated December 13, 2021 (*Sandhu v. British Columbia (Police Complaint Commissioner)*, 2021 BCSC 2424, Vancouver Docket S2010395).

Counsel for the Appellant:	M.G. Underhill, K.C. K.R. Phipps
Counsel for the Respondent Sgt. Ajmer Sandhu:	M.D. Shirreff G.A. Cavouras
Place and Date of Hearing:	Vancouver, British Columbia September 13, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 19, 2024

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon

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Summary:

This appeal arises out of a disciplinary proceeding under the Police Act that was commenced based on an improperly initiated investigation. The respondent was ultimately found to have committed deceit in the course of an investigation into another officer's misconduct. Together with other decisions that preceded it, the misconduct decision was quashed on judicial review on the basis of jurisdictional error and procedural unfairness. The Commissioner appeals. Held: Appeal allowed. It is not in the interests of justice to quash the decisions and require the process to be repeated. While there was a jurisdictional error, the process followed was fair, the misconduct in question was serious, and the substantive decision is unchallenged. In the absence of the jurisdictional error, substantially the same process would have been followed.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This appeal arises out of a discipline proceeding under the *Police Act*, R.S.B.C. 1996, c. 367. The discipline authority, Chief Constable Les Sylven, found that the respondent, Sgt. Ajmer Sandhu, committed misconduct by knowingly making false statements in the course of an investigation into the conduct of another officer. On judicial review, Sgt. Sandhu sought orders quashing several steps in the process, contending that Chief Constable Sylven lacked statutory authority to order the investigation into his conduct and the process followed was procedurally unfair. Chief Justice Hinkson granted the application on the basis of both jurisdictional error and procedural unfairness. The Police Complaint Commissioner of British Columbia appeals and asks this Court to dismiss Sgt. Sandhu's application for judicial review.

[2] On appeal, the Commissioner concedes that Chief Constable Sylven had no authority to initiate the investigation into Sgt. Sandhu's conduct given the absence of a complaint that was sufficiently related to his impugned conduct. However, the Commissioner challenges the Chief Justice's conclusions on procedural unfairness, arguing that he erred by failing to account for the statutory scheme and conflating procedural unfairness with lack of jurisdiction. He also challenges the Chief Justice's exercise of remedial discretion given the benign nature of Chief Constable Sylven's error and the notice provided to all concerned as the process unfolded. In the

Commissioner's submission, substantially the same process would have followed had the investigation been initiated properly, and the interests of justice were not served by granting the relief sought.

[3] In my view, Chief Constable Sylven's lack of authority to initiate the investigation in the exceptional circumstances of this case did not create procedural unfairness. Nor was the process that followed otherwise procedurally unfair. Rather, Chief Constable Sylven made a contextually benign jurisdictional error by initiating the investigation himself rather than referring the matter to the Commissioner for an order initiating the investigation under s. 93 of the *Police Act*. However, the evidence established that substantially the same process would have unfolded in the absence of that error, and no useful purpose would be served by quashing the decisions and requiring the process to be repeated. For that reason and those that follow, I would allow the appeal and dismiss Sgt. Sandhu's application for judicial review.

Statutory Framework

[4] The *Police Act* is specialized labour relations legislation concerned with the employment of police officers and the protection of the public by means of disciplinary tools provided by the statute. It establishes a process for addressing police misconduct involving multiple stages, participants, and time-limits, together with extensive notice and reporting requirements: *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 at paras. 2–3. Viewed in its entirety, the scheme reflects a balancing of the interests of the public and the police officers whose conduct requires scrutiny. It is designed to discourage police misconduct and ensure the fair, timely, and efficient resolution of complaints: *Florkow* at para. 61; *Chu v. British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174 at paras. 47–48.

[5] To place the issues on appeal in context, it is helpful to review several features of the statutory scheme.

[6] Part 11 of the *Police Act* sets out the procedures to be followed with respect to "Misconduct, Complaints, Investigations, Discipline and Proceedings". Divisions 2 and 3 of Part 11 set out the definition of "misconduct" and the "Process Respecting Alleged Misconduct". Pursuant to s. 77(1)(b)(ii), misconduct includes a "disciplinary breach of public trust" committed by a member or former member of a municipal police department. Pursuant to s. 77(3)(f)(i)(A), a disciplinary breach of public trust of "deceit" includes "making or procuring the making of any oral or written statement … that, to the member's knowledge, is false or misleading".

[7] The Commissioner is an independent officer appointed by the Legislative Assembly of British Columbia: s. 47. Pursuant to s. 177(1), the Commissioner oversees and monitors complaints, investigations, and the administration of discipline under Part 11. The Commissioner thus acts as a "gatekeeper", providing civilian oversight and ensuring that police misconduct is dealt with in the public interest and in accordance with the *Police Act*, but not adjudicating complaints on their merits. In other words, as Justice Newbury explained in *Elsner v. British Columbia (Police Complaint Commissioner)*, 2018 BCCA 147, the Commissioner's role is "executive or prosecutorial in nature — deciding whether complaints are admissible, whether investigations should be ordered, to what stage the processes should be pursued, and who should be appointed as "authorities" and "adjudicators" under the Act": at para. 60; see also *Florkow* at paras. 2, 8.

[8] The starting point of the process is usually s. 78, which sets out how complaints are made and registered with the Commissioner. On receiving a complaint or a copy of a complaint, the Commissioner decides whether the complaint is admissible. A complaint is admissible if: i) the conduct alleged would, if substantiated, constitute misconduct; ii) the complaint was made within the time allowed; and, iii) it is not frivolous or vexatious: s. 82(2).

[9] The Commissioner's decision on the admissibility of a complaint is a screening device. It is not an adjudication of the merits of the complainant's allegations: *Elsner* at para. 60; *Chu* at para. 109. In other words, the focus of

concern for admissibility purposes is not the likelihood that the subject officer committed the alleged conduct. Rather, it is the nature and characterization of that conduct, if substantiated, under the *Police Act*.

[10] Reasons for an admissibility decision are not required when a complaint is found to be admissible: *Chu* at para. 29. Upon finding a complaint admissible, the Commissioner must notify the complainant and a chief constable of the police department that employs or employed the subject member: s. 83(2). When a chief constable is notified of an admissible complaint, the chief constable must notify the subject member, describe the complaint, and provide the complainant's name: s. 83(3).

[11] Complaints and investigations are overseen by a discipline authority. Except in specified circumstances, a discipline authority is a chief constable of the relevant police department or their delegate: ss. 76(1), 134. If the Commissioner considers it necessary in the public interest, the Commissioner may designate a senior officer of another police department as an external discipline authority: s. 135.

[12] In some cases, an admissible complaint may be resolved informally under Division 4 of Part 11 of the *Police Act*. If a complaint is not resolved informally, a chief constable of the relevant police department must promptly initiate an investigation, appoint an investigating officer, and notify the Commissioner of the appointment: s. 90(1)(a)-(c). If the Commissioner considers it necessary in the public interest, the Commissioner may direct that the investigation be conducted by a constable of an external police force: s. 92(1)(a). Subject to the Commissioner's approval, a chief constable is also authorized to direct an external investigation: s. 92(2).

[13] Regardless of whether a complaint was made, if at any time information comes to the Commissioner's attention concerning conduct of a member or former member that would, if substantiated, constitute misconduct, the Commissioner may order an investigation and direct its conduct under Division 3 of Part 11 by an investigating officer of the employing police department, an external police force, or

a special provincial constable: s. 93(1). When the Commissioner orders an investigation in the absence of a complaint, the Commissioner must notify a chief constable of the relevant police department, who must notify the subject member: s. 93(5). The Commissioner's independent power to order an investigation under s. 93 is non-delegable: s. 51.02(d).

[14] The Commissioner or a designate may observe an investigation if the Commissioner considers it necessary in the public interest: s. 96. As the process proceeds, if the Commissioner becomes satisfied that further investigation is unnecessary and impracticable or the complaint is frivolous, vexatious or knowingly false or misleading, the Commissioner may direct the discontinuation of an investigation: s. 109(1)(a)–(b).

[15] A police officer has a duty to cooperate fully with an investigating officer in the course of an investigation: s. 101(1). This includes a duty to answer questions in respect of relevant matters and comply with a request to provide a written statement: s. 101(2).

[16] Throughout an investigation, the investigating officer must report regularly to the discipline authority and the Commissioner on its progress within specified time limits: ss. 98(1)–(2). Unless it would hinder the investigation, the Commissioner must provide the complainant with a copy of the progress reports: s. 98(3).

[17] An investigating officer has an ongoing duty to report information concerning possible police misconduct. When information concerning the conduct of a member or former member comes to an investigating officer's attention in the course of an investigation, if that conduct is not the subject of the investigation and, if substantiated, would constitute misconduct, the investigating officer must immediately report the conduct to a chief constable of the relevant police department and the Commissioner: s. 108(1).

[18] When an investigation is concluded, the investigating officer and disciplinary authority must take various steps within specified time limits. For example, within 10

days the investigating officer must file a final investigation report with the discipline authority and the Commissioner: s. 98(4). However, the discipline authority may reject the report and direct that further investigative steps be taken: s. 98(9). Upon receipt of such a direction, the investigating officer must comply promptly, and, after carrying out the further steps, resubmit a final investigation report to the discipline authority and the Commissioner: s. 98(10).

[19] Within 10 days of receiving the final investigation report, the discipline authority must review the report, the evidence, and the records, and provide the complainant and subject member with a copy of the report, subject to permissible redactions. In addition, the discipline authority must provide the subject member with a copy of the (possibly redacted) evidence and records, and notify the complainant, the subject member, the Commissioner, and the investigating officer of the next applicable steps: s. 112(1). The notification must be in writing and, among other things, must describe: the complaint, if any; any conduct of concern; each allegation of misconduct considered; and the disciplinary authority's determination of whether the evidence appears to substantiate each allegation: s. 112(2).

[20] After reviewing the final investigation report, the evidence, and the records, if the discipline authority believes the subject member's conduct appears to constitute misconduct, the discipline authority must convene and preside over a discipline proceeding in respect of the matter: s. 112(3), 118, 123. The subject member is a competent, but not compellable, witness, and has the right to examination and cross-examination of the investigating officer and other witnesses: ss. 124(6)–(9). At any time before or during a proceeding, if the discipline authority considers further investigation is necessary in the public interest, the discipline authority may briefly adjourn the proceeding and direct the investigating officer to conduct the further investigation: ss. 132(1)–(2).

[21] Within 10 days after hearing evidence or submissions, the discipline authority must make a finding in relation to each allegation of misconduct: s. 125. Where misconduct is found, the discipline authority must propose a disciplinary or corrective

step: ss. 126, 128. If the discipline authority proposes dismissal or a reduction in rank, the Commissioner must promptly arrange a public hearing should the subject member request one: s. 137(1). A public hearing is a new hearing concerning the subject member's conduct, and is "not limited to the evidence and issues that were before a discipline authority in a discipline proceeding": s. 143(2)–(3).

[22] A public hearing must be conducted by a retired judge, recommended by the Associate Chief Justice of the Supreme Court to act as an adjudicator. The adjudicator must decide whether any misconduct has been proven, determine appropriate disciplinary or corrective measures, and recommend any changes in policy or practice considered advisable: s. 142(1)–(2), s. 143(9).

[23] If it is not necessary to examine or cross-examine witnesses or receive evidence not in the record and if a public hearing is not required to restore public confidence, the Commissioner may arrange a review on the record by a retired judge, acting as adjudicator, rather than a public hearing: s. 137, s. 142(1)–(2). The Commissioner may reconsider whether to arrange a public hearing or a review on the record if new evidence that is substantial and material to that determination is discovered or becomes available: s. 139.

[24] A review on the record concerns the disciplinary decision, including the findings and reasons of the discipline authority, the proposed disciplinary or corrective measures, and any salient aggravating and mitigating factors: s. 141(1). The review is based on the records of the investigation and proceeding, together with any new evidence related to a s. 139 determination: s. 141(3). The standard of review is correctness: s. 141(9). The adjudicator must decide whether any misconduct has been proven and determine the appropriate disciplinary or corrective measures: ss. 141(10), 142(3).

[25] The decision of an adjudicator in a s. 141 review proceeding is final, conclusive, and not open to question or review in any court: s. 154(2). With the leave of a justice, an appeal on a question of law lies to this Court from a decision of an adjudicator in a public hearing proceeding under s. 143: s. 153(3).

Background

[26] On March 1, 2018, a Crown prosecutor submitted a complaint to the Commissioner alleging that a man attempted to intimidate her during a break in a criminal trial she was prosecuting against a member of Sgt. Sandhu's family. When she made the complaint, the complainant did not know the man's name, but understood he was a member of the Vancouver Police Department ("VPD"). Among other things, she alleged that the man was standing in the courthouse hallway with a group of people associated with the accused when he attempted to intimidate her, and that the accused's uncle, a VPD sergeant, was part of the group.

[27] "Cst. M" was the man described by the complainant. As she stated, he was a member of the VPD. Sgt. Sandhu, also a VPD member, was the uncle of the accused who was standing nearby.

[28] The Commissioner deemed the complaint admissible pursuant to s. 82(1) and (2) on the basis that, if substantiated, the conduct alleged would constitute misconduct (the "Admissibility Determination"). The Admissibility Determination did not refer to a complaint against Sgt. Sandhu or identify any potential misconduct on his part.

[29] The Commissioner provided the Admissibility Determination to the complainant and VPD Chief Constable Palmer, with a direction that the latter process the complaint pursuant to Division 3 of Part 11 of the *Police Act*. On March 13, 2018, a VPD inspector, then acting as discipline authority, issued a Notice of Complaint and Initiation of Investigation to Cst. M pursuant to ss. 83(3) and 90.

[30] The complaint was initially investigated by a VPD member, Sgt. Gray. After confirming that Sgt. Sandhu had witnessed the hallway incident, Sgt. Gray ordered him to provide a written duty report. As required by s. 101, Sgt. Sandhu submitted a duty report on April 5, 2018. In the report, he provided an account of the incident that conflicted with the complainant's account and with the account of another prosecutor who was with the complainant at the time.

[31] On April 26, 2018 and May 25, 2018, Sgt. Gray submitted progress reports to the Commissioner and Chief Constable Palmer summarizing the investigative steps taken in the investigation. The complainant and Cst. M received copies of the reports.

[32] On June 5, 2018, the Commissioner and Sgt. Gray received an email from the complainant asking them to consider having an outside police agency complete the investigation. In making her request, she stated that two VPD officers, one a sergeant, were involved and providing versions of the incident that conflicted with other evidence. She also suggested that any conflict could be avoided if an outside agency took over the investigation.

[33] On July 17, 2018, the Commissioner issued an Appointment of External Investigator pursuant to s. 92(1)(a) and an Appointment of External Discipline Authority pursuant to s. 135(1) (the "External Appointment"). The External Appointment was addressed and provided to the complainant, Cst. M, the Deputy Commissioner of the Royal Canadian Mounted Police ("RCMP"), Chief Constable Sylven, and VPD Chief Constable Palmer.

[34] In the External Appointment, the Commissioner described the complaint and the complainant's June 5 email. He stated that, in order to prevent any potential perception of conflict, an external police agency should conduct the investigation. He also stated that an external discipline authority should be appointed because "[t]he concerns expressed by [the complainant] regarding the investigation being conducted by the VPD can reasonably be extended to the DA decision from a senior member of the VPD in that any real or perceived conflict could be avoided if an external DA was appointed".

[35] The Commissioner directed that the RCMP conduct the investigation and appoint an investigating officer. In addition, he designated Chief Constable Sylven, the Chief Constable for the Central Saanich Police Service, as discipline authority and ordered that "the investigation include any potential misconduct, or attempted

misconduct, as defined in s. 77 of the *Police Act* that may have occurred in relation to this incident".

[36] Inspector Brian MacDonald was appointed investigating officer. In the course of the investigation, he conducted two compulsory interviews with Sgt. Sandhu: the first on September 12, 2018; the second on October 16, 2018. As the investigation proceeded, Inspector MacDonald submitted progress reports to the Commissioner and VPD Chief Constable Palmer, copies of which were provided to the complainant and Cst. M.

[37] On November 20, 2018, Inspector MacDonald submitted a Final Investigation Report (the "First FIR"), but Chief Constable Sylven rejected it. On December 4, 2018, he emailed a Rejection of Final Investigative Report to Inspector MacDonald pursuant to s. 98(9) and directed him to undertake further investigation (the "Rejection Report"). Specifically, he directed Inspector MacDonald to attempt to obtain forensic enhancement of the video of the hallway incident, and ordered him to investigate additional possible misconduct by Cst. M during the incident and subsequent investigation, including possible deceit in his written report and statements. He also stated that "based on the evidence in the FIR, it appears possible that misconduct may have occurred in relation to the actions of the VPD witness member, Sgt. A. Sandhu". He ordered Inspector MacDonald to investigate whether Sgt. Sandhu appeared to have committed misconduct by providing other witnesses with information in order to mislead the investigation and deceit by knowingly making a false or misleading statement in his report and statements.

[38] Chief Constable Sylven emailed the Rejection Report and a Notice of Reassignment of Members Pending Investigation to VPD Chief Constable Palmer, VPD Deputy Chief Rai, and the Commissioner, as well as to Inspector MacDonald. In the Notice of Reassignment, he noted that he had rejected the First FIR, directed additional investigative steps, and "instructed that new allegations of misconduct are investigated involving [Cst. M], as well as an additional VPD officer, Sgt. A. Sandhu", which allegations he described.

[39] On December 6, 2018, Inspector MacDonald issued a Notice of Complaint and Initiation of Investigation to Cst. M pursuant to s. 98(9) identifying three additional possible instances of misconduct for investigation. The same day, he issued a Notice of Complaint and Initiation of Investigation to Sgt. Sandhu pursuant to s. 98(9) (the "Sandhu Notice of Complaint"). In the Sandhu Notice of Complaint, Inspector MacDonald described the March 13, 2018 complaint regarding Cst. M and stated that "[b]ased on evidence contained in the Final Investigation Report the Discipline Authority ordered an investigation of your conduct regarding the following offences which may have occurred during the incident and the subsequent *Police Act* investigation".

[40] On March 14, 2019, Inspector MacDonald interviewed Sgt. Sandhu again, this time as a subject in the investigation. On April 17, 2019 he submitted a new Final Investigation Report (the "Second FIR"). The Second FIR addressed both the complaint regarding Cst. M and the investigation Chief Constable Sylven directed regarding Sgt. Sandhu.

[41] After he was made a respondent, Sgt. Sandhu was provided with copies of Inspector MacDonald's progress reports on an ongoing basis. In April 2019, after he received the Second FIR, he was provided with a list of all prior steps in the investigation and prior progress reports.

[42] On May 17, 2019, Chief Constable Sylven issued a Notice of Disciplinary Authority's Decision pursuant to s. 112 of the *Police Act*. In the s. 112 Notice, he found that the three counts of deceit against Sgt. Sandhu appeared to be substantiated on a balance of probabilities, but the allegation of accessory to misconduct did not. On June 6, 2019, he issued a Notice of Disciplinary Proceeding outlining the allegations of misconduct faced by Sgt. Sandhu.

[43] On November 6, 2019, Chief Constable Sylven convened a disciplinary proceeding in which he heard the complaint against Cst. M and the allegations of misconduct against Sgt. Sandhu. Sgt. Sandhu and Cst. M were both represented by

counsel. Sgt. Sandhu testified at the hearing and denied all allegations of misconduct.

[44] On February 13, 2020, Chief Constable Sylven issued a Notice of Decision Following a Disciplinary Proceeding pursuant to s. 125(1)(a) (the "Notice of Decision"). He determined that three of the four allegations regarding Cst. M and three of the four allegations regarding Sgt. Sandhu were proven on a balance of probabilities. On March 13, 2020, he made a Disciplinary Disposition ordering a temporary reduction in rank from first class to second class constable for a nine-month period in the case of Cst. M, and a reduction in rank from sergeant to first class constable with no ability to compete for promotion for five months in the case of Sgt. Sandhu.

[45] On April 16, 2020, Sgt. Sandhu applied for a public hearing under s. 137(1). The Commissioner refused the application and issued a Notice of Review on the Record instead. The review on the record was scheduled for December 14, 2020. However, on November 27, 2020, the Chief Justice granted a stay that was subsequently extended pending determination of Sgt. Sandhu's petition for judicial review.

Reasons on Judicial Review: 2021 BCSC 2424

[46] After reviewing the statutory scheme, the factual background, and the positions of the parties, the Chief Justice identified the applicable standards of review. Then, under the heading "Jurisdiction", he noted the Commissioner conceded that Chief Constable Sylven did not have jurisdiction to direct the issuance of the Notice of Complaint. He also found that Chief Constable Sylven "unreasonably relied on s. 98(9) to initiate the proceedings against [Sgt. Sandhu] and acted without jurisdiction in so doing": at para. 67. Nevertheless, he stated, the Commissioner argued that he should view this error as a "'benign procedural flaw' and not 'privilege form over substance'": at para. 68.

[47] Next, the Chief Justice turned to the question of procedural fairness. He dealt first with issues of waiver and delay. In doing so, he observed that Sgt. Sandhu

clearly “did not raise the issue of procedural fairness as soon as he practically could have”, and therefore he must “determine if that failure precludes him from now doing so”: at para. 77. He noted the Commissioner’s argument that Sgt. Sandhu had waived his right to raise allegations of procedural unfairness as he was aware of all the material facts in support of his allegations at the outset of the disciplinary hearing, and Sgt. Sandhu’s response that he was previously unaware Chief Constable Sylven lacked jurisdiction to order the investigation. He also noted Sgt. Sandhu’s submission that because Chief Constable Sylven ordered the investigation without authority “the proceedings and all subsequent decisions that flowed from those orders are nullities”, relying on *Crook v. British Columbia (Director of Family and Community Service)*, 2020 BCCA 192: at paras. 81, 82–84.

[48] The Chief Justice did not deal directly with the question of whether the proceedings and decisions that followed the unauthorized order were nullities. He found it “perhaps ironic” for the Commissioner to assert that Sgt. Sandhu should have appreciated “the procedural issues” when he had “laboured under a misapprehension with respect to the jurisdiction wrongly assumed by Chief Constable Sylven” until recently and stated that Sgt. Sandhu was unaware of the “pertinent fact of Chief Constable Sylven’s lack of jurisdiction” until he retained his current counsel. Consequently, he held, Sgt. Sandhu “did not waive his right to challenge the procedure followed in the process against him by not raising the issue sooner than he did”: at paras. 85–88.

[49] After holding that Sgt. Sandhu had not waived his right to challenge the procedure followed, the Chief Justice asked whether the disciplinary process was procedurally unfair. He began this part of his analysis by summarizing Sgt. Sandhu’s position that “given the nature of Chief Constable Sylven’s decision and the potential impact and consequences on his rights and interests, the Chief Constable had an obligation to act fairly in the discipline process and to conduct himself so that there could be no reasonable apprehension of bias”, but had failed to do so: at para. 89. Specifically, he noted, Sgt. Sandhu argued the process was procedurally unfair for four reasons, namely: he gave two interviews under “the pretext that he was a

witness in the complaint"; he did not receive timely notice of investigative steps taken before he was "unlawfully added" as a respondent; the decision to initiate the investigation came after the investigation into Cst. M was "already substantially complete"; and:

> [92] … most importantly, the discipline authority conceived the allegations against [Sgt. Sandhu], appointed himself as the presiding discipline authority, directed the investigative steps to be taken with respect to those allegations, and then ultimately decided on the merits of those same allegations. Even if the discipline authority were permitted to take these steps under the *Act*, [Sgt. Sandhu] contends that the result is that he acted in [Sgt. Sandhu's] matter as complainant, investigator and adjudicator.

[50] The Chief Justice addressed each of Sgt. Sandhu's arguments on procedural unfairness. Regarding the witness interviews, he found that Sgt. Sandhu's participation did not amount to procedural unfairness given his duty to cooperate under s. 101: at para. 96. Regarding timely notice, he observed that the investigation was ongoing when the Second FIR was submitted. However, he stated, the Commissioner's argument "ignores the obligations of the disciplinary authority under ss. 112(1) and (2) of the *Act*" and "unfairly places an onus upon [Sgt. Sandhu] to ensure that he received timely notice": at paras. 97–98. Regarding the initiation of the investigation, he noted the Commissioner argued that Sgt. Sandhu knew about the initiation of the investigation by the outset of the hearing and was afforded many procedural safeguards in the process. However, he stated:

> [101] As [Sgt. Sandhu] pointed out, he did not receive notice of the investigative steps respecting [Cst. M] as they were being carried out and only began receiving investigation reports after he was named as a respondent. By then, the investigation was substantially complete. All of the evidence that was ultimately used to "substantiate" [Sgt. Sandhu's] misconduct had already been compiled through the investigation into [Cst. M's] conduct. Indeed, the decision to initiate proceedings against [Sgt. Sandhu] only came after the submission of the first FIR, which was intended to signify the conclusion of the investigation. The discipline authority formed an opinion about [Sgt. Sandhu's] conduct and credibility when it was not before the discipline authority and without [Sgt. Sandhu] having received any notice that his conduct was potentially at issue.
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> [Emphasis added.]

[51] As to overlapping roles, the Chief Justice observed that in the absence of clear statutory authority the same person cannot act as both accuser and adjudicator, citing *Nichols v. Graham,* [1937] 3 D.L.R. 795 and *Gardner v. The Ontario Civilian Commission on Police Services*, 72 O.R. (3d) 285, (S.C.J.) leave to appeal ref'd [2004] O.J. 4320. However, he stated, the Commissioner argued that the *Police Act* contemplates a disciplinary authority wearing "multiple hats", and Sgt. Sandhu knew Chief Constable Sylven acted as the "complainant" in ordering the investigation and presided over the disciplinary hearing. He went on to find that, having directed the investigation, Chief Constable Sylven acted in the overlapping roles of both complainant and adjudicator. However, he held, Sgt. Sandhu's failure to raise those overlapping roles earlier prevented him from doing so on judicial review:

> [106] The Commissioner argues that the Notice of Complaint and Initiation of Investigation made clear that the discipline authority had ordered an investigation into [Sgt. Sandhu's] conduct based on the evidence in the first FIR. Therefore, the Commissioner contends, and I agree, that [Sgt. Sandhu] was well aware that the discipline authority acted as the "complainant" who subsequently presided over the disciplinary hearing that commenced on November 6, 2019.
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> …
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> [108] … I agree with the Commissioner that Chief Constable Sylven did not act as investigator; however, he clearly directed the investigation. Therefore, I find that Chief Constable Sylven acted in the overlapping roles as the complainant and adjudicator.
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> [109] I find, however, that [Sgt. Sandhu's] failure to raise the overlapping roles of the discipline authority at the disciplinary hearing prevents him from now doing so.
>
> [Emphasis added.]

[52] The Chief Justice dealt next with the Commissioner's argument that the process followed would not have been "fundamentally different" had he initiated the investigation. He stated the Commissioner: "asserted, without evidence" that he chose not to exercise his s. 109 power to interfere with Chief Constable Sylven's decision to proceed; argued the only available conclusion was that he would have initiated the Sandhu Notice of Complaint had the referral been made; and submitted therefore after-the-fact affidavit evidence was unnecessary: at paras. 110–112. He

also noted Sgt. Sandhu's response that there was contemporaneous evidence to the contrary, namely, Inspector MacDonald did not report alleged misconduct by Sgt. Sandhu and the Commissioner did not make a s. 93 order. In addition, he noted, Sgt. Sandhu argued that "even if the Commissioner had formulated the same allegations that Chief Constable Sylven did, he would have had the benefit of an adjudicator who had not already formed an opinion about those allegations", citing *Rosenstock v. College of Physicians & Surgeons (Alberta)* (1989), 93 A.R. 298: at paras. 113–114.

[53] The Chief Justice went on to observe that the Commissioner argued Chief Constable Sylven's error was a benign procedural flaw analogous to the error in *Chu*: at para. 115. He rejected this argument. In doing so, he distinguished *Chu* on the basis that in *Chu* the Commissioner himself erred by citing the wrong statutory provision and the evidence established that he intended to initiate the proceeding. In contrast, he stated, in this case Chief Constable Sylven erred by ordering a new investigation under s. 98(9) when he lacked the authority to do so. In addition:

> [118] … There is no evidence before me as to whether the Commissioner would have entertained, let alone acceded to, a request to initiate proceedings against [Sgt. Sandhu] and combine them with the hearing of the proceedings involving the constable.
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> [119] [Sgt. Sandhu] asserts that the Commissioner, a sophisticated actor with an intimate knowledge of his authority under the *Act*, should not be allowed to now argue that he would have acted exactly as the Chief Constable Sylven did. I agree.
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> [Emphasis added.]

[54] The Chief Justice concluded that he was unable to make findings on the Commissioner's intention regarding the process undertaken. However, he considered it unnecessary to address that matter because, in his view: the Commissioner had not established a "benign procedural flaw"; Sgt. Sandhu had not received "the process to which he was entitled"; and the process followed was procedurally unfair:

> [120] Because the Commissioner was not involved in the decision-making process and has failed to provide sufficient evidence, I am unable to make any findings regarding the Commissioner's intention with respect to the disciplinary process undertaken against [Sgt. Sandhu].
>
> [121] However, it is unnecessary for me to address that because I find that the Commissioner has not established a "benign procedural flaw", as was the case in *Chu*. I find that [Sgt. Sandhu] did not receive the process to which he was entitled pursuant to the *Act* and given the potential impact and consequences on [Sgt. Sandhu's] rights and interests, the process followed was procedurally unfair.
>
> [Emphasis added.]

[55] Under the heading "Curing a lack of Jurisdiction", the Chief Justice considered Sgt. Sandhu's position that noncompliance with the statutory scheme could not be "cleansed" by arguing Sgt. Sandhu had waived his right to raise "these issues": at para. 122. After quoting Justice Taggart's observation in *Board of Naturopathic Physicians of British Columbia v. Heuper*, 66 D.L.R. (3d) 727 that consent cannot confer jurisdiction, he noted Sgt. Sandhu's argument that even if the process could be characterized as a procedural flaw, he must determine "whether an appellate proceeding can cure an earlier procedural defect" based on the factors discussed in *International Union of Operating Engineers, Local 882 v. Burnaby Hospital Society* (1997), 46 B.C.L.R. (3d) 97, as quoted in *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at para. 28. Then, without further analysis, he stated "I find that what occurred in this case with respect to [Sgt. Sandhu] cannot be likened to the 'benign procedural flaw' in *Chu*": at para. 124.

[56] Finally, the Chief Justice turned to the question of remedy. In providing his answer, he began by summarizing the parties' arguments. He noted the Commissioner argued that he should refuse to grant the relief sought by Sgt. Sandhu because doing so would be contrary to the interests of justice and have no utility, citing *Chu*: at paras. 129–132. As to Sgt. Sandhu's argument, he said this:

> [133] In this case, [Sgt. Sandhu] argues that the Commissioner's gatekeeping function was usurped, and Chief Constable Sylven assumed a power that could not even be lawfully delegated to him. Doing so fundamentally re-cast the process under the *Act* and removed the "executive" or "prosecutorial" function of the Commissioner. It also impermissibly

> combined the roles of complainant and adjudicator. Using the language of *Florkow*, this is not a case where a step in the statutory process has merely been "leapfrogged". It is a case where an entirely new non-statutory process has been invented.
>
> [134] [Sgt. Sandhu] contends that it is entirely speculative to conclude that the result of a hypothetical future complaint is a *fait accompli*, and the Court should be especially cautious about assuming that the outcome of a fair process would inevitably lead to the same outcome as an unfair one. He contends that this is simply not an exceptional case where it would be fair or appropriate for the Court to refuse to grant a remedy.

[57] The Chief Justice responded to these arguments, first, by repeating that the Commissioner had failed to establish that essentially the same process would have unfolded had the correct procedure been followed. He also emphasized that a remedy for a breach of procedural fairness will only be denied in exceptional cases: at paras. 135, 137, 140. He went on to discuss several authorities concerned with reasonable apprehension of bias, including *Rosenstock*, *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856 and *Canada (Attorney General) v. McBain*, 2017 FCA 204. He also noted the Commissioner's position that any alleged procedural unfairness could be cured by the review on the record and Sgt. Sandhu's response that a review on the record could not cure a lack of jurisdiction: at paras. 145, 149.

[58] The Chief Justice observed that breaches of procedural fairness ordinarily render a decision invalid and the usual remedy is a new hearing, unless the outcome is legally inevitable: at paras. 139–140, 146–150. Then he returned to Sgt. Sandhu's arguments, namely, that: the duty of fairness "must exclude the overlapping process that was followed"; the process had "serious consequences for his professional standing"; the process involved the "severe" error of assuming jurisdiction without authority; and, a review on the record is not a hearing *de novo* because it is based on the material before the original tribunal: at paras. 151–153. He also referred to Sgt. Sandhu's assertions that: there was nothing inevitable about what may have occurred "had the proper statutory actors acted within their lawful authority"; there was "no evidence the same result would be reached in his case, absent the

jurisdictional error"; and this was not a situation in which granting the relief sought would make no practical difference: at paras. 155–156.

[59] Ultimately, the Chief Justice concluded this was not an exceptional case in which it would be fair not to grant the remedy sought by Sgt. Sandhu. In doing so, he stated that a review on the record is more limited in scope than the public hearing Sgt. Sandhu requested because the latter "is not limited with respect to the evidence and issues that were before a discipline authority": at para. 154. In responding to Sgt. Sandhu's other arguments, he said this:

> [157] The incident giving rise to the findings involved the intimidation of an officer of the court by a police officer, and [Sgt. Sandhu] was found to have committed deceit during the investigation of that incident. This is a serious matter that risks a loss of public confidence should it be overturned in the absence of any demonstrated unfairness to [Sgt. Sandhu]. The "taint" of any errors or unfairness in the disciplinary process has not been substantiated, but the findings of misconduct against [Sgt. Sandhu] have.
>
> [158] As a result, I find that this is not an exceptional case where it would be fair or appropriate for the Court to refuse to grant a remedy.
>
> [Emphasis added.]

[60] Based on the foregoing analysis, the Chief Justice granted all of the relief sought in the petition. This included quashing the Rejection Report, the Sandhu Notice of Complaint, and the Notice of Decision in so far as they concerned Sgt. Sandhu: at paras. 159–161. He ended his reasons by observing that nothing prevented the Commissioner from initiating a new investigation into Sgt. Sandhu's conduct, and stating the basis for his decision:

> [162] As [Sgt. Sandhu] conceded before me, there is nothing to prevent him from initiating a new investigation into the conduct of [Sgt. Sandhu].
>
> [163] In conclusion, [Sgt. Sandhu's] application is granted on the basis of jurisdictional error and procedural unfairness. The discipline authority exercised improper jurisdiction by initiating a new investigation against [Sgt. Sandhu], and the discipline authority's interpretation of his scope of authority to do so under the *Act* was unreasonable. Furthermore, the discipline authority assumed overlapping roles as the complainant and the adjudicator, and this was procedurally unfair.
>
> [Emphasis added.]

[61] In summary, as I understand the Chief Justice's reasons, read as a whole, he concluded that:

- Chief Constable Sylven committed jurisdictional error by initiating the investigation without statutory authority (paras. 67, 163), which he did not consider a "benign procedural flaw" such as the error in *Chu* or curable by a review on the record (paras. 118–124, 154); and
- the process was procedurally unfair because Sgt. Sandhu "did not receive the process to which he was entitled", the process was potentially consequential, and Chief Constable Sylven "assumed overlapping roles as the complainant and the adjudicator" (paras. 121, 163).

On Appeal

[62] As I noted at the outset, the Commissioner concedes that s. 98(9) did not authorize Chief Constable Sylven to order the investigation because Sgt. Sandhu's conduct was insufficiently related to the existing complaint regarding Cst. M's conduct to fall within that complaint. For this reason, he acknowledges that the proper procedure would have been for Chief Constable Sylven to relay his concerns regarding Sgt. Sandhu to the Commissioner to make an order initiating the investigation under s. 93. However, the Commissioner submits, the Chief Justice erred in finding the process followed was procedurally unfair and granting the relief sought by Sgt. Sandhu. In oral submissions, he abandoned his ground of appeal related to waiver of Sgt. Sandhu's right to raise allegations of procedural unfairness.

[63] In Sgt. Sandhu's submission, the Chief Justice's analysis is error-free and his exercise of remedial discretion is entitled to appellate deference.

[64] The issues that emerge for determination are:

a) What are the applicable standards of review?

b) Were the proceedings unfair due to Chief Constable Sylven's error in initiating the investigation without authority or for any other reason?

c) Did the Chief Justice err in the exercise of his remedial discretion? If so, what remedy, if any, should be granted?

Discussion

What are the Applicable Standards of Review?

[65] This Court's task on appeal from judicial review is to step into the shoes of the chambers judge to determine whether the judge identified the appropriate standard of review and applied that standard appropriately: *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at para. 69. The parties agree that the Chief Justice identified the appropriate standards of review. The issues for determination on appeal are whether he applied those standards correctly and, if not, what order we should make.

[66] The standard for reviewing questions of procedural fairness is correctness or "fairness": *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at paras. 24–25, 28; *Seaspan Ferries Corp. v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 52. Accordingly, we are to step into the shoes of the Chief Justice to determine whether the process followed was procedurally fair: *Bains v. Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159 at para. 25.

[67] The standard of review on questions of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[68] The standard for reviewing the grant of discretionary relief on judicial review is highly deferential. This Court will only interfere with an exercise of judicial discretion where the court below erred in principle, ignored or misapplied a relevant factor, or came to a decision that is so clearly wrong that it amounts to an injustice: *Council of Canadian with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para. 60. If the chambers judge erred in exercising his discretion, this Court is entitled to undertake its own review of the impugned decision pursuant to its power

to make any order that could have been made in the court below: *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(1)(a). As noted in *Chu*, this may be appropriate bearing in mind "the stage of the proceedings and the fact that this Court's role in reviewing administrative decisions is to 'effectively step into the shoes of the judge below': at para. 62.

Were the Proceedings unfair due to Chief Constable Sylven's error in initiating the Investigation without authority or for any other reason?

Positions of the Parties

Preliminary Observation

[69] Although the parties agree that the standard for reviewing questions of procedural fairness is correctness or fairness, they focused their submissions on the Chief Justice's reasons for judgment. However, as noted, this Court's task on appeal is to step into his shoes to determine whether the process that was followed was procedurally unfair. Given the focus of the submissions, in undertaking that task I will begin by addressing what I see as the Chief Justice's errors in his procedural fairness analysis, and then explain why, in my view, the process followed, though flawed, was not procedurally unfair.

The Commissioner

[70] The Commissioner begins by stating that the Chief Justice found three instances of procedural unfairness: the timeliness of notice, the initiation of the Sandhu Notice of Complaint relative to the progress of the investigation, and the overlapping roles of Chief Constable Sylven. However, he contends, the investigation and proceeding were not unfair for those reasons, or at all. In his submission, the Chief Justice erred in finding procedural unfairness by misinterpreting or failing to consider the statutory scheme established by the *Police Act*.

[71] According to the Commissioner, although Chief Constable Sylven lacked authority to initiate the proceeding, the process followed was not unfair given the structure and content of the statutory scheme. In particular, he says: Sgt. Sandhu

received timely notice, as the scheme requires (ss. 98, 112); the investigation was ordered based on information arising in another investigation, as the scheme contemplates (s. 108); and the discipline authority fulfilled overlapping roles, as the scheme envisions (ss. 98, 112 and 123). However, the Chief Justice erroneously found that Sgt. Sandhu was unfairly deprived of his right to timely notice, unfairly subjected to an investigation initiated near the end of another investigation, and unfairly exposed to a discipline authority wearing "multiple hats" as both the complainant and adjudicator.

[72] In support of his submission, the Commissioner argues that where, as here, a statute creates an investigative function distinct from the adjudicative function, the duty of fairness at the investigative stage is minimal and normally does not require disclosure. He also argues that notice obligations under s. 112 only arose after the Second FIR was received. Further, he says, triggering an investigation is merely an administrative step, and, while Chief Constable Sylven was not the one authorized to take it, there was nothing unfair about initiating the investigation given the serious nature of Sgt. Sandhu's apparent conduct. In other words, he says, although Chief Constable Sylven misinterpreted the scope of his authority under s. 98(9), initiating the investigation when he did was not unfair.

[73] The Commissioner goes on to say that the legislature is entitled to choose the structure and roles of administrative tribunals, and to authorize modification of the principles of natural justice, citing *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301 and *Robertson v. Edmonton (City) Police Service (#10)*, 2004 ABQB 519. In his submission, in enacting the *Police Act*, the legislature created a scheme that contemplates a discipline authority assuming overlapping roles, including the roles of complainant and adjudicator. For example, the scheme contemplates a discipline authority: rejecting a FIR and directing further investigation in an investigation involving the same circumstances (thus acting as effective complainant); determining whether misconduct appears to be substantiated based on the investigation (thus acting as quasi-prosecutor); deciding whether the matter should proceed to a disciplinary proceeding; and presiding over the proceeding (thus

acting as adjudicator): ss. 98, 112, 123. However, he says, the Chief Justice misinterpreted or failed to consider these key elements of the scheme.

[74] The Commissioner concedes that Chief Constable Sylven should have referred his concerns for a s. 93 order in the circumstances of this case, which he characterizes as exceptional. Specifically, he says, a s. 93 order was required, and would have been made, because Sgt. Sandhu's concerning conduct was insufficiently related to the complaint regarding Cst. M then under investigation. However, he emphasizes, a referral would have been unnecessary had that conduct related more directly to the investigation because s. 98(9) would have authorized Chief Constable Sylven to order further investigation. In addition, he says, had Chief Constable Sylven referred his concerns it would have been entirely practical and appropriate to appoint him to carry on with the process, including deciding whether the investigation substantiated the apparent misconduct and presiding over the disciplinary hearing.

[75] In other words, the Commissioner says that even if the investigation had been initiated properly, Chief Constable Sylven would have assumed the overlapping roles of effective complainant and adjudicator. Moreover, he says, Chief Constable Sylven assumed those very roles in ordering Inspector MacDonald to investigate Cst. M's similar apparently deceitful conduct under s. 98(9) and then presiding at the disciplinary hearing. In the Commissioner's submission, it follows that the procedural unfairness alleged flows from the structure and operation of the scheme itself, and not from whether Chief Constable Sylven or the Commissioner initiated the investigation. Accordingly, he submits, the impugned error was a jurisdictional error alone.

[76] Furthermore, the Commissioner submits, the Chief Justice acknowledged that the principle against a statutory actor assuming overlapping roles only applies "in the absence of clear statutory authority to do so". He also acknowledged that the statutory scheme contemplates a disciplinary authority assuming overlapping roles. However, at paras. 108, 133 and 163 of his reasons, without analysis, the

Chief Justice implicitly found that Chief Constable Sylven acted unfairly by directing the investigation (thus assuming the role of complainant) and then presiding over the hearing (thus acting as adjudicator).

[77] According to the Commissioner, the foregoing finding is untenable and erroneous. In his submission, it cannot be reconciled with, and has significant implications for, the proper and efficient operation of the statutory scheme. In particular, he says, the Chief Justice's finding on Chief Constable Sylven's overlapping roles arguably impugns any discipline process in which a discipline authority decides further investigation of a member is required, acts as the effective complainant in directing that investigation, and then acts as adjudicator in the subsequent disciplinary process. However, he says, the statutory scheme expressly contemplates that very process. That being so, he asks this Court to disavow the Chief Justice's finding on this point.

Sgt. Sandhu

[78] Sgt. Sandhu responds that the jurisdictional and procedural fairness issues in this case are fundamentally intertwined, which the Commissioner seemingly fails to acknowledge. In his submission, by usurping the Commissioner's gatekeeping role and acting without authority or jurisdiction, Chief Constable Sylven created the procedural unfairness, which flowed directly from his lack of authority or jurisdiction to order the investigation.

[79] In advancing his submission, Sgt. Sandhu argues, first, that the scheme requires ongoing disclosure of misconduct allegations and investigative steps throughout the course of an investigation. He says that s. 98(3) would not refer to the Commissioner's discretion to withhold such disclosure in specified circumstances if the legislature intended to permit disclosure to be withheld until an investigation is complete. Therefore, he argues, except in the circumstances specified, the scheme obliges the Commissioner to disclose misconduct allegations and investigative reports as an investigation progresses. However, he says, that is not what happened in his case.

[80] Second, Sgt. Sandhu submits that ordering an investigation in the absence of a complaint is a non-delegable statutory power conferred upon the Commissioner, not a mere administrative step in the process. He emphasizes a disciplinary authority is only authorized to direct further investigation of a member already the subject of an admissible complaint, not to devise allegations against a new member and then assume overlapping roles. However, he says, without authority, Chief Constable Sylven devised the allegations against him and then acted as adjudicator. In Sgt. Sandhu's submission, therefore the common law doctrine of reasonable apprehension of bias applies and the process was unfair.

[81] Further, Sgt. Sandhu submits, a review on the record cannot cure a lack of jurisdiction, and the proceedings and decisions that flowed from the unauthorized order were nullities which could not be cured later in the proceeding. In support of the latter proposition, he relies on *Annacis Auto Terminals (1997) Ltd. v. Assessor of Area #11 – Richmond/Delta*, 2003 BCCA 315 at paras. 43, 53–54 and *Crook* at para. 66. Citing *Florkow*, *Elsner,* and *Bentley v. The Police Complaint Commissioner*, 2014 BCCA 181, he also emphasizes the importance of the Commissioner's gatekeeping role and the need for all statutory actors to abide strictly by the requirements of the statutory scheme.

Analysis

Governing Principles

[82] The duty of procedural fairness is highly variable, flexible, and context-specific. Its content and extent will depend upon the context and facts in a particular case. The procedural requirements that apply in each case are determined in accordance with the non-exhaustive list of so-called *Baker* factors, namely: the nature of the decision and process followed in making it; the nature of the statutory scheme and terms pursuant to which the body operates; the importance of the decision to those affected; the legitimate expectations of the person challenging the decision; and the procedural choices made by the agency itself: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 77; *A Lawyer v. The*

Law Society of British Columbia, 2021 BCSC 914 at para. 106, aff'd 2021 BCCA 437.

[83] An administrative body that undertakes an investigation into a subject member's conduct owes the member a general duty of fairness. The content of the duty will depend on the nature of the investigation and the consequences it may have for the affected parties: *Puar v. Association of Professional Engineers and Geoscientists (British Columbia)*, 2009 BCCA 487 at paras. 18, 21; *Elsner* at para. 61. Where the investigative function is distinct from the adjudicative function, the duty of fairness is minimal at the investigative stage and generally does not require disclosure of the allegations and an opportunity to be heard. As explained in *Puar*, "[w]hile early disclosure may be useful, it is not normally required until the adjudicative stage where the member can expect to be afforded a hearing": at para. 22; *A Lawyer* at para. 107.

[84] A reasonable apprehension of bias is a well-recognized source of procedural unfairness in administrative proceedings. The requirement for impartiality on the part of a decision-maker in law is a fundamental tenet of our legal system. Based on the principle that no one should be a judge in their own cause, under the common law a reasonable apprehension of bias arises where the roles of accuser and adjudicator overlap: *Brosseau* at p. 309. The applicable test is: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would they think it more likely than not that the decision-maker, consciously or unconsciously, would not decide fairly?: *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 at paras. 81–83; *Gardner* at paras. 14, 27.

[85] Nevertheless, the legislature is entitled to choose the structure and roles of tribunals and administrative decision-makers, and to authorize modification or ouster of the principles of natural justice, including reasonable apprehension of bias. Assuming its constitutionality, where a statute authorizes overlapping roles an exception to the general principle applies. For example, in *Brosseau* the Court held that because the Alberta Securities Commission was empowered by statute to

institute investigations and adjudicate charges, the Chair was authorized by law to adjudicate a case in which he was also involved at the investigative and prosecutorial stages of the process: at p. 310. As the Commissioner notes, this principle was also applied in the police discipline context in *Robertson*, where the statutory scheme authorized the chief of police to initiate a complaint, determine whether the complaint was sufficiently serious to justify a hearing, appoint the presiding officer, and provide advice on appropriate punishment: at paras. 40–42; 66–67.

[86] In some circumstances, an appellate proceeding can cure a breach of procedural fairness or other defect in the proceedings conducted before an original tribunal, including a reasonable apprehension of bias. As the Chief Justice noted, the factors for consideration in this regard are: i) the gravity of the error committed at first instance; (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing; (iii) the seriousness of the consequences for the individual; (iv) the width of the powers of the appellate body; and (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*: *Taiga Works* at para. 28.

Application of Principles

[87] I will begin by addressing the Commissioner's submission that the Chief Justice implicitly found Chief Constable Sylven acted unfairly by directing the investigation (thus assuming the role of complainant) and then presiding over the hearing (thus acting as adjudicator). As noted, according to the Commissioner, this finding arguably impugns any discipline process in which a discipline authority decides further investigation of a member is required, acts as the effective complainant in directing that investigation, and then acts as adjudicator in the subsequent disciplinary process.

[88] In my respectful view, the underlying rationale for the Chief Justice's conclusion on procedural unfairness is not entirely obvious. Although he reviewed the arguments and authorities on reasonable apprehension of bias at some length,

he did not expressly find that Chief Constable Sylven created a reasonable apprehension of bias by assuming the overlapping roles of complainant and adjudicator. Rather, he found that Chief Constable Sylven "acted in the overlapping roles as the complainant and adjudicator" by ordering the investigation and presiding at the hearing, but precluded Sgt. Sandhu from raising those overlapping roles as procedurally unfair because he did not raise the issue earlier. Nevertheless, he found the process followed unfair because the Commissioner "was not involved in the decision-making process" and Sgt. Sandhu did not receive the "process to which he was entitled", which was not a "benign procedural error" that could be waived or cured by a review on the record, although "[t]he 'taint' of any errors or unfairness in the disciplinary process [had] not been substantiated" (paras. 108, 120–121, 157).

[89] As the Commissioner submits, the foregoing might be read as implying that a reasonable apprehension of bias arises whenever a discipline authority acts as the complainant and adjudicator, but that Sgt. Sandhu could not rely on that reasonable apprehension because he failed to raise the issue earlier. Read in this way, I agree that the Chief Justice's reasons could have significant implications for the proper and efficient operation of the statutory scheme, which expressly allows a discipline authority to fulfill overlapping roles. However, in my view, given their grounding in the particular facts of the case, the reasons do not actually convey that implication. Rather, as I understand the reasons, the Chief Justice's finding of procedural unfairness is grounded in his apparent acceptance of Sgt. Sandhu's argument that Chief Constable Sylven "usurped" the Commissioner's role by directing the investigation in the absence of a sufficiently related existing complaint.

[90] Reading the reasons as a whole and in context, I understand the Chief Justice to have found that because the *Police Act* authorized the Commissioner alone to order the investigation and because Chief Constable Sylven ordered it, Chief Constable Sylven improperly assumed the Commissioner's role, which deprived Sgt. Sandhu of the process to which he was entitled, namely, a decision by the Commissioner on whether to initiate the investigation and combine the proceedings with those involving Cst. M. Based on that deprivation, and despite

the absence of unfairness in the disciplinary process, but given its potentially serious consequences for Sgt. Sandhu, he found the process followed was unfair.

[91] In other words, the Chief Justice's finding of procedural unfairness was based on Chief Constable Sylven's jurisdictional error, not on the known fact that he initiated the investigation and presided at the hearing, thus acting as complainant and adjudicator, which created a reasonable apprehension of bias. Although he precluded Sgt. Sandhu from raising the overlapping roles of which he was aware, the Chief Justice found that he "did not waive his right to challenge the procedure followed in the process against him by not raising [Chief Constable Sylven's lack of jurisdiction] at the disciplinary hearing". When he went on to find that procedural unfairness was established, he did so on the basis that he had not precluded, namely, Chief Constable Sylven's lack of statutory authority to initiate the investigation and related "usurping" of the Commissioner's role (paras. 87–88, 109, 121).

[92] In my view, this finding was premised on a mischaracterization of the nature of Chief Constable Sylven's error. Regardless of whether his misinterpretation of the scope of his authority under s. 98(9) and related order to investigate is conceived as a jurisdictional, legal or procedural error, as I see it Chief Constable Sylven did not usurp the Commissioner's independent oversight role or purport to exercise his non-delegable power under s. 93. Nor did he "fundamentally recast" the process followed.

[93] Rather, while acting as discipline authority overseeing the investigation into Cst. M, Chief Constable Sylven was informed of conduct committed by Sgt. Sandhu in that investigation which, if substantiated, would manifestly constitute serious misconduct. In response, rather than refer the matter to the Commissioner, he directed further investigation under s. 98(9). This was an error because the concerning conduct was insufficiently related to the complaint then under investigation to fall within its parameters. Nevertheless, while erroneous, it was also understandable given that the complainant's request for an external investigation

referred to two VPD officers providing conflicting versions of the incident and the Commissioner stated in the External Appointment designating
Chief Constable Sylven as discipline authority that “the investigation include any potential misconduct, or attempted misconduct, as defined in s. 77 of the *Police Act* that may have occurred in relation to this incident”.

[94] When a statutory actor fails to comply strictly with the requirements of the *Police Act*, that failure may well be fatal from a jurisdictional perspective. However, non-compliance with statutory requirements *per se* does not also create procedural unfairness simply because the process followed was potentially consequential and not that to which a member was entitled under the statutory scheme. In my view, some discernible form of unfairness associated with the non-compliant process that is followed is required to establish procedural unfairness in addition to the absence of jurisdiction or statutory authority.

[95] I discern no such unfairness in this case. In initiating the investigation without statutory authority, as I see it, Chief Constable Sylven made a jurisdictional error alone. I reach this conclusion for the following reasons.

[96] First, Sgt. Sandhu was not unfairly deprived of his right to timely notice under s. 112, or otherwise, by Chief Constable Sylven’s error. As the Commissioner emphasizes, notice obligations under s. 112 did not arise until Sgt. Sandhu became a respondent in April 2019, at which point he received adequate notice well in advance of the November 2019 hearing. I would not accede to Sgt. Sandhu’s submission that the scheme requires prompt and ongoing disclosure of the progress of an investigation unless such disclosure would hinder the investigation. Section 98 does not specify time lines for disclosing progress reports and the duty of fairness does not generally require disclosure in the investigative stage of a disciplinary proceeding: *Puar* at para. 22; *A Lawyer* at para. 107. Given the absence of clear statutory language imposing such an obligation, I would not find one implicit within the statutory scheme.

[97] Second, while I agree with Sgt. Sandhu that triggering an investigation is not a mere "administrative step", there was no unfairness associated with the timing of the investigation. Sgt. Sandhu engaged in the concerning conduct in the course of the investigation into Cst. M. That it was "substantially complete" when the Sandhu Notice of Complaint was issued is irrelevant from a fairness perspective. The scheme expressly contemplates the initiation of a new investigation based on information that comes to light in an ongoing investigation, and the timing of this investigation would not have differed materially had the Commissioner made the order under s. 93.

[98] Moreover, and most importantly, a decision to initiate an investigation is not a merits-based assessment regarding a subject member's "conduct and credibility". Rather, it is an assessment of whether alleged conduct, if substantiated, would constitute misconduct, akin to a screening determination made by the Commissioner under s. 82. In making that assessment, a statutory actor does not investigate, adjudicate or form any conclusions whatsoever on the merits of the allegation. That is the salient concern with respect to overlapping roles for purposes of procedural fairness: *Police Act*, ss. 82, 93; *Elsner* at para. 60; *Rosenstock* at para. 38; *Gardner* at paras. 14, 17.

[99] As to the issue of overlapping roles more generally, I agree with the Commissioner that the scheme envisions a disciplinary authority wearing "multiple hats" in the course of a disciplinary process. This includes the overlapping roles of "complainant" and adjudicator, albeit in a proceeding that was properly initiated by the Commissioner under either ss. 82 or 93. I also agree that
Chief Constable Sylven would have acted as the effective complainant in any event had he referred his concerns regarding Sgt. Sandhu's conduct to the Commissioner, just as he did when he ordered Inspector MacDonald to investigate Cst. M's similar conduct under s. 98(9) in strict accordance with the scheme.

[100] Bearing in mind the structure of the scheme and non-adjudicative nature of a decision to initiate an investigation, in my view, an informed person, viewing the

matter realistically and practically, and having thought it through, would not consider it more likely than not that Chief Constable Sylven, consciously or unconsciously, would not decide fairly at the adjudicative stage of the discipline process. While the Commissioner alone was authorized to initiate the investigation given the nature of the existing complaint, the fact that Chief Constable Sylven did so and later acted as adjudicator did not create a reasonable apprehension of bias. Nor, in my view, for the reasons discussed below, was Sgt. Sandhu unfairly deprived of a process in which the Commissioner might not have initiated an investigation. Further, to the extent any bias might be perceived in connection with Chief Constable Sylven's overlapping roles as complainant and adjudicator, it could be cured by a review on the record. A review on the record is a *de novo* determination by an independent adjudicator that would not be permeated by any possible prejudicial effects associated with those overlapping roles.

[101] Moreover, I do not accept Sgt. Sandhu's assertion that the acts and decisions that followed the unauthorized order to investigate were necessarily nullities. Neither *Annacis Auto Terminals* nor *Crook*, upon which he relies, support that broad proposition. On the contrary, both cases involved a single unauthorized decision: in *Annacis Auto Terminals*, an order assessing exempt Crown lands for taxation purposes; in *Crook*, a direction that a parent supervise children not in need of protection. Neither considered its possible impact on subsequent acts or decisions, which, in this case, were all authorized by the statutory scheme. As is apparent from *Chu* and some of the other cases I will discuss under the second ground of appeal, the fact that a jurisdictional error is made at the outset of an administrative proceeding does not necessarily nullify the acts and decisions that follow or require a remedy.

[102] Given all of the foregoing, the remaining questions in connection with procedural fairness are whether the process followed would have differed in any material respect in the absence of Chief Constable Sylven's error, and, relatedly, whether the Commissioner consented to that process as it unfolded. It is thus necessary to decide, if possible, whether the Commissioner would have ordered an

investigation and appointed Chief Constable Sylven as discipline authority had Chief Constable Sylven referred the matter to him, and whether the Commissioner consented to the process that was undertaken proceeding as it did. In other words, to decide whether Chief Constable Sylven's error was benign or consequential from a fairness perspective, these questions need to be answered, if possible, based on the evidence presented on the application. For reasons also discussed under the second ground of appeal, in my view the evidence clearly establishes the Commissioner would have initiated the investigation and appointed Chief Constable Sylven as discipline authority had Chief Constable Sylven referred his concerns regarding Sgt. Sandhu's conduct. It is equally clear that the Commissioner consented to the proceeding unfolding as it did.

[103] In sum, Sgt. Sandhu was not deprived of the process "to which he was entitled" in any sense that was material to its procedural fairness. As Sgt. Sandhu reasonably expected, the Commissioner provided civilian oversight throughout the process and was manifestly satisfied with its conduct, which, as the Chief Justice found, was not marred by "[t]he 'taint' of any errors or unfairness". Although Chief Constable Sylven lacked authority to order the investigation, the Commissioner had that authority and would have exercised it had he been asked to consider doing so. Thereafter, all concerned acted appropriately and within the bounds of their statutory authority. In these circumstances, while flawed, the process followed was fair.

[104] With this conclusion in mind, I turn now to the second ground of appeal.

Did the Chief Justice err in the Exercise of his Remedial Discretion? If so, what remedy, if any, should be granted?

Positions of the Parties

The Commissioner

[105] The Commissioner contends that the Chief Justice erred in the exercise of his remedial discretion by: distinguishing *Chu* by limiting its application to situations involving a "benign procedural flaw"; ignoring evidence that Chief Constable Sylven

notified him of all steps taken throughout; and, unfairly criticizing him for failing to adduce after-the-fact evidence on whether he would have ordered the same proceeding. In his submission, it was manifestly contrary to the interests of justice to quash the decisions and require the process to be repeated in the exceptional circumstances of the case.

[106] According to the Commissioner, *Chu* is instructive in all cases where an error is made in adding a new member to an existing complaint if substantially the same process would have been followed in the absence of the impugned error. As *Chu* illustrates, he says, the proper focus in all such cases is the interests of practicality and judicial efficiency, and whether quashing a decision would privilege form over substance and serve no useful purpose. In the Commissioner's submission, granting the relief sought in this case had that effect.

[107] In support of his submission, the Commissioner repeats that Sgt. Sandhu would have been in substantially the same position had he ordered the investigation, namely, participating in a discipline proceeding based on the same evidence from the same investigation. He also emphasizes Chief Constable Sylven was authorized to take every step he took after he initiated the investigation, and says that initial unauthorized act had no impact on the subsequent steps. According to the Commissioner, Sgt. Sandhu's only real complaint is the wrong statutory actor ordered the investigation at the outset. However, he says, in the absence of any procedural unfairness, quashing the decisions and remitting the matter for the process to be repeated would be contrary to the public interest and serve no useful purpose.

[108] The Commissioner also says the uncontradicted evidence is that Chief Constable Sylven kept him fully informed throughout the proceeding and, although he could have done so, he did not intervene. According to the Commissioner, it should be presumed that he fulfilled his statutory duty where, as here, there is no evidence to suggest otherwise. Given the absence of such

evidence, he says, the evidence clearly establishes that he considered the investigation warranted and accepted the proceeding should unfold as it did.

[109] Relatedly, the Commissioner says there is no contrary contemporaneous evidence with respect to his intentions. In his submission, there was obviously no perceived need for a s. 93 order initiating the investigation as no one questioned Chief Constable Sylven's authority to initiate it until after the disciplinary hearing took place. Moreover, he says, he should not be faulted for not adducing after-the-fact evidence on what he would have done had Chief Constable Sylven referred his concerns regarding Sgt. Sandhu's conduct. In his submission, it would be unhelpful to adduce such after-the-fact evidence, and the application should be decided on the record of what transpired.

[110] According to the Commissioner, it was manifestly contrary to the interests of justice to quash the decisions and require the process to be repeated. In his submission, the circumstances were exceptional and the relief sought should have been refused. Given the absence of procedural unfairness and other errors in the Chief Justice's analysis, he asks this Court to consider the matter afresh and exercise its own remedial discretion by allowing the appeal, setting aside the decision below, and dismissing Sgt. Sandhu's application for judicial review.

Sgt. Sandhu

[111] Sgt. Sandhu responds that the Chief Justice's exercise of discretion was error-free and his decision is entitled to appellate deference.

[112] According to Sgt. Sandhu, there was no evidence of what would have happened in the absence of Chief Constable Sylven's error beyond mere postulation. Moreover, even if the Commissioner tacitly consented to the investigation proceeding, he emphasizes he is a VPD member and therefore Chief Constable Sylven had no authority over him unless he was appointed external disciplinary authority. In Sgt. Sandhu's submission, had Chief Constable Sylven referred his concerns to the Commissioner, the Commissioner might not have appointed him as such, and, regardless, the process would have been different than

that actually followed. Most importantly, he submits, but for Chief Constable Sylven's error, he would have had the benefit of a disciplinary authority who had not already made determinations about his credibility before the matter was properly before that disciplinary authority.

[113] In support of his submission, Sgt. Sandhu argues that *Chu* is significantly distinguishable from this case because the defects in the two proceedings were starkly different. In particular, in *Chu* the Commissioner exercised his gatekeeping function by initiating the investigation based on the wrong statutory provision, whereas Chief Constable Sylven purported to exercise a power that he did not possess. In other words, Sgt. Sandhu submits, in *Chu* the right statutory actor performing the right statutory function merely relied on the wrong statutory section. However, in this case the wrong statutory actor usurped the non-delegable power of a different statutory actor and it was unclear whether the right actor would have exercised that power in the same way or at all.

[114] Most importantly, Sgt. Sandhu says, this was not a case like *Chu* where the process followed made "little practical difference". In his submission, by usurping the Commissioner's gatekeeping function, Chief Constable Sylven fundamentally recast the process that unfolded in this case. He emphasizes Justice Rothstein's warning in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, that the court must be very cautious about declining to exercise its remedial discretion where a process failed to comply with a statutory requirement because doing so may make inroads into the rule of law. With that caution in mind, he says this Court should defer to the Chief Justice's exercise of remedial discretion and dismiss the appeal.

Analysis

Governing Principles

[115] Judicial review is discretionary. Where an applicant makes out a case for review on the merits, the reviewing court nevertheless has an overriding discretion to refuse to grant relief, including where doing so would serve no useful purpose. As Justice Savage explained in *Yang v. Real Estate Council of British Columbia*, 2019

BCCA 43, this reflects a principled concern for judicial economy and a recognition that courts are intended to adjudicate disputes in a way that makes a practical difference to the rights of the parties: at paras. 10–12.

[116] A reviewing court may decline to grant relief in situations "where the decision under review would have been the same despite an error being demonstrated on the part of the administrative decision maker": *ISH Energy Ltd. v. British Columbia (Finance)*, 2017 BCCA 62 at para. 24. In some circumstances, in exercising its discretion not to grant relief, a court may allow an administrative process that failed to comply with statutory requirements to stand. For example, in *MiningWatch Canada*, the Court exercised its discretion not to require an environmental assessment to be repeated despite a finding that the process that was followed did not comply with the requirements of the governing statute. It did so because it saw no justification for requiring the process to be repeated when there was no challenge to the substantive decisions that were made: at para. 52.

[117] In *Chu*, this Court applied these principles in the context of a judicial review involving the disciplinary process under the *Police Act*. The petitioners in *Chu* sought to quash various decisions made within that process, including the Commissioner's decision to initiate proceedings against former Supt. Wiebe by adding him to a complaint made against former Chief Constable Chu using s. 82 (referred to as "Decision #4"). This was a manifest error because Supt. Wiebe was not named in the existing complaint and the scheme does not empower the Commissioner to amend a complaint against one member to include another member. Accordingly, the Court found, "the proceedings against Supt. Wiebe were fundamentally flawed from the outset" and the process followed "was clearly incongruent with the *Act*'s requirements". Speaking for the Court, Justice Abrioux explained this was so because s. 93, not s. 82, provides the mechanism for the Commissioner to initiate a proceeding against a member in the absence of a complaint: at paras. 109–113.

[118] However, despite the fundamental flaw in the proceedings, this Court refused to quash Decision #4 and remit the matter back to the Commissioner. Given the

significance of *Chu* for the parties in this case, it is helpful to reproduce a substantial portion of Justice Abrioux's analysis on whether to exercise the Court's remedial discretion in the circumstances of that case:

> [114] … should Decision #4 be quashed and remitted to the decision maker?
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> [115] In my view, it should not. I say this for reasons of practicality and judicial efficiency. Put simply, had [the Commissioner] acted under s. 93 rather than s. 82, essentially the same process would have unfolded, albeit under a different structure. In these circumstances, the interests of justice would not be served by requiring [the Commissioner] to restart the proceedings from the beginning.
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> [116] In *Vavilov*, the Supreme Court of Canada explained that courts' remedial discretion on judicial review must be guided by the need to promote "expedient and cost-efficient decision making", stating:
>
> > [142] … while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended … An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose … Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed …
> >
> > [Emphasis added; citations omitted.]
>
> [117] This may occur where a decision reflects benign procedural flaws. In *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, the Supreme Court cited with approval the case of *R. v. Monopolies & Mergers Commission*, [1986] 2 All E.R. 257, [1986] 1 W.L.R. 763 (C.A.):
>
> > [54] … In that case, a Chairman interpreted a statute administered by his Commission in order to determine whether a take over proposal had been abandoned. When he decided that abandonment had, in fact, occurred, he stopped a monopolies and mergers reference at the threshold stage. Upon judicial review, the Court of Appeal held that the Chairman had properly interpreted the statute, but the court also held that he had no statutory authority to act alone. Nonetheless, the

> discretionary remedies at the disposal of the court were withheld, at least partly because "[g]ood public administration is concerned with substance rather than form" and because the Commission "would have reached and would now reach the same conclusion as did their experienced chairman" (p. 774). Given the circumstances of this case as I have described them, this statement is accurate here, although I would reiterate its exceptional character and would not wish to apply it broadly.
>
> [Emphasis added.]
>
> [118] Similarly, quashing and remitting Decision #4 would, in my view, privilege form over substance. The appeal belongs to those "limited scenarios" in which doing so would "serve no useful purpose": *Vavilov* at para. 142.
>
> [119] As I have noted, quashing and remitting Decision #4 would sideline the fact that [the Commissioner] could have initiated substantially the same process against Supt. Wiebe under s. 93 that it began under s. 82. Supt. Wiebe acknowledges as much in his submissions but argues that Decision #4 ought to be quashed.
>
> [120] I disagree. The differences between s. 82 and s. 93 do not justify restarting the process. I acknowledge that the s. 93 procedure provides more limited rights of notice and participation to third parties than those available to complainants under s. 82. For example, had the proceedings against Supt. Wiebe been commenced pursuant to s. 93, the Charters would not have had standing to challenge DA Jones' decision which resulted in the appointment of DA Oppal. [The Commissioner], however, decided to make that appointment; and I note that it could have done so on its own initiative pursuant to s. 117(1) and (4) of the *Act*. The fact that the proceedings against Supt. Wiebe were initiated under s. 82, therefore, has made little practical difference.
>
> …
>
> [123] In my view it would not serve the interests of efficiency to interrupt the disciplinary proceedings in the manner urged by the appellants.
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> [Emphasis added.]

[119] In my view, the analysis in *Chu* is instructive whenever a reviewing court must decide whether to exercise its remedial discretion in a case where a new subject member was erroneously added to an ongoing disciplinary proceeding conducted under the *Police Act*. As the Commissioner submits, the proper focus in all such cases is the interests of justice, in light of the facts and considerations of fairness, practicality, and efficiency.

[120] When a reviewing court must decide whether to exercise its remedial discretion, the characterization of an impugned error as jurisdictional, legal or procedural may be of limited significance. Notably, the *Monopolies & Mergers Commission* decision that Justice Abrioux drew upon involved a jurisdictional error made by a statutory actor who lacked authority to make the decision under review. Nevertheless, the court declined to set aside that unauthorized decision, allowing it to stand on the basis that the authorized decision-maker would have reached the same decision.

[121] Moreover, "any challenge to an administrative decision can be characterized as 'jurisdictional' in the sense that it calls into question whether the decision-maker had the authority to act as it did": *Vavilov* at para. 66. In my view, the most salient question is not whether the impugned error is characterized as "procedural" or "jurisdictional" in nature. Rather, it is whether the error was "benign" in its impact on the fairness of the proceedings, and whether quashing and remitting the decision under review would serve the interests of justice in the circumstances of the case. While I accept that this will rarely be so in cases involving jurisdictional errors, as this case illustrates, from time to time exceptional cases do occur.

Application of Principles

[122] As I have explained, the Chief Justice erred in principle in his procedural unfairness analysis. Accordingly, this Court is entitled to interfere with his exercise of remedial discretion and undertake our own review based on the record.

[123] Contrary to the Chief Justice's appreciation of the record, in my view, the uncontested evidence clearly establishes that the Commissioner would have initiated the proceeding had Chief Constable Sylven referred the information regarding Sgt. Sandhu to him for a s. 93 order. The Commissioner's statutory role is to ensure that police misconduct is dealt with in the public interest and Sgt. Sandhu's alleged conduct, if substantiated, manifestly constituted serious misconduct by a senior officer. As the Commissioner submitted, given the serious nature of the

allegation, there is no reason whatsoever to think that he would not have ordered the investigation. Nor has Sgt. Sandhu suggested one.

[124] Further, the evidence reveals that after he received the complainant's email expressing concern that two VPD officers were providing conflicting versions of the incident involving Cst. M and suggesting an outside police agency complete the investigation, the Commissioner issued the External Appointment. As previously noted, in the External Appointment he described the complainant's email and, among other things, ordered that the investigation "include any potential misconduct, or attempted misconduct, as defined in s. 77 of the *Police Act* that may have occurred in relation to this incident". In my view, it is abundantly clear from this contemporaneous evidence that the Commissioner considered the deceitful conduct alleged to warrant external investigation.

[125] I also agree with the Commissioner that there was no contrary contemporaneous evidence regarding his intentions with respect to the proceeding. As he points out, there was no perceived need for a s. 93 order when Chief Constable Sylven had already initiated an investigation. That the Commissioner did not also order an investigation in these circumstances is of no moment. Nor did Inspector MacDonald fail to report Sgt. Sandhu's concerning conduct, as was apparently argued before the Chief Justice. On the contrary, Chief Constable Sylven rejected the First FIR based on Inspector MacDonald's report. Furthermore, it would have been unhelpful and arguably inappropriate for the Commissioner to adduce after-the-fact evidence as to what he would have done had Chief Constable Sylven referred his concerns for a s. 93 order. By its nature, such after-the-fact evidence could carry little, if any, weight on judicial review.

[126] In sum, given the serious nature of Sgt. Sandhu's alleged conduct, the Commissioner's statutory role, and the absence of contrary evidence regarding his intentions, the evidence clearly established that the Commissioner would have ordered the investigation had Chief Constable Sylven referred the matter to him. Although I would not base this conclusion on a presumption, it is the only reasonable

inference available on the clear, persuasive, and uncontested body of evidence presented on the application.

[127] Relatedly, I would accept the Commissioner's submission that, when ordering an external investigation, he would have appointed Chief Constable Sylven as external discipline authority. The alleged conduct was closely related to, and committed in the course of, the ongoing proceeding against Cst. M. In the External Appointment, the Commissioner stated his view that an external discipline authority should be appointed because "[t]he concerns expressed by [the complainant] regarding the investigation being conducted by the VPD can reasonably be extended to the DA decision from a senior member of the VPD in that any real or perceived conflict could be avoided if an external DA was appointed". The concerns to which he referred related to both VPD officers described in the complainant's email.

[128] In addition, practical considerations of cost and efficiency militated strongly in favour of appointing Chief Constable Sylven to conduct a combined disciplinary proceeding. Further, when Chief Constable Sylven presided over the combined proceeding, the Commissioner actively oversaw the process, raised no concerns, and did not intervene. Again, in my view, on this record, there is no reason to think that the Commissioner would have done anything other than appoint Chief Constable Sylven as external discipline authority. Nor is there any reason to think that he did not consent to the process followed in this case.

[129] Moreover, this is not a case such as *Bentley* or *Florkow*, in which quashing the decisions at issue made a practical difference, in part because applicable time limits had passed. In contrast, in this case, as Sgt. Sandhu conceded before the Chief Justice, nothing prevents the Commissioner from initiating a new investigation into his conduct. Nor would anything prevent that investigation from incorporating the fruits of the existing investigation.

[130] I am mindful of Justice Rothstein's warning in *MiningWatch* that courts must be cautious about declining to exercise remedial discretion where a process failed to

comply with a statutory requirement. However, given all of the foregoing, I consider this to be an exceptional case in which it would not be in the interests of justice to quash the decisions regarding Sgt. Sandhu and require the process to be repeated, with all of the associated cost and delay. The process was fair, the misconduct in question was serious, and the substantive decision is unchallenged. As the Commissioner submits, in the absence of the impugned error substantially the same process would have been followed. In these circumstances, no useful purpose would be served by requiring the parties to start the process over again.

Conclusion

[131] For all of these reasons, I would allow the appeal, set aside the decision below, and dismiss the application for judicial review.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Fenlon"