Le comportement dans l'appréciation du témoignage : un examen de la jurisprudence (1900-1910) pour guider les avocates d'aujourd'hui

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Le 9 mars 2022

Propos introductifs

Plusieurs sujets m'intéressent depuis toujours, y compris le choix de la peine,1 la plaidoirie2 et l'appréciation du témoignage,3 notamment le comportement des témoins.4 De fait, l'objet de mes recherches depuis quelques mois5 est l'examen du comportement des témoins dans le cadre de

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1 The Sentencing Code of Canada: Principles and Objectives, LexisNexis Inc., Markham, 2009, Les Misérables on Sentencing, Sandstone Academic Press, Melbourne, Australie, 2007, Speaking to Sentence: A Practical Guide, Carswell, Toronto, 2005 et Principes de la détermination de la peine, Les Éditions Yvon Blais, Cowansville, Québec, 2004.

2 Plaider – Un juge se livre, Les Éditions Yvon Blais, Cowansville, Québec, 2017 et Advocacy: A Lawyers' Playbook, Carswell, Toronto, 2006.

3 Judging by the Book – A Legal and Literary Analysis of Fact Finding, (j'ai fait imprimer ce texte), Cornwall, 2010, L'évaluation du témoignage Un juge se livre, Les Éditions Yvon Blais, Cowansville, Québec, 2008.

4 « La plaidoirie et l'examen des grands principes visant l'appréciation du comportement du témoin », Jurisource, le 5 avril 2016 et Demeanour Evidence on Trial: A Legal and Literary Criticism, Sandstone Academic Press, Melbourne, Australie, 2008.

5 « La preuve du comportement: ce que Balzac enseigne aux plaideurs à la lumière du roman Eugenie Grandet – la question du voile, du visage et de la voix », Jurisource, 24 janvier 2022; « La preuve du comportement – les enseignements de la Cour d'appel de l'Ontario du 7 janvier 2022 à la lumière du roman de Balzac La maison du chat-qui-pelote – la question du témoin 'calme' et du témoin 'agressif' », Jurisource, le 27 janvier 2022; « La preuve du comportement: Les enseignements de l'arrêt *Clarke c. Edinburgh and District Tramways Co.* à la lumière du roman Le contrat de mariage de Balzac – la question des 'cillements' des témoins », Jurisource - le 3 février 2022; « La preuve du comportement – un examen à la lumière des enseignements de la Cour canadienne de l'impôt », Jurisource - le 14 février 2022; « Plaider – un juge se livre : Les enseignements de R.L. Stevenson dans le cadre du roman Le maitre de Ballantrae », Jurisource, le 14 février 2022, « Plaider – un juge se livre – Macbeth et les enseignements de Shakespeare pour l'avocate qui plaide », Jurisource - le 22 février 2022 et « Le comportement dans l'appréciation du témoignage : un examen de la jurisprudence (1850-1900) pour guider les avocates d'aujourd'hui », Jurisource, le 2 mars 2022.

l'appréciation du témoignage, car je suis convaincu que la jurisprudence va évoluer de façon étonnante dans les années à suivre en raison des progrès de la technologie. Ma thèse : que les assisses des normes de contrôle, qui se basent sur l'incapacité des juges d'appel de voir et d'entendre les témoins aussi bien que la juge du procès, vont s'effriter avec la capacité des plaideurs de soumettre des enregistrements de l'ensemble du témoignage. Le procès Zoom qui est instruit devant moi ce matin sera peut-être « capté » de façon intégrale permettant ainsi à la Cour d'appel de juger du bien-fondé de mes constats de faits, dont ceux de comportement, avec autant d'aise que moi. Et, si pas ce matin, tout probablement l'an prochain à pareille date…

Mon objectif est donc de prêter main-forte aux avocates afin qu'elles puissent puiser des aperçus révélateurs des éléments du comportement durant cette époque, ainsi que des enseignements utiles portant sur les auxiliaires du comportement dont la question de l'attitude du témoin et sa manière de déposer. À ce titre, en guise d'entrée en matière, il sied de revoir brièvement *R. c. Legros*, [1908] O.J. No. 69, 17 O.L.R. 425, 14 C.C.C. 161, qui nous offre un exemple assez rare d'un juge qui porte à l'attention de la Cour d'appel la question : "3. Was I justified in taking into consideration the expression and demeanour of the prisoner Legros when giving judgment?" Pour sa part, le juge Osler a écrit, avec la concurrence des juges Moss, Garrow et MacLaren :

> 8 The third question must be read in connection with what the magistrate has said in the case as stated, namely, that his decision was not based altogether on the evidence, but to a greater or less degree upon the expression and demeanour of the witnesses, and especially of the accused Legros, both in the trial for theft and in that for perjury.
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> 9 While the expression and demeanour, whatever that may exactly mean, of the witnesses and of the accused when testifying at the present trial, were proper to be considered by the magistrate in weighing the evidence, he had no right to import into that trial anything of that kind which occurred at the former trial. His duty was to be guided by the evidence before him and by that alone. The third question, understood in the way I have stated it and as the magistrate evidently intended to be understood, must therefore be answered in the negative. [Soulignement ajouté.]

Quant à lui, le juge Meredith a déposé des motifs minoritaires, dont les commentaires que l'on trouve au paragr. 17 :

> 17 The third question can be answered in one way only, that is in the affirmative. The demeanour of witnesses in giving evidence upon the trial is a very useful means in many cases of reaching a true conclusion as to their credibility…

Donc, les juges de la Cour d'appel étaient unanimes à déclarer ce genre de preuve utile et recevable, la majorité des membres de la formation ayant dit : « … While the expression and demeanour, whatever that may exactly mean…". C'est à répondre à cette question de la définition du comportement que ce document est voué, tout en jetant un éclairage utile sur les autres éléments de cette question d'actualité.

Examen en enfilade des grands thèmes du comportement

Mon plan est le suivant : je fais l'examen en enfilade des éléments énumérés ci-dessus, au moyen d'un survol thématique et en ordre alphabétique des grandes questions. Malheureusement, il y a des thèmes qui se rejoignent et qui s'entrecoupent, et il en résulte des renvois qui sont répétés, mais je préfère agir ainsi afin de faciliter le travail des avocates qui peuvent s'orienter plus aisément lorsqu'il y a des titres multiples très précis.

Apparence du témoin – élément de l'appréciation du témoignage, de même que le comportement

Le jugement du juge Rouleau, de la Cour suprême des Territoires du Nord-Ouest en date du 18 juin 1900, et intitulé *R. c. Mellon*, [1900] N.W.T.J. No. 2, 7 C.C.C. 179, nous offre ce passage que j'ai honte à reproduire :

> 3 Charles Pepin himself was examined before me, and he swore that he never dressed like an Indian; that he had worked for one Donald McLeod freighting between Calgary and Edmonton for two summers; that he never wore moccasins; that he was driving a pair of horses and selling posts the day he got the liquor. In fact, Pepin speaks English fluently and dresses better than many ordinary white men; there is no indication whatsoever in his appearance, in his language, or in his general demeanour, that he does not belong to the better class of half-breeds. (*sic*) It is a fact, though, that he "took treaty" about fifteen years ago, and, according to *Regina v. Houson*, 1 Terr. L.R. 492, 1 N.W.T. Rep. 44, a half-breed having taken treaty is an Indian within the meaning of the Indian Act.

Pour nos fins, il suffit de relever que le juge Rouleau a fait mention de deux éléments, c'est-à-dire « appearance … language », afin de conclure que l'on pourrait se tromper quant à ses origines. Pour l'avocate qui s'évertue à contrer une preuve de comportement apparemment favorable, il serait sage de souligner, autant que faire se peut, que le langage du témoin et son apparence lors de sa déposition n'étaient pas de nature à lui gagner la confiance de la juge.

Par ailleurs, *McKay Bros v Victoria Yukon Trading Co*, [1902] BCJ No 97, 9 B.C.R 37, une décision de la Cour suprême de la Colombie-Britannique, nous livre ces observations pertinentes du juge Drake:

> 2 … The other point is one of evidence. The decision of a Judge in first instance who has had the opportunity of seeing the witnesses and judging from their demeanour of the accuracy of their statements is, in most instances, much more competent to decide on questions as to evidence than the Court of Appeal, and his views should not be lightly disregarded. <u>But in this case the evidence of the defendants was chiefly evidence taken on commission, therefore personal appearance and conduct of the witnesses is not a factor in the case</u>.

Avocates, comportement envers les

Kon v Archibald, [1908] OJ No 73, 17 O.L.R. 484, 12 O.W.R. 592, 14 C.C.C. 201 contient ce commentaire: « 16 … As to the defendant Archibald, while his demeanour towards the plaintiffs' counsel and witnesses during the investigation was deserving of most severe censure, and should have been inflicted with the reprobation of the magistrate, I cannot say that it even suggests that,

under all the circumstances, he acted from an improper motive, or recklessly, in destroying the plaintiffs' goods…" Il s'agit d'un jugement de l'hon. Teetzel.

Caractère d'un témoin, et le comportement

Les motifs du juge Longley nous font part de ce qui suit dans l'arrêt *Nova Scotia (Attorney General) v. Landry*, [1910] N.S.J. No. 8, 9 E.L.R. 81

> 12 It is extremely unfortunate that Father Trenett who could give very important evidence on this point is now located in Washington State, on the Pacific, and his testimony is not before me. It is an unpleasant and delicate duty to decide upon conflicting evidence of this kind, but having regard to the fact that this document M/5 came from the possession of Bishop Cameron, in whose custody it properly was, and having regard to the reasonableness of the respective stories, the demeanor and character of the witnesses, I am compelled to find that the plaintiff's version of the facts is the true one. In spite of Landry and Dunn's specific denial of their signatures to this document from admitted signatures to other documents it would seem that they both signed the document as drawn up and typewritten by the priest. [Soulignement ajouté.]

Caractère raisonnable de la preuve, et le comportement

Voir les motifs du juge Longley à l'arrêt *Nova Scotia (Attorney General) v. Landry*, [1910] N.S.J. No. 8, 9 E.L.R. 81, discuté au sous-titre « Caractère d'un témoin, et le comportement ».

Circonstances de la preuve et le comportement

Le juge Denton a entrepris ses motifs dans l'arrêt *Long c. Smith*, [1910] O.J. No. 476, 17 O.W.R. 710 ainsi : « 3 This case took more than a day to try. Many of the facts are in dispute and the evidence as to them, very conflicting. Weighing this evidence as best I can, looking at the surrounding circumstances and the probabilities, and - what is more important still in this case - considering the demeanour of the witnesses in the box, I find upon the evidence the facts to be as follows."

Commission rogatoire qui n'est pas filmée – impossibilité de juger le comportement

Voir en premier le paragr. 7(5) de l'arrêt *Gold Leaf Mining Co. v. Clark*, [1905] O.J. No. 239, 5 O.W.R. 6, jugement de l'hon. Anglin et les mots "... I had not the advantage of seeing Darby, whose evidence was taken on commission) …" Voir aussi « Preuve documentaire – comportement ne saurais être évalué à juste titre » et l'arrêt *McKay Bros v Victoria Yukon Trading Co*, [1902] BCJ No 97, 9 B.C.R 37 et, de plus, le paragr. 19 de l'arrêt *Re Moore*, [1910] M.J. No. 2, 16 C.C.C. 264.

Comportement – avantage que possède la juge de première instance d'avoir vu et entendu le témoignage

D'entrée de jeu, il est évident que les cours canadiennes accordaient un poids important au comportement des témoins durant la période qui est sous étude, tel qu'en fait état l'arrêt *Granby (Village) c Ménard*, [1900] SCJ No 56, 31 R.C.S, 14, 1900 CanLII 74, discuté dans le cadre du sous-titre : « Norme d'intervention des paliers d'appel de l'année 1900 exprimée par la Cour suprême du Canada – l'intervention est non indiquée dans le cas de témoins ». Bien que l'on n'ait jamais discuté de la question à savoir, « pourquoi devrait-on se fier au comportement? », le fait demeure que toutes les cours canadiennes de l'époque suivaient l'exemple de notre Cour suprême pour ce qui est de l'importance du comportement du témoin. De fait, le Privy Council en faisait autant, à en juger par le pourvoi *Arnold Estate (Re)*, [1918] J.C.J. No. 2, 44 D.L.R. 12, [1918] 3 W.W.R. 850, [1919] AC 254. S'exprimant pour le tribunal, Lord Dunedin a déclaré aux paragr. 11 et 12:

> 11 The trial judge gave a very careful and considered opinion, in which he set forth the chief considerations on the one side and on the other. The Judges of the Court of Appeal who disagreed with him on the facts contented themselves with stating that they had come to an opposite conclusion from that reached by the trial judge. Accordingly the counsel for the appellants strongly pressed on their Lordships the consideration that a finding of pure fact arrived at by the judge who had tried the case and seen the witnesses ought not to be interfered with.
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> 12 Their Lordships are of opinion that there must be discrimination as to what is the class of evidence being dealt with: whether the result arrived at depends on the view taken of conflicting testimony or depends upon the inferences to be drawn from facts as to which there is no controversy. They may cite the words of Lord Halsbury in the case of *Montgomerie & Co. (Limited) v. Wallace-James*, [1904] A.C. 73
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> > Where a question of fact has been decided by a tribunal which has seen and heard the witnesses the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court. [Soulignement ajouté.]

Relevons certains commentaires du juge en chef Taschereau à la page 294 de l'arrêt *Dempster c. Lewis*, 1903 CanLII 6, 33 SCR 292: "… It is not at all contended that the credibility of any of these witnesses depended upon their demeanour in the box at the trial, or anything of that kind. So that the Court of Appeal was, and we are here, in just as good a position to pass upon the evidence as the Chancellor was..." J'ai choisi ces pages afin d'illustrer la situation contraire.

Comportement – définition : la notion d'entendre les témoins

Les juges Taschereau, Sedgewick et Girouard ont appuyé les motifs du juge Davies dans l'arrêt *Davidson v. Georgian Bay Navigation Co. And The Shenandoah and the Crete* (1902) 33 SCR 1, 1902 CanLII 70, notamment l'extrait suivant, à la page 9:

> Whatever conclusion I might have reached had 1 been determining this question in the first instance, I do not, under all the circumstances, feel justified in reversing the finding of fact which the learned trial judge has reached as to the proper navigation of the "Carmona." He had not only the advantage of hearing the witnesses and noting their demeanour, but, in a case where so much depends upon relative distances, the further great advantage, which we are denied, of having very many of their important statements explained and illustrated by the witnesses on the maps and charts of the river. Much of the evidence, without this advantage, is difficult to understand. [Soulignement ajoute.]

Selon moi, les mots que j'ai soulignés laissent entendre, sans jeu de mots, que le comportement s'entend non pas du fait d'écouter le témoignage, mais de l'appréciation de la façon dont déposent les témoins. Exprimé autrement, si écouter le témoin faisait partie du comportement, pourquoi le juge Davies a-t-il écrit : « He had not only the advantage of hearing the witnesses and noting their demeanour… »? Toutefois, il se peut que l'avocate puisse plaider à bon droit que ces juges ne cherchaient pas à livrer des enseignements d'ordre définitif.

Comportement – preuve silencieuse, mais potentiellement d'une importance primaire

Je suis ravi de citer les commentaires du juge en chef Hunter qui suivent, que l'on trouve au paragr. 4 de l'arrêt *R v Scherf*, [1908] BCJ No 22, 8 W.L.R. 219, 13 B.C.R. 407, 13 C.C.C. 382,

> 4 … What does the evidence consist of? Not merely the words that fall from the lips of the witnesses, but their demeanour, the demeanour of the prisoner and, generally speaking, the whole atmosphere of the trial. Suppose the case of a servant accused of murdering her mistress. A Fellow servant testifies to the screams. The judge is busy taking notes and does not catch the note of eagerness on the part of the witness to accentuate every circumstance that may be against the prisoner and gloze over anything that might be in her favour. But suppose the jury does so and, observing the demeanour of the prisoner - especially if there is a view - and knowing that she has had a clear record before this occasion, comes to the conclusion that there must have been sudden and extreme provocation, such as a charge of unchastity, to impel her to commit the act, can anyone say that the jury would be wrong in finding manslaughter; and yet there would not be a shred of evidence in support of such a verdict in the transcript of the proceedings, which alone would be before the Court of Appeal. How, then, is it possible for the Court of Appeal to be possessed of all the evidence either for or against the prisoner? And how, then, is it possible for it to say, with certainty, that the finding of the lesser, as opposed to the major, offence was wrong?

Comportement - qui est jugé de façon favorable n'équivaut pas toujours par un gain de cause

Voir le sous-titre « Constat de faits favorable, grâce au comportement ».

Comportement, sans objet

Le paragr. 13 de l'arrêt *Sarnia Transportation Co c Piggott*, [1908] OJ No 208, 12 O.W.R. 121 suit: "13 … But I probably should state that my view of the effect of the evidence does not at all depend upon the demeanour of the witnesses who testified." Il s'agit du juge Anglin. Voir aussi

Ontario Sewer Pipe Co. v. Macdonald & Stephen, [1910] O.J. No. 657, 15 O.W.R. 820, au paragr. 3.

Conduite du témoin, et son comportement, doivent être évalué par la juge des faits, tout comme d'autres éléments dont le contenu du témoignage

Il sied de relever les commentaires du juge Davies à la page 657 du pourvoi *The Schooner Reliance v. Conwell* (1901) 31 SCR 653, 1901 CanLII 6 :

> This court has time and again laid down the rule that the decision of the trial judge on disputed questions of fact will not be reversed unless it is clearly shown that the evidence is against the finding. *Santandarino* v. *Vanvert*, 1893 CanLII 55, 23 SCR 145*; Village of Granby* v. *Menard*, [1900] SCJ No 56, 31 R.C.S, 14, 1900 CanLII 74.
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> Such a rule is peculiarly applicable to cases of collision at sea, where there is almost invariably a great conflict of testimony and the judge must necessarily be largely influenced by the demeanor and conduct of the witnesses when examined … [Soulignement ajouté.]

McKay Bros v Victoria Yukon Trading Co, [1902] BCJ No 97, 9 B.C.R 37, une décision de la Cour suprême de la Colombie-Britannique, nous livre ces observations pertinentes du juge Drake:

> 2 … The other point is one of evidence. The decision of a Judge in first instance who has had the opportunity of seeing the witnesses and judging from their demeanour of the accuracy of their statements is, in most instances, much more competent to decide on questions as to evidence than the Court of Appeal, and his views should not be lightly disregarded. But in this case the evidence of the defendants was chiefly evidence taken on commission, therefore personal appearance and conduct of the witnesses is not a factor in the case.

Le juge Riddell fournit un exemple assez remarquable de la philosophie des juges de l'époque qui étaient disposés à rejeter un témoignage du fait de la conduite et du comportement, pour ensuite faire mention, sans examen minutieux, du contenu du témoignage. Ainsi, le paragr. 11 de *Calverley v Lamb*, [1907] OJ No 532, 10 O.W.R. 279, nous explique les constats de faits :

> 11 The defendant, I judge by his demeanour and conduct in the witness box, is not worthy of credence, and nothing is to be taken or accepted as proved in his favour by his evidence. So far as any matter in favour of the defendant is concerned, his evidence is to be entirely disregarded. The evidence called to corroborate the defendant in respect of the alleged gift of the land, I am not satisfied with. For example, Howell, though he says that Mrs. Stewart told him that she had given the piece of land to Mike and his little family, also says that he understood that Mike had the place rented from her. His recollection I do not rely upon, and Mrs. Lamb, wife of the defendant, I do not credit. None of these witnesses by their demeanour impressed me favourably, very much the reverse indeed. [Soulignement ajouté.]

Derechef, le juge Riddell déclare ce qui suit, un peu plus tard :

> 4 While there are several questions of law involved, the chief question is one of fact, depending upon the relative credit to be given to the witnesses. The chief witness for the defence was detected by the clerk of the Court kissing his thumb instead of the book, and was by him required to take the oath properly. Sometimes there is an objection taken by witnesses on sanitary grounds to kissing the book, and such objections are deserving of all attention and respect. But the present was not a case of that kind. This witness, upon being detected and challenged, kissed the book with alacrity. This is not the only reason for preferring to the evidence of this witness that of those called for the plaintiff. From their conduct and demeanour I am convinced that the facts of the case, where in dispute, are substantially as given by the employees of the plaintiff. [Soulignement ajouté.]
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> …
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> 8 It is contended for the defendants that their story of the real agreement should be accepted - but I am unable to give credence to the evidence, and I am satisfied that the agreement was as set out by the witnesses for the plaintiff, coming to this conclusion largely upon the demeanour of the witnesses. [Soulignement ajouté.]

Le juge Riddell a aussi écrit: « 7 An enormous mass of evidence was taken at the trial, and winnowing from the chaff what I consider to be the wheat, I find the facts as follows (being guided in my findings by the amount of credit I give to the witnesses called and basing the amount of credit by their conduct and demeanour in the witness box.)" Voir *Horan v McMahon*, [1910] OJ No 422, 2 O.W.N. 224, 17 O.W.R. 376. De plus, *McCabe c. National Mfg. Co.*, [1910] O.J. No. 629, 15 O.W.R. 662, a vu le juge Riddell consigner les remarques qui suivent : **"**7 The conduct and demeanour of the witnesses were all that could be desired; each is a man of more than average intelligence and both seemed to me to be anxious to tell the exact truth irrespectively of the effect upon the case. And yet in many points their evidence was diametrically opposite; and their statements wholly irreconcilable. I could not at the trial see any reason for believing one more than the other; and reserved judgment that I might see if any light could be shed upon the vexed questions by the somewhat numerous documents produced.**"**

Il sera utile à l'avocate de lire *Noble v. Gunn Limited and Gunn, Langlois and Co., Ltd.*, [1910] O.J. No. 248, 16 O.W.R. 504, au paragr. 4, et le dossier McKim v Cobalt-Nepigon Syndicate, [1907] OJ No 750, 10 O.W.R. 1121 est également un jugement qu'il faut lire.

Les motifs du juge Davies dans le dossier *Dunsmuir v. Loewenberg, Harris & Co*., 1903 CanLII 80, 34 SCR 228, discutent de cette question à la page 239 : « … nor is it a question of how this court would find if the matter was open to them. The conduct and demeanour of the witnesses and the credibility and weight to be attached to their statements together with the correspondence and other written testimony, were matters peculiarly within the exclusive province of the jury…" Un exemple insigne (et bref) de la situation où la juge accepte à la fois le contenu du témoignage, et le comportement du témoin, nous est fourni dans les motifs du juge-en-chef Moss au paragr. 14 de *Craig c McKay*, [1906] OJ No 31 12 O.L.R. 121: "The defendants testified in their own behalf, and the learned Chief Justice believed and accepted their testimony. He expressed himself as

favourably impressed by their manner and demeanour, as well as by their evidence, and there is nothing on the face of their testimony, or in the circumstances to which our attention was forcibly drawn by counsel for the plaintiff, to lead to a contrary view." Voir aussi le paragr. 10 et le paragr 12 de l'affaire *Madill v McConnell*, [1907] OJ No 638, 10 O.W.R. 672: "10 At all events, from the conduct and demeanour of Mr. McC. in the box, I was and am convinced that he was telling the truth" et "12 If the evidence of Mr. McC. and that of Dr. N. are inconsistent, I accept the evidence of the former. In all cases judge of the credit and weight to be given to the evidence by the conduct and demeanour of the witness." *Stacey v Miller*, [1907] OJ No 687, contient ces remarques : " 6 Judging of the credibility of the witnesses upon their conduct and demeanour in the box, upon such part of the evidence as I believe, I find the following to be the facts…"

De plus, *Kane v Trusts and Guarantee Co*, [1908] OJ No 266, 12 O.W.R. 301, un jugement de l'hon. Anglin, nous informe que: "13 While the evidence of the plaintiff impressed me favourably, and led me to believe that he was an honest and reliable witness, I was by no means so well satisfied with the demeanour of young John Moynahan, who gave evidence on behalf of the defendants." Le juge a accepté certains témoignages et a rejeté certains autres. Le juge Riddell a écrit ce qui suit dans l'arrêt *Bradley v. Egan*, [1908] O.J. No. 715, 11 O.W.R. 944 : « 4 The facts as I find them to be, judging of the witnesses by their conduct and demeanour in the box, are as follows."

White c. Victoria Lumber and Manufacturing Co., [1909] B.C.J. No. 55, 11 C.R.C. 473, 14 B.C.R. 367, contient cet extrait des directives au jury:

> 6 … There is a good deal of evidence about that. It is not for me, as I have said before, to indicate to you what I think the fact actually was. I, perhaps, may say, perhaps should say, that you are entitled, and you only are entitled, to take into account not merely the words that fell from the lips of a witness, but his demeanour, his conduct in the box. I need not enlarge upon that, you simply have to use your best judgment as reasonable men as to the truth of the story the witnesses tell, and you must do the best you can in coming to a conclusion as to which side the truth is on. [Soulignement ajouté.]

Constat de faits favorable, grâce au comportement

Conley c. Canadian Pacific R.W. Co., [1900] O.J. No. 119, 32 O.R. 255, un arrêt signé du juge Meredith, siégeant à la Haute Cour de Justice de l'Ontario, fait mention de ces commentaires au paragr. 6 : « The plaintiffs' story, as told by Mr. Conley, the only witness in their behalf, is a somewhat extraordinary one, but one to which, having regard especially to the demeanour of the witness in giving his testimony, I give credence generally." Cependant, il ne s'agit pas d'un exemple de la jurisprudence que pourrait citer l'avocate qui cherche à illustrer un constat de faits favorable en raison du comportement insigne d'un témoin, malgré une déposition qui, au niveau du contenu, semble laisser à désirer. Au total, même en acceptant ce témoignage quant au fond.

Cela étant, il sera utile de songer à la situation contraire telle qu'illustrée au paragr. 18 de l'arrêt *R c Sunfield*, [1907] OJ No 55, 15 O.L.R. 252, 13 C.C.C. 1: "In another part of the judgment (p. 70) it is remarked that the evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of

the demeanour of the witnesses." Voir aussi *Pacific Towing Company v. Morris*, [1904] B.C.J. No. 23, 11 B.C.R. 173, au para. 11.

Le juge Anglin a écrit ce qui suit dans l'arrêt *Sawyer-Massey Co. v. Hodgson*, [1909] O.J. No. 32, un dossier en appel du premier juge :

> 8 From a perusal of the evidence, I am not at all certain that I would have reached the conclusion that the plaintiffs' agent, when demanding that Mrs. Hodgson, as registered owner of the farm occupied by herself and her husband, should guarantee Lawton's debt, did not more than hint at certain unpleasant consequences to her husband should she refuse. But the trial Judge has found that no such threats were made, expressly stating, at least twice, that he bases his finding upon "consideration of the witnesses whose conduct and demeanour I see in the witness-box." With our hands thus tied, we cannot, upon conflicting evidence, reverse this finding: *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury*, [1908] A.C. 323, 326. [Soulignement ajouté.]

Au demeurant, relevons le cas de deux avocats dont on ne pouvait déclarer un « champion » au niveau de la crédibilité. De fait, le juge Falconbridge a commenté au paragr. 5 de l'arrêt *Martin v Hopkins*, [1908] OJ No 762: "… I may say here that I should have great difficulty as regards this and other matters where there is conflict of testimony. I should experience much doubt and hesitation in deciding which of these two men is telling the truth. They are both members of the legal profession, and, so far as I know, of equal standing in the community; and I cannot report that the demeanour of either one in the box was better than that of the other. I think, however, that the case can be disposed of on other grounds."

Contester le comportement, élément subjectif, par des arguments s'appuyant sur des éléments objectifs, dont le manque d'appui pour la preuve et les contradictions

Le rapport du pourvoi *Kaulbach v. Archbold*, (1901) 31 SCR 387, 1901 CanLII 74, nous offre une belle illustration du genre de plaidoirie qui avait beau jeu à cette époque. Ainsi, l'entête comporte ce qui suit, à la page 390 : « … The trial judge discredited the appellant and disbelieved her story; and was fully justified in doing so, not only by her demeanour but in the matter of her testimony; and her statements are improbable, inconsistent, contradicted and uncorroborated…" Pour nos fins, il suffit de mettre de côté la grandiloquence du procureur afin de souligner qu'il est sage pour l'avocate de s'inscrire en faux face non seulement aux éléments subjectifs du comportement, mais aussi des éléments objectifs de la preuve qui sont critiqués, notamment l'impossibilité matérielle, les carences au niveau de la collaboration et les contradictions, tant internes qu'externes.

Contenu du témoignage, d'une part, et sa présentation, qui est synonyme du comportement

Les juges Taschereau, Sedgewick et Girouard ont appuyé les motifs du juge Davies dans l'arrêt *Davidson v. Georgian Bay Navigation Co. And The Shenandoah and the Crete* (1902) 33 SCR 1, 1902 CanLII 70, notamment l'extrait suivant, à la page 9:

> Whatever conclusion I might have reached had 1 been determining this question in the first instance, I do not, under all the circumstances, feel justified in reversing the finding of fact which the learned trial judge has reached as to the proper navigation of the

> "Carmona." He had not only the advantage of hearing the witnesses and noting their demeanour, but, in a case where so much depends upon relative distances, the further great advantage, which we are denied, of having very many of their important statements explained and illustrated by the witnesses on the maps and charts of the river. Much of the evidence, without this advantage, is difficult to understand. [Soulignement ajoute.]

Selon moi, les mots que j'ai soulignés laissent entendre, sans jeu de mots, que le mot comportement cherche à décrire la façon dont le témoignage est porté à l'attention de la juge du procès et il ne s'agit pas du fond, c'est-à-dire du contenu de la preuve.

Le juge Ferguson a présidé au procès *Jarvis c. Gardner*, [1903] O.J. No. 542, 2 O.W.R. 640. Il a écrit au paragr. 11 : "I have read throughout her examination for discovery in this action - a large part of which had little or no relevancy to the case - for the purpose of understanding what were her mental powers; and I paid, as I think, strict attention to her demeanour and her answers in the witness box at the trial, all with the view of forming a correct opinion of my own upon the subjects, or an opinion as nearly correct as may be…" [Soulignement ajouté.]

Dans l'arrêt *Harris v. Burt*, [1904] O.J. No. 582, 3 O.W.R. 400, le juge Falcomnbridge a commenté : "7 The judgment was delivered two weeks after the close of the evidence, and the learned Judge had the evidence and the demeanour of the witnesses." Les motifs du juge Anglin dans l'arrêt *Brown v. Beamish*, [1905] O.J. No. 439, 5 O.W.R. 722, nous rappellent que les constats de faits impliquent un examen de l'ensemble du témoignage, dont le fond de la preuve et le comportement, et d'autres éléments ponctuels : "6 … I was, however, satisfied by the testimony and demeanour of defendants - considered in the light of the circumstances surrounding the impeached transaction - that the allegation of a further advance or assumption of liability by Barnet Beamish at the time of and as consideration for the giving of the mortgage is untrue, and that what is put forward to make good this defence is, as a present consideration, merely pretended and colourable."

Contexte qui explique les commentaires antérieurs des témoins et peut-être leur intérêt à être franc, ou pas, et le jeu du comportement

Le jugement *McKinnon v Gillard No 1*, [1907] OJ No 230, note ce qui suit quant à l'importance du contexte dans lequel des aveux sont faits, notamment que l'intérêt du sort d'un procès. On nous informe de juger du contexte et de peser l'importance de savoir si l'individu se doute, ou pas, si ses paroles sont répétées devant une juge : « 18 I had an opportunity of observing the demeanour of the witnesses in the box. They who were charged with fraud were more than usually intelligent men and women. They may not perhaps at the trial have been making in many cases deliberate and intentional misstatements of what was distinctly remembered as the fact, but I think that very much more reliance is to be placed upon statements made previously, when, perhaps, the pinch of the case was not appreciated. …" [Soulignement ajouté.]

« Contradictions » au niveau du témoignage, et le comportement

McHugh Estate v. Dooley, [1903] B.C.J. No. 80, 10 B.C.R. 537, un jugement du juge Martin, nous livre ces observations au paragr. 35 :

> 35 … [re] the principal witness for the defence, Mrs. Dooley. Her statements were frequently contradicted, and her demeanour in the witness box was such as to convey an unfavourable impression of her reliability or discretion.

Contre-interrogatoire, et le comportement

Le juge Anglin a écrit les motifs majoritaires de l'arrêt *Brownell c. Brownell*, 1909 CanLII 21, 42 S.C.R. 368 et nous informe notamment de ce qui suit, à la page 373, au sujet du large pouvoir discrétionnaire du premier juge de refuser qu'une question soit posée en contre-interrogatoire : "The character of this discretion, however, is such that its precise limits are not easily defined and in practice its exercise, though undoubtedly reviewable, must be left largely to the sound judgment and wisdom of the presiding judge who, from his observation of the demeanour of the witness and also of the manner of and the conduct of the case by counsel, has means and opportunities of forming a correct opinion as to the importance and real purpose of questions propounded which are not open to an appellate court."

Crédibilité est souvent au cœur des litiges

D'entrée de jeu dans l'arrêt *King c. Burt*, [1904] O.J. No. 582, 3 O.W.R. 400, le juge Falconbridge rappelle aux avocates leur pain quotidien, pour ainsi dire, au sujet des conflits dans le cadre des témoignages : "As to the events of Sunday 8th June, 1902, there are, as among immediate actors, widely divergent accounts, and some contradictions in the narratives of plaintiffs as between one another and as between statements made on examinations for discovery and statements made at the trial." Voir aussi *Oakes c. Stephens*, [1909] O.J. No. 253, 14 O.W.R. 189.

Définition du comportement

R. c. Legros, [1908] O.J. No. 69, 17 O.L.R. 425, 14 C.C.C. 161, nous offre un exemple assez rare d'un juge qui porte à l'attention de la Cour d'appel la question du comportement : "3. Was I justified in taking into consideration the expression and demeanour of the prisoner Legros when giving judgment?" Pour sa part, le juge Osler a écrit, avec la concurrence des juges Moss, Garrow et MacLaren :

> 8 The third question must be read in connection with what the magistrate has said in the case as stated, namely, that his decision was not based altogether on the evidence, but to a greater or less degree upon the expression and demeanour of the witnesses, and especially of the accused Legros, both in the trial for theft and in that for perjury.
>
> 9 While the expression and demeanour, whatever that may exactly mean, of the witnesses and of the accused when testifying at the present trial, were proper to be considered by the magistrate in weighing the evidence, he had no right to import into that trial anything of that kind which occurred at the former trial. His duty was to be guided by the evidence before him and by that alone. The third question, understood in the way I have stated it and as the magistrate evidently intended to be understood, must therefore be answered in the negative. [Soulignement ajouté.]

Quant à lui, le juge Meredith a déposé des motifs minoritaires, dont les commentaires que l'on trouve au paragr. 17 :

> 17 The third question can be answered in one way only, that is in the affirmative. The demeanour of witnesses in giving evidence upon the trial is a very useful means in many cases of reaching a true conclusion as to their credibility…

Donc, les juges de la Cour d'appel étaient unanimes à déclarer ce genre de preuve utile et recevable, la majorité des membres de la formation ayant dit : « … While the expression and demeanour, whatever that may exactly mean…".

De plus, je suis ravi de citer les commentaires du juge en chef Hunter qui suivent, que l'on trouve au paragr. 4 de l'arrêt *R v Scherf*, [1908] BCJ No 22, 8 W.L.R. 219, 13 B.C.R. 407, 13 C.C.C. 382,

> 4 … What does the evidence consist of? Not merely the words that fall from the lips of the witnesses, but their demeanour, the demeanour of the prisoner and, generally speaking, the whole atmosphere of the trial. Suppose the case of a servant accused of murdering her mistress. A Fellow servant testifies to the screams. The judge is busy taking notes and does not catch the note of eagerness on the part of the witness to accentuate every circumstance that may be against the prisoner and gloze over anything that might be in her favour. But suppose the jury does so and, observing the demeanour of the prisoner - especially if there is a view - and knowing that she has had a clear record before this occasion, comes to the conclusion that there must have been sudden and extreme provocation, such as a charge of unchastity, to impel her to commit the act, can anyone say that the jury would be wrong in finding manslaughter; and yet there would not be a shred of evidence in support of such a verdict in the transcript of the proceedings, which alone would be before the Court of Appeal. How, then, is it possible for the Court of Appeal to be possessed of all the evidence either for or against the prisoner? And how, then, is it possible for it to say, with certainty, that the finding of the lesser, as opposed to the major, offence was wrong?

Désinvolte, comportement d'une nature

Gibson v Temps Publication Co, [1904] OJ No 244, 8 O.L.R. 707, contient ces commentaires du juge Anglin :

> 7 … As against Flavien Moffet the statute makes this declaration conclusive evidence: in his favour it is no evidence whatever. His flippant demeanour, his manifest disregard of the seriousness of his oath, and his quibbling evasions in the witness box, in my opinion render his evidence entirely untrustworthy except in regard to matters upon which he testifies adversely to his own interest. There is no other evidence of any dissolution of the partnership between himself and his wife, except that afforded by the declaration last mentioned and the oral testimony of Flavien Moffet... [Soulignement ajouté.]

Détecteur de mensonges, le comportement agi, selon certains, à titre de

Le juge Martin a dit, dans l'arrêt *McKay Bros v Victoria Yukon Trading Co*, [1902] BCJ No 97, 9 B.C.R 37:

> 11 While the substantial effect of the foregoing cases is, in my opinion, that the Appellate Court must not be driven to find that the trial Judge was "very" (which I understand as being, under the circumstances, really equivalent to "grossly") wrong before reversing the trial Judge, yet at the same time, bearing in mind the more recent expressions of the Lord Chancellor in *The Gannet, supra*, as to the "very powerful" reason for not interfering where the Judge had the opportunity of seeing the witnesses and the necessity under such circumstances of taking care to see, as Lord Justice Rigby puts it, that there is "sound ground" for differing from him, I am of the opinion that the Supreme Court exactly and happily expressed the prevailing rule, when it laid it down, supra, that the Appellate Court should not interfere unless satisfied that the trial Judge is "clearly wrong." And it would be most unfortunate, I think, if any other rule were to prevail, because if such findings of fact are to be lightly disturbed it would, I am satisfied, in the great majority of cases lead to injustice, for the reason that, speaking as a trial Judge, it frequently happens that the demeanour of a witness, or some incident occurring during the trial, is the only thing by which the rays of truth are let into dark places and the scale turned between fact and fiction. [Soulignement ajouté.]

L'avocate est invitée à lire le complément de renseignements portant sur ce jugement sous « Norme d'intervention des paliers d'appel de l'année 1900 exprimée par les cours d'appel ».

Documents, constats de faits qui impliquent le comportement, et l'influence de

Le juge Duff, plus tard juge-en-chef du Canada, a écrit ce qui suit au para. 40 de *Voigt v. Groves,* [1906] B.C.J. No. 53, 3 W.L.R. 428, 12 B.C.R. 170 :

> 40 I have come to the conclusion that the defendants have established this case. I do not forget the rule relating to the weight to be attached to the finding of the trial Judge on questions of fact. Where one's view of the intrinsic credibility of individual witnesses is the controlling factor in a case, and where the estimate of such witnesses based upon their demeanour must largely determine the character of that view, an appeal on questions of fact, although given theoretically, is, generally, in practice an appeal in name only. But one cannot refuse to recognize that there is a right of appeal on such questions, and that on an appeal from a judgment after a trial by a Judge sitting alone, the hearing of the appeal is a re-hearing of the cause; and where, giving to the views of the trial Judge as to the credibility of particular witnesses the weight which is justly due to them, one finds that one cannot reconcile his decision with the inferences one draws from admitted facts, from facts proved by credible witnesses, by documents, from circumstances which are common ground, then I think that generally one should not regard oneself as bound by his conclusions: see *Coghlan v. Cumberland* (1898), 1 Ch. 704; *Hood v. Eden* (1905), 36 S.C.R. 476 at p. 483; *Rickmann v. Thierry* (1896), 14 R.P.C. 105, and *Grahame v. Youlton* (1906), 22 T.L.R. 380. [Soulignement ajouté.]

Voir aussi *Boyle v Rothschild*, [1907] OJ No 647, 10 O.W.R. 696 au paragr. 7 : "… My conclusions, based as they are upon the conduct and demeanour of the witnesses in the box, would be strengthened, if they needed strengthening (which they do not) …" Il s'agit de renvois à l'des documents.

Le juge Riddell a commenté dans l'arrêt *Bishop v. Bishop*, [1907] O.J. No. 499, 10 O.W.R. 177: "4 It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the Impression made on the Judge who saw the witnesses." De plus, *Dart v Quaid*, [1907] OJ No 376 illustre bien l'importance des documents et du comportement :

> 11 Upon the second finding, namely, that, if ignorant of its nature and contents, defendants were grossly negligent in affixing their signatures to the note, the case is precisely the same. This finding depends upon the following undisputed facts: (a) that defendants are intelligent men, able to read and write, and with a fair knowledge of business; (b) that the note in question is a plain, legible document, comprising words few in number and unmistakable in meaning, owing to their directness and simplicity; (c) that there was no such relation of confidence or trust between defendants and Watterworth as would afford any pretence of justification for their reliance upon any statement of his as to the nature or contents of such a document to which they were asked to affix their signatures. These facts were established by the evidence and the demeanour of defendants at the trial and by the internal evidence afforded by the note itself when produced.

McCabe c. National Mfg. Co., [1910] O.J. No. 629, 15 O.W.R. 662, a vu le juge Riddell consigner les remarques qui suivent :

> 7 The conduct and demeanour of the witnesses were all that could be desired; each is a man of more than average intelligence and both seemed to me to be anxious to tell the exact truth irrespectively of the effect upon the case. And yet in many points their evidence was diametrically opposite; and their statements wholly irreconcilable. I could not at the trial see any reason for believing one more than the other; and reserved judgment that I might see if any light could be shed upon the vexed questions by the somewhat numerous documents produced.

Il faut aussi commenter que les litiges qui sont sans documents, dans la plupart des cas, notamment au niveau des controverses d'ordre familial, au contraire du monde des affaires avec ses paperasses, sont souvent ceux où le comportement jouait un très grand rôle durant l'époque sous étude. À ce titre, le juge Britton a présidé au procès *Lofthouse c. Lofthouse*, [1908] O.J. No. 25, 12 O.W.R. 140 et a écrit au paragr. 13 : "I am now to determine the plaintiff's right to a separation and to alimony as matters stood on 4th June, 1904. This depends mainly upon the evidence of the plaintiff, but I accept her evidence as against that of the defendant. The demeanour of the plaintiff was that of a truthful woman. I find that what she says happened did happen…" Aucun constat de fait n'est relié à un document ou autre preuve objective.

Cela étant, il sied de faire référence à un dossier commercial. Le juge Martin a dit dans l'arrêt Cairns v British Columbia Salvage Co, [1907] BCJ No 17: « 17 I confess I find it somewhat

difficult in the circumstances of this case to satisfy myself on the point of desertion on which the appeal depends. It is, however, a question of fact which the learned County judge has determined on conflicting evidence in favour of the plaintiff, and I cannot bring myself to say he reached an erroneous conclusion. In determining the intention of the plaintiff his demeanour in the witness box would, in this case particularly, be of assistance to the judge." [Soulignement ajouté.] Donc, aucun document précis a fait pencher la balance, semble-t-il.

Éléments multiples de l'appréciation du témoignage, dont le comportement

Le jugement du juge Rouleau, de la Cour suprême des Territoires du Nord-Ouest en date du 18 juin 1900, et intitulé *R. c. Mellon*, [1900] N.W.T.J. No. 2, 7 C.C.C. 179, nous offre ce passage que j'ai honte à reproduire :

> 3 Charles Pepin himself was examined before me, and he swore that he never dressed like an Indian; that he had worked for one Donald McLeod freighting between Calgary and Edmonton for two summers; that he never wore moccasins; that he was driving a pair of horses and selling posts the day he got the liquor. In fact, Pepin speaks English fluently and dresses better than many ordinary white men; there is no indication whatsoever in his appearance, in his language, or in his general demeanour, that he does not belong to the better class of half-breeds. (*sic*) It is a fact, though, that he "took treaty" about fifteen years ago, and, according to *Regina v. Houson*, 1 Terr. L.R. 492, 1 N.W.T. Rep. 44, a half-breed having taken treaty is an Indian within the meaning of the Indian Act.

Pour nos fins, il suffit de relever que le juge Rouleau a fait mention de deux éléments, c'est-à-dire « appearance … language », afin de conclure que l'on pourrait se tromper quant à ses origines. Pour l'avocate qui s'évertue à contrer une preuve de comportement apparemment favorable, il serait sage de souligner, autant que faire se peut, que le langage du témoin et son apparence lors de sa déposition n'étaient pas de nature à lui gagner la confiance de la juge.

Voir aussi le sous-titre « Conduite du témoin, et son comportement, doivent être évalué par la juge des faits, tout comme d'autres éléments dont le contenu du témoignage », et le renvoi à l'arrêt *The Schooner Reliance v. Conwell* (1901) 31 SCR 653, 1901 CanLII 6 et les commentaires du juge-en-chef Moss dans l'arrêt *Attorney-General for Ontario v Hargrave*, [1907] OJ No 543, 10 O.W.R. 319 discuté *in «* Intelligence du témoin, élément « parent » de l'examen du comportement. »

Embarras du témoin, comportement et

McHugh Estate v. Dooley, [1903] B.C.J. No. 80, 10 B.C.R. 537, un jugement du juge Martin, nous livre ces observations au paragr. 7 :

> 7 **…** because it was quite apparent from his demeanour in the witness box that he was not a little embarrassed by the existence of that certificate, moreover that it had, quite unconsciously doubtless, a considerable effect upon his evidence, as indeed would be expected to be the case. So far as the performance of my duties is concerned, sitting as a jury, the result is that I feel unable to give that full effect to the statements of this witness which under other circumstances I should feel justified in doing so …

Ensemble du témoignage, le comportement doit être évalué en ayant en vue

Martin v. Martin, [1904] O.J. No. 200, 8 O.L.R. 462, contient ces observations :

> 9 … There is no use wasting harsh criticism on the evidence of this unfortunate man Joseph, a man who was distinctly under the influence of liquor when he was giving his evidence, and who presented an altogether lamentable spectacle, a man who evidently is not merely temporarily under the influence of liquor, but who has reduced his mental and moral attitude to a very lamentable condition by the habitual use of intoxicants; so that I attach no great credence to anything he said before me. Dosithée is a sober man apparently, sober here at any rate, but still I do not regard his evidence, from his demeanour and from the circumstances attending the case, from his manifest animus and from his clear interest in the proceedings, as entitled to any great credit either. … [Soulignement ajouté.]

Examen du témoin par une juge ou autre auxiliaire de la magistrature, et l'impact quant au comportement

L'avocate pourrait profiter de ce renvoi à l'arrêt *Connolly v. Connor*, [1906] O.J. No. 61, 12 O.L.R. 304, ou le juge Anglin fait l'examen du rôle du comportement dans le contexte d'une procédure impliquant un protonotaire qui va interroger elle-même le témoin. Ainsi :

> 10 But, in the present instance, the Master has apparently deemed it very desirable that the evidence of the defendant should be taken before himself rather than before a commissioner to be appointed by him. If it were certain that the defendant would appear as a witness before the Master at a later stage of the reference it might not be so important that the Master should himself take the examination now proposed. But if, as is quite possible, the defendant will not give any evidence upon the pending reference except such as he may give upon the examination now in contemplation, it may be of the greatest moment that the Master should have the advantage of observing his demeanour as a witness and of controlling the conduct of his examination. The Master has already taken the evidence of one of the plaintiffs, who, although non-resident, attended pursuant to the Master's direction at Ottawa for that purpose… [Soulignement ajouté.]

Crosby v Canada, 11 ExCR 74, un jugement de l'hon. Burbridge, contient des observations qui sont utiles dans le contexte d'une juge qui n'a pas vu les témoins : « 7 … If he is mistaken Crompton may on the 9th, 10th or 11th of May, have delivered ex-warehouse for shipment to St. John the identical packages that had been received into warehouse from the Armstrongs on the 5th or 6th of May. But if Johnston is right Crompton must be mistaken. Neither witness was examined before me. The evidence of both was taken in June, 1905, under the commission issued at issued at the instance of the respondent. I had of course no opportunity of observing the demeanour of either witness..." Voir aussi le paragr. 19 de *Livingston v Livingston*, [1906] OJ No 557.

Expression du témoin, et le comportement

R. c. Legros, [1908] O.J. No. 69, 17 O.L.R. 425, 14 C.C.C. 161, nous offre un exemple assez rare d'un juge qui porte à l'attention de la Cour d'appel la question du comportement: "3. Was I

justified in taking into consideration the expression and demeanour of the prisoner Legros when giving judgment?" Pour sa part, le juge Osler a écrit, avec la concurrence des juges Moss, Garrow et MacLaren :

> 8 The third question must be read in connection with what the magistrate has said in the case as stated, namely, that his decision was not based altogether on the evidence, but to a greater or less degree upon the expression and demeanour of the witnesses, and especially of the accused Legros, both in the trial for theft and in that for perjury.
>
> 9 While the expression and demeanour, whatever that may exactly mean, of the witnesses and of the accused when testifying at the present trial, were proper to be considered by the magistrate in weighing the evidence, he had no right to import into that trial anything of that kind which occurred at the former trial. His duty was to be guided by the evidence before him and by that alone. The third question, understood in the way I have stated it and as the magistrate evidently intended to be understood, must therefore be answered in the negative. [Soulignement ajouté.]

Quant à lui, le juge Meredith a déposé des motifs minoritaires, dont les commentaires que l'on trouve au paragr. 17 :

> 17 The third question can be answered in one way only, that is in the affirmative. The demeanour of witnesses in giving evidence upon the trial is a very useful means in many cases of reaching a true conclusion as to their credibility…

Évasion au niveau du témoignage, et le comportement

Revoir « Désinvolte, comportement d'une nature », et l'arrêt *Gibson v Temps Publication Co*, [1904] OJ No 244, 8 O.L.R. 707.

Expertise objective mise en relief avec le comportement subjectif

La personne qui a rédigé l'entête du jugement *Robinson c Toronto Railway Co*, [1901] OJ No 160, 2 O.L.R. 18, nous informe de ce qui suit : « Held, that in a case … depending upon the weight to be given to scientific and expert testimony and not upon the questions of credibility and demeanour, such a verdict could not stand…" De fait, deux témoins pour la partie demanderesse ont déclaré que la compagnie de chemin de fer avait preuve de négligence, alors que onze témoins pour l'autre partie, qui comptait beaucoup plus d'expérience et de formation scientifique, ont dit le contraire. Je crois que ce jugement illustre bien que le comportement favorable de témoins experts ne fût pas suffisant pour justifier la décision du jury. En l'espèce, la preuve subjective qu'est le comportement ne pouvait pas suffire à contrecarrer la preuve objective des onze experts.

De plus, *Sheppard Publishing Co. v. Press Publishing Co.*, [1905] O.J. No. 52, 10 O.L.R. 243, contient ces remarques:

> 40 In *Jackson v. The Grand Trunk Railway Company*, (1901) 2 O.L.R. 689, where two witnesses,-men without practical experience,-testified that in their opinion the engine was

> defective constructively, while eleven witnesses called by the defendants,-all men of practical experience,- testified that the engine was constructed in accordance with the best prevailing practices, the jury having answered the questions in favour of the plaintiff, judgment was entered accordingly. The Court of Appeal held that in a case of that kind, depending upon the weight to be given to scientific and expert testimony and not upon questions of credibility and demeanour such a verdict could not stand and it was set aside and the action dismissed, Armour C.J.O., dissenting. This decision was affirmed in the Supreme Court, (1902) 32 SCR 24, Armour C.J.O., in dissenting, said: "I do not think we should take the extreme course of ignoring the finding of the jury, of depriving the plaintiff of his right to a trial of the case by a jury, and of taking the case into our own hands and dismissing the action," p. 703.

Explications, des témoins, en sus de leur comportement

Les juges Taschereau, Sedgewick et Girouard ont appuyé les motifs du juge Davies dans l'arrêt *Davidson v. Georgian Bay Navigation Co. And The Shenandoah and the Crete* (1902) 33 SCR 1, 1902 CanLII 70, notamment l'extrait suivant, à la page 9:

> Whatever conclusion I might have reached had 1 been determining this question in the first instance, I do not, under all the circumstances, feel justified in reversing the finding of fact which the learned trial judge has reached as to the proper navigation of the "Carmona." He had not only the advantage of hearing the witnesses and noting their demeanour, but, in a case where so much depends upon relative distances, the further great advantage, which we are denied, of having very many of their important statements explained and illustrated by the witnesses on the maps and charts of the river. Much of the evidence, without this advantage, is difficult to understand. [Soulignement ajoute.]

Faits établis, et constats de crédibilité qui impliquent le comportement

Voir le sous-titre « Documents, constats de faits qui impliquent le comportement, et l'influence de » et le renvoi à l'arrêt *Voigt v. Groves*, [1906] B.C.J. No. 53, 3 W.L.R. 428, 12 B.C.R. 170**.**

Fiabilité au niveau du témoignage, et le comportement

Voir *McHugh Estate v. Dooley*, [1903] B.C.J. No. 80, 10 B.C.R. 537, discuté *in* « 'Contradictions' au niveau du témoignage, et le comportement. »

Force de convaincre du témoignage, et le comportement

Le juge Falconbridge a déclaré au paragr. 4 de l'arrêt *Merchants Bank v. Grimshaw*, [1903] O.J. No. 575, 2 O.W.R. 729: "… I accept the evidence of Mr. Heggie as to what took place on the nights of the 2nd and 3rd October, his account of the conversations being preferable both on account of the demeanour of the witnesses and the cogency of the circumstances…"

Franchise du témoin, et le comportement

Empey v Fick, [1907] OJ No 88, contient ces commentaires:

> 8 The trial Judge in this case interfered, with reluctance, upon the ground that sufficient evidence was not given to support the transaction. He gives credit to the testimony of the daughters benefitted, and speaks of their demeanour in the witness box as "frank and fair," but regrets that he feels compelled to set aside the conveyance…

Honnêteté du témoin, élément « parent » de l'examen du comportement

Voir les commentaires du juge-en-chef Moss dans l'arrêt *Attorney-General for Ontario v Hargrave*, [1907] OJ No 543, 10 O.W.R. 319 discuté *in «* Intelligence du témoin, élément « parent » de l'examen du comportement. »

Intelligence du témoin, élément « parent » de l'examen du comportement

Le juge-en-chef Moss a écrit ce qui suit dans le cadre de l'arrêt *Attorney-General for Ontario v Hargrave*, [1907] OJ No 543, 10 O.W.R. 319 :

> 6 The questions in issue are almost, if not wholly, matters of fact, to be determined upon the evidence, documentary and oral, forming the record on the appeal. In dealing with it, however, <u>we are not to overlook, upon any question of credibility, the advantage which the Chancellor possessed in having seen the witnesses, observed their demeanour, and formed an impression as to their intelligence, truthfulness, and honesty</u>. And further, it is to be borne in mind that the conclusions of the trial Judge, upon questions of fact, are not to be overturned unless, upon full consideration of the facts and circumstances, and the fair inferences to be derived therefrom, it is manifest that a wrong conclusion has been reached. [Soulignement ajouté.]

Interprète, comportement et

R. c. Walker, [1910] B.C.J. No. 18, 13 W.L.R. 47, 15 B.C.R. 100, 16 C.C.C. 77, nous offre un exemple de la question du comportement de l'interprète.

Jury, directives, quant au comportement

White c. Victoria Lumber and Manufacturing Co., [1909] B.C.J. No. 55, 11 C.R.C. 473, 14 B.C.R. 367, contient cet extrait des directives au jury:

> 6 … There is a good deal of evidence about that. It is not for me, as I have said before, to indicate to you what I think the fact actually was. I, perhaps, may say, perhaps should say, that you are entitled, and you only are entitled, <u>to take into account not merely the words that fell from the lips of a witness, but his demeanour, his conduct in the box.</u> I need not enlarge upon that, you simply have to use your best judgment as reasonable men as to the truth of the story the witnesses tell, and you must do the best you can in coming to a conclusion as to which side the truth is on. [Soulignement ajouté.]

Au demeurant, il sied de citer *Longdon [Longden] v Bilsky*, [1910] OJ No 3, qui nous enseigne ce qui suit:

> 41 *Davis v. Hardy* (1827), 6 B. & C. 225, determines the precise question unless it can be said to be inconsistent with the later cases. Upon the trial the defendant called a witness, and, his evidence shewing reasonable cause for the prosecution, the trial Judge, who had previously refused to nonsuit, withdrew the case from the jury and dismissed the action. Counsel for the plaintiff obtained a rule, and in support of it contended: "The facts sworn to by the witnesses on one side are not to be taken as proved against the other side. The jury are to decide whether they are proved or not. ... The jury are to ascertain the facts ... The Judge entirely withdrew the case from the consideration of the jury, and took upon himself to decide the fact, whereby the plaintiff's counsel was deprived of the opportunity of remarking on the demeanour of the witness and the consistency of his evidence." Abbott, C.J., says: "Where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a Judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly." Bayley, J., says: "If there is nothing in the demeanour of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon. If this case had been submitted to a jury, and they had disbelieved this witness, I think we should have been bound to send the case down to a new trial."
>
> 42 This, in effect, is the same principle as that laid down in *Ryder v. Wombwell* (1868), L.R. 4 Ex. 32, which has the sanction of the Privy Council in *Giblin v. McMullen* (1868), L.R. 2 P.C. 317, and *Hiddle v. National Fire and Marine Insurance Co. of New Zealand*, [1896] A.C. 372.

Jury, pouvoirs de constater les faits, en se fiant au comportement

R c Jenkins, [1908] BCJ No 52, contient les enseignements qui suivent à ce sujet :

> 8 In *The Queen v. Brewster* (1896), 4 C.C.C. 34, where the trial judge was dissatisfied with the verdict and thought that the defendant ought to have been acquitted, the Supreme Court of the North-West Territories refused a new trial, Wetmore, J., at pp. 39-40, making the following statement of the views of that Court:
>
> > "I am free to confess that looking at the evidence as it appears on paper, I think if I had been trying the case without the intervention of a jury I would have acquitted the defendant. I have not, however, had the opportunity of observing the demeanour of the witnesses; the jury have, and they are, when there is a jury, the constituted judges of the facts. It has been urged that when an appeal has been brought on the ground that the verdict is against the weight of evidence, the Court will as a matter of course order a new trial if the judge expresses himself dissatisfied with the verdict. That, however, is not the law as established by the later authorities. The law as so laid down is, that in deciding whether there should be a new trial the question is whether the verdict is one that the jury as reasonable men would properly find. *Solomon v. Bitton* (1881), 8

> Q.B.D. 176; *Webster v. Friedeberg* (1886), 17 Q.B.D. 736; and see *Metropolitan Railway Co. v. Wright* (1886), 11 App. Cas. 152; *Commissioner for Railways v. Brown* (1887), 13 App. Cas. 133, and *Phillips v. Martin* (1890), 16 App. Cas. 193. No doubt in deciding the question as to the reasonableness of the verdict the opinion of the trial judge is entitled to and ought to receive great weight. But it is not conclusive."

Langage du témoin – élément de l'appréciation du témoignage, de même que le comportement

Voir le jugement du juge Rouleau, *R. c. Mellon*, [1900] N.W.T.J. No. 2, 7 C.C.C. 179, discuté dans le cadre du sous-titre « Apparence du témoin – élément de l'appréciation du témoignage, de même que le comportement. »

Mains, et le comportement

D. c. D., [1910] OJ No 590, nous offre un commentaire quant aux mains d'un témoin, ce qui est assez rare dans le contexte du comportement :

> 5 Both the mother and Ethel M., as well as the parties to this action, appeared before me in the witness box and I gave the most careful attention to their demeanour. Although at time of trial the widow was 74 years of age, she appeared to be in the enjoyment of robust health. Physically she appeared to be an unusually strong woman, and her hands - which she exhibited to the Court with some pride - gave convincing evidence that they had done years of hard work. She spoke in a loud, forceful, almost masculine voice, and impressed me as a woman of tyrannical disposition - harsh, self-willed, and tactless.

Manière de témoigner, et le comportement

Les motifs du juge Boyd, pour la Cour, dans l'arrêt *H. W. Kastor & Sons Advertising Co. v. Coleman*, [1905] O.J. No. 35, 11 O.L.R. 262, enseignent aux avocates ce qui suit quant à la question de la « manière de témoigner » :

> 18 But, turning to the evidence, it is open for us, under the rule laid down in *Coghlan v. Cumberland*, [1898] 1 Ch. 704, to deal with all the facts as on a rehearing of the case. It is. there said: "<u>It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions</u>; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." [Soulignement ajouté.]

Mémoire du témoin – est-ce vraiment du ressort du comportement?

La question du bien-fondé du refus du témoin de répondre à toutes les questions de la partie adverse est discutée sous le titre « Refus de répondre à des questions – est-ce vraiment du ressort du comportement? » en relation à l'arrêt Stevenson v Cameron, [1907] OJ No 569, 10 O.W.R. 432, sous la signature du juge Anglin. Ce savant juge a aussi discuté de la mémoire comme faisant partie de l'examen du comportement ainsi :

> 19 While Mrs. Stevenson's demeanour on cross-examination was not always entirely satisfactory - yielding apparently to a spirit of obstinacy, she sometimes declined to answer counsel for the defendants explicitly, and once or twice said she did not remember matters upon which she answered quite promptly when questioned by Mr. Keefer, - on the whole I was favourably impressed with her testimony and found nothing which would justify a conclusion against her veracity. Her daughter appeared to be a modest young girl, very nervous, but desirous of telling the truth to the best of her ability. [Soulignement ajouté.]

J'inviterais l'avocate à plaider aujourd'hui que le refus de répondre à certaines questions n'est pas un élément du comportement que les cours d'appel ne peuvent évaluer à juste titre, car, contrairement à l'époque du juge Anglin, la transcription et l'enregistrement audio de l'audience laissent voir que le témoin ne voulait pas aider la partie adverse en invoquant une piètre mémoire, à des fins partisanes.

Nature humaine, personne qui ne garde pas le secret quant à ses affaires commerciales, et le comportement

Les motifs du juge Boyd dans l'arrêt *Alexandra Oil and Development Co. c. Cook*, [1909] O.J. No. 578, 13 O.W.R. 405, nous relatent ce qui suit :

> 15 From the beginning of 1905 the farmer was transformed into the speculator; the one business on which Cook' thoughts revolved and to which his energies were directed was this great oil "proposition." He acted with unwonted generosity to his wife, and long before she had expended the money received from him in clearing the farm and paying the urgent debts of her husband, she must have been fully aware of what was going on and the risks which were being run. The husband, to judge by his demeanour in the box, is not a secretive man, and the knowledge of his plans and movements may be readily imputed to his wife, if that was necessary to the plaintiffs' success in this action. Cook interviewed the different syndicates in the spring of 1905, and had them gathered in a general meeting on the last day of August, 1905, in order to form a company. [Soulignement ajouté.]

Norme d'intervention des paliers d'appel des années 1900-1910 exprimée par la Cour suprême du Canada – l'intervention est non indiquée dans le cas de témoins

D’emblée, citons le juge en chef Wagner aux paragr. 36 et 37 de son jugement majoritaire dans l’affaire *R. c. Lacasse*, [2015] 3 R.C.S. 1089 :

A. *Norme d'intervention en appel d'une sentence*

> 36 En général, les cours d'appel jouent un double rôle en matière de contrôle de la cohérence, de la stabilité et de la pérennité de la jurisprudence tant en droit criminel qu'en droit civil. D'une part, elles font office de rempart contre les erreurs commises par les tribunaux de première instance. Elles sont ainsi appelées à rectifier les erreurs de droit et à contrôler la raisonnabilité de l'exercice du pouvoir discrétionnaire. Il leur revient de veiller à ce que les tribunaux de première instance énoncent correctement le droit et l'appliquent uniformément.
>
> 37 D'autre part, les cours d'appel doivent voir au développement cohérent du droit, tout en énonçant des lignes directrices propres à en assurer une application homogène à l'intérieur d'un même territoire. Elles sont donc appelées à clarifier le droit lorsque la chose est nécessaire ou en cas de décisions contradictoires : T. Desjardins, *L'appel en droit criminel et pénal* (2e éd. 2012), p. 1. …

Cet aperçu du rôle contemporain que doit exercer une cour d’appel sert d’entrée en matière en rapport au jugement de l’hon. juge Girouard qui s’est exprimé ainsi aux pages 17 et 18 de l’affaire *Granby (Village) c Ménard*, [1900] SCJ No 56, 31 R.C.S, 14, 1900 CanLII 74 :

> It is admitted that the evidence is contradictory, four or five witnesses, principally co-workmen of Coté, testifying one way, and as many, chiefly the officers in charge and expects, flatly contradicting them. The trial was held before a judge without a jury, the parties not having exercised the option both had for a trial by jury. The learned judge saw and heard all the witnesses. True, he throws no suspicion, in words, upon the character or credibility of either of them in particular; in fact he makes no remark upon their competency, manner or demeanour, although his formal judgment is accompanied by a full and elaborate opinion. He finally comes to the conclusion that the witnesses for the defendant must be believed rather than those for the plaintiff and dismissed the latter's action with costs

Le savant juge a poursuivi en mettant en épingle le passage qui suit, afin d’expliquer aux procureurs la raison pour laquelle il était incapable de suivre les enseignements contenus dans la jurisprudence citée par les parties [pages 20-21:

> The present case, however, differs from any of the cases above quoted, and I believe we never before had occasion to adjudicate upon a similar one. The two appellate courts proceeded as if they had to deal with an ordinary *enquête* case, <u>where the witnesses are not seen by the trial judge, and where the judges in appeal are in just as good a position as he was to weigh the evidence of record and arrive at a conclusion</u>. Here the trial judge alone saw and heard the witnesses; he tells us, both in his formal judgment and in his notes, that the witnesses for the appellant are to be believed, and gives judgment accordingly, entirely ignoring the witnesses against the appellant, evidently because, in his own opinion at least, they were unsatisfactory either from interest, prejudice,

> incompetence, ignorance, or other cause, not specified, but nevertheless clearly implied from the judgment he pronounces. The learned judge names the witnesses upon whom he relies. It is not pretended that the evidence is clearly against his findings. Both parties before this court, as well as the appellate courts, treated it as contradictory, and all proceeded to discuss it *pro* and *con.* We think that the judgment of the first court ought to prevail. The Court of Review should not under the circumstances of the case, have interfered with it, and the judgment of the Court of Appeal refusing to restore it is clearly erroneous. See *Cook* v. *Patterson,* 10 Ont. App. R. 645. [J'ai souligné.]

Le juge Girouard a aussi écrit, aux pages 22-23 :

> In *Jones* v. *Hough,* in 1879 5 Ex. D. 115, quoted with approbation by our learned Chief Justice in *Phonic Insurance Co* v *McGhee,* 18 Can. S.C.R. 61, Lord Bramwell said :
>
> > A great difference exists between a finding by a judge and a finding by a jury. Where the jury find the facts, the court cannot be substituted for them because the parties have agreed that the facts shall be decided by a jury; <u>but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like</u>. [Soulignement ajouté.]
>
> But Lord Cotton added:
>
> > Of course I need not say in all questions of fact, especially where there has been *vivâ voce* evidence before the judge in the court below, the Court of Appeal ought to be most unwilling to interfere with the conclusion <u>which the judge has arrived at when he has had the opportunity, which the court have not, of seeing the witnesses, and judging of their demeanour</u>. [Soulignement ajouté.]

L'avocate devrait aussi tenir compte des enseignements qui suivent, tirés du jugement de l'hon. Girouard, à la page 23 en premier et par la suite à la page 24 :

> In *Colonial Securities Trust Co.*v. *Massey,* [1896] 1 Q.B. 38, which was an appeal from the judgment of a trial judge sitting without a jury, it was admitted that there was a con flit of evidence? Lord Esher M. R., speaking for the court, said:
>
> > … The Court of Appeal in Chancery acted upon this rule, that they would not allow an appeal unless they were satisfied that the judge was wrong. If they were in doubt at the end of the argument whether the judge was right or wrong, since the burden of proof was on the appellant and he had not satisfied them that the judge was wrong, they dismissed the appeal That is the rule of conduct which we ought now to apply in this court. <u>The judge in the court below may have heard witnesses; and if so the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit</u>. Where witnesses are not examined before the judge but the case is determined on evidence taken on affidavit or examination not before

> the judge, or partly on one and partly on the other the Court of Appeal is not hampered by the consideration that the judge in the court below has seen the witnesses, whilst the Court of Appeal has not, and the rule of conduct would not apply so strongly but still this court would not reverse the judgment and give a different one, unless satisfied that the judge was wrong. [Soulignement ajouté.]

In a still more recent case *Coghlan v. Cumberland*, [1898] 1 Ch. 704, Lord Lindley said:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not ; and there circumstances may warrant the court in differing from the judge even on a question of fact turning on the credibility of witnesses whom the court has not seen. [Soulignement ajouté.]

Le juge Davies a consigné les remarques qui suivent, aux pages 686-687 du pourvoi *The King v. The Kitty D*, 1904 Can LII 73, 34 SCR 673 : ”I have thought it desirable to call attention to what I conceive to be cardinal errors in the trial judge's assumption of the facts in order to shew that his conclusions were not based upon any questions arising out of the demeanour or credibility of witnesses, matters which would be peculiarly within his province and with a decision upon which an appeal court would not interfere.”

Poursuivant notre examen de façon chronologique, je note que l’arrêt *Syndicat Lyonnais du Klondyke v. Barrett*, [1905] S.C.J. No. 41, contient les commentaires qui suivent, de la plume du juge Idington : “The learned trial judge sat in appeal and after hearing full argument and the judgments of his brother judges he reiterates the view already expressed, and as it is peculiarly a case in which the local conditions of mining and certainly demeanour in the box plays such an important part I cannot feel that it is right for an appellate court to come to a conclusion that the trial judge was clearly wrong in his findings of fact…”

À ce stade, il sied de relever un jugement du même juriste, une fois qu’il a pris le serment d’un membre de la Cour suprême du Canada, à ce sujet, à la page 164 de *Dodge c. Canada*, [1906] S.C.J. No. 63, 38 S.C.R. 149 :

> The respondent undertook to establish as a fact that the land in question was in situation and in character of the soil itself suitable to be utilized for fruit growing in a highly profitable degree; and that it was owing to ignorance of its character on the part of its owners that it had recently been sold to him at prices much below its real value. The learned judge of the Exchequer Court has taken the view that this case is substantially made out, and, although (the learned judge not having in this case had an opportunity to observe the demeanour of the witnesses) we are not in a position less advantageous than his, as regards the appreciation of the evidence, we would not, even in such circumstances, disturb such a finding, except upon coming to a clear opinion that it cannot be supported. There is, however, an appeal to this court on questions of fact as well as on questions of law, and having come to such an opinion it is our duty to give effect to it. For the reasons given by my brother Idington, I agree that the learned judge's finding ought to be reversed and the amount of compensation reduced to the sum offered by the Government valuator. [Soulignement ajouté.]

Au demeurant, voir *The Ship "Wandrian" v. Hatfield* (1907) 38 SCR 431, 1907 CanLII 98, aux pages 438-439.

Norme d'intervention des paliers d'appel des années 1900-1910 exprimée par les cours d'appel

Belcher c. McDonald, [1902] Y.J. No. 4, 9 B.C.R. 377, un jugement de la Cour suprême de la Colombie-Britannique, siégeant en banc, inclus les commentaires suivants du juge Drake qui a déclaré au paragr. 44:

> 44 I cannot part with this case without referring to the oft-repeated view of eminent Judges that the demeanour of witnesses and the opportunity which the trial Judge has of forming an opinion on the evidence given before him, is a most valuable factor in arriving at the true merits of disputed facts, and where, as in this case, the facts are disputed, and no explanation is offered by the plaintiffs of certain important matters which one would suppose to be within their cognizance, the opinion formed by the learned Judge should not be lightly disregarded. As far as I am able to judge of the merits of the case, I think the judgment of Mr. Justice Dugas was eminently right.

Plus tôt, au paragr. 19, le juge Martin a dit :

> 19 Then as to the merits. First, I must remark that one cannot read through the evidence without feeling that we have not had, as the learned Judge has had, the advantage of observing the demeanour of the witnesses (excepting that of the defendant) which in a case of this kind must be of great assistance in coming to judgment, and while in saying this I am not unmindful of the remark of Lord Halsbury, that we are not to be overwhelmed by the thought that we have not seen the witnesses, yet it cannot be denied that, to use the phrase of Coleridge, J., we have now before us only the dead body of the evidence, without its spirit. [Soulignement ajouté.]

McKay Bros v Victoria Yukon Trading Co, [1902] BCJ No 97, 9 B.C.R 37, une décision de la Cour suprême de la Colombie-Britannique, nous livre ces observations pertinentes du juge Martin :

> 5 It being in the first place contended by the appellants that the findings of the learned trial Judge on the question of fact should be reversed, it is desirable to ascertain how far this Court should go in that direction.
>
> 6 The point was lately considered by the Supreme Court of Canada in the case of *The Village of Granby v. Menard* (1900), 31 S.C.R. 14, wherein the five Judges who sat therein decided unanimously that where the trial Judge has, as Mr. Justice Gwynne says at p. 16, "heard all the witnesses give their evidence before him, ... no Judge sitting in review of, or in appeal from that judgment, upon matters of fact, ought to reverse that judgment, unless it is shewn to be clearly wrong upon the evidence so taken." This expresses the essence, as I understand it, of the result of the inquiry by Mr. Justice Girouard, who delivered the judgment of the Court, into the leading cases on the subject. At p. 21, after stating that in the case then under discussion, the "trial Judge alone saw and heard the witnesses," the learned Judge proceeds to say that it not being contended that the "evidence was clearly against his findings" the Appellate Court should not disturb them. But he intimates (pp. 20-1) that "where the witnesses are not seen by the trial Judge ... the Judges in appeal are in just as good a position as he was to weigh the evidence of record and arrive at a conclusion." And he states that, "so far, the Courts of England and of this country have not given to the findings of a trial Judge the effect of a verdict by a jury, because, it is argued, the latter is the result of a supposed agreement between the parties that the facts shall be tried by a jury," adding that he fails to appreciate the force of such reasoning, and that "probably we have not heard the last word from the English Courts."

L’avocate profitera à ce stade à examiner les autres commentaires au moyen desquels le juge Martin revoit l’évolution de la jurisprudence à cette époque, et notamment le fait qu’il met en exergue des jugements qui n’ont pas été portés à l’attention de la Cour suprême du Canada :

> 7 So far as I am able to discover, the "last word" of the House of Lords on the point in question is the proposition laid down by the Lord Chancellor in the same year in the case of *The Gannet v. The Algoa* (1900), A.C. 234 (not cited to the Supreme Court) at p. 239, wherein he says in delivering the unanimous judgment of the six Judges constituting the Court: "My Lords, the point as to having seen the witnesses and having had an opportunity of judging whether they were speaking the truth or not is generally a very powerful one," and then proceeds to give his reasons why he could not regard the case at bar as one "in which I am to be overwhelmed by the opinion of the learned Judge who heard and saw the witnesses."
>
> 8 The last utterance of the Court of Appeal on the point is, I think, to be found in the very recent case of the *London General Omnibus Co., Ltd. v. Lavell* (1901), 1 Ch. 135, wherein Lord Justice Rigby states that before reversing the finding of a Judge on a matter of fact "we must take great care to see that there is sound ground for our differing from him."

J’ajoute que les observations suivantes vaillent aussi la peine d’être reproduites, compte tenu des commentaires portant sur les « exceptions » à la règle :

9 It was argued by the appellant's counsel that the rule as laid down by the Supreme Court is not in harmony with the English decisions, and considerable reliance is placed on the case of *Rickmann v. Thierry*, decided by the House of Lords in December, 1896, and reported in 14 Rep. Pat. Cas. 105. This case also was not cited in *The Village of Granby v. Menard*, and only a note of it was before us at the argument. Since then I have obtained copies of the judgment bearing on the point and find that the Lord Chancellor, after pointing out that appeal is a rehearing, and that he thinks there should not be any presumption in favour of the Judge of first instance being right, proceeds, in reality, to recognize two exceptions, as I think they should properly be termed, as follows: [Soulignement ajouté.]

> "That one's mind may be, and ought to be, affected so as to lead one to distrust one's own judgment, if the appeal is from a very able or learned Judge, for whose judgment one may have a great respect is true; and, again, if the Judge of first instance has had an opportunity of hearing the witnesses, and testing their credit by their demeanour under examination and the like, which the appellate tribunal does not possess, I can quite understand that, under those circumstances, great weight should be attached to the finding of fact at which the learned Judge of first instance has arrived. And it may also be that where a jury has found a fact, it is not a re-hearing of such a fact, because the constitution has placed in the hands of the jury, and not in the hands of the Court, the jurisdiction to find the fact, and in such a case the Court can only disturb the verdict where, in their judgment, the jury have not done their duty; short of that, the Court is bound to accept the finding of the jury, though they may think they would have found a different verdict."

10 And finally the Lord Chancellor says:

> "For these reasons, I have thought it right to protest against the notion that when a Judge of first instance has decided a question he has done something which is binding on the Court of Appeal, and that unless they think it very wrong, according to the language of the learned Judges, they must acquiesce in his judgment."

Fort de ces enseignements, le juge Martin poursuit ainsi:

11 While the substantial effect of the foregoing cases is, in my opinion, that the Appellate Court must not be driven to find that the trial Judge was "very" (which I understand as being, under the circumstances, really equivalent to "grossly") wrong before reversing the trial Judge, yet at the same time, bearing in mind the more recent expressions of the Lord Chancellor in *The Gannet*, *supra*, as to the "very powerful" reason for not interfering where the Judge had the opportunity of seeing the witnesses and the necessity under such circumstances of taking care to see, as Lord Justice Rigby puts it, that there is "sound ground" for differing from him, I am of the opinion that the Supreme Court exactly and happily expressed the prevailing rule, when it laid it down, supra, that the Appellate Court should not interfere unless satisfied that the trial Judge is "clearly wrong." And it would be most unfortunate, I think, if any other rule were to prevail, because if such findings of fact are to be lightly disturbed it would, I am satisfied, in the great majority of cases lead

> to injustice, for the reason that, speaking as a trial Judge, it frequently happens that the demeanour of a witness, or some incident occurring during the trial, is the only thing by which the rays of truth are let into dark places and the scale turned between fact and fiction. [Soulignement ajouté.]

Dans le cadre de l'appel intitulé *Camsusa et al., and Coigdarripe et al*., [1904] B.C.J. No. 24, 11 B.C.R. 177, la Cour a siégé en banc et le juge-en-chef Hunter a déclaré au paragr. 20 :

> 20 … The explanation given by him of the transfer to Boucherat is not an unreasonable one, and the learned trial Judge, who saw him under a most severe cross-examination, taking his evidence as a whole, came to the conclusion that it was the evidence of a truthful witness. In a case of this sort, I think the Court of Appeal ought, to be very careful before it comes to the conclusion that the learned trial Judge was wrong who had the advantage of observing the demeanour of the witness under such circumstances. Of course, it is open to the Court of Appeal, notwithstanding the fact that it has not had the advantage of observing the demeanour of the witnesses, to reverse the trial Judge, if it comes to the conclusion that he was wrong; but in a case of this sort I think the Court ought to be extremely careful how it reverses the trial Judge, because not having had the advantage of observing the demeanour of the witnesses, it would be reversing his decision on less evidence than was before him…

Le juge Duff, plus tard juge-en-chef du Canada, a écrit ce qui suit au para. 40 de *Voigt v. Groves*, [1906] B.C.J. No. 53, 3 W.L.R. 428, 12 B.C.R. 170 :

> 40 I have come to the conclusion that the defendants have established this case. I do not forget the rule relating to the weight to be attached to the finding of the trial Judge on questions of fact. Where one's view of the intrinsic credibility of individual witnesses is the controlling factor in a case, and where the estimate of such witnesses based upon their demeanour must largely determine the character of that view, an appeal on questions of fact, although given theoretically, is, generally, in practice an appeal in name only. But one cannot refuse to recognize that there is a right of appeal on such questions, and that on an appeal from a judgment after a trial by a Judge sitting alone, the hearing of the appeal is a re-hearing of the cause; and where, giving to the views of the trial Judge as to the credibility of particular witnesses the weight which is justly due to them, one finds that one cannot reconcile his decision with the inferences one draws from admitted facts, from facts proved by credible witnesses, by documents, from circumstances which are common ground, then I think that generally one should not regard oneself as bound by his conclusions: see *Coghlan v. Cumberland* (1898), 1 Ch. 704; *Hood v. Eden* (1905), 36 S.C.R. 476 at p. 483; *Rickmann v. Thierry* (1896), 14 R.P.C. 105, and *Grahame v. Youlton* (1906), 22 T.L.R. 380. [Soulignement ajouté.]

Cela étant, il sied de relever un jugement du même juriste, une fois qu'il a pris le serment d'un membre de la Cour suprême du Canada, à ce sujet, à la page 164 de *Dodge c. Canada*, [1906] S.C.J. No. 63, 38 S.C.R. 149 :

> The respondent undertook to establish as a fact that the land in question was in situation and in character of the soil itself suitable to be utilized for fruit growing in a highly profitable degree; and that it was owing to ignorance of its character on the part of its owners that it had recently been sold to him at prices much below its real value. The learned judge of the Exchequer Court has taken the view that this case is substantially made out, and, although (the learned judge not having in this case had an opportunity to observe the demeanour of the witnesses) we are not in a position less advantageous than his, as regards the appreciation of the evidence, we would not, even in such circumstances, disturb such a finding, except upon coming to a clear opinion that it cannot be supported. There is, however, an appeal to this court on questions of fact as well as on questions of law, and having come to such an opinion it is our duty to give effect to it. For the reasons given by my brother Idington, I agree that the learned judge's finding ought to be reversed and the amount of compensation reduced to the sum offered by the Government valuator. [Soulignement ajouté.]

L'avocate qui cherche à savoir la règle d'intervention que la Cour d'appel du Nouveau-Brunswick appliquait à l'époque a avantage à consulter *Papageorgiouv v. Turner*, [1906] N.B.J. No. 6, 37 N.B.R. 449, notamment les enseignements du juge Barker :

> 1 … I had occasion in *Boggs v. Scott*, 34 N.B.R. 110, to refer briefly to the rule which governs motions for new trials on objections to a judge's finding of facts in cases tried without a jury. The court in such a case can disregard such a finding and substitute for it the finding which they think he should have made and give judgment accordingly without ordering a new trial, as would be done if the case had been tried with a jury. (C.S. 1903, cap. Ill, sec. 375). In order to warrant that course the court must be satisfied that the judge is wrong, and the *onus* of showing that is upon the party moving. If the question is left in doubt, the presumption that the judge is right is not displaced. I am speaking of course of cases where, as in the present case, the evidence has been given *viva voce* before the judge and he has therefore had the very great advantage of observing the witnesses and their demeanour under examination. *Coghlan v. Cumberland*, (1898), 1 Ch. 704, may be referred to as a recent exposition of the rule; *Scott v. Dent*, 38 U.C.Q.B. 30 and *Smith v. Hamilton*, 29 U.C.Q.B. 394, as cases where the rule has been acted upon in Ontario. In the latter the judge's finding was upheld even where the court say they themselves would have found differently. In *Jones v. Hough*, 5 Ex. D. 115, Cotton L.J. says:
>
> > Of course I need not say in all questions of fact, especially where there has been *viva voce* evidence before the judge in the court below, the court of appeal ought to be most unwilling to interfere with the conclusion which the judge has arrived at when he has had the opportunity, which the court have not of seeing the witnesses and judging of their demeanour.

Le juge en chef Falconbridge, et les juges MacMahon et Riddell, ont présidé à l'appel intitulé *Riddle v. Todd*, [1908] O.J. No. 332, 12 O.W.R. 615

> 28 In *The Gliannibanta*, 1 P.D. 283, the Court said: "The parties are entitled to have the decision of the Court of Appeal on questions of fact as on questions of law, and the Court

> cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has not heard nor seen the witnesses, for which due allowance should be made. As a rule, a court of appeal will be disinclined to interfere when the Judge hearing the witnesses has come to his decision upon the credibility of witnesses as evidenced by their demeanour, but otherwise in cases where it depends upon the drawing of inferences from the facts in evidence."

L'arrêt *Beal c. Michigan Central R.R. Co*., [1909] O.J. No. 151, 19 O.L.R. 502, nous informe de ce qui suit quant à la norme d'intervention vers la toute fin de la période que nous étudions:

> 13 Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence. Of course, "when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons:" *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326, per Lord Loreburn L.C. And "when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses:" *Coghlan v. Cumberland*, [1898] 1 Ch. 704, at p. 705, per Lindley M.R., giving the judgment of the Court of Appeal; Bishop v. Bishop (1907), 10 O.W.R. 177.
>
> 14 But where the question is not "What witness is to be believed?" but, "Giving full credit to the witness who is believed, what is the inference?", the rule is not quite the same. And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse these findings. Of course, the judgment of the trial Judge should be treated with all respect, and if the matter is still in doubt a reversal should not be made.

Au demeurant, en ce qui a trait aux jugements de l'Ontario, *Meyers c. Crown Bank of Canada*, [1909] O.J. No. 608, 13 O.W.R. 533, nous fait la leçon qui suit :

> 10 There is direct conflict of testimony. Apparently there is wilful and corrupt perjury on one side or the other. Either the witnesses who were called for the defence, and who say they saw the cheque in the hands of Margolis, and saw it there in the presence of the plaintiff, and saw money which must, if seen, have been money received for the cheque, testified untruly, or the plaintiff, having obtained the cheque in anticipation of her marriage, and having got married and having lost her husband and her money, is now fraudulently and by falsehood attempting to make the defendants pay.
>
> 11 The action was tried without a jury. The learned trial Judge came to the conclusion that he could not rely upon witnesses for the defence, and he did believe the plaintiff in the main and essential part of her story. After a careful reading of the evidence, I cannot say that the learned Judge was wrong. If called upon, merely upon reading the

> evidence, to say which side is right, perhaps I should incline, with doubt and hesitancy, to the side of the defendants, but the learned Judge heard the witnesses testify. He saw their demeanour, and was better able to test their credibility than any person from merely reading the evidence can be. [Soulignement ajouté.]

Voir aussi *Sawyer-Massey Co. v. Hodgson*, [1909] O.J. No. 32, au paragr. 8 et les paragr. 24 à 29 de l'arrêt *Ontario Sewer Pipe Co. et al. v. Macdonald*, [1910] O.J. No. 523, 2 O.W.N. 483, 17 O.W.R. 1014.

Nuances quant à la force probante du comportement

Moorehouse v Perry, [1910] OJ No 360, un jugement de l'hon. Riddell, un juge remarquable tant pour ses décisions que pour la doctrine dont il est l'auteur, contient les remarques qui suivent au paragr. 7 : "From my observation of the witnesses in the box, their conduct and demeanour, I am of the opinion that the evidence of the plaintiff is to be accepted rather than that of the defendant, and I say this being not at all forgetful of the fact that his manner of answering was not all that could be desired and that in all probability his evidence read might not strike a Judge favourably. Nor do I forget the episode as to mortgages (see note at end of case), which certainly is not creditable to any one connected with it." [Soulignement ajouté.]

Parti pris du témoin, et le comportement

R. v. Din, [1910] B.C.J. No. 77, 15 B.C.R. 476, 18 C.C.C. 82, un jugement en appel, contient les observations utiles du juge Martin qui suivent :

> 32 In considering the question of corroboration, it is to be borne in mind that it is just as touch open to the jury (or judge acting as such) to believe a part only of the testimony of a witness offered in corroboration as of a main witness, and they are just as much at liberty, in considering credibility, to make all proper allowances for lapses of memory or the mental limitations of tender years, or the presence or absence of bias or other undue influence in the one case as in the other. And this is peculiarly a case where these principles should not be lost sight of, because the learned trial judge was of the opinion that the complainant, Alex Ashford, had been tampered with concerning his testimony, as appears by his strong observations concerning his demeanour as follows:
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> > "That boy gave his evidence in a very unwilling way to the Crown prosecutor; whatever he said in reply to the questions of the Crown prosecutor had to be dragged out of him. He was exceedingly adverse and stubborn. There was, however, a notable difference in his demeanour as a witness when he was taken in hand by counsel for the accused; and having this circumstance in mind, I cannot but attach the greatest importance to the admissions made by him which were unfavourable to the accused because, beyond any doubt, he intended the whole tenor of his evidence and manner to be favourable to the accused." [Nous avons souligné.]

Voir aussi le sous-titre, **«** Ensemble du témoignage, le comportement doit être évalué en ayant en vue » et l'affaire *Martin v. Martin*, [1904] O.J. No. 200, 8 O.L.R. 462**.**

Plaider – la subjectivité du comportement mise en relief avec des éléments objectifs

J'invite l'avocate à lire « Contester le comportement, élément subjectif, par des arguments s'appuyant sur des éléments objectifs, dont le manque d'appui pour la preuve et les contradictions », et le renvoi à l'arrêt *Kaulbach v. Archbold*, (1901) 31 SCR 387, 1901 CanLII 74.

Preuve documentaire – comportement ne saurais être évalué à juste titre

McKay Bros v Victoria Yukon Trading Co, [1902] BCJ No 97, 9 B.C.R 37, une décision de la Cour suprême de la Colombie-Britannique, nous livre ces observations pertinentes du juge Drake:

> 2 … The other point is one of evidence. The decision of a Judge in first instance who has had the opportunity of seeing the witnesses and judging from their demeanour of the accuracy of their statements is, in most instances, much more competent to decide on questions as to evidence than the Court of Appeal, and his views should not be lightly disregarded. But in this case the evidence of the defendants was chiefly evidence taken on commission, therefore personal appearance and conduct of the witnesses is not a factor. [Soulignement ajoute.]

Plus loin, le juge Martin s'exprime ainsi :

> 13 The case at bar, however, does not come within the rule as above stated because all the evidence for the defence was taken by commission, and some of the evidence for the plaintiff also appears in the appeal book in the shape of depositions of Haywood and Hugh M. Wright taken de *bene esse*, consequently the remarks hereinbefore cited as to the better opportunity for discovering the truth that the trial Judge ordinarily has over the Appellate Court have here very little, if any, application. Such being the case, I have weighed the evidence to the best of my ability with the result that I also am of the opinion that the learned trial Judge has failed to give due effect to the evidence for the defence, and I agree with my learned brothers that we must find the contract to have been made with Munn and not with the defendant Company. At the same time I feel bound to say, to illustrate my understanding of the rule above considered, that had all the witnesses in this case been before the trial Judge I should not have felt justified in disturbing his findings.

Probabilités que les faits accordent avec le témoignage, et le comportement

Le juge Denton a entrepris ses motifs dans l'arrêt *Long c. Smith*, [1910] O.J. No. 476, 17 O.W.R. 710 ainsi : « 3 This case took more than a day to try. Many of the facts are in dispute and the evidence as to them, very conflicting. Weighing this evidence as best I can, looking at the surrounding circumstances and the probabilities, and - what is more important still in this case - considering the demeanour of the witnesses in the box, I find upon the evidence the facts to be as follows."

Procès-verbal « silencieux » quant au comportement

De plus, je suis ravi de citer les commentaires du juge en chef Hunter qui suivent, que l'on trouve au paragr. 4 de l'arrêt *R v Scherf*, [1908] BCJ No 22, 8 W.L.R. 219, 13 B.C.R. 407, 13 C.C.C. 382,

> 4 … What does the evidence consist of? Not merely the words that fall from the lips of the witnesses, but their demeanour, the demeanour of the prisoner and, generally speaking, the whole atmosphere of the trial. Suppose the case of a servant accused of murdering her mistress. A Fellow servant testifies to the screams. The judge is busy taking notes and does not catch the note of eagerness on the part of the witness to accentuate every circumstance that may be against the prisoner and gloze over anything that might be in her favour. But suppose the jury does so and, observing the demeanour of the prisoner - especially if there is a view - and knowing that she has had a clear record before this occasion, comes to the conclusion that there must have been sudden and extreme provocation, such as a charge of unchastity, to impel her to commit the act, can anyone say that the jury would be wrong in finding manslaughter; and yet there would not be a shred of evidence in support of such a verdict in the transcript of the proceedings, which alone would be before the Court of Appeal. How, then, is it possible for the Court of Appeal to be possessed of all the evidence either for or against the prisoner? And how, then, is it possible for it to say, with certainty, that the finding of the lesser, as opposed to the major, offence was wrong?

Rapport de la juge portant sur le comportement

Il est d'intérêt de noter le paragr. 41 de *Preston v Kennedy* (No 3), [1906] OJ No 104: "The Court, with or without a report from the trial Judges as to the demeanour of witnesses, etc., may reverse or confirm the decision appealed against, in view of the whole case as it then appears, or they may require any witnesses to be re-examined, etc."

Refus de répondre à des questions – est-ce vraiment du ressort du comportement?

Le spectacle des cirques des enfants de ma jeunesse débutait toujours au moyen d'un homme en tenue de gala qui nous invitait sous le grand chapiteau, et on m'a expliqué que ce mot désignait tout ce qui se trouvait sous la grande tente. À cet effet, le juge Anglin place le refus d'un témoin de répondre à certaines questions sous le chapiteau du comportement, ce qui me surprend. Voici un exemple que l'on trouve dans l'arrêt Stevenson v Cameron, [1907] OJ No 569, 10 O.W.R. 432 :

> 19 While Mrs. Stevenson's demeanour on cross-examination was not always entirely satisfactory - yielding apparently to a spirit of obstinacy, she sometimes declined to answer counsel for the defendants explicitly, and once or twice said she did not remember matters upon which she answered quite promptly when questioned by Mr. Keefer, - on the whole I was favourably impressed with her testimony and found nothing which would justify a conclusion against her veracity. Her daughter appeared to be a modest young girl, very nervous, but desirous of telling the truth to the best of her ability. [Soulignement ajouté.]

J'inviterais l'avocate à plaider aujourd'hui que le refus de répondre à une ou des questions n'est pas un élément du comportement que les cours d'appel ne peuvent évaluer à juste titre, car,

contrairement à l'époque du juge Anglin, la transcription et l'enregistrement audio de l'audience laissent voir que le témoin ne voulait pas aider la partie adverse. Le procès-verbal fait état de se refuse d'être juste et de donner effet au serment de dire toute la vérité.

Rejet du comportement sans commentaires ou explication – la règle générale

Le rapport du dossier *Merchants Bank of Halifax v. Houston & Ward*, [1900] B.C.J. No. 76, 7 B.C.R. 465, contient le jugement du juge Martin qui a déclaré : « 2 … A good deal of evidence was given on the point, and there is not a little conflict of testimony. » J'estime que cette observation résume bien le quotidien de la plupart des avocates qui plaident. Par la suite, cherchant à trancher ce conflit quant au témoignage, le premier juge a fait les constats qu'il jugeait utiles au paragr. 3 :

> 3 As to Lawford's evidence, it is still less satisfactory, and, further, his demeanour in the witness-box did not impress me favourably. The manager's evidence was also, in my opinion, given at times with a certain amount of reluctance - the not unnatural reluctance of a man who realizes too late that a mistake has been made; at the same time it is not to be understood that I think there was anything underhand about his conduct, far from it. I regard it in the nature of a risky transaction with the otherwise laudable intention on the manager's part of increasing his bank's business. Even if there were no further evidence than that of these two witnesses I should hesitate to find the facts in the plaintiff's favour. But, for the defence, Gray's testimony is important, and satisfies me, if I had any doubt, that the use of Lawford's name in the matter was but a form. It is true that he, Gray, was, in a business way, lax and careless, but I believe he nevertheless told the truth in the witness-box. The evidence of Thompson, the mill foreman, which was given in a straightforward manner, was analyzed at length by counsel on the recent argument, and while there may be in it some minor inconsistencies, yet, in my opinion, after a re-perusal of it, they are not sufficient to impair its substantial accuracy.

Ayant reproduit ces conclusions de fait, notamment que "… his demeanour in the witness-box did not impress me favourably", je suis d'avis que la lectrice va tirer profit de l'examen du contraste entre la conclusion sans plus que le comportement n'était pas favorable et l'explication pour le rejet du témoignage du gérant. À l'instar de tant de jugements décrits dans le document de travail intitulé « Le comportement dans l'appréciation du témoignage : un examen de la jurisprudence (1850-1899) pour guider les avocates d'aujourd'hui », en date du 2 mars 2022, le juge relègue aux oubliettes le témoin en invoquant le seul élément du comportement, il va beaucoup plus loin en cherchant à justifier le rejet du témoignage du gérant, soulevant la façon dont pourrait réagir quelqu'un qui se rend compte trop tard d'une bévue couteuse. À ce titre, on se rappellera que le juge Girouard s'est exprimé ainsi à la page 20 de l'affaire *Granby (Village) c Ménard*, [1900] SCJ No 56, 31 R.C.S, 14, 1900 CanLII 74 :

> … Here the trial judge alone saw and heard the witnesses; he tells us, both in his formal judgment and in his notes, that the witnesses for the appellant are to be believed, and gives judgment accordingly, <u>entirely ignoring the witnesses against the appellant</u>, evidently because, in his own opinion at least, they were unsatisfactory either from interest, prejudice, incompetence, ignorance, or other cause, not specified, but nevertheless clearly implied from the judgment he pronounces. [Soulignement ajouté.]

Donc, s'il n'était pas utile, voire nécessaire de motiver le rejet du témoignage d'une partie, ce que le juge Martin a fait était de nature insigne. Au demeurant, la Cour d'appel a cassé ce jugement eu égard à son interprétation des conséquences des gestes des parties, sans que les constats de fait jouent un rôle important dans le sort du litige au stade de l'appel. Cela étant dit, le paragr. 7 suit : "There is no dispute between the parties as to the facts, although the opinion of the learned trial Judge as to which of the witnesses most credit should be given may be open to question on a careful examination of the transcript of the evidence which we have had the advantage of perusing."

Serment, sans aucune influence, et le comportement

Revoir « Désinvolte, comportement d'une nature », et l'arrêt *Gibson v Temps Publication Co*, [1904] OJ No 244, 8 O.L.R. 707.

Subjectivité du comportement mise en relief avec des éléments objectifs

J'invite l'avocate à lire « Contester le comportement, élément subjectif, par des arguments s'appuyant sur des éléments objectifs, dont le manque d'appui pour la preuve et les contradictions », et le renvoi à l'arrêt *Kaulbach v. Archbold*, (1901) 31 SCR 387, 1901 CanLII 74.

Témoignage antérieur, et le comportement

R. c. Legros, [1908] O.J. No. 69, 17 O.L.R. 425, 14 C.C.C. 161, nous offre un exemple assez rare d'un juge qui porte à l'attention de la Cour d'appel la question du comportement: "3. Was I justified in taking into consideration the expression and demeanour of the prisoner Legros when giving judgment?" Pour sa part, le juge Osler a écrit, avec la concurrence des juges Moss, Garrow et MacLaren :

> 8 The third question must be read in connection with what the magistrate has said in the case as stated, namely, that his decision was not based altogether on the evidence, but to a greater or less degree upon the expression and demeanour of the witnesses, and especially of the accused Legros, both in the trial for theft and in that for perjury.
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> 9 While the expression and demeanour, whatever that may exactly mean, of the witnesses and of the accused when testifying at the present trial, were proper to be considered by the magistrate in weighing the evidence, he had no right to import into that trial anything of that kind which occurred at the former trial. His duty was to be guided by the evidence before him and by that alone. The third question, understood in the way I have stated it and as the magistrate evidently intended to be understood, must therefore be answered in the negative.

Quant à lui, le juge Meredith a déposé des motifs minoritaires, dont les commentaires que l'on trouve au paragr. 17 :

> 17 The third question can be answered in one way only, that is in the affirmative. The demeanour of witnesses in giving evidence upon the trial is a very useful means in

> many cases of reaching a true conclusion as to their credibility. The question does not cover the demeanour of any witnesses at any other time than upon the trial in question; and the fact that in the case it is stated, in a somewhat equivocal manner, that demeanour, upon a former trial, was to "greater or less degree" the basis of the magistrate's decision, cannot justify us in framing another different question. But if we were to take upon ourselves to frame another and a very difficult question, by interpolating the words "both on the trial for theft and on that of perjury," and "to a greater or less degree," I would have much difficulty in agreeing that the trial was vitiated. If every Judge and every juror, who has had any prior knowledge of any of the witnesses which affected his mind on the question of their credibility were disqualified, many would be disqualified, and many judgments and verdicts, never doubted, should fall. One's common sense points to such knowledge, in an umpire, an arbitrator, a Judge, or a juror, being beneficial. If it were otherwise how could this magistrate, or any Judge, try any case in which any of the parties or their witnesses had been, on any other occasion, a witness before him, or with whom he had had any sort of acquaintanceship, or of whom even any sort of general knowledge? It would be idle to say that his mind was absolutely free from prior impressions as to credibility. My impression was that jurors were preferably chosen from the county in which the parties resided because of the aid which their general knowledge of the surrounding circumstances and local atmosphere would afford. But I decline to usurp the magistrate's powers, and the more firmly because, if the magistrate really meant his question to be different from that which it is, it is a very simple thing for him, not us, to reframe it.

Le juge Riddell a écrit ce qui suit dans l'arrêt *Crawford v. Canadian Bank of Commerce*, [1908] O.J. No. 283, 12 O.W.R. 401, au paragr. 6, portant sur la valeur de ces constats de faits pour les litiges qui vont suivre**:** "… I have stated my impressions, and do not change, and my remarks at the close of the case may, in case of any further proceedings, be taken as my findings of fact made in view of and based upon the conduct and demeanour of the witnesses."

Témoignage par écrit, et le comportement

Les motifs du juge Boyd, pour la Cour, dans l'arrêt *H. W. Kastor & Sons Advertising Co. v. Coleman*, [1905] O.J. No. 35, 11 O.L.R. 262, enseignent aux avocates ce qui suit quant au témoignage rendu de façon non-verbale :

> 18 But, turning to the evidence, it is open for us, under the rule laid down in *Coghlan v. Cumberland*, [1898] 1 Ch. 704, to deal with all the facts as on a rehearing of the case. It is. there said: "It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." [Soulignement ajouté.]

Témoignage sans appui, et le rôle potentiel du comportement

Anderson v. City of Toronto, [1904] O.J. No. 421, 4 O.W.R. 485, un jugement assez bref de l'hon. Meredith illustre bien le rôle que jouait le comportement à cette époque :

> 4 The parties present for our consideration upon this appeal but one question, and that purely a question of fact - whether the trial Judge erred in refusing to find that plaintiff's injury was caused in the manner testified to by him at the trial - in refusing to give effect to his unsupported testimony in that respect.
>
> 5 Obviously the trial Judge had advantages in determining that question which we have not; he saw and heard all the witnesses, and, though his reasons expressed at the trial for reaching the conclusion that plaintiff has since his injury learned to believe; contrary to the fact, that the proximate cause of that injury was a contact between his foot and the raised plank, went largely to the probabilities of the case, it by no means follows that his judgment was not affected by the demeanour of the witnesses. [Nous avons souligné.]
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> 6 The case seems to be just such an one that, had the Judge believed and given effect to plaintiff's testimony at the trial, we could not have rightly interfered; and ... there is even less ground for interference, for there is in the circumstances to which he refers, much to support his finding.
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> 7 Immediately after the accident plaintiff gave as the cause of it the slipperiness of the walk only. No matter how much pain he may then have been suffering, that can hardly account for his not attributing it to the true cause, if it really were than which he now asserts - a violent contact between his foot and the plank impelling him forward so far that where he fell was 18 feet beyond the place of contact. It was not until the action was pretty well advanced that the cause was plainly stated as that now relied upon. It is true that it is by no means impossible that plaintiff's position upon the ground, immediately after the accident, might have been as it was, if it happened in the way he now asserts; but it is at least more probable with the happening of it as the Judge has found.

Témoins, comportement envers les

Voir le sous-titre « Avocates, comportement envers les », et le dossier *Kon v Archibald*, [1908] OJ No 73, 17 O.L.R. 484, 12 O.W.R. 592, 14 C.C.C. 201.

Véracité du témoin, élément « parent » de l'examen du comportement

Le juge Wetmore a déclaré ce qui suit au paragr. 6 de l'arrêt *McGillivray v Moose Jaw (City)*, [1907] SJ No 1, 6 W.L.R. 108, 7 Terr. L.R. 465 :

> 6 The question of negligence is one of fact, and an appellate Court will rarely interfere with the findings of fact of the Judge when the case is tried by a Judge without a jury. There are cases, however, in which the appellate Court will interfere, and one instance when it will do so is pointed out by Lord Halsbury in *Montgomerie & Co. v. Wallace-*

> *James*, [1904] A.C. 73 at p. 75, as follows: "Doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an appellate Court."

Voir les commentaires du juge-en-chef Moss dans l'arrêt *Attorney-General for Ontario v Hargrave*, [1907] OJ No 543, 10 O.W.R. 319 discute *in «* Intelligence du témoin, élément « parent » de l'examen du comportement. » De plus, il sied de citer *Hêtu c. Dixville Butter & Cheese Association*, 1908 CanLII 81, 40 SCR 128, à la page 131 : *"...* The judge of the Superior Court, who saw the witnesses and had full opportunity of judging by their demeanour whether they were witnesses of truth, came to the conclusion that the respondents had taken care to inform themselves of the facts of the case …"

Je recommande fortement les commentaires du juge Meredith au paragr. 7 de l'arrêt *Berkinshaw c Henderson*, [1909] OJ No 417, 1 O.W.N. 97, 14 O.W.R.:

> 7 This case is not one in which it can be said that everything, or indeed very much, depended upon the veracity of the witnesses, and, therefore, much upon their demeanour in the witness-box. It may, I think, be taken for granted that none of them intentionally said that which was untrue. The transaction took place a good while ago; and I have no doubt that the discrepancies in the testimony may be fully accounted for by the effect of that lapse of time upon memories not unwilling to be swayed by self-interest - perhaps the normal condition. The truth is rather to be found in the writings, the surrounding circumstances and the probabilities of the case…

Longdon [Longden] v Bilsky, [1910] OJ No 3, nous enseigne ce qui suit:

> 41 *Davis v. Hardy* (1827), 6 B. & C. 225, determines the precise question unless it can be said to be inconsistent with the later cases. Upon the trial the defendant called a witness, and, his evidence shewing reasonable cause for the prosecution, the trial Judge, who had previously refused to nonsuit, withdrew the case from the jury and dismissed the action. Counsel for the plaintiff obtained a rule, and in support of it contended: "The facts sworn to by the witnesses on one side are not to be taken as proved against the other side. The jury are to decide whether they are proved or not. ... The jury are to ascertain the facts ... The Judge entirely withdrew the case from the consideration of the jury, and took upon himself to decide the fact, whereby the plaintiff's counsel was deprived of the opportunity of remarking on the demeanour of the witness and the consistency of his evidence." Abbott, C.J., says: "Where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a Judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly." Bayley, J., says: "If there is nothing in the demeanour of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a

> jury to deliberate upon. If this case had been submitted to a jury, and they had disbelieved this witness, I think we should have been bound to send the case down to a new trial."
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> 42 This, in effect, is the same principle as that laid down in *Ryder v. Wombwell* (1868), L.R. 4 Ex. 32, which has the sanction of the Privy Council in *Giblin v. McMullen* (1868), L.R. 2 P.C. 317, and *Hiddle v. National Fire and Marine Insurance Co. of New Zealand*, [1896] A.C. 372.

Conclusion

En guise de conclusion, qu'il me soit permis de reprendre les observations du juge en chef Hunter, au paragr. 4 de l'arrêt ***R v Scherf***, [1908] BCJ No 22, 8 W.L.R. 219, 13 B.C.R. 407, 13 C.C.C. 382,

> 4 … What does the evidence consist of? Not merely the words that fall from the lips of the witnesses, but their demeanour, the demeanour of the prisoner and, generally speaking, the whole atmosphere of the trial. Suppose the case of a servant accused of murdering her mistress. A Fellow servant testifies to the screams. The judge is busy taking notes and does not catch the note of eagerness on the part of the witness to accentuate every circumstance that may be against the prisoner and gloze over anything that might be in her favour. But suppose the jury does so and, observing the demeanour of the prisoner – especially if there is a view – and knowing that she has had a clear record before this occasion, comes to the conclusion that there must have been sudden and extreme provocation, such as a charge of unchastity, to impel her to commit the act, can anyone say that the jury would be wrong in finding manslaughter; and yet there would not be a shred of evidence in support of such a verdict in the transcript of the proceedings, which alone would be before the Court of Appeal. How, then, is it possible for the Court of Appeal to be possessed of all the evidence either for or against the prisoner? And how, then, is it possible for it to say, with certainty, that the finding of the lesser, as opposed to the major, offence was wrong?

Je suis d'avis que ces enseignements illustrent parfaitement le rôle le plus important du comportement, soit de laisser voir ce que le témoin pense alors qu'il dit ce qu'il dit. Le témoignage peut sembler objectif, mais c'est le « note of eagerness » qui se dégage du témoignage qui va peut-être nous dévoiler la vérité...