IN THE MATTER OF A PROCEEDING UNDER THE POLICE ACT, S.N.B. 1977, c. P-9.2.

BETWEEN: **THE CHIEF OF POLICE, FREDERICTON POLICE FORCE**

(the "Complainant")

–and-

CONSTABLE CHERIE CAMPBELL

(the "Respondent")

DECISION

Appearances:

For the Complainant

Mr. Jamie Eddy and Ms. Jessica Bungay
Cox & Palmer
Barristers and Solicitors

For the Respondent

Mr. Thomas J. Burke, Q.C., and Ms. Emily Cochrane
The Burke Law Group
Barristers & Solicitors

Dates and place of hearing:

August 25, 2015
November 27, 2015
December 7, 8 and 9, 2015
December 16, 2015
Fredericton, NB

Date of Decision: January 6, 2016

Arbitrator: Cedric L. Haines, Q.C.

BACKGROUND

1. Chief Leanne Fitch (referred to in this decision as "Fitch" or the "Complainant"), the Chief of the Fredericton Police Force, has made a complaint (the "Complaint") against Constable Cherie Campbell (referred to in this decision as "Campbell" or the "Respondent"), a member of the Fredericton Police Force. The complaint alleges that the Respondent has breached the *Police Act* (the "*Police Act*"), S.N.B. 1977, c. P-9.2.

2. The Complainant alleges that the acts and/or omissions of the Respondent constitute a breach of sections 35(a) and (l), 36(1) (a) (ii), (c) and (d) (ii) and 47 the *Code of Professional Conduct Regulation* (the "*Code of Conduct*"). Particulars of the acts and/or omissions complained of are as follows:

> On or about December 2, 2014 Constable Cherie Campbell, while off-duty, attended Marden's Surplus & Salvage in Houlton, Maine, USA. While at Marden's Surplus & Salvage, Cst. Campbell was observed placing several items of merchandise in her pocket. Cst. Campbell left Marden's Surplus & Salvage without paying for the merchandise she had placed in her pocket, thereby committing theft. The security personnel of Marden's Surplus & Salvage who observed Cst. Campbell's behavior apprehended Cst. Campbell in the parking lot and called the police. As a result of her conduct, Cst. Campbell was issued a criminal trespass notice and arrested for theft.
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> During her encounters with the security personnel and the police who attended to this matter, Cst. Campbell asserted that she was a police officer and that the security personnel and/or police ought to exercise their discretion such that she should not be criminally charged. In engaging in such conduct, Cst. Campbell attempted to utilize her position as a police officer to gain favourable treatment.
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> Subsequent to being apprehended by the security personnel of Marden's Surplus & Salvage, Cst. Campbell was observed speaking on her cellular phone with another member of the Fredericton Police Force. Cst. Campbell expressed concern about the Fredericton Chief of Police becoming aware of her conduct on the date in question. Cst. Campbell attempted to persuade the member of the Fredericton Police Force from disclosing her conduct to the Fredericton Chief of Police.[1]

3. Sections 35(a) and (I), 36(1)(a)(ii), (c) and (d)(ii) and 47 the *Code of Conduct* provide as follows:

[1] Exhibit C-3.

35 A member of a police force commits a breach of the code if he or she does any of the following:

(a) engages in discreditable conduct as described in section 36;

…

(l) is a party to a breach of the code as described in section 47; …

36(1) A member of a police force engages in discreditable conduct if

(a) the member, while on duty, acts in a manner that is

…

(ii) likely to bring the reputation of the police force with which he or she is employed into disrepute, …

…

(c) the member, while off duty, asserts or purports to assert authority as a member of a police force and does an act that would constitute a breach of the code if done while the member is on duty,

(d) the member, while on or off duty,

…

(ii) withholds or suppresses a complaint or a report concerning a complaint,

47 A member of a police force is a party to a breach of the code if the member aids, abets, counsels or procures another member of the police force to which he or she belongs to commit a breach of the code or is an accessory after the fact to a breach of the code.

4. A Notice of Arbitration Hearing was served on the Respondent on July 20, 2015.

5. I was selected by the parties as Arbitrator in this matter pursuant to Section 33.02 (1) of the *Police Act* and on July 30, 2015, I confirmed to the parties that I accepted the appointment as Arbitrator in this matter.[2]

6. On August 5, 2015, after consulting the solicitors for the parties, I issued a Notice of Hearing to the parties advising them that the hearing of the Complaint would be held in Fredericton, NB, on August 25, 2015.[3]

[2] Exhibit C-1.

[3] Exhibit C-1.

7. I commenced hearing of the Complaint on August 25, 2015. The hearing was commenced and conducted for the limited purpose of determining the number of days required for the hearing of evidence and the dates on which the parties, and their solicitors, would be available to proceed. Following this brief hearing I issued a Notice of Continuation of Hearing advising the parties that hearing of the Complaint would continue on December 7, 2015.[4]

8. On November 27, 2015 I participated in a telephone conference call with the solicitors for the parties. The telephone conference call was held for the purpose of hearing a motion made by the Respondent requesting an adjournment *sine die* of the hearing. With the consent of the parties, the discussions of the parties and the arbitrator were not recorded in accordance with the *Recording of Evidence Act*, SNB 2009, c R-4.5. Following the hearing I issued an Interim Order dismissing the motion.[5]

9. On resumption of the hearing, on December 7, 2015, an objection to my jurisdiction to hear this matter was made by the Respondent and the Respondent. The Respondent's objection was based on an allegation that my name was improperly placed on the list of arbitrators established and maintained by the New Brunswick Police Commission (the "Commission") in compliance with section 8 of the *Code of Conduct*. I address this objection in this decision.

10. On December 7, 2015, the alleged breaches of the *Code of Conduct* were read by me to the Respondent, following which reading she was immediately given the opportunity to admit or deny each of the alleged breaches. The Respondent denied each of the allegations.

11. Following the Respondent's denial of the allegations, I called on legal counsel the then requested legal counsel for the New Brunswick Police Commission to proceed to the proof of these allegations. The standard of proof in these proceedings, it is to be noted, is that of

[4] Exhibit C-1.
[5] Exhibit C-1.

the "balance of probabilities".[6] I also take note that as an Arbitrator I am allowed by law to "hear and accept any relevant evidence even though it is not admissible under the rules applying to trials in The Court of Queen's Bench of New Brunswick".[7]

12. A number of witnesses were called upon by the Complainant to testify at the hearing of this matter.[8]

13. At the conclusion of the presentation of evidence by the Complainant, having determined that a *prima facie* case has been made out by the Complainant, I provided the Respondent with an opportunity to call evidence. The Respondent called no evidence. I note that under section 19 of the *Code of Conduct*, as the member of a police force who is alleged to have committed breaches of the *Code* under section 35, the Respondent is not compelled to testify at the arbitration hearing.

14. All oral evidence at the hearing of this matter was given under oath or affirmation and the entirety of the proceedings before me were recorded in accordance with the *Recording of Evidence Act*.

15. The Respondent objected to the admissibility in evidence of entries in her service record of discipline, entries which she maintains were expunged in accordance with section 4 of the *Code of Conduct*. I address this objection in this decision.

THE OBJECTION TO MY JURISDICTION

16. The solicitor for the Respondent objects to my jurisdiction to hear this matter.

17. The Respondent argues that that public confidence is essential to the proper functioning of the justice system as a whole. Public confidence can only be ensured by the independence

[6] *Police Act*, subsection 32.6(1).
[7] *Inquiries Act*, R.S.N.B. 1973, c. I-11.
[8] Sargeant Edward Smith, Ms. Sarah Foster, Mr. Stephen Shannon and Officer Stephen Nason were called as witnesses by the Complainant.

of the decision maker and the confidence of the parties that they will be treated impartially and without bias. These principles, I agree, are part of the fabric of the law in Canada.

18. In support of his objection, the solicitor for the respondent called Mr. Robert Davidson ("Davidson") as a witness. Davidson is employed as a Labour Analyst by the New Brunswick Police Association.

19. Davidson testified that the selection of arbitrators whose names appear on the list of arbitrators established and maintained by the New Brunswick Police Commission (the "Commission") in compliance with section 8 of the *Code of Conduct* have, since the 2005 revisions of the *Police Act* came into force, been persons whose selection has been agreed on by the various stakeholders in the New Brunswick policing community sitting on the Police Act Review Committee, which included representatives of police officers in New Brunswick.

20. Davidson also testified that my name and that of some of the other arbitrators whose names appear on the Commission's list of arbitrators were not agreed to by the Police Act review Committee.

21. Davidson referred to a letter[9] dated May 27, 2005 which he received from the then Minister of Public Safety in which it is stated, in part:

> We agreed on a number of actions on which our go forward approach will be based. I wish to reiterate the following commitments I made with regard to the NB Police Act amendments process:
>
> As my staff commence the Regulation drafting process, in support of the amendments contained in Bill 50, the final Police Act Review Committee (PARC) recommendations specific to the issue of the 'list of arbitrators' and fee schedule to be maintained by the NB Police Commission will be reviewed to ensure the wording to be added to the Regulation is consistent with the recommendation of the Committee.
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> Secondly, the PARC membership will be refreshed with representative organizations. It will be re-convened to continue the Police Act review process, beyond this current amendment package, for identification of recommendations for future amendments to the Act, to receive input to the drafting of the

[9] Exhibit R-1.

> Regulation, and to discuss the process for periodically reviewing the 'list of arbitrators'.

22. On the basis of this 2005 statement by the Minister of Public Safety, as well as minutes and other documents[10] of the working of the Police Act Review Committee on which he sat, Davidson concluded that an agreement had been reached with the Minister that the names of no persons would appear on the list of arbitrators unless the Police Act Review Committee had agreed to the addition of the name.

23. The *Police Act* provides, in section 33.01, that the Commission "shall, in accordance with the regulations, establish and maintain a list of persons who have indicated a willingness to act as an arbitrator …"

24. The *Code of Conduct* provides as follows with respect to the establishment and maintenance of a list of arbitrators:

> 8 The Commission shall establish and maintain a list of arbitrators who shall meet the following criteria:
>
> (a) is any one of the following:
>
> (i) a lawyer who is a member in good standing of the Law Society of New Brunswick;
>
> (ii) a lawyer who is a member in good standing of the governing body of the legal profession in another province or territory of Canada; or
>
> (iii) a member or former member of the judiciary in Canada;
>
> (b) Repealed: 2009-87
>
> (c) does not act as a representative at a settlement conference or arbitration hearing; and
>
> (d) does not give legal advice on any police matter to a party to an arbitration hearing either before or during an arbitration hearing.

25. I note that the Respondent does not object to my jurisdiction to hear this matter by reason of my failure to meet the criteria identified in section 8 of the *Code of Conduct*. As goes the argument of the Respondent, the Commission's right to determine the names of persons

[10] Exhibits R-2, R-3, R-4 and R-5.

whose names are to appear on the list of arbitrators has been fettered by a ministerial commitment.

26. Although the Minister has many duties to perform under the *Police Act* and the various regulations made under the *Act*, the establishment and maintenance of a list of arbitrators is not a duty which the Minister is required to perform, nor is it a right conferred on the Minister by law. The duty and obligation to establish and maintain the list of arbitrators is that of the Commission and not that of the Minister.

27. The Minister's letter of May 27, 2005, when read as a whole, point to commitments on a "go forward" basis respecting the *Police Act* amendments process then underway. The Minister states his commitment to ensuring that the wording of the regulations under the *Police Act* respecting the list of arbitrators and the fee schedule to be maintained by the Commission would be "consistent with the recommendation of the Committee". The Minister also states his commitment to refreshing the Police Act Review Committee membership and to have the Committee continue the *Police Act* review process "beyond this current amendment package, for identification of recommendations for future amendments to the Act, to receive input to the drafting of the Regulation, and to discuss the process for periodically reviewing the 'list of arbitrators'."

28. The *Code of Conduct* was filed on December 21, 2007 and since that time has been part of the regulatory fabric under the *Police Act*. I can only conclude, in the absence of any evidence to the contrary and in the absence of any evidence of objections to the wording of section 8 of the *Code of Conduct* by the Committee, that the wording in the *Code of Conduct* respecting the establishment and maintenance of a list of arbitrators met with the approval of the Committee.

29. As to the second ministerial commitment, I note that the Minister committed only to a discussion of the process for periodically reviewing the list of arbitrators. This, in my opinion, is quite different from an agreement giving the Police Act Review Committee a veto on the addition of names to the list of arbitrators.

30. Davidson also testified to the existence of guidelines[11] for the appointment of arbitrators.

31. The guidelines to which Davidson referred provide, in part, as follows:

> Individuals will be chosen by the Sub-committee [a sub-committee of the Police Act Review Working Committee] and appointed to a Register of Arbitrators. The primary criterion for all individuals who are to be appointed to the Register of Arbitrators is that they be accepted by all constituents represented on the Sub-committee.
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> …
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> … Arbitrators will submit their decision no later than 30 calendar days following the last day of the hearing. Arbitrators must file their award with the parties involved in the dispute as well as the Sub-committee and the New Brunswick Police Commission.

32. I have two observations to make with respect to the guidelines to which Davidson referred. First, the portion dealing with appointment of arbitrators is at odds with the wording of section 8 of the *Code of Conduct* in that a reference to a "primary criterion" of acceptability by all members of the Sub-committee does not appear in the criteria for selection under section 8. Second, the reference in the guidelines to decisions being submitted "no later than 30 calendar days following the last day of the hearing" is clearly at odds with subsection 17.96 (2) of the *Police Act*, which provides that an arbitrator is required to give a notice in writing of his or her decision within 15 days of completion of the hearing and not 30 days as referred to in the guidelines to which Davidson referred.

33. In *Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Education v. Kennedy et al.*, 2015 NBCA 58 (CanLII), Chief Justice Drapeau, speaking on behalf of the Court of Appeal of New Brunswick, at paragraph 79 of the Court's decision, quoted from the decision of the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559, in which it was said at paragraph 95:

[11] Exhibits R-3 and R-5.

> The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis in original.]

34. I am of the opinion that the expectation to which Davidson alluded in his testimony and on which the Respondent's objection is based is not founded in law. There is before me no evidence establishing a clear, unambiguous and unqualified basis for such an expectation. Moreover, the evidence on which the Respondent relies in support of her objection fails to establish any lack of independence on my part or that she will not be treated impartially and without bias. I also note Davidson's testimony to the effect that the members of the Police Act Review Committee had agreed that no one arbitrator would be selected for two consecutive hearings involving the same police department. This is contrary to what is provided for in the regulatory scheme under the *Police Act* and contrary to public policy.

35. The Respondent's objection is dismissed.

FACTS

36. The Respondent commenced employment with the Fredericton Police Force in 2004. The Respondent now is classified as a Constable 1A and works as a Primary Response Team member. As a member of the Primary Response Team she, along with other members of the Team, is responsible for the enforcement of a number of statutes, including the *Criminal Code of Canada*. The position which she holds is what is referred to as a "high visibility" position and involves daily contact with members of the public.

37. Members of the Fredericton Police Force are expected to demonstrate trust, honesty and integrity in both their on-duty and off-duty conduct.

38. The events giving rise to this matter occurred on December 2, 2014 at Marden's Surplus & Salvage ("Marden's") in Houlton, Maine, USA. Marden's is a retailer of factory overstock and salvaged goods. It operates from various locations in the State of Maine, including one in Houlton, Maine. Marden's Houlton retail facility has an on-site video surveillance/recording system and a good part of the evidence before me comes from a recording made of the Respondent by use of this system.

39. This case is about an allegation of theft of a small number of makeup items by the Respondent from Marden's.

40. At a point in time before 10:00 a.m. on December 2, 2014, the Respondent entered Marden's retail store in Houlton, Maine. At approximately 9:49 a.m., Stephen Shannon ("Shannon"), Marden's loss prevention employee who was monitoring the store's video feed, observed the Respondent holding several small makeup items in her hand. She then placed the items in the top part of her cart, which already had a number of items in it, including what appeared to be magazines or kids' activity books. A few seconds later she picked up the makeup items and then proceeded to walk around the store. She continued to shop, holding the makeup in her hand while selecting another, larger item for purchase and placing it in her cart.

41. A few minutes later the Respondent was seen to remove her cell phone from her coat pocket and place the cosmetics in that pocket. Then she appeared to zip up the pocket a bit. On arrival at the store's cash register the Respondent attempted to place her cell phone in her left pocket, in which the makeup items were located, but then she switched and placed the phone in her right pocket. She was seen to zip up her left coat pocket at the cash register before she paid for the items in her cart. The items in the cart, and for which the Respondent paid, had an approximate retail value of $83.00 (U.S.).

42. She then proceeded out of the store and into the parking lot.

43. Shannon followed her out to the parking lot and asked her to come back inside the store. Shannon did not tell the Respondent why he was making the request and the Respondent made no comment, but she did turn around and go back into the store.

44. Once Shannon and the respondent had entered the store, the Respondent said "I know what this is for. It's about the makeup," She also added that she was a police officer. Those comments were unsolicited, he said, and he told her they could talk about it more in his office.

45. On arrival to Shannon's office the Respondent was asked by him if she knew why he'd stopped her, and Campbell said she did, that it was over the makeup. The Respondent then unzipped her coat pocket, removed the items from it and placed them on Shannon's desk. The makeup items which the Respondent placed on the desk had a retail value of approximately $20.00 (U.S.).

46. Shortly thereafter, two Officers of the Houlton Police Force attended at Marden's. Officer Stephen Nason, one of the officers, was equipped with a body camera. The Respondent at the outset identified herself to Officer Nason as a police officer. Officer Nason then told her that he was going to review the store's surveillance video before proceeding any further.

47. After having viewed the store's surveillance video[12], Officer Nason engaged in a conversation with the Respondent. He asked her if she had any identification, to which she replied she had none. Officer Nason then read the Respondent her rights, including the right to remain silent. The Respondent, when asked if she understood her rights as read out to her, replied in the affirmative and she stated that she wished to answer questions at that time.

48. She related her version of the events and emphasized that she had had no intent to steal.

49. When asked by Officer Nason how she had gained entry into the U.S. that day, the

[12] Exhibit C-4, Tab 18.

Responded remembered that she had her passport in her possession.

50. The video surveillance was then reviewed with the Respondent. The Respondent repeatedly admitted to taking items for which she had not paid out of the store. She however denied, also a number of times, having had any intent to commit theft.

51. The Respondent did a number of times during the course of her conversation with Officer Nason refer to the fact that she was a police officer. The following extracts from the unofficial transcript[13] of the voice recording of Officer Nason's body camera system are some of the more extensive mentions the Respondent made of being a police officer:

> CC: I would think in my situation that I would feel pretty shitty if I were you right now. Having to look at me saying that I'm a police officer here. That I'm putting you in a very uncomfortable, terrible situation. But, I'm telling you, and I'm not even going to do the whole tear thing but, there was no intent there whatsoever, to walk out of this store today. Especially because I'm not going to lose my job over some makeup that I'm trying to give to some single mother. [page 6]
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> …
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> CC: Absolutely. But I also do, and unfortunately because of the amount on the, on the stickers on the lipstick and the, I don't even know what the other stuff, eyeliner, is. It's a significant amount too. I've used discretion on things under a certain amount of dollars. Whatever. And I give people a break. And I give them the trespass notice. And I'm s-, and please, like, if you only understand, in my profession, if I go back with a charge, I could be suspended. Without pay. And this is where it's getting upset, because I didn't, yes, based on your experience and your experience and my own experience, that is exactly what it is. And I walked out of here without making any attempt to pay for that, those items. And I walked out into the thing. [page 7]
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> …
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> CC: But I'm asking you, as a, and I don't even want to ask it because I don't like it when people even when I them over and the first they do is they drop their names, that they're a police officer and they're speeding. But what I'm asking you is that, let me have the trespassing and please not charge me for theft. [pages 7 and 8]

[13] Exhibit C-4, Tab 19.

52. Sarah Foster, Marden's store manager, testified that while present in Stephen Shannon's office she overheard part of a telephone conversation that the Respondent was having with an unidentified person. She testified that she thought the person to whom the Respondent was speaking on the phone was the Respondent's superior and, possibly, her union representative. She testified hearing the Respondent say to the person with whom she was speaking that she wanted the event in which she was involved to be kept "quiet" "so the Chief doesn't find out about this".

53. As a result of the events that occurred at Marden's on December 2, 2014, the Respondent was issued a Criminal Trespass Warning[14] and she was charged with theft[15].

54. The Criminal Trespass Warning was issued to her by Marden's and prohibited her from entering any of Marden's facilities in the State of Maine for a period of one year.

55. The theft charge was eventually tried by a judge and jury in the Maine Superior Court in Houlton, Maine, on May 27, 2015. The Respondent had entered a plea of not guilty and she did testify at the trial. The trial resulted in a hung jury.

THE ARGUMENTS OF THE PARTIES

56. Oral arguments were made at the conclusion of this matter and the parties submitted written briefs on the abuse of process issue raised by the Respondent's counsel in his arguments.

The Arguments on behalf of the Complainant

57. The solicitor for the Complainant argues that the alleged theft must be determined on a balance of probabilities. He also argues that the required elements to establish a theft are all before me.

[14] Exhibit C-4, Tab 13.
[15] Exhibit C-4, Tab 14.

58. The theft itself, according to the solicitor for the Complainant, is a mid-scale offence. There are certainly more serious offences, as there are, according to him, less serious offences. What makes this matter serious are the actions of the Respondent after the theft: she did not accept responsibility for her actions, she lied to the Houlton Police, she lied to the U.S. Border Services, she attempted to use her position to have the Houlton Police drop the theft charge, she attempted to advise her superior officer from disclosing her conduct to the Complainant, she lied to fellow police officers and she lied at her criminal trial in Maine Superior Court.

59. The solicitor for the Complainant argued that the Respondent has no rehabilitative potential and that the only appropriate discipline to be imposed is a termination of the Respondent.

The Arguments on behalf of the Respondent

60. Counsel for the Respondent argued that I had no jurisdiction to act as arbitrator in this matter. I have dealt with this argument and given my decision above.

61. He also argued that the evidence before me did not establish that the Respondent had the requisite intent to commit theft.

62. Counsel for the Respondent, in his closing arguments, argued that these proceedings are an abuse of process inasmuch as the Complainant is seeking re-litigation of an issue previously tried in Maine Superior Court.

63. Finally, the Respondent's solicitor argued that the Respondent's service record of discipline[16] ought not to be considered in this matter by reason of the operation of subsection 4(1), 4(2) and 4(3) of the *Code of Conduct*.

[16] Exhibit C-4, Tabs 3, 4, 5 and 6.

ANALYSIS AND DECISION

The abuse of process argument

64. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63 (CanLII), Arbour J., writing for the majority of the Supreme Court of Canada, stated at paragraph 35 of the reported decision:

> 35. Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:
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> > . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

65. This case comes within the scope of the decision of the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 SCR 541, 1987 CanLII 41 (CanLII), where an RCMP officer committed a common assault, as defined in the Criminal Code, which was also a "major service offence" under the *Royal Canadian Mounted Police Act.* The major service offence was dealt with first. The trial judge quashed the information for the charge of common assault under s. 24(1) of the *Canadian Charter of Rights and Freedoms* on the ground that the accused was being tried twice for the same misconduct contrary to s. 11 of the *Charter.* In holding that the fact that the officer had already been disciplined for the same conduct was no impediment to the criminal proceeding, Wilson J. (speaking for the majority) held at para. 28:

> 28. I would hold that the appellant in this case is not being tried and punished for the same offence. The "offences" are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major service offence and has, therefore, accounted to his profession. The other offence is the criminal

> offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice quoted above, I am of the view that the two offences were "two different matters: totally separate one from the other and not alternative one to the other". While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions. I would respectfully adopt the following passage from the reasons of Cameron J.A. in the court below:
>
> > A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public.... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.

66. The decision of the New Brunswick Court of Appeal in *Belong v. Her Majesty the Queen in Right of the Attorney General of Canada and Timothy Quigley,* 2013 NBCA 68 (CanLII), is also applicable. In that case, an RCMP officer had been acquitted of several charges of domestic violence, but in spite of the acquittals disciplinary proceedings continued. He subsequently commenced a civil action for abuse of process which was dismissed, and subsequently appealed. In addressing the issue of abuse of process, Bell J.A. held at paragraphs 14 to 18:

> [14] In pleading this ground of appeal, Cst. Belong appears to confuse the concept of the doctrine of abuse of process, with its roots in the doctrine of *res judicata* and issue estoppel, with the tort of abuse of process. The doctrine of abuse of process is concerned with maintaining the integrity of the judicial process by, for example, preventing the same issue from being litigated in multiple forums. This avoids the risk of inconsistent results which would bring the administration of justice into disrepute. The tort, on the other hand, is meant to address situations in which a person uses the processes of the court for an improper purpose. The trial judge articulated that the tort of abuse of process requires the establishment of the following two essential elements: 1. the misuse of process for any purpose other than that which it was designed to serve; and 2. some overt act or threat, distinct from the proceedings themselves, in furtherance of the improper purpose.

[15] Cst. Belong failed to establish these elements. No evidence was led at trial to demonstrate the existence of a collateral or improper purpose behind the RCMP's decision to proceed with the disciplinary charges. Furthermore, Cst. Belong led no evidence of a definite act or threat in furtherance of such a purpose. Instead, Cst. Belong's focus at trial was, and on appeal continues to be, that the disciplinary proceedings became an abuse of process by virtue of his acquittal on the criminal charges. He contends the trial judge ignored the decision of the Court in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, and the observations of Cromwell, J.A. (as he then was) in *Haché v. Lunenburg County District School Board*, 2004 NSCA 46 (CanLII), [2004] N.S.J. No. 120 (QL). Neither of those cases considered the tort of abuse of process. Rather, they were administrative law cases in which the integrity of the adjudicative process was called into question because of the possibility of conflicting outcomes on the same issue by different adjudicative bodies. The Courts concluded that, in such cases, the potential for different outcomes on the credibility issue, and hence the ultimate decision, would bring the administration of justice into disrepute. Parenthetically, even though Haché is not applicable, it is interesting to note Cromwell J.A.'s statement with respect to criminal and civil proceedings that arise out of the same factual circumstances:

> [. ..] generally speaking, acquittal at a criminal trial does not foreclose relitigation of the same allegations in the employment context. One reason for this is that there is no inconsistency between an acquittal, which reflects the Crown's inability to establish its case beyond a reasonable doubt, and a finding in the employment context of just cause for discharge arising from the same facts, which need not be proved to the criminal standard. [para. 55]

[16] This is not a situation akin to Haché where the doctrine of abuse of process was applied to prevent a disciplinary proceeding from continuing after the accused was acquitted at trial on the basis that no weight could be given to the complainant's evidence. In the present case, there was no re-trial of the criminal charges and, hence, no negative credibility findings. C. U.P.E. is also distinguishable. In C.U.P.E. the grievor, who was found guilty in the criminal context, was later found not to have committed the offence in the context of an administrative proceeding regarding his employment. The Court concluded that in the absence of new evidence demonstrating innocence, it was not open to the grievor (offender) to relitigate his innocence on a lower standard. To permit him to do so would have called into question the trustworthiness of the guilty verdict.

[17] In summary, the facts and the law at issue in the present case are not at all similar to those in Haché and C.U.P.E. First, as already mentioned, they were not cases in which the tort of abuse of process had been pleaded. Second, in the present case there was no adjudication of Cst. Belong's guilt or innocence

> based upon the testimony of Cst. Haywood. The determination of innocence was based solely upon the Crown decision to offer no evidence. Third, the trial judge acknowledged the equivocal recantation of the sexual assault by Cst. Haywood, but concluded that recantation could not be used to invalidate the RCMP decision to proceed with disciplinary charges founded on other allegations.
>
> [18] Applying *R. v. Wigglesworth*, 1987 CanLI1 41 (SCC), [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71 (QL), the trial judge correctly acknowledged that criminal and disciplinary proceedings can flow from the same facts and, given the different standards of proof, disciplinary proceedings can proceed even if the criminal proceedings have resulted in an acquittal.

67. I accept and apply the conclusions of Bell J.A. in *Belong* to the effect that criminal and disciplinary proceedings can flow from the same facts and, given the different standards of proof, disciplinary proceedings can proceed even if the criminal proceedings have resulted in an acquittal. In the matter before me the criminal proceedings respecting the charge of theft by the Respondent in Maine Superior Court resulted in a hung jury. There was no finding of guilt or innocence of the Respondent.

68. I do not accept the Respondent's argument on abuse of process.

The standard of proof

69. The *Police Act*, at subsection 32.6(1), provides that the standard of proof in arbitration matters under the *Act* is the following:

> 32.6(1) If the arbitrator finds on a balance of probabilities that a member of a police force is guilty of a breach of the code, the arbitrator may impose any disciplinary or corrective measure prescribed by regulation.

70. Legal counsel for the Respondent argues, and legal counsel for the Complainant agrees, that "clear, convincing and cogent" evidence is required in order to sustain a breach of the *Code of Professional Conduct*.

71. In *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII), in which Rothstein J. stated at paragraphs 40, 45 and 46:

> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.
>
> …
>
> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

72. The law requires that I scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred and base my findings on clear, convincing and cogent evidence to satisfy the balance of probabilities test.

The standard of conduct applicable to police officers

73. The following provision respecting the standards applicable to police officers is found in section 34 of the *Code of Conduct*:

> 34. It is incumbent upon every member of a police force:
> (a) to respect the rights of all persons;
> (b) to maintain the integrity of the law, law enforcement and the administration of justice;

(c) to perform his or her duties promptly, impartially and diligently, in accordance with the law and without abusing his or her authority;
(d) to avoid any actual, apparent or potential conflict of interests;
(e) to ensure that any improper or unlawful conduct of any member of a police force is not concealed or permitted to continue;
(f) to be incorruptible, never accepting or seeking special privilege in the performance of his or her duties or otherwise placing himself or herself under any obligation that may prejudice the proper performance of his or her duties;
(g) to act at all times in a manner that will not bring discredit on his or her role as a member of a police force; and
(h) to treat all persons or classes of persons equally, regardless of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity.

74. In *New Brunswick Police Commission* v. *Constable John Morrison (*August 20, 2014, unreported, found on the New Brunswick Police Commission web-site) Arbitrator McLaughlin, at paragraph 97 of his decision, adopted the following statement made by Christopher John McNeil in an investigation report on the matter heard by Arbitrator McLaughlin:

> 97. At page 12 of the investigation report Mr. McNeil describes role and status of police officers which I adopt as follows:
>
> > "Police Officers hold one of most trusted positions in the public service because they have significant authority over the lives of members of the public. Their authority is both specific and general in nature. Legislated powers of arrest are an example of specific authority. The status of a police officer also includes significant public esteem and influence which leads to a more subtle general authority. Citizens expect that police will act with integrity at all times, and, as such in all circumstances, police officers are afforded an elevated level of trust. That trust is fundamental to law enforcement in a democratic society. The Code of Professional Conduct is intended to protect that trust."

75. As did Arbitrator McLaughlin in *New Brunswick Police Commission* v. *Constable John Morrison*, *supra,* I accept the statement of Christopher John McNeil as a relevant and applicable explanation of the role and status of police officers in our society.

The test for determining what constitutes "discreditable conduct"

76. Police Commissions of other jurisdictions have adopted an objective test for determining whether an act of an officer constitutes "discreditable conduct". The Nova Scotia Police Review Board in *Re Smith,* 2005 CanLII 77786 (NS PRB), set out the test at pp. 12-13 of the decision as follows:

> 1. The test primarily is an objective one.
> 2. The Board must measure the conduct of the officer by the reasonable expectations of the community.
> 3. In determining the reasonable expectations of the community, the Board may use its own judgment, in the absence of evidence as to what the reasonable expectations are. The Board must place itself in the position of the reasonable person in the community, dispassionate and fully apprised of the circumstances of the case.
> 4. In applying this standard the Board should consider not only the immediate facts surrounding the case but also any appropriate rules and regulations in force at that time.
> 5. Because of the objective nature of the test, the subjective element of good faith (referred to in the *Shockness* case) is an appropriate consideration where the officer is required by the circumstances to exercise his discretion.

The elements of theft

77. The solicitor for the Respondent has correctly pointed out to me that theft is comprised of two elements: the *actus reus* and the *mens rea*. The first, *actus reus*, refers to the external or objective element of the act of theft, while the second, *mens rea*, refers to the required intent of the perpetrator. This is certainly true of the elements required to prove theft in criminal proceedings, where the existence of the elements have to be shown to be present beyond a reasonable doubt.

78. The case law, as it applies to disciplinary matters, also establishes that there must be a "dishonest intention" for there to be theft. As stated in *Re Berto's Restaurant and Hotel, Motel & Restaurant Employees Union, Local 442* (1989), 8 L.A.C. (4th) 87 (Dissanayake), the arbitrator reviewed the meaning of "theft" and stated, at p. 94:

> In my view, the proper definition of "theft" in the context of a collective agreement (unless other indications are to be found in the collective agreement) is not the definition in the *Criminal Code,* nor dictionary definitions. The best test is: What is understood to be a "theft" in common usage? In my view, there can be no question that the dishonest intention or the intention to unlawfully benefit from another's property, is the crux of the meaning attached to "theft." Whichever way the term is defined, there simply cannot be a theft without a dishonest intention.

79. In his closing argument, the solicitor for the Respondent admitted on behalf of his client that the evidence before me clearly established the existence of the first of the two elements.

80. This leaves me with the question of determining on the evidence before me whether or not the second element is present. I need not be satisfied to the extent of moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is insufficient. It is necessary that the quality and quantity of evidence must be such as lead me, acting with care and caution, to a fair and reasonable conclusion that the act was committed. In other words, clear, convincing and cogent evidence of the presence of an intention to commit theft is required.

81. In dealing with the question of the absence or presence of a dishonest intention in the matter before me, I have not taken into account any conclusions arrived at by Marden's staff or by Officer Nason of the Houlton Police Department. I have reviewed the entirety of the evidence presented at the hearing, including the surveillance video of the event and the video and audio recording of Officer Nason's on site questioning of the Respondent.

82. The Marden's surveillance video clearly establishes the physical element of theft and shows the Respondent on a number of occasions checking her coat pocket after initially placing the makeup items there. She even checked her coat pocket while she was standing in line at the checkout. I can only characterize her actions as intentionally furtive and consistent with the actions of a thief. The unsolicited comment which she made to Stephen Shannon when she re-entered the Marden's store at his request also are consistent with those of a thief.

83. I find that evidence establishes the two required elements of theft.

Attempts to gain favour

84. The video and audio recording of Officer Nason's on site questioning of the Respondent show her as denying many times having any intention to steal. Her principal concern throughout her questioning by Officer Nason was to avoid a criminal charge because of the impact that the charge would have on her employment situation with the Fredericton Police Force. She was quite willing to accept a Criminal Trespass Warning, the fact of which she undoubtedly thought would not become known to the Complainant. She focussed her efforts on attempting to convince Officer Nason not to proceed with a criminal charge. In her attempts to do so, she repeatedly referred to her position as a police officer and the effect that a criminal charge would have on her employment. Her references to her status as a police officer go far beyond being casually made. In doing so she clearly sought to influence Officer Nason and to obtain favourable treatment from him. Nobody is above the law, including police officers, and no preferential treatment ought to be sought or given because of one's position.

Attempts to persuade a member of the Fredericton Police Force

85. Sarah Foster testified as to having overheard part of a telephone conversation that the Respondent was having with an unidentified person. She thought that she thought the person to whom the Respondent was speaking on the phone was the Respondent's superior and, possibly, her union representative. She testified that the Respondent, while on the phone, said she wanted the event in which she was involved to be kept "quiet" "so the Chief doesn't find out about this".

86. There is no evidence before me identifying with certainty the person to whom the Respondent was speaking. Ms. Foster did not hear the entire conversation.

87. There is before me no clear, convincing and cogent evidence which would lead me to conclude that the Respondent attempted to persuade a member of the Fredericton

Police Force to conceal or withhold from the Complainant information pertaining to the Respondent's situation.

Findings

88. On the evidence before me I find as follows:

1. that the Respondent did on December 2, 2014 commit theft of a number of items from the Marden's retail facility in Houlton, Maine, U.S.A., and in so doing engaged in discreditable conduct contrary to and in violation of section 36(1)(d)(i) of the *Code of Professional Conduct* thereby breaching section 35(a) thereof;

2. that the Respondent did on December 2, 2014, in Houlton, Maine, U.S.A., attempt to utilize her position as a police officer to gain favourable treatment from a member of the Houlton Police Department and in so doing engaged in discreditable conduct contrary to and in violation of section 36(1)(d)(i) of the *Code of Professional Conduct* thereby breaching section 35(a) thereof; and

3. that there is insufficient evidence on which I can conclude that the Respondent attempted to persuade a member of the Fredericton Police Force from disclosing her conduct to the Fredericton Chief of Police.

Disciplinary and corrective measures

89. The *Code of Professional Conduct* provides for a range of disciplinary and corrective measures that may be applied in appropriate circumstances:

> 6 The parties to a settlement conference may agree to or an arbitrator may impose one of the following disciplinary and corrective measures or any combination of the following disciplinary and corrective measures:
>
> (a) a verbal reprimand;
> (b) a written reprimand;
> (c) a direction to undertake professional counselling or a treatment

program;
(d) a direction to undertake special training or retraining;
(e) a direction to work under close supervision;
(f) a suspension without pay for a specified period of time;
(g) a reduction in rank; or
(h) dismissal.

90. I note that the range of disciplinary and corrective measures provided for in the *Code of Professional Conduct* is such as to allow the imposition of measures which would allow a police officer to be reinstated to his or her former position, or even a lesser position, with or without directions.

The service record of discipline of the Respondent

91. The Respondent has objected to the admissibility in evidence of her service record of discipline. In particular she objects to the following documents being received in evidence: (1) a record of suspension dated September 25, 2012, (2) a McNeill Disclosure with respect to the September 25, 2012 suspension, (3) a record of suspension contained in Minutes of Settlement dated August 21, 2013, and (4) a McNeill Disclosure with respect to the August 21, 2013 suspension.

92. A "service record of discipline" is defined in section 1 of the Police Act as meaning "a record containing details of disciplinary and corrective measures agreed to by the parties to a settlement conference or imposed by an arbitrator".

93. The *Code of Conduct* provides as follows with respect to entries made in the service record of discipline of a member of a police force:

> 4(1) If an entry made in the service record of discipline of a member of a police force is a disciplinary and corrective measure set out in paragraph 6(a), (b), (c), (d) or (e), the entry shall be expunged from the service record of discipline one year after being made if during that time no further entries have been made in the service record of discipline.
>
> 4(2) If an entry made in the service record of discipline of a member of a police force is a disciplinary and corrective measure set out in paragraph 6(f) or (g), the entry shall be expunged from the service record of discipline 2 years after being

> made if during that time no further entries have been made in the service record of discipline.
>
> 4(3) If 2 or more entries referred to in subsection (1) or (2) are made to a service record of discipline, no entry shall be expunged until the expiration of all entries made in the service record of discipline.

94. The merits of the Respondent's objection are to be assessed using the September 25, 2012 and August 21, 2013 dates as a starting point. The question is then one of determining when the entries made in the Respondent's service record of discipline would have been expunged.

95. In the normal course of events, barring any intervening entries, the entry respecting the Respondent's September 25, 2012 suspension would have been expunged on September 25, 2014. However, the entry made on August 21, 2013 had the effect of extending the life of the first entry to coincide with the date on which the second entry would, barring any intervening entries, have expired, that is to say to August 21, 2015.

96. Neither the *Police Act*, nor the *Code of Conduct*, address the question of what happens to entries which would otherwise have been expunged but before that scheduled date a complaint is made under the *Police Act* which eventually is heard by an arbitrator.

97. The solicitors for the parties obviously have different views of how section 4 of the *Code of Conduct* should be interpreted. Neither of them could however refer me to any case law interpreting the section or a similar provision in other jurisdictions.

98. In interpreting section 4 of the *Code of Conduct*, I am guided by the words of Robertson, J.A., in *Enbridge Gas New Brunswick Limited Partnership et al. v. The Attorney General in and for the Province of New Brunswick*, 2013 NBCA 34 (CanLII), where he stated at paragraph 7:

> [7] The starting point of any interpretative analysis rests on Elmer Driedger's modern approach to the interpretation of statutes: "Today there is only one principle or approach, namely the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the

> scheme of the Act, the object of the Act, and the intention of Parliament". This is the preferred approach of the Supreme Court and the one explained in *Re Rizzo and Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 (QL) referring to E.A. Dreidger, *Construction of Statutes* (Toronto, Butterworths, 1974), at p. 87, and the approach applied by this Court (see *New Brunswick v. Rothmans Inc.*, 2010 NBCA 35 (CanLII), 357 N.B.R. (2d) 160, leave to appeal refused, [2010] S.C.C.A. No. 240 (QL); *Lévesque v. New Brunswick*, 2011 NBCA 48 (CanLII), 372 N.B.R. (2d) 202; *LeBlanc v. Doucet*, 2012 NBCA 88 (CanLII), 394 N.B.R. (2d) 228; *J.D. Irving Ltd. v. Douthwright*, 2012 NBCA 35 (CanLII), 386 N.B.R. (2d) 241; *Canada Post Corp. v. Carroll*, 2012 NBCA 18 (CanLII), 383 N.B.R. (2d) 326 and *Robichaud v. Canada (Attorney General)*, 2013 NBCA 3 (CanLII), [2013] N.B.J. No. 7 (QL)).

99. The *Police Act* defines the expression "service record of discipline" as follows:

> "service record of discipline" means a record containing details of disciplinary and corrective measures agreed to by the parties to a settlement conference or imposed by an arbitrator;

100. Subsection 32.6(2) of the *Police Act* clearly states that an arbitrator may have access to a member's service record when imposing disciplinary or corrective measures:

> 32.6(2) When imposing disciplinary or corrective measures, an arbitrator may have access to the service record of discipline of the member of a police force.

60.

101. The interpretation of a regulation was specifically addressed by the Supreme Court of Canada in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 98 and 99:

> The interpretation of a regulation merely requires consideration of the purpose and context of the enabling statute, and more specifically the section which confers the powers to enact regulations, as an additional element to be factored into the modern approach to interpretation. In fact, the modern approach already embodies the important role that context must inevitably play when a court construes the written words of a statute. It is undoubted that words take their colour from their surroundings: Bell ExpressVu, at para. 27. Furthermore, this Court acknowledged, on more than one occasion, that one is required to consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations (meaning) and be labelled ambiguous: Bell ExpressVu, at para. 29. Thus, the specific regulation has to be read in the context of both the regulations, as an ensemble, and the enabling act as a whole: Sullivan,

at p. 282.

102. Where a conduct complaint proceeds to arbitration, the role of the arbitrator is to determine if the member of the police force is guilty of a breach of the *Code of Conduct.* Subsection 32.6(1) of the *Police Act* states that where a member is found guilty of a breach of the *Code of Conduct* the arbitrator may impose disciplinary or corrective measures.

103. The scheme and objective of the legislation is to provide for a mechanism of addressing conduct complaints filed against police officers and, where a police officer is found guilty of a breach of the *Code of Conduct,* to impose appropriate disciplinary or corrective measures.

104. Where a member is found guilty of a breach of the *Code of Conduct,* both the legislation and the jurisprudence recognize that a member's service record is matter that ought to be considered in determining the appropriate disciplinary or corrective measure.

105. It is consistent with the scheme and objective of the legislation that the service record considered by the arbitrator is the service record of the member as it existed at the time of the breach of the *Code of Conduct*.

106. To conclude otherwise would result in the absurd conclusion that a member could have entries expunged from his or her service record during that time that passes between when the conduct occurred that resulted in a breach of the *Code of Conduct* and when the matter is heard before an arbitrator.

107. Furthermore, subsection 26.8 of the *Police Act*, provides that the Chief of Police may suspend a member with pay, pending the completion of the processing of a conduct complaint, if the Chief of Police has reason to believe that the member has committed a breach of the *Code of Conduct.*

108. Thus, if the arbitrator were only permitted to access the member's service

record as it exists at the time of arbitration, the effect could be that a member has entries in the service record expunged while suspended with pay, pending a hearing before an arbitrator regarding an alleged breach of the *Code of Conduct.* This is clearly contrary to the scheme and objective of the legislation.

109. In the event that the Respondent was to be found guilty of a breach of the *Code of Conduct* in relation to her conduct on December 2, 2014, it would be illogical to conclude that her service record, as it existed on December 2, 2014, would not be considered as a relevant factor at arbitration when determining the appropriate disciplinary or corrective measure to be imposed. Such a conclusion is inconsistent with the scheme and objective of the *Police Act* and the *Code of Conduct.*

110. A conclusion that the arbitrator could only consider the service record as it existed at the time of the arbitration hearing, in the case of the Respondent, would lead to the incongruous result that her prior discipline was a relevant consideration during the investigation process and at the settlement conference but was no longer a relevant consideration at the arbitration hearing due to the passage of time. Such a conclusion, in my opinion, would be inconsistent with the statutory and regulatory scheme with which I am dealing.

111. An interpretation that an arbitrator is permitted to access the member's service record as it existed at the time of the breach of the *Code of Conduct,* is consistent with the arbitral jurisprudence on so-called “sunset clauses” in the general area of labour law and the statutory scheme fashioned to deal with conduct offences.

112. In *Domtar Papers (Cornwall and CEP, Local* 212 *(Barker), 2003* CarswellOnt 9680 (arbitrator Burkett), the purpose of a sunset clause is referred to in paragraph 13:

> ... The purpose of a sunset clause is to remove prior discipline from the record where there has been a period of good behaviour. Absent express direction to the contrary, therefore, the period must commence with a return to work

> following a suspension and, it would seem to me, extend through a period of active employment. In other words, an employee must be at work in order to demonstrate the required rehabilitation.

113. I also to *Glidden* v. *New Brunswick,* [1984] NBJ No. 193 (QB), in which the grievor was terminated from his employment as a result of misconduct. The termination was grieved and upheld on adjudication. An application for judicial review then followed. The grievor claimed that the adjudicator exceeded his jurisdiction by admitting into evidence his past disciplinary record, contrary to the provisions of the collective agreement. The collective agreement provided as follows: "Twenty-four months after any suspension or disciplinary action any letter of reprimand or adverse report shall be destroyed." The previous discipline was imposed in May 1980. The employee was terminated in September 1982. The adjudication hearing took place in December 1982. The grievor argued that because the prior discipline occurred more than twenty-four (24) months prior to the adjudication hearing, the adjudicator was prohibited from relying on it. This argument was rejected by the adjudicator and his decision was subsequently upheld by the New Brunswick Court of Queen's Bench.

114. For the above reasons I dismiss the Respondent’s objection to the admissibility of her service record of discipline.

Factors for consideration

115. Where discipline is to be imposed, each case must be examined in context, weighing both aggravating and mitigating factors.

116. The seriousness of the offence is an aggravating factor. Theft of a small amount of makeup, in the grand scheme of things, is not a serious offence. Theft by a police officer, even when off duty, constitutes a serious breach of the standard of conduct expected of a police officer.

117. The attempt by the Respondent to obtain favourable treatment as a police officer is an aggravating factor.

118. The long service of the Respondent is a mitigating factor. This mitigating factor is however in the present case counter-balanced by her service record of discipline. She was disciplined on September 25, 2012 for failing to follow the policies and procedures of the Fredericton Police Force. She was again disciplined on August 21, 2013 for an incident arising from an investigation of missing property which she had seized.

Conclusions on remedy

119. As I have stated above, section 6 of the *Code of Conduct* requires that I consider a range of disciplinary and corrective measures, with a verbal reprimand at the lower end and dismissal at the higher end, or a combination of any within that range.

120. I have reviewed the range of possible disciplinary and corrective measures that could be imposed in this matter. I do not believe that a reprimand, whether verbal or written, is an appropriate remedy to be imposed. I have no evidence, nor do I believe that professional counselling or participation in a treatment program would be an appropriate response to this situation. Working under close supervision would be of no obvious benefit, nor would special training or retraining. The Respondent by her actions has closed the door to all of these possibilities. A suspension without pay, for any length of time, or a reduction in rank would do nothing to restore the trust which she breached. A termination, in my view, is the only appropriate remedy to be imposed.

ORDER

121. I impose the following discipline in accordance with the relevant regulation:

> **Constable Cherie Campbell is hereby dismissed from her employment with the Fredericton Police Force.**

Dated at Fredericton, N.B. this 6th day of January, 2016.

Cedric L. Haines, Q.C.
Arbitrator

LIST OF EXHIBITS

C-1	List of Arbitrators under the Police Act and appointment documents in this matter
C-2	Amended Notice of Arbitration Hearing and Transmittal Letter, September 14, 2015
C-3	Particulars, October 19, 2015
C-4	Complainant's Book of Exhibits
C-5	Physical Evidence
C-6	Witness Statement, Sara Foster, December 5, 2014
C-7	Witness Statement, Stephen Shannon, December 5, 2014
C-8	Notes, Stephen Shannon
R-1	Letter dated May 27, 2005, Minister of Public Safety to Mr. Bob Davidson
R-2	Minutes of Police Act Review Working Committee, January 20, 2006
R-3	New Brunswick *Police Act Code of Professional Conduct* Disciplinary Hearings Arbitration Guidelines
R-4	Policing Act Review Committee, Agenda and Minutes of Meeting, April 15, 2010
R-5	New Brunswick *Police Act Code of Professional Conduct* Disciplinary Hearings Arbitration Guidelines