TRANSLATION FROM ORIGINAL FRENCH
ARRANGED BY THE COUNCIL OFFICE

CANADIAN JUDICIAL COUNCIL INQUIRY COMMITTEE

THE HONOURABLE MICHEL GIROUARD
Justice of the Superior Court

and

THE CANADIAN JUDICIAL COUNCIL INQUIRY COMMITTEE
Respondent

SUBMISSIONS MADE BY THE HONOURABLE MICHEL GIROUARD TO THE CANADIAN JUDICIAL COUNCIL IN RESPONSE TO THE REPORT OF THE INQUIRY COMMITTEE DATED NOVEMBER 18, 2015 AND ITS APPENDICES

C A N A D A

PROVINCE OF QUEBEC

FILE No. CJC: 12-0456

CANADIAN JUDICIAL COUNCIL

THE HONOURABLE MICHEL GIROUARD

Justice of the Superior Court

and

THE CANADIAN JUDICIAL COUNCIL INQUIRY COMMITTEE

TABLE OF CONTENTS

Page

PRELIMINARY AND JURISDICTIONAL ISSUES....1

INTRODUCTORY NOTE 12

INTRODUCTION 12

THE FACTS 16

The procedure for removal 19

Procedural fairness 20

Inconsistency 1 – The payment for previously viewed movies made directly to Mr. Lamontagne 23

Inconsistency 2 – The act of slipping money under the desk pad 25

Inconsistency 3 – The moment when Mr Lamontagne and M^e^ Girouard began to discuss the tax matter on September 17, 2010 27

Inconsistency 4 – The content of the note: the amount for settlement of the tax matter 29

Inconsistency 5 – The content of the note: the message saying [TRANSLATION] "I'm under surveillance, I'm being tailed" 29

Inconsistency 6 – The fact that Justice Girouard did not read the note 32

Corroboration 33

Conclusion on the analysis of the facts 35

ISSUES OF LAWS 39

The absence of a notice of allegation 39

The admission in evidence of the video sequence of September 17, 2010 40

The admission in evidence of M^e^ Doray's report 41

The infringement of the right to solicitor-client privilege 43

The bias 44

CONCLUSION 46

APPENDICES:

Appendix 1: Stenographic notes of May 7, 2015, pages 5 and 6 48

Appendix 2: Stenographic notes of May 6, 2015, pages 118 and 119 51

Appendix 3: Stenographic notes of May 7, 2015, pages 10 and following 54

Appendix 4: Stenographic notes of May 6, 2015, pages 124, 127 and 128 79

Appendix 5: Letter of May 22, 2015 83

Appendix 6: Stenographic notes of May 14, 2015, page 56 86

Appendix 7: Stenographic notes of May 13, 2015, pages 325 and following 88

Appendix 8: Stenographic notes of May 5, 2015, pages 38 and 39 98

Appendix 9: Stenographic notes of May 7, 2015, page 307 101

Appendix 10: Mortgage deed 103

Appendix 11: Stenographic notes of May 11, 2015, pages 117 to 121 116

Appendix 12: Notice of December 2, 2015 122

Appendix 13: Stenographic notes of June 8, 2015, page 239 124

Appendix 14: Letter of December 11, 2014 126

Appendix 15: Representations on the requirements related to the disciplinary complaint 129

CANADA

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PRELIMINARY AND JURISDICTIONAL ISSUES

1. The inquiry conducted by the Canadian Judicial Council's Inquiry Committee began within the limited and specific scope of an amended notice of allegations, which focused on an alleged cocaine transaction (the allegation subsequently referred to an illicit substance). The complaint was dismissed. From that moment on, the Inquiry Committee had discharged its mandate and was *functus officio*.

2. However, the inquiry diverged when the majority of the Committee assigned itself a new authority. This change of direction seems to have occurred while the Committee adjourned for deliberations, between June 8, when closing arguments were made, and November 18, 2015, when the Inquiry Committee submitted its report. During deliberations, the majority of the Committee gave itself the authority to create an entirely new complaint and to act on it, and concluded that it was

substantiated and recommended that the Honourable Michel Girouard, Judge of the Superior Court of Quebec, be removed from office.

3. Chief Justice Chartier expressed his dissent with regard to such a deviation from the rules of procedural fairness:

> *[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.*

4. The new complaint seems to be defined as follows, although its outline is evanescent:

> *"[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."*

5. These inconsistencies are apparently the following:

a) the purpose or purposes of the meeting of September 17, 2010: the movies, the tax matter, or both;

b) the act of slipping money under a desk pad;

c) the exact moment during the meeting when discussion of the tax matter began;

d) the content of the "Post-it" note;

e) the message saying [TRANSLATION] "I'm being tailed" contained in M^e^ Doray's report;

f) the fact that the "Post-it" note was not read immediately.

6. However, it is not very easy to grasp its specific scope, since this statement of misconduct is redefined and restructured throughout the second part of the

majority's report, which deals with this new complaint.

7. Certain rules that apply were ignored by the majority of the Inquiry Committee, to the detriment of the Honourable Michel Girouard's constitutional and procedural rights:

   a) *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2015-203, at section 7: "*The Inquiry Committee shall conduct its inquiry or investigation in accordance with the principle of fairness.*"

   b) "*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.*" (section 64 of the *Judges Act*). M^{e} Doug Mitchell's letter of May 22, 2015, sent on behalf of the Inquiry Committee, cannot be a substitute for a notice of allegation.

   c) "*The independent counsel shall give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.*" (subsection 5(2) of the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2002 version with amendments) Record of sources in support of these Submissions (hereinafter referred to as the "Record of sources"), Tab 1;

   d) "*The Inquiry Committee must inform the judge of all complaints or allegations pertaining to the judge and must give them sufficient time to respond fully to them.*" (subsection 5(2) of the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015 version), Record of sources, Tab 2;

8. The obscure procedure that led to this outcome, namely the creation of a new complaint, was conducted in violation of rules of procedural fairness and several constitutional principles:

   a) The *audi alteram partem* rule was ignored: Justice Girouard was neither informed of the procedure leading to the creation of the new complaint, nor was he given the opportunity to submit his views on it;

b) The new complaint is itself ill-defined and its outline cannot be discerned. It is vague to the point of not allowing for a full answer and defence;

c) Acting as judge and jury, the majority of the Inquiry Committee thought they perceived misconduct, analyzed it, reviewed the evidence, and concluded that there was serious misconduct;

d) Whichever version of the *Canadian Judicial Council Inquiries and Investigations By-laws* applies, be it version SOR/2015-203 or SOR/2002-371, the procedure that was followed bypassed all review stages provided for in the *By-laws*, insofar as these stages are valid;

i) The 2002 version of the *By-laws* provides as follows:

5. (1) The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.

(2) The independent counsel shall give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.

ii) The 2015 version of the *By-laws* provides as follows at subsections 5(2) and 5(3):

(2) The Inquiry Committee must inform the judge of all complaints or allegations pertaining to the judge and must give them sufficient time to respond fully to them.

(3) The Inquiry Committee may set a time limit to receive comments from the judge that is reasonable in the circumstances, it must notify the judge of that time limit, and, if any comments are received within that time limit, it must consider them.

This principle was not applied and no such notice was given;

e) Section 64 of the *Judges Act*, which provides for the right to be notified of the subject-matter of the inquiry, was disregarded;

f) The recommendation for removal was made *ultra petita*. The majority of the Inquiry Committee reached a decision on a matter that had not been referred to the Committee and to which the judge was not given a reasonable opportunity to respond;

g) In the Inquiry Committee's report, the majority suggested that the following statement, contained in a letter from counsel for the Inquiry Committee sent on May 22, 2015 in anticipation of submissions scheduled for June 8, 2015 (which were limited to two hours per party), constituted sufficient notice:

> [TRANSLATION]
>
> "*Of course, we will hear your arguments as to whether the evidence shows, on a balance of probabilities, that a drug transaction occurred on September 17, 2010 between Mr. Justice Girouard (while he was a lawyer) and Mr Yvon Lamontagne. Should the Committee be unable to conclude, on a balance of probabilities, that it was a drug transaction, or conclude that Justice Girouard's version is correct, whether supported by evidence or plausible, what should be the implications, if any, of such a conclusion.*"

In response to this specific question, the Independent Counsel, in the outline of her written submissions, concluded the following:

> [TRANSLATION]
>
> "*54. If the Committee comes to the conclusion that the evidence does not show, on a balance of probabilities, that a drug purchase transaction occurred on September 17, 2010, the Committee should conclude that Justice Girouard should not be removed from office and make a recommendation to this effect.*"

Thus, Justice Girouard was given no notice of the nature of the new allegations that the majority of the Inquiry Committee was preparing to level against him. Also, it appears that the Independent Counsel herself did not perceive any new allegations in the letter of May 22, 2015;

h) Justice Girouard had a legitimate expectation of compliance with procedural guarantees, in having the right to be given a specific notice of allegation in the event of a new complaint against him. This is how the procedure began following the initial complaint and how Inquiry Committee's hearings were conducted, and it is in that context that the parties were involved in the inquiry. From that perspective, the majority of the Inquiry Committee completely changed the rules of the game, to the detriment of the most basic principles of fair play and contrary to section 7 of the *By-laws*, without giving Justice Girouard any opportunity to be heard on: a) the new procedure being

followed; and b) the merits of the new complaint;

i) This legitimate expectation was confirmed in the ruling of the Inquiry Committee in the matter of Justice Douglas, in which a new notice of allegations was submitted by the Independent Counsel. Such a procedure complies with the minimal requirements of procedural fairness and the right to a full answer and defence (ref.: In the matter of an investigation pursuant to section 63(2) of the *Judges Act* regarding the Honourable Associate Chief Justice Lori Douglas (September 30, 2014): "Ruling of the Inquiry Committee on Independent Counsel's motion to seek directions"), Record of sources, Tab 3;

j) The *By-laws* provide as follows:

> "*5. (1) The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.*"

This provision allows the Inquiry Committee to review any complaint that is brought to its attention; it does not allow the Inquiry Committee to create a new complaint. If the Council was of the opposite view, the creation of this new complaint could not constitute an authority to bypass the entire process and all the measures established to ensure procedural fairness;

k) Otherwise, the situation would be similar to the one that the Supreme Court of Canada analyzed in the matter of *ATCO Gas & Pipelines Ltd*. v. *Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4: [46], Record of sources, Tab 4. The Supreme Court stated as follows:

> "*It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.*"

Consequently, if the Council was to conclude that subsection 5(1) of the *By-laws* allows the Inquiry Committee to set out the limitations of its own jurisdiction and powers, such a provision would be invalid and Justice Girouard hereby gives notice of his intention to exercise his constitutional rights in this regard and submit appropriate notices to the attorneys general of Canada, the provinces and the territories;

l) The “evidence” to support the allegations of misconduct and the inconsistencies rests essentially on documents that, on the one hand, are inadmissible as evidence and, on the other hand, were obtained in violation of the principle of separation. Consequently, the use of M^{e} Doray’s report, which was never introduced in evidence, breached the “firewall” between the Independent Counsel and her associate, the outside counsel;

m) Inasmuch as the new complaint was fabricated between June 8, 2015 and November 18, 2015, the issue of which version of the *By-laws* applies cannot be ignored, since, as of July 2015, the previous version applied to pending matters but not new matters. Whatever the Council may decide in this regard, the procedural and constitutional violations are grave and serious.

9. In this context, Justice Girouard calls on the Canadian Judicial Council, in its capacity as guardian of the rule of law and judicial independence, which have been adversely affected in an unconstitutional and inappropriate manner in the present matter, to issue the following orders:

a) ORDER that a hearing be held before the Canadian Judicial Council in order to allow Justice Girouard, through his counsel, to make appropriate submissions, in accordance with the *By-laws* and the *Act*, and, in this regard, ESTABLISH procedural rules consistent with principles of fairness and constitutional principles provided for in the *Judges Act* and in regulations made pursuant to the *Act*;

b) CONFIRM AND ACKNOWLEDGE the dismissal of the complaint made against Justice Michel Girouard, in accordance with the unanimous conclusions made by the Inquiry Committee in paragraphs 176, 177 and 178 of the report dated November 18, 2015;

c) DECLARE that the Inquiry Committee is *functus officio* and, accordingly, DISMISS findings of misconduct made by the majority of the Inquiry Committee, and dismiss the finding made at paragraph 242 of the report as well as any other similar findings;

d) SUBSIDIARILY, Justice Girouard is asking the Canadian Judicial Council,

by virtue of its statutory powers as a superior court, to make the following orders:

i) DECLARE INVALID subsection 5 (1) of the *Canadian Judicial Council Inquiries and Investigations By-laws* (SOR/2015-203), insofar as it allows the Inquiry Committee to determine the limitations of its own jurisdiction;

ii) DECLARE INVALID subsection 5 (1) of the *Canadian Judicial Council Inquiries and Investigations By-laws* (SOR/2002-371), insofar as it allows the Inquiry Committee to determine the limitations of its own jurisdiction;

iii) DECLARE INVALID regulatory provisions governing the preliminary review of complaints, for reasons stated in applications for judicial review to the Federal Court nos. T-646-14 and T-733-15 (Federal Court Procedures, Appendices 1 and 2), the Inquiry Committee having dismissed these reasons in its ruling of April 8, 2015, and, consequently, declare invalid the Review Panel's decision to refer the initial complaint to an Inquiry Committee;

iv) DECLARE NULL the Inquiry Committee's ruling of May 14, 2015 admitting as evidence the video recording of September 17, 2010, for reasons stated in the application for judicial review to the Federal Court no. T-941- 15 (Federal Court Procedures, Appendix 3), and, consequently, exclude as evidence the said video recording of September 17, 2010 identifying the Honourable Justice Michel Girouard;

v) AUTHORIZE Justice Girouard to serve appropriate notices to attorneys general of Canada, the provinces and the territories, so that these issues may be discussed before the Canadian Judicial Council;

vi) DISMISS the finding set out at paragraph 242 and any other similar findings contained in the Inquiry Committee report dated November 18, 2015, as having been made in violation of rules governing impartiality requirements, on the grounds that the majority of the Inquiry Committee sought to intervene directly before the Canadian Judicial Council, through a veritable pleading and indictment of Justice Girouard, which irremediably tainted its impartiality and

constituted a breach of procedural fairness and a violation of the rule of separation;

vii) DISMISS the finding set out at paragraph 242 and any other similar findings contained in the Inquiry Committee report dated November 18, 2015, as having been made in violation of rules of procedural fairness, particularly the *audi alteram partem* rule, and of the right to be given reasonable notice, and contrary to the most basic principles of fair play, which prohibit trial by ambush;

viii) DISMISS the finding set out at paragraph 242 and any other similar findings contained in the Inquiry Committee report dated November 18, 2015, as having been made on the strength of documents submitted at earlier stages of the complaint review process and introduced before the Inquiry Committee in violation of the rule of separation expressly acknowledged by the Federal Court, the Attorney General of Canada and Justice Girouard in the decision rendered in *Girouard* v. *Canadian Judicial Council*, 2015 FC 307 (CanLII);

e) ORDER a stay of proceedings against Justice Girouard;

f) ISSUE any other order that is appropriate or necessary to protect Justice Girouard's constitutional and procedural rights.

IN THE EVENT THAT THE COUNCIL INTENDS TO REVIEW THIS REPORT, JUSTICE GIROUARD MAKES THE FOLLOWING SUBMISSIONS:

INTRODUCTORY NOTE

10. The Honourable Michel Girouard's submissions are intended to enlighten the Canadian Judicial Council about the analysis of the Inquiry Committee's report of November 18, 2015. They contain elements that are deemed appropriate. However, the fact of not having responded to each and every paragraph of the report must not be interpreted as an acknowledgement of its content.

INTRODUCTION

11. The principle of security of tenure is expressly stated in the Canadian Constitution (*The Constitution Act, 1867*, 30 & 31 Victoria, c 3, Record of sources, Tab 6):

> "*99. (1) Subject to subsection two 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.*"

12. Judicial independence is at the heart of our democratic freedoms. It rests on the security of tenure of judges, a principle that cannot be derogated from except on the most serious grounds. The procedure to do so must be respectful of the rule of law. Evidence of a judge's misconduct must always be clear, convincing and cogent.

13. The misconduct alleged in the complaint against Justice Girouard was not proven. None of the allegations contained in the notice of allegations was upheld. That is why the complaint was dismissed.

14. Nevertheless, two majority members of the Inquiry Committee recommended that Justice Girouard be removed from office, at the end of a process that failed to meet high standards of evidence, procedural fairness and Justice Girouard's constitutional rights.

15. Moreover, these two (2) Committee members misunderstood the notions of credibility and reliability of evidence and got them mixed up. Yet, these notions are quite distinct. It is important to specify their meaning:

In the matter of *Bairaktaris* c. *9047-7993 Québec inc.*, *Najah Bouras et Magid Naim*[1], quoted in the book entitled *L'évaluation du témoignage : un juge se livre*, the following remarks, stated at paragraph 32, are relevant in this regard:

[TRANSLATION]

[32] The credibility of a witness is assessed on the basis of the following principles:

> *Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves consideration of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose testimony on a point is not credible cannot give reliable testimony on that point. The evidence of a credible, that is honest, witness, may, however, still be unreliable. [See Note 3 below: R. v. Morrissey (1995), 97 C.C.C. (3d) 193, at 205, per Doherty JA. (Ont. C.A.) [Emphasis added]*

In *J.R.* c. *R.*, 2006 QCCA 719, Record of sources, Tab 8, the Court of Appeal stated as follows:

> [TRANSLATION]
>
> *[49] As the appellant submits, the notions of reliability and credibility are distinct. Reliability relates to the value of a statement made by a witness, whereas credibility refers to the person. My colleague, Justice François Doyon, explains quite well the distinction that must be made between these concepts (reference: Honorable François DOYON, L'évaluation de la crédibilité des témoins, 4 Rev.Can. D.P., 1999, p. 331)*:
>
> > *Credibility refers to the person and their characteristics, such as their honesty, which may manifest themselves in their behaviour. This is referred to as the credibility of the witness.*
> >
> > *Reliability refers instead to the value of the account given by the witness. This is referred to as the reliability of the witness' testimony, in other words a reliable testimony.*
> >
> > *Thus, it is well known that a credible witness may honestly believe that his or her version of the facts is truthful, when in fact it is not, simply because*

[1] *Bairaktaris* c. *9047-7993 Québec Inc.*, *Najah Bouras et Magid Naim*, [2002], J.Q. n° 4148, n° : 500-05-072827-023 (C.S.), quoted in *L'évaluation du témoignage : un juge se livre*, Renaud Gilles, Les Éditions Yvon Blais Inc. 2008, at pp. 18 and following.

the witness is mistaken ; therefore, the witness' credibility does not necessarily mean that his or her testimony is reliable.

[50] Therefore, a credible person can make an unreliable statement.

In *Pointejour Salomon* c. *R.*, 2011 QCCA 771, Record of sources, Tab 9, the Court of Appeal, referring to the aforementioned matter of *J.R.* c. *R*., added the following:

[41] Watt, J.A., of the Ontario Court of Appeal describes these distinctions in R. v. *C.(H.):*

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall;

and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: R. v. Morrissey (1995), 22 O.R. (3d) 514 (Ont. C.A.), at 526. (reference: (2009), 241 C.C.C. (3d) 45 (C.A. Ont.), at para. 41).

16. In conclusion, Justice Girouard endorses as his own the following comments stated in *Themens* c. *Miscioscia*, 2009 QCCS 546, Record of sources, Tab 10, at paragraphs 40 and following:

[TRANSLATION]

[40] In reaching this conclusion, the Court takes into account the following factors, among others:

- *It is not unusual, when someone is recounting facts, to find certain discrepancies in the details, especially when dealing with events that occurred five years earlier. Besides, the opposite is often suspicious, because when two people give accounts that are identical to within a few words, it can sometimes be an indication of a "fabricated" account; (...)*

[41] (...) The realiability and credibility of testimony are distinct notions. Commenting on the Supreme Court of Canada's decision in R. v. *R.E.M. (reference: 2008 SCC 51), M^e Jean-Claude Hébert wrote the following in the Journal du Barreau du Québec:*

[TRANSLATION]

"Being the exclusive domain of the trial judge, assessing the credibility of a witness is a complex process, often an approximate one, where the sincerity of the witness gets muddled up with the reliability of his account. Honestly believing that his account is true, a witness may err in good faith and give an unreliable testimony. Reliability and credibility are two distinct notions. The first refers to the evidentiary value of a testimony, while the second refers to the characteristics of the person giving the testimony."

[42] In this particular case, both Themens and Bélair seem to honestly believe that their account of the facts is true, even though their testimony differs in every respect on certain details. In this particular case, the contradictions raised by the defence are not such that they adversely affect the evidentiary value of the testimony.

17. Justice Girouard is the victim of a substantial injustice. The Canadian Judicial Council has the power to redress this injustice. It is its duty to do so.

THE FACTS

18. The notice sent by the Director of Criminal and Penal Prosecutions to Chief Justice Rolland in the fall of 2012 (on October 30) was bereft of nuance. It mentioned a transaction in the following terms: [TRANSLATION] "*We must point out that, with regard to Michel Girouard, a video was disclosed showing him acquiring drugs from Yvon Lamontagne, an important subject of the investigation.*" The notice also indicated that Justice Girouard had been a client of a drug trafficker.

19. This information, sent to Chief Justice Rolland, was relayed in the following terms in a letter that Chief Justice Rolland addressed to the Canadian Judicial Council on November 30, 2012:

[TRANSLATION]

"*In addition, a video shows him [Justice Girouard] allegedly making a transaction, alleged to be a cocaine purchase, approximately thirteen days prior to his appointment.*"

It will be shown that what were nothing more than assumptions and suppositions do not stand up to analysis.

20. On May 7, 2015, an admission related to Chief Justice Rolland's testimony was

introduced at the hearings of the Inquiry Committee, with the consent of the parties (pp. 5 and 6 of stenographic notes of May 7, 2015, Appendix 1, p. 48):

> [TRANSLATION]
>
> "*Chief Justice Rolland viewed the video recording of September 17, 2010, which shows Justice Girouard, while he was a lawyer, slip under the desk pad of a third party what appears to be a wad of money, and receive a small object from this person, in a context which may suggest that it was a drug purchase. Chief Justice Rolland noted, however, that the video recording has no sound track which could possibly confirm this supposition.*"

21. Essentially, the flow of this information was set out in the Inquiry Committee's report. It was published in various press releases from the Canadian Judicial Council at every step of the procedure surrounding the review of Justice Girouard's conduct.

22. What it does not show is the tremendous harm that has been done to Justice Girouard's reputation, honour and dignity. Supplemented by unfounded allegations, including one that Justice Girouard grew cannabis plants in his home, this information was set out in a notice of allegations that was given considerable media coverage in Canada. This was also the case for an allegation that Justice Girouard was under the control of organized crime, despite the absence of any evidence to support it. The information was sensational. To this date, it is still posted in notices of allegations on the Canadian Judicial Council's Web site, even though the allegations were withdrawn or dismissed.

23. It is significant to note the following chronological steps:

a) the allegations set forth in the notice of allegations relate to the purchase of drugs from informer X in the 1990s, some 25 years ago;

b) the video of September 17, 2010 was seized by police forces in October 2010 and analyzed on December 7, 2011;

c) the incriminating statement from informer X was made in May 2012; and

d) the information from the Director of Criminal and Penal Prosecutions

was sent to Chief Justice Rolland in the fall of 2012.

24. The video alone does not appear to have led to any action, and it is only after informer X's statement of May 2012 that the conduct of the judge, while he was a lawyer, was brought to the attention of Chief Justice Rolland and the Canadian Judicial Council.

25. The Independent Counsel herself argued, in support of her application to have witness X testify, as evidence of similar facts, that such evidence was necessary to shed a different light on an otherwise neutral gesture. However, this evidence was rejected and the gesture remains neutral.

26. The review procedure began in 2013 and ended on November 18, 2015. At every step, Justice Girouard cooperated with the Council and, to the best of his recollection, provided all explanations that he considered relevant or necessary.

27. The Inquiry Committee's public hearings began in an atmosphere of doubt and suspicion, where Justice Girouard's every action while he was a lawyer was scrutinized. The evidence focused on allegations regarding events that, according to these same allegations, supposedly occurred more than 25 years ago, and on a video recording lasting only a few seconds.

28. Justice Girouard's every word was examined. The Independent Counsel stated before the Committee that [TRANSLATION] "*the conversations he had, at certain times, in any case, the four (4) that we introduced – or the three (3), four (4), I can't recall – between Mr. – Maître Girouard, at the time, and Mr. Lamontagne, were possibly coded conversations"* (stenographic notes of May 6, 2015, pp. 118 and 119, Appendix 2, p. 51); this hypothesis was dismissed by the Inquiry Committee.

29. The Independent Counsel stated that she did not believe Justice Girouard (a comment that surprised the Inquiry Committee – see stenographic notes from the hearing of May 7, 2015, at pp. 10 and following, Appendix 3, p. 54), even before she heard his testimony (May 6, 2015, at pp. 124, 127 and 128 of the stenographic notes, Appendix 4, p. 79).

30. Such a context for the inquiry created an atmosphere of suspicion which resulted in a form of reverse onus of proving several peripheral issues.

31. Justice Girouard testified more than once at the public inquiry. The transcript of his testimony amounts to some 800 pages of stenographic notes. He provided repeated explanations, clarifications, hypotheses, impressions and deductions, to the best of his knowledge and recollection, about what did not happen more than five years ago, and about an act which, in itself, was quite ordinary (a meeting with a client who owns a video store) and lasted about six (6) minutes; the part of the meeting that was admitted in evidence lasted less than a minute, while the other part was excluded as evidence because it was protected under solicitor-client privilege established in 2010.

32. The testimony of informer X, seeking to incriminate Justice Girouard in a web of contradictions and lies, was rejected, if not ignored. It cannot be concluded from the video that there was an illegal transaction. The matter is closed. In an appropriate procedural world, Justice Girouard, a lawyer, a judge and a family man whose conduct is beyond reproach, could have carried on with his career. However, this is not the case.

THE PROCEDURE FOR REMOVAL

33. Two (2) members of the Inquiry Committee came to the conclusion that Justice Girouard deliberately "attempted" to mislead the Inquiry Committee by concealing the truth. They saw a "*multitude of significant inconsistencies and implausibilities in Justice Girouard's testimony regarding the issues stemming from the transaction recorded on video on September 17, 2010*" (para. 226 of the report).

34. Chief Justice Chartier, on the other hand, is of the opinion that the inconsistencies, errors or weaknesses are perfectly understandable and are not serious enough to give rise to any real doubt about Justice Girouard's credibility.

35. However, before reviewing those, it is appropriate to draw the attention of Council members to the absence of a notice of allegations that is sufficiently precise to allow

Justice Girouard to provide an adequate response to such allegations.

Procedural fairness

36. The right to a full answer and defence supersedes the right to know the particulars of any alleged misconduct, in advance of giving testimony. The Supreme Court of Canada stated this rule as follows:

> *"[41] (...) While the appellants go too far in arguing that the particulars they seek must be built into the s. 100 Resolution, inquiry participants are entitled to particulars of what, if any, misconduct is alleged against them sufficiently in advance of the conclusion of the hearings (and ordinarily to each of them in advance of giving testimony) to reasonably enable each of them to respond (if they have not already responded) as each of them may consider appropriate. Witnesses are routinely required to make disclosure of relevant documents to Commission counsel, and in the spirit of even-handedness it should be customary for Commission counsel, to the extent practicable, to disclose to witnesses, in advance of their testimony, any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into. Judicial inquiries are not ordeals by ambush. Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitional rather than adversarial, and that there is no lis between the participants. Judicial inquiries are not, in that sense, adversarial. On this basis the appellants and others whose conduct is under scrutiny can legitimately say that as they are deemed by the law not to be adversaries, they should not be treated by Commission counsel as if they were.*" (*Consortium Developments (Clearwater) Ltd.* v. *Sarnia (City),* [1998] 3 S.C.R. 3, Record of sources, Tab 11*)*.

37. No notice was given of the six (6) allegations made against Justice Girouard that were ultimately accepted by the majority of the Inquiry Committee. The majority suggests, however, that such a notice was given in the letter of May 22, 2015 and through issues raised at the hearing of May 14, 2015.

38. The purpose of the letter of May 22 was to schedule submissions for the June 8, 2015 hearing. Each of the two parties' submissions were limited to two (2) hours. With respect to what would ultimately be relied on as a ground for removal, the Inquiry Committee stated the following through its counsel, M^{e} Doug Mitchell (Appendix 5, p. 83):

> [TRANSLATION]

> "*Of course, we will hear your arguments as to whether the evidence shows, on a balance of probabilities, that a drug transaction occurred on September 17, 2010 between Mr. Justice Girouard (while he was a lawyer) and Mr. Yvon Lamontagne. Should the Committee be unable to conclude, on a balance of probabilities, that it was a drug transaction, or conclude that Justice Girouard's version is correct, whether supported by evidence or plausible, what should be the implications, if any, of such a conclusion.*"

39. The letter of instructions to counsel, far from indicating that a recommendation for removal might be possible or likely, made no mention of the six (6) inconsistencies that were ultimately relied on to recommend Justice Girouard's removal from office. This situation poses the following problem: if the majority of the Inquiry Committee had already identified the six (6) inconsistencies to which they expected to obtain precise answers, why were counsel not informed of these inconsistencies prior to the hearing of June 8? If the majority of the Inquiry Committee was not aware of these inconsistencies, how could counsel be expected to identify or foresee them?

40. This procedure proved to be prejudicial and fatal to Justice Girouard's rights. Indeed, submissions were obviously focused on the main allegation, namely the transaction set out in count 3, which rested on evidence of similar facts described in counts 1, 2 and 4. The Inquiry Committee stated the issue in the following manner:

> [TRANSLATION]
>
> "*Should the Committee be unable to conclude, on a balance of probabilities, that it was a drug transaction, or conclude that Justice Girouard's version is correct, whether supported by evidence or plausible, what should be the implications, if any, of such a conclusion.*"

With regard to the main issue, Justice Girouard's version was so accurate, plausible and supported by evidence that it was accepted and that ethical concerns which were the subject of the inquiry were dismissed.

41. So it was clear, for counsel, that the issue of accuracy and plausibility of the evidence against the allegation of having made an illegal transaction was central to the inquiry and, therefore, the submissions.

42. For her part, the Independent Counsel, in the outline of her written submissions dated June 8, 2015, arrived at the following conclusion on this issue:

[TRANSLATION]

> "*54. If the Committee comes to the conclusion that the evidence does not show, on a balance of probabilities, that a drug purchase transaction occurred on September 17, 2010, the Committee should conclude that Justice Girouard should not be removed from office and make a recommendation to this effect.*"

43. And so it was that the main complaint was dismissed.

44. At this point, the final report set aside the main allegation (the only one which was the subject of a notice of allegations) and engaged in a "nit-picking" exercise that is unacceptable in Canadian law.

45. We will now look at the inconsistencies that the majority of the Inquiry Committee believes it found.

Inconsistency 1 – The payment for previously viewed movies made directly to Mr Lamontagne

46. No notice of allegation was given on this issue. Let us recall that, for purposes of the inquiry, count 3 was worded as follows:

> "*Count 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, Mr Girouard allegedly purchased an illicit substance from Yvon Lamontagne, who was also his client.*"

47. He also had to face evidence of "similar facts" (inasmuch as such a procedure exists in Canadian disciplinary law) based on counts 1, 2 and 4, which were worded as follows:

> *SIMILAR FACTS (Report, para. [48])*
>
> *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 of total of about 1 kilogram with an approximate value of between $90,000 and $100,000.*
>
> *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 a case before the predecessor of the Régie des alcools, des courses et des jeux, for cocaine for his personal use.*"

48. This is the only notice that was given to Justice Girouard. These are the allegations that he defended himself against. This is the question that he answered. Members of the Inquiry Committee unanimously accepted the soundness of his defence, which was therefore highly plausible and clearly well-founded. Moreover, nothing was spared to investigate Justice Girouard's conduct: even his conversations with clients, which were intercepted by police, were introduced in evidence.

49. The two (2) majority members of the Inquiry Committee found a significant contradiction or inconsistency between the content of Justice Girouard's letter of

January 2013 to the Council's Executive Director, in which he wrote that he purchased movies directly from Mr Lamontagne because he preferred that these movies not appear on his customer file, and his testimony before the Committee, in which he stated that he purchased all kinds of movies from Mr Lamontagne, but rarely adult movies.

50. The explanations provided by Justice Girouard were summed up well by Chief Justice Chartier. They are credible. They read as follows:

> "*[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. 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. 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.*"

Inconsistency 2 – The act of slipping money under the desk pad

51. No notice of allegation was given on this issue, but the Inquiry Committee still reviewed the act of slipping money under the desk pad. When asked to explain why he did this, Justice Girouard stated that it was a habit of his and that he did not want to be seen giving money to a trafficker.

52. The majority of the Inquiry Committee expressed concern, particularly about the fact that Justice Girouard did not close the door to the office, if he did not want to be seen giving money to a trafficker. Yet, Justice Girouard raised this issue himself and responded to it in his testimony (see the transcript of Justice Girouard's testimony of May 14, 2015, page 56, lines 15 to 24, Appendix 6, p. 86):

[TRANSLATION]

(Michel Girouard) A. Yes, and...

(M^{e} Marie Cossette) Q. Thank you!

(Michel Girouard) A. ... the... I... in the same way, if I... if you... me, if I were you, I might have asked another question, I would have said: "why did you not close the door? Why don't you close the door?"

(M^{e} Marie Cossette) Q. Explain it to us...

(Michel Girouard) A. What?

(M^{e} Marie Cossette) Q. ... if it's important to you.

(Michel Girouard) A. I never closed the door, when I went into Mr. Lamontagne's office, because there was never anything illegal that I did in Mr. Lamontagne's office! If I had closed the door that time, the woman at the cash would have said: "what's going on there?" You know! So there was no reason for me to close the door!

(M^{e} Marie Cossette) Q. Perfect.

53. From this exchange, it is reasonable to conclude that Justice Girouard's response was to everyone's satisfaction. Nevertheless, in the final report, the absence of a justification was relied on as a ground for removal. This amounts to trial by ambush, which was very effective and popular at one time, but fortunately a thing of the past in Canada.

54. How can one explain that the majority of the Inquiry Committee, quoting from stenographical notes in footnotes 123 to 128, and specifically referring to pages 53-55 of Justice Girouard's testimony of May 14, 2015, failed to refer to the next page, page 56, where the answer to this specific question can be found? Why did the majority ignore this explanation, which is quite simple and crystal-clear, while concluding that this issue raises some doubt?

55. It is a very understandable and excusable omission on the part of the majority of the Inquiry Committee to have failed to refer to page 56, when quoting from stenographic notes in footnotes 123 to 128. However, the consequences of this

omission are fatal for Justice Girouard.

56. The majority of the Inquiry Committee expressed the opinion that Justice Girouard's action was "unusual". Such an assessment is subjective. It conflicts with the evidence.

57. The majority of the Inquiry Committee asked the following question at paragraph [194] of the report: "*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?*" Yet, Justice Girouard addressed the issue of paying the cashier for certain movies and paying Mr Lamontagne for others, particularly at pages 325 and following of the transcript of stenographic notes of his testimony of May 13, 2015, Appendix 7, p. 88.

58. This is the context in which the majority said it was "perplexed". It concluded that Justice Girouard's explanations "raise[d] some doubt". Such a conclusion is certainly not compatible with the requirements of clear, convincing and cogent evidence ("*evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test*" (*F.H.* v. *McDougall*, [2008] 3 S.C.R. 41, at para. 46, Record of sources, Tab 12);

59. Chief Justice Chartier understood the situation well, which led him to conclude as follows:

> "*[252]* *<u>The reason why Justice Girouard slipped money under the desk pad</u>: 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:* [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.*"

Inconsistency 3 – The moment when Mr Lamontagne and M^e^ Girouard began to discuss the tax matter on September 17, 2010

60. No notice of allegation was given on this issue. However, the majority of the Inquiry Committee concluded as follows: "*we have some reservations...*" Such a conclusion is incompatible with the requirements of clear, convincing and cogent evidence.

61. The majority's reservations are not justified. On the contrary, the evidence clearly shows that:

    a) The main purpose of the meeting of September 17, 2010 was to discuss Mr Lamontagne's tax matter (Mr Lamontagne's testimony of May 7, 2015, stated at paragraph 89 of the Inquiry Committee's report, and Justice Girouard's testimony of May 5, 2015, at pp. 38 and 39 of stenographic notes, Appendix 8, p. 98);

    b) Justice Girouard and Mr Lamontagne pointed out that they took the opportunity to settle the bill for movies (Mr Lamontagne's testimony, stated at paragraph 89 of the Inquiry Committee's report, and Justice Girouard's testimony of May 5, 2015, at p. 39 of stenographic notes, Appendix 8, p. 98);

    c) In his testimony of May 7, 2015, at p. 307, line 5 of stenographic notes, Mr Lamontagne confirmed that the issue of movies was discussed [TRANSLATION] "*when he arrived, there*", Appendix 9, p. 101;

    d) In his testimony of May 5, 2015, at pp. 38 and 39, lines 13 to 23 (Appendix 8, p. 98), Justice Girouard himself also confirmed that this issue was addressed at the beginning of the meeting of September 17, 2010;

    e) At p. 23 of its report, the Inquiry Committee described what it observed in the clip from the video that was introduced in evidence, at 13:01:56, and from 13:01:57 to 13:02:09.

62. Therefore, the Inquiry Committee had undisputed evidence that the issue of movies

was dealt with at the very beginning of the meeting between Mr Lamontagne and Justice Girouard. However, the majority of the Committee failed to consider this evidence when it stated the following at paragraph 198: "*… 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.*"

63. Chief Justice Chartier understood the situation very well and summed it up as follows:

> "*[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 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. 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.*"

Inconsistency 4 – The content of the note: the amount for settlement of the tax matter

64. No notice of allegation was given on this issue.

65. Mr Lamontagne's testimony is crucial with regard to the main allegation set out at count 3. Prior to his testimony of May 7, 2015 before the Inquiry Committee, no one knew his version of the facts. Everyone heard it at the public inquiry. The main part of his testimony dealt with the allegation of an illegal transaction. He never sold any illegal substances to Justice Girouard.

66. Mr Lamontagne had been incarcerated for several years. He saw the video for the first time on May 7, 2015, the day he testified. This was almost five (5) years after the meeting, which lasted some six (6) minutes; the part that was admitted in evidence lasted less than a minute, while the other part was excluded as evidence because of the solicitor-client privilege. When asked about the content of the note, Mr

Lamontagne stated that he could not recall, but assumed that it may have been an invoice for previously viewed movies.

67. For his part, Justice Girouard stated that the note contained the amount to settle the tax matter (or the amount of the loan, which Justice Girouard considered as being the same thing), as well as the name of the lender. His version is corroborated by irrefutable evidence, namely a mortgage deed in favour of the person named in the note and for the amount indicated by Justice Girouard (see, in this regard, the mortgage deed introduced in evidence, Appendix 10, p. 103).

68. Yet, the majority of the Committee concluded that this was "*one of the important inconsistencies in this matter*" (para. 199 of the report) which "*raises some questions*" (para. 202 of the report).

69. As for the argument drawn from the fact that the video does not show Mr Lamontagne using a pen or pencil to write a note, it is problematic. First, it was not submitted at the hearing. Furthermore, the evidence does not contain the entire video recording of the hours preceding the meeting. In addition, the evidence is limited to what is stated at paragraph [91] of the Inquiry Committee's report: we do not know what happened before 10:16, between 10:22 and 11:07, nor between 12:25 and 13:02. Finally, the note could very well have been written elsewhere or outside the field of view of the video camera. In these circumstances, drawing an inference that is unfavourable to Justice Girouard and dismissing his explanations are contrary to rules of evidence and fairness.

70. Chief Justice Chartier summed up well this aspect of the inquiry:

> "*[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.*"

Inconsistency 5 – The content of the note: the message saying [TRANSLATION] "I'm under surveillance, I'm being tailed"

71. No notice of allegation was given on this issue.

72. The majority of the Inquiry Committee contrasts Justice Girouard's testimony with a note contained in the summary report prepared by M^{e} Doray. Such an approach is inappropriate.

73. Firstly, the Canadian Judicial Council's complaints review process is governed by the provisions of the *Complaints Procedures*, the *By-laws* and the *Act*. It enshrines the principle of separation that the parties (Justice Girouard and the Attorney General of Canada) argued before the Federal Court (docket T-646-14). In accordance with this principle, the various stages of the review process are separated, so much so that the Independent Counsel and her associate, M^{e} Doray, who was appointed as outside counsel at an initial stage of the process, even signed a confidentiality agreement (firewall).

74. By indirectly introducing M^{e} Doray's report, the majority of the Inquiry Committee breached the principle of separation provided for in the rules.

75. Secondly, M^{e} Doray did not testify. His notes were not introduced in evidence. It is contrary to the rules of evidence to confront a witness with a statement that he or she did not make and that is not in evidence.

76. Finally, the allegation made at paragraph [210] and repeated at paragraph [214], to the effect that counsel for Justice Girouard did not object to the message contained in the report, raises two (2) serious problems: on the one hand, in order to respond to this suggestion, counsel could be called to testify, and, on the other hand, it could raise serious issues of protection of the right to solicitor-client privilege. However, it was established that the timeframes were very short. The report was dated August 13, 2013, and the response was dated August 14, 2013.

77. The process that was followed led to an illegality, in addition to a substantial injustice.

It is supremely unfair to ask questions about a truncated version of a report recounting contacts established over a period of several weeks, while the exchanges that occurred during those weeks remain totally unknown.

78. Chief Justice Chartier's conclusions were very reasonable and read as follows:

> "*[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. 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. Therefore, version (ii) may not be so inconsistent with version (iii).*"

Inconsistency 6 – The fact that Justice Girouard did not read the note

79. No notice of allegation was given on this issue.

80. Moreover, there is no real inconsistency with regard to this issue, and Justice Girouard's explanations convinced Chief Justice Chartier, who stated the following:

> "*[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. 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.*"

Corroboration

81. After reviewing the six (6) inconsistencies, the majority of the Inquiry Committee stated that the following evidentiary elements supported its conclusion (para. 229 of the report). However, this is very flimsy.

Excerpts from the Inquiry Committee report	**Comments from Justice Girouard**
(1) a prior statement made by Justice Girouard to M^{e} Doray which is incompatible with his testimony at the hearing;	There can be no corroboration in the absence of production of the witness' statement, if any, and in the absence of testimony from the author of this alleged statement.
(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;	If the letter is read in its entirety, it clearly shows that its main purpose was not to describe all of Justice Girouard's habits with regard to cinema. There is no inconsistency in the further information that was provided.
(3) Mr Lamontagne's testimony about the moment when the privileged discussion between lawyer and client began, which differs from Justice Girouard's testimony;	The most basic common sense suggests that it is impossible to have a clear recollection, to within a second, of the exact moment when words were said during a short conversation.
(4) Mr Lamontagne's testimony about what was written in the note, which is inconsistent with Justice Girouard's version of the facts;	Mr Lamontagne explained very well that he had no clear recollection of the content of the note. He suggested a possibility. In this context, one can hardly expect him to do more.
(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, particularly because, in our opinion, Mr Lamontagne gave to M^{e} Girouard what he had folded and put in that same pocket a few minutes before their meeting;	Such a suggestion is surprising. Several minutes of what occurred on September 17, 2010 were not introduced as evidence. In addition, there is nothing to indicate that the note may have been written elsewhere than within the field of view of the camera. Finally, it is purely hypothetical and speculative, in the absence of evidence to support a conclusion such as the one drawn by the majority of the Inquiry Committee.
(6) the fact that M^{e} Girouard, although an assiduous person who is very rigorous 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	The explanations that were provided are clear: it was not necessary to do so, because Mr Lamontagne had verbally indicated its content. The majority of the Inquiry Committee substituted its own opinion and value judgment, instead of analyzing the facts as established by the evidence.

(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, particularly because Justice Girouard did not look at what Mr. Lamontagne gave him.	Sergeant-Supervisor Y testified that no conclusion can be drawn from a furtive gesture, in the absence of a pattern of behaviour and a series of consecutive actions. He gave no interpretation of the fact of looking or not at what is exchanged. This summary of Sergeant-Supervisor Y is inaccurate. He did not deal with immorality or illegality (stenographic notes of May 11, 2015, pages 117 to 121, Appendix 11, p. 116).

Conclusion on the analysis of the facts

82. The questions and concerns raised by the majority of the Inquiry Committee about certain peripheral elements of the evidence, or its interpretation of these elements, cannot constitute evidence of misconduct or lack of integrity on the part of Justice Girouard. The absence of evidence to support any of the allegations, the series of “questions”, the fact of being “perplexed”, the “unusual” nature of certain gestures, the suspicions and suppositions cannot constitute evidence within the meaning of the rules of law. The inconsistencies, which are often nothing more than further details provided in an overly strong desire to fully cooperate with the inquiry, cannot justify the most severe sanction, namely removal from office.

83. Some of the suggestions made by the majority of the Inquiry Committee also raise concerns:

Excerpts from the Inquiry Committee report	**Comments from Justice Girouard**
[185] Justice Girouard’s testimony as to why he purchased movies directly from Mr Lamontagne is therefore not entirely clear.	How is this an inconsistency?

[191] (…) However, if the person to whom the money is intended for is present, as Mr Lamontagne was, such an action becomes unusual.	Is this an inconsistency or a value judgment not supported by the evidence? Or is it rather a personal opinion? What judicial knowledge do the members of the Inquiry Committee have regarding the handling of small-denomination notes? Do their habits differ from those of Justice Girouard's? If not, can a negative inference be drawn from it? If so, does it demonstrate Justice Girouard's habits in handling small-denomination notes? What is the norm in this regard?
[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?	Perplexity cannot be a substitute for evidence or the requirements of clear, convincing and cogent evidence. *Charette* c. *Larocque*, [2000] QCTP 34 (CanLII), Record of sources, Tab 13: [TRANSLATION] *The peers cannot substitute their opinion to make up for a lack of evidence. Their role is limited to assessing, based on the established standard, whether the facts demonstrate if it was observed or not.* *The Supreme Court of Saskatchewan wrote that it is not up to members of the discipline committee, despite their expertise in the area, to apply it beyond the evidence in order to reach other conclusions. (citations omitted) Also, the Divisional Court of Ontario stated that it is not part of the duties of the discipline committee to establish standards of practice or judge the quality of a medical procedure "a posteriori", in the absence of evidence to this effect. (citations omitted).*
[194] (…) And why did he not close the door to Mr. Lamontagne's office in order to avoid being seen?	Justice Girouard himself put forward this question and responded to it in a manner which, at the time, seemed to satisfy all members of the Committee. If that was not the case, none of the Committee members then cautioned him. Reference to the aforementioned matter of *Charette* c. *Larocque*.

[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 had 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.	The rule of evidence is not that of incongruity. An "incongruous" matter is one that is not suitable, ill-placed or contrary to the rules of etiquette. The English version of the report says that it "make[s] no sense" (para. 202 of the report). It is far from being the same thing. Members of the Inquiry Committee refused to accept a simple explanation. Reference to the aforementioned matter of *Charette* c. *Larocque*.
[215] Therefore, considering the stakes, Justice Girouard's claim that he did not read M^{e} Doray's summary seems improbable.	Nevertheless, that is the evidence. In order to counter this conclusion, the only solution would have been to breach the right to solicitor-client privilege.
[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.	A question is not evidence. Reference to the aforementioned matter of *Charette* c. *Larocque*.
[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.	The record of fees does not support any inference as to the nature of the object that was exchanged. It confirms Justice Girourard's version about the purpose of the meeting.
[224] (…) These contradictions, inconsistencies and implausibilities relate to each important element of the scenes 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) M^{e} Girouard paying the sum he owed for previously viewed movies directly to Mr Lamontagne, instead of paying the cashier of the movie rental store; (iii) M^{e} Girouard slipping 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.	This series of questions cannot constitute evidence. Reference to the aforementioned matter of *Charette* c. *Larocque*.

[225] (…) 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.	Nevertheless, that is the evidence. In order to counter this conclusion, the only solution would have been to breach the right to solicitor-client privilege. This report should not have been provided to members of the Committee. In order to respond to it, it would have been necessary to breach solicitor-client privilege. It is prejudicial to and a violation of Justice Girouard's constitutional rights to draw any negative inference from it.
[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 (reference omitted), we cannot, with great regret, accept Justice Girouard's version of the facts. Although this provides no evidence of 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.	The inquiry focused on, or rather seemed to focus on, a serious accusation: a cocaine transaction. There was no credible evidence. The entire testimony of the main witness at the heart of this matter, along with all his statements and his whole conduct, were summed up as follows: "*[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 rejected his entire testimony.*" Such a conclusion leaves no room for doubt: it was a testimony without any credibility. With respect to the fundamental elements of the inquiry, namely the allegation of an illegal transaction, it was Justice Girouard's testimony that was deemed credible. If someone attempted to mislead the Committee, it was not Justice Girouard.

Issues of law

84. Canadian law rests on principles aimed at preserving procedural fairness, which guarantees rights and freedoms. The Chief Justice of Canada recalled these principles in the following statement:

> *"Canadians are privileged to live in a peaceful country. Much of our collective sense of freedom and safety comes from our community's commitment to a few key values: democratic governance, respect for fundamental rights and the rule of law, and accommodation of difference. Our commitment to these values must be renewed on every occasion, and the institutions that sustain them must be*

cherished. Among those institutions, I believe that Canadian courts, including the Supreme Court of Canada, play an important role. A strong and independent judiciary guarantees that governments act in accordance with our Constitution. Judges give effect to our laws and give meaning to our rights and duties as Canadians. Courts offer a venue for the peaceful resolution of disputes, and for the reasoned and dispassionate discussion of our most pressing social issues. Every judge in Canada is committed to performing this important role skillfully and impartially. Canadians should expect no less." (Home page of the Supreme Court of Canada's Web site, as it was on December 4, 2015, at 1:00 pm).

85. In the present matter, several fundamental and constitutional principles were violated. While judges do not have more rights than their fellow citizens, they do not have any fewer.

The absence of a notice of allegation

86. What is mentioned in the report (the letter of May 22, 2015 and the issues of May 14, 2015) does not constitute a notice of allegations. The method used is rather similar to trial by ambush, which is reproved by procedural fairness rules.

87. The fact of being found guilty of a misconduct that is different from what is set out in the notice of allegations also constitutes a serious breach of procedural fairness.

88. In disciplinary law, the respondent cannot be found guilty of an ethical breach that is different from the one which he was called to defend himself against. On this issue, Council members are invited to read the Honourable Michel Girouard's representations (Appendix 15, p. 129, which are also found in the Record of sources in support of Submissions made by the Honourable Michel Girouard, Tab 14).

The admission in evidence of the video sequence of September 17, 2010

89. On the one hand, it was obtained in a manner that is contrary to the *Charter* and constitutes a breach of the right to solicitor-client privilege, while creating a dangerous precedent. In addition, this video sequence was obtained without prior judicial authorization. Finally, in order to properly understand all its aspects, Justice Girouard asked the Committee to issue appropriate orders to attend; his application was denied, so that we have no evidence of the entire handling of this

videotape between police forces, the Director of Criminal and Penal Prosecutions, and the Canadian Judicial Council.

90. The issue of admissibility of the video sequence as evidence was submitted to the Federal Court in docket no. T-941-15, which was deferred by decision of the Federal Court until November 18, 2015, the date of the Inquiry Committee's report. At this writing, the stay order was terminated by verbal directive of the Federal Court, contained in a notice dated December 2, 2015, Appendix 12, p. 122. A new notice of stay of proceedings was requested by consent. Considering the conclusions set forth in the Inquiry Committee's report, the Canadian Judicial Council is invited to review this issue; the Council's decision on this matter remains subject to the power of review of the Federal Court.

The admission in evidence of M^{e} Doray's report

91. In docket no. T-646-14, it was argued before the Federal Court that the rule of separation invokes the rule of confidentiality at each step of the inquiry process (see, in this regard, the order issued by the Honourable Justice Martineau, Federal Court, on December 5, 2014, para. 45, Federal Court proceedings, Appendix 4). In the present matter, taking into account M^{e} Doray's report is contrary to the rules governing inquiries conducted by the Council. It also leads to a violation of solicitor-client privilege, in order to respond to the allegation made by the majority of the Inquiry Committee.

92. This violation of the rule of separation was raised following discovery of a letter from counsel for the Canadian Judicial Council's Inquiry Committee, dated December 11, 2014 (Appendix 14, p. 126), to the Independent Counsel for the Inquiry Committee and counsel for Justice Girouard. The relevant excerpt from this letter reads as follows:

> [TRANSLATION]
>
> "*The Committee would like to point out to you that what Justice Martineau said in paragraph 45 is not accurate, since on June 18, 2014,*

the Vice-Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council sent to each member of the Inquiry Committee the report of the Review Panel in this matter, together with the supporting evidence.

Furthermore, the Committee would like to inform you that one member of the Committee has examined the decision of the Review Panel, but not the supporting evidence, that one member has examined all the documentation submitted by the Canadian Judicial Council, and that no member has examined the elements of the documentation.

The Committee wishes to advise you that the Inquiry Committee is planning to rely solely on the evidence that it deems admissible at the hearing to settle all the issues required to perform its duties. Moreover, as you know, judges are, by the nature of their duties, able to ignore evidence that they have heard in certain contexts, for example in a voir dire, or that they will declare inadmissible, either during the hearing or in the final judgment."

93. The Federal Court expressed its opinion on the impact of the violation of the rule of separation, the application of which was not challenged before the Court. On the contrary, both the Attorney General of Canada and Justice Girouard relied on this principle in their respective submissions. The application alleging violation of the rule was dismissed as being premature, in anticipation of the inquiry committee report in the present matter.

94. However, the Federal Court applied the following principles:

"*[73] Finally, even if I am prepared to assume, for the purposes of the present matter, that the rule of separation does not seem to have been observed, absent any evidence of concrete harm, I am not prepared, at this point in the proceedings, to order an immediate stay of proceedings before the Inquiry Committee. This is not prima facie a case of apprehended violation of a principle of natural justice where the affected party finds himself without remedy because a final decision has already been rendered. The inquiry before that Inquiry Committee has not really begun. Although the decision of the Review Panel, the report of outside counsel and its appendices, including the video in question, have been communicated unilaterally to the Committee, it will be possible to debate their exclusion on a preliminary basis. Clearly, the public interest and the balance of convenience favour the continuation of the inquiry, all without prejudice to the applicant's right to submit any motion for a stay of proceedings before the Inquiry Committee.*" *Girouard* v. *Canadian Judicial Council*, 2015 FC 307 (CanLII)

95. Despite the principles stated in the 3rd paragraph of the letter from counsel for the Canadian Judicial Council's Inquiry Committee, dated December 11, 2014 and previously mentioned (at para. 91), and the Federal Court's comments quoted in the preceding paragraph, it is now undeniable that the rule of separation was violated when the Inquiry Committee considered the Doray report, which led to a breach of the "firewall" established between the Independent Counsel and her associate, Me Raymond Doray. By introducing a report completed at an earlier stage of the procedure that was subject to the rule of separation, the Inquiry Committee violated a procedural guarantee established from the outset of the process. The harm that Justice Martineau referred to has now been committed.

96. Considering the conclusions set forth in the Inquiry Committee's report, it is appropriate for the Canadian Judicial Council to review the issue of admissibility of the Doray report as evidence; the Council's decision on this matter remains subject to the power of review of the Federal Court.

The infringement of the right to solicitor-client privilege

97. By introducing Me Doray's report and drawing negative inferences from the fact that counsel did not correct some of its content, members of the Inquiry Committee placed counsel in a situation where they could not respond to the Committee's questions without infringing Justice Girouard's right to solicitor-client privilege, although it was clearly explained that a very short timeframe had been given to respond to the report and that additional explanations had been provided.

98. There was no rule (nor is there any rule today) whereby not responding to nor correcting an allegation of fact contained in a document written by a third party, including an investigator from the Council, implied acquiescence. If such a rule existed and if established procedure allowed for a response to be required within a period of a few hours, it would be a real pitfall for persons involved in good faith in the inquiry. If such a rule exists and if persons involved in the inquiry are not informed of it, it is a real pitfall for those involved in good faith in the inquiry. If such a rule did not exist and was still applied by the Inquiry Committee, it is a real pitfall for those involved in good faith in the inquiry.

99. The fact of drawing a negative inference from the absence of justification for this failure to correct, at a separate stage from the Inquiry Committee's public inquiry stage, constitutes a breach of procedural fairness rules.

The bias

100. The lower court's *locus standi* in the review proceedings is very limited. It cannot provide justification for the merits of its decision, since this would adversely affect the impartiality of the court. The majority of the Inquiry Committee did not respect this most fundamental principle.

101. The Supreme Court of Canada has crystallized this principle in numerous decisions since *Paccar*, Record of sources, Tab 15, in which it stated the following:

> "*In that case, the Board had presented "detailed and elaborate arguments" in support of the merits of its decision. Estey J., at p. 709, commented: Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.*" (*Caimaw* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983)

102. An organization whose decision is under review by a higher court must be careful not to intervene in the review process, failing which its impartiality would be called into question. The majority of the Inquiry Committee indirectly did what it is not allowed to do directly: to argue and plead before the Canadian Judicial Council. The following excerpts from the Inquiry Committee's report amount to a veritable pleading submitted to the Canadian Judicial Council. They violate the principle of impartiality.

> "*[232] (...) Given these particular circumstances, we consider that procedural fairness does not require that the Council allow Justice Girouard a further hearing.*

> *[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 could still benefit from our analysis of 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 transparency, honesty and integrity before the Committee, and that (ii) he deliberately attempted to mislead the Committee by concealing the truth.*"

103. In addition to this veritable pleading by the majority of the Inquiry Committee, the Independent Counsel stated, on May 6, 2015 (Appendix 4, p. 79), that she did not believe Justice Girouard, even before the latter had testified. Such a statement prejudiced the impartiality of the public inquiry process.

104. These elements of the report of the majority of the Inquiry Committee confirm the existence of a serious apprehension of bias.

105. Justice Girouard suggests that the determination of these issues is essential to the protection of his rights.

106. Finally, Justice Girouard submits that the observations made by the Inquiry Committee at paragraphs 174 and 175 of its report are not supported by the evidence and are taken completely out of context (see, in this regard, stenographic notes of June 8, 2015, p. 239, Appendix 13, p. 124);

CONCLUSION

107. The allegations made in the new complaint cannot justify a recommendation for removal from office.

108. Such a recommendation is all the more excessive since Justice Girouard's conduct as a judge is impeccable, as was acknowledged by the Inquiry Committee, and does not in any way trigger the process provided for under section 99 of the *Constitution Act, 1867*. His family values, and the esteem in which he is held by his close relations, the Bar, his fellow judges and his community, are undeniable.

109. We endorse as our own Chief Justice Chartier's conclusions:

> "*[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 real 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.*"

For all the above reasons, the Honourable Justice Girouard concludes that the complaint should be dismissed.

Montreal, December 15, 2015

McCarthy Tétrault S.E.N.C.R.L.

Le bâtonnier Gérald R. Tremblay , Ad. E.

Quebec, December 15, 2015

Joli-Cœur Lacasse S.E.N.C.R.L.

Le bâtonnier Louis Masson, Ad.

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