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Inquiry Committee concerning
the Honourable Michel Girouard

# Report of the Inquiry Committee to the Canadian Judicial Council

18 November 2015

# REPORT TO THE CANADIAN JUDICIAL COUNCIL

## OF THE COMMITTEE CONSTITUTED PURSUANT TO SUBSECTION 63(2) OF THE *JUDGES ACT* TO INVESTIGATE THE CONDUCT OF JUSTICE MICHEL GIROUARD OF THE SUPERIOR COURT OF QUEBEC


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**REPORT TO THE CANADIAN JUDICIAL COUNCIL**

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## I. Background of this inquiry pursuant to subsection 63(2) of the *Judges Act*

### A. The Honourable Justice Michel Girouard

[1] The Honourable Justice Michel Girouard[1] was appointed to the Superior Court of Quebec on September 30, 2010, having been a lawyer and member of the *Barreau du Québec* since 1985.

[2] Justice Girouard was appointed to the judiciary after having practiced in the Abitibi region of Quebec for twenty-five (25) years. He had developed a diversified law practice, working mostly in the areas of civil law, criminal law, commercial law and administrative law. At the inquiry, Justice Girouard testified that his practice was focused mainly on civil litigation and family law, but that he also acted, from time to time, as defence counsel in criminal law matters.[2]

[3] During his career as a lawyer, Justice Girouard also held positions within the law society. In 2007, the president of the *Barreau de l'Abitibi-Témiscamingue* asked M[e] Girouard[3] to become the region's first councillor. After holding this position, M[e] Girouard was later elected president of the *Barreau de l'Abitibi-Témiscamingue* in 2008 for a term of one year. His mandate was renewed for a second year. In addition, M[e] Girouard sat on the executive council of the *Barreau du Québec* in 2009, as a representative of the *Association des avocats de province*, and he was a member of the *Barreau du Québec*'s Governance Committee.

[4] Justice Girouard was also involved in his community while he was a lawyer. In particular, he sat for several years on the board of directors of the local junior-major hockey team, the *Foreurs de Val D'Or*. In 2002, he was appointed president of the team, for a period of two years.

[5] Justice Girouard is a judge of the Superior Court's Quebec Division. As such, in addition to sitting in the regions of Rouyn-Noranda and Témiscamingue, he travels to several remote areas of Quebec.

[6] Finally, beyond Justice Girouard's professional career, he and his spouse are family-oriented. They have four (4) children and, as we understand from their testimony, they are very involved and present in their lives.

### B. The complaint from Chief Justice Rolland

[7] In the fall of 2012, the Honourable François Rolland, then Chief Justice of the Superior Court of Quebec, was notified by the Director of Criminal and Penal Prosecutions that Justice Girouard had been identified by Mr X, a drug trafficker who later become a police informer, as a former client of his from several years earlier. In addition, the Director informed Chief Justice

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[1] For the sake of conciseness, we refer to "Justice Girouard".
[2] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 26-27: Criminal law accounted for approximately 5% of Justice Girouard's practice.
[3] When referring to Justice Girouard while he was a lawyer, the Committee uses his professional designation (*Maître, abbreviated to M[e]*).

Rolland of the existence of a video recording showing [TRANSLATION] “a transaction, presumed to be a cocaine purchase, that occurred approximately thirteen days before Justice Girouard’s appointment.”[4]

[8] On November 30, 2012, Chief Justice Rolland, as he then was, wrote to the Canadian Judicial Council (the “Council”) to request a review of Justice Girouard’s conduct while he was a lawyer.[5]

[9] Immediately after the request for a review was made, no further cases were assigned to Justice Girouard. In January 2013, Justice Girouard was suspended with pay to allow the review process to run its course.

### C. The *Écrevisse* [Crayfish] investigation

[10] As further explained in this report, the two elements at the root of Chief Justice Rolland’s complaint stem from the *Écrevisse* investigation (“**Crayfish**”). Therefore, the Committee deems it appropriate to provide an overview of this investigation.

[11] The Committee specifies from the outset that Justice Girouard was never a subject of the Crayfish investigation. The independent counsel stated unequivocally that M$^{e}$ Girouard was not one of the individuals targeted by the investigation, and that he was not under investigation nor placed under any surveillance by the *Sûreté du Québec*[6]. The evidence submitted with regard to the Crayfish investigation was admitted only as background information, so that the Committee could familiarize itself with this operation and with two individuals who were under long-term surveillance by the *Sûreté du Québec* and who are key to the Committee’s work, as discussed later in this report.

[12] During the 2000s, the Abitibi-Témiscamingue region was plagued by organized crime and drug trafficking problems. Several violent crimes were also committed, which made the situation worse.

[13] The *Sûreté du Québec* responded by launching an investigation of unusually large scale. This is how operation Crayfish began in 2009, and was later given considerable media coverage after an extensive raid in early October 2010.

[14] This police investigation was also noteworthy due to the scope of surveillance operations conducted by the *Sûreté du Québec*. In addition to conventional surveillance methods, police forces used electronic, video and GPS surveillance. On top of two hundred and eighty (280) static surveillances, three hundred (300) physical surveillances, eleven (11) locator beacons (GPS) and ten (10) surveillance cameras, seventy-four (74) individuals were placed under electronic surveillance. The *Sûreté du Québec* recorded more than one hundred thousand conversations and four hundred thousand text messages.[7]

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[4] Chief Justice Rolland’s letter to the Canadian Judicial Council, dated November 30, 2012.
[5] Chief Justice Rolland’s letter to the Canadian Judicial Council, dated November 30, 2012.
[6] Submissions made by M$^{e}$ Cossette, May 4, 2015, at pp. 36-37.
[7] *PowerPoint Projet Écrevisse/Résumé de l’enquête*, Exhibit P-2, at p. 6.

[15] Mr Denis Lefebvre and Mr Yvon Lamontagne are two of the individuals who were placed under surveillance. They were both clients of M[e] Girouard at one time or another. Mr Lamontagne retained M[e] Girouard's services for a tax matter that was in the process of being settled in 2010. He was therefore still a client of M[e] Girouard during the Crayfish investigation. M[e] Girouard had also represented Mr Lamontagne several years earlier, around 1999-2000, following the seizure of three hundred (300) to three hundred and fifty (350) marijuana plants at Mr Lamontagne's residence.[8]

[16] On October 6 and 7, 2010, police forces conducted a raid in the region. A total of four hundred (400) police officers took part in this operation. Sixty-two (62) individuals were placed under arrest and fifty-seven (57) searches were performed.[9]

[17] Mr Lamontagne and Mr Lefebvre were among those arrested. They were later charged with drug trafficking. Mr Lamontagne pleaded guilty and was sentenced to nine (9) years imprisonment[10]. Mr Lefebvre was convicted of the charges and sentenced to twenty (20) years imprisonment[11].

[18] Mr Lamontagne's movie rental store, located on 3[rd] Avenue in Val D'Or, was searched and several items were seized. Of particular interest to this inquiry, Mr Lamontagne had installed a closed-circuit camera surveillance system in his store. The system's digital recorder, which contained the recordings of the previous thirty (30) days[12], was seized during the raid.

[19] Investigators viewed what was filmed and recorded inside Mr Lamontagne's store by that surveillance system. These recordings have no sound track. One of the recorded scenes shows a meeting between Mr Lamontagne and M[e] Girouard, on September 17, 2010, in which one can observe an exchange between the two men that suggests a potentially illegal transaction. As explained later in the report, this recording is central to the Committee's work.

[20] Furthermore, also as part of Crayfish, an individual whose name is protected by a publication ban, whom we will refer to as Mr X, was placed under arrest. He subsequently pleaded guilty to charges of drug trafficking, including cocaine trafficking. He was sentenced to ten (10) years in prison. This individual, who had a lengthy criminal history[13], met with the *Sûreté du Québec* several times in 2011 as a "source". In 2012, he became a cooperating witness for the *Sûreté du Québec*.

[21] It was during the process of becoming a cooperating witness that Mr X provided a lengthy written statement. In his statement, Mr X referred to Justice Girouard while he was a lawyer. Mr X alleged that he sold a considerable amount of cocaine (approximately 1 kg) to

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[8] Justice Girouard's testimony, May 12, 2015, at pp. 167-168. M[e] Girouard challenged the legality of the search warrant that was then invalidated by the Court of Quebec.
[9] *PowerPoint Projet Crayfish/Résumé de l'enquête*, Exhibit P-2, at p. 4.
[10] See Mr Lamontagne's testimony, May 7, 2015, at pp. 59-60.
[11] Sergeant Marc April's testimony, May 4, 2015, at pp. 81-82.
[12] Investigators found that Mr Lamontagne's digital recorder contained recordings from September 9 to October 6, 2015: Sergeant-Supervisor Caouette's testimony, May 4, 2015, at p. 182; *Preuve relative aux séquences intérieures*, Exhibit P-3, Tab 2.
[13] The independent counsel conceded that cooperating witness Mr X had a lengthy criminal history: Submissions made by the independent counsel regarding the evidence supporting count 3 in the Detailed Notice of Allegations, June 8, 2015, at para. 60.

M[e] Girouard between 1987 and 1991. This is the second element of Chief Justice Rolland's complaint.

### D. The Canadian Judicial Council's complaints review process

[22] Following this complaint, the Council's internal complaints review process was initiated.

[23] In its April 8, 2015 ruling on preliminary motions, the Committee described the internal review process that led to this inquiry. Without describing the entire process again, the Committee wishes to note certain facts pertaining to that process.

[24] On January 11, 2013, Justice Girouard wrote to the Council to state his version of the facts. His letter was submitted in evidence as Exhibit P-28. In his letter, Justice Girouard expressed his astonishment at cooperating witness Mr X's claims and categorically denied his allegations. He also denied purchasing drugs from Mr Lamontagne and claimed that the video recording instead captured a meeting between a lawyer and his client.

[25] On February 7, 2013, following his initial review of the file, the late Chief Justice Blanchard, then Chief Justice of the Court Martial Appeal Court of Canada and Vice-Chairperson of the Council's Judicial Conduct Committee, asked outside counsel to make further confidential inquiries, in accordance with paragraph 5.1*(c)* and sections 7 and 8 of the *Complaints Procedures*[14], in order to assist in considering the complaint.

[26] M[e] Raymond Doray, Ad. E., was appointed by the Council to conduct these further inquiries. We understand that, after having completed his inquiries, M[e] Doray submitted a preliminary report to counsel for Justice Girouard.

[27] On August 13, 2013, M[e] Doray met with Justice Girouard, who was accompanied by his counsel. Comments and submissions provided by Justice Girouard and his counsel at this meeting were recorded separately in a document entitled *Synthèse des témoignages et des éléments de preuve complémentaires recueillis dans le cadre d'une rencontre avec l'honorable Michel Girouard*, *juge à la Cour supérieure*, dated August 13, 2013. Although this document was used to cross-examine Justice Girouard on a prior statement, all documents that together form what we refer to as the "Doray Report" are not part of the evidence entered into the record of this inquiry.

[28] M[e] Doray submitted a second report to Chief Justice Blanchard under the seal of solicitor-client privilege. On April 16, 2015, as part of preliminary motions under this inquiry, counsel for Justice Girouard requested that this second report by disclosed. In response to this request, the Committee asked the Council to allow M[e] Doug Mitchell, counsel for the Committee, to review the second report, in order to determine if it was subject to the solicitor-client privilege. M[e] Mitchell examined the report and concluded that it was in fact a privileged document. Therefore, the second report was not disclosed. Neither the members of the

[14] *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges*, approved by the Canadian Judicial Council, effective October 14, 2010, hereinafter called the "*Complaints Procedures*". It should be noted that the *Complaints Procedures* were amended in 2014. However, the 2010 version applies in the present matter.

Committee nor the independent counsel are aware of its contents.

[29] After reviewing all the information related to the complaint, Chief Justice Blanchard decided to refer the matter to a Review Panel. The Review Panel, after having considered the file, concluded that the matter may be serious enough to warrant the judge's removal and, in accordance with the *By-laws*[15], decided to constitute this Committee.

[30] Justice Girouard applied to the Federal Court for judicial review of the decisions by the Council and the Review Panel which lead to the constitution of an Inquiry Committee. Justice Girouard also asked the Federal Court to consider issues regarding the Council's jurisdiction and the validity of the Council's *By-laws* and *Complaints Procedures*.

[31] The Attorney General of Canada submitted a motion to strike the application for judicial review, on the grounds that it was premature.

[32] After having considered these two motions, Justice Martineau of the Federal Court ruled that Justice Girouard's application was premature.[16] He subsequently confirmed that decision after hearing Justice Girouard's motion to set aside the first order in light of new evidence.[17]

[33] The issues related to the Council's jurisdiction and the validity of its *By-laws* and *Complaints Procedures*, that were referred to the Federal Court by Justice Girouard, were submitted to this Committee in the form of preliminary motions that were heard on March 23-24, 2015 in Quebec. After having reserved judgment on these motions, the Committee rendered its decision with reasons on April 8, 2015.[18]

### E. The Committee's work

[34] On June 18, 2014, the Council announced that, in accordance with subsection 63(3) of the *Judges Act*[19] and subsection 2(1) of the *By-laws*, the Committee would consist of three members: two chief justices appointed by the Council and one experienced counsel designated by the Minister of Justice. At the same time, in accordance with subsection 3(1) of the *By-laws*, the Council also announced the appointment of M$^{e}$ Marie Cossette as independent counsel responsible for presenting the case to the Inquiry Committee in the public interest.

[35] In September 2014, the Committee informed counsel for Justice Girouard and the independent counsel of its intention to begin its work. With regard to preparatory work performed by the parties, readers are referred to the Committee's decision of April 8, 2015.

[36] The initial detailed Notice of Allegations was submitted by independent counsel on March 13, 2015. On April 22, 2015, the Notice of Allegations was amended to refine certain

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[15] *Canadian Judicial Council Inquiries and Investigations By-laws, S*OR/2002-371 (the "*By-laws*"), subsections 1.1(1) and (3).
[16] *Girouard v. Canadian Judicial Council*, 2014 FC 1175.
[17] *Girouard v. Canadian Judicial Council*, 2015 FC 307.
[18] Inquiry Committee, *Décision relative aux requêtes préliminaires*, April 8, 2015. Justice Girouard filed forjudicial review of this decision, Docket no. T-733-15.
[19] *Judges Act*, R.S.C., 1985, c. J-1.

counts. Eight (8) counts were set out by the independent counsel:

1. While he was a lawyer, M[e] Girouard allegedly used drugs on a recurring basis.

2. For a period of three to four years between 1987 and 1992, while he was a lawyer, M[e] Girouard allegedly purchased cocaine from Mr X for his personal use, namely a total of about 1 kilogram with an approximate value of between $90,000 and $100,000.

3. On September 17, 2010, while his application for appointment as a judge was pending, and more specifically two weeks before his appointment on or about September 30, 2010, M[e] Girouard allegedly purchased an illicit substance from Yvon Lamontagne, who was also his client.

4. In the early 1990s, while he was a lawyer, M[e] Girouard allegedly exchanged professional services provided to Mr X worth about $10,000, in relation to a case before the predecessor of the *Régie des alcools, des courses et des jeux*, for cocaine for his personal use.

5. While he was a lawyer, M[e] Girouard was allegedly under the influence of an organization involved in organized crime, since he allegedly set up a mini greenhouse for cannabis plants in the basement of his home with the help of two members of that organization.

6. On January 25, 2008, M[e] Girouard signed the Personal History Form used by the Office of the Commissioner for Federal Judicial Affairs and failed to disclose the information included in this Notice of Allegations in answer to the following question: “Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?”.

7. On or about January 11, 2013 and on or about August 14, 2013, Justice Girouard tried to mislead the Canadian Judicial Council by providing explanations that concealed the truth about the video recording of the transaction on September 17, 2010.

8. On or about January 11, 2013 and on or about August 14, 2013, Justice Girouard made unbecoming comments that discredited certain officers of the court (agents of the Crown, lawyers and police officers) by insinuating that they had acted together to encourage false statements against him as retaliation.

[37] The Committee asked counsel for Justice Girouard as well as the independent counsel to submit all their preliminary motions. It then convened in Quebec City on March 23-24, 2015, to hold public hearings on these motions.

[38] On April 1st and 8, 2015, the Committee held case management sessions by conference call. Among other issues, the Committee raised the possibility of commencing its hearings by addressing only certain counts. At the March 23 hearing, the independent counsel noted that the September 17, 2010 video recording was central to the complaint[20]. Consequently, the Committee decided that it was appropriate to initially address counts dealing with events that

[20] See submissions made by M[e] Cossette, March 23, 2015, at p. 235.

occurred in the years immediately prior to Justice Girouard's appointment to the judiciary.

[39] On April 16, 2015, the Committee and the parties met again in Quebec to hear additional preliminary motions.

[40] As a result of these hearings and case management conferences, some counts were withdrawn and others were amended.

[41] Count 7 was withdrawn, because the Committee was of the opinion that the statements in question could prove to be relevant to count 3, both by way of cross-examination of Justice Girouard and through the independent counsel's rebuttal evidence, if any. Therefore, the Committee considered that a separate count was not necessary.[21]

[42] As for count 8, counsel for Justice Girouard argued, during preliminary motions, that his remarks were not made in public, but rather in private discussions between him and the Council. In addition, they submitted that Justice Girouard made these remarks in good faith, in an attempt to respond to M[e] Doray's questions. As a result, the independent counsel requested that count 8 be withdrawn. In its decision of April 8, 2015, the Committee agreed to this request.

[43] In its decision of April 8, 2015, the Committee amended the wording of count 5 as follows:

> 5. While he was a lawyer, M[e] Girouard allegedly had close ties to an organization involved in organized crime, which raises the question as to whether he would have the necessary impartiality if he had to hear a case involving criminal organizations, in addition to projecting an image that undermines the dignity of the office of judge.

[44] Count 5 was later withdrawn, because the independent counsel stated that she had no evidence to produce in support of this count.

[45] Finally, count 1 was clarified in as follows:

> 1. While he was a lawyer, <u>during a period between 1987 and 1992</u>, M[e] Girouard allegedly used […] <u>cocaine</u> on a recurring basis**.**

[46] At the case management conference of April 8, 2015 and the hearing of April 16, 2015, the Committee confirmed its intention to proceed initially with the hearing of count 1, if evidence of cocaine use in 2009-2010 was available, and count 3. The independent counsel advised that she had no evidence to submit to the Committee regarding cocaine use by Justice Girouard in 2009-2010, except for evidence that Mr Lamontagne may give at the hearing.

[47] Therefore, the Committee felt it was appropriate to proceed initially with the hearing of count 3, and deferred its decision as to whether or not it would proceed with counts 1 (for the period of 1987 to 1992), 2, 4 and 6. In rendering its decision, the Committee advised the parties that it remained seized of the other counts and that it could still proceed with them.

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[21] Transcript of March 23-24, 2015, at pp. 371-434.

[48] Consequently, the independent counsel submitted a motion for introducing evidence of similar facts between, on one hand, certain evidentiary elements in support of count 3 and, on the other hand, certain evidence in support of counts 1, 2 and 4. This motion was allowed by the Committee on April 16, 2015.[22]

[49] We also note that Justice Girouard and Mr Lamontagne refused to meet with the independent counsel as part of her inquiries. However, they testified at the hearing of count 3 before the Committee in May 2015. Finally, the Committee emphasizes that neither Justice Girouard nor his counsel communicated with Mr Lamontagne, either directly or indirectly, before the latter testified.

## F. The inquiry

[50] The Committee and the parties met in Quebec from May 4 to May 15, 2015 for the public hearing of count 3.

[51] Justice Girouard objected to the admissibility of the September 17, 2010 video recording evidence. He stated that the seizure of the video recording by the *Sûreté du Québec* was unreasonable and that the recording violated his fundamental rights. He testified briefly before the Committee at a *voir dire* on this issue. The Committee heard submissions of the parties on this motion on the first day of hearings, on May 4, 2015. The Committee dismissed Justice Girouard's motion the same day and provided written reasons for its decision on May 14, 2015.[23]

[52] Justice Girouard also objected to the admissibility of the video recording on the grounds of solicitor-client privilege. The Committee heard Justice Girouard's testimony regarding the context of the meeting *in camera*, in the absence of the independent counsel, and reserved its decision on the objection to admissibility until Mr Lamontagne's testimony on the issue.

[53] The independent counsel called seven (7) witnesses: four (4) members of the *Sûreté du Québec* who testified about the Crayfish investigation, expert witness Sergeant-Supervisor Y, Mr Yvon Lamontagne, and cooperating witness Mr X.

[54] Justice Girouard testified at the inquiry and called five (5) other witnesses, who were professional and personal acquaintances of his, as well as his spouse.

[55] The following sections summarize parts of their testimony that the Committee considered the most relevant to this inquiry.

[56] Closing arguments were heard on June 8, 2015 and the Committee reserved its decision on the matter in order to draft this report to the Council.

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[22] See below, section F: *The evidence of similar facts*, at paras. 126 and following.
[23] Inquiry Committee, *Décision relative à la requête du juge Girouard en exclusion d'un élément de preuve*, May 14, 2015. Justice Girouard filed for judicial review of this decision, Docket no. T-941-15.

## II. The legal context

[57] In its April 8, 2015 decision on preliminary motions, the Committee reviewed the legal principles that guide its activities in conducting an inquiry under subsection 63(2) of the *Judges Act*[24]. Without repeating all these principles, the Committee wishes to emphasize some of them.

[58] The Committee cannot overstate the importance of public confidence in the judiciary for our democratic system. The rule of law could not exist without impartial, independent and honest judges who have the public's confidence.

[59] Judges are in a place apart in our society and the public expects their conduct to be beyond reproach. Justice Gonthier, writing for the Supreme Court of Canada in *Therrien*[25], eloquently described the unique status of judges:

> "108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.
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> 109 If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).
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> 110 Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But

[24] Inquiry Committee, *Décision relative aux requêtes préliminaires*, April 8, 2015, at paras. 16-33.
[25] *Therrien (Re)*, [2001] 2 S.C.R. 3.

beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
>
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

111 The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:

> [TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others.
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> ("*Figure actuelle du juge dans la cité*" (1999), 30 *R.D.U.S*. 1, at pp. 11-12)

In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167:

> The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.

112 The reasons that follow therefore cannot disregard two fundamental premises. First, and following from the foregoing, they cannot be dissociated from

> the very particular context of the judicial function. The judge is in "a place apart" in our society and must conform to the demands of this exceptional status (Friedland, *supra*). […]"
>
> [Emphasis added]

[60] Consequently, public confidence in the judiciary can only be maintained if judges demonstrate the highest level of integrity and probity, in both their personal and professional lives.

[61] As for judicial independence, it rests on three pillars: security of tenure, financial security, and institutional or administrative independence.

[62] Security of tenure is an essential component of judicial independence. However, the Constitution does not provide judges with absolute security of tenure, but rather makes it conditional upon good behaviour.

[63] Section 99 of the Constitution provides as follows[26]:

> **99.** (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.
>
> (2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at any time he has already attained that age.

[64] Good conduct acts as a necessary counterbalance to security of tenure to ensure public confidence in the judiciary. As Justice Strayer noted in the matter of the Honourable Justice Gratton:

> "But is is equally important to remember that protections for judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged."[27]

[65] However, penalizing a judge without due cause would be equally damaging to judicial independence. The public would inevitably see it as a form of interference that is entirely incompatible with our conception of democracy.

[66] Therefore, a judge's conduct must be reviewed only in the most serious cases, and the standard to be met to recommend removal must be rigorous. The review framework provided for in the statutory scheme reflects these considerations. As such, and more specifically, the *Judges Act* provides for the following safeguards with respect to the review of a judge's conduct:

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[26] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (*Constitution Act, 1867*), s. 99.

[27] *Gratton v. Canadian Judicial Council*, [1994] 2 F.C.R. 769 (Trial Division), p. 782, (quoted with approval in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 329).

**63.** (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)*(a*) to *(d*).

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

> *(a*) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and
>
> *(b*) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

**64.** A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

**65.** (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry

> or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> > *(a)* age or infirmity,
> > *(b)* having been guilty of misconduct,
> > *(c)* having failed in the due execution of that office, or
> > *(d)* having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
>
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[67] As the majority of Council emphasized in its reasons for decision in the matter of the Honourable Justice Matlow, the Committee's task is twofold:

> "The Inquiry Committee […] correctly characterized its task as two-fold: first, determine whether Justice Matlow's conduct falls within any one of paragraphs *(b)* through *(d)* of s. 65(2) of the *Judges Act*; and second, if so, apply the test for removal set forth above"[28].

[68] The test for determining whether to recommend removal was set out in the *Marshall* case[29] and approved by the Supreme Court of Canada.[30] This test establishes a high bar:

> "Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?"[31]

[69] This test is prospective in nature: "Implicit in the test for removal is the concept that public confidence in the judge would be sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date."[32]

[70] The Committee's mandate involves a search for the truth in accordance with rules of procedural fairness afforded to Justice Girouard. Consequently, the Inquiry Committee must gather the information necessary for the Council to assess the situation and make a recommendation to the Minister of Justice. After having gathered the information, the Committee must also support its analysis on the basis of the previously stated criteria, and

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[28] Canadian Judicial Council, *Report of the Canadian Judicial Council to the Minister of Justice in the matter of the Honourable Theodore Matlow*, December 3, 2008, at para.166.
[29] Canadian Judicial Council, *Report to the Canadian Judicial Council of the Inquiry Committee regarding Justices Hart, Jones and Macdonald*, August 1990 ("the *Marshall* case").
[30] *Therrien (Re)*, [2001] 2 S.C.R. 3, at para. 147. See also: Canadian Judicial Council, *Report of the Canadian Judicial Council to the Minister of Justice in the matter of the Honourable Theodore Matlow*, December 3, 2008, at para. 164; and recently, Canadian Judicial Council, *Report to the Canadian Judicial Council of the Inquiry Committee in the matter of the Honourable Michel Déziel*, June 3, 2015, at para. 15.
[31] Canadian Judicial Council, *Report to the Canadian Judicial Council of the Inquiry Committee regarding Justices Hart, Jones and Macdonald*, August 1990, at p. 28.
[32]Canadian Judicial Council, *Report of the Canadian Judicial Council to the Minister of Justice in the matter of the Honourable Theodore Matlow*, December 3, 2008, at para.166.

make a recommendation to the Council as to whether or not the judge should be removed.

[71] As in any other civil matter, the standard of proof is based on a balance of probabilities[33]. As Justice Rothstein, writing for the Supreme Court of Canada, stated in *F.H.* v. *McDougall*: "[…] evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.[34]"

[72] Furthermore, the Committee considered the issue of the credibility of witnesses. The distinction between the credibility and reliability of evidence is well known. Reliability refers to the accuracy of the evidence: does the witness recall the events, what is his ability to observe the events, what is his ability to communicate what he observed? Credibility, on the other hand, refers to the veracity of events recounted by a witness, as well as the witness' frankness and honesty.[35]

[73] The Committee took into account the following caselaw in its analysis of the credibility of the various witnesses it heard during the inquiry.

[74] In an oft-quoted excerpt from *White* v. *The King*, Justice Estey recalls that credibility is assessed based on human characteristics[36] :

> "The issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law and, in so far as the language of Mr Justice Beck may be so construed, it cannot be supported upon the authorities. Anglin J. (later Chief Justice) in speaking of credibility stated:
>
> > by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence. *Reymond v.Township of Bosanquet*.
>
> The foregoing is a general statement and does not purport to be exhaustive. Eminent judges have from time to time indicated certain guides that have been of the greatest assistance, but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility."

[33] *F.H.* v. *McDougall*, [2008] 3 S.C.R. 41, at para. 40.
[34] *F.H.* v. *McDougall*, [2008] 3 S.C.R. 41, at para. 46.
[35] See: David Paciocco et al., *The Law of Evidence*, 7th ed., Irwin Law, 2015, at pp. 35-36.
[36] *White* v. *The King,* [1947] S.C.R. 268, at p. 272.

[Emphasis added]

[75] Although there is no exhaustive set of rules regarding determination of credibility, the Committee relied on certain principles found in the jurisprudence.

[76] To begin, when assessing a witness' credibility, undue weight should not be placed on his motive to lie in order to protect himself. In *R.* v. *Laboucan*[37], Justice Charron, writing for the Supreme Court of Canada, stated as follows:

> "The fact that a witness has an interest in the outcome of the proceedings is, as a matter of common sense, a relevant factor, among others, to take into account when assessing the credibility of the witness' testimony. A trier of fact, however, should not place undue weight on the status of a person in the proceedings as a factor going to credibility. For example, it would be improper to base a finding of credibility regarding a parent's or a spouse's testimony solely on the basis of the witness' relationship to the complainant or to the accused. Regard should be given to all relevant factors in assessing credibility.
>
> […]
>
> Therefore, any assumption that an accused will *lie* to secure his or her acquittal flies in the face of the presumption of innocence, as an innocent person, presumably, need only tell the truth to achieve this outcome. In *R.* v. *B. (L.)* (1993) O.R. (3d) 796 (C.A.), Arbour J.A. (as she then was) succinctly described the inherent danger in considering the accused's motive arising from his or her interest in the outcome of the trial. In an often-quoted passage, she stated as follows (at pp. 798-99):
>
> > <u>It falls into the impermissible assumption that the accused will lie to secure his acquittal, simply because, as an accused, his interest in the outcome dictates that course of action.</u> This flies in the face of the presumption of innocence and creates an almost insurmountable disadvantage for the accused. The accused is obviously interested in being acquitted. In order to achieve that result he may have to testify to answer the case put forward by the prosecution. However, it cannot be assumed that the accused must lie in order to be acquitted, unless his guilt is no longer an open question. <u>If the trial judge comes to the conclusion that the accused did not tell the truth in his evidence, the accused's interest in securing his acquittal may be the most plausible explanation for the lie. The explanation for a lie, however, cannot be turned into an assumption that one will occur.</u>"
>
> [Emphasis in the original]

[37] *R. v. Laboucan*, [2010] 1 S.C.R. 397, at paras. 11-12.

[77] Moreover, assessing a witness' credibility must not be based solely on the appearance of the witness' sincerity at the hearing. The words of Justice O'Halloran, of the Court of Appeal of British Columbia, in *Faryna* v. *Chorney*[38], have been quoted on several occasions[39]:

> "If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond* v. *Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case."[40]

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[38] *Faryna* v. *Chorney*, [1952] 2 D.L.R. 354, at pp. 356-357.
[39] See, for example, *R.* c. *Hamann*, 2002 CanLII 3187 (QC CA), at paras. 25-26.
[40] Quoted in *Suntec Environmental Inc.* v. *Trojan Technologies Inc.*, 2004 FCA 140, at para. 21.

[Emphasis added]

[78] Furthermore, rejection of a witness' testimony on the basis of a lack of reliability or credibility cannot, in itself, serve to demonstrate a fact in issue. In *R.* v. *Hibbert*[41], the majority of the Supreme Court of Canada wrote:

> "61 These concessions were appropriate. A defence of alibi may be disbelieved, particularly in the face of an overwhelming case for the prosecution, merely on the basis that the witnesses who testified in support of the alibi were imprecise or inconclusive, that their recollection was unreliable, or that they simply were mistaken. In such cases their evidence must be discarded, without more.
>
> 62 Even if an alibi is advanced by the accused himself and is rejected, the finding that the alibi is untrue cannot serve to corroborate or complement the case for the prosecution, let alone permit an inference that the accused is guilty.
>
> 63 If the alibi witnesses were found to be deliberately untruthful, their attempt at deceiving the jury could not be visited upon the accused unless he or she participated in the deceit. If, on the other hand, there was evidence that the accused attempted to put forward a fabricated defence, that effort, akin to an effort to bribe or threaten a witness or a juror, could be tendered as evidence of consciousness of guilt."
>
> [Emphasis added]

[79] Similarly, Justice Moldaver, writing for the majority of the Supreme Court of Canada in *R.* v. *Nedelcu*[42], stated:

> "[23] While it is true that Mr Nedelcu's inconsistent discovery evidence might lead the triers of fact to reject his trial testimony, rejection of an accused's testimony does not create evidence for the Crown – any more than the rejection of an accused's alibi evidence does, absent a finding on independent evidence, that the alibi has been concocted. (See *R.* v. *Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at paras. 61-67.)"

[80] Faced with inconsistencies in a witness' testimony, the Committee may accept one version or another, or none of the witness' versions. However, we must provide reasons for our decision. Here is what the Court of Appeal of Quebec wrote on this issue[43]:

> [TRANSLATION]
> "34 However, when assessing credibility, or should we say reliability, a particular challenge arises where a witness alternately gives diametrically opposed versions. The judge is then faced with the problem of having to choose

[41] *R.* v. *Hibbert*, [2002] 2 S.C.R. 445.
[42] *R.* v. *Nedelcu*, [2012] 3 S.C.R. 311.
[43] *Pouliot* c. *Promutuelle de Montmagny*, EYB 2005-88361 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed, No. 30960, October 6, 2005.

to believe the first version, the second one, or neither of them.

35 At the root of this problem is the inescapable fact that, on at least one occasion, the witness gave an unreliable version. This basic fact forces the judge to explain the reasons for his choice and, in that regard, the reasons that he puts forward must be free of palpable and overriding errors."

[81] Finally, the words of Justice Rothstein, in *F.H.* v. *McDougall*[44], are particularly relevant to the present matter:

"[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case. […]

[70] The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. […]

[80] Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private. […]

[86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases."

[Emphasis added]

[44] *F.H.* v. *McDougall*, [2008] 3 S.C.R. 41.

## III. The evidence

### A. The video recording of September 17, 2010

[82] As previously noted, the video recording of September 17, 2010 is central to this inquiry[45]. This video was recorded by Mr Lamontagne's security system inside his movie rental store located on 3rd Avenue in Val D'Or. It bears underscoring that the video recording has no sound track. Consequently, interpretation of what can be seen on this recording is limited by the quality of the picture and the absence of sound. The testimony given by Justice Girouard and by Mr Lamontagne is the only evidence that the Committee has of what may have been said during their meeting.

[83] All agree that part of the meeting was a conversation between Me Girouard and his client regarding the tax matter that concerned them. Mr Lamontagne did not waive privilege in respect of these discussions[46]. Consequently, a portion of the recording, from minute 13:02:15 onwards, was not introduced as evidence. The portion of the video recording that was submitted in evidence, which shows an object being exchanged between Mr Lamontagne and Me Girouard, lasts only eighteen (18) seconds.

[84] The Committee viewed the recording and heard Mr Lamontagne and Justice Girouard's testimony about what can be seen at the meeting of September 17, 2010.

[85] Here is a description of what the Committee observed:

| **Time of the recording**[47] | **Description** |
|---|---|
| 12:26:35 | Mr Lamontagne sits alone at his desk. He takes a "Post-it" self-stick note from a pad. The self-stick note seems to be of medium size. Mr Lamontagne places the self-stick note in front of him on the desk. |
| 12:26:48 to 12:26:57 | Mr Lamontagne takes a small object from the right pocket of his trousers and places it on the "Post-it" self-stick note that he had already placed on his desk. |
| 12:26:58 to 12:27:06 | Mr Lamontagne rolls the small object (three or four times) inside the "Post-it" self-stick note and folds its two ends. |
| 12:27:07 to 12:27:12 | Mr Lamontagne takes the small object rolled inside the "Post-it" self-stick note and places it in the right pocket of his trousers. |
| 12:37:02 to 12:37:59 | A woman enters Mr Lamontagne's office. She files a document in a cabinet behind Mr Lamontagne. They have a discussion. She walks out of the surveillance camera's field of view. She returns, takes a few papers, and then leaves the office. During this time, Mr Lamontagne remains seated at his desk. |
| 13:01:56 | Me Girouard enters Mr Lamontagne's office. |

[45] Video recording of September 17, 2010, Exhibit P-26.
[46] Mr Lamontagne's testimony, May 7, 2015, at pp. 212-267.
[47] The time of the recording corresponds to the time of day using the 24-hour clock system.

| | |
|---|---|
| 13:01:57 to 13:02 :09 | M[e] Girouard searches in the left pocket of his jacket and takes out dollar bills that he immediately slips under Mr Lamontagne's desk pad. He also holds in his hands a piece of paper that he places on Mr Lamontagne's desk. |
| 13:02:01 to 13:02:08 | Mr Lamontagne searches in the right pocket of his trousers and takes out an object that he hides in his hand. |
| 13:02:08 to 13:02:09 | Mr Lamontagne, hiding the object in his hand, places his hand on the desk and slides his hand toward M[e] Girouard. M[e] Girouard slides his hand forward in the same manner and receives the object from Mr Lamontagne. |
| 13:02:10 | Mr Lamontagne no longer has the object in his hand. |
| 13:02:11 to 13:02:14 | Mr Lamontagne takes the money that M[e] Girouard had slipped under the desk pad. |

***Mr Yvon Lamontagne's testimony***

[86] Mr Lamontagne viewed this recording for the first time at the hearing and testified about his recollection of the meeting.

[87] He identified the woman who entered his office at 12:37:02 as being the manager of his movie rental business.

[88] Mr Lamontagne testified that, before M[e] Girouard's arrival, he took some medication that was in the right pocket of his trousers and wrapped the pills in a "Post-it" self-stick note to prevent them from crumbling in his pocket. He brought the medication from his home that morning, as he usually did, and left the pills in his pocket until he decided to wrap them up at 12:26:48.[48]

[89] Mr Lamontagne testified that M[e] Girouard had arranged to meet him in order to discuss their ongoing tax matter. He took this opportunity to inform M[e] Girouard that the latter owed him some money, about $100, for previously viewed movies, and he asked M[e] Girouard to pay for these as soon as he entered his office on September 17, 2010[49].

[90] Mr Lamontagne testified that slipping the money under the desk pad was M[e] Girouard's way of doing things[50]. As for the object that he took from his pocket and slid toward M[e] Girouard, Mr Lamontagne testified that it may have been an invoice for movie rentals that M[e] Girouard owed him, which he may have put in his right pocket earlier that morning. He added that it was not the medication that he had wrapped earlier, nor was it narcotics.[51] However, Mr Lamontagne testified that he had no specific recollection of the exchange.[52]

[48] Mr Lamontagne's testimony, May 7, 2015, at pp. 291-298, 358-362.
[49] Mr Lamontagne's testimony, May 7, 2015, at pp. 306-312.
[50] Mr Lamontagne's testimony, May 7, 2015, at p. 313.
[51] Mr Lamontagne's testimony, May 7, 2015, at pp. 326-27.
[52] Mr Lamontagne's testimony, May 7, 2015, at pp. 316-320.

[91] The Committee reviewed the three video scenes recorded on September 17, 2010 that were submitted in evidence by the independent counsel. The first scene, no. 13, shows what was recorded from 10:16 to 10:22.[53] The second scene, no. 14, is from 11:07 to 11:37[54]. The third scene, no. 15, shows what was captured from 12:25 to 13:02[55]. In particular, it shows the exchange that took place between Mr Lamontagne and M[e] Girouard. The Committee noted that none of these three scenes show Mr Lamontagne making any handwritten note.

[92] Mr Lamontagne denied having narcotics in the right pocket of his trousers.[56] He admitted to having been a marijuana dealer, but maintained that he never sold cocaine[57]. He testified that he never sold or otherwise gave illegal substances to M[e] Girouard.[58]

[93] Mr Lamontagne stated that he had no discussions with Justice Girouard or his counsel regarding his testimony at this inquiry. However, he mentioned that he had read newspaper articles about the inquiry.[59]

***Justice Girouard's testimony***

[94] Justice Girouard also testified about the contents of the video recording on three occasions: at the *voir dire* on the admissibility of the video recording with regard to issues of unreasonable seizure and violation of his fundamental rights; at the *in camera* hearing on the issue of solicitor-client privilege; and, finally, during his main testimony. The evidence given by Justice Girouard on all issues, including his testimony about the video recording, was spread over a period of five (5) days and amounted to more than eight hundred (800) pages of transcripts.

[95] Justice Girouard admitted that the exchange which took place between him and Mr Lamontagne looks "suspicious"[60], but he denied that it involved an illegal substance[61].

[96] He confirmed that he went to Mr Lamontagne's office because the latter had received documents regarding the tax matter.[62] The meeting was probably arranged by phone.[63] Mr Lamontagne was going to inform him of the amount he was able to pay as a final settlement of the matter, and the name of the individual who would lend him this sum[64].

[97] Justice Girouard stated that he took the opportunity to pay Mr Lamontagne for previously viewed adult movies[65] that he had acquired beforehand.[66] He slipped the money under the desk

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[53] Exhibit P-25, Scene no. 13, September 17, 2010, 10:16:00 to 10:22:40.
[54] Exhibit P-25, Scene no. 14, September 17, 2010, 11:07:52 to 11:36:50.
[55] Exhibit P-26, Scene no. 15, September 17, 2010, 12:25:52 to 13:02:15.
[56] Mr Lamontagne's testimony, May 7, 2015, at p. 326.
[57] Mr Lamontagne's testimony, May 7, 2015, at pp. 343-344.
[58] Mr Lamontagne's testimony, May 7, 2015, at pp. 344-345.
[59] Mr Lamontagne's testimony, May 7, 2015, at pp. 249-250.
[60] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 79-80.
[61] Justice Girouard's testimony, May 12, 2015, at p. 321.
[62] Justice Girouard's testimony, May 5, 2015 (*in camera*), at p. 25.
[63] Justice Girouard's testimony, May 13, 2015, at pp. 364-366.
[64] Justice Girouard's testimony, May 12, 2015, at pp. 301-302.
[65] Justice Girouard's testimony, May 13, 2015, at pp. 283-286.
[66] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 38-39; May 12, 2015, at p. 302; May 13, 2015, at p. 268.

pad to avoid being seen giving money to a drug trafficker.[67] He added that it was also his way of doing things, and a habit of his: he doesn't like to leave money lying around on a table.[68]

[98] Justice Girouard claimed that Mr Lamontagne must have been mistaken about what the latter slipped to him, because it was not an invoice for previously viewed movies.[69] Neither was it medication wrapped in a "Post-it" self-stick note[70]. Instead, Justice Girouard claimed that it was note on which Mr Lamontagne had written the amount for the final settlement of the tax matter and the name of the individual who would lend him this sum.[71]

[99] He maintained that it was Mr Lamontagne who decided to slip him the note in a covert manner.[72] He acknowledged that Mr Lamontagne's way of doing things was always a bit suspicious, and that it was not the first time that Mr Lamontagne had slipped him a note in this manner.[73]

[100] Justice Girouard admitted that he did not read the note immediately after receiving it. He explained that he did not need to read it, since he was expecting Mr Lamontagne to give him this information[74]. He could not recall in which pocket he placed the note that Mr Lamontagne slipped to him, but he had it on him when he arrived at his office after the meeting.[75] He testified that he probably looked at the note before having a phone conversation with a representative of the Canada Revenue Agency later that same day.[76]

[101] Justice Girouard proclaimed that he has never bought nor used drugs.[77]

### B. The relationship between M$^{e}$ Girouard and Mr Lamontagne

[102] Beyond the solicitor-client relationship, the evidence also revealed that M$^{e}$ Girouard was a special client of Mr Lamontagne's movie rental business. Mr Lamontagne would offer M$^{e}$ Girouard new releases that were not yet available in his store.[78]

[103] M$^{e}$ Girouard also purchased directly from Mr Lamontagne previously viewed movies that the former wanted to keep. Some of these were adult movies, and Justice Girouard indicated that he paid Mr Lamontagne directly for those, because he did not want them to appear on his

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[67] Justice Girouard's testimony, May 5, 2015 (*in camera*), at p. 40; May 14, 2015, at pp. 41-46, 53-54.
[68] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 40-43; May 12, 2015, at pp. 302-303; May 13, 2015, at pp. 406-407; May 14, 2015, at pp. 37-41.
[69] Justice Girouard's testimony, May 12, 2015, at pp. 307-308.
[70] Justice Girouard's testimony, May 12, 2015, at p. 317.
[71] Justice Girouard's testimony, May 12, 2015, at pp. 308-309; May 13, 2015, at pp. 358, 362, 366-367.
[72] Justice Girouard's testimony, May 12, 2015, at pp. 317-318; May 13, 2015, at pp. 394-396, 430-431; May 14, 2015, at pp. 58-59.
[73] Justice Girouard's testimony, May 13, 2015, at pp. 374-375 and 431.
[74] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 53-54 and 74-75; May 13, 2015, at p. 377; May 14, 2015, at p. 66.
[75] Justice Girouard's testimony, May 13, 2015, at pp. 424-428.
[76] Justice Girouard's testimony, May 13, 2015, at pp. 374-381.
[77] Justice Girouard's testimony, May 5, 2015 (*in camera*), at p. 64; May 12, 2015, at p. 321; May 14, 2015, at pp. 52-53.
[78] Justice Girouard's testimony, May 12, 2015, at p. 261; May 13, 2015, at pp. 256-258.

customer file at the movie rental business.[79]

[104] The Committee expresses no criticism regarding the rental and purchase of this type of movie; however, considering the evidence, it is necessary for the Committee to record this aspect of the matter.

### C. The phone calls

[105] The independent counsel also submitted in evidence four phone calls between Mr Lamontagne and M[e] Girouard that were recorded when Mr Lamontagne was under electronic surveillance during operation Crayfish[80]. Certain portions of these phone calls were not introduced as evidence, because they were protected by solicitor-client privilege.

[106] The Committee emphasizes the fact that, out of the eight hundred and fifty (850) phone calls that were sequestered during the entire Crayfish operation because of discussions with a legal advisor, M[e] Girouard was involved in only fourteen (14) of those calls. Of these, only four (4) were submitted in evidence by the independent counsel[81].

[107] Both Mr Lamontagne and Justice Girouard testified about the contents of these phone calls. According to them, they were trivial conversations about movie rentals.

[108] It should also be noted that the *Sûreté du Québec* had placed several of Mr Lamontagne's phone lines under surveillance. Investigators had established that some of these phone lines were reserved for Mr Lamontagne's illegal activities, while others were used for legitimate affairs related to his movie rental business. All phone calls between Mr Lamontagne and M[e] Girouard that were intercepted were made on a line used for Mr Lamontagne's legitimate business affairs, and not on a line reserved for his illegal activities.

[109] The independent counsel noted the unexpected and incoherent nature of certain remarks made during the phone calls. She referred particularly to a comment that Mr Lamontagne made about Canadian Tire during the phone call of February 12, 2010.[82] Mr Lamontagne testified that it was a joke[83], to which Justice Girouard replied that he did not understand the joke[84].

[110] Sergeant-Supervisor Y, whose expert testimony the Committee discusses later in this report, stated that phone calls between a drug dealer and his client are sometimes coded and made through a dealer's other commercial activities. He gave the example of drug trafficking through a pizzeria, where a person wanting to buy cocaine knows he has to order [TRANSLATION] "a pizza with extra white cheese", or through a hardware store, where the drug dealer owns the business and the buyer has to ask for [TRANSLATION] "a half-can or a can of

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[79] Justice Girouard's testimony, May 12, 2015, at pp. 263-264; May 13, at pp. 264-265.
[80] Audio and video evidence, Exhibit P-25.
[81] Mylène Brunet's testimony, May 6, 2015, at p. 47 and following; Evidence related to electronic surveillance, Exhibit P-12, Tab 1.
[82] Audio and video evidence, Exhibit P-25.
[83] Mr Lamontagne's testimony, May 7, 2015, at pp. 107-115.
[84] Justice Girouard's testimony, May 12, 2015, at pp. 266 and 277; May 13, 2015 at pp. 311-315.

white paint".[85]

[111] The independent counsel also pointed to the existence of a certain concomitance between the phone calls that were intercepted and the movements of certain drug traffickers, including Mr Lamontagne, in order to transport illegal substances.

[112] However, the Committee considers that the evidence of the phone calls does not demonstrate the existence of a code or a context to prove the nature of the exchange that took place on September 17, 2010.

### D. Sergeant-Supervisor Caouette's testimony

[113] Sergeant-Supervisor Éric Caouette testified before the Committee on May 4 and 5, 2015. He is the team leader of the *Sûreté du Québec*'s regional investigation squad in Val D'Or. His involvement in the Crayfish investigation consisted at first in surveilling suspects, and, after the raid, in analyzing what was intercepted during the investigation or seized during the searches.[86]

[114] Sergeant-Supervisor Caouette was also involved in preparing small bags containing different quantities of three illegal substances, namely cocaine, haschich and cannabis. Evidence of the real substances was photographed[87]. He noted that cocaine is a powdery substance that resembles flour in its physical appearance[88]. Haschich was described as a hard lump of tar[89]. Finally, cannabis is a green plant whose leaves are sold on the market in the form of buds, approximately the size of a twenty-five cent coin (25¢).[90]

[115] Sergeant-Supervisor Caouette displayed before the Committee other small bags containing flour, which was used to simulate the physical aspect and weight of cocaine.[91]

[116] Sergeant-Supervisor Caouette performed a demonstration for the Committee where he rolled, one by one, small bags containing different quantities of flour inside a "Post-it" self-stick note of medium size, and then folded the two ends. He was able to wrap four small bags in this manner, each containing ¼ gram, 1.7 grams, 3.5 grams and 7 grams of flour, representing cocaine.[92]

[117] Following this demonstration, Sergeant-Supervisor Caouette testified that he would not be able to do the same thing with the other illegal substances – haschich and cannabis.[93]

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[85] Sergeant-Supervisor Y's testimony, May 11, 2015, at pp. 102-105.
[86] Sergeant-Supervisor Caouette's testimony, May 4, 2015, at pp. 169-172.
[87] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at pp. 147-149. See the photographs of real illegal substances: *Power Point du Projet Crayfish / Résumé de l'enquête*, Exhibit P-2, at p. 41.
[88] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at p. 149.
[89] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at pp. 149-150.
[90] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at pp. 150-151.
[91] Samples corresponding to different quantities of cocaine, but filled with flour, Exhibit P-8.
[92] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at pp. 160-163.
[93] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at p. 163.

## E. Sergeant-Supervisor Y's testimony

[118] The independent counsel introduced Sergeant-Supervisor Y as an expert witness, so that he could explain to the Committee what can usually be observed during a drug transaction and provide his analysis of the video recording of September 17, 2010. The Committee issued a publication ban on any information that could identify Sergeant-Supervisor Y, since the protection of his identity is necessary for the performance of his duties, particularly in undercover operations.

[119] Sergeant-Supervisor Y has had an impressive career with the *Sûreté du Québec*. He has been a police officer for twenty-six (26) years. He worked as an undercover operator for twenty-two (22) years, first on a part-time basis, then on temporary assignments, and later on a full-time basis. He was also a narcotics investigator in the organized crime squad for a little more than ten (10) years. For the last four (4) years, he has been the Sergeant-Supervisor of the *Sûreté du Québec*'s undercover division.

[120] Sergeant-Supervisor Y has taken several training programs during his career, particularly on undercover activities, organized crime infiltration, narcotics investigation, organized crime investigation, and video interrogation. He was also a trainer on several occasions. In particular, Sergeant-Supervisor Y has given training courses on undercover activities and drugs at the *École nationale de police du Québec*.

[121] During the first thirteen (13) years of his career as an undercover operator, while on temporary assignments in the undercover division, Sergeant-Supervisor Y was involved in a hundred or so operations per year, that is to say about a hundred drug transactions. Later, for a period of four (4) years after becoming a full-time undercover operator, he was involved in approximately four hundred (400) operations per year. Eighty percent (80%) of drug transactions carried out by Sergeant-Supervisor Y were cocaine purchases.

[122] Sergeant-Supervisor Y pointed out that much of an undercover operator's work is to observe. Before playing the role of a buyer, he observes other transactions in order to understand the dealer's *modus operandi*.

[123] The Committee allowed Sergeant-Supervisor Y to be qualified as an expert witness in undercover activities. He has an extensive, wide and comprehensive experience acquired over many years. In addition, he is presently at the top of the hierarchy of the *Sûreté du Québec*'s undercover division, and has been for four (4) years.

[124] Sergeant-Supervisor Y's experience is relevant to this inquiry and his comments may assist the Committee with issues that its members are not familiar with. Consequently, the Committee agreed to hear his testimony on usual behaviour observed during a drug transaction, that is to say a typical transaction. However, the Committee refused to hear Sergeant-Supervisor Y's analysis of the video recording of September 17, 2010, since the Committee is of the opinion that it is responsible for determining what transpired at the meeting captured by the video. Sergeant-Supervisor Y's report, submitted in evidence as Exhibit P-22, was also circumscribed to reflect the Committee's decision.

[125] From the thousands of drug transactions that Sergeant-Supervisor Y has observed, he drew the following conclusions[94] :

- Approximately seventy percent (70%) of illegal substance transactions occur in public places. Others take place inside dwellings or vehicles. Behaviours observed in these two types of transactions are different.

- During transactions that occur in public, individuals involved attempt to conceal their actions: speaking in whispers or in a low voice; exchanging money, sometimes under a table; sliding money towards someone; etc. In Sergeant-Supervisor Y's view, the intent to conceal an action is an indication that it is illegal or immoral.

- However, Sergeant-Supervisor Y emphasized that a single action is not a clear indication of the nature of a transaction. For example, the act of concealing a cash payment is just one of many signs. Instead, Sergeant-Supervisor Y looks for a pattern of behaviour, in other words a series of consecutive actions, in order to detect an illegal substance transaction. He also looks for a similar pattern of behaviour with other buyers.

- Sergeant-Supervisor Y also pointed out that individuals involved in a transaction do not look at their hands, in order to avoid drawing attention to the exchange that is taking place.

- When individuals are used to doing business together, transactions can sometimes occur without anything being said. Such is the case in approximately twenty-five percent (25%) of transactions observed by Sergeant-Supervisor Y. These are referred to as habitual transactions.

- When a transaction takes place in a bar, contact can be made by cellular phone or in person.

- Sergeant-Supervisor Y indicated that many traffickers keep illegal substances in the small coin pocket of the right pocket of a pair of jeans.

### F. The evidence of similar facts

[126] The independent counsel called cooperating witness Mr X to testify before the Committee. Mr X was arrested on October 6, 2010 during the raid conducted as part of operation Crayfish. He pleaded guilty to charges of drug trafficking, including cocaine trafficking, and has been imprisoned since then. Soon after his arrest, Mr X began a process of cooperation with police forces, which is why he is now a cooperating witness.

[127] Mr X had no knowledge of the exchange that was recorded on video on September 17,

[94] Sergeant-Supervisor Y's testimony, May 11, 2015, at pp. 94-110, 117-123. See also Sergeant-Supervisor Y's report, Exhibit P-22, Tabs 2 and 3.

2010.

[128] However, in 2012, Mr X made a statement alleging that M[e] Girouard regularly purchased cocaine from him from the late 1980s until the early 1990s. The independent counsel submitted that the relationship between M[e] Girouard and Mr X and the one between M[e] Girouard and Mr Lamontagne showed certain similarities.

[129] The Committee therefore agreed to hear Mr X's testimony, but only to provide evidence, if any, of similar facts given the following: (1) Mr X and Mr Lamontagne were clients of M[e] Girouard; (2) Mr X and Mr Lamontagne were high-ranking members of a criminal organization; (3) the purchase of an illegal substance by M[e] Girouard allegedly took place in Mr X's office and in Mr Lamontagne's office; and (4) it was allegedly the purchase of an illegal substance.

[130] In rendering its decision on the admissibility of this evidence, the Committee advised the parties that the probative value of the evidence still needed to be determined.[95] This is particularly because the facts related by cooperating witness Mr X go back more than twenty-five (25) years.

[131] Mr X testified at the inquiry on May 7-8, 2015; he was also cross-examined by counsel for Justice Girouard.

[132] Following Mr X's testimony, the Committee was of the opinion that no conclusion could be drawn from the evidence he gave regarding count 3. Consequently, the Committee did not place any weight on his testimony.

### G. The evidence of good reputation and non-use of drugs

[133] The evidence introduced by Justice Girouard portrays him as a reputable lawyer and judge. He testified about his involvement with his family, his community and the *Barreau du Québec*. It is also undeniable that Justice Girouard is a diligent judge who is committed to his work, and whose judgments are rendered expeditiously and with due regard for the proper administration of justice.[96]

[134] As previously mentioned, Justice Girouard, at every step of the process before the Council, claimed that he has never used drugs. His counsel submitted that the exchange captured on video cannot possibly show an illicit substance transaction, since Justice Girouard has never used any such substance.

[135] Five (5) witnesses who are professional and personal acquaintances of Justice Girouard, as well as his spouse, testified about Justice Girouard's good reputation and the absence of any sign that he used illegal substances.

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[95] Transcript of April 16, 2015, at pp. 1395 and following.
[96] Decisions rendered by Justice Girouard, Exhibits I-7, I-8 and I-10; Average number of judgments reserved by Justice Girouard, Exhibit I-9; Appeals against Justice Girouard's judgments, Exhibit I-11.

[136] Dr Joël Pouliot is a cardiologist who practices in the Abitibi region. Justice Girouard and Dr Pouliot have been friends since 1996. Although they saw each other more or less regularly over the years, the Committee unhesitatingly accepted that Dr Pouliot is a close friend of Justice Girouard. Together, they took part in various activities in Val D'or and often travelled with their spouses or their families.

[137] Dr Pouliot testified that he has never observed any unseemly conduct on the part of Justice Girouard. He has never observed any behaviour that would have led him to believe that Justice Girouard used cocaine.[97]

[138] M[e] Robert-André Adam, a lawyer in Val D'Or, was the next to testify. He started working in M[e] Girouard's law firm in 1996 and subsequently became his partner in 2001. In 2010, when M[e] Girouard was appointed to the judiciary, M[e] Adam took over his former partner's cases and clientele.

[139] M[e] Adam spoke highly of M[e] Girouard, especially about his diligent work, his efficiency and his organization.[98] He stated that, during all their years of working closely together, he never observed any odd behaviour on the part of M[e] Girouard, nor any sign of a drug problem.[99] M[e] Adam claimed that he would have never tolerated such a problem from his partner.[100]

[140] In addition, M[e] Jean McGuire, who also practices in the Abitibi region, testified before the Committee. He had professional dealings with M[e] Girouard on several occasions during their careers; their relationship was a professional one. From time to time, M[e] McGuire used an office next to M[e] Girouard's. He had the impression that it was a well-organized practice[101].

[141] M[e] Jean McGuire never observed any troubling behaviour on the part of Justice Girouard while he was a lawyer or a judge.[102]

[142] Mr Guy Boissé also testified. He is a company president who specializes in high risk insurance. Justice Girouard and Mr Boissé have been close friends for thirty (30) years. Mr Boissé is also married to a cousin of Justice Girouard. In addition to seeing each other at family gatherings, Mr Boissé and M[e] Girouard share several hobbies. They have travelled together for fishing trips and family holidays in the south.

[143] Mr Boissé stated that he never saw any sign that M[e] Girouard was a drug user. In his view, he was so close to M[e] Girouard that he would have known about such behaviour, had M[e] Girouard ever been a drug user.[103]

[144] Finally, Justice Girouard's spouse testified. In addition to talking about her family life with Justice Girouard, she stated that there have never been any drugs in their home and that her

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[97] Dr Pouliot's testimony, May 12, 2015, at pp. 373-378.
[98] M[e] Robert-André Adam's testimony, May 13, 2015, at pp. 35-40.
[99] M[e] Robert-André Adam's testimony, May 13, 2015, at pp. 40-42.
[100] M[e] Robert-André Adam's testimony, May 13, 2015, at p. 41.
[101] M[e] Jean McGuire's testimony, May 13, 2015, at pp. 116-118.
[102] M[e] Jean McGuire's testimony, May 13, 2015, at pp. 121-125.
[103] Mr Guy Boissé's testimony, May 13, 2015, at pp. 192-194.

spouse never used drugs.[104]

[145] Furthermore, two affidavits were signed and submitted in evidence to serve as testimony. The first was signed by the Honourable Justice Marc Ouimette of the Court of Quebec[105]. In it, he stated that he worked closely with M[e] Girouard from 2008 to 2010, and that he never noticed nor observed any indication or behaviour of any kind that would suggest that M[e] Girouard was a drug user.

[146] The second affidavit was signed by M[e] Wolfgang Mercier-Giguère. In 2009, he completed the articling term required by the *Barreau du Québec* and was assigned to M[e] Girouard. He was later hired as a lawyer by M[e] Girouard's firm and the two worked together until M[e] Girouard's appointment to the judiciary.[106]

[147] M[e] Mercier-Giguère also stated that he never noticed any characteristic signs of cocaine use, or of any other drug use, on the part of M[e] Girouard. In his view, M[e] Girouard's personal and professional behaviour was beyond reproach.

### H. The expert evidence on cocaine use

[148] Counsel for Justice Girouard submitted the written report of an expert on the potential effects of regular cocaine use. In rebuttal, the independent counsel introduced the report of a second expert who qualified the words of the first. By mutual agreement of the parties, which was approved by the Committee, neither expert testified at the inquiry.

[149] For the benefit of the Council, the following is a summary of this evidence.

[150] Counsel for Justice Girouard submitted the expert evidence of Mr Jean Charbonneau, a chemist, regarding the effects that cocaine can have on its users.[107] Mr Charbonneau holds a bachelor's degree in biochemistry and a bachelor's degree in science (law, occupational health and safety, drug addiction). He also holds a master's degree in environmental and occupational health and wrote a thesis on the validity of blood alcohol calculations. Mr Charbonneau has worked for more than twenty (20) years as a consultant on blood alcohol levels and drug toxicology.

[151] In his three (3) page report, Mr Charbonneau described cocaine and its pharmacological effects. He noted that the use of this substance in repeated doses shortens the period of euphoria that it provides and that the adverse effects become more and more pronounced. In his opinion, use of this drug leads to behavioural changes such as anxiety, distorted judgment, delusions of grandeur, hypervigilance, mistrust, paranoid disorders, psychomotor agitation, irritability, anger, aggressiveness, as well as visual, auditory and sensory hallucinations.

[152] In Mr Charbonneau's opinion, if a person used cocaine regularly over a period of several

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[104] Testimony of Mrs Z, Justice Girouard's spouse, May 14, 2015, at pp. 40-42, 51-52.
[105] The affidavit was read at the hearing and placed on the record: Transcript of May 11, 2015, at pp. 125 and following.
[106] M[e] Wolfgang Mercier-Giguère's detailed affidavit, Exhibit I-12.
[107] Mr Jean Charbonneau's report and *curriculum vitae*, Exhibit I-13.

years in quantities described by cooperating witness Mr X, it would have the effect of disrupting his or her social relationships. In his view, it would be unlikely that individuals who spent time with the user would not notice significant behavioural changes in this person.

[153] In rebuttal, the independent counsel introduced the expert evidence of Dr Claude Rouillard.[108] Dr Rouillard holds a doctoral degree in neurobiology from *Université Laval*. He is a full professor in the department of psychiatry and neuroscience at the faculty of medecine of *Université Laval*, and a senior researcher at the *CHU de Québec* Research Center (neuroscience research area). In addition to being a university teacher on subjects relevant to this inquiry, Dr. Rouillard has published numerous academic papers and participated in many conferences on the effects of drugs.

[154] In his report, Dr Rouillard first detailed the effects of cocaine use. He underlined the different types of use. What emerged from his report is that cocaine users are not a homogeneous group. According to Dr Rouillard, some of them manage to control their use of the drug, while others quickly develop an addiction to this substance. Dr Rouillard specified that nearly half of users do not complain of disorders related to their habit, and that only 16% to 25% of users develop an addiction.

[155] Dr Rouillard qualified the words of Mr Charbonneau. In his opinion, behavioural disorders identified by Mr Charbonneau occur only in a limited number of users and, generally, in users who have developed a drug abuse problem.

[156] Dr Rouillard noted that, from cooperating witness Mr X's statement, it cannot be determined if the drug was used individually or shared with others. As for the quantities described by cooperating witness Mr X, Dr Rouillard was of the opinion that the probability of complications and behavioural changes is very low with a personal use of 0.5 grams per week. The effects on behaviour and physical and psychological health would be more significant with a personal use of up to 3.5 grams per week. However, only a limited number of users become addicted and develop behavioural and health problems.

[157] On the basis of available information and scientific knowledge, Dr Rouillard concluded that there could have been cocaine use for a period of a few years, without people close to the user being able to detect signs that would have led them to suspect drug use.

[158] As explained further in this report, the Committee is of the opinion that no evidence of drug use in the months preceding Justice Girouard's appointment has been established. Therefore, the Committee considers that the expert evidence on cocaine use, although useful in terms of specialized scientific knowledge, is not helpful in analyzing the evidence on the record.

## I. Analysis

[159] On the basis of the evidence introduced at the inquiry, the Committee cannot conclude, on a balance of probabilities that there was clear and convincing evidence that the exchange captured and recorded on video on September 17, 2010 is an illegal substance transaction.

[108] Dr Rouillard's report, Exhibit P-27, and his *curriculum vitae*, Exhibit P-27A.

[160] Justice Girouard asked the Committee to lift the cloud of uncertainty that hangs over him[109]. It is understandable why Justice Girouard would have wanted the Committee to state that no illegal substance transaction took place on September 17, 2010. However, the Committee is unable to draw such a conclusion. The Committee's analysis is set forth in the following paragraphs.

[161] There is no direct evidence of the nature of the object that was exchanged.

[162] After viewing the video recording, the Committee was unable to determine the nature of the object. Mr Lamontagne's testimony and the evidence given by Justice Girouard are partly conflicting as to the nature of the object. Mr Lamontagne claimed that the object may have been an invoice for previously viewed movies. Justice Girouard, both at the inquiry and in response to M[e] Doray's questions, stated that it was a note containing information regarding his client's tax matter. According to these two versions, the object was a piece of paper, and not an illegal substance.

[163] As a result of the demonstration performed by Sergeant-Supervisor Caouette, where he rolled, one by one, four small bags containing different quantities of flour representing cocaine[110], the Committee is of the opinion that if the object was an illegal substance, it was likely cocaine and not marijuana, since Sergeant-Supervisor Caouette testified that marijuana is sold on the market in the form of buds[111]. On the basis of Sergeant-Supervisor Caouette's testimony, the Committee concluded that such buds could not have been wrapped in a "Post-it" self-stick note, in the way that Mr Lamontagne had done shortly before M[e] Girouard arrived in his office.

[164] When searches were conducted at Mr Lamontagne's movie rental store and at his residence, no cocaine was seized, although considerable quantities of marijuana were seized[112]. Based on the testimony of *Sûreté du Québec* officers who appeared before the Committee, only Sergeant Caouette and Sergeant Sirois could have observed Mr Lamontagne in possession of cocaine through video recordings that were captured from time to time. However, according to their testimony, they did not see Mr Lamontagne in possession of cocaine. Furthermore, Mr Lamontagne was charged with trafficking marijuana, not cocaine.

[165] Although the Committee is of the opinion that the evidence has shown that Mr Lamontagne could have easily obtained cocaine[113], no evidence was submitted at the inquiry that he was actually in possession of this substance at any time in the months preceding the meeting of September 17, 2010, despite the fact that he had been under police surveillance for almost a year.

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[109] Justice Girouard's testimony, May 12, 2015, at pp. 350-351.
[110] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at pp. 160-163.
[111] Sergeant-Supervisor Caouette's testimony, May 5, 2015, at pp. 150-151.
[112] Sergeant Marc April's testimony, May 4, 2012, at pp. 129-139; *PowerPoint Projet Crayfish/Résumé de l'enquête*, Exhibit P-2, at pp. 27-37.
[113] Mr Lamontagne unquestionably mixed with cocaine traffickers within the criminal organization that he belonged to. In addition, he was highly placed within that organization, which gave him the status needed to obtain drugs easily. *PowerPoint Projet Crayfish/Résumé de l'enquête*, Exhibit P-2. See also the testimony of *Sûreté du Québec* officers, Transcript of May 4, 5 and 6, 2015.

[166] Mr Lamontagne's testimony that he took medication from his pocket and wrapped it in a "Post-it" self-stick note is certainly questionable. Based on the movement observed, it is highly unlikely that he was retrieving pills from his pocket. However, rejecting this testimony would not, in itself, provide evidence of the nature of the object that was exchanged.

[167] Sergeant-Supervisor Y's testimony was most helpful to the Committee and we gave it much credibility and probative value. He gave evidence that a single action is not a clear indication of the nature of a transaction. An undercover operator looks instead for a pattern of behaviour, in other words a series of consecutive actions, in order to detect an illegal substance transaction; he also looks for a similar pattern of behaviour with several other individuals.

[168] Only one video recording of an exchange lasting eighteen (18) seconds was submitted to the Committee. Based on this sole exchange, the Committee is unable to determine if it captured a series of consecutive actions between a dealer of illegal substances and his client, or simply innocuous gestures. Although the gestures look suspicious, they are not clear and convincing.

[169] Furthermore, the Committee rejected the evidence of similar facts regarding a history of similar transactions, and is of the opinion that the phone calls that were intercepted do not provide evidence of a context for an illegal substance transaction.

[170] All things considered, there is no evidence that M$^{e}$ Girouard used or purchased cocaine in the months preceding his appointment to the judiciary, despite the fact that individuals who were dealing in cocaine in the region had been under constant and lengthy surveillance.

[171] The independent counsel argued that the evidence submitted to the Committee was sufficient to establish a presumption of serious, specific and corroborating facts that a cocaine transaction occurred on September 17, 2010. With great respect, the evidence presented to the Committee is insufficient to draw such a conclusion.

[172] Nor can the Committee conclude, on the basis of the evidence on the record, that the exchange was not an illegal substance transaction, as requested by Justice Girouard.

[173] Accordingly, count 3 has not been proven on a balance of probabilities.

## IV. Other comments

[174] The Committee found it disturbing that, in their final submissions, counsel for Justice Girouard suggested, in veiled terms, that police forces may have interfered in the case, as if to retaliate against Justice Girouard.[114] There is no evidence to support such an inference. This is particularly disconcerting in light of the fact that the evidence shows there was a critical need for police action in the Abitibi region to deal with the activities of organized crime, and that, quite obviously, project Crayfish was a success.

[175] Although he is entitled to a full and complete defence, Justice Girouard remains a

[114] Submissions made by counsel for Justice Girouard, June 8, 2015, at pp. 239-245.

member of the judiciary throughout this inquiry and, in our opinion, he must ensure that his conduct is irreproachable. Such comments from his counsel, made in passing without any supporting evidence, bring the administration of justice into disrepute.

## V. The Committee's conclusion

[176] As previously mentioned, the Committee has determined that count 3 has not been proven.

[177] The Committee does not deem it appropriate to pursue the inquiry into Justice Girouard's conduct with respect to counts 1 (1987-1992), 2, 4 and 6. Many years have passed since the events described in counts 1, 2 and 4, which would inevitably weaken the quality of the evidence that may be submitted to the Committee. Furthermore, on the basis of findings and conclusions drawn from the evidence presented to the Committee, it seems unlikely that the independent counsel could, on a balance of probabilities, prove counts 1, 2 and 4.

[178] With regard to count 6, in light of its conclusions regarding count 3, the Committee is of the opinion that it is not necessary to pursue the inquiry on this count.

## VI. Analysis of Justice Girouard's testimony by Chief Justice Crampton and M$^{e}$ LeBLanc, Q.C.

[179] The Committee repeatedly emphasized throughout the inquiry that it seeks the truth. The Committee also stated at the outset of the hearings that it wishes to lift the cloud of uncertainty that hangs over Justice Girouard, either by finding that there was no misconduct, or by detailing the nature of the misconduct. As previously mentioned, Justice Girouard himself made this request directly to the Committee during his testimony.[115]

[180] After two weeks of hearings and a thorough review of the record, we, Chief Justice Crampton and M$^{e}$ LeBlanc, Q.C., feel it is our duty to address important pertinent issues regarding the reliability and credibility of Justice Girouard's version of the facts. We found that the evidence contained several contradictions, inconsistencies and implausibilities that are central to the September 17, 2010 transaction which was recorded on video.

### *The payment for previously viewed movies made directly to Mr Lamontagne*

[181] As soon as he entered Mr Lamontagne's office on September 17, 2010, M$^{e}$ Girouard slipped what appeared to be money under the desk pad. At the inquiry, Justice Girouard testified that it was a sum of money he owed his client for previously viewed movies that he had decided to purchase from him.

[182] At the *voir dire* on the admissibility of the video recording, on May 4, 2015, Justice Girouard stated that he went to Mr Lamontagne's place of business to discuss the legal matter that concerned them, and that this was the only reason for his visit.[116]

[115] Justice Girouard's testimony, May 12, 2015, at pp. 350-351.
[116] Justice Girouard's testimony, May 4, 2015 (*voir dire*), at p. 412.

[183] The following day, on May 5, 2014, at the *in camera* hearing to determine whether the video recording was protected by solicitor-client privilege, Justice Girouard specified that he did not go to Mr Lamontagne's place of business to pay him for the movies. Instead, he used the opportunity of his business meeting to give Mr Lamontagne the amount he owed for the movies.[117] He paid the money directly to Mr Lamontagne because he did not want the movies to appear on his customer file at the movie rental business.[118] He therefore implied that they were adult movies.

[184] During his main testimony, Justice Girouard nevertheless indicated that he purchased all sorts of movies from Mr Lamontagne, including commercial films and children's movies.[119] He also mentioned that he rarely purchased adult movies.[120] However, we note that Justice Girouard did not mention commercial films or children's movies when he wrote to the Council's Executive Director in January 2013.[121]

[185] Justice Girouard's testimony as to why he purchased movies directly from Mr Lamontagne is therefore not entirely consistent. If he always purchased adult movies, as suggested in his letter to the Council, his motivation would be obvious. However, he stated that he rarely purchased such movies.

[186] It is plausible that Justice Girouard, while he was a lawyer, purchased all sorts of previously viewed movies from Mr Lamontagne. It is true that Justice Girouard mentioned that he did not feel it necessary to provide details of all his movie purchases to the Council's Executive Director[122]. Nonetheless, what emerges is that, at different stages, Justice Girouard described the nature of these purchases in different ways.

***The act of slipping money under the desk pad***

[187] As previously noted, M[e] Girouard slipped money under the desk pad as soon as he entered Mr Lamontagne's office.

[188] At the *in camera* hearing on the issue of solicitor-client privilege, Justice Girouard provided two reasons to explain why he did this. First, he testified that he slipped the money under the desk pad so that it would not be obvious he was giving money to a trafficker[123]. He then added that, regardless of this first reason, he slipped the money under the desk pad because it was his way of doing things: he never leaves cash lying around on a table[124]. He makes sure to slip money under an object so that the person it is intended for will find it. He gave the example of leaving money on a table so that his children can use it to take taxis[125].

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[117] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 38-39.
[118] Justice Girouard's testimony , May 5, 2015 (*in camera*), at p. 39.
[119] Justice Girouard's testimony, May 13, 2015, at pp. 264-268.
[120] Justice Girouard's testimony, May 13, 2015, at pp. 265, 283-296. Justice Girouard testified that he purchased between twenty (20) and thirty (30) movies of this type: May 13, 2013, at p. 289.
[121] Letter to the Council, Exhibit P-28.
[122] Justice Girouard's testimony, May 13, 2015, at pp. 292-296.
[123] Justice Girouard's testimony, May 5, 2015 (*in camera*), at p. 40.
[124] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 40-41.
[125] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 40-41.

[189] However, during his main testimony, in both direct and cross-examination, Justice Girouard, when asked about his action, spoke only about his habit of slipping money under an object.[126]

[190] It was only after the Chairperson of the Committee, on the last day of hearings, reminded him of the initial explanation he gave at the *in camera* hearing that Justice Girouard went back to it, saying that he did not want to be seen giving money to a trafficker. In a further cross-examination following questions asked by the Committee, Justice Girouard confirmed that he acted in such a manner for those two reasons, but still more out of habit.[127]

[191] Beyond the inconsistency in Justice Girouard's testimony as to the reason why he slipped money under the desk pad, we also question the plausibility of this explanation. Naturally, if the person to whom the money is intended for is not present, the thought of not leaving it lying around would seem insignificant, even quite appropriate. However, if the person to whom the money is intended for is present, as Mr Lamontagne was, such an action becomes unusual.

[192] When pressed in further cross-examination by the independent counsel about the logic of slipping the money under the desk pad while Mr Lamontagne was less than three (3) feet away from him, Justice Girouard replied that he did so because he did not want to be seen giving money to a trafficker.[128]

[193] We are perplexed by this response: did Justice Girouard act in this manner mostly because he did not want to be seen, or mostly out of habit?

[194] Furthermore, if Justice Girouard, while he was a lawyer, did not want to be seen giving money to a trafficker, why did he not pay the cashier for previously viewed movies that he purchased? And why did he not close the door to Mr Lamontagne's office in order to avoid being seen? Justice Girouard testified that he purchased a lot of movies, but rarely ones of the kind that he did not want appearing on his customer file. If Justice Girouard did not want to be seen giving money to Mr Lamontagne, his testimony regarding the payment he made directly to Mr Lamontagne raises some doubt.

***The moment when Mr Lamontagne and M$^{e}$ Girouard began to discuss the tax matter on September 17, 2010***

[195] At the *in camera* hearing on the issue of solicitor-client privilege, Justice Girouard stated that Mr Lamontagne and he discussed the tax matter during their entire meeting of September 17.[129] As for Mr Lamontagne, he stated that he could not recall exactly when they began to talk about business; however, he said that they started to discuss the tax matter after he got up to retrieve documents located behind him.[130]

[196] We are well aware that memory has a way of fading. We draw no negative inference

[126] Justice Girouard's testimony, May 12, 2015, at pp. 302-303; May 13, 2015, at p. 407; May 14, 2015, at pp. 37-41.
[127] Justice Girouard's testimony, May 14, 2015, at pp. 41, 45-46.
[128] Justice Girouard's testimony, May 14, 2015, at pp. 53-55.
[129] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 32, 38-39, 48 and 77.
[130] Mr Lamontagne's testimony, May 7, 2015, at pp. 250 and 256-260.

from the fact that neither Justice Girouard nor Mr Lamontagne could recall what they discussed during their meeting.

[197] However, after viewing the video recording several times, we find it unlikely that, as soon as M[e] Girouard entered Mr Lamontagne's office and took out money to pay him for previously viewed movies, the two immediately began to discuss the tax matter without saying a word about the movies.

[198] Justice Girouard had viewed the video recording before testifying about the duration of the meeting with his client. He also testified that he used the opportunity of the meeting to pay Mr Lamontagne.[131] However, we have some reservations about the suggestion that M[e] Girouard and Mr Lamontagne discussed the tax matter during their entire meeting, and did not talk about the payment for previously viewed movies in the first few moments, which, according to their testimony, took place during this meeting.

***The content of the note: the amount for settlement of the tax matter***

[199] One of the important inconsistencies in this matter is the explanation of what was written in the note, if any, that Mr Lamontagne allegedly gave to M[e] Girouard.

[200] With regard to the object that he gave to M[e] Girouard during the exchange recorded on video, Mr Lamontagne testified that it may have been an invoice for previously viewed movies that M[e] Girouard had decided to purchase from him. By contrast, Justice Girouard, as we know, stated that it was a note on which was written the amount to settle the tax matter and the name of the lender.

[201] Yet, Mr Lamontagne said that it was M[e] Girouard who informed him of the final amount to settle the tax matter, and not the other way around. He added that he had asked M[e] Girouard to calculate how much he owed, so he could borrow enough money to proceed with the settlement. Mr Lamontagne also said that M[e] Girouard must have written the settlement amount, because M[e] Girouard was sometimes absent-minded about numbers.[132] Furthermore, when asked if, on September 17, 2010, he may have given M[e] Girouard a document containing information related to his tax matter, Mr Lamontagne said that he did not think so.[133] However, it must be remembered that Mr Lamontagne did specify that he had no recollection of the content of the note and assumed it was an invoice for previously viewed movies.[134]

[202] We see no reason why Mr Lamontagne would have lied about this aspect of the case, unless, of course, it was not a written note. It is certainly possible that he did not remember it well, as five (5) years have passed since his brief meeting with M[e] Girouard. However, this inconsistency raises some questions. It would obviously make no sense that the note he gave to M[e] Girouard contained the loan amount to settle the tax matter, if Mr Lamontagne did not know what the settlement amount was.

[203] We note that Justice Girouard specified, in cross-examination, that he may have told Mr

[131] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 38-39.
[132] Mr Lamontagne's testimony, May 7, 2015, at pp. 151-152, 195-197, and 314-315.
[133] Mr Lamontagne's testimony, May 7, 2015, at pp. 323-325.
[134] Mr Lamontagne's testimony, May 7, 2015, at pp. 316-320.

Lamontagne about the settlement amount prior to their meeting of September 17, 2010, but that he could not confirm it because he did not remember[135].

[204] It must also be repeated, that if it was actually a written note from Mr Lamontagne, whether it was an invoice for previously viewed movies or information regarding the tax matter, Mr Lamontagne is not seen using a pen or pencil to write a note in any of the three video scenes recorded on September 17, 2010 that were submitted in evidence to the Committee.[136]

***The content of the note: the message saying* [TRANSLATION] *"I'm under surveillance, I'm being bugged"***

[205] In the summary prepared by M[e] Doray, who met with Justice Girouard on August 13, 2013, M[e] Doray stated that Justice Girouard told him that the note contained information regarding the tax matter, as well as a message from Mr Lamontagne saying: [TRANSLATION] "I'm under surveillance, I'm being bugged".

[206] At the *in camera* hearing on the issue of solicitor-client privilege, Justice Girouard testified that he told M[e] Doray that the note contained a message saying that Mr Lamontagne thought he was under surveillance. However, he later added that he was not certain if the note contained such a message. He remembered having talked about surveillance with M[e] Doray, but stated that he could only recall with certainty the two (2) other pieces of information he was expecting, that is to say the settlement amout and the name of the lender. Justice Girouard stated that Mr Lamontagne's behaviour led him to believe that the latter thought he was under surveillance. Justice Girouard then added that he realized he should explain himself.[137]

[207] In his main testimony, Justice Girouard made no mention of a message regarding surveillance.

[208] When cross-examined on this issue, Justice Girouard replied that M[e] Doray must have misunderstood him and that he did not use the words "I'm under surveillance, I'm being bugged".[138] Instead, he told M[e] Doray that Mr Lamontagne's behaviour led him to believe that the latter was under surveillance.[139]

[209] Consequently, there seems to be a substantial inconsistency between Justice Girouard's testimony at the *in camera* hearing and the evidence he gave during his cross-examination. In addition, the evidence shows that, on September 17, 2010, Mr Lamontagne did not know he was under surveillance.[140]

[210] We question the explanation provided by Justice Girouard. The contents of the note, that is to say the nature of the object that was exchanged, is an essential element in analyzing the

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[135] Justice Girouard's testimony, May 13, 2015, at pp. 362-363.
[136] See *supra*, at para. 91.
[137] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 104-106.
[138] Justice Girouard's testimony, May 13, 2015, at pp. 367-374; May 14, 2015, at pp. 14-17.
[139] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 104-105; May 12, 2015, at pp. 314-315; May 13, 2015, at pp. 434-435.
[140] Mr Lamontagne's testimony, May 7, 2015, at pp. 72-77; Recorder, October 6, 2010, electronic evidence, Exhibit P-12, Tab 5.

video recording. If M[e] Doray had incorrectly reported what Justice Girouard said, we believe that Justice Girouard or his counsel would have certainly reacted and written to M[e] Doray to ask for an amendment.

[211] Indeed, it was put in evidence that M[e] Doray made changes to the first draft of his summary.[141] He would have undoubtedly, for the sake of accuracy, amended the summary of his meeting with Justice Girouard if it had not accurately reflected the nature of their discussions.

[212] Justice Girouard stated that he did not read the August 13, 2013 summary of his meeting with M[e] Doray.[142] Justice Girouard said he was exhausted at the time when this summary was provided to his counsel.[143] He stated that, after finding out that M[e] Doray's report was negative, he did not read it.[144]

[213] Justice Girouard drew the Committee's attention to two things. Firstly, he noted that it was a confidential meeting that was being used by the independent counsel as a prior inconsistent statement. Secondly, he emphasized the distinction between the summary of his August 13, 2013 meeting with M[e] Doray and a statement made in due form. In his opinion, the summary of the meeting provided an account of discussions between parties involved and submissions made by his counsel[145]. Therefore, in his opinion it was not, strictly speaking, a statement that he made. Such a distinction is appropriate. However, it remains true that this statement of facts, as we understand it, is contained in M[e] Doray's summary.

[214] The evidence has shown that Justice Girouard was an assiduous and meticulous lawyer with a fighting spirit. Justice Girouard described himself as a "warrior" lawyer.[146] His record since his appointment to the judiciary all the more illustrates his diligence in his work. In our opinion, it is very likely that the man depicted by numerous witnesses, including Justice Girouard himself, would have read M[e] Doray's summary of August 13, 2013. In fact, Justice Girouard read M[e] Doray's preliminary report of May 6, 2013.[147] The August 13 report contained more information, including the summary of the meeting between M[e] Doray and Justice Girouard. In the absence of evidence on this issue and of submissions from Justice Girouard's counsel in this regard, we understand that counsel for Justice Girouard made no objection to M[e] Doray's description of the message as stating [TRANSLATION] "I'm under surveillance, I'm being bugged" contained in his report.[148]

[215] Considering the stakes for Justice Girouard, his claim that he did not read M[e] Doray's summary seems improbable.

***The fact that Justice Girouard did not read the note***

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[141] Submissions made by counsel for Justice Girouard, May 13, 2015, at pp. 442-444; May 14, 2015, at pp. 27-35.
[142] Justice Girouard's testimony, May 14, 2015, at pp. 16-19.
[143] Justice Girouard's testimony, May 12, 2015, at pp. 300-301; May 14, 2015, at pp. 14-17.
[144] Justice Girouard's testimony, May 14, 2015, at pp. 16-19.
[145] Justice Girouard's testimony, May 14, 2015, at pp. 16-19.
[146] Justice Girouard's testimony, May 12, 2015, at p. 191.
[147] Justice Girouard's testimony, May 14, 2015, at p. 17.
[148] Justice Girouard's testimony, May 14, 2015, at pp. 16-35.

[216] In the video recording, M[e] Girouard can be seen placing his hand on the object that Mr Lamontagne slipped to him, taking possession of it, and not looking at it. This raises an important question.

[217] Justice Girouard testified that the note contained information that he urgently needed to resolve the tax matter. He specified that it had become urgent to settle the tax matter, because of a risk of seizure of Mr Lamontagne's assets by government authorities.[149] And yet, Justice Girouard stated that he did not look at the note because he knew what it contained.[150]

[218] In our opinion, it is unlikely and improbable that Justice Girouard would have waited until returning to his office to read the note[151], rather than taking the opportunity to discuss this information with his client, while they were together.

[219] As Justice Girouard suggested in his testimony, it is possible, since the video recording had no sound track, that M[e] Girouard and Mr Lamontagne talked about this information when they met in Mr Lamontagne's office. However, it must be remembered that Mr Lamontagne testified that it was M[e] Girouard who informed him of the amount required to settle the tax matter. He added that he had asked M[e] Girouard to calculate how much he owed, so that he would know how much he had to borrow.[152]

[220] Justice Girouard stressed that his record of fees, including an entry made on September 17, 2010, was evidence corroborating his version of the facts.[153] The entry for September 17, 2010 reads as follows:

> [TRANSLATION] "Review of the file; Telephone conversation with Claire Boucher, Revenue Canada"

[221] The meeting with Mr Lamontagne is not mentioned in the entry for September 17, even though it appears in other entries made by M[e] Girouard. Justice Girouard said that he did not always bill for everything[154]. He added that his meeting with Mr Lamontagne, which lasted six (6) minutes, was probably included in the entry, although it was not specifically mentioned.[155]

[222] In our opinion, M[e] Girouard's record of fees is evidence of the fact that he worked on this case on September 17, 2010. However, this evidence is insufficient to draw an inference as to the nature of the object that was exchanged.

## VII. Chief Justice Crampton and M[e] LeBlanc, Q.C.'s conclusion

[149] Justice Girouard's testimony, May 5, 2015 (*in camera*), at p. 97; May 12, 2015, at pp. 301-302; May 13, 2015, at pp. 375-376.
[150] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 53-54 and 74-75; May 13, 2015, at p. 377; May 14, 2015, at p. 66.
[151] Justice Girouard's testimony, May 13, 2015, at pp. 396-397.
[152] Mr Lamontagne's testimony, May 7, 2015, at pp. 151-152, 195-197 and 314-315.
[153] Record of fees, Exhibit P-17.
[154] Justice Girouard's testimony, May 12, 2015, at p. 311; May 13, 2015, at pp. 381-382.
[155] Justice Girouard's testimony, May 13, 2015, at pp. 381-382 and 526.

[223] Taken together, the contradictions, inconsistencies and implausibilities in Justice Girouard's testimony, which are discussed above, are, in our opinion, much more than mere oversights attributable to the passage of time or the usual types of inconsistencies that can result from being nervous about testifying.

[224] After reviewing all the evidence, we are of the opinion that the constellation of contradictions, inconsistencies and implausibilities in Justice Girouard's testimony raises serious questions about his credibility. These contradictions, inconsistencies and implausibilities relate to each of the important elements of the transaction recorded on video and, therefore, are central to this inquiry, in particular: (i) the moment when M$^{e}$ Girouard and Mr Lamontagne began to discuss the tax matter that concerned them; (ii) why M$^{e}$ Girouard paid the sum he owed for previously viewed movies directly to Mr Lamontagne, instead of paying the cashier of the movie rental store; (iii) why M$^{e}$ Girouard slipped money under Mr Lamontagne's desk pad; (iv) what Mr Lamontagne gave M$^{e}$ Girouard immediately after the latter put the money down; and (v) the reason why M$^{e}$ Girouard did not look at what Mr Lamontagne gave him.

[225] It is also improbable that Justice Girouard did not read M$^{e}$ Doray's summary of their meeting. Considering Justice Girouard's personality, his nature as a trial lawyer and his diligence as a judge, this would be completely out of character for him. Furthermore, it would also suggest that counsel for Justice Girouard, who are both experienced lawyers, did not discuss M$^{e}$ Doray's summary of August 13, 2013 with Justice Girouard, which seems inconceivable.

[226] In addition, at the *voir dire* on the admissibility of the video recording, on May 4, 2015, Justice Girouard stated that the only purpose of the meeting of September 17 was to discuss the tax matter and that nothing was said about the payment for previously viewed movies[156]. Similarly, at the *in camera* hearing on the issue of solicitor-client privilege, Justice Girouard stated that, during their entire meeting, Mr Lamontagne and him spoke only about the tax matter that concerned them[157]. All Committee members preferred Mr Lamontagne's testimony, in which he stated that the discussion about the tax matter probably began after he got up to retrieve a document located behind him. This must be added, in our opinion, to the constellation of significant inconsistencies and implausibilities in Justice Girouard's testimony regarding the issues stemming from the transaction recorded on video on September 17, 2010.

[227] In short, on the basis of all the evidence submitted to the Committee to date, and subject to our comments below about the possibility of bringing a further count[158], we cannot, with great regret, accept Justice Girouard's version of the facts. Although this implies nothing about the nature of the object that was exchanged, we wish to express our deep and serious concerns about Justice Girouard's credibility during the inquiry and, consequently, about his integrity. In our opinion, Justice Girouard deliberately attempted to mislead the Committee by concealing the truth.

[228] We have reviewed Chief Justice Chartier's dissent from our analysis of Justice Girouard's testimony. Chief Justice Chartier states that, in his opinion, the state of the law requires evidence external to Justice Girouard's testimony in order to conclude that he lacked

[156] Justice Girouard's testimony, May 4, 2015, at p. 412.
[157] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 32, 38-39, 48 and 77.
[158] See *infra*, at paras. 230 and following.

transparency. With the greatest respect, we do not share Chief Justice Chartier's opinion. Assessing the credibility of a witness is the role of the trial judge, or in this case, members of the Committee. Although credibility is assessed on the basis of all the evidence, it is not necessary, in our opinion, to obtain evidence that is independent of an individual's testimony to support the conclusion that the individual lacks credibility. A conclusion as to the credibility of a witness can be based on inconsistencies or implausibilities in his or her own testimony, as well as on the judge's assessment of the witness' truthfulness.

[229] That said, in the event that evidence independent of the witness's testimony is required to draw a conclusion regarding his credibility, we are of the opinion that the evidence submitted to the Committee includes evidentiary elements which support our conclusion that Justice Girouard lacked candour during the inquiry. This includes the following:

1) a prior statement made by Justice Girouard to M$^{e}$ Doray which is inconsistent with his testimony at the hearing;

2) a prior statement made by Justice Girouard to the Executive Director of the Council, in his letter of January 2013, which is not entirely consistent with his testimony before the Committee;

3) Mr Lamontagne's testimony about the moment when the privileged discussion between lawyer and client began, which differs from Justice Girouard's testimony;

4) Mr Lamontagne's testimony about what was written in the note, which is inconsistent with Justice Girouard's version of the facts;

5) the fact that, in the three video scenes of September 17, 2010 submitted in evidence, at no time is Mr Lamontagne seen holding a pen and writing a note, then putting the note in the right pocket of his trousers. In our opinion, Mr Lamontagne gave to M$^{e}$ Girouard the very same object that he had folded and put in that same pocket a few minutes before their meeting[159];

6) the fact that M$^{e}$ Girouard, although an assiduous person who is very meticulous in his work, did not read the note in the presence of Mr Lamontagne, even though urgent action was required to avoid seizure – M$^{e}$ Girouard, as he was described by several witnesses who appeared before the Committee, would have looked at such a note in Mr Lamontagne's office, even if the latter had given him the information orally; and

7) the testimony of Sergeant-Supervisor Y, who observed that, from his experience, things that are done in a concealed manner are, most of the time, either immoral or illegal. His testimony sheds light on the furtive gesture between Mr Lamontagne and M$^{e}$ Girouard, and the fact that Justice Girouard did not look at what Mr Lamontagne gave him.

[230] Our decision is based on the very particular circumstances of this case, our observations and conclusions regarding Justice Girouard's credibility, and the importance of maintaining public confidence in the administration of justice. Should the Council decide that procedural fairness requires that Justice Girouard be given another opportunity to respond to our concerns and conclusions, we suggest two options to continue and complete this process.

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[159] See *supra*, at para. 85.

[231] Firstly, a further count could be brought against Justice Girouard in relation to his conduct during his testimony before the Committee.

[232] We emphasize that Justice Girouard was given an opportunity at the hearing to respond to each of the inconsistencies and implausibilities stated above.[160] Accordingly, we consider that procedural fairness does not require that the Council provide Justice Girouard a further hearing.

[233] Secondly, the Council could decide to itself hear Justice Girouard, so that he may respond to the concerns set out above.

[234] With respect to the first option, considering the type of evidence that would be presented at an inquiry on such a further count, that is to say mostly oral evidence, including the testimony of Justice Girouard and other individuals who have already testified before the Committee, it would be preferable, in our opinion, that such an inquiry be conducted by a different committee.

[235] With respect to the second option, we are of the opinion that should the Council decide to provide Justice Girouard with a further hearing, it should have the benefit of our views on Justice Girouard's testimony at the hearing. In our opinion, given the six (6) inconsistencies and improbabilities set out above at paragraphs 181 to 222, and on a balance of probabilities, Justice Girouard's testimony before the Committee to date has been such that we can only conclude that (i) Justice Girouard lacked candour, honesty and integrity before the Committee, and that (ii) he deliberately attempted to mislead the Committee by concealing the truth.

[236] Through his lack of candour during his testimony, Justice Girouard did not demonstrate a level of conduct that is irreproachable, nor did he embody the ideals of justice and truth that the public is entitled to expect from members of the judiciary. He did not set an example of integrity. Instead, he lacked integrity. By acting in this manner, he placed himself in a position incompatible with the due execution of the office of judge, which amounts to misconduct under paragraph 65(2)*(d)* of the *Judges Act*.

[237] Therefore, having concluded, based on the evidence currently on the record, that Justice Girouard engaged in misconduct, we now turn our attention to the second stage of the analysis set out in *Marshall*. As mentioned earlier, the test is stated as follows:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[238] At the present time, and without additional evidence that would allay our serious concerns about Justice Girouard's credibility and honesty, this question can only be answered in the affirmative. As regards the integrity of a judge, there can be no half-measure: either the judge has integrity, or he does not. Through his lack of candour before the Committee, Justice Girouard raised some serious doubts about his integrity, which inevitably undermines public

[160] See Justice Girouard's responses to questions asked by the Committee and counsel, May 14, 2015. See also the Inquiry Committee's letter to counsel dated May 22, 2015.

confidence.

[239] Furthermore, we are of the opinion that the analysis of this question, that is to say whether the conduct alleged is so manifestly and profoundly destructive of the concept of the integrity of the judicial role that public confidence would be sufficiently undermined to render the judge incapable of performing his or her functions, must include an assessment of what a reasonably informed member of the public would think of such conduct. We are persuaded, on the basis of the evidence currently on the record, that a reasonably informed member of the public would conclude that Justice Girouard's testimony is so lacking in credibility that public confidence in his integrity would be sufficiently undermined to render him incapable of executing the judicial office. No matter what type of cases would be assigned to Justice Girouard, and even if no criminal cases were assigned to him, persons coming before him would remember his lack of integrity and would have doubts about him. Such a conclusion is all the more justified since Justice Girouard deliberately and intentionally attempted to conceal the truth during the hearing.

[240] A compromising of a judge's integrity through the giving false and deceitful evidence before a Committee of his peers undermines the integrity of the judicial system itself and strikes at the heart of the public's confidence in the judiciary. Such conduct is most incompatible with the due execution of the office of judge, and weakens and undermines public confidence.

[241] If Justice Girouard were to continue as a judge of the Superior Court of Quebec, this would, in our opinion, undermine public confidence in the entire judicial system.

[242] Therefore, at the present time, and despite Justice Girouard's impeccable record while he was a judge, we are of the opinion that a recommendation should be made to remove Justice Girouard from office.

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| [*signed: P. Crampton*] | [*signed: R. LeBlanc*] |
| THE HONOURABLE PAUL CRAMPTON<br>Chief Justice of the Federal Court | M[E] RONALD LEBLANC, Q.C. |

## VIII. Chief Justice Chartier's dissenting opinion on the analysis of Justice Girouard's testimony

[243] Before explaining the reasons why I cannot share the opinion of my colleagues on their analysis of Justice Girouard's testimony, I wish to reiterate that I fully agree with the Committee's analysis set out at paragraphs 1 to 178.

[244] Despite the fact that the Committee dismissed all allegations made against Justice Girouard, two of its members, Chief Justice Crampton and M$^{e}$ LeBlanc, Q.C., are of the opinion that, in his testimony before the Committee, Justice Girouard deliberately attempted to mislead the Committee by concealing the truth. Chief Justice Crampton and M$^{e}$ LeBlanc therefore recommend that Justice Girouard be removed from office or, alternatively, that a further count be brought against him. With all due respect, their recommendations give rise to serious concerns. Judges, like any other person facing allegations of misconduct, must know that, if successful in defending themselves against such allegations, they are not at risk, in the absence of extraordinary circumstances, of being removed from office because their testimony was rejected. Their confidence in the justice system depends on it.

[245] I acknowledge that the credibility of judges must meet a higher standard. I also acknowledge that there can be extraordinary circumstances where the removal of a judge may be warranted solely only the basis of his or her conduct during an inquiry. However, I consider that this is not the case here.

[246] For the reasons that follow, I cannot subscribe to the recommendations made by my colleagues.

[247] First and foremost, although we generally agree on the relevant legal principles, we are divided on the assessment of the evidence surrounding Justice Girouard's testimony and on the application of the law to the facts in evidence before the Committee. A witness' testimony is assessed on the basis of reliability and credibility. Such an assessment must also provide some allowance for normal human error. In my view, the five or six inconsistencies identified by Chief Justice Crampton and M$^{e}$ LeBlanc were predictable, since they are of the kind that can be expected in a testimony that lasted five (5) days, amounted to more than eight hundred (800) pages of transcripts, and focused on a brief exchange lasting eighteen (18) seconds that occurred almost five (5) years ago. From my own experience, I can say that it is rare for a witness, in similar circumstances, to give evidence that is one hundred percent (100%) accurate. There will always be some inconsistencies.

[248] As specified earlier, the Committee was unable to conclude, on the basis of the evidence submitted, that the object which Mr Lamontagne slipped to M$^{e}$ Girouard was cocaine. According to these two witnesses, they exchanged a note regarding either movie rentals or Mr Lamontagne's tax matter. For them, it was an insignificant event that evoked no specific personal recollection of the meeting. Of course, there was the video recording. Unfortunately, this recording had no sound track. The absence of a sound track greatly hampered their exact recollection of the exchange. In my view, such a situation diminishes the evidential value of their testimony and makes it more difficult to draw definitive conclusions.

[249] Although I acknowledge that there are some inconsistencies, errors or weaknesses in Justice Girouard's testimony, I find that they affect the reliability of the testimony much more than the credibility of the witness. I consider that the inaccuracies identified by my colleagues can be the result of being nervous about testifying, or be mere oversights attributable to the passage of time or a genuine willingness to provide explanations or details regarding a prior response. In short, in my opinion, such inaccuracies, when considered separately or as a whole, do not give rise to any concrete doubt about the credibility of Justice Girouard's testimony. Furthermore, I consider that these inaccuracies are not so serious or numerous to warrant a recommendation for removal or to bring a further count against Justice Girouard. More specifically, I provide the following comments on the inconsistencies identified by my colleagues.

[250] The payment made directly to Mr Lamontagne: In his letter of January 2013 to the Executive Director of the Council, Justice Girouard wrote that he purchased movies directly from Mr Lamontagne because he did not want adult movies to appear on his customer file. In his testimony before the Committee in May 2015, Justice Girouard specified that he purchased all kinds of movies from Mr Lamontagne, but rarely adult movies. My colleagues consider that there is a significant contradiction or inconsistency between Justice Girouard's letter to the Executive Director and his testimony before the Committee. I do not share their view.

[251] Justice Girouard did not think it was necessary to describe all his movie rental habits to the Executive Director of the Council.[161] The evidence also shows that since M$^{e}$ Girouard was a special client of Mr Lamontagne's movie rental business, the latter would personally offer M$^{e}$ Girouard new releases of all sorts that were not yet available in his store.[162] This also explains why M$^{e}$ Girouard would often deal directly with Mr Lamontagne instead of the cashier of the movie rental store. In my opinion, the explanations provided by Justice Girouard are plausible and credible.

[252] The reason why Justice Girouard slipped money under the desk pad: At the beginning of the hearings, during the *in camera* session, Justice Girouard gave two reasons to explain why he slipped money under the desk pad: the first, so that it would not be obvious he was giving money to a trafficker; and the second, that he was acting out of habit. My colleagues consider that these two explanations are contradictory or inconsistent. I do not share their view. There can be more than one reason to explain an action. Near the end of his cross-examination by the independent counsel, on May 14, 2015, Justice Girouard confirmed that there were two reasons to explain his action[163]:

> [TRANSLATION]
> "Q. So, in that instance where we see you, was it out of habit, or to avoid being seen giving money to a trafficker?
>
> A. Well, I think it was a bit of both, but mostly out of habit."

[253] The moment when Justice Girouard and Mr Lamontagne began to discuss the tax matter: In his testimony at the *in camera* hearing, Justice Girouard stated that, during their entire

[161] Justice Girouard's testimony, May 13, 2015, at pp. 292-296.
[162] Justice Girouard's testimony, May 12, 2015, at p. 261; May 13, 2015, at pp. 256-258.
[163] Justice Girouard's testimony, May 14, 2015, at p. 45.

meeting of September 17, 2010, Mr Lamontagne and him discussed only the tax matter. He added that he may have also talked about the payment for previously viewed movies, but only for a few seconds.[164] In deference to my colleagues, I consider that this is not a contradiction nor an inconsistency. It is merely a further detail provided by Justice Girouard. In my opinion, this part of his testimony is of little significance in this matter and is in no way an indication of false testimony.

[254] The content of the note – the settlement amount: Mr Lamontagne testified that he had no recollection of the content of the note, but assumed that it was an invoice for movies. Justice Girouard stated that the note contained two pieces of information: the amount to settle the tax matter and the name of the lender. Although Mr Lamontagne was probably aware of the settlement amount, Justice Girouard testified that he needed to know how much Mr Lamontagne had to borrow and the name of the lender. My colleagues chose to accept the version of the facts provided by Mr Lamontagne, an imprisoned drug trafficker, instead of the one given by Justice Girouard. I do not share the opinion of my colleagues.

[255] Mr Lamontagne's testimony regarding the content of the note is far from being conclusive or decisive – he has no recollection of it, but he thinks it was an invoice for movies. From Mr Lamontagne's own testimony, it can be concluded that Justice Girouard's version of the facts may be the correct one. I also note that, even though they accepted Mr Lamontagne's version of the facts, my colleagues also question his credibility, at paragraph 204, where they state that the video recording does not show Mr Lamontagne using a pen to write a note. All in all, and unlike my colleagues, I am not prepared to accept Mr Lamontagne's version of the facts, let alone prefer it to Justice Girouard's version.

[256] The content of the note – the message saying [TRANSLATION] "I'm under surveillance, I'm being bugged": My colleagues are of the opinion that there appears to be a substantial inconsistency between:

(i) what is written in M$^{e}$ Doray's summary of August 13, 2013, where Justice Girouard is said to have told M$^{e}$ Doray that the note he received from Mr Lamontagne contained a message saying [TRANSLATION] "I'm under surveillance, I'm being bugged";

(ii) Justice Girouard's testimony at the *in camera* hearing on the issue of solicitor-client privilege, where he stated that the note may have contained a message saying that Mr Lamontagne believed he was "under surveillance"; and

(iii) the evidence given by Justice Girouard in his main testimony, where he stated that there was no mention of surveillance in the note. It was instead Mr Lamontagne's behaviour that led Justice Girouard to believe that Mr Lamontagne was under surveillance.

[257] Justice Girouard testified that M$^{e}$ Doray's summary, which was provided to his counsel, indicated that Mr Lamontagne had written on the note, among other things, a message saying [TRANSLATION] "I'm under surveillance, I'm being bugged". Justice Girouard stated before the Committee that M$^{e}$ Doray must have misunderstood him, and that he told him instead it was Mr

[164] Justice Girouard's testimony, May 5, 2015 (*in camera*), at p. 39.

Lamontagne's behaviour which led him to believe that the latter was under surveillance[165].

[258] My colleagues are of the view that, if M[e] Doray had incorrectly reported what Justice Girouard said, the latter would have communicated with M[e] Doray to ask for an amendment. They state that "[I]n the absence of evidence on this issue and of submissions from Justice Girouard's counsel in this regard", they conclude that Justice Girouard never asked for an amendment. With respect, I fear that such reasoning leads to a shift of the burden of proof to Justice Girouard. It is important to remember that neither the first, the subsequent or the final drafts of M[e] Doray's summary, nor the correspondence between counsel for Justice Girouard and M[e] Doray concerning the Doray report, were submitted in evidence to the Committee.

[259] We must review the three different versions detailed above regarding this issue. As to version (i), I believe that we cannot rule out, on the basis of the evidence submitted, the possibility that M[e] Doray did in fact incorrectly report what Justice Girouard said. Justice Girouard testified that M[e] Doray had already made amendments to the first part of his summary[166]. Nothing in the evidence allows us to conclude that no amendments were required in the part of the summary concerning the meeting with Justice Girouard. As to version (ii), it must be remembered that Justice Girouard also said, in his testimony of May 5, that he was uncertain whether there was any mention of surveillance in the note[167]. Therefore, version (ii) may not be so inconsistent with version (iii).

[260] Finally, my colleagues find it difficult to believe that Justice Girouard read the first draft of the summary dated May 6, 2013, but that he did not read the August 13, 2013 version. I must admit that I also find it hard to believe this part of his testimony. In my view, Justice Girouard's explanation on this issue was weak and ambiguous. However, it is plausible that Justice Girouard, as a result of being exhausted and discouraged after finding out that the conduct review process would go forward[168], did not immediately read M[e] Doray's summary of their meeting.

[261] The fact that Justice Girouard did not read the note: The final suspicious element raised by my colleagues concerns the fact that Justice Girouard did not immediately look at the note. This can easily be explained. Let us remember that the video recording has no sound track. As mentioned by Justice Girouard, Mr Lamontagne may have told him that the note contained the information he was expecting to receive while he was in his office.[169] In my view, a negative inference should not be drawn from the fact that the two men do not recall what they talked about five (5) years ago. Certainly, the evidence shows that immediately after their meeting of September 17, 2010, M[e] Girouard contacted a Revenue Canada representative. This seems to be evidence corroborating his version of the facts.

[262] I wish to make it very clear that what I saw on the video recording of September 17 seems shady to me. Even Justice Girouard acknowledged it in his testimony: what is shown on the video looks [TRANSLATION] "suspicious". Although the video recording could certainly cast

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[165] Justice Girouard's testimony, May 13, 2015, at pp. 367-374; May 14, 2015, at pp. 14-17.
[166] Justice Girouard's testimony, May 14, 2015, p. 17; Submissions made by counsel for Justice Girouard, May 14, 2015, at pp. 26-35.
[167] Justice Girouard's testimony, May 5, 2015 (*in camera*), at pp. 104-106.
[168] Justice Girouard's testimony, May 14, 2015, at pp. 14-19.
[169] Justice Girouard's testimony, May 14, 2015, at pp. 60-61 and 66.

doubt on the explanations provided by Justice Girouard, I cannot conclude that his explanations are false. The fact remains that the independent counsel was unable to provide the Committee with clear and conclusive evidence regarding the object that was exchanged and, therefore, the true nature of the transaction that was recorded on video. Although it is true that there are some inaccuracies in Justice Girouard's testimony, it is important to make a distinction between a version of the facts that is disbelieved and one that is deliberately fabricated. As the Court of Appeal of Quebec stated in *Bureautique Nouvelle-Beauce inc. c. Compagnie d'assurance Guardian du Canada*[170], [TRANSLATION] "[…] what is untrue is not necessarily deceitful."

[263] The second reason why I cannot subscribe to the position taken by my colleagues is that, in my humble opinion, the evidence of unthruthfulness, raised by my colleagues, is not sufficient in law to recommend removal. Generally, the assessment of a witness's credibility is used to determine whether that person should be held liable. In the present matter, the conclusion regarding Justice Girouard's credibility is not being used to determine whether the allegations against him have been made out, since all such allegations were dismissed by the Committee. Instead, my colleagues are using their assessment of Justice Girouard's credibility at the hearing to recommend his removal from office.

[264] In my opinion, in order to conclude that Justice Girouard deliberately attempted to mislead the Committee or that he lied during a disciplinary process, there needs to be more evidence than simply the Committee's credibility assessment of Justice Girouard. There needs to be additional evidence that is independent of the impugned testimony, such as in instances of fabricated alibi or perjury. As Justice Moldaver wrote in *R.* c. *Nedelcu*[171], at para. 23:

> "While it is true that Mr. Nedelcu's inconsistent discovery evidence might lead the triers of fact to reject his trial testimony, rejection of an accused's testimony does not create evidence for the Crown – any more than the rejection of an accused's alibi evidence does, absent a finding on independent evidence, that the alibi has been concocted. (See *R.* v. *Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at paras. 61-67.) As Arbour J. observed at para. 67 of *Hibbert*:
>
> > A disbelieved alibi is insufficient to support an inference of concoction or deliberate fabrication. There must be other evidence from which a reasonable jury could conclude that the alibi was deliberately fabricated and that the accused was involved in that attempt to mislead the jury."

[265] I find support for my analysis in decisions relating to judicial ethics, such as *Therrien*[172] and *Landreville*[173]. In *Therrien*, there was factual evidence of a false statement made in the form submitted to the selection committee, being the fact of deliberately failing to disclose a criminal record to the selection committee. Similarly, in *Landreville*, there was also indisputable evidence of a lack of integrity. There was evidence of a fraudulent disposal of shares and an obvious conflict of interest.

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[170] *Bureautique Nouvelle-Beauce inc.* c. *Compagnie d'assurance Guardian du Canada*, EYB 1995-56102 (C.A.), at para. 20 and following.
[171] *Supra.*
[172] *Supra*.
[173] Canada, Commission of Inquiry Re: The Hon. Mr. Justice Leo A. Landreville. *Inquiry Re: The Honourable Justice Leo A. Landreville*. Ottawa: The Commission, 1966.

[266] In the opinion of my colleagues, there is independent evidence that Justice Girouard deliberately attempted to mislead the Committee. With all due respect, the evidentiary elements they rely on do not meet the standard of independent evidence. In order to establish that a false statement has been made, the Doray report and M$^{e}$ Doray's testimony would have had to be submitted in evidence. In my opinion, the evidence given by Mr Lamontagne , an imprisoned drug trafficker, is insufficient. The fact that the video recording never shows Mr Lamontagne writing a note is inconclusive. The Committee only viewed brief scenes of the video recording. Mr Lamontagne may have written the note before the first scene that the Committee viewed. All in all, in my opinion, there is no question that there needs to be evidence, on a balance of probabilities, showing that the contradictions or inconsistencies were intentional and fabricated. In my view, there is no sufficient independent evidence that would lead me to conclude that Justice Girouard deliberately attempted to mislead the Committee.

[267] An Inquiry Committee may consider an allegation only in cases where the matter may be serious enough to warrant removal, as provided for under subsection 1.1(3) of the *By-laws*. As I previously mentioned, I am of the opinion that the inconsistencies, errors or weaknesses in Justice Girouard's testimony are not serious enough to give rise to any concrete doubt about his credibility. Consequently, I am not convinced, on the basis of the evidence submitted, that the alleged misconduct suggested by Chief Justice Crampton and M$^{e}$ LeBlanc meets the standard to support a further count being brought against Justice Girouard.

[268] Another point. My colleagues recommend that, alternatively, a further count be brought against Justice Girouard. I do not agree with their recommendation. However, they suggest that such an inquiry not be conducted by this Committee. I agree with them on this last point. I am concerned that we, members of the Committee, would be in conflict of interest if we were to continue this inquiry, since such a further count would be the result of an alleged misconduct having occurred during the inquiry. By concluding that there is sufficient evidence to bring a further count against Justice Girouard, my colleagues have acted, in a way, as a Review Panel deciding that a further inquiry is justified. After hearing the evidence submitted, my colleagues and I have also expressed our opinion on this matter.

[269] In my humble opinion, just as members of the Review Panel are not eligible to be members of the Inquiry Committee, members of our Committee cannot participate in any deliberations regarding such a further count: *By-laws*, paragraph 2(3)*(b)* and section 11(2). These provisions of the *By-laws* demonstrate that the statutory regime governing inquiries is sensitive to the issue of reasonable apprehension of bias.

[270] My last point relates to the recommendation proposed by my colleagues to recommend the revocation of Justice Girouard despite the fact that our Committee dismissed all allegations against him. In my humble opinion, in the present case, we cannot impose a consequence for a misconduct that was not part of the Notice of Allegations. In my view, procedural fairness requires, if there is sufficient evidence of misconduct, that Justice Girouard be given an opportunity to respond to the issues raised by my colleagues.

[*signed: R. Chartier*]

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THE HONOURABLE RICHARD CHARTIER
Chairperson of the Inquiry Committee
Chief Justice of Manitoba