CANADA

PROVINCE OF QUEBEC

CJC FILE: 16-0179

CANADIAN JUDICIAL COUNCIL

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CANADIAN JUDICIAL COUNCIL
REGARDING THE CONDUCT OF THE
HONOURABLE MICHEL GIROUARD, S.C.J.

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SUBMISSIONS MADE BY THE HONOURABLE MICHEL GIROUARD TO THE CANADIAN JUDICIAL COUNCIL (DECEMBER 5, 2017)

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1. PREAMBLE

1. The report of the Inquiry Committee concerning the Honourable Michel Girouard ("the Committee's report") was submitted following an inquiry requested by the Minister of Justice and Attorney General of Canada and the Minister or Justice and Attorney General of Quebec pursuant to subsection 63(1) of the *Judges Act*[1] ("the *Act*").

2. The Canadian Judicial Council ("the Council") did not "*deem it advisable to constitute this Committee*", contrary to what is suggested at paragraph 25 of the Committee's report. It was obliged to do so. The inquiry did not arise from a complaint or allegation made under subsection 63(2) of the *Act*, and, as a result, the screening and review procedures governing the disciplinary process were not followed.

3. The request from the Ministers and the approach followed by the Inquiry Committee ("the Committee") therefore bypassed the legislative process.

4. The Committee implicitly suggests that the approach previously followed in accordance with subsection 63(1) of the *Act* is inadequate. It concludes at the outset, at paragraph 3 of its report, that the findings of the majority of the First Inquiry Committee ("the First Committee") "*seemed destined to remain unresolved*". Faced with such an impasse, the Committee innovated and invented a new procedure, namely an inquiry about the inquiry. However, it would have been fairer to conclude that the findings of the fragile majority of the First Committee, chaired by the Honourable Richard Chartier, were simply not accepted by

[1] R.S.C., 1985, c. J-1, *Book of sources*, tab 7.

the Council, like it or not, since the conclusions of the "minority" were much better supported and justified. The Committee dismissed the rigorous analysis conducted by the Honourable Richard Chartier, in the First Committee's report, and by the 18 Chief Justices and Associate Chief Justices who make up the Council.

5. This brief contains the submissions of the Honourable Michel Girouard regarding the Committee's report. In some respects, it restates certain issues of law that were put forward during the inquiry. Several jurisdictional and constitutional questions were raised before the Committee and are contained in the "*Mémoire de l'honorable Michel Girouard concernant les moyens préliminaires*"[2].

1.1 The procedure set out in the *Judges Act*

6. The first stage of the procedure includes a mechanism that can be likened to a screening. A complaint alleging the purchase of an illicit substance was made against the Honourable Michel Girouard. This complaint was founded on a video recording, lasting a few seconds, in which the client of the judge, while he was a lawyer, handed him a "post-it" note containing information regarding a tax matter. The Honourable Michel Girouard provided his explanations, a lawyer prepared a confidential report, a review committee was created to decide whether or not to conduct an inquiry, and an inquiry committee was constituted, namely the First Committee. The First Committee unanimously concluded that the complaint should be dismissed. However, contradictions that the First Committee considered troubling resulted in a split decision: a judge and a lawyer who were members of the First Committee concluded that a recommendation for removal should be made on the basis these contradictions. The Honourable Richard Chartier, who dissented and was described as a minority member, concluded on the contrary that the Honourable Michel Girouard's explanations were plausible and did not warrant any sanction.

7. The First Committee wrote a report that it provided to the Council. Comprised of 18 Chief Justices and Associate Chief Justices, the Council unanimously concluded that the complaint against the Honourable Michel Girouard should be dismissed, in the following terms:

> "*[46] In light of this conundrum, and considering that all three members of the Committee concluded that there was not sufficient evidence to establish allegation number 3 that "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, Me Girouard allegedly purchased an illicit substance from Yvon Lamontagne, who was also his client.", and in light of the minority conclusion about the*

[2] *Book of sources,* tab 44.

judge's credibility, we would in any event have been unable to act on the majority's findings.

[47] The Council accepts the unanimous conclusion of the Inquiry Committee that the allegation that the Judge purchased drugs from Yvon Lamontagne has not been proven on a balance of probabilities.

[48] The Council accepts the Inquiry Committee's unanimous conclusion that allegations 1, 2, 4 & 6 should not be pursued because they cannot be proven. Allegations 5, 7 and 8 have been withdrawn.

[49] The Council recommends to the Minister of Justice, pursuant to section 64 of the Judges Act, that the Judge not be removed from office on the basis of these allegations."

8. The Committee completely misinterpreted these paragraphs, since the Council dismissed the complaint both on its merits and on grounds of procedural fairness.

9. The Council's report[3] was submitted to the Minister of Justice of Canada. She had a choice: accept the report, or submit to Parliament a motion for removal. It should be noted that, in accordance with subsection 65(1) of the *Act*, the Ministers of Justice did not receive the First Committee's report; they received only the Council's report. Therefore, they should not have considered the First Inquiry Committee's report.

10. The Council's favorable report toward the Honourable Michel Girouard ended the inquiry. That was the unanimous decision of the Council. The process should have ended. The inquiry was completed. After four years of procedures that made headlines and affected the judge's professional and personal lives, he could be fully reinstated in his judicial duties.

1.2 The new procedure

11. The Minister of Justice of Canada and the Minister of Justice of Quebec, on grounds that are not disclosed in the record, made a joint request for an inquiry. They expressly invoked subsection 63(1) of the *Act*. Its purpose was described in these terms: "*that an inquiry be held into the findings of the majority of the Inquiry Committee that prompted it to recommend Justice Girouard's removal from office.*" It deals with "his conduct during the inquiry".

12. The "majority" of the First Committee referred to in the joint request for an inquiry is very slim. In fact, it consists of only one member of the judiciary, namely the Honourable Paul Crampton. The other member of this "majority" is a lawyer, Me Ronald Leblanc. In reality, if we analyze the disciplinary process that unfolded from 2012 to 2016, only one

[3] Report of the Canadian Judicial Council to the Minister of Justice (April 20, 2016), *Book of sources*, tab 4.

judge reached a conclusion that was unfavourable to the Honourable Michel Girouard. The 19 other judges concluded in favour of the Honourable Michel Girouard.

13. The request for an inquiry is very strangely defined. It focuses on the conclusions of the majority of the First Committee. It excludes the conclusions of the judge described as a minority member and, mostly, those of the 18 Chief Justices, Associate Chief Justices and Assistant Chief Justices that were unanimously favourable to the Honourable Michel Girouard. The Ministers' request for an inquiry seeks to have an inquiry committee disregard all the conclusions favourable to the Honourable Michel Girouard resulting from the part of the inquiry conducted by the First Committee and by the Council.

14. Moreover, this so-called "majority" of the First Committee is very fragile and is unconstitutionally formed. Indeed, it is well established that only judges can participate in the decision-making process to remove a judge from office. In *Therrien (Re)*[4], the Supreme Court of Canada determined that members of the public or the Bar can contribute to the process. Justice Gonthier concluded as follows:

> "*[101] In these circumstances, the presence of persons who are not members of the judiciary at a preliminary stage may seem valuable in that it may provide input for the deliberations of the committee members and bring another perspective to the perceptions that members of the legal profession (in the case of the lawyers) and the general public (in the case of the other members) have of the judiciary. In my view, and in the specific circumstances of this case, the composition of the committee of inquiry of the Conseil de la magistrature complies with the structural principle of judicial independence and the rules of procedural fairness.*"

15. In the matter at hand, the lawyer who was a member of the First Committee did much more than provide input or bring another perspective: he formed the majority that decided to recommend the removal of the Honourable Michel Girouard.

16. The Ministers of Justice gave weight and credibility only to this fragile majority of the First Committee. The opinion and analysis of the minority member of the First Committee, a judge, the Honourable Richard Chartier, was excluded from the process. As for the Council's report, it was set aside and ignored by two Ministers of Justice. This is a precedent, and the only thing that can rally all participants to the current analysis is that "*it bears acknowledging the circumstances which led to the constitution of our Committee are unprecedented.*"[5]

---

[4] [2001] 2 SCR 3, *Book of sources*, tab 33.

[5] Report of the Inquiry Committee to the Canadian Judicial Council ("report of the Inquiry Committee"), November 6, 2017, at para. 2, *Book of sources*, tab 3.

17. It is certainly unprecedented for two Ministers of Justice to bypass the *Act* in order to propose a new procedure. It is equally unprecedented for the Committee to enthusiastically accept such a request, without even questioning it and taking the time to review its legitimacy.

18. How did the Committee approach this request for an inquiry into part of the First Committee's inquiry? Let's review its approach.

1.3 The new inquiry

19. In the first instance, it is necessary to describe this approach: is it an appeal, a review, a judicial review, the revocation of a judgment, the re-opening of an inquiry, or the resumption of an inquiry? The answer to this question is crucial. It will guide the conduct of the inquiry and the analysis of the report of the Committee. However, the Committee did not answer this question. From the very start of its analysis, the Committee already states and announces its unavoidable conclusion:

> "*[5] All things considered, we concluded it was appropriate to accept the findings of the majority underlying that Allegation only if it was shown they were both free from error and reasonable, and only to the extent they withstood our assessment of the evidence deemed reliable.*"

20. This introduction, which leads to its inevitable conclusion, is quite short. If the words "*all things considered*" have meaning, one looks in vain for the considerations that support such a proposition.

21. It must be stated that two of the three judges who are members of the Committee had already participated in the decision-making process as members of the Review Panel. However, under the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*[6], members who participated in the Review Panel stage are not eligible to sit on the Inquiry Committee. This ineligibility is stipulated in a specific provision:

> "*3. (1) An Inquiry Committee constituted in accordance with subsection 63(3) of the Act is composed of an uneven number of members designated by the senior member, the majority of whom are from the Council.*
>
> *[...]*
>
> *(4) The following persons are not eligible to be members of the Inquiry Committee:*

[6] SOR/2015-203, *Book of sources*, tab 9.

[...]

(c) a member of the Judicial Conduct Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted."

22. During the First Committee's inquiry, the 2002 version of the *Canadian Judicial Council Inquiries and Investigations By-laws*[7] was in force and was to the same effect:

"*2. (1) An Inquiry Committee constituted under subsection 63(3) of the Act shall consist of an uneven number of members, the majority of whom shall be members of the Council designated by the Chairperson or Vice-Chairperson of the Judicial Conduct Committee.*

[...]

(3) A person is not eligible to be a member of the Inquiry Committee if

[...]

(d) they participated in the deliberations of the Review Panel in respect of the necessity for constituting an Inquiry Committee."

23. By taking this course of action and adopting its own standards for assessing the evidence, as stated at paragraph 5 of its report, the Committee created a reverse onus of proof: the findings of the fragile minority are accepted if they are free from error and reasonable. Thus, unless it can be shown that they are faulty and unreasonable, these findings are accepted. Such an analytical standard disregards the conclusion of the Honourable Richard Chartier of the First Committee and of the 18 members of Council.

24. Let's examine how this new procedure applies to each allegation.

1.4 The new procedure applied to allegation 1

25. The rule of evidence adopted by the Committee has the benefit of originality. It was applied to paragraphs 110, 120, 132, 151, 160 and 176 of the Committee's report with regard to each pseudo-contradiction identified by a judge:

"*[110] Nothing in Judge Girouard's testimony before our Committee justifies setting aside the findings of the majority. Moreover, they are not tainted by error, and are entirely reasonable. We adopt them without hesitation.*

[7] SOR/2002-3715, *Book of sources*, tab 8.

[120] [...] In our judgment, those findings are free from error, and are reasonable. Finally, nothing in Judge Girouard's testimony warrants their setting aside. We adopt them without hesitation.

[132] [...] In our view, these findings are untainted by error, and they are reasonable. Nothing in Judge Girouard's testimony justifies setting them aside. We adopt them without hesitation.

[151] [...] In our view, these findings are not the product of any error, and they are reasonable. Finally, nothing in Judge Girouard's testimony justifies setting them aside. We adopt those findings without any hesitation.

[160] [...] In our view, there is no error in this finding of implausibility, and it is entirely reasonable. Finally, nothing in Judge Girouard's testimony justifies setting it aside. We adopt the finding without hesitation.

[176] [...] Furthermore, that finding is entirely reasonable. Finally, nothing in the explanations provided by Judge Girouard justifies setting it aside and the same applies to the other findings set out in paragraphs 205 to 215 and 225 of the First Committee's Report. We adopt them without any hesitation."

26. Such an exercise is the sort of analysis that is applied in the case of an appeal or a judicial review and involves re-opening an inquiry. Whatever the approach, it involves a reverse onus of proof in a manner that is prejudicial to the rights of the Honourable Michel Girouard. This approach is poles apart from the search for truth through clear and convincing evidence, which is the standard that must be applied at every stage of the process.

1.5 The new procedure applied to allegation 3

27. The inquiry requested by the Ministers of Justice pursuant to subsection 63(1) of the *Act* is limited to the following: "*an inquiry [...] into the findings of the majority of the Inquiry Committee that prompted it to recommend Justice Girouard's removal from office.*" Nevertheless, the Committee decided to consider a new complaint made by a person, L.C., who expressed her profound contempt for Quebec in a letter, the relevant parts of which are as follows:

"*I must state clearly I am appalled and extremely disappointed by the review provided by the committee. It reminds me one "the old boys club" where on another protect each other. I have work for McGill University in the Faculty of Medicine and have been privy to a great deal of inappropriate behavior by doctors, which like Mr. Girouard's behavior has been swept under the carpet. There is no doubt that large professional institutions like to keep their "dirty laundry" quiet. It happens in medical, financial, and now it seems in law.*

[...]

There were other lawyers that Mr. Girourad (sic) went to Law School with that were helping him to try and get this case "taken care of". One of them was a very well known criminal lawyer here in Montreal. I overheard the entire conversation of my ex-partner and this is how I became privy to the information. It was at this point that I realize my ex-partner was still speaking and seeing Mr. Girouard but was keeping it secret from me because he knew my "issues" of being involved with Mr. Girouard and his wife.

[...]

One thing I have found in Quebec many people are "dirty" and nothing gets done about it. Many professionals due cocaine, especially in high ranking positions. This is why I am taking the time to write to this committee, especially since there has never been an opportunity to come forward before as there was no place to write to regarding this case.

[...]

Personally after seeing this document today on line. I have zero faith in the Quebec Law System. I'll be sure to pass along my story to some of my journalists friends. I think it would make a great article. One only needs to recall any of the several criminal cases here in Quebec were individuals are provided such lenient sentences for fraud and theft. We need only look at cases such as the EX-Quebec Lieutenant-Governor, Lise Thibault, and the famous case of Quebec City lawyer, Lu Chan Khuong. Ms. Khuong was caught stealing 2 pairs of jeans totaling over $400, later after this case she was elected Vice-President of the Barreau. Any public governing company would have fired these people from employment, and charged in full, period!

[...]

I find the committee's decisions a big joke, not surprised at all. One of the reasons I am seriously looking to leave this province. It is so corrupt here and nothing *gets done about it, especially if you hold a position with honour, but by an un-honrable person. We only need to look at the fiasco with Dr. Porter for the MUHC Hospital, a committee I worked on for 2 years well before the development of that hospital. Then theres the lovely Mr. Vaillancourt, the ex-mayor of Laval who it's claimed stole $23M from the citizens of Laval, and is now stating he has Alzheimer. I have no doubt the wonderful ex-mayor will be allowed to go along with the defense and get off with it. i am sure he has a Dr. Friend also.*

[...]

The list is endless here in Quebec of "professional thieves" and interestingly enough these individuals are all white, Quebecois and have a big sense of entitlement.

Nothing will ever change if these type of individuals are always provided an easy pass."

28. The Committee agreed with L.C. in the following terms:

"*[283] These are, quite obviously, personal opinions that L.C. reached as a result of events covered by the media. That said,it is common ground that the former mayor of Laval, Gilles Vaillancourt, pled guilty to a charge of gangsterism and was sentenced to six years in prison, and that Lieutenant-Governor Lise Thibault was sentenced to 18 months in jail for misappropriation of public funds. The observations of our investigating counsel, M^e^ Gravel, with respect to L.C.'s critical opinions bear repeating:*

> *[TRANSLATION]*
>
> *And, on the other hand, there may be many people who keep silent, but I think that one must nevertheless be aware […] that Madame L.C. is not in a minority of people who find themselves to be – unfortunately, it is not a French word – but who are "écoeurés" [disgusted] – I will use the word, by behaviour like that of the lieutenant-governor, who was charged with theft and imprisoned; by the behaviour of the Mayor of Laval, Mr. Vaillancourt, who was charged with gangsterism, and imprisoned, and convicted; and with behaviours such as that seen in the Charbonneau Commission; […] I would hope […] that we have not yet reached the point of thinking that it is abnormal to be outraged by that type of behaviour. And I would think that, in a society like ours, the last thing that we would wish to discourage and condemn is the fact of reacting against or being upset by that type of behaviour. […] Madame L.C. may well be blamed for many things, but the fact that a person is shocked by that type of behaviour, in general, I find, on the contrary, to be good news in a democracy.*"

29. L.C. was believed from the outset. She was not submitted to any preliminary screening. Every procedure for assessing the credibility of such an important witness was bypassed. L.C. even talked about the fact that she saw the chief of police in the company of the head of the mafia:

> "*A- Well, I've seen a few things. I've seen the Montreal Police Chief, when I was bartendering, hanging out with the mafia and hanging out afterhours, and it took a few years before they actually, I guess, had enough pressure to go and relieve him of his job. I'm talking back in the early nineties (90s). So I've seen several examples of this situation.*"[8]

30. Furthermore, her letter of complaint was redacted from the outset, without request or a confidentiality order, and she was granted special witness status, benefitting from surprising

[8] Stenographic notes from May 10, 2017, page 82, *Book of sources*, tab 70.

privileges. Her letter was not submitted to a preliminary screening, as required by the *Act*, and despite repeated requests by counsel for the Honourable Michel Girouard, her entire letter was never published, the Committee choosing to disclose only portions of its contents.

31. L.C.'s testimony is troubling. She never saw the Honourable Michel Girouard use cocaine. Her testimony is made up of inferences and opinions, which is incompatible with the limits that must be imposed on a witness who is not qualified as an expert; most of all, her testimony constitutes hearsay. Indeed, the real witness, the only one who could have been present at the inquiry, is L.C.'s former spouse, Alain Champagne, whom L.C. described as a compulsive liar:

> *"Me GERALD R. TREMBLAY:*
> *Yes.*
>
> *Q - So he was lying all the time; that's your evidence.*
>
> *A - Well, there's a psychiatric definition for it, but I'm not a professional, so I won't get into that, but he's definitely not a truthful person.*
>
> *Q- And tell me, you're talking about him and...*
>
> *CHAIRPERSON:*
> *Well, let me correct you there, counsel. You say ... you said that he was lying all the time; that's not what she said. She said that he was lying in respect of certain matters .. . have mentioned certain things.*
>
> *Me GERALD R. TREMBLAY:*
> *No but she said...*
>
> *CHAIRPERSON:*
> *... but it's not her testimony that he was lying all the time when he was talking to her.*
>
> *No, he wasn't lying...*
>
> *Me GERALD R. TREMBLAY:*
> *But right now, she said there's a psychiatric name for that...*
>
> *CHAIRPERSON:*
> *Yes.*
>
> *Me GERALD R. TREMBLAY:*
> *... that's done...*

A - Well, someone who lies... who is basically a pathological liar and believes in their own lie to the death, I mean, it's ... there's a term for it, and he was actually, he actually was evaluated by a psychiatrist when he was in prison, and they ... you know, the woman ... the RCMP officer, she just said to me, «I cannot discuss this with you, but my advice to you is to stay away. This man has many issues.» So I thought there must have been something that the psychiatrist picked up on."[9]

32. The third allegation contained in the notice is therefore based only on the letter of complaint from L.C., whose testimony was accepted despite her contradictions. This person is motivated by a sentiment that she described as follows:

"A- H'm... you know, when I say "old boys' club", I'm saying... I'm speaking in the sense of, in some professions, there is... I have seen, or I have been witness to situations where people get a pass. They... you know, if you're at McGill and you're a doctor and you have tenure, it's basically impossible to throw you out. I had this conversation with my employer, Doctor Paris(?) at the time, and then I had other issues too, you know, and there are certain things that they just... you know, it is what it is.

Q- So inappropriate behaviours by doctors are swept under the carpet, that's your...

A- Well, I've seen a few things. I've seen the Montreal Police Chief, when I was bartendering, hanging out with the mafia and hanging out afterhours, and it took a few years before they actually, I guess, had enough pressure to go and relieve him of his job. I'm talking back in the early nineties (90s). So I've seen several examples of this situation."

[.. .]

Me GERALD R. TREMBLAY:
Comments. Comments. Nice comments about Quebec.

CHAIRPERSON:
No, no...

Me MARC-ANDRE GRAVEL:
No, this is... this is... I'll let you go, Mr. President, but this comment is... you know, is not necessary, is not useful.

Me GERALD R. TREMBLAY:
I said, «charges against Quebec»; what's wrong with the word?

[9] Stenographic notes from May 10, 2017, pages 36-37, *Book of sources*, tab 88.

HON. MARIANNE RIVOALEN, member:
No, it's inaccurate.

CHAIRPERSON:
The correct word is observation or opinion.

Me GERALD R. TREMBLAY:
All right.

Q- Let's use a very nice word. Would you consider the last three (3) lines of the third page, "In this Province of Quebec, it has clearly been proven over and over again that any person will lie if it works in their favour."

A- Well, that's a broad... that is definitely a broad statement. I... you know, honestly, I would back that up a bit, because it sounds all inclusive, but it's not the way that I meant it.

Q- But you wrote it.

A- Yes. I mean...

Q- But you didn't think...

A- ... if it's in here, I wrote it definitely. I own it, I wrote it, but I don't think... you know, I type about eighty (80) words a minute and I'm typing as I'm thinking and, you know, I'm just spewing it out, so I might have used the wrong words as you just did just recently, so...

Q- Yes...

A- ... but, you know... So, no, not every person, but... it's a bit rampant, I think.

Q- It's a bit rampant?

A- Rampant.

Q- Rampant, yes.

A- Meaning, you know, we see a lot of it.

Q- All right. The third one, it's paragraph... it's page 4, third line, "One thing that I have found in Quebec: many people are dirty and nothing gets done about it. Many professionals due (...)"
You wrote D-U-E, but...

A- Yes, that's a misprint.

Q- It's 0-0, eh?

A- Exactly.

Q- "Many professionals do cocaine, especially in higher-ranking position."

A- This I've seen many many times. As I said, I worked at a bar. I had a... I saw... you know, I worked at a very famous bar and I had some very high- profile regular customers: Dennis Martinez was my regular customer. Ken Keniston was my regular customer. I mean, Rizzuto walked in there. I mean, everybody was in this bar, so there was a lot of lawyers, all types of people.

CHAIRPERSON:
Q- I'd prefer that we not get into names. It serves no useful purpose.

A- No, but I'm just saying.

Q- Maître Tremblay. ..

A- I'm trying to give him an idea...

Q- ... do you need the names?

Me GERALD R. TREMBLAY:
I don't need the names.

CHAIRPERSON:
Okay.

A- So...

Me GERALD R. TREMBLAY:
Q- When you say nothing...

A- I'm not saying them; I'm just telling you that, you know, these are... I saw all kinds of people. So that's what I'm kind of referring to as...

Q- And when you say, "nothing gets done about it", what did you mean, "nothing gets done about it"?

A- Meaning a lot of times, things are sort of, you know... I mean, I don't feel

that the... I don't feel that the charges or the results are fitting to the case, such as the Norbourg case, such as... you know, the Governor General's case, such as the Vaillancourt'scase, the mayor. You know, we see a lot of that, and it's sad. It's sad, because the people who hurt are the citizens of Quebec.

Q- The fourth one, "I have zero (0) faith in the Quebec law system". Is that...

A- I would...

Q- ... is that... you wrote it down; you must have felt it, or you must have believed in it?

A- Well, I did. I could give you that example of when my ex-partner showed up at my house, he's Quebecois. He was talking to the Quebecois cop, and then he was a young guy, actually his last name was Cloutier, and he was being extremely rude to me, and I didn't do anything. I was just standing there, and he was being aggressive. So he... Alain obviously said something to him that was not truthful, and I told him... I said to him, "I would like to have your supervisor's name, because I'm going to make a complaint." And so he gave... he says, "I have three (3) supervisors." And I said, "Well, give me all three (3) supervisors' names then." And so then he said them very quickly, like he was being very arrogant, you know? And then he gave me one and it must have been Russian, because there was about thirteen (13) letters in it, and I asked him if he would spell it, and he said, "I'm not going to spell it for you." So, you know, it's this kind of... you know, and we're talking about... he's only there to be sure that - I guess what - I don't kill my ex, which I wasn't even twenty feet (20) near him, but he was being aggressive. He wanted to come in my house, and I said, "You have no reason to come in my house", you know? My girls can go in the house and get their stuff by themselves, I mean..."[10]

33. This person never saw the Honourable Michel Girouard use cocaine. She claims that she observed symptoms of cocaine use, allowing her to draw inferences and assumptions.

34. Furthermore, how can one claim to conduct an inquiry in the search for truth by voluntarily ignoring this criminal, this trafficker with a very mysterious role. He was ordered to undergo a new trial. Then, he vanished and resurfaced as a director of publicy-listed companies.[11] Considering the requirements for integrity and the checks that are performed in such cases, especially in this corrupt province of Quebec (according to the Committee and L.C.) which has adopted anti-corruption control measures, it must be acknowledged that the

[10] Stenographic notes from May 10, 2017, pages 82 and 87-92, *Book of sources*, tab 70.
[11] Exhibits G-5, G-6 and G-8 (exhibits related to publicly-listed companies), *Book of sources*, tab 46.

picture we have is difficult to reconcile with the criminal depicted by the Committee. The Committee's lack of interest for this crucial witness and the absence of his testimony are incompatible with the search for truth.

35. And yet, this is the only witness who knows. The only one. Nevertheless, the Committee took an interest in him only in closing arguments on July 10, 2017. The Committee's too-short conclusions are as follows:

> "*[199] L.C. testified her relationship with Mr. Champagne was tumultuous. He frequently used cocaine, was unfaithful to her and was imprisoned for importing 20 kilos of cocaine in 1993. Mr. Champagne was remanded into custody in 1993, while awaiting trial, and was subsequently sentenced to a 10-year prison term. The underlying conviction was set aside by the Quebec Court of Appeal and Mr. Champagne was released for several months in 1995, pending a new trial. He was then re-incarcerated for a period of approximately one year and a half. The final outcome of the proceedings remains unclear, although the hypothesis of a pardon was mentioned without, however, being confirmed.*"

36. There is no indication that this witness, the only one, was not available.

37. The introduction of this new complaint by L.C. was not submitted to any analysis. It is nevertheless a crucial issue. Is it possible to consider such a complaint, which has had a devastating effect on the reputation of the Honourable Michel Girouard, without any preliminary screening, as required by subsection 63(2) of the *Act*?

38. L.C. describes with precision a scene around a pool at the home of the Honourable Michel Girouard, which she said occurred in 1994-1995-1996, without being able to provide any details.[12] However, the pool was built in July 2000. The Committee's reasoning in this regard deserves consideration:

> "*[240] We are satisfied L.C. did not "invent" a swimming pool and, if her memory of a pool on the property is mistaken, there can be no doubt the mistake is honest. L.C.'s last visit to the home of M^e^ Girouard and G.A. occurred almost 20 years ago and, at the time, she had no reason to pay attention to the premises' characteristics. If there was no swimming pool on the property at the time of L.C.'s visits, there may have been one on the property of another acquaintance in Val-d'Or, which might explain the confusion. L.C.'s recollection of a swimming pool on the premises is no more than an innocent mistake, if it is a mistake.*"

[12] Stenographic notes from May 9, 2017, page 46, *Book of sources*, tab 64.

39. This contradiction is important, because it is one of the objective elements for assessing the credibility of the witness L.C.

40. The Committee's analysis is also odd and has the effect of creating a new rule of evidence:

> "*[234] When a party intends to attack the credibility of a witness on a specific point, the failure to draw his or her attention to that point in cross-examination, thus depriving the witness of an opportunity to provide an explanation, may, in some cases, blunt the effectiveness of that attack. The Committee reminded Judge Girouard's counsel of this fairness-driven principle. When the subject was broached, Judge Girouard's counsel submitted it was within their discretion not to put the "contradictions" to L.C. directly and that it would have been strategically unsound for them to do so.*"

41. The purpose of procedural fairness rules is to protect the rights of the Honourable Michel Girouard. The Committee's position is contrary to the rules of cross-examination: it is at the very least inappropriate to cross-examine a witness in such circumstances. The rule remains: the evidence must be clear and convincing, and the decision-maker must consider all the evidence and the contradictions.

42. It is in this factual context that fundamental issues now arise.

1.6 The variable-geometry burden of proof

43. The burden of proof evolves throughout the Committee's report, from clear and convincing evidence, to objective plausibility, and a strong balance of probabilities, as well as using expressions such as "all the evidence suggests that", "leads us to conclude", "we adopt those findings", and "the inferences drawn are logical and reasonable."

1.7 The legal writers

44. It is surprising to note that the Committee engaged the services of legal writers. The introduction of these participants at a crucial stage of the inquiry, namely the drafting of the decision, raises an issue related to the rule that the decision-maker must be present at the inquiry and hear the evidence ("he who decides must hear"). What role did the legal writers play in the Committee's report, and which parts of the report did they write? When did they write it? On whose instructions?

45. This decision-making method has the virtue of being original. It cannot be accepted.

1.8 The conclusions of the Committee and the Council

46. The Committee did not answer the fundamental question about the true nature of its inquiry. Is it an appeal, a judicial review, the re-opening of an inquiry, or a new inquiry? As for the true nature of the inquiry, is it governed by the request from the Ministers (which limits the inquiry to a review of the conclusions of the majority of the First Committee), or by the Notice of Allegations which goes much farther?

47. As previously noted, the Committee raised the issue of contradictions and stonewalling in the testimony given by the Honourable Michel Girouard, as would an appellate court or a judicial review tribunal: it limited itself to assessing the reasonableness of the conclusions of the First Committee. This is what the Committee did, instead of carrying out an objective analysis of the evidence.

48. The Committee also needed to dismiss the report of the minority of the First Committee. To that end, it suggests the following approach:

> "*[98] In our respectful view, Chief Justice Chartier's dissent cannot prevail because, inter alia, the record available to us is materially different from the one at his disposal. Indeed, Chief Justice Chartier explained his reasons for not subscribing to the unfavourable findings of the majority included: (1) the Doray Report had not been admitted in evidence; and (2) its author had not testified. The record at our disposal includes the key portions of the Doray Report and the author's sworn testimony, and that additional evidence provides direct support for one of the majority's findings, and indirect support for its general conclusion that Judge Girouard attempted to mislead the First Committee by concealing the truth. We are confident Chief Justice Chartier would have endorsed the findings and conclusions of the majority, which are targeted by the First Allegation, if he had at his disposal the amplified record available to us.*"

49. Furthermore, since the Committee states that the record available to it is materially different from the one that was at the disposal of the First Committee, how can it claim that the reasoning of the majority is free from any factual error?

50. It is troubling to note that the Honourable Richard Chartier's opinion contained in the First Committee's report is quoted incompletely in the Committee's report, considering that the following paragraphs are determining:

> "*[100] Finally, it bears remembering Chief Justice Chartier began his dissenting opinion by confirming his full agreement "with the Committee's analysis as set out at paragraphs 1 to 178". The First Committee made the following findings at paragraphs 160 and 172:*

> *[160] Judge Girouard asked the Committee to lift the cloud of uncertainty that hangs over him. It is understandable why Judge 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.*
>
> *[…]*
>
> *[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 Judge Girouard. [Footnotes omitted, emphasis added]*"

51. Yet, the Honourable Richard Chartier wrote the following in the introduction to his dissent from the report of the First Committee:

> "*[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 a few 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 in the present matter.*
>
> *[246] For the reasons that follow, I cannot subscribe to the recommendations made by my colleagues.*"

52. How can the Committee claim that the Honourable Richard Chartier confirmed his full agreement with the findings of his colleague and the lawyer who was a member of the Committee, since he wrote exactly the opposite:

"*[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.*"

53. This analysis of what the Honourable Richard Chartier would have decided is not supported by the evidence, results from spontaneous deductions, and constitutes a breach of deliberation secrecy. Such an assumption is not supported by the facts nor the law. It is pure speculation.

54. Therefore, the following issues have not been resolved by the Committee:

a. The procedure set out in the *Judges Act*;
b. The new procedure;
c. The new inquiry;
d. The new procedure applied to allegation 1;
e. The new procedure applied to allegation 3;
f. The variable-geometry burden of proof;
g. The conclusions of the Committee and the Council.

2. A REVIEW OF THE FACTS

2.1 The factual background

55. The inquiry into the conduct of the Honourable Michel Girouard commenced on November 30, 2012. It dealt with events going back as far as 1988 and resulted in the Council's unanimous report, dated April 20, 2016, which concluded as follows:

"CONCLUSION

[47] The Council accepts the unanimous conclusion of the Inquiry Committee that the allegation that the Judge purchased drugs from Yvon Lamontagne has not been proven on a balance of probabilities.

> *[48] The Council accepts the Inquiry Committee's unanimous conclusion that allegations 1, 2, 4 & 6 should not be pursued because they cannot be proven. Allegations 5, 7 and 8 have been withdrawn.*
>
> *[49] The Council recommends to the Minister of Justice, pursuant to section 64 of the Judges Act, that the Judge not be removed from office on the basis of these allegations.*"[13]

56. In an unprecedented move, the Minister of Justice of Canada and the Minister of Justice of Quebec wrote to the Council, in a letter dated June 9 and 13, 2016, to "*request, pursuant to s. 63(1) of the Judges Act, that an inquiry be held into the findings of the majority of the Inquiry Committee that prompted it to recommend Justice Girouard's removal from office.*"[14] The Ministers did not ask for a review of the conclusions of the minority of the First Committee[15] nor of those of the 18 judges named in the Council's report.

57. The inquiry was expanded to include additional allegations based on statements made by a witness (L.C.), which were similar to those that were the subject of the Council's report and had been dismissed by the Council.

58. The re-opening of the inquiry that was ended on April 20, 2016 raises several issues of law which were decided during the hearing on preliminary motions, at the beginning of the Committee's hearings.

2.2 A unanimous decision

59. The Ministers of Justice suggest that the Council, when it rendered its unanimous decision on April 20, 2016, neglected or failed to analyze and dispose of the only reason put forward by the majority of the Committee to recommend the removal of the Honourable Michel Girouard.

---

[13] *Report of the Canadian Judicial Council to the Minister of Justice in the matter of Section 65 of the Judges Act, R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Michel Girouard of the Superior Court of Quebec* (hereinafter referred to as "the Council's report"), signed by the Honourable Neil C. Wittman (Chairperson), the Honourable Heather J. Smith, the Honourable David D. Smith, the Honourable J. Derek Green, the Honourable Jacqueline R. Matheson, the Honourable David H. Jenkins, the Honourable Robert Kilpatrick, the Honourable Robert Bauman, the Honourable John D. Rooke, the Honourable Lawrence I. O'Neil, the Honourable Austin F. Cullen, the Honourable Martel D. Popsecul, the Honourable Shane I. Perlmutter, the Honourable Alexandra Hoy, the Honourable Frank N. Marrocco, the Honourable Robert G. Richards, the Honourable Christopher E. Hinkson and the Honourable George R. Strathy, *Book of sources*, tab 3.

[14] Letter from the Ministers of Justice, *Book of sources*, tab 42.

[15] Report of the First Committee, *Book of sources*, tab 5.

60. It is disrespectful to make such a claim against the 18 judges who were involved in analyzing the report of the First Committee and who rendered a unanimous decision on April 20, 2016.

61. A complete reading of the decision clearly shows that the Council considered, analyzed and dismissed the position of the majority members of the First Committee:

> "*[26] Having found that none of the allegations had been proven, two of the three members of the Committee (the majority) expressed concern about the reliability and credibility of the Judge's evidence. Their analysis of six specific concerns is set out at paras. 181-222 of their reasons. They found the Judge's evidence contained "contradictions, inconsistencies and implausibilities" central to the September 17, 2010 transaction.*
>
> *[27] These two members expressed "deep and serious concerns" about the Judge's credibility and therefore about his integrity. In their opinion, the Judge attempted to mislead the Committee by concealing the truth. It was their view that the Judge lacked candour, honesty and integrity before the Committee. They concluded that, in so doing, the Judge placed himself in a position incompatible with the execution of his office and that in testifying this way the Judge had undermined the integrity of the judicial system.*
>
> *[28] The majority suggested that if Council thought procedural fairness required that the Judge be given an opportunity to respond to their concerns and conclusions, a further allegation could be brought against him in relation to his conduct during his testimony. They concluded, however, that he had been given an opportunity to respond to the evidence at the hearing and as a result procedural fairness did not require a further hearing. The majority also suggested, as an alternative that Council could hear the Judge so that he could respond to their concerns about his evidence.*
>
> *[29] Finally, they expressed the opinion that Council should, due to the majority's conclusions about the Judge's testimony at the Inquiry, recommend his removal from office.*
>
> *[...]*
>
> *[42] In this Report, we do not consider the majority's conclusion that the judge attempted to mislead the Committee by concealing the truth and that such conduct places him in a position incompatible with the execution of his office. The Council takes this approach because the judge was not informed that the specific concerns of the majority were a distinct allegation of misconduct to which he must reply in order to avoid a recommendation for removal.*
>
> *[43] Because the judge was entitled to this kind of notice and did not get it, the Council does not know whether the majority's concerns would have been resolved had it received an informed response to them from the judge.*

> *[44] Because we do not know if the majority's concerns would have been resolved, the Council, itself, cannot act upon the majority's concerns as if they were valid.*
>
> *[45] Although unnecessary for purposes of our conclusions, we also observe that the majority's comments present a clear conundrum. It would seem that either (1) there was no drug transaction or (2) the judge misled the Committee and there was a drug transaction. The majority's reasoning does not resolve this apparent paradox.*
>
> *[46] In light of this conundrum, and considering that all three members of the Committee concluded that there was not sufficient evidence to establish allegation number 3 that "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, Me Girouard allegedly purchased an illicit substance from Yvon Lamontagne, who was also his client.", and in light of the minority conclusion about the judge's credibility, we would in any event have been unable to act on the majority's findings.*"

62. The Council unanimously accepted the flawless analysis of the Chairperson of the First Committee, the Honourable Richard Chartier.

63. At paragraph 3 of its report, the Council clearly indicated the importance of ensuring the integrity of the judiciary and, therefore, the integrity of the Honourable Michel Girouard:

> "*[3] This responsibility on the CJC to make its own independent assessment and judgement is as it should be given the serious nature of the interests at stake. Those interests include both the need to preserve public confidence in the integrity of the judiciary and the need to ensure that judicial independence is not improperly compromised through the use of disciplinary proceedings. Public confidence in the judiciary is essential in maintaining the rule of law and preserving the strength of our democratic institutions. All judges have both a personal and collective duty to maintain this confidence by upholding the highest standards of conduct both before and after their appointment.*"

64. At paragraph 6 of its report, the Council carefully reviewed the views expressed in the First Committee's report, both those of the majority and those of the minority:

> "*[6] This Inquiry Committee consisted of two chief justices and a senior member of the Bar. Its composition, expertise and role, together invite the CJC to carefully consider the Inquiry Committee's perspective described in its Report.*"

65. At paragraph 28 of its report, the Council again demonstrated that it specifically analyzed the six particular issues which led two members of the First Committee to believe that the Honourable Michel Girouard lacked integrity.

66. At paragraph 30 of its report, the Council described the analysis and conclusions of the Chairperson of the First Committee, the Honourable Richard Chartier, and quite evidently concluded that his analysis was flawless and in accordance with our rules of law:

> "*[30] The third member of the committee (the minority) expressed full agreement with the reasons of the Committee in finding that allegation 3 had not been proven, but did not agree with the majority's recommendation that the Judge be removed. He examined the inconsistencies, errors and weaknesses in the Judge's evidence and concluded that they did not raise a concrete doubt about the credibility of the Judge's testimony. He acknowledged that the events in the video seemed "shady". The minority member did not find the Judge's explanations false. Rather he thought that "the five or six inconsistencies [identified by the majority] …are of the kind that can be expected in a testimony that lasted five (5) days, amounted to more than eight hundred pages of transcripts, and focused on a brief exchange lasting eighteen (18) seconds that occurred almost five (5) years ago."*"

67. The Council had a free hand in drawing its conclusions. Following a rigorous analysis of the positions of the majority and the minority of the First Committee, and considering the record in its entirety, the Council ended the inquiry proceeding by recommending unanimously that there were no grounds for removal. Since the inquiry was ended, the Committee should have given the utmost importance to the Council's report, being very careful not to act as an appellate court or a review tribunal.

3. ALLEGATION 1 AND THE NEW PROCEDURE APPLIED TO ALLEGATION 1

Justice Girouard has become incapacitated or disabled from the due execution of the office of judge by reason of his misconduct during the inquiry conducted by the First Committee, which misconduct is more fully set out in the findings of the majority reproduced at paragraphs 223 to 242 of its Report:

- ***a) Justice Girouard failed to cooperate with transparency and forthrightness in the First Committee's inquiry;***
- ***b) Justice Girouard failed to testify with transparency and integrity during the First Committee's inquiry;***
- c) ***Justice Girouard attempted to mislead the First Committee by concealing the truth.***

68. In the First Committee's report, the majority members identified six alleged contradictions, describing them as follows:

a. The purpose(s) of the visit of September 17, 2010: the movies, the tax matter, or both[16];
b. The act of placing the money under the desk pad[17];
c. The exact moment during the meeting when the discussion of the tax matter began[18];
d. The content of the "post-it" note[19];
e. The message saying [TRANSLATION] "I'm being tailed" contained in the Doray report[20];
f. The fact that the content of the "post-it" note was not read immediately[21].

69. However, it is difficult to grasp the precise significance of these alleged contradictions, since they are redefined and reshaped throughout the report.

3.1 The purpose(s) of the visit of September 17, 2010: the movies, the tax matter, or both

70. The two majority members of the First Committee found a substantial contradiction or inconsistency between the content of the letter that the Honourable Michel Girouard sent in January 2013 to the Executive Director of the Council, Me Norman Sabourin, explaining that he purchased the movies directly from Mr. Lamontagne because he did not want them to appear on his customer file, and the testimony that the Honourable Michel Girouard gave to the First Committee, in which he stated that he purchased all kinds of movies from Mr. Lamontagne, but rarely adult movies.

71. The Honourable Richard Chartier summed up well the explanations provided by the Honourable Michel Girouard. 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.*

[16] Report of the First Committee, contradictions identified by the minority at paragraphs 250 and 251, *Book of sources*, tab 5.
[17] *Ibid.*, paragraph 252.
[18] *Ibid.*, paragraph 253.
[19] *Ibid.*, paragraph 254-255.
[20] *Ibid.*, paragraph 256-260.
[21] *Ibid.*, paragraph 261-262.

[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."[22]

72. Furthermore, the Honourable Michel Girouard again explained those events during the Committee's inquiry. The highlights of his testimony are as follows:

[TRANSLATION]

"*A- I can't read it to you, you've read it, but that's why I really wanted it to be mentioned, the point where, obviously, we will no longer agree with Justice Chartier, is when he considers it incredible that I did not read the note and that I did not try to have the note corrected in Me Doray's summary, which we now understand I never got! At least, he's telling the truth about that, that I could not read something that I didn't have! And I had about one hundred and fifty (150) pages that centered around the fact that:*

"You didn't read it; that's incredible! You didn't ask that it be corrected; that's incredible!"

So ...I take as my own Justice Chartier's reasoning, which I consider to be impeccable.

Q- Ok!

A- So, the first...

Q- Er...

A- the first point you raised in your explanations, is found at page 31 of the compendium, and it refers to paragraph 188 of the Inquiry Committee's report.

We are under the title:

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

And here we have excerpts from notes - excuse me - here we have footnotes 123, 124 - ok, it's going well! - and 125 that deal with it. And, for purposes of your explanations, you point to footnote 125. So now, I'm going to take a bit more

[22] Report of the First Committee, *Book of sources*, tab 5.

time, perhaps, to properly read paragraph 188, and we'll accelerate as we become more familiar with the document.

> *"First of all, at the in camera hearing... Justice Girouard gave two explanations... he first testified that he slipped the money under the desk pad so that it would not be obvious he was giving money to a trafficker.* "[23]

73. In keeping with the rule of evidence that it adopted, the Committee endorsed the conclusions of the fragile majority without studying the Honourable Richard Chartier's analysis on this issue. Such is the consequence of a proceeding initiated as a result of a ministerial directive which is poles apart from the search for truth. How can one accept a conclusion that completely neglects the views of the Honourable Richard Chartier and those of the Council:

> "*[109] The majority noted the following: (1) in the voir dire on the issue of solicitor-client privilege, Judge Girouard stated under oath that, during the whole discussion, Mr. Lamontagne and he spoke only about the tax dispute; (2) all the members of the Committee preferred Mr. Lamontagne's testimony that the conversation in connection with the tax dispute probably began when he stood up to retrieve a document from behind him; and (3) the rejection of Judge Girouard's evidence on that issue had to be added "to the constellation of significant inconsistencies and implausibilities in Judge Girouard's testimony regarding the issues stemming from the transaction recorded on video on September 17, 2010".*
>
> *[110] Nothing in Judge Girouard's testimony before our Committee justifies setting aside the findings of the majority. Moreover, they are not tainted by error, and are entirely reasonable. We adopt them without hesitation.*"

3.2 The act of placing the money under the desk pad

74. The majority members expressed their concern, particularly about the fact that the Honourable Michel Girouard did not close the office door in order to avoid being seen giving money to a trafficker. However, the Honourable Michel Girouard brought up this issue himself and responded to it during his testimony:

> [TRANSLATION]
>
> "*Q- My other question...*
>
> *A- ...me, I... I was not taking drugs, at that time, so I wasn't buying any.*

[23] Stenographic notes from May 12, 2017, pages 683 and 684, *Book of sources*, tab 75.

Q- My other...

A- But...

Q- ... question, is that: when you leave money, at home, as you explained, to the housekeeper or your children, for example, and you place an object on top of it, so they can see it, but that, nevertheless, the money...

A- Er, er.

Q- ... is... is placed, there, with an object, I... I understand the logic of what you're explaining to us, but, here, in this case, Mr. Lamontagne is in front of you...

A- Er, er.

Q- ... so, obviously, the money is for him, he's already there, it's not someone who will pick it up later, at another time...

A- Er, er.

Q- ... where you won't be, you, present; once again, so that you can explain to us the logic of doing this, out of habit, when your counterpart is directly in front of you, and that you're only one (1) foot away, two (2) feet, maybe, three (3) feet at the most.

A- For the second reason I gave you, and you don't want to believe me.

Q- Just a moment, I did not make any judgment, I...

A- Well, you...

Q- ... asked you the question...

A- But...

Q- ... and I... I told you that...

A- Well...

Q- ... on the face of it, there may be a contradiction, and I wanted you to have the opportunity to explain to us, and I clearly heard your explanation.

A- Respectfully, Madam, you said that you didn't believe me, before I testified; respectfully;

Q- I asked your...

A- With all due respect.

Q- ... counsel to meet with you, during the pre-inquiry, and it was refused, so there!

THE HONOURABLE R.J. CHARTIER, Chairperson:

But...

Me MARIE COSSETTE, Independent Counsel:

Q- I heard you here, however.

THE HONOURABLE R.J. CHARTIER, Chairperson:

Q- But did you have the - I don't know if... if... if, Mr. Justice, you answered... the question.

Me MARIE COSSETTE, Independent Counsel:

I think he told me: "It's for the second reason...

THE HONOURABLE R.J. CHARTIER, Chairperson:

Yes.

Me MARIE COSSETTE, Independent Counsel:

... that I gave you."

THE WITNESS:

A- Well, yes...

THE HONOURABLE R.J. CHARTIER, Chairperson:

Ok. Good.

Me MARIE COSSETTE, Independent Counsel:

So, I heard his answer. Perfect.

THE WITNESS:

A- Yes, and...

Q- Thank you!

A- ... the... I... in the same way, if I... if you... me, if I were you, I would perhaps have asked another question, I would have said: "Why did you not close the door? Why don't you close the door?"

Q- Explain it to us...

A- What?

Q- If it's important to you...

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, that time, I had closed the door, the girl who was at the cash would have said: "What's going on in there?" You know! So there's no reason for me to close the door!

Q.- Perfect."[24]

75. How can one explain why the majority members of the First Committee, quoting excerpts from stenographic notes under footnotes 123 to 128, specifically mentioning the reference to pages 53 to 55 from May 14, 2015, neglected to refer to the next page, namely page 56, where the answer to that specific question can be found?

76. Why did the majority members of the First Committee ignore this explanation, which, after all, is quite simple and crystal-clear, and conclude that it raised doubts?

77. If the majority members of the First Committee can be forgiven for not referring to page 56 of the stenographic notes from May 14, 2015, this oversight had serious consequences for the Honourable Michel Girouard.

78. The majority members of the First Committee were of the opinion that this action was "unusual". Such an assessment is subjective. It is contrary to the evidence.

79. The majority members of the First Committee asked the following question at paragraph 194 of their 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?*" However, the Honourable Michel Girouard responded to this

[24] Stenographic notes from May 14, 2015, page 56, *Book of sources*, tab 60.

question by saying that he paid the cashier for certain movies, and paid Mr. Lamontagne for others.[25]

80. This is the context in which the majority said it was "perplexed". It concluded that these explanations "raise some doubt". Such a conclusion is certainly not compatible with the requirements of clear and convincing evidence ("*evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test*"[26]).

81. The Honourable Richard Chartier understood the situation well, and he concluded as follows:

> "*[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:*
>
> *[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."*[27]

82. Furthermore, the Honourable Michel Girouard again explained those events during the Committee's inquiry. The highlights of his testimony are summed up in the stenographic notes from May 12, 2017, at pages 684 to 694, in which the Honourable Michel Girouard repeated the same explanations he gave to the First Committee, about the reasons why he slipped the money under the desk pad.

83. In keeping with the rule of evidence that it adopted, the Committee endorsed the conclusions of the fragile majority of the First Committee without studying the Honourable Richard Chartier's analysis on this issue. Such is the consequence of a proceeding initiated as a result of a ministerial directive which is poles apart from the search for truth. How can one

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[25] Stenographic notes from May 13, 2015, pages 325 and following, *Book of sources*, tab 59.
[26] *F.H. v. McDougall*, [2008] 3 SCR 41, at para. 46, *Book of sources*, tab 17.
[27] Report of the First Committee, page 50, *Book of sources*, tab 5.

accept a conclusion that completely neglects the views of the Honourable Richard Chartier and those of the Council:

> "*[132] The majority made the following findings: (1) Judge Girouard's testimony regarding the reasons for slipping the money under the desk pad is inconsistent and implausible; and (2) his testimony with respect to the payment directly to Mr. Lamontagne gives rise to doubts. In our view, these findings are untainted by error, and they are reasonable. Nothing in Judge Girouard's testimony justifies setting them aside. We adopt them without hesitation.*"

3.3 The exact moment during the meeting when the discussion of the tax matter began

84. The Committee's reservations regarding the Honourable Michel Girouard's explanations about the exact moment during the meeting when the discussion of the tax matter began are not justified. The evidence, on the contrary, clearly demonstrates that:

a. The main purpose of the meeting of September 17, 2010 was to discuss Mr. Lamontagne's tax matter (testimony given by Mr. Lamontagne on May 7, 2015, stated at paragraph 89 of the First Committee's report, and testimony given by the Honourable Michel Girouard on May 5, 2015, recorded at pages 38 and 39 of the stenographic notes)[28];

b. The Honourable Michel Girouard and Mr. Lamontagne specified that they used the opportunity to settle the amount of money owed for the movies (testimony given by Mr. Lamontagne, stated at paragraph 89 of the First Committee's report, and testimony given by the Honourable Michel Girouard on May 5, 2015, recorded at page 39 of the stenographic notes)[29];

c. In the testimony he gave on May 7, 2015, recorded at page 307, line 5, of the stenographic notes[30], Mr. Lamontagne confirmed that the issue of the movies was discussed [TRANSLATION] "when he arrived, there";

d. In the testimony he gave on May 5, 2015, recorded at pages 38 and 39, lines 13 to 23, of the stenographic notes[31], the Honourable Michel Girouard also confirmed that this issue was brought up at the beginning of the meeting of September 17, 2010;

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[28] Stenographic notes of May 5, 2015, pages 38 and 39, *Book of sources*, tab 56.
[29] *Ibid.*
[30] Stenographic notes of May 7, 2015, page 307, *Book of sources*, tab 58.
[31] Stenographic notes of May 5, 2015, pages 38 and 39, *Book of sources*, tab 56.

e. At pages 22 and 23 of its report, the First Committee described what it observed on the video recording with regard to the portions that were submitted in evidence (13:01:56 and 13:01:57 to 13:02:09).

85. The Committee therefore had uncontradicted evidence that the issue of the movies was resolved at the very beginning of the meeting between Mr. Lamontagne and the Honourable Michel Girouard. And yet, the majority members of the Committee neglected to consider this evidence when they stated, at paragraph 198, that "*we have some reservations about the suggestion that Me 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.*"

86. The Honourable Richard Chartier understood the situation very well, which he summed up in the following terms:

> "*[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.*"[32]

87. Furthermore, the Honourable Michel Girouard relied on the conclusions of the Honourable Richard Chartier on that subject[33]:

> [TRANSLATION]
>
> "*Me LOUIS MASSON*
> *for Justice Michel Girouard:*
>
> *Q- So, Mr. Justice Girouard, is there anything you wish to add at this stage?*
>
> *A- I would like to repeat, so that it's clear, that I endorse as my own Justice Chartier's impeccable reasoning, and that I never intended to mislead the Committee.*"

88. In keeping with the rule of evidence that it adopted, the Committee endorsed the conclusions of the fragile majority of the First Committee without studying the Honourable Richard Chartier's analysis on this issue. Such is the consequence of a proceeding initiated as

[32] Report of the First Committee, page 51, *Book of sources*, tab 5.
[33] Stenographic notes from May 12, 2017, page 770, *Book of sources*, tab 77.

a result of a ministerial directive which is poles apart from the search for truth. How can one accept a conclusion that completely neglects the views of the Honourable Richard Chartier and those of the Council, who said:

> "*[110] Nothing in Judge Girouard's testimony before our Committee justifies setting aside the findings of the majority. Moreover, they are not tainted by error, and are entirely reasonable. We adopt them without hesitation.*"

3.4 The content of the "post-it" note

89. The treatment given to Mr. Lamontagne's testimony is problematic and unfair, in that it is rejected without justification when it is favourable to the Honourable Michel Girouard, and is accepted when it is favourable to the position taken by the Committee.

90. Prior to Mr. Lamontagne's testimony before the First Committee on May 7, 2015, no one knew his version of the facts. Everybody found out about it at the public hearing. The key points of his testimony dealt with the allegation of an illicit purchase. Mr. Lamontagne testified that he never sold any illicit substance to the Honourable Michel Girouard.

91. Mr. Lamontagne had been incarcerated for several years. He saw the video recording for the first time on May 7, 2015, the day he testified. This was almost five years after the meeting which lasted about six minutes; the portion of the video that was introduced in evidence lasted 18 seconds and had no sound track, and the other portion was excluded as evidence on the grounds of lawyer-client privilege. When he was asked about the content of the note, Mr. Lamontagne testified that he had no recollection, but assumed that it was an invoice for previously viewed movies. Because the video recording had no sound track, no factual finding could be drawn, as the Honourable François Rolland himself pointed out in his complaint. The fact that there is no sound track is prejudicial to the Honourable Michel Girouard.

92. The Honourable Michel Girouard, for his part, stated that the note showed the amount to settle the tax matter (or the amount of the available loan, which was the same reality for the Honourable Michel Girouard), and the name of the lender. His version is corroborated by irrefutable evidence, namely a mortgage deed in favour of the person mentioned in the note and for the amount indicated by the Honourable Michel Girouard (see the aforementioned mortage deed submitted in evidence[34]).

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[34] Document I-1 of exhibit E-4.1, Mortage deed, *Book of sources*, tab 48.

93. Nevertheless, the majority members, in their report, concluded that this was one of the "important inconsistencies in this matter"[35] that raises "some questions"[36].

94. As for the argument based on the fact that the video recording does not show Mr.Lamontagne taking a pen or pencil to write a note, it is problematic. First of all, it was not brought up at the hearing. Also, the evidence does not contain all the video recordings of the hours preceding the meeting. Furthermore, the evidence is limited to what is mentioned at paragraph 91 of the First Committee's report: we do not know what happened before 10:16, between 10:22:40 and 11:07:52, and between 11:36:50 and 12:25:52. Finally, the note could well have been written elsewhere or outside the range of the video camera. To draw an inference that is unfavourable to the judge and to dismiss his explanations are, in the present circumstances, contrary to every rule of evidence and fairness.

95. The Honourable Richard Chartier, in the First Committee's report, summed up well this aspect of the inquiry:

> *"[254] <u>The content of the note – the settlement amount</u>: 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.*"[37]

96. Furthermore, the Honourable Michel Girouard again explained those events during the Committee's inquiry. The highlights of his testimony are summed up in the stenographic notes from May 12, 2017, at pages 694 to 709.

97. In keeping with the rule of evidence that it adopted, the Committee endorsed the conclusions of the fragile majority without studying the Honourable Richard Chartier's analysis on this issue. Such is the consequence of a proceeding initiated as a result of a ministerial directive which is poles apart from the search for truth. How can one accept a conclusion that completely neglects the views of the Honourable Richard Chartier and those of the Council:

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[35] Report of the First Committee, paragraph 199, *Book of sources*, tab 5.
[36] *Ibid.*, paragraph 202.
[37] Report of the First Committee, page 51, *Book of sources*, tab 5.

"*[160] In our view, the totality of the circumstances, including notably the surreptitious actions of the two men and the link between the payment of money and the passing of the folded "Post-it", contradicts Judge Girouard's explanations about the nature of the object he received and, correlatively, his explanations for failing to read the alleged note while in the office. Like the majority of the First Committee, we find it implausible that, in the context of urgency described by Judge Girouard, a diligent and experienced lawyer like him would have failed to immediately get acquainted with salient information being relayed by his client. In our view, there is no error in this finding of implausibility, and it is entirely reasonable. Finally, nothing in Judge Girouard's testimony justifies setting it aside. We adopt the finding without hesitation.*"

3.5 The message saying [TRANSLATION] "I'm being tailed" contained in the report from Me Raymond Doray

98. The members of the majority of the First Committee oppose the testimony of the Honourable Michel Girouard in a note contained in the summary report prepared by Raymond Doray (hereafter the "**Doray Summary**"**).**

99. The Council's complaint review procedure is governed by the provisions contained in the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*, in the *Canadian Judicial Council By-laws* (2015) and in the Act. It entrenches the principle of separation that was argued by the parties (the Honourable Michel Girouard and the Attorney General of Canada) in case number T-646-14 before the Federal Court. Under this principle, the various steps in the process are kept separate. Indeed, a confidentiality document was even signed (firewall) by the independent counsel and her associate, Me Doray, a lawyer assigned to an initial stage of the case.

100. By indirectly introducing the Doray Summary in this manner, the majority members of the First Committee violated the separation set out in the rules and recognized by the Federal Court in *Girouard v. Canadian Judicial Council*[38].

101. Lastly, the criticism in paragraph 210 and reiterated in paragraph 214 of the First Committee's report to the effect that the lawyers for the Honourable Michel Girouard did not raise an objection to the phrase [TRANSLATION] "I am being tailed" contained in the report raises a serious problem. During Raymond Doray's testimony before the Committee, it was established that the attorneys for the Honourable Michel Girouard did not receive volume III of the Summary on August 13, 2013. Consequently, they could not have raised any objections at that time.

102. The Honourable Michel Girouard and his attorneys were criticized for failing to respond on August 14, 2013 to a document that they did not have in their possession. This criticism (which we now know to be unfounded) has serious consequences, because it undermined the credibility of the Honourable Michel Girouard and tainted the entire evaluation of the Honourable Michel Girouard's testimony.

[38] (2015) F.C. 307, Book of sources, tab 2

103. The findings of the Honourable Richard Chartier are very reasonable, and read as follows: [TRANSLATION]

> *"[259] The above three detailed versions of this mention must be reviewed. As for version (i), I find that, based on the evidence presented, the possibility that we are indeed dealing here with words that were misunderstood by Me Doray cannot be ruled out. In fact, Justice Girouard testified that Me Doray had already made corrections to the first part of his summary. Nothing in the evidence presented suggests that corrections were not necessary for the part dealing with the meeting with Justice Girouard. As for the version set out in point (ii), we must not forget that Justice Girouard also stated, during his May 5th testimony, that he was not sure whether the note mentioned any surveillance. Thus, this version may not be as contradictory as that in point (iii)."* [39]

104. What is more, the inquiry revealed that Me Doray had not communicated the version of the facts (volume 3) on August 13, 2013, meaning that the Honourable Michel Girouard could not have responded to this on August 14, 2013.

105. Furthermore, the Honourable Michel Girouard explained these events once again during the inquiry before the Committee. The highlights are summarized in the transcript of May 12, 2017, on pages 709 to 728.

106. Faithful to the evidentiary rules it set for itself, the Committee endorses the findings of the fragile majority without examining in the least the Honourable Richard Chartier's analysis on this subject. That is the consequence of a procedure conducted under a ministerial directive at odds with the search for the truth. How can a finding that completely disregards the opinion of the Honourable Richard Chartier and of the Council be accepted? [TRANSLATION]

> *"[176] In our view, there is no error in the majority's finding of improbability regarding Judge Girouard's testimony that he did not read the Summary before the hearings by the First Committee. Furthermore, that finding is entirely reasonable. Finally, nothing in the explanations provided by Judge Girouard justifies setting it aside and the same applies to the other findings set out in paragraphs 205 to 215 and 225 of the First Committee's Report. We adopt them without any hesitation."*

[39] *Report of the First Committee*, page 52, Book of sources, tab 5.

3.6 Post-it note not read immediately

107. What is more, there is no real contradiction here, and the Honourable Michel Girouard's explanations convinced the Honourable Richard Chartier, who had this to say: [TRANSLATION]

> *[261] Note not read: 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, Me Girouard contacted a Revenue Canada representative. This seems to be evidence corroborating his version of the facts."*[40]

108. Furthermore, the Honourable Michel Girouard explained these events once again during the inquiry before this Committee. The salient points are summarized in the transcript of May 12, 2017, on pages 762 to 768.

109. Faithful to the evidentiary rules it set for itself, the Committee endorses the findings of the fragile majority without examining in the least the Honourable Richard Chartier's analysis on this subject. That is the consequence of a procedure conducted under a ministerial directive at odds with the search for the truth. How can a finding that completely disregards the opinion of the Honourable Richard Chartier and of the Council be accepted? [TRANSLATION]:

> *[160] In our view, the totality of the circumstances, including notably the surreptitious actions of the two men and the link between the payment of money and the passing of the folded "Post-it", contradicts Judge Girouard's explanations about the nature of the object he received and, correlatively, his explanations for failing to read the alleged note while in the office. Like the majority of the First Committee, we find it implausible that, in the context of urgency described by Judge Girouard, a diligent and experienced lawyer like*

[40] *Ibid.*

him would have failed to immediately get acquainted with salient information being relayed by his client. In our view, there is no error in this finding of Implausibility, and it is entirely reasonable. Finally, nothing in Judge Girouard's testimony justifies setting it aside. We adopt the finding without hesitation."

3.7 Corroboration

110. After reviewing the six contradictions, the majority members of the First Committee see corroboration in the following elements (paragraph 229 of the report of the First Committee). This corroboration is very weak, though:

Excerpts from the report of the First Committee	**Remarks of the Honourable Michel Girouard**
(1) a prior statement made by Justice Girouard to Me Doray which is inconsistent with his testimony at the hearing	Me Doray's testimony allows us to put this point to rest once and for all: the Honourable Michel Girouard was never able to provide clarifications or corrections with respect to volume III of the Doray Summary, since Me Doray never provided him with the document before sending it to the review panel
(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	A full review of the letter makes it clear that its chief purpose was not to describe all of the Honourable Michel Girouard's movie habits, but rather to respond to the accusations made against him. No contradiction can be seen in the later clarifications.
(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 precisely recall, right down to the second, the exact moment when words were spoken in a brief and entirely unremarkable conversation in the normal course of events
(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 made it very clear that he had no specific recollection of the note's content, but he had a theory. It is difficult in the circumstances to ask more of him.
(5) the fact that, in the three video scenes of the morning 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.	This proposition is surprising. Several minutes of what transpired on September 17, 2010 were not entered in evidence. And nothing indicates that this note could not have been written off-camera. Lastly, this is pure speculation and conjecture, with no

Lamontagne gave to Me Girouard the very same object that he had folded and put in that same pocket a few minutes before their meeting.	evidence supporting the finding of the majority members of the First Committee.
(6) the fact that Me 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 – Me 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;	The explanations are clear: it was not necessary to do this, since Mr. Lamontagne had verbally indicated its content. The majority members of the First Committee substituted their own opinion and value judgment for an analysis of the facts as established by the evidence. This was the explanation that was provided during the inquiry in 2015, and it was reiterated during the inquiry in 2017.
(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 Me Girouard, and the fact that Justice Girouard did not look at what Mr Lamontagne gave him	The testimony of the sergeant supervisor is that a surreptitious action, in the absence of repetition or of a domino effect, cannot form the basis of any conclusion. The sergeant supervisor did not voice an opinion on the interpretation of looking at or not looking at what was handed over. This summary of Sergeant-Supervisor Y's testimony is inaccurate. At no time did he discuss immorality or illegality (transcript of May 11, 2015, pages 117 to 121[41]).

111. The line of questioning by the majority of the members of the first Inquiry Committee concerning certain peripheral aspects of the evidence or of their interpretation of the evidence cannot constitute evidence pertaining to misconduct or a lack of integrity on the part of the Honourable Michel Girouard. The lack of evidence about each of the criticisms, the mounting "questions," being "perplexed," the "unusual" nature of certain actions, the suspicions and the suppositions cannot constitute evidence within the meaning of the rules of law. The contradictions which, all too often, are merely clarifications motivated by an overzealous desire to fully cooperate with the inquiry cannot pave the way for the most serious sanction, namely removal.

[41] Transcript of May 11, 2015, pages 117 to 121, Book of sources, tab 84

112. Faithful to the evidentiary rules it set for itself, the Committee endorses the findings of the fragile majority without examining in the least the Honourable Richard Chartier's analysis on this subject. That is the consequence of a procedure conducted under a ministerial directive at odds with the search for the truth. How can a finding that completely disregards the opinion of the Honourable Richard Chartier and of the Council be accepted?

3.8 Admission in evidence of video scene from September 17, 2010

111.

112.

113. This video scene from September 17, 2010 was obtained in a manner contrary to the *Canadian Charter of Rights and Freedoms*[42] and constitutes a violation of solicitor-client privilege, while setting a dangerous precedent. Furthermore, this scene was obtained without prior judicial authorization. To gain a proper understanding of all the aspects, the Honourable Michel Girouard asked the First Committee to issue the appropriate orders to appear, but this request was denied, such that we do not have evidence of the full chain of custody of this video as it made its way between the police authorities, the Director of Criminal and Penal Prosecutions and the Council.

114. Even the independent counsel for the First Committee dealing with the first complaint, Me Marie Cossette, had something to say about the admission in evidence of the video scene: [TRANSLATION]

> *"You cannot – and I am considering my words very carefully – interpret what is taking place in the video without understanding what transpired in years past […] Obviously, if this type of video comes out of the blue and you have no context of prior consumption, well, never (sic) that the defence argument can indeed go a long way."*[43]

115. Faithful to the evidentiary rules it set for itself, the Committee endorses the findings of the fragile majority without examining in the least the Honourable Richard Chartier's analysis on this subject. That is the consequence

[42] Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c 11, Book of Sources. Tab 6.
[43] Transcript of April 1, 2015, page 50, Book of sources, tab 55.

of a procedure conducted under a ministerial directive at odds with the search for the truth. How can a finding that completely disregards the opinion of the Honourable Richard Chartier and of the Council be accepted? [TRANSLATION]

> *"[52] Before the First Committee, Judge Girouard objected to the admissibility in evidence of the September 17, 2010 video recording, on the grounds that it was obtained by means of an "abusive seizure" and in violation of his "basic rights", in particular "his right to privacy and his right to his image". He further argued its admission would violate Mr. Lamontagne's right to solicitor-client confidentiality.*
>
> *[53] Judge Girouard's objection was unanimously dismissed by the First Committee in a May 14, 2015 decision. Judge Girouard reiterated his objection before us.*
>
> *[54] We dismissed it for the reasons provided by the First Committee.*
>
> *[55] That said, the majority's observations spotlighting the link between the Committee's decision and the credibility of Judge Girouard's testimony bear repeating:*
>
> > *"[226] In addition, at the voir-dire on the admissibility of the video recording, on May 4, 2015, Judge 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. Similarly, at the in-camera hearing on the issue of solicitor-client privilege, Judge Girouard stated that, during their entire meeting, Mr. Lamontagne and he spoke only about the tax matter that concerned them. 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 Judge Girouard's testimony regarding the issues stemming from the transaction recorded on video on September 17, 2010."*

3.9 Admission in evidence of the summary prepared by Me Raymond Doray

116. The rule of separation implies the rule of confidentiality in respect of each step of the inquiry process. In the case at hand, taking the Doray Summary into account

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[44] *Girouard v. Review Panel constituted under the Procedures for dealing with complaints made to the Canadian Judicial Council about federally appointed judges,* 2014 F.C. 1175, paragraph 45, Book of sources, tab 1.

runs counter to the rules governing Council inquiries. It also implies a violation of solicitor-client privilege to respond to the criticism adopted by the majority of the members of the First Committee.

117. This violation of the rule of separation was raised with regard to a letter from the First Committee counsel, dated December 11, 2014,[45] to the independent counsel for the First Committee and to the attorneys for the Honourable Michel Girouard. The salient portion of the letter reads as follows: [TRANSLATION]

> *"The Committee would like you to know that what Justice Martineau wrote in paragraph 45 is inaccurate, since on August 18, 2014, the Vice-Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council sent each member of the Inquiry Committee the report of the Review Panel in the case at hand, as well as the supporting evidence.*
>
> *In addition, the Committee would like to inform you that a Committee member examined the Review Panel's decision, but not the supporting evidence, that a member reviewed all the documentation submitted by the Canadian Judicial Council and that no member examined the elements of the documentation.*
>
> *The Committee would like to advise you that the Inquiry Committee plans to rely solely on the evidence it deems admissible at the hearing in settling all the questions necessary to the performance of its duties. In addition, as you know, judges are able, as part of their functions, to ignore evidence that they heard in certain contexts, such as in a voir-dire or evidence they declare inadmissible either during the hearing or in the final judgment."*

118. The Federal Court ruled on the impact of the violation of the rule of separation, whose application before it is not challenged. On the contrary, both the Attorney General of Canada and the Honourable Michel Girouard cite this principle in their respective representations. The motion alleging violation of the rule was judged premature, pending the inquiry report in the case at hand.

119. Volume III of the Doray Summary, despite having been discussed during the inquiry by the First Committee, was never entered into evidence. Therefore, the Committee could not use it to draw any conclusions, far less as a basis for recommending removal.

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[45] Exhibit G-1, Letter from counsel for the Inquiry Committee of the Canadian Judicial Council dated December 11, 2014, Book of sources, tab 52.

Taken as a whole, the serious irregularities relating to the process surrounding the Doray Summary significantly and irremediably prejudice the rights of the Honourable Michel Girouard.

120. With regard to this evidence, the Federal Court had nevertheless applied the following principles: [TRANSLATION]

> *[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.*[46]

121. Despite the principles mentioned in the third paragraph of the above-cited letter from counsel for the First Committee dated December 11, 2014, and the remarks by the Federal Court cited in the previous paragraph, there is now no denying that the rule of separation was broken because of the consideration given to the Doray Summary before the Committee. By introducing a report prepared at another stage of the proceedings subject to the rule of separation, the Committee violated a procedural guarantee established at the onset of the case. The prejudice cited by the Honourable Luc Martineau of the Federal Court in his ruling is now complete.

122. Faithful to the evidentiary rules it set for itself, the Committee endorses the findings of the fragile majority without examining in the least the Honourable Richard Chartier's analysis on this subject. That is the consequence of a procedure conducted under a ministerial directive at odds with the search

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[46] *Girouard v. Canadian Judicial Council*, 2015 FC 307 (CanLII), Book of sources, tab 2.

for the truth. How can a finding that completely disregards the opinion of the Honourable Richard Chartier and of the Council be accepted? [TRANSLATION] « [59] Before us, Judge Girouard objected to the admissibility of the Doray Summary on several grounds, including confidentiality. We dismissed the objection.

> *[60] When the objection was raised, counsel for Judge Girouard underscored the fact that the Doray Summary had not been admitted in evidence before the First Committee, and argued it should not have been mentioned in its Report. Counsel added the questions relating to the Summary had been formulated by members of the First Committee, and not by the independent counsel, who, in their submission, knew full well the document was inadmissible.*
>
> *[61] With respect, those submissions are not in sync with what transpired before the First Committee. While it is true the Doray Summary was first raised by means of a question from a member of the First Committee during Judge Girouard's in-camera testimony on May 5, 2015, the independent counsel did put questions to Judge Girouard about the Summary during cross-examination on May 13, 2015.*
>
> *[62] A lengthy debate then followed during which counsel for Judge Girouard submitted the Doray Report should not be admitted without the testimony of its author. He went on to explain he was not objecting to Judge Girouard being confronted with his prior statements and that his objection related exclusively to the use of extracts from the Doray Report that recounted the author's conversations with third parties.*
>
> *[63] Following those clarifications, the independent counsel confirmed her sole purpose was to confront Judge Girouard with the statements attributed to him in the Doray Summary. Judge Girouard's counsel then reconfirmed he had no objection to this process.*
>
> *[64] That being so, we have some difficulty in grasping the thrust of the criticism levelled at the First Committee and the seriousness of the objection before us.*
>
> *[65] First, our mandate obligates us to consider the findings of the majority of the First Committee that prompted its recommendation for removal of Judge Girouard from office. In furtherance of that obligation, it is proper, in our view, to consider the parts of the Doray Summary that bear upon the alleged informational content of the "Post-it" that Mr. Lamontagne passed to Me Girouard on September 17, 2010. To that end, and at the request of Me Gravel, we agreed to receive in evidence the third and fourth paragraphs of the Doray Summary. We did likewise as*

> *regards the eighth paragraph, at the request of Judge Girouard's counsel. The other paragraphs were redacted.*
>
> *[66] Second, Me Doray testified before our Committee. Accordingly, the three paragraphs mentioned above were admitted in evidence after their author testified.*
>
> *[67]* Third, the complaint of disregard for the confidentiality of the Doray Summary and the "separation" principle is without foundation. Assuming for the sake of argument that Council claimed a privilege over the document based upon its solicitor-client relationship with Me Doray, it waived any such privilege by providing Judge Girouard and his counsel with a copy. We suggest the theory pressed by Judge Girouard leads to an absurdity. A judge targeted by a complaint would be free to make false statements to an external counsel, with a view to provoking the shelving of the complaint, and then be able to successfully claim an absolute immunity from any subsequent consideration of this dishonesty by an inquiry committee.
>
> *[68] Furthermore, nothing in the Complaints Procedures precludes the admission in evidence of extracts from an external counsel's report for which no privilege is claimed by Council. The same is true of the Canadian Judicial Council Inquiries and Investigations By-Laws (2002), in effect at the material time. Finally, Judge Girouard's statements to Me Doray were not predicated on any explicit or implicit undertaking of confidentiality.*
>
> *[69] The paragraphs of the Doray Summary to which objection was taken do not relate the author's opinion or conclusions. They purport to be an account of statements made by Judge Girouard at the August 13, 2013 meeting.*

123. While Raymond Doray's testimony established the sequence of events detailed in his summary, the fact remains that the right to solicitor-client privilege and the principle of separation were violated.

124. Drawing a negative inference from the lack of justification for this failure to correct, at a stage separate from the public inquiry by the Committee, constitutes a violation of the rule of procedural fairness.

125. This ethical breach has to do with transparency, reticence, frankness, integrity and truth. Once the veracity of the Honourable Michel Girouard's testimony about the objective facts presented at the inquiry has been established, the inquiry deals basically with the style of the Honourable Michel Girouard's replies. At times, they can be seen as lengthy, often preceded by a preamble and multiple/repeated explanations which

some would interpret as a lack of transparency in instances where, on the contrary, there is a desire for full transparency.

126. It was in a very specific context that the Honourable Michel Girouard offered numerous explanations, assumptions and reasons for acts that took mere seconds nearly seven years ago.

127. Right from the start of this inquiry, on December 12, 2010, he has sought to explain himself. His letter to the Council back in January 2011, his requests to meet with the Council investigator, his lengthy explanatory letters and the promptness he has exhibited are not the actions of someone who is reticent.

128. This entire case essentially boils down to the analysis of an 18-second video from September 17, 2010, and of an allegation that what the video depicts is a transaction involving an illegal substance. We established in the first part that the findings on this question by the First Committee and the Council cannot be called into question.

129. This observation having been made, we must point out that with respect to the core element of the inquiry, the Honourable Michel Girouard told the truth and that the fact that there was no finding of illegal transaction on September 17, 2010 was established, true and definitive.

130. Thus, concerning the core element of the inquiry, it is unanimous that nothing illegal took place on September 17, 2010. To that effect, the report of the First Committee reads as follows: [TRANSLATION]

> *[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 Me 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, 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. 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 Me 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. 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, 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.

[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."

131. In a brief dated June 9, 2017, counsel for the Committee therefore had to search among the peripheral elements of the principal inquiry for the sources of these so-called breaches.

132. Paragraphs 50 to 68 of the written representations by counsel for the Inquiry Committee ("**written representations**") contain a number of value judgments that do not constitute evidence. In particular, the use of the compendium prepared by the Honourable Michel Girouard's attorneys is criticized. This compendium contains nothing more than the transcripts and relevant excerpts from the opinion of the Honourable Richard Chartier, Chair of the First Committee. And yet, the Committee Chair had this to say about the document: [TRANSLATION]

> "*Me LOUIS MASSON*
> *Per Justice Michel Girouard:*
>
> *It's a compendium and... it's a compendium of quotations. It was prepared with the greatest care by myself – my colleague and myself. It was cut and paste, there's no… there's nothing else. Obviously, nothing is mistake-proof, if it happens, it's obviously…we did the best we could. Still, it was a challenge…*
> *THE HONOURABLE J. ERNEST DRAPEAU, Chair:*
>
> *It's part of the opportunity given to Justice Girouard to provide explanations.*
>
> *Me GÉRALD R. TREMBLAY*
> *per Justice Michel Girouard*
>
> *Right..*
>
> *Me LOUIS MASSON*
> *Per Justice Michel Girouard:*
>
> *But mostly it's intended to be a tool for your Committee, because we asked ourselves: how are we going to deliver testimony…to give explanations by referring to ten (10) documents?*
>
> *THE HONOURABLE MARIANNE RIVOALEN,*
>
> *member: Hmm.*
>
> *Me LOUIS MASSON*
> *Per Justice Michel Girouard:*
>
> *I mean, there'd be no end to it...*
>
> *THE HONOURABLE J. ERNEST DRAPEAU, Chair:*
>
> *That...*

[47] Transcript of May 12, 2017, pages 667 to 689, Book of sources, tab 75.

Me LOUIS MASSON
Per Justice Michel Girouard:

and you too, it would be impossible!

THE HONOURABLE J. ERNEST DRAPEAU,
Chair: That strikes me as very wise on your part.

Me LOUIS MASSON
Per Justice Michel Girouard

So, it's…

THE HONOURABLE J. ERNEST DRAPEAU, Chair:

Maître Gravel, do you have any problem with the approach that Bâtonnier Masson plants to take?

Me MARC-ANDRÉ GRAVEL per the Committee:

Well, your Honour, I have to admit that it's… Certainly, when I see pages like this, where it's…it's…it's excerpts from Justice Chartier's dissent that are…that are laid out end to end, it's…that's what comes to mind first, so I...

If we — if we wanted to question the witness about the contradictions and the — get to the heart of what the inquiry is about, well, I don't see why Justice Chartier's comments are integrated at the same time, but...

THE HONOURABLE J. ERNEST DRAPEAU, Chair:

Well, I think it's only fair that Justice Girouard can make references to Justice "Girouard" dissent...

THE HONOURABLE GLENN D. JOYAL,

member: Chartier.

Me MARC-ANDRÉ GRAVEL per the

Committee: Chartier.

THE HONOURABLE J. ERNEST DRAPEAU, Chair:

... I have a hard time seeing why one would... why one would want to criticize this approach. Bâtonnier Masson tells us he won't...

Me MARC-ANDRÉ GRAVEL per the Committee:

Hmm.

THE HONOURABLE J. ERNEST DRAPEAU, Chair:

... go through this compendium from cover to cover. He plans on asking Justice Girouard for some observations. He thinks he can wrap up in a half-hour, and you'll have this to do your cross-examination. I have a hard time seeing how we can prevent Bâtonnier Masson from proceeding in this manner. Listen, we know...

Me MARC-ANDRÉ GRAVEL per the Committee:

[…]

Yes, ok!

Me LOUIS MASSON
Per Justice Michel Girouard:

Because, clearly, the...

THE HONOURABLE J. ERNEST DRAPEAU, Chair:

Excellent.
I find this document very useful, Mr. Bâtonnier, very useful!"

133. Thus, the decision to present the Honourable Michel Girouard's testimony with the help of the compendium elicited no negative observations either before or during the testimony. Quite the contrary, the Committee Chair found this document useful.

134. That was the most appropriate way of proceeding fairly and efficiently. It is only natural that the Honourable Michel Girouard, called upon to testify about his previous testimony, have access to excerpts from the transcripts in respect of which he has to provide explanations. No one dared suggest that the Honourable Michel Girouard had to testify from memory about several hundred pages of testimony delivered two years previous when this was precisely the purpose of the inquiry. No one suggested that he simply read only the incomplete excerpts identified by counsel for the Committee without allowing him to read the context surrounding these excerpts.

135. In this regard, we refer to the transcript of May 17, 2017:
[TRANSLATION]

> *"THE HONOURABLE J. ERNEST DRAPEAU, Chair:*
> *Q Please give this compendium, which has not been entered in evidence, to your attorneys."*[45]

136. It would be prejudicial to the Honourable Michel Girouard to level criticisms in this regard at this time. Such an approach would be akin to an ambush rather than a fair hearing.

137. As for the other questions raised, they are more a case of value judgment than evidence of some intent to deceive, conceal or mislead. Here are some examples: [TRANSLATION]

> *[54] Both the Committee and its counsel had to rephrase and repeat the questions, to excess, so that Justice Girouard could finally answer.*[49]
>
> *[120] We find it hard to believe that a judge who is subject to a review process and who is assisted by two experienced lawyers would not discuss the content of documents that pertain to him or pay them attention.*[50]
>
> *[131] It seems obvious to us that someone who had only taken drugs a handful of times, calling them the mistakes of his youth, should remember the nature of the substances concerned.*[51]
>
> *[169] We found the same type of evasion, lack of forthrightness, discrepancies or omissions as the ones in Justice Girouard's testimony.*[52]
>
> *[171] In short, the complete aversion that Ms. G.A. expressed towards drugs appears to suffer from highly specific exceptions and very surprising tolerance in some circumstances.*[53]

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[45] Transcript of May17, 2017, page 1131, Book of sources, tab 78.
[49] Inquiry Committee Counsel's Brief, June 9, 2017, page 19, Book of sources, tab 45.
[50] Inquiry Committee Counsel's Brief, June 9, 2017, page 31, Book of sources, tab 45.
[51] Inquiry Committee Counsel's Brief, June 9, 2017, page 33, Book of sources, tab 45.
[52] Inquiry Committee Counsel's Brief, June 9, 2017, page 41, Book of sources, tab 45.
[53] Inquiry Committee Counsel's Brief, June 9, 2017, page 42, Book of sources, tab 45.

> *[175] However, during re-examination by the Committee's counsel, what started out as being complete amnesia suddenly turned to clarity [...]*[54]
>
> *[177] These examples support our finding that Ms. G.A. gave skewed testimony intended to favour her husband.*[55]

138. The Committee's approach glosses over one of the pillars of our legal system: the importance of rehabilitation. G.A. can certainly not be criticized for lacking sensitivity with regard to this principle.

139. The Committee report then reprises the six purported contradictions raised by the majority of the First Committee. These observations are substantively the same as those that have already been analyzed, and the Honourable Michel Girouard reiterated that he concurred with the conclusions of the Honourable Richard Chartier, except in respect of the note stating "I am being tailed."

140. In this regard, the findings of the First Committee are that it is implausible that the Honourable Michel Girouard and his attorneys failed to respond, the very next day after the meeting of August 13, 2013, in other words, on August 14, 2013, to the inaccuracies and implausibilities contained in volume III of Me Doray's report, with particular reference to the erroneous mention: "I am being tailed."

141. This finding with regard to volume III of Me Doray's report is dramatic for the Honourable Michel Girouard. Indeed, the implausibility of failing to correct this erroneous mention is deemed to be so serious that it constitutes the cornerstone of the findings by the majority of the First Committee. They have this to say: [TRANSLATION]

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

142. And yet, the present inquiry before the Committee has revealed that the Honourable Michel Girouard and his attorneys did not have volume III of Me Doray's report and thus were unable to respond to it on August 14 (in an urgent manner). This volume III was transmitted directly to the Honourable Edmond Blanchard, without the knowledge

[54] Inquiry Committee Counsel's Brief, June 9, 2017, page 43, Book of sources, tab 45.
[55] Inquiry Committee Counsel's Brief, June 9, 2017, page 43, Book of sources, tab 45.

of the Honourable Michel Girouard and his attorneys, accompanied by a letter in respect of which Me Doray is claiming solicitor-client privilege.[56]

143. Had the rule of separation been observed, this situation would have never arisen.

144. This good faith error stemming from the procedure followed during the inquiry stage by Me Doray caused grave harm to the Honourable Michel Girouard and impacted on the overall assessment of his credibility. The Council can correct this injustice.

145. Faithful to the evidentiary rules it set for itself, the Committee endorses the findings of the fragile majority without examining in the least the Honourable Richard Chartier's analysis on this subject. That is the consequence of a procedure conducted under a ministerial directive at odds with the search for the truth. How can a finding that completely disregards the opinion of the Honourable Richard Chartier and of the Council be accepted? [TRANSLATION]

> "*[58] Although the Doray Summary was used in the cross-examination of Judge Girouard before the First Committee, the document itself was not admitted in evidence.*
>
> *[59] Before us, Judge Girouard objected to the admissibility of the Doray Summary on several grounds, including confidentiality. We dismissed the objection.*
>
> *[60] When the objection was raised, counsel for Judge Girouard underscored the fact that the Doray Summary had not been admitted in evidence before the First Committee, and argued it should not have been mentioned in its Report. Counsel added the questions relating to the Summary had been formulated by members of the First Committee, and not by the independent counsel, who, in their submission, knew full well the document was inadmissible.*
>
> *[61] With respect, those submissions are not in sync with what transpired before the First Committee. While it is true the Doray Summary was first raised by means of a question from a member of the First Committee during Judge Girouard's in-camera testimony on May 5, 2015, the independent counsel did put questions to Judge Girouard about the Summary during cross-*

[56] Transcript of May 9, 2017, pages 301 to 324, Book of sources, tab 67.

examination on May 13, 2015.

[62] A lengthy debate then followed during which counsel for Judge Girouard submitted the Doray Report should not be admitted without the testimony of its author. He went on to explain he was not objecting to Judge Girouard being confronted with his prior statements and that his objection related exclusively to the use of extracts from the Doray Report that recounted the author's conversations with third parties.

[63] Following those clarifications, the independent counsel confirmed her sole purpose was to confront Judge Girouard with the statements attributed to him in the Doray Summary. Judge Girouard's counsel then reconfirmed he had no objection to this process.

[64] That being so, we have some difficulty in grasping the thrust of the criticism levelled at the First Committee and the seriousness of the objection before us.

[65] First, our mandate obligates us to consider the findings of the majority of the First Committee that prompted its recommendation for removal of Judge Girouard from office. In furtherance of that obligation, it is proper, in our view, to consider the parts of the Doray Summary that bear upon the alleged informational content of the "Post-it" that Mr. Lamontagne passed to Me Girouard on September 17, 2010. To that end, and at the request of Me Gravel, we agreed to receive in evidence the third and fourth paragraphs of the Doray Summary. We did likewise as regards the eighth paragraph, at the request of Judge Girouard's counsel. The other paragraphs were redacted.

[66] Second, Me Doray testified before our Committee. Accordingly, the three paragraphs mentioned above were admitted in evidence after their author testified.

[67] Third, the complaint of disregard for the confidentiality of the Doray Summary and the "separation" principle is without foundation. Assuming for the sake of argument that Council claimed a privilege over the document based upon its solicitor-client relationship with Me Doray, it waived any such privilege by providing Judge Girouard and his counsel with a copy. We suggest the theory pressed by Judge Girouard leads to an absurdity. A judge targeted by a complaint would be free to make false statements to an external counsel, with a view to provoking the shelving of the complaint, and then be able to successfully claim an absolute immunity from any subsequent consideration of this dishonesty by an inquiry committee.

[68] Furthermore, nothing in the Complaints Procedures precludes the admission in evidence of extracts from an external counsel's report for which no privilege is claimed by Council.

The same is true of the Canadian Judicial Council Inquiries and Investigations By-Laws (2002), in effect at the material time. Finally, Judge Girouard's statements to Me Doray were not predicated on any explicit or implicit undertaking of confidentiality.

[69] The paragraphs of the Doray Summary to which objection was taken do not relate the author's opinion or conclusions. They purport to be an account of statements made by Judge Girouard at the August 13, 2013 meeting."

4. SECOND ALLEGATION

Judge Girouard has also become incapacitated or disabled from the due execution of the office of judge by reason his misconduct and his failure in the due execution of the office of judge (ss. 65(2)(b) and (c) of the Judges Act), by falsely stating before the First Committee

a) he never used drugs;

b) he never obtained drugs.

146. The second allegation was dismissed by the Committee, since the evidence shows that the Honourable Michel Girouard never claimed that he had never consumed or obtained narcotics. The transcript of the inquiry by the First Committee and that of the inquiry by the Committee speak volumes and allow us to decide this allegation on a balance of probabilities according to clear and convincing evidence.

5. THIRD ALLEGATION AND NEW PROCEDURE APPLIED TO NOTICE OF THIRD ALLEGATION

Judge Girouard has also become incapacitated or disabled from the due execution of the office of judge by reason of his misconduct and failure in the due execution of the office of judge (ss. 65(2)(b) and (c) of the Judges Act), by falsely stating before this Inquiry Committee that he never used cocaine when he was a lawyer.

147. A person who was absent, Alain Champagne, who was not called to testify, was the subject of a new trial order. According to the evidence, this new trial did not take place, so it is possible to conclude that he does not have a criminal record. He was active in founding the lithium manufacturing company Nemaska Lithium, which is listed on the TSX.[57]

148. During the testimony by the Honourable Michel Girouard before the Committee, he did state that he had never used cocaine while a lawyer.[58]

149. Doubt must be cast on the credibility of witness L.C. because of his contradictions and the remarks made in his letter but not reprised in his testimony, as well as his motivations.

150. His motivations appear in his complaint:

> *« 1 must state clearly 1 am appalled and extremely disappointed by the review provided by the committee. It reminds me one « the old boys club » where on another protect each other. I have work for McGill University in the Faculty of Medicine and have been privy to a great deal of inappropriate behavior by doctors, which like Mr. Girouard's behavior has been swept under the carpet. There is no doubt that* large *professional institutions like to keep their « dirty laundry » quiet. It happens in medical, financial, and now it seems in law.*
>
> *[…]*
> *There were other lawyers that Mr., Girourad (sic) went to Law School with that were helping him to try and get this case « taken care of ». One of them was a very well known criminal lawyer here in Montreal. I overheard the entire conversation of my ex-partner and this is how 1 became privy to the information. It was at this point that I realize my ex-partner was still speaking and seeing Mr. Girouard but was keeping it secret from me because he knew my « issues » of being involved with Mr. Girouard and his wife.*
>
> *[…]*
> One *thing I have found in Quebec many people are « dirty » and nothing gets done about it. Many professionals due cocaine, especially in high*

[57] Exhibits G-7, Book of sources, tab 53 and Exhibit G-8 (Exhibit relating to publicly traded companies), Book of sources, tab 46.
[58] Transcript of May 12, 2017, pages 659 to 661, Book of sources, tab 75.

ranking positions. This is why I am taking the time to write to this committee, especially since there has never been an opportunity to come forward before as there was no place to write to regarding this case.

[..]

Personally after seeing this document today on line. I have zero faith in the Quebec Law System. I'll be sure to pass along my story to some of my journalists friends. 1 think it would make a great article. One only needs to recall any of the several criminal cases here in Quebec were individuals are provided such lenient sentences for fraud and theft. We need only look at cases such as the EX-Quebec Lieutenant-Governor, Lise Thibault, and the famous case of Quebec City lawyer, Lu Chan Khuong. Ms. Khuong was caught stealing 2 pairs of jeans totaling over $400, later after this case she was elected Vice-President of the Barreau. Any public governing company would have fired these people from employment, and charged in full, period!

[…]

I find the committee's decisions a big joke, not surprised at all. One of the reasons 1 am seriously looking to leave this province. It is so corrupt here and nothing gets done about it, especially if you hold a position with honour, but by an un-honrable person. We only need to look at the fiasco with Dr. Porter for the MUHC Hospital, a committee 1 worked on for 2 years well before the development of that hospital. Then theres the lovely Mr. Vaillancourt, the ex-mayor of Laval who it's claimed stole $23M from the citizens of Laval, and is now stating he has Alzheimer. I have no doubt the wonderful ex-mayor will be allowed to go along with the defense and get off with it. i am sure he has a Dr. Friend also.

[…]

The list is endless here in Quebec of « professional thieves » and interestingly enough these individuals are all white, Quebecois and have a big sense of entitlement. Nothing will ever change if these type of individuals are always provided an easy pass. »

151. L.C. made similar remarks during his testimony before the Committee:

« Q- *... do you remember why you sent that letter to the Canadian Judiciary Council?*

A- Well, I sent it because 1 wasn't pleased to see the fact that I felt things were being swept under the carpet in the sense that, through the hearings, nothing was resolved as far as the questions pertaining to Monsieur Girouard's use of drugs, and 1 was feeling a little frustrated because it was not the only case that I saw or personally experienced myself, and so I felt that a voice was required to be heard, because my understanding was part

> *of the reason why the case didn't end in what I would consider* a *positive result is the fact that they didn't have any witnesses without a criminal record to testify,* »[59]

152. The Inquiry Committee must qualify these remarks. What is the nature of these assertions, particularly the one stating: « One *thing I have found in Quebec many people are « dirty » and nothing gets done about it. Many professionals due cocaine, especially in high ranking positions. [...] I have zero faith in the Quebec Law System. »?*

153. Beyond his complaint, during his testimony before the Committee, L.C. made several misrepresentations.

5.1 Contradictions in L.C.'s testimony

154. First, L.C. mentioned the presence of a pool at the residence of the Honourable Michel Girouard during her testimony:

> *« A- There was* a *pool, an outdoor pool, nice location, waterfront property. That's about all I remember inside, a big kitchen, you know, bathrooms, that type of things. »*[6°]
>
> *« A- Nobody was in the pool. Nobody was bowling...*
>
> *Q- But there was* a *pool?*
>
> *A- Yes, he had a pool on his property, because when we went up the stairs, I believe you could see it lower or something to that effect.* »[61]

155. It was impossible that L.C. saw a pool during her July 1995 visit to the home of the Honourable Michel Girouard, since it was not until the summer of 2000 that it was built. The Honourable Michel Girouard confirmed this as follows: [TRANSLATION]

> *"THE HONOURABLE MARIANNE RIVOALEN, member:*

[59] Transcript of May 9, 2017, pages 11 and 12, Book of sources, tab 61
[60] Transcript of May 9, 2017, page 48, Book of sources, tab 64.
[61] Transcript of May 10, 2017, page 71, Book of sources, tab 69.

Q- And when you bought your house in Val-d'Or, was there already a sort of pool on the property?

A- Not at all.

Q- There wasn't a pool at all?

A- Not at all.

Q- O.K.

A- I.., this week, one of our friends sent us the menu from the "opening pool party"

Q- Uh-huh.

A- Which was on the twenty-second (22) of July, two

thousand (2000).

Q- O.K. »[62]

156. The Honourable Michel Girouard reiterated this later on:

"Me PAULE VEILLEUX, member:

Perhaps just one… a few questions as well, following the questions by Justice Rivoalen.

Q- If I understand correctly, you're saying that the pool was built, or in any event, the opening party was on the twenty-second (22) of July, two thousand (2000).
[…]

Q- Right. So, had you…before this pool, which was an in-ground pool, did you have an above-ground pool, previously, for the kids?

A- No.

Q- No, no other type…another type of...

A- No.

Q-… pool?

A- No.

Q- O.K."[63]

[82] Transcript of May 18, 2017, pages 1619 and 1620, Book of sources, tab 80.

157. Second, she also mentioned that the Honourable Michel Girouard owned a red Corvette back then:

> *a Q- Do you remember Mr. Girouard's car for instance?*
>
> *A- I... I never saw his car, but! remember Alain always joking about Michel driving this red «Vet» on these terrible roads that his house happened to be on, because they were gravel and not... you know, just sort of graded and...* »[64]

158. Ms. G.A. went on to testify, during her cross-examination, that the Honourable Michel Girouard's car was white and not red, as L.C. maintained: [TRANSLATION]

> *Q- ... your spouse, back in the nineties (90s), what sort of car did he have?*
>
> *A- Nineties (90s)...*
>
> *Q- If I told you it was a Corvette?*
>
> *A- Yes, white. Yes.*
>
> *Q- O.K., fine."*[65]

159. Third, L.C. testified that her visit to the Honourable Michel Girouard and his spouse took place in 1999-2000, in the presence of her mother, and she described the event as follows:

> « *Q- On page 2 of your letter, you refer to an event that.*
>
> *A- Oh yes.*
>
> *Q- ... happened in Val-d'Or. Could you testify on that?*
>
> *A- After my children were born, I would fly my mother out to Montreal to come and spend a few months to stay with us, because Alain was never there, and I was often alone, and I had the children and it gave her an opportunity to get a break from the Manitoba weather and... winter*

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[63] Transcript of May 18, 2017, pages 1625 and 1626, Book of sources, tab 80
[64] Transcript of May 9, 2017, page 25, Book of sources, tab 62.
[65] Transcript of May 9, 2017, page 1845, Book of sources, tab 82.

weathers. So she would often come up. She came up in the winter. She also came up in the summer. On this particular trip, she came up, and we went to Val-d'Or. She had never met my partner's father. She had met his mother, but she'd never met his father, but we were doing the whole tour, you know? We... you know, we went out with his mother. We went for dinner at his father's place. And then, we all went one (1) afternoon, I believe it was a Saturday - it could have been a Sunday - we went to the house of Mr. Girouard and his partner, and at that point, they had already had their children, and I had had my children. And they were all still fairly young. So this would have been... my oldest daughter is born in nineteen ninety-six (1996), in January nineteen ninety-six (1996), and she was about four (4) years old and it was summer time... around summer time. So it was about four (4) years after nineteen ninety-six (1996). So basically, we were visiting...

[...]

A- Yes, so... and my children are exactly two (2) years apart. They're born the same week of the same month, so I can really remember certain things just based... and you know, it was a very traumatic lifestyle during those times, so it wasn't good times, so it's quite hard to forget about those situations, but... anyway, my mother was there, and we went to Mr. Girouard's house and...

Q- Could you tell us what year this incident occurred?

L'HON. MARIANNE RIVOALEN, member: Two thousand (2000).

A- Yes.

MR. CHAIRPERSON: Q- Did you say?

L'HON. MARIANNE RIVOALEN, member: Two thousand (2000).

A- So it would have been... yes, it could have been nineteen ninety-nine (1999), two thousand (2000). That would make sense. It would have to fit in before the time they had... he sent the guy to sue us or the bailiff to come, which I don't have the exact date. You might have ft so we could possibly narrow it down even better. But I know she was... my daughter was very close to four (4), if not four (4). And... and his were younger. My children, my oldest... »[66]

160. Several aspects of this statement are false. First, L.C. came only once to the home of the Honourable Michel Girouard, from July 9 to 12,

[66] Transcript of May 9, 2017, pages 48 to 51, Book of sources, tab 64.

1995. In fact, she left the home a few hours before the birth of the couple's twins. The Honourable Michel Girouard and Ms. G.A. testified to that effect: [TRANSLATION]

> *(M. G.) A- [...] The garage, it was there, um.., in ninety-five (95), and that's the only time that Ms.L. C. came to our place, it was from the ninth (9) of July to the twelfth (12) of July in ninety-five (95), because the evening she left, my wife gave birth to twins, on the night of the thirteenth (13), five-thirty (5:30) and then five-thirty-one (5:31); it was a caesarian, so it was one right after the other! So, I can't be wrong about the date when she came over, and I'm sure that at that time, there was a garage, but my thirteen-month-old (13) girl wasn't playing in the garage!"*[67]

> *(G.A.) A- [...] And I…we…for me, another memory I have of her is that, um…well, from the tenth (10) to the twelfth (12) of July in ninety-five (95), I was pregnant with the twins, very, very pregnant, because I delivered on the thirteenth (13) of July…um…Mr. L... L.C., well..."*[68]

161. It is implausible that three users who hid out to use cocaine would supposedly show powder in their nostrils, especially when one of the supposed users delivered that same night. It is also implausible that L.C. made such an observation:

> *« A- Or... his partner. And I remember his partner was... because I was sitting down, and so was my mother, and they came up and they were standing, or at least she was standing with him, and Alain went to sit near my mother. And they were talking, so, you know, I was looking up, but I could see right up their noses, and inside their noses, it was all white, and that's when I lost it. I just was so upset. I basically... and I didn't want my mom to know. I mean, I was horrified.* »[69]

Q- .,. *you had observed a powder... white powder in the nostrils... A-*

Inside the nostrils?

> *Q- Inside the nostrils?*
>
> *A- It's not outside.*
>
> *Q- Okay.* »[70]

[67] Transcript of May 12, 2017, page 578, Book of sources, tab 73.
[68] Transcript of May 18, 2017, pages 1673 and 1674, Book of sources, tab 81.
[69] Transcript of May 9, 2017, page 53, Book of sources, tab 64.
[70] Transcript of May 9, 2017, page 54, Book of sources, tab 65.

162. Second, it was on March 19, 1999 that the requisition for a writ of seizure before judgment was issued for Alain Champagne. It is therefore implausible that L.C. stayed in their home in 1999-2000.

163. And yet she is adamant that both her daughters had been born and that the eldest was four years old.

164. Fourth, L.C. states that the bailiff came to her home to seize furniture during a case brought by the Honourable Michel Girouard

> «Q- / *show you legal proceedings taken by Mr. Girouard against...*
> *A- I never even knew why. I only found out that they were fighting when the bailiff showed up and was about to seize my kids' bed and I had...* a *little bit of a tantrum. But...* »[72]

165. However, the bailiff who was sent to L.C.'s home simply drew up an inventory of the property rather than carting away any of it. The Honourable Michel Girouard explains the seizure before judgment procedure that is governed by the *Code of Civil Procedure*[73]

> *- No, no. Well, in Que... in Quebec, how that's done, is that he takes inventory, he – He doesn't remove it.*
>
> *Q- O.K.*
>
> *A- He takes inventory of the... the... the furniture and then, that, that frustrated Ms.* C., *and it's... that frustrated Mr. Champagne, to the max, and so, they, they were enraged, "all" two of them (2), so... but in the end, there was no ex... writ of execution; that's a writ before judgment.*[74]

166. This was also stipulated in the *Code of Civil Procedure* in force at the time, in articles 737, 552 and 553.

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[71] Exhibit E-16, Writ of Seizure Before Judgment, Book of Authorities, tab 51.
[72] Stenographic notes of May 9, 2017, page 59, Book of Authorities, tab 65.
[73] *RLRQ* v. *C-25.01*.
[74] Stenographic notes of May 18, 2017, page 1615, Book of Authorities, tab 80.

167. Fifth, when L.C. discusses the symptoms of cocaine users, she says:

> *A- Well, when you're under the influence of cocaine, you are very speedy. You're very speedy. And when you know somebody, you know, fairly well, you can see the difference. Also, you'll notice that the pupils are dilated under, you know, regular lighting, like inside of a house. And you'll also notice sniffling or a runny nose, that type of thing if they're doing from what now I understand either a low-grade cocaine or if they're doing a lot of it on a regular basis, I've noticed that that seems to be an issue also. So...*[75]
>
> […]
>
> *Q- And after that, what did you... what did you observe about Judge or Mr. Girouard's behaviour that would have suggested that he had consumed cocaine?*
>
> *A- Well, he gets quite full of himself, like Mr. Champagne gets, and they get very talkative. His wife is very… gets very talkative, because she's a quiet, soft spoken person, and she sort of comes out of her... herself, you know? That's what I noticed about her behaviour. And so... we left, and I didn't say a word They didn't know what I saw or that I knew. I didn't say anything...*[76]

168. L.C. lacks the necessary qualifications to determine whether the alleged symptoms she allegedly witnessed were or were not related to use of cocaine. L.C. is not a physician and has no degree or studies that could justify any relevance and reliability on the matter of drug use.

169. Inspector Robert Cloutier also stated

> *M^e^ GÉRALD R. TREMBLAY*
> *per Justice Michel Girouard:*
>
> *Q- Are the symptoms you describe, are these symptoms limited solely to cocaine use or are there other things that can cause this type of behaviour: people talking faster, overexcited, whether alcohol, or...*
>
> *A- They are not limited to cocaine...*

[75] Stenographic notes of May 9, 2017, page 31, Book of Authorities, tab 62
[76] Stenographic notes of May 9, 2017, page 55, Book of Authorities, tab 65

Q- Good.[77]

170. Furthermore, L.C. finally admitted that she had never witnessed any cocaine use by the Honourable Michel Girouard:

MR. CHAIRPERSON:

Q- But you've told us of, I think, four (4) incidents that you observed where Mr. Girouard manifested signs of cocaine consumption. You testified that you actually saw an instance where he had powder up his nose. So the statement that... where you claim that he was using on a daily basis, this is more in the nature of an inference, an opinion that you formed based on his behaviour, because you didn't observe him...

A- Daily.

Q- Daily. You're absolutely right, [...][78]

171. It was her former husband who allegedly revealed his cocaine use with the Honourable Michel Girouard to L.C. during a quarrel.[79] Her former husband did not testify.

172. All the testimony by L.C. reveals her enmity and aversion toward the Honourable Michel Girouard.

173. In addition, this inquiry may be defined in several respects as a substitute for a criminal investigation, by the evidence produced, the notice of allegations and the questions asked by M[e] Marc-André Gravel and Committee members. However, none of the basic principles of such an investigation have been respected.

174. Sixth, L.C. states in her complaint:

We [L. C. and Robert Cloutier] had a discussion about his his (sic) experiences under cover along with a case he worked in Val-d'or. He started to discuss this lawyer who was a real coke head. During the

[77] Stenographic notes of May 10, 2017, page 377, Book of Authorities, tab 72.
[78] Stenographic notes of May 9, 2017, pages 87 and 88, Book of Authorities. tab 66.
[79] Stenographic notes of May 9, 2017, page 31, Book of Authorities, tab 62.
[80] Complaint of L.C., Book of Authorities, tab 43.

conversation at some point he mentioned the lawyer was Mt̂. Girouard, note realizing that I knew him personally ».

175. However, Robert Cloutier testified to the contrary, that it was L.C. who mentioned the name of M^e^ Michel Girouard:

THE HONOURABLE J. ERNEST DRAPEAU, Chairperson:

Q- Saint-Norbert!

A- Indeed, Saint-Norbert, yes. Saint-Norbert. We went to school together, so we were friends, the families—the two (2) families were very good friends. So to return to the conversation, we talked about general things, then she asked me: 'Do you know...' – because she knew, I said I was [from] Val-d'Or, she said, 'Oh! Do you know Michel Girouard?'

- I said: Yes!

- She goes: 'Oh, my...' - in English, but she said something like. 'Oh, my God! He is a... he takes coke!' And I said, 'Yeah, I know that!' and that's where it ended.

M^e^ MARC-ANDRÉ GRAVEL
for the Committee:

Q- O.K.

The expression.

THE HONOURABLE J. ERNEST DRAPEAU, Chairperson

It's for the context, it's for the narration, but this doesn't mean—this does not constitute evidence of use by Justice Girouard, in my opinion.

176. Furthermore, in her complaint, L.C. states that Inspector Robert Cloutier stated that the Honourable Michel Girouard was a "coke head."

"We [L.C. and Robert Cloutier] had a discussion about his his (sic) experiences under cover along with a case he worked in Val-d'or. He started to discuss this lawyer who was a real coke head. [...]"

177. When questioned about this, Constable Robert Cloutier denied using this expression to describe the Honourable Michel Girouard:

A- Because people, they... it's like a label; they will say of someone, "Oh, that guy is a—or that girl is a coke head!"

Q- O.K.

A- And this is not a good reputation to have, for anyone, whether they're an alcoholic, whether it's anyone.

Me MARC-ANDRÉ GRAVEL
for the Committee:

Q- Is there an expression you used with Ms. L.C.?

A- ... oh, I know it—that I personally would have used?

Q- Uh huh.

A-…

THE HONOURABLE J. ERNEST DRAPEAU, Chairperson:

Do you recall it?

A- No.[81]

178. Seventh, L.C. stated that she talked with G.A. in English:

Q- Did you ever speak English with G., Mr. Justice Girouard's...

A- Yes, she speaks very good in English.

Q- She speaks good in English?

A- M'hm.

Q- Did you ever speak French to her? Not that I can recollect.[82]

179. However, evidence was produced that G.A. does not speak English:

Q- *[...] And for that, in terms of francization, I was watching a little of the program, then…*

A- Uh huh.

[81] Stenographic notes of May 10, 2017, pages 365 and 366, Book of Authorities, tab 71.
[82] Stenographic notes of May 10, 2017, page 31, Book of Authorities, tab 68.

Q- ... for that reason, you don't need to know any English?

A- I will admit to you that it's hard for me. Fortunately, in my class, there are many people of Hispanic origin, who speak Spanish, and since I have often been to Mexico, I have learned... I have learned Spanish, I can get by in Spanish. Otherwise, the other people who speak English... um... I get help from other students who speak Eng... y'know, who speak English and a little French, we... we... we help each other, but thanks to them, I can tell you that I have improved my English, because they speak slowly. And for me, what stymies me in English is that I don't feel comfortable with that language, so when I'm with Anglophones, I freeze up. But being with them, those who are like me, as hopeless in dealing with the French language, it's like I feel more comfortable, I find it easier to understand them, understand the words, more or less, we manage.

And that is what I told my director, I said, "I don't speak English."
- He said, others – he said G., he said, that's fine, they're going to learn... they're going to learn French, because you're going to speak to them in French.

And we find all types of ways, with gestures, I use a computer, when I want to show them, let's say, a term, an animal or whatever, I go to the computer. And now we have translators on the computer, and they have... they have... they have the right...

180. In the end, all of L.C.'s testimony is riddled with inconsistencies and implausibilities regarding the dates and the events that transpired. Here is an excerpt:

A- Hmm... well, I mean, it's sort of difficult to count. I know that, in two thousand (2000), they had a fall out. I think it was in the year two thousand (2000), and Mr. Girouard sent a bailiff to our house to try to seize all our belongings, because he had some... some situation. So basically, between nineteen ninety-two (1992) and two thousand (2000), I would say I saw him probably... I mean, I want to be fair and honest, so just give me a second so I can try to remember. Hmm... I would say at least twenty (20) times. That's dinners here in Montreal, in Val-d'Or, because Monsieur Girouard used to come into town for Court. Sometimes, he would bring his partner, because they would go to, I believe, Quebec City also. I think her family was from Trois-Rivières or Quebec City; I can't recall. And I remember she liked to go shopping here in Quebec City, and so, you know, they would call us up.[83]

[83] Stenographic notes of May 9, 2017, page 41, Book of Authorities, tab 63.

> « *Q- How many times do you think you've seen Mr. Girouard... then Mr. Girouard in your life?*
> *A- Oh, I would say easily over a dozen times, at restaurants. Several times... several times at the prison that Alain was at, because Alain was convicted for importation of cocaine, nothing that I knew about at the time, and also I saw him probably three (3) or four (4) times in Val-d'Or. I remember we went to a restaurant, I remember being in his house* a *couple of times, and I remember... I remember... 1 remember us meeting him, but I cannot be specific as to the location, again, if it was a restaurant or someone's house. 1 think it was probably a restaurant, because I didn't go to too many places in Val-d'Or, except for his family, and Monsieur Girouard's house, so... or the restaurant. So... and I didn't go often, because it's not really a favourite place of time. There's not much to do there, so... »* [84]

181. This is just one example among a host of improbabilities, contradictions and false statements by L.C. The Honourable Michel Girouard addresses several of these contradictions in his own testimony[85] to set the facts straight.

182. The written representations cite the fact that the Honourable Michel Girouard allegedly used cocaine because he was a lawyer. This allegation is quite simply not proven.

183. The feedback from excerpts of the testimony by the informant, who has not testified before the Committee and was deemed not credible by the First Committee constitutes a challenge of the unanimous findings of the First Committee. This approach is incompatible with the principle of estoppel:

> *[132] following his testimony, the Committee finds that it cannot draw any conclusion from this evidence in respect of count no. 3. The Committee therefore dismisses this testimony in its entirety.*

184. With respect to the witness L.C., she never saw the Honourable Michel Girouard use cocaine. We cannot draw from her conclusions, founded on hearsay and assumptions, any evidence of use by the Honourable Michel Girouard.

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[84] Stenographic notes of May 9, 2017, pages 26 and 27, Book of Authorities, tab 62.
[85] Stenographic notes of May 18, 2017, pages 1614 *ff*, Book of Authorities, tab 80.

185. L.C. also claimed in her testimony that it was Inspector Robert Cloutier who touched on the issue of M[e] Michel Girouard and his alleged reputation as a "coke head" in their discussions. When questioned about this, Inspector Robert Cloutier stated instead that it was L.C. who brought up the subject and that he did not use the expression "coke head" in reference to M[e] Michel Girouard. Inspector Robert Cloutier's version appears much more probable to us than L.C.'s version. Her testimony is simply inconsistent with that of Inspector Robert Cloutier, investigator and undercover agent in Val d'Or, who associated with traffickers and visited points of sale, and never saw the Honourable Michel Girouard. He can only report a single piece of gossip, which is not even consistent with L.C.'s testimony.

186. Use of the term "coke head" by L.C. is unrealistic. It applies to a regular user,[86] which is incompatible with the evidence produced by independent witnesses:

a. M[e] Jean McGuire;
b. The Honourable Marc Ouimette (affidavit);
c. M[e] Wolfgang Mercier Giguère;
d. Mr. Guy Boissé;
e. M[e] Robert-André Adam;
f. Dr. Joël Pouliot.

187. Certain relevant excerpts from this testimony are as follows.

> *Jean McGuire: stenographic notes, May 13, 2015, page 124:*
> *A. I... I was saying that I know full well about... about... with what this matter involves, it is not suggestive, but I... I know very well what is the subject of your debate here today, now, and never, in no instance, did I perceive, feel, hear anything related to use of illicit substances that might have... uh... been... been... been... I believe this would have struck me!*
>
> *Uh... I would tell you that, personally, I know absolutely nothing about use of drugs, drugs or about… about... about*

[86] *"Noun. A cocaine addict,"* definition from *The Dictionary of American Slang,* Fourth Edition by Barbara Ann Kipfer, PhD, and Robert L. Chapman, PhD, Book of Authorities, tab 37.

such things, now, but we run into people who... who have behaviours we find a little odd, and perhaps a little hastily, we tend to say: well, maybe he's using something, now.

Marc Ouimette, affidavit, May 8, 2015, paragraphs 4 and 5:

4. At no time did I notice or observe indications or behaviours of any nature whatsoever that might suggest use of drugs by Bâtonnier Girouard;

5. I observed Bâtonnier Girouard's skill in directing the business of the Barreau de l'Abitibi-Témiscamingue. He was orderly, effective and very responsible.

Guy Boissé, stenographic notes, May 13, 2015, page 193:

I... as I was telling you, a moment ago, we talked about... fishing and about... about... about moments, I mean, if... if... if ever that would have happened, a, I mean, I... I would have known.

I would have known, it's... it's impossible that I missed this, by his behaviour, by his... his... his gestures, by his... by his presence, toward his family, toward his friends, toward… toward his profession... uh... I... that would have been... it's impossible.

Dr. Joël Pouliot, stenographic notes, May 12, 2015, page 372.

I would say that we may have done about 10 trips together as couples, and also as families because Michel has four (4) children and I, I have four (4) daughters, so... uh... with our families, we had some... some... some... some things in common, we had affinities.

Dr. Joël Pouliot, stenographic notes, May 12, 2015, page 377

A... In the past... I have associated with people who used cocaine and at no… at no time did I think Justice Girouard was using cocaine.

I never saw this, he never offered me any, and I never suspected behaviour that might have made me think that Justice Girouard was using cocaine, at the time when I knew him.

188. These people, judges, lawyers, physicians, and businessmen associated with the Honourable Michel Girouard on a continuing basis. Their testimony is highly credible and has never been challenged.

189. These witnesses had also been known by the Honourable Michel Girouard for many years, some for more than 30 years, while he only met L.C. on a very few occasions.

L.C.'s complaint mentions the following:

> *[...] I find it very interesting that no one has ask Mr. Girouard to prove his innocence by arranging to be examined by a Dr. who specializes in Ears, Nose & Throat. [...] All it would take is one examination of M. Girouard's nasal passage and I have no doubt they will find he has burnt a hole right through the tissues, due to his heavy use. [...]*

190. However, the Honourable Michel Girouard's nasal passages were examined, although the report was never entered into evidence.[87] We consider it necessary that the Council read this report.[88] It is conclusive in confirming that the Honourable Michel Girouard's nasal passages are intact and present no sign of cocaine use.

[logo illegible]
Val-d'Or, June 13, 2013
[illegible]

Re: Girouard Michel GIRM59051312

Medical assessment at patient's request

Mr. Girouard wishes to obtain a medical assessment following allegations of cocaine use over a period of several years. He wishes to obtain a physical examination specifically of the ORL sphere (nasal septum).

The purpose of the examination is to rule out a perforation of the nasal septum due to chronic use.

Medical history: seasonal allergies

B/P	Good general condition
ORL	Nasal septum normal, inflammatory changes in the context of seasonal allergies
Ears	Normal bilateral
Throat	Normal

In summary, nasal septum examination perfectly normal. Symptomatic seasonal allergies.

[signature illegible]
Marc Frédérick Lee, MD
[footer illegible]

[87] Stenographic notes of May 12, 2017, pages 631 and 640, Book of Authorities, tab 74. [88] Medical assessment by Marc Frédérick Lee, MD, Book of Authorities, tab 54.

191. The Committee wrongly refused to accept this report into evidence, although it formed part of the evidence produced before the First Committee. The Council has the power and duty to consider this report. The Committee's refusal to receive evidence that is relevant constitutes a breach of procedural fairness and entails consequences acknowledged in the *Université du Québec à Trois-Rivières* v. *Larocque*[89] ruling:

192. And the expert report by Mr. Jean Charbonneau, professional chemist, states the same:

> *It therefore is very difficult to consider that Mr. Girouard was using cocaine on a regular basis over many years, without his immediate entourage (social, family and professional) as well as a physician discovering indications linked to such use.*[90]

193. L.C.'s credibility is seriously compromised by its consistencies and her frivolous and inventive statements. Moreover, L.C. even testified that she had seen the City of Montreal's Chief of Police in a Montreal bar with the mafia:

> « Q- *So inappropriate behaviours by doctors are swept under the carpet, that's your...*
>
> *A-Well, I've seen a few things. I've seen the Montreal Police Chief, when I was bartendering, hanging out with the mafia and hanging out afterhours, and it took a few years before they actually, I guess, had enough pressure to go and relieve him of his job. I'm talking back in the early nineties (90s). So I've seen several examples of this situation.* »[91]

194. It also has not been contradicted that L.C. spent a few days at the Honourable Michel Girouard's home. So it is possible for her to mention the presence of a Dobermann dog or describe a few rooms in the house. The fact remains, however, that she never could have visited this house in 1999 or 2000 since:

---

[89] [1993] 1 S.C.R., 471, Book of Authorities, tab 34a.
[90] Document 1-13, Exhibit E-4.1: Expert report by Mr. Jean Charbonneau, page 4, Book of Authorities, tab 49.
[91] Stenographic notes of May 10, 2017, page 82, Book of Authorities, tab 70.

a. The requisition of a writ of seizure before judgment was served on March 19, 1999 and execution of this writ deeply angered her;

b. The swimming pool was built in the summer of 2000 and the unveiling of the pool took placed on July 22, 2000;

c. The couple's children could not have been of the age she describes, as the twins were born in the hours after she left;

d. L.C.'s mother never visited the Honourable Michel Girouard's home.

195. In addition, L.C. states in her testimony that between her visits to the Honourable Michel Girouard's home, that home did not change. However, the home underwent many changes between 1992 and 1996 since the habitable area more than doubled. The claim that she visited the home on many occasions starting in 1992 therefore is unlikely.

196. The presence of the Dobermann dog and the description of the house's storeys alone cannot make L.C.'s testimony credible and reliable. L.C. never saw the Honourable Michel Girouard use cocaine, all her testimony is riddled with improbabilities and inconsistencies, and the grounds in support of her complaint argue for full dismissal of her testimony.

6. ALLEGATION NUMBER 4

Judge Girouard has also become incapacitated or disabled from the due execution of the office of judge by reason of his misconduct and failure in the due execution of the office of judge (ss. 65 (2)(b) and (c) of the Judges Act) by falsely stating before this Inquiry Committee that he never became acquainted with and was never provided a copy of Volume 3 of the Doray Report before May 8, 2017, his testimony on point being:

A. That is... that is... I was never shown Volume 3, even in the first inquiry, never; I saw it for the first time on Monday, May 8, this week; O.K.?

That is...

But...
A. ...the truth!"
Q.

6.1 The Doray Summary

197. The Doray Summary[92] consists of three volumes. Volume I contains 10 pages and is dated May 6, 2013, and Volume II contains seven pages and is dated July 11, 2013; they were revised on August 13, 2013.

198. Only after this revision on August 13, 2013 was Volume III added, containing four pages.

199. On May 12, 2017, in his testimony before this Committee, the Honourable Michel Girouard said he never saw Volume Ill before Monday, May 8, 2017.[93] The Honourable Michel Girouard repeated this statement on May 17, 2017.[94] When confronted with a new allegation, the Honourable Michel Girouard provided his explanations.[95]

200. It is important to remember that the Committee confronted a witness on:

a. More than 30 years of facts related to a first part of the inquiry on allegations;

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[92] Exhibit E-3, Doray Summary, Book of Authorities, tab 47.
[93] Stenographic notes of May 12, 2017, pp. 721 ff, Book of Authorities, tab 76.
[94] Stenographic notes of May 17, 2017, pp. 943 ff, Book of Authorities, tab 78.
[95] Stenographic notes of May 18, 2017, pp. 1494 ff, Book of Authorities, tab 79.

b. More than 4,000 pages of stenographic notes from the inquiry before the Honourable Richard Chartier;

c. More than 14 days of hearings during this inquiry in 2015;

d. More than 2,540 pages of stenographic notes from the hearing before the Honourable J. Ernest Drapeau in 2017;

e. More than 10 days of hearings during this inquiry;

f. An incalculable number of documents, exhibits and correspondence for each stage of the inquiry, as well as the witnesses in question.

201. The Honourable Michel Girouard testified from memory that he had never seen Volume III of the Doray summary, which is highly likely given the very large amount of documents produced in the months prior to the First Committee's Inquiry. Moreover, the Honourable Michel Girouard had no recollection of all his testimony at that inquiry, which led him to state mistakenly that he had never been shown the document.

202. This error cannot be deemed a contradiction, false statement or even less, an attempt to mislead the Committee. This was simply an error made in good faith, in the context of an inquiry process spread over almost five years now, involving an alleged drugs transaction. Given the circumstances, this point is of relative importance compared with all the evidence led to date. Such an error certainly should not entail any consequence for the Honourable Michel Girouard, much less constitute grounds for removal.

7. THE PROCEDURES SET OUT IN THE *JUDGES ACT*

203. On June 21, 2016, the Council wrote to the Honourable Michel Girouard to inform him of the start of the inquiry after receiving the complaint from the Ministers of Justice.

204. On September 13, 2016, the Council formed a committee of inquiry, as indicated in the press release, to be composed of:

a. The Honourable J. Ernest Drapeau;
b. The Honourable Glenn D. Joyal;
c. The Honourable Marianne Rivoalen;
d. Bâtonnier Me Bernard Synnott, Ad. E.;
e. Me Paule Veilleux.

205. The Honourable J. Ernest Drapeau and the Honourable Glenn D. Joyal had already acted as members of the review committee in the case of the Honourable Michel Girouard during the initial inquiry.

206. The requirement of independence means not only that members of the judiciary have an independent mind, but also that the very structure of the judiciary meet the same level of independence;

207. The criterion for analysis of structural judicial independence is described in the *Bell Canada* v. *Canadian Telephone Employees Association* decision [2003] 1 S.C.R. 884:

> *[17] The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, nemo debet esse judex in propria sua causa. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? (See Committee for Justice and Liberty v. Office national de l'énergie, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, p. 394, Justice de Grandpré, dissenting).*

208. The *R.* v. *Lippé*[96] ruling is also very eloquent in institutional or structural independence:

> *Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect (Valente, supra, at p. 687), so too must the requirement of judicial impartiality.*

[96] [1991] 2 S.C.R. 114, Book of Authorities, tab 29

[…]

> *The objective status of the tribunal can be as relevant for the "impartiality" requirement as it is for "independence". Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. [...]* [97]

209. The situation prevailing in this case directly assails the principle of structural judicial independence, especially through the lack of compartmentalization of Council's various authorities, between the Review Panel, the First Committee, the Committee and Council.

210. The principle of separation was recognized in this same case by the Federal Court in the *Girouard* v. *Canadian Judicial Council* decision constituted under procedures related to review of complaints submitted to Council on federally appointed judges:[98]

> *[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. […]*

211. The Supreme Court of Canada, in the *2747-3174 Québec Inc.* v. *Québec (Régie des permis d'alcool)*[99] ruling, also mentions the principle of separation:

> *[...] The Act authorizes employees of the Régie to participate at every stage of the process leading up to the cancellation of a liquor permit, from investigation to adjudication. While a plurality of functions in a single administrative agency is not necessarily problematic, here a person informed about the role of the Régie's lawyers would have a reasonable apprehension of bias in a substantial number of cases. […] The annual report and the silence of the Act and regulations leave open the possibility of the same jurist performing these various functions in the same matter. The annual report mentions no measures taken to separate the lawyers involved at different stages of the process. [excerpts taken from summary]*

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[97] *R.* c. *Lippé*, [1991] 2 R.C.S. 114, p. 140, Book of sources, tab 29.
[98] 2015 CF 307, Book of sources, tab 2.
[99] [1996] 3 R.C.S. 919, Book of sources, tab 10.

> *[60] [...] It seems to me that, as with the Régie's jurists, a form of separation among the directors involved in the various stages of the process is necessary to counter that apprehension of bias.*

212. A practical example of the principle of separation is found in the *Ruffo* v. *Conseil de la magistrature*[100] ruling:

> *[75] As well, a survey of statutes across the country reveals the following: in Ontario, the* Courts of Justice Act, *R.S.O. 1990, c. C.43, provides that a complaint may be made to the Council by any person, which would include the Chief Judge (s. 51.3); the Chief Judge is a member of the Council* ex officio *(s. 49(2)*(b)*) but is always excluded from the subcommittee reviewing the complaint (s. 51.4(1)). It also provides that the Council determines who are the parties to the hearing (s. 51.6(6)). In British Columbia, s. 15(5) of the* Provincial Court Act*, R.S.B.C. 1979, c. 341, provides that a chief judge who has conducted an investigation into a judge's conduct shall not sit as a member of the council on an inquiry respecting the same matter. In Newfoundland, s. 16(3) of the* Provincial Court Act, 1991*, S.N. 1991, c. 15, contains a similar provision except that it applies where the chief judge has suspended or reprimanded the judge whose conduct is in question. In these last two cases, however, I note that the chief judge is not prohibited from making submissions to the council as a party. In New Brunswick, s. 6.10(4) of the* Provincial Court Act, *R.S.N.B. 1973, c. P-21, provides that the counsel to the panel acts as the prosecutor at the formal hearing.*

213. Eliminating the principle of separation from the inquiry process and allowing members to participate in several stages of the process creates a reasonable fear of partiality by members. The decision *Hiebert* v. *Canada (Attorney General)*[101] states:

> *« (iv) The right to an impartial hearing*

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[100] [1995] 4 S.C.R. 267, Book of Authorities, tab 30.

[101] 2002 CFPI 1086 (CanLII), Book of Authorities, tab 18.

[29] In the present case, Mr. Hiebert argues that a reasonable apprehension of bias was raised because "the institutional characteristics of the disciplinary process were capable of affecting" the Independent Chairperson's state of mind and because Mr. Niles performed multiple overlapping roles within the hearing and in the process leading up to the hearing.

[30] Particular reliance was placed upon the remarks of Justice Gonthier for the majority of the Supreme Court of Canada in 2747-3174 Québec Inc. *v.* Québec (Régie des permis d'alcool), *1996 CanLII 153 (SCC), [1996] 3 S.C.R. 919 at that portion of paragraph 60 where Justice Gonthier wrote:*

> *The fact that the Régie, as an institution, participates in the process of investigation, summoning and adjudication is not in itself problematic. However, the possibility that a particular director could, following the investigation, decide to hold a hearing and could then participate in the decision-making process would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. It seems to me that, as with the Régie's jurists, a form of separation among the directors involved in the various stages of the process is necessary to counter that apprehension of bias.*

[31] In my respectful view, Mr. Hiebert's submission overlooks the fact that the right to a fair hearing flows from the nemo judex in sua causa *rule. A party to a proceeding has a right to expect that an impartial adjudicator will deal with his or her case. Thus, cases on institutional bias arise in situations where there is an overlap in investigative and adjudicative functions.*

214. The *Métivier* v. *Mayrand*[102] ruling goes to the same effect:

[7] [...] The Attorney General of Canada explained it in the following terms to the trial judge:

[…]

Une fois que ça sera réglé, on n'aura toujours pas de jugement sur la validité de... enfin, de garantie offerte, par le Surintendant des faillites, par le biais de la pratique, en fait les mesures de cloisonnement qu'il a mises en place, dans son bureau, donc, de la suffisance de ces mesures de cloisonnement, de la pratique au niveau des garanties en matière d'indépendance et d'impartialité.

[102] 2003 CanLII 32271 (QCCA), Book of Authorities, tab 21.

> *[…]*
>
> *[26] Upon reading these sections, it seems clear that the legislator has deliberately allocated the duties of investigation, prosecution and decision-making in any matter relating to the conduct of trustees in bankruptcy to the superintendent, due to the specialized nature of the office.*
>
> *[…]*
>
> *[28] The legislator has also empowered the superintendent to delegate any or all of its powers "by written instrument, on such terms and conditions as are therein specified." It is therefore possible for the superintendent to establish a quasi-judicial process which separates the investigators/prosecutors from the decision-maker. In some cases, the superintendent may personally play no role whatsoever in this process.*

215. Having been appointed to set on the review committee for the initial inquiry, the Honourable J. Ernest Drapeau and Glenn D. Joyal had to be excluded from any participation in any subsequent stage of the process and from any process involving the same facts.

216. At the stage of the review committee on which they were members, the Honourable J. Ernest Drapeau and Glenn D. Joyal clearly stated their assessment of the evidence. Despite this fact, they have been called on to sit on the Committee for continuation of the inquiry, which is incompatible with the requirements of impartiality.

217. Appointing an inquiry committee that fails to provide full guarantees of impartiality due to the status of two Committee members arising from their participation in the process at the review committee stage of the complaint makes these members incompetent under paragraph 2(3)(b) of the *Canadian Judicial Council Inquiries and Investigations By-laws*.[103]

218. A well-informed person can only find that it is impossible for members of the Committee to render an impartial decision free of prejudice on the decisions they themselves made during the inquiry.

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[103] SOR/2002-371, Book of Authorities, tab 8.

219. In the Valente v. The Queen104 ruling, the court, citing the existence of a close link between independence and impartiality, describes impartiality as follows:

> *[15] [...] Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11*(d) *reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.*
>
> *[16] Fawcett, in The Application of the* European Convention on Human Rights *(1969), p. 156, commenting on the requirement of an "independent and impartial tribunal established by law" in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, puts the distinction between independence and impartiality as follows:*
>
> > *The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.*

220. The similarity between independence and impartiality is specified in the *Bell Canada* v. *Canadian Telephone Employees Association*[105] ruling:

> *[24] The fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch. [...]*
>
> *[25] We turn now to impartiality. The same test applies to the issue of impartiality as applies to independence (*R. v. Lippé, *1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, at p. 143,* per *Lamer C.J., citing* Valente, supra, *at pp. 684 and 689). Whether the Tribunal is impartial depends upon whether it*

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[104] [1985] 2 S.C.R. 673, Book of Authorities, tab 35.
[105] [2003] 1 S.C.R. 884, Book of Authorities, tab 13.

> *meets the test set out by de Grandpré J. in* Committee for Justice and Liberty, supra*, at p. 394: would a well-informed person, viewing the matter realistically and practically, have a reasonable apprehension of bias in a substantial number of cases? As Lamer C.J. stated in* Lippé*, allegations of institutional bias can be brought only where the impugned factor will give a fully informed person a reasonable apprehension of bias in a substantial number of cases (p. 144).*

221. The Yukon Francophone School Board v. Yukon (Attorney General)[106] ruling explains the criteria applicable to disqualification:

> *[20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:*
>
> > *... what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]*
> >
> > *(Committee for Justice and Liberty v. National Energy Board, 1976 CanLII 2 (CSC), [1978] 1 S.C.R. 369, p. 394, per de Grandpré (dissenting))*
> >
> > […]
>
> *[22] The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In Valente, Le Dain J. connected the dots from an absence of bias to impartiality, concluding "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" and "connotes absence of bias, actual or perceived": p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind: see S. (R.D.), at para. 49, per L'Heureux-Dubé and McLachlin JJ.*
>
> *[…]*
>
> *[38] Applying this test to the trial judge's conduct throughout the proceedings, I agree with the Court of Appeal that the threshold for a finding of a reasonable apprehension of bias has been met.*

[106] [2015] 2 S.C.R. 282, Book of Authorities, tab 15.

222. Citing the *Ville de Boisbriand* c. *Le Procureur général du Québec*[107] decision, author François Doyon, in "De quelques aspects de l'impartialité et de l'indépendance d'une commission d'enquête," *Développements récents sur les commissions d'enquête*, 1998, states:

> *[TRANSLATION] After repeating that in the discharge of their duties and depending on the circumstances, inquiry boards must follow the rules of natural justice, the Honourable Justice Claude Tellier points out:*
>
> > *The rules of natural justice include a requirement that all board members not only be impartial but also be seen to be impartial. These people must have every appearance of impartiality. [...]*
>
> *We believe that the Municipal Board could not receive or read the staff report without creating at least an appearence of bias since it has been asked for its own opinion, not that of others; at the very least, if the board members were faced with a fait accompli, they should have notified the people involved, sent them a copy and considered recusing themselves.*[108]

223. Consequently, the Honourable J. Ernest Drapeau and Glenn D. Joyal are incapacitated from execution of their duties in this case.

8 NEW PROCEDURE

8.1 External drafters

224. In its report, the Committee mentions the names of two external drafters, M^{e} Emmanuelle Rolland and M^{e} Marc-André Grou, legal counsel not constituting part of the Committee formed by Council.

225. The Committee also specifies that:

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[107] [1993] R.J.Q. 771 (SC), Book of Authorities, tab 36.

[108] François Doyon, "De quelques aspects de l'impartialité et de l'indépendance d'une commission d'enquête," Développements récents sur les commissions d'enquête, Barreau du Québec, 1998, pages 30 and 31, Book of Authorities, tab 38.

> *[6] We have carefully considered both the documentary and the testimonial evidence. That process involved the review, either personally or through our advisory counsel and legal drafters, of 4,000 pages of stenographic note reporting the 14 days of hearings before the First Committee. [Emphasis added]*

226. This approach taken by the Committee is incompatible with the most basic rules of natural justice and runs counter to the well-recognized principle in Canadian law: "he who decides must hear." Therefore, the Committee could not delegate drafting of its report to legal drafters who had not heard the evidence.

227. This principle is established by the *Mehr v. The Law Society of Upper Canada*[109] ruling:

> *« The other matter to which I wish to refer is as follows. At the hearing before the Discipline Committee on Sept. 18, six members were present. At the hearing on Oct, 2 the same six members and two additional members were present. At the hearing on Nov. 19 the eight members who had been present on Oct. 2 were present and one additional member was present. There is nothing to indicate that all nine of these members did not take part in deciding as to the report which the Committee should make to Convocation. While it is not necessary to express any final opinion as to whether such* a *course would render the report invalid I am much impressed by the reasoning of Lord Hanworth and Romer J. in Rex v. Huntingdon Confirming Authority[7]. At page 714 Lord Hanworth said.'—*
>
> > *One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be 'composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching* a *decision, on this question of confirmation.*
>
> *And at page 717 Romer J. who agreed with Lord Hanworth added:—*
>
> > *Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never*

109 [1955] S.C.R. 344, Book of Authorities, tab 20.

> *heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown. »*

228. This maxim is drawn from various principles of natural justice as described in the book *Principles of Administrative Law*:[110]

> *« It is a rule of natural justice that "he who decides must hear". Several considerations justify the rule. First, it is based on statutory intention and the maxim delegatus non potest dele gare [A delegate cannot delegate.] Second, it is based on the need for independence. Natural justice requires that decisions be made without inappropriate influences upon the decision-makers. Third, it reinforces the rule that parties must be given the chance to address the points raised against them. It is an aspect of the audi alteram partem rule.*
>
> *Allowing persons to participate as decision-makers when they have not participated in whatever hearing may have been held raises the obvious possibility that new matters will be introduced without an opportunity for a response.*
>
> *In general, the person upon whom the statutory power to decide has been conferred shall make the decision. No delegation of this power is allowed..."*

8.2 Non-judges

229. One member of the First Committee is not a judge under the Act. This member forms part of the majority of the First Committee that recommended removal of the Honourable Michel Girouard.

230. This outcome runs fully counter to the principle established in the *Reference re Remuneration of Judges of Provincial Court PEI* cited in the Therrien (Re) ruling [*supra*] to the effect that only a body composed of judges may recommend removal of a judge:

> *[97] It should be recalled, first, that under s. 248 C.J.A., the Conseil de la magistrature is composed of 14 members: the chief judge of the Court of*

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[110] David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 2d ed. Carswell, Toronto, 1994, page 288, Book of Authorities, tab 39

> *Québec who is also its chairman, the senior associate chief judge and the three associate chief judges of the Court of Québec, one of the chief judges of the Municipal Courts of Laval, Montréal or Québec, one judge chosen among the persons exercising the functions of chief judge of the Labour Court, president of the Human Rights Tribunal, or chairman of the Professions Tribunal, three judges chosen among the judges of the Municipal Courts (two judges chosen among the Municipal Courts of Laval, Montréal or Québec and appointed upon the recommendation of the Conférence des juges du Québec, and one judge chosen among the other Municipal Courts and appointed upon the recommendation of the Conférence des juges municipaux du Québec), two advocates appointed upon the recommendation of the Barreau du Québec and two persons who are neither judges nor advocates. In 1998, another member was added, namely the chief judge of the municipal courts, bringing the number to 15: S.Q. 1998, c. 30, s. 40.*
>
> *[98] The appellant argues that the involvement of one of the four persons who are not members of the judiciary in the decision-making process violates the collective or institutional dimension of the structural principle of judicial independence, in that only a body composed of judges may recommend the removal of a judge. He relies on certain remarks by Lamer C.J. in Reference re Remuneration of Judges of the Provincial Court, supra, at para. 120:*
>
> > *The guarantee of security of tenure, for example, may have a collective or institutional dimension, such that only a body composed of judges may recommend the removal of a judge. <u>However, I need not decide that particular point here.</u> [Emphasis added.]*

231. In this case, a person who is not a member of the judiciary did much more than contribute to the deliberations or to provide another perspective: this person formed part of the majority in the report of the First Committee that issued a recommendation of removal.

232. This outcome is unconstitutional.

233. Author **H.** Patrick Glenn also writes, in his article "Indépendance et déontologie judiciaire" published in the *Law Journal*:

> [TRANSLATION] *Who watches over the guardians? The composition of disciplinary boards raises several issues in the Canadian and Quebec context. There is acceptance, I believe, that a board formed entirely of peers—judges from the same judicial system as the judge named in the complaint—poses no threat to judicial independence. Issues arise, however, over the participation and level of participation of judges from another judicial system, barristers and the general public.*

> *If we start from the principle of judicial independence—and I stress the need for this starting point in our historical, cultural and institutional context—I believe we must conclude that the first responsibility for the exercise of disciplinary power rests on judges in the same judicial system. Shifting genuine disciplinary power outside that system would jeopardize judicial independence. These days, however, any exclusive power is suspect—thus the need for openness and external representation. This openness and representation can be established without, however, jeopardizing the basic principle of self-monitoring. In particular, judges from the judicial system in question should not be a minority in disciplinary decisions; the presence of a judge from another judicial system is not necessary but may be accepted subject to reciprocity; the participation of barristers and the general public is desirable, provided it does not endanger the majority position of judges from the judicial system in question.*[111]
> [Emphasis added]

234. This situation is incompatible with judicial independence .

9. THE NEW INQUIRY

9.1 Estoppel

235. The reopening of the inquiry concluded on April 20, 2016 raises particular fundamental and procedural difficulties. Indeed, the principle of estoppel, which affirms the rule of stability of court decisions, and was reiterated in *Toronto (City)* v. *C.U.P.E., Local 79* of the Supreme Court of Canada, finds application here:

> "*[23] Issue estoppel is a branch of res judicata (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the*

[110] H. Patrick Glenn, "Indépendance et déontologie judiciaire," Law Journal, Vol. 55, No. 2, June-July 1995, p.308, Book of Authorities, tab 40.

> *parties to both proceedings must be the same, or their privies (Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality)) (1990), 69 R. du B. can. 623, pp. 648-651). In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely."* [112]

236. The implicit procedural approach adopted by counsel for the Committee falls within the scope of the appeal, the retraction of judgement, the rehearing and the judicial review, without respecting the rules. In the case of an appeal or judicial review, it is necessary to identify the error of fact, the error of law or the manifest error of the First Committee. However, no such error has been identified by counsel for the Committee.

237. All of these issues have been decided by the Council in paragraphs 40 and 41 of the Council Report:

> *"[40] We agree with the Committee's conclusion that it could not be proven on a balance of probabilities that the Judge used cocaine regularly between 1987 and 1992, purchased $90,000-$100,000 worth of cocaine in that period and exchanged professional services in that period for cocaine and that as a result those allegations need not be pursued. Not only had a great deal of time (about 25 years) passed since the events, thereby weakening the quality of the evidence available, but there was also no evidence confirming the drug trafficker's allegations. There was, however, evidence to the contrary in the Judge's denial and the evidence of family, friends and professional colleagues.*
>
> *[41] Finally, we agree that, as a result of the Committee's findings, Allegation 6, to the effect that the Judge withheld information concerning his past and present which would negatively reflect on himself and the judiciary could not have been proven and as a result should not be pursued."*

238. His comments thus constitute a search for disregarding the unanimous decision of the First Committee and the unanimous decision of the Council. The ministerial complaint significantly weakens the essential separation between the executive and the judiciary.

[112] [2003] 3 C.S.R. 77, Record of sources, tab 34.

239. This disregard mainly affects the unanimous conclusions of the Council's report.

240. Plus particulièrement aux paragraphes 72 à 74, 80 à 83, 87 à 99 et 103 à 111, le mémoire de l'avocat du Comité cherche à changer la conclusion unanime de rejet de l'allégation 3 du premier Comité à l'égard de l'achat d'une substance illicite à M. Yvon Lamontagne et, indirectement, des conclusions à l'égard des chefs 1 et 6. On y retrouve une nouvelle analyse de la preuve, par l'avocat du Comité, qui veut ainsi substituer ses propres conclusions aux conclusions unanimes du premier Comité.

241. Specifically, at paragraphs 72 to 74, 80 to 83, 87 to 99 and 103 to 111, the Committee Counsel's brief seeks to change the unanimous finding of rejection of allegation 3 of the First Committee with respect to the purchase of an illicit substance from Mr. Yvon Lamontagne and, indirectly, the conclusions with respect to counts 1 and 6. It contains a new analysis of the evidence, by counsel for the Committee, who wishes to substitute its own conclusions for that of the unanimous conclusions of the First Committee.

242. This first step concerned allegation 3 , which reads:

> *"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."*

243. This rejected claim is still unproven even after reopening the inquiry. After five years of investigation (which began in 2012), testimonies, pseudo expertise and "spontaneous" simulations of folding of "Post-it"s 113, the Committee's counsel is still unable to conclude the nature of this "illicit substance". We are still following the original complaint to the letter of the Honor able Chief Justice François Rolland, who indicated that, in the absence of his hearing of the video of September 17, 2010, this was only "Suppositions":

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113 Brief of the Prosecutor of the Inquiry Committee, 9 June 2017, paragraph 106, Record of sources, tab 45.

"Me GERALD R. TREMBLAY for Judge Michel Girouard:

R - Yes

Before I begin, I just spoke with my colleague, and to avoid having Chief Justice Rolland removed, so we could call him right away, we are ready to stipulate - and I read:

"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."

I spoke to my colleague, who, with — if this "statement", this claim is formally on file, we could contact Judge Rolland, who would not have to travel.

THE HONOURABLE R.J. CHARTIER, Chair.

Q- Me Cossette?

Me MARIE COSSETTE Independent Counsel:

R- Absolutely. "114

244. It is in vain that we search within the Written Representations for the answer to the question of the existence of the nature of any "illicit substance" or not, or the drugs that would have been purchased on September 17, 2010.

245. The first person to review this video is the investigator who described the video evidence obtained in October 2010 in the performance of the search warrants.[115]

246. At no time does this investigator (Mr. Eric Caouette) describe something that looks like an illicit substance. This is the first witness to have seen this video clip. His first reaction is neutral following the viewing of the video tape. His

[114] Stenographic notes of May 7, 2015, page 6, Record of sources, tab 57.
[115] Exhibit E-4.1, document P-3, page 6 of the Videotron DVR Analysis, Record of sources, tab 50.

observations are dated December 7, 2011, and there is nothing in the evidence to indicate that they have elicited any response from the investigators, prior to the May 2012 statements from an informant whose testimony to the Committee offered no guarantee of credibility or reliability.

247. It is difficult to see in this neutral description any reference to an illegal transaction.

248. Thus, there is still no evidence of the nature of the allegedly "illicit" object that would have been exchanged, even after five years of successive investigations by an independent prosecutor, a review panel, a first panel and the Council, which benefited from the work of the Sûreté du Québec investigator, Michel Déry, who did not bring any proof. Even counsel for the Committee cannot identify or demonstrate it under the most basic rules of evidence.

249. The most meticulous searches failed to detect any trace of cocaine in Mr. Lamontagne's office and no one dared to suggest that marijuana be traded in a “Post-it”. On the contrary, the evidence has shown that marijuana cannot be traded via a “Post-it”[116]. Whatever the version adopted, the proof is that there is only writing on the "Post-it".

250. It must be taken for granted that there is still no evidence of an unlawful transaction on September 17, 2010, that the re-analysis of the evidence contained in the Written Representations is not relevant and is illegal. It constitutes an indirect challenge to the Report of the First Committee of 18 November 2015 and the Report of the Council of 20 April 2016, without however concluding that they were shelved.

9.2 Rule of Separation

251. The situation prevailing in this case directly undermines the principle of structural judicial independence, in particular by the absence of separation between the different bodies of the Council, namely between the Review Committee, the First Committee and the Council.

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116 Report of the First Committee, paragraphs 163 to 165, Record of sources, tab 5

10. THE SCALABLE BURDEN OF PROOF

10.1 Standard of Manifestly Unreasonable Assessment — Objective Plausibility

252. The inquiry Committee uses the rule of objective plausibility in its report as follows :

> *"[94] The following analysis necessarily focuses on the objective plausibility of Judge Girouard's testimony in the light provided by the rest of the evidence. The main problem with Judge Girouard's testimony is that each of his explanations is disharmonious with the most reasonable conclusion. In connection with each controversy, Judge Girouard would have us park our incredulity to accept his version of the facts. At any rate, this essentially intellectual process of evaluating the objective plausibility of Judge Girouard's explanations is supplemented by our observation of his demeanour while testifying. That demeanour buttressed our finding that his explanations are not credible."*

253. Objective plausibility is not a standard of proof at least in Quebec.

10.2 Strong balance of probabilities

254. Among the array of rules, standards and burdens of evidence, surprisingly, the Committee also uses the "strong balance of probabilities" rule in its report as follows:

> *"[10] For the reasons fleshed out in the text that follows, the Committee finds the First Allegation, the Third Allegation and the Fourth Allegation have been established on a strong balance of probabilities by clear and convincing evidence.*
>
> **[...]**
>
> *[51] We have meticulously reviewed the evidence, with a view to determining whether each allegation was established on a balance of probabilities. That process led us to the unanimous conclusion that the Second Allegation has not been established, whereas the First Allegation, the Third Allegation and the Fourth Allegation have been established on a strong balance of probabilities.*

[...]

> *[178] Having found the misconduct identified in the First Allegation has been established on a balance of probabilities, we must now apply the Marshall test and determine whether that misconduct is "so manifestly and totally destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render [Judge Girouard] incapable of executing the judicial office". We answer that question with an unequivocal "yes". Correlatively, we wish to express our complete agreement with the opinion of the majority of the First Committee that the "compromising of a judge's integrity through the giving [of] 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".*
>
> [...]
>
> *[309] All things considered, we find L.C. told the truth when she described the events, actions and behaviour that led her to deduce, quite logically and reasonably, that Me Girouard used cocaine. That use occurred during the 1990s, while he was a lawyer. We likewise find L.C.'s description of those events, actions and behaviour is reliable. Her testimony constitutes clear and convincing evidence establishing the Third Allegation on a strong balance of probabilities.*
>
> *[...]*
>
> *[319] All things considered, we unhesitatingly find there is clear and convincing evidence establishing the Fourth Allegation on a strong balance of probabilities."*

255. The notion of strong balance of probabilities is[117]:

> *"[...] a criterion outside Quebec's existing law of evidence, that is, the strong balance of probabilities in establishing in civil matters the commission of an offence of an act which could, otherwise, be criminal."*

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[117] *American Home Insurance Company* v. *Auberge des Pins* inc.1989 CanLII 1199 (QC CA), Sourcebook, tab 11

256. The Honourable Louis Lebel in the judgement *American Home Insurance Company* v. *Auberge des Pins inc.*[118], clearly explains how this burden of proof cannot be accepted:

> *"On reading the judgement, it can be seen that the trial judge used a different criterion than the one admitted by the case law. He uses the criterion of "strong balance of probabilities" twice (m.a., pp. 269-279): In these passages it is not a matter of assessing the weight of a particular element of the quality of that evidence. He seems to see in the use of the "strong balance of probabilities" criterion, a principle that must govern his assessment of the totality of the evidence. He then uses a criterion that case law has generally rejected. Even the Dalton judgement, which he claims to rely on, does not hold it, since Chief Justice Laskin's opinion places the assessment of the quality of the evidence within this exercise of the determination of the preponderance of probabilities." It leaves no room for an intermediate criterion between that of the criminal law and that of the civil law."*

257. A more recent decision, *Protection de la jeunesse - 122002*[119] summarizes very well the state of jurisprudence on the applicable standard of proof:

> *"[61] The Tribunal, having considered all the evidence carefully, must decide on the basis of the only standard of proof applicable, that of the balance of probabilities as decided unanimously by the Supreme Court of Canada in 2008:*
>
> > *[...] I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. [...]*
> >
> > *I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.*
> >
> > *Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. [...]*

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[118] *Ibid.*
[119] 2012 QCCQ 17384, Record of sources, tab 25.

> *As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.*
> *[…]*
>
> *In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities*[120].

[62] It is obvious that mere suspicions are insufficient and that the facts put in evidence must convince the Court of evidence that crosses the threshold of the very probable hypothesis[121]*."*

258. Neither the Council nor any other inquiry committee has used the standard of a strong balance of probabilities in the assessment of the evidence in an inquiry into the conduct of a judge. It is in vain therefore that we will seek the foundations of the application of such a norm.

7.3 Rule of hearsay

259. The Committee wrongly accepts hearsay.

260. Judgement *R. v. Khelawon*[122] enacts the rules surrounding hearsay:

> *"2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. [...] Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its*

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120 *F.H. v. McDougall, [2008] 3 CSR 41, paragraphs. 40, 45, 46, 47 and 49, Record of sources, tab 17. It must also be remembered that the Quebec Court of Appeal had already unanimously reiterated, since 1989, that the test of a strong balance of probabilities was not a criterion applicable in civil law, American Home Assurance Co. v. Auberge des Pins Incorporée, AZ-90011166, Judge LeBel, for the unanimous Court of Appeal, at pages 14 and 21, and another panel of the Court of Appeal unanimously recalled in 2005 that there was no intermediate criterion between the balance of probabilities and the standard applicable in criminal matters (beyond a reasonable doubt), Laplante v. Séminaire de Québec, 2005 QCCA 1118 CanLII), para. 9 and 10.*

[121] *"It is a matter for a Court to interpret the various pieces of evidence after having analyzed them and so to retain, by reasoning of a mind that takes into account the serious, precise and concordant assumptions derived from the facts, the most likely cause. The proof of this must be preponderant to the point of inferring such a conclusion which must exceed the threshold of the hypothesis itself."*

[122] *[2006] 2 C.S.R. 787, Record of sources, tab 28.*

truth-seeking function. [...] When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

[...]

35 [...] The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. I will deal with each defining feature in turn."

261. More recently, the judgement *R.* c. *Baldree*[123], explains in the summary:

"Hearsay evidence is presumptively inadmissible unless it falls under a traditional exception to the hearsay rule. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if, pursuant to the principled analysis, sufficient indicia of reliability and necessity are established on a voir dire. Hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. The need for a functional approach to implied assertions is readily apparent, bearing in mind the core hearsay dangers of the declarant's perception, memory, narration and sincerity.

Here, no traditional exception applies and the impugned evidence withers on a principled analysis. This was a single drug purchase call of uncertain reliability. No effort was made to find and interview the caller, still less to call him as a witness — where the assertion imputed to him could have been evaluated by the trier of fact in the light of cross-examination and the benefit of observing his demeanour. Although this drug purchase call does not withstand scrutiny under the principled approach, this need not always be the case with drug purchase calls."

262. In disciplinary law, the evidence cannot be based solely on hearsay. This is the conclusion that emerges from the decision of

Ordre professionnel des infirmiers et des infirmières v. *Forrest*[124]*:*

[123] [2013] 2 C.S.R. 520, Record of sources, tab 27

> "*[66] Although hearsay evidence may be admitted into disciplinary law, the Counsel considers that the complainant could not base her evidence solely on hearsay."*

263. The decision of Psychologues c. Fortin125, explains the criterion of reliability that must be met in order to be able to rely on hearsay:

> *"[12] Disciplinary law is a sui generis right and the evidence is in both the civil, criminal and common law rules. But if you look at any of the sources of the law of evidence, it's the exceptions to the hearsay exclusion rule that apply. It is apparent, regardless of the source of the law, that hearsay is generally admissible when the best evidence is impossible to prove and the evidence is sufficiently reliable.*
>
> *[13] In this case, most of what the syndic witness reported is hearsay, including but not limited to:*
>
> *when he talks about a conversation with a lady on the telephone who says that she bears the name of the respondent's client, adds that she did not tell the truth the first time, and says she has a cassette;*
>
> *when he reports that the same lady told him that he recorded two telephone calls with the respondent;*
>
> - *when he says that these conversations were recorded during the period when he did the investigation.*
>
> *[14] This evidence shows that the witness had a conversation during which these facts were reported to him. But that does not prove the facts.*
> *[15] The evidence is so deficient that it does not reveal:*
> *the conditions for recording telephone conversations;*
>
> *the handling and integrity of the cassette;*
> *the precise time of the recordings;*
>
> *authentification or voice recognition.*
>
> *[…]*
>
> *[21] Counsel for the appellant argued at the hearing that disciplinary law opens the door to hearsay.*
>
> *[22] Only exceptionally is hearsay evidence permitted, and again when it is reliable.*

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124 2012 CanLII 55216 (QC 00011), Record of sources, tab 23
125 2004 QCTP 1, Record of sources, tab 26.

[…]

[26] Prohibition of hearsay remains the rule. To avoid it, the syndic and the Committee had to follow the rules. What they did not do.

[27] At first, it would have been possible for the appellant to have the patient appear, but he has not demonstrated the impossibility that she be heard.

[28] In a second step, this recording was not introduced into evidence, authenticated, and has no reliability. The conditions for recording these conversations, keeping the cassette and forwarding it to the syndic's office are unknown. We do not even know if this is the original conversation or a touched-up version. There has been no evidence presented on these questions.

[29] No reliability can be given to these recordings and transcripts. They had not been admitted into evidence."

264. The more serious the complaint, and in this case, it is, the more important it is to demand high quality evidence. This is what is written in the decision of *Chauvin* v. *Rivarola*[126]*:*

> *"Although hearsay evidence may be admitted in disciplinary law, some reservations must be made. The more serious the complaint, the more high-quality evidence must be required. The alleged offences under this head are serious and the respondent allegedly lied to Ms. MacDonald.*
>
> *Admitting the evidence presented would deny the respondent the right to cross-examine Ms. MacDonald. However, the Committee does not say that it does not believe the syndic when she reports the words that Ms. MacDonald said to her. This evidence is not sufficient to declare the respondent guilty on this count."*

265. There is no reason for the Committee to rule out the way in which it deals with the hearsay principles, especially in such an investigative context. The Committee was free to question all the witnesses necessary to the search for the truth, in order to avoid such procedural unfairness and the blatant rejection of the most elementary notions of the law of evidence. In doing so, the Committee has irredeemably achieved the most fundamental rights of the Honourable Michel Girouard with respect to full and complete defence and procedural fairness.

[126] 2000 CanLII 21182 (QC CDCHAD), Record of sources, tab 14.

10.4 Clear and convincing proof

266. Since security of tenure is a principle that can only be infringed for the most serious reasons, the procedure for doing so must be respectful of the rule of law. Evidence of a judge's misconduct must always be clear and convincing (cogent). The Supreme Court of Canada said the following in the judgement *F.H.* v. *McDougall*[127]*:*

> *"[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test."*

267. The work titled *Evidence Principles and problems*[128] recalls this important principle:

> *« The decision of Lord Wright in Caswell v. Powell Dufftyn Associated Collieries Ltd., [1940] A.C. 152 (H.L.) at 169-70, is often cited as authority for this long-standing principle:*
>
> > *The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture. »*

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127 [2008] 3 C.S.R. 41, Record of sources, tab 17.

[128] Delisle, R., Stuart, D., Tanovich & Lisa Dufraimont, Tenth Edition Carswell, page 77, Record of sources, tab 41.

268. A ton of suspicion is not worth an ounce of proof. The accusations made against the Honourable Michel Girouard have not been proven. Moreover, the evidence filed and presented during the inquiries before the First Committee and the Committee argues in favour of a complete and total abandonment of the allegations. The complaint must be rejected.

10.5 Credibility and reliability

269. In the case of *Bairaktaris* v. *9047-7993 Québec* inc.,[129] credibility is analyzed:

> *"[32] The credibility of witnesses is assessed in light 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.)] »*

270. In the judgement *J. R. v.* R.[130], the Court of Appeal stated:

> *"[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):*

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[129] *Bairaktaris* v. *9047-7993 Québec inc.*, [2002], J.Q. no 4148, no. : 500-05-072827-023 (CS.), Record of sources, tab 12.
1302006 QCCA 719, Record of sources, tab19.

> *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 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."*
>
> [Emphasis added]

271. In the judgement of *Pointejour Salomon* v. R.[131], the Court of Appeal referring to the judgement of *J.R.* v. *R.* added the following:

> *"[41] Jude Watt 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 (référence (2009), 241 C.C.C. (3d) 45 (C.A. Ont.), paragr. 41)*

272. In conclusion, the Honourable Michel Girouard endoreses the following paragraphs 40 and follwoing the case of *Themens* v. *Miscioscia*[132]*:*

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[131] 2011 QCCA 771, Record of sources, tab24.
[132] 2009 QCCS 546, Record of sources, tab 32.

> *"[40] In reaching this conclusion, the court takes into account the following factors:*
>
> > *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 reliability 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:*
>
> > *"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."*

273. The Honorable Michel Girouard is the victim of a serious injustice. The confusion of the First Committee with respect to the credibility and reliability has led to some far-reaching conclusions, since it is on this basis that the Minister of Justice of Canada and the Minister of Justice of Quebec have called for of an inquiry.

274. The Committee had the power to correct this injustice. It had the duty. It did not *do it.*

10.6 Gravity of the injustice

275. The whole process facing the Honourable Michel Girouard is a serious injustice. The seriousness of the injustice committed is demonstrated by:

a. The undermining of judicial independence;
b. The infringement of the decision-making independence of the Council;
c. The estoppel which constitutes the object of the ministerial procedure;
d. The absence of bad faith on the part of the Honourable Michel Girouard and the absence of a breach of honour and dignity;
e. The substitution of the inquiry to a criminal nature that constitutes the notice of allegations (charges);
f. The punitive and non-restorative purpose of the process being followed;
g. The imprecision of the Committee's notice of allegations (accusations);
h. Incomplete disclosure of the evidence;
i. The non-credibility of the disclosed evidence;
j. The mixed status of complainants, investigators and judges of certain members involved in this case which goes against the principle of separation raising a problem of institutional bias;
k. All breaches of procedural fairness;
I. All procedures that tend to undermine the reputation of the Honourable Michel Girouard;

276. The cumulative effect of all these irregularities constitutes a serious injustice.

10.7 Sanction

277. The criterion that can lead to a dismissal recommendation is that of conduct that is of such gravity that an impartial, well-informed person undermines integrity and dignity.

278. The Supreme Court of Canada stated this criterion in 2001 in the abovementioned judgement of *Therrien (Re)* :

> *"[146] [...]˙ the majority of the committee of inquiry established by the Conseil de la magistrature found that the appellant's conduct was so manifestly and profoundly destructive of public confidence in him and in the justice system as a whole that a reprimand could not restore that confidence. Accordingly, because of the gravity and the continuing nature of the offence, it was appropriate to recommend the applicant's removal. The Inquiry Panel of the Court of Appeal made the same finding. In the opinion of that Court,*

> *the appellant's conduct was so blameworthy that it entitled the government to remove him without violating the principle of judicial independence. The fact that he deliberately concealed his conviction and deprived the selection committee of relevant information concerning his competence to be appointed as a judge warrants the recommendation that his commission be revoked."*

279. This criterion was repeated in the judgement of *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*[133] :

> *"[66] In this case, the Council applied the evidence available to it to the question,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?" (per Drapeau J.A., Moreau-Bérubé (N.B.C.A.), supra, at para. 88)."*

280. In Quebec, this criterion was also applied by the Court of Appeal in the judgement of *Ruffo (Re)*[134]*:*

> *"[18] The public's confidence in its justice system, which every judge is responsible for preserving, is at the heart of this inquiry and must dictate the ultimate conclusion of the Court. It is therefore a question of verifying, in the words of Judge Gonthier in the judgement of Therrien, whether the conduct impugned by Judge Ruffo "so clearly and completely undermines the impartiality, integrity and to the independence of the judiciary that it undermines the trust of the public or the public in its justice system and renders the judge incapable of performing the duties of his office". In such a case, dismissal will then become the sanction to be recommended to the Minister of Justice. The L.T.J. offers only two choices, reprimand or recommendation of dismissal."*

281. This criterion must be analyzed by the Council and the file does not reveal any circumstance justifying any impeachment recommendation whatsoever.

11. THE CONCLUSIONS OF THE COMMITTEE AND THE COUNCIL

[133] (2002] 1 C.S.R. 249, Record of sources, tab 22.

[134] 2005 QCCA 1197, Record of sources, tab 31.

282. The search for truth is an objective that animated all the speakers present during this inquiry and shaped the conduct of the case. However, it is the rules and theories of law and the law alone that can carry out this quest for truth.

283. Comments on the Honourable Michel Girouard follow the Committee report. The Committee's instructions were that counsel for the Committee should submit arguments in support of the theory that the Honourable Michel Girouard was guilty of the allegations against the notice of allegation:

> *“THE HONOURABLE J. ERNEST DRAPEAU, Chair:*
>
> *You understand that.*
>
> *Good.*
>
> *The other thing is: we will have to decide on the four (4) allegations that appear in the Notice of Allegations". The Committee has no doubt that all the credible arguments that can be developed in favour of the rejection of these allegations, that all these arguments will be developed by the Counsel of Judge Girouard represented by two (2) of the large firms in the province of Quebec.*
>
> *The role of counsel Gravel, the role of counsel for the Committee: he mentioned that his role was, to a certain extent, to approach the case, independently, but the needs of the Committee must be considered, here, and we are certain that the arguments in favour of rejecting the allegations will be fully delineated by the counsel of Judge Girouard.*
>
> *So, Me Gravel, you will have to file a brief that will not exceed fifty (50) pages. We are, the members of the Committee, independent, but we need a brief that presents arguments in favour of the thesis that the allegations have been established.*
>
> *That does not mean that if you, as counsel for the Committee, point out something that deserves to be highlighted and that Judge Girouard thinks it should be avoided, the needs of the Committee are to have a brief of the argument that supports the proposition that these four (4) allegations have been made.*
>
> *So, I'm not asking you to give up your independent hat, but there is a new procedure in place. I'm not going to go to settlement, you are subject to the authority of the Committee and its Chair, just to say to you: I have no doubt that the arguments, that is, the good arguments in favour of Judge Girouard will be made by Me Tremblay and Me Masson and Master Dupuis; but we,*

> *we want to be helped to resolve the questions before us, and, what would help us, would be a brief that refers to the arguments, as I said, opposed to the thesis that Justice Girouard conveys. So, it's a nuance; I am not asking you to give up your independence, I am talking about the needs of the Court.*
>
> *The file is enormous, it would not be fair to impose on the Committee the need to go through the documents for arguments from one side to the other.*
>
> *Do we understand each other?*[135]*."*

284. So, the Committee chose to ask its Counsel, instead of having objective observations, an indictment concluding the revocation.

285. In doing so, the procedure is similar to that described in the judgement of *Consortium Developments (Clearwater) Ltd. v. Sarnia (Ville)*[136]*:*

> *"41 [...] Judicial inquiries are not surprise events. In fact, the existence of these inquiries and the processes used by them are often justified by the fact that they are inquisitory rather than contradictory and that there is no dispute between the participants. Judicial inquiries are not, in this sense, contradictory. For this reason, the appellants and others whose conduct is examined may legitimately argue that, being in law, not to be adversaries, counsel for the commission should not treat them as if they were."*

286. As described in the *Politique sur l'avocat indépendant* (which is out of date):

> *"Independent counsel is impartial in that it does not represent any client, but it must be rigorous, if necessary, and fully address all issues, including any issues that may arise, when necessary, independent counsel may have to take a firm stand on the issues involved. It must be remembered, however, that the judge may continue to perform his or her judicial duties in the future, so that any comments regarding the judge's credibility or motives must be carefully considered."* [137]

287. In our opinion, this excerpt from the Politique sur l'avocat indépendant was full of wisdom.

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[135] Stenographic notes of May 19, 2017, pages 1878 to 1880, Record of sources, tab 83.
[136] [1998] 3 C.S.R. 3, Record of sources, tab 16.
[137] *Politiques du CCM à l'égard des enquêtes, Record of sources, tab 9a.*

288. Unlike Therrien (Re) above, there is not one iota of proof of the effect that the Honourable Michel Girouard lied in his form.

289. After months of investigation by two Council committees, two teams of senior lawyers and investigators, the intervention of some 32 judges, and the analysis of hundreds of documents collected by police authorities, there is no less evidence of an unlawful transaction. The Committee inquiry formed at the request of the two Ministers of Justice has turned into a reopening of the first inquiry. It did not gather more evidence. This inquiry has once again revealed the difficulties that arise when the rules of partitioning are not followed and when the witness is opposed to previous statements contained in several hundred pages of stenographic notes on events that sometimes go back 30 years old. The complaint must be dismissed.

290. Constitutionally, the wisdom of the Governor General's decision to appoint a person as a judge cannot be questioned. This is a royal prerogative. To recommend to Parliament the dismissal of a judge on the basis of a case where there is complete absence of evidence of misconduct in such a context would be an extremely dangerous precedent.

12. CONCLUSION

291. It all began with a few seconds of soundless video that Chief Justice François Rolland brought to the attention of the Canadian Judicial Council with the mention: without sound, these are just suppositions.

292. A long process is underway, a process that goes well beyond the parameters of the letter of the Honourable Chief Justice François Rolland and which is difficult to reconcile with the words "during good behaviour" of the Constitution Act, 1867. This process ends with a unanimous report from the Council withholding the dissent from the First Committee report. The Honourable Michel Girouard resumes his duties.

293. Two ministers propose a new complaint, asking the same Council to launch another inquiry into the reasons of the majority rejected by the Council. A polymorphic process is triggered that produces new complaints that have nothing to do with the ministers' letter and the "during good behaviour" of the Constitution Act, 1867. Despite the contrary statements at the beginning of the inquiry, the Committee redid the original inquiry and added a "star witness", L.C. Despite the improbabilities of his testimony, his irrelevance and not being able to constitute any evidence of any unlawful act on the part of the Honourable Michel Girouard, the Committee based its recommendations on his testimony, dismissing without any good reason any evidence that would have the effect of depriving him of his credibility. For example, why was this question posed to G.A. "Did you have an above ground pool?" Why with pools on other grounds?

294. Is there an iota of proof about G.A.'s English knowledge? One proof: Like millions of Quebecers, she does not speak English as millions of Canadians do not speak French, including thousands of Montrealers. Imagine in Trois Rivières?

295. The result is that an honest family is unfairly treated by a Committee that prefers to believe the version of someone who lashes out in all directions on the basis of newspapers, who manages to include in his caustic criticism of Quebec society the members of the Council of the Judiciary, which has only occasional contacts with the judge and his wife, to the version never questioned by the first committee and the Council itself from G.A., and other unassailable individuals who have lived with Judge Girouard and his family day after day for years. The Committee's reasons paint a picture so far from reality and evidence that the Council must, in all fairness, intervene.

296. How can one explain the flagrant contradiction between the version of L.C. who has not seen anything tangible but who asserts an enormous consumption by Girouard to the point that this "coke head" certainly has broken nostrils, which is wrong, and the explanation held by the Committee found in an expert report that explains that these witnesses believed by all and cross-examined by none that it is possible that consumption at a particular level may not be noticed.

297.

298. Finally, it is relevant to note that in the Déziel case, the conclusions of the Committee, which incidentally included Judges Drapeau and Joyal, were upheld by the Council with three major differences in the Déziel case. Neither of the two ministers asked for an inquiry into the major reasons for dissent. Their decision was final. In our case as well.

297. For all these reasons, the allegations against the Honourable Michel Girouard are unfounded and the Council is invited to dismiss the notices of allegation against him.

Montreal, December 5, 2017

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