Le comportement dans l'appréciation du témoignage : un examen de la jurisprudence (1850-1899) pour guider les avocates d'aujourd'hui

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Propos introductifs

Plusieurs sujets m'intéressent depuis toujours, y compris le choix de la peine,[1] la plaidoirie[2] et l'appréciation du témoignage,[3] notamment le comportement des témoins.[4] De fait, l'objet de mes recherches depuis quelques mois[5] 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 et « Plaider – un juge se livre – Macbeth et les enseignements de Shakespeare pour l'avocate qui plaide », Jurisource - le 22 février 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 *R. c. Jones*, [1868] O.J. No. 12, 28 U.C.R. 416, un jugement portant la signature du juge en chef Richards, au nom de ses collègues Wilson et Morrison. Ce jugement nous informe que :

> 13 There can be no clearer or better established rule than that the jury must judge of the credibility of the witness. The nature of the story he tells, the manner of telling it, the probability of its being true, his demeanour, his readiness to answer some questions, his unwillingness to answer others, and his whole conduct indicating favour to one side or the other, must and ought to raise doubts as to his telling the truth. On the other hand, a frank, straightforward manner of answering, questions without regard to consequences to either party, a desire to state all the facts, no unwillingness or hesitation to answer, - these are calculated to impress jurors favourably; and in fact the superiority of oral over written examinations of witnesses in extracting the truth, is the opportunity it affords of judging how far you may rely on the mere statements of a witness, when unaccompanied by such other concurrent circumstances as give weight to such statements as facts. [Soulignement ajouté.]

Ce survol des éléments du témoignage qui devraient influencer la personne appelée à juger si le témoin dit la vérité ou, est fiable à ce sujet, met en épingle un grand nombre des points en litige qui surviennent dans moult procès de notre époque, et que l'avocate doit étudier, à savoir :

1) la nature de l'histoire qu'il ou elle raconte;
2) la manière ou le mode du témoin en déposant;
3) la probabilité que le témoignage soit vrai;
4) le comportement du témoin[6];
5) sa disposition à répondre à certaines questions;
6) son refus de répondre à d'autres questions;
7) sa conduite indiquant la faveur d'un côté ou de l'autre;

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[6] Je tiens à soulever le fait que tout au long de mes recherches, je n'ai jamais lu un jugement qui cite un témoin possédant le « gentle demeanour » dont il est question a la page 127 de l'autobiographie de l'immortel Nelson Mandela, Long Walk to Freedom, en désignant le fils du non moins immortel Mahatma Gandhi, Manilal, [Little, Brown and Company, New York, N.Y, 1994.]

8) sa manière franche, sa manière directe, sa façon directe ou sa façon simple de répondre aux questions;
9) ses réponses sans égard aux conséquences pour l'une ou l'autre partie;
10) une volonté d'énoncer tous les faits;
11) aucune réticence ou hésitation à répondre.

Au demeurant, ce document de travail va mettre l'accent sur le comportement du témoin, tout en cherchant à bien saisir de quelle façon ces autres éléments entrent en jeu lorsque l'avocate cherche à convaincre la juge que le témoin est, ou n'est pas, digne de foi.

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.

Ancienneté de la juge et la preuve du comportement

Le juge Proudfoot a déposé un de plusieurs jugements concordants dans l'arrêt *Peterkin c. McFarlane*, [1884] O.J. No. 107, 9 O.A.R. 429. Abordant au paragr. 225 la question de l'expérience de la juge et donc de sa sagesse au niveau de l'examen de son comportement, ce juge a écrit :

> 225 It seems to me perfectly clear that no Court of Appeal ought to interfere with the finding of a Judge on a matter of fact, who based his conclusion on the credibility of the witnesses on the one side and the untruthfulness of those on the other side, unless indeed there were no evidence in support of the finding. We cannot determine whether the demeanor of the witnesses was such as to lead to the belief of their veracity or otherwise. Evidence taken by a phonographic reporter can give no means of determining that. In the case of a verdict found by a jury, no Court would ever interfere with it because they believed one set of witnesses and not another set. <u>And at least as much effect should be given to the decision of a Judge who has spent many years of his life in weighing testimony and determining the proper value to be placed on it</u>. [Soulignement ajouté.]

Au niveau concret, je suis juge depuis 1995. Est-ce à dire que mon jugement aujourd'hui en pareille matière est supérieur à celui de mes collègues plus jeunes? Si c'est vrai, à quelle date est-ce que j'ai moi-même navigué au-delà des limites du manque d'expérience et atteint les eaux de la sagesse?

Apparence du témoin, contraste avec son comportement

Le juge Spragge a écrit le jugement dans l'affaire *Grant c. Brown*, [1865] O.J. No. 311, 12 Gr. 52 et le paragr. 34 nous informe de ce qui suit

> 34 … That they gave their evidence with bias in favour of their father I cannot but think; but their appearance, demeanour, the circumstance to which I have alluded, and the many small circumstances which occur in an examination, and which impress a court for or against the truthfulness of a witness, would lead me, apart from the circumstances against the plaintiff and in favour of the defendant upon which I have dwelt at some length, to give credit to the two sons of the plaintiff. Some of those circumstances are of considerable weight…

Les mots que j'ai soulignés mettent l'accent sur le fait que ce juge distinguait entre « the appearance » des témoins et leur comportement.

Le prochain jugement d'intérêt est *Gibson c North Easthope (Township*), [1894] OJ No 46, 14 C.L.T. 503, 21 O.A.R. 504:

> 66 … The case is not one which depends upon the trial Judge's view of witnesses' credibility founded upon their appearance and demeanour, as neither Meredith J., nor the Judges of the Queen's Bench Division, saw the witnesses but acted upon the evidence as reported. We are, therefore, in the same position as any judge who has passed upon the evidence to form an opinion upon it. [Soulignement ajouté.]

L'affaire *Day c. Brown*, [1871] O.J. No. 284, 18 Gr. 68, contient les enseignements de juge Spragge qui a déclaré que :

> 7 But the circumstances here were not of such cogency; they were only suspicious, and the Master having himself seen the witnesses, having observed their demeanour, and not only their answers, but their mode of answering; their appearance, manner, and the many minor circumstances attending the examination of witnesses which give to, or detract from the value of oral testimony, had materials for forming a more correct judgment as to the weight to be attached to it, than any one from merely reading the evidence can possibly have. [Soulignement ajouté.]

Voir aussi *Cotter c Cotter*, [1874] OJ No 199, 21 Gr. 159, au paragr. 8 et *Magnan v Dugas*, (1884), 9 SCR 93 ou le juge Gwynne fait la remarque que : « The questions raised upon this appeal are all questions purely of matters of fact … » Il a donc conclu que l'intervention n'était pas justifiée.

Davis (Re), [1871] O.J. No. 307, 3 Chy. Chrs. 277, un jugement de la plume du juge Mowat, relate ce qui suit au paragr. 11 quant à la décision du premier juge de faire un examen de chaque témoin pour juger, entre autres, de leur apparence:

> 11 The marriage of these parties was a marriage of affection, as each of them took occasion to tell me. The husband said that they had been "keeping company" for three years before their marriage; and that his means had enabled him, and would still enable him, to keep her in greater comfort than, from her father's narrow income, she has ever known in her father's house. If all that is so, and if the husband has always treated his wife properly, how is it that she is now so unwilling to live with him? Why is it that her parents desire to burden their narrow income with her maintenance? and why is it that the wife and her parents voluntarily bring on themselves the reproach and unhappiness to all

> parties which are inseparable from the separation of a man and his wife? Looking at the affidavits and sill the circumstances, I am not prepared to say, that the wife's explanation of the separation is not more probable than any other. A comparison of the appearance and demeanour of the parties (which my interview with each of them enabled me to make) did not in my mind help the case of the husband. [Soulignement ajouté.]

Le juge Blake a écrit ce qui suit au paragr. 25 de l'arrêt *Mulholland c. Merriam*, [1873] O.J. No. 158, 20 Gr. 152:

> 25 … In order to do away with, or materially vary the effect of a written instrument, the evidence adduced for the purpose must be conclusive [*Lewis v. Robson*, 18 Gr. 395]. It is not sufficient that the mind may be led to doubt whether the paper truly sets out what the agreement of the parties to it may have been. Here, I think, if I looked at the documents on the one side and contrasted them with the evidence adduced on behalf of the defendant, and this evidence of the defendant and his witnesses was admissible and to be relied on, I should have determined that there was sufficient to shew that the instrument did not truly express the agreement of the parties, and that the plaintiff should give the defendant credit for $200, the value of the Branchton lot. But the Judge who took the evidence was not impressed favourably with the witnesses examined on the part of the defendant; he could not place confidence in them, and I therefore think it impossible that on such testimony the transaction, as it plainly appears without this evidence, can be varied as is here sought [*Sanderson v. Burdett*, 18 Gr. 417].

De poursuivre l'hon. juge, toujours au paragr. 25 :

> There are cases, no doubt, in which it is proper for the Appellate Court to consider on which side is the weight of evidence, and to vary a decree based upon what it may conceive to be a misapprehension in that respect; but it is impossible for this Court, in such a case as the present, to review the impression made upon the Judge before whom the witnesses were examined, and to say, notwithstanding the demeanour and appearance of the witness, and his manner in giving his evidence, which impressed the Court below with his untruthfulness, want of candor, or forgetfulness, we will give a credit to his testimony refused by him who has had peculiar advantages to aid in a correct conclusion upon its worth. [Soulignement ajouté]

L'hon. Sprague a dressé un lien entre l'apparence du témoin, son comportement, son intérêt pécuniaire et une preuve documentaire contradictoire au paragr. 23 de *Vannatto v Mitchell*, [1867] OJ No 310, 13 Gr. 665:

> 23 As to the two principal witnesses Bean and Meadows. The former though called for the plaintiff was a favourable witness for the defendants. His appearance and demeanour were in his favour; and he seemed to be truthful. At the same time I think that, in reading his evidence, it should be remembered that he had a great interest in exonerating himself and those named as his co-executors from responsibility; and that he had written a paper in which he speaks of their relinquishing all further action on the will of the testator, implying according to the ordinary use of language, that they had acted

> upon the will, an implication that cannot be wholly reconcilable with some of his evidence. [Soulignement ajouté]

Aspect du témoin, dans le cadre de l'examen de son comportement

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « look » du témoin, c'est-à-dire son aspect. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le jugement du juge en chef nous informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Les mots qui sont soulignés illustrent bien que le « look », que je traduis tant par le regard que par l'aspect, se distingue des mots « conduct – conduite », « carriage – le port » « tones of voice – tons de la voix » et « evidence of surprises – preuve du jeu de la surprise ». Il est évident que si l'on scrute les dictionnaires, on s'aperçoit que les différents mots sont assez proches l'un de l'autre et que ce n'est que des poussières qui les distinguent.

Pour sa part, le juge Drake a ajouté ces commentaires au paragr. 86 :

> 86 It must be remarked that Cameron was, in the opinion of the trial judge, a very unsatisfactory witness. A witness' demeanour in the box is often better evidence of his veracity than the answers he gives; a jury have the advantage of seeing the witness as well as hearing him, and forming an opinion of his evidence which no Court of Appeal can possibly do, reading only from the notes of evidence as printed. […] [Soulignement ajouté.]

Au total, l'importance que l'on accordait au « whole demeanour » devait certes nuire aux chances de succès en ce qui avait trait aux témoins et parties qui étaient des « étrangers » au sens de membres de groupes culturels ou linguistiques minoritaires, notamment les autochtones, nonobstant que ces derniers vivaient dans ces régions depuis toujours.

Astucieux témoignage, contraste avec le comportement

Le juge Ferguson a signé le jugement dans l'affaire *Bryson c Ontario and Quebec Railway Co*, [1884] OJ No 321, 8 O.R. 380. Ses motifs nous informent de ce qui suit :

> 20 I do not think that the evidence shows that Mrs. Bryson was, at the time of making the agreement, a "confirmed invalid," or that her mental faculties were affected by her alleged illness to any appreciable extent, and her demeanor in Court as a witness indicated to me that she is a person possessing a very fair share of sense and shrewdness, and I cannot avoid being of the opinion that this part of the plaintiffs' contentions is without sufficient foundation in fact. [Soulignement ajouté.]

Biaisé, le témoin démontre un parti pris, qui doit être évalué avec les autres éléments

Le juge Spragge a fait ces remarques au paragr. 6 de l'arrêt *Gray v. Coucher*, [1868] O.J. No. 348, 15 Gr. 419 :

> 6 … I do not think it would be safe to hold the fact of notice established by the evidence of Thomas Gray: his demeanour in the witness box impressed me unfavourably; he answered some questions evasively; and appeared to hesitate before answering in order to see the bearing of the questions and the effect of his answers upon the interest of the parties. He exhibited, I thought, a strong bias for the plaintiff, from a desire, as I thought probable, to save his father from the consequences of his act. He did not seem to me entirely reliable. Then he is contradicted in regard to his previous dealing with the same property…

Candeur et comportement

Le juge Blake a écrit ce qui suit au paragr. 25 de l'arrêt *Mulholland c. Merriam*, [1873] O.J. No. 158, 20 Gr. 152:

> 25 … In order to do away with, or materially vary the effect of a written instrument, the evidence adduced for the purpose must be conclusive [*Lewis v. Robson*, 18 Gr. 395]. It is not sufficient that the mind may be led to doubt whether the paper truly sets out what the agreement of the parties to it may have been. Here, I think, if I looked at the documents on the one side and contrasted them with the evidence adduced on behalf of the defendant, and this evidence of the defendant and his witnesses was admissible and to be relied on, I should have determined that there was sufficient to shew that the instrument did not truly express the agreement of the parties, and that the plaintiff should give the defendant credit for $200, the value of the Branchton lot. But the Judge who took the evidence was not impressed favourably with the witnesses examined on the part of the defendant; he could not place confidence in them, and I therefore think it impossible that on such testimony the transaction, as it plainly appears without this evidence, can be varied as is here sought [*Sanderson v. Burdett*, 18 Gr. 417].

Le paragr. 25 se poursuit ainsi :

> There are cases, no doubt, in which it is proper for the Appellate Court to consider on which side is the weight of evidence, and to vary a decree based upon what it may conceive to be a misapprehension in that respect; but it is impossible for this Court, in

> such a case as the present, to review the impression made upon the Judge before whom the witnesses were examined, and to say, notwithstanding the demeanour and appearance of the witness, and his manner in giving his evidence, which impressed the Court below with his untruthfulness, want of candor, or forgetfulness, we will give a credit to his testimony refused by him who has had peculiar advantages to aid in a correct conclusion upon its worth. [Soulignement ajouté]

« Chœur grec » et la preuve du comportement

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath,* jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[7] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui prit l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de présenter leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

***Christie, c. R.,* [1914] A.C. 545 - preuve circonstancielle et le comportement – silence d'une partie dans le cadre d'une situation qui devrait soulever une objection**

The President, Directors and Company of The Bank of Upper Canada c Widmer, [1832] OJ No 6, 2 U.C.Q.B. (O.S.) 256, un procès civil entendu par le juge Macaulay nous fournit ces enseignements sur ce qu'on désigne aujourd'hui à titre de la règle *Christie*:

Voir, au demeurant, 27 R.C.S. 13.

> 103 … Assuming as a settled principle, that whether there is any evidence, is a question for the court; and whether the evidence is sufficient, for the jury; and that the assent of a party, or his approval or adoption of an act, may be inferred from his silence, or demeanour and conduct, especially under circumstances in which duty or interest would prompt dissent or disavowal; and admitting that the assent of the members of the board of directors, as a board, or their approval or adoption as a board, of the spoliation of the defendant's bond as proved in this case, might be inferred from the silence and demeanour of the members present, and be regarded as a quasi act and assent, approval or adoption of the board, and sufficient to excuse the defendant from all legal liability as for a tort at the suit of the corporation; still I do not think the evidence offered in proof thereof satisfactory … [Nous avons souligné.]

Voir aussi le paragr. 5 de *McKinnon v Burrows*, [1833] OJ No 27.

Circonstances du témoignage – contraste avec le comportement et les autres éléments de l'examen de la crédibilité et de la fiabilité

L'affaire *Day c. Brown*, [1871] O.J. No. 284, 18 Gr. 68, contient les enseignements de juge Spragge qui a déclaré que :

> 7 But the circumstances here were not of such cogency; they were only suspicious, and the Master having himself seen the witnesses, having observed their demeanour, and not only their answers, but their mode of answering; their appearance, manner, and the many minor circumstances attending the examination of witnesses which give to, or detract from the value of oral testimony, had materials for forming a more correct judgment as to the weight to be attached to it, than any one from merely reading the evidence can possibly have. [Soulignement ajouté.]

Comportement démontrant que les gestes et les paroles étaient sérieux

Rodman c. Rodman, [1873] O.J. No. 190, 20 Gr. 428, compte un jugement du juge Spragge qui a écrit :

> 12 Now, what is the evidence in this case? To begin with, it is clear, on the evidence of both, that Mrs. Plowden has never received a wound, or bruise, or personal injury of any kind from her husband. But it is sworn by the petitioner that on the two nights before she left him his conduct and language were most violent; that on one night he held a drawn sword over her; and on the next he drew from its sheath an Indian knife which he had in his room and laid it by his side "to be in readiness," as he said; and that though he did not make any attempt to injure her with either of these weapons he did very much frighten her. I am far from saying that such conduct as this, though confined to two occasions, might not be sufficient to establish cruelty, if this account were entirely true, and the respondent's demeanour such as to shew he was in earnest. On the other hand, though he were not in earnest, if he really tried to frighten his wife and had constant recourse to such a shew of violence, his conduct would be intolerable, and the wife entitled to relief. But

> what is true? The respondent entirely denies it. (The learned Judge here referred to some facts touching the credibility of the petitioner's evidence.) On the whole then (his Lordship continued), I find myself unable on the unsupported testimony of the petitioner, in the face of the respondent's denial, to give that credence to her account which would alone support the charge of cruelty, and I hold the proof of it to have failed." [Soulignement ajouté.]

Comportement, envisagé sur tous ses angles, dans le cadre de l'examen de son témoignage

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « look » du témoin. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le jugement du juge en chef nous informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Les mots qui sont soulignés illustrent bien que le « look », que je traduis tant par le regard que par l'aspect, se distingue des mots « conduct – conduite », « carriage – le port » « tones of voice – tons de la voix » et « evidence of surprises – preuve du jeu de la surprise ». Il est évident que si l'on scrute les dictionnaires, on s'aperçoit que les différents mots sont assez proches l'un de l'autre et que ce ne sont que des poussières qui les distinguent. En outre, la mention du « whole demeanour » signale que le tribunal doit envisager le tout de façon globale, et l'avocate doit donc s'évertuer à faire l'examen de chaque élément, favorable ou défavorable, en l'espèce.

Pour sa part, le juge Drake a ajouté ces commentaires au paragr. 86 :

> 86 It must be remarked that Cameron was, in the opinion of the trial judge, a very unsatisfactory witness. A witness' demeanour in the box is often better evidence of his veracity than the answers he gives; a jury have the advantage of seeing the witness as well as hearing him, and forming an opinion of his evidence which no Court of Appeal can possibly do, reading only from the notes of evidence as printed. […] [Soulignement ajouté.]

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Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[8] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui pris l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de rendre leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

De plus, relevons ce que le juge Strong a écrit dans le cadre du pourvoi *German c Rothery*, [1892] SCJ No 17, 20 R.C.S. 376, en guise d'explication de l'importance du comportement dans l'appréciation du témoignage.

> … The personal history of Wood and his conduct in relation to this election as given by himself are not irrelevant in considering the weight to be given to his evidence, and so far as I am able to give an opinion as to the credibility of a witness I did not see examined and whose demeanour in the witness box. I had no opportunity of observing, I should say the account. he gives of himself, his admitted offer to sell his vote, and the way he has acted since the election with reference to his evidence, all tend to discredit him, and that for these reasons his testimony does not commend itself to favourable consideration… [Soulignement ajouté.]

Le juge Spragge a fait ces remarques au paragr. 6 de l'arrêt *Gray v. Coucher*, [1868] O.J. No. 348, 15 Gr. 419 :

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[8] Voir, au demeurant, 27 R.C.S. 13.

> 6 … I do not think it would be safe to hold the fact of notice established by the evidence of Thomas Gray: his demeanour in the witness box impressed me unfavourably; he answered some questions evasively; and appeared to hesitate before answering in order to see the bearing of the questions and the effect of his answers upon the interest of the parties. He exhibited, I thought, a strong bias for the plaintiff, from a desire, as I thought probable, to save his father from the consequences of his act. He did not seem to me entirely reliable. Then he is contradicted in regard to his previous dealing with the same property…

Comportement, susceptible d'appuyer ou de miner la crédibilité et la fiabilité de tous les témoins

Le juge en chef Draper a commenté cette question au paragr. 14 de l'arrêt *Canadian Bank of Commerce c. Wilson & Moul*, [1875] O.J. No. 1, 36 U.C.R. 17: "14 … It is not, however, a question upon which the demeanor of a witness or his general character can be brought in aid of or adversely to the testimony he has given…" En d'autres mots, le comportement peut servir ou nuire à toutes les parties à une procédure judiciaire.

Comportement favorable n'est pas l'équivalent d'un gage de succès

Le juge d'appel Moss a fourni un exemple de cette situation dans l'arrêt *Rice c. Bryant*, [1880] O.J. No. 103, 4 O.A.R. 542, au paragr. 19 :

> 19 We think that it would be contrary to public policy to hold that such a transaction, entered into upon the eve of insolvency, can be supported upon such evidence, even if the demeanour of the witnesses does produce a favourable impression upon the Judge. It is sufficient to say to the defendant, that however unfortunate it may be for him, if he has really advanced his money, he has not produced satisfactory evidence of the fact, which the law requires him to prove. If he has none but the statements of himself and the person with whom he deals, it is not meting out to him any hard measure to require that his story shall be both probable and self-consistent. [Soulignement ajouté.]

Voir aussi le paragr. 25 de l'arrêt *McCrae v Whyte*, [1882] OJ No 9:

> 25 … in order to rebut it sound policy, as the Chief Justice remarked, seemed to require something more than the mere assertion of the insolvent, however persuasive his demeanour, that he did not anticipate a result which must have appeared inevitable to any man of ordinary common sense in his position…

Conduite, et l'aspect du témoin, dans le cadre de l'examen de son comportement

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « conduct » du témoin, de sa conduite ou façon de témoigner. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le

jugement du juge en chef nous informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Les mots qui sont soulignés illustrent bien que le « look », que je traduis tant par le regard que par l'aspect, se distingue des mots « conduct – conduite », « carriage – le port » « tones of voice – tons de la voix » et « evidence of surprises – preuve du jeu de la surprise ». Il est évident que si l'on scrute les dictionnaires, on s'aperçoit que les différents mots sont assez proches l'un de l'autre et que ce ne sont que des poussières qui les distinguent.

Pour sa part, le juge Drake a ajouté ces commentaires au paragr. 86 :

> 86 It must be remarked that Cameron was, in the opinion of the trial judge, a very unsatisfactory witness. A witness' demeanour in the box is often better evidence of his veracity than the answers he gives; a jury have the advantage of seeing the witness as well as hearing him, and forming an opinion of his evidence which no Court of Appeal can possibly do, reading only from the notes of evidence as printed. […] [Soulignement ajouté.]

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath,* jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[9] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's

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Voir, au demeurant, 27 R.C.S. 13.

> notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui prit l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de rendre leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

Il sera utile de rappeler le jugement *Crabbe c Hickson, Duncan, & Co*, [1890] OJ No 270, 14 P.R. 42, ou le juge Boyd a écrit : « 12 … If it be, as suggested during argument, that the case is one not so much of specific acts as of general dissatisfaction arising from a variety of small causes, this should be so indicated as to shew when the demeanour and conduct of the plaintiff changed, as I understand he was twelve years in the defendants' service…"

Voir aussi le paragr. 56 de l'arrêt *Herbert v Mercantile Fire Ins Co*, [1878] OJ No 104 : "The learned Vice Chancellor saw the witnesses and heard their testimony. He could and did observe their conduct and demeanour when giving evidence. His opinion, and not ours, is the one which ought to prevail as to whether the witnesses were adverse in the sense which we have described."

Enfin, il peut être utile de lire *Kneeshaw v. Collier et al*., [1879] O.J. No. 291.

Contenu du témoignage – à être évalué tout comme le comportement, et de façon globale

Walsh v Nattrass, [1869] OJ No 151 rapporte ce qui suit au paragr. 10, sous la plume du juge Gwynne :

> 10 Whether the opinion which the learned judge formed of the evidence was correct or not, that is, whether another judge might or not have formed a different opinion from the evidence, is not, I think, a point which we are called upon to decide. The public policy of the law will, I have no doubt, be sufficiently protected by leaving that point to the discretion of the judge who tries the case, and who, from the demeanour of the witness, the general context of her narrative and the modes of expression made use of by her, can best determine whether or not she intends to convey by her evidence a charge of felony. [Nous avons souligné.]

Le juge Spragge a fait ces remarques au paragr. 6 de l'arrêt *Gray v. Coucher*, [1868] O.J. No. 348, 15 Gr. 419 :

> 6 … I do not think it would be safe to hold the fact of notice established by the evidence of Thomas Gray: his demeanour in the witness box impressed me unfavourably; he answered some questions evasively; and appeared to hesitate before answering in order

> to see the bearing of the questions and the effect of his answers upon the interest of the parties. He exhibited, I thought, a strong bias for the plaintiff, from a desire, as I thought probable, to save his father from the consequences of his act. He did not seem to me entirely reliable. Then he is contradicted in regard to his previous dealing with the same property…

Contrecarrer la preuve du comportement – pas si aisé qu'on pourrait le croire

Il est d'intérêt de citer un commentaire au paragr. 25 de l'arrêt *Woodruff c. McLennan*, [1887] O.J. No. 20, 14 O.A.R. 242 :

> 25 It seems to me impossible to deny that what the defendants propose to do is to try over again the very question which was in issue in the original action. The charge of fraud is superadded; but that charge involves the assertion that a falsehood was knowingly stated, and before the question of scienter is reached a conclusion of fact adverse to that arrived at by the Michigan jury must be adopted. The attempt is not to prove some extrinsic fraud or imposition upon the Court, but to induce the Court here to deduce from evidence which either conflicts with other evidence or is at most indirect evidence, a state of facts different from that found by the tribunal before which both parties were heard, and which had all the means of testing their credibility that their appearance and demeanour and the other testimony given at the trial may have afforded. …

L'avocate doit se poser la question : comment « attaquer » les constats quant au comportement lorsqu'il est difficile de savoir ce que la juge a même perçu, encore moins relevé comme étant important quand on n'est pas tenu d'articuler ce qu'étaient ces observations?

Détecteur de mensonge, comportement agissant à titre de

Callahan c Cople, [1899] BCJ No 28, 6 B.C.R. 523, un jugement de l'hon. Martin, nous informe de ce qui suit au parar. 2: "… I feel I would not be justified in giving preponderating weight to the evidence offered on behalf of the plaintiff on this point, though without explanation it was a strong case of circumstantial evidence. I might say here that it was a pleasant feature of this case that I had no reason to believe from anything in the demeanor of the principal parties concerned that there was any intention to deceive the Court, or that anything other than a straight story was being told; there is practically no direct conflict of evidence."[10]

Le juge Proudfoot a dit ce qui suit au paragr. 16 de l'arrêt *Birdsell c Johnson*, [1876] OJ No 309, 24 Gr. 202:

> 16 The witnesses seemed respectable; and I saw no reason from their demeanour to distrust their statements. I am quite aware of the danger of relying on the evidence of conversations at such a distance of time. But they are in this case so uniform, proved by persons who well knew the parties, and in one instance, that of the preparation of Abraham's will, when there was a reason for making the inquiry, and when, if Abraham still retained any interest in the 30 acres, he would have stated it …

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[10] [1900] S.C.J. No. 1, 30 S.C.R. 555, 1 M.M.C. 348, 1899 CarswellBC 15.

Voir aussi le paragr. 9 de l'affaire *Rapson v Hersee*, [1869] OJ No 285 et le paragr. 18 de *Riddell v. Brown*, [1864] O.J. No. 15.

Documentation, non conséquente au comportement

L'hon. Sprague a lié l'apparence du témoin, son comportement et son intérêt pécuniaire et une preuve documentaire contradictoire au paragr. 23 de *Vannatto v Mitchell*, [1867] OJ No 310, 13 Gr. 665:

> 23 As to the two principal witnesses Bean and Meadows. The former though called for the plaintiff was a favourable witness for the defendants. His appearance and demeanour were in his favour; and he seemed to be truthful. At the same time I think that, in reading his evidence, it should be remembered that he had a great interest in exonerating himself and those named as his co-executors from responsibility; and that he had written a paper in which he speaks of their relinquishing all further action on the will of the testator, implying according to the ordinary use of language, that they had acted upon the will, an implication that cannot be wholly reconcilable with some of his evidence. [Soulignement ajouté]

Le juge Spragge a fait ces remarques au paragr. 6 de l'arrêt *Gray v. Coucher*, [1868] O.J. No. 348, 15 Gr. 419 :

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Éléments de l'évaluation du témoignage - les paroles du témoin, son comportement et d'autres circonstances qui viennent en aide à la juge

Le juge Proudfoot a déposé un de plusieurs jugements concordants dans l'arrêt *Peterkin c. McFarlane*, [1884] O.J. No. 107, 9 O.A.R. 429. Il sied de relever les observations suivantes :

> 224 There is no doubt a considerable conflict of testimony, and, according as the learned Judge believed or disbelieved the witnesses, there was ample evidence to support a decree for plaintiff or for defendant. With regard to the evidence at the former hearing the Chancellor says: "There was much in the evidence of Burke and McKenzie, especially in that of Burke, which I discredited. I thought him untruthful, and that the weight of evidence preponderated in favour of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor and the many circumstances which aid a Judge of fact, before whom evidence is given, to form a

> correct judgment as to its truthfulness, and the weight properly due to it." [Soulignement ajouté.]

Malheureusement, il m'est impossible de déceler ce que sont ces « many circumstances » qui appuient la juge dans l'appréciation de la crédibilité et fiabilité du témoignage à la lecture de ce jugement.

Voici ce que le juge Strong a écrit à ce sujet:

> In his judgment delivered after the second hearing the Chancellor makes the following observations on the evidence:
>
> > Before dealing with the further evidence I desire to say that I refused the indulgences asked for by Burke, because I was satisfied by the evidence which was taken vivâ voce before me that the defence set up was a righteous one. There was much in the evidence of Burke and McKenzie, especially in that of Burke which I discredited. I thought him untruthful, and that the weight of evidence upon the question of notice greatly preponderated in favour of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanour, and the many circumstances which aid a judge of fact before whom evidence is given, to form a correct judgment as to its truthfulness and the weight properly due to it. [Soulignement ajoute.]

Voir aussi *Rose c. Peterkin*, [1885] SCJ No 45, 13 S.C.R. 677, 1885 CanLII 16.

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath*, jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[11] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

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Voir, au demeurant, 27 R.C.S. 13.

[12] La juxtaposition des mots "manner" et "demeanour" se lit aussi dans le jugement du juge en chef Ritchie dans l'arrêt *McKay v. Glen*, [1880] S.C.J. No. 2.

> was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui prit l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de rendre leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

Le juge Spragge a écrit le jugement dans l'affaire *Grant c. Brown*, [1865] O.J. No. 311, 12 Gr. 52 et le paragr. 34 contient des observations qui laissent voir la nature de ces « many small circumstances » qui s'ajoutent à l'évaluation du comportement dans l'appréciation de la crédibilité:

> 34 The direct evidence in support of the contract is of itself sufficient, unless impeached, or unless the circumstances of the case are sufficient to outweigh it. The plaintiffs two sons, William and Thomas, are men of intelligence, and of apparent respectability. I thought each of them shewed a strong desire to place the facts to which they deposed in as strong alight as they would bear in favour of their father; but on the other hand they admitted ignorance of matters which, if answered in the affirmative, would have told strongly in his favour. What they say, the one as to the agreement in Scotland, and both as to what passed upon the land in reference to its division, is either true or it is an entire fabrication. If a fabrication, they would almost certainly have answered in the affirmative as to all facts confirmatory of it, but they do not. William, for instance, says that he never heard his father ask Brown for a deed, and that he never himself asked him for one. Thomas says, that when Brown informed his father of the issue of the patent his father did not ask for a deed, and that when his father, on the occasion of "the slander," declared he would have a deed for his half, Brown did not in words promise to give one. Men who would manufacture a wholesale falsehood, would scarcely hesitate at minor points like these. Again, while both speak of what passed on the ground as to the division, William only speaks of what passed in Scotland, and says it passed in the presence of the family. If Thomas were deliberately inventing a story, he would scarcely fail to confirm William's account of what passed in Scotland. That they gave their evidence with bias in favour of their father I cannot but think; but their appearance, demeanour, the circumstance to which I have alluded, and the many small circumstances which occur in an examination, and which impress a court for or against the truthfulness of a witness, would lead me, apart from the circumstances against the plaintiff and in favour of the defendant upon which I have dwelt at some length, to give credit to the two sons of the plaintiff. Some of those circumstances are of considerable weight. The question with me is, whether they are of such weight as to outweigh direct evidence which otherwise I should believe. I think before I should discard the direct evidence, in fact pronounce it a deliberate fabrication, I ought to be convinced that the circumstances against it are inconsistent with it; not merely such as to render it improbable, but so

> inconsistent that the court must feel a moral conviction that the direct evidence is not true. I have weighed all the evidence and considered all the circumstances over and over again. Some of those circumstances, and with them the evidence of Mrs. Taylor, have, in the course of my consideration of the case, shaken my faith in the direct evidence. But I have, upon the whole, come to the conclusion that the weight of evidence, taking all circumstances into account, is in favour of the plaintiff's case, and that I ought to decree in his favour. [Soulignement ajouté.]

Les motifs qu'a déposé le juge Spragge dans le dossier *Orr c. Orr*, [1874] O.J. No. 236, 21 Gr. 397, 21 Gr. 397, nous offrent un aperçu révélateur en ce qui a trait à cette question, et qui illustre la situation au début de la période de notre survol. Ainsi,

> 91 … I do not propose to refer to the many cases in which Appellate Courts have expressed their extreme unwillingness to find differently, upon questions of fact, from the Court appealed from, where the latter has had the advantage, - an advantage that can scarcely be overestimated - of seeing the witnesses, of hearing them give their evidence, of observing their demeanour, and the thousand circumstances that go to the value or worthlessness of evidence, upon which it is simply impossible that any person merely reading evidence can form an accurate judgment…

Poursuivons dans le context de la notion des "circumstances". L'arret *Freeman c. Freeman*, [1889] O.J. No. 55, 19 O.R 141, contient un passage des motifs du juge Falconbridge: "9 The value of the evidence of the other witnesses who attempted to prove the due execution of a will, can be tested by the light of surrounding circumstances and the other common and ordinary standards of veracity; and as to their demeanour I offer no observation."

Enregistrement du témoignage – insuffisant pour permettre un palier d'appel d'intervenir

Le juge Proudfoot a déposé un de plusieurs jugements concordants dans l'arrêt *Peterkin c. McFarlane*, [1884] O.J. No. 107, 9 O.A.R. 429. Il sied de relever les observations suivantes :

> 224 There is no doubt a considerable conflict of testimony, and, according as the learned Judge believed or disbelieved the witnesses, there was ample evidence to support a decree for plaintiff or for defendant. With regard to the evidence at the former hearing the Chancellor says: "There was much in the evidence of Burke and McKenzie, especially in that of Burke, which I discredited. I thought him untruthful, and that the weight of evidence preponderated in favour of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor and the many circumstances which aid a Judge of fact, before whom evidence is given, to form a correct judgment as to its truthfulness, and the weight properly due to it." [Soulignement ajouté.]

Abordant la question de l'impossibilité pour un palier d'appel de bien saisir ce qui a été vu et entendu lors de l'audition, y compris au moyen d'un enregistrement, le juge Patterson explique :

> 225 It seems to me perfectly clear that no Court of Appeal ought to interfere with the finding of a Judge on a matter of fact, who based his conclusion on the credibility of the witnesses on the one side and the untruthfulness of those on the other side, unless indeed there were no evidence in support of the finding. We cannot determine whether the demeanor of the witnesses was such as to lead to the belief of their veracity or otherwise. Evidence taken by a phonographic reporter can give no means of determining that. In the case of a verdict found by a jury, no Court would ever interfere with it because they believed one set of witnesses and not another set. And at least as much effect should be given to the decision of a Judge who has spent many years of his life in weighing testimony and determining the proper value to be placed on it. [Soulignement ajouté.]

Évasions du témoin et la preuve du comportement

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath*, jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[13] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui prit l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de rendre leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

Le juge Spragge a fait ces remarques au paragr. 6 de l'arrêt *Gray v. Coucher*, [1868] O.J. No. 348, 15 Gr. 419 :

Voir, au demeurant, 27 R.C.S. 13.

> 6 … I do not think it would be safe to hold the fact of notice established by the evidence of Thomas Gray: his demeanour in the witness box impressed me unfavourably; he answered some questions evasively; and appeared to hesitate before answering in order to see the bearing of the questions and the effect of his answers upon the interest of the parties. He exhibited, I thought, a strong bias for the plaintiff, from a desire, as I thought probable, to save his father from the consequences of his act. He did not seem to me entirely reliable. Then he is contradicted in regard to his previous dealing with the same property…

Examen du comportement – au sens de « demeanour under examination »

Cote c Goulet, [1884] SCJ No 9, 9 S.C.R. 279, contient les observations qui suivent du juge Gwynne :

> … appear to me to afford a good illustration of the importance of our being very careful not to set aside the finding of the judge of first instance upon matters of fact, unless thoroughly convinced that the finding is erroneous … I cannot but think that the very unsatisfactory character of the evidence given by the appellant, and his demeanor under examination mainly contributed to induce the learned judge to draw the inference that the intent in the cases adjudicated upon by him was corrupt, and as upon appeal we have not that evidence before us, as the learned judge had, we are not in a position that would justify us in pronouncing his judgment to be erroneous. [Soulignement ajouté.]

La phrase, « demeanour under examination » revient souvent dans les rapports des jugements de cette époque. Voir, par exemple, *Bell v. Macklin*, [1887] S.C.J. No. 44.

Extraordinaire, élément du comportent de cette nature?

Oscar and Hattie (The) v Canada, (1894), 23 SCR 396, contient ce passage d'intérêt, que nous livre le juge en chef Strong, suivant ce titre : « … He gives the state of the wind and weather as his reason for making the North coast of the Island instead of the South side, which was outside Behring's Sea. The witness further says that he saw no seals near Attou Island, and that there were none there. This evidence by itself, even if not corroborated by other evidence, given by a witness who cannot be discredited by reason of any peculiarity of his demeanour in the witness box …"

Façon de s'exprimer au procès : est-ce un élément du comportement ou un aspect connexe dans l'évaluation du témoignage?

Le juge Ferguson du Banc de la Reine de l'Ontario a traité du contentieux *Stuart c. Thomson*, [1893] O.J. No. 155, 23 O.R. 503. Sa Seigneurie a déclaré au paragr. 23:

> … The others who were sworn on the subject spoke naturally, and seemingly in a straightforward manner. They did not give the contents of the important letter in the same words, nor did any of them profess to give all the words of the letter. There was, so far as I was able to perceive in the demeanour of the witnesses, or in the manner in which the

> evidence was given, nothing to indicate that the story had been concocted or invented for the purpose and the occasion; nor do I think that the witnesses had sufficient intelligence of a legal or quasi legal character to enable them to invent such a story; and I cannot even suspect for an instant that any professional gentleman would aid them in such a matter. The circumstances are, however, peculiar… [Soulignement ajouté.]

J'ai reproduit certains des commentaires du juge Draper dans le cours de l'arrêt *Davidson c. Ross*, [1876] O.J. No. 296, 24 Gr. 22 en raison de l'appui qu'on y trouve à la question que j'ai posée:

> 30 The learned Judge appears to have been very favourably impressed by the manner in which the defendant and the other witnesses gave their evidence, and it was urged, and properly urged, that great weight was due to the decision of a Judge of first instance who had an opportunity which we do not possess of forming a judgment upon their demeanor and manner, and no one has a greater deference and respect than I have for any judgment of the very able and learned Judge who pronounced this decree, but I can, upon a careful perusal of this evidence, scarcely avoid feeling that their manner of giving evidence may to some extent have influenced his opinion and prevented his detecting, at the hearing, the contradictions and consistencies in the evidence which we have had the opportunity of considering more deliberately in our own chambers after an elaborate and able discussion, both of the evidence and the learned Judge's opinion of it, by the counsel engaged. [Soulignement ajouté.]

Ainsi, le premier juge a erré non pas au niveau de l'examen du comportement mais bien en se laissant trop impressionné par la façon dont le témoin s'est exprimé.

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath*, jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[14] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

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Voir, au demeurant, 27 R.C.S. 13.

> unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui prit l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de rendre leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

Walsh v Nattrass, [1869] OJ No 151 rapporte ce qui suit au paragr. 10 :

> 10 Whether the opinion which the learned judge formed of the evidence was correct or not, that is, whether another judge might or not have formed a different opinion from the evidence, is not, I think, a point which we are called upon to decide. The public policy of the law will, I have no doubt, be sufficiently protected by leaving that point to the discretion of the judge who tries the case, and who, from the demeanour of the witness, the general context of her narrative and the modes of expression made use of by her, can best determine whether or not she intends to convey by her evidence a charge of felony. [Nous avons souligné.]

Façon de s'exprimer au procès : comme dans la vie de tous les jours?

Le juge Ferguson du Banc de la Reine de l'Ontario a traité du contentieux *Stuart c. Thomson*, [1893] O.J. No. 155, 23 O.R. 503. Sa Seigneurie a déclaré au paragr. 23: "… Thomson gave his evidence very slowly, but this was, I think, owing to his personal manner…" Donc, ce constate élimine les arguments à savoir que le témoin s'exprimait lentement en raison du fait qu'il était à chercher ses mots, ne sachant pas la vérité, et que celle lenteur trahit le fait de mentir.

Fond du témoignage mis en relief avec la forme du témoignage – la crainte que le témoin reçoive un crédit non-indiqué en raison de l'apparence

Le jugement dans *Campbell c. Prince*, [1880] O.J. No. 72, 5 O.A.R. 330, comporte l'opinion du juge Patterson au paragr. 23 à l'effet que la partie demanderesse a peut-être reçu un crédit non-indiqué de la part du jury en raison de son comportement favorable et de sa manière prévenante et engageante :

> 23 I should judge from remarks made by the learned Judge that the plaintiff is prepossessing in her appearance and demeanour. He said to the jury, "From her appearance I would say she is a remarkably intelligent woman, that she gave her evidence in a manner that is highly creditable to her, because we have heard it, and it was plain and it was straightforward, and so far then as appearance and the manner of giving evidence it is in the plaintiff's favour." I should myself gather from the report of the plaintiff's evidence that she was candid enough, and probably as accurate as could be expected in any one whose interest it was to relate particular incidents in the way that told for herself.

> I fear, however, that the eulogy addressed to the jury, while perhaps merited by the way she gave her evidence, may have diverted their attention from the evidence itself. When I read in her evidence that she replied to the defendant's remonstrance in the words I have already quoted, adding, "This is a public office, and you are a public official;" when I find her, however candidly, and perhaps a little boastfully, relating how she had charged the defendant with unfair treatment of her husband … I only state an obvious truth when I say that the quietness of her manner in telling her story, or the credit she apparently took to herself for addressing the defendant as she did, ought not to have disguised the fact that the language she recounted was that of a virago …

Plus loin, au paragr. 27, le juge soulève que : "… but I am disposed to think … that the more favourable impression may have been due to a plausible demeanour and apparent candour in the witness box, which may for the moment have kept the other characteristics out of view…" Au demeurant, un des dangers de se fier, même un peu, à la preuve du comportement est que le jury pourrait se tromper en prêtant beaucoup trop d'importance à la forme favorable du témoignage et scruter de façon incomplète le fond du témoignage.

Fraude, à titre d'accusation, et l'examen accru du comportement du témoin

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, c'est-à-dire le juge en chef Begbie et les juges Walkem et Drake, nous est utile à ce titre. Les trois membres de la formation étaient d'avis de rejeter l'appel, le jugement du juge en chef nous informant de ce qui suit au paragr. 61, et ses commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Ainsi, le juge-en-chef Begbie, sans opposition de ses collègues, a fait valoir que la nature de l'accusation, à savoir impliquant le dol ou la tricherie, était un élément clef de la décision de mettre en relief le comportement de témoin. Aujourd'hui, un tel « penchant » serait jugé contraire à la présomption d'innocence au criminel et ferait entorse, dans le cadre civil, du principe de l'égalité des parties. En somme, il est impensable qu'une cour fasse de sorte que son évaluation du témoignage soit plus ciblée, quant au comportement, si la personne fait face à des accusations de fraude – tout témoin voit sa déposition passé au même crible. Voir aussi le paragr. 15 de l'affaire *Bank of Upper Canada c. Beatty*, [1862] O.J. No. 272.

Hésitations du témoin et la preuve du comportement

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath*, jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[15] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui prit l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de rendre leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

Honnêteté au niveau du comportement

Le juge Boyd a fait les observations qui suivent au paragr. 36 de l'arrêt *Hands v. Law Society of Upper Canada*, [1888] O.J. No. 174, 16 O.R. 625:

> 36 The fact that the solicitor guilty of misconduct has made reparation to the client may satisfy that particular individual, but it does not deprive the general public of its claim for protection against an unsafe member of a privileged class, nor the Law Society of its claim to expel an unworthy member. The professional man who does what is right because he is in jeopardy of degradation has ceased to act uprightly. This honesty of compulsion is not the kind of honest demeanour to which the solicitor pledges himself in his oath of office. Mischief more or less must result to the good repute of the whole profession by the indulgence of mistaken lenity in cases where the payment of money, unjustly and dishonestly withheld by an officer of the law, is allowed to purchase immunity from wholesome discipline. I merely put into words what the vote of the

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Voir, au demeurant, 27 R.C.S. 13.

> Benchers implies. Their sentence of excision commends itself, and it becomes now my duty to dismiss this action, which I do without doubt, though not without regret that such an occasion has arisen. [Soulignement ajouté.]

Incohérence, comportement et la question d'un témoignage de cette nature

L'avocate qui est appelée à démontrer que la cour doit rejeter un témoignage ne souffrant pas de problème évident au niveau du comportement peut invoquer l'incohérence du témoignage. Ainsi, le juge Moss a écrit ce qui suit au paragr. 219 de l'arrêt *McManus c. McManus,* [1876] O.J. No. 299, 24 Gr. 118:

> 19 We think, therefore, that the plaintiffs' bill should have been dismissed on the mere ground that their case was not satisfactorily proved by their own evidence. We have arrived at this conclusion irrespective of the evidence given on behalf of the appellant. We have treated the case as if the learned Judge had wholly discredited the witnesses called by the appellant, although we are not informed whether in fact thus was his view. If he did so, it must have been from their demeanour, or other circumstances which, though observable in Court, cannot be reproduced on the recorded depositions. Their statements do not involve any self-contradictions, or inherent improbability. Their veracity was not impeached in any formal manner. Their evidence, which is directly opposed to the truth of the plaintiffs' case, or to the existence of any trust in the father, would certainly have tended to excite doubt, and to create difficulty, even if the plaintiffs' case had been stronger. It is to be remembered that in such cases as the present it is for the plaintiff to satisfy the mind of the Court with seasonable certainty. If he fails to do this, the Court is certainly justified in making the negative declaration that it cannot find that the alleged trust has been established. [Soulignement ajouté.]

Inconséquence du témoignage, comportement et la question d'un témoignage de cette nature

L'avocate qui est appelée à démontrer que la cour doit rejeter un témoignage ne souffrant pas de problème évident au niveau du comportement peut invoquer le fait que le témoignage était inconséquent. Ainsi, le juge Moss a écrit ce qui suit au paragr. 219 de l'arrêt *McManus c. McManus,* [1876] O.J. No. 299, 24 Gr. 118:

> 19 We think, therefore, that the plaintiffs' bill should have been dismissed on the mere ground that their case was not satisfactorily proved by their own evidence. We have arrived at this conclusion irrespective of the evidence given on behalf of the appellant. We have treated the case as if the learned Judge had wholly discredited the witnesses called by the appellant, although we are not informed whether in fact thus was his view. If he did so, it must have been from their demeanour, or other circumstances which, though observable in Court, cannot be reproduced on the recorded depositions. Their statements do not involve any self-contradictions, or inherent improbability. Their veracity was not impeached in any formal manner. Their evidence, which is directly opposed to the truth of the plaintiffs' case, or to the existence of any trust in the father, would certainly have tended to excite doubt, and to create difficulty, even if the plaintiffs' case had been stronger. It is to be remembered that in such cases as the present it is for

> the plaintiff to satisfy the mind of the Court with seasonable certainty. If he fails to do this, the Court is certainly justified in making the negative declaration that it cannot find that the alleged trust has been established. [Soulignement ajouté.]

Voir aussi le paragr. 8 de l'arret *Houghton (Township) v Freeland*, [1879] OJ No 196 ou il est question de la situation contraire:

> 8 … His evidence was given clearly and consistently, and, as far as I could judge from his manner and demeanour, truthfully. There was nothing to lead to any well grounded suspicion that he had used the moneys for his own purposes, or retained them for his own use, dishonestly using the occasion of the fire to cover a fraud. … It becomes then a question of credibility, and I see no sufficient reason for disbelieving the evidence of the defendant.

Langage du témoin dans l'appréciation de son comportement formant partie de l'examen de sa crédibilité

Le rapport de l'arrêt *Douglas c. Ward,* [1864] O.J. No. 245, 11 Gr. 39, contient les commentaires suivants, de la plume du juge Mowat, qui a aussi été premier ministre de l'Ontario, qui sont très pertinents en rapport à la question si le ton de la voix du témoin est utile au niveau des constats de crédibilité. Ainsi:

> 43 I believe that the impression my brother Spragge formed of the son from his manner in giving evidence, was unfavourable to him. But in regard to the father the reverse was the case. The father's manner was like that of an honest witness; but though a truthful or an untruthful manner is an aid, and often a valuable aid, in judging of the credibility of a witness, it is certainly no infallible test of it. Falsehood is often able to clothe itself in the garb of truth; and I must say that I think the disputed facts here are of such a character that, under the acknowledged circumstances of the case, they ought not to be held established by the unsupported evidence of any witness so mixed up with all that is suspicious about the transactions in controversy as Joseph Ward was, no matter who such witness may be, or how plausible may be his tone, language, and demeanour in giving his testimony. I think also that even Joseph's deposition, when carefully considered, is open to much (sic) observation. [Soulignement ajouté.]

En d'autres mots, l'avocate doit plaider que la cour doit toujours scruter les éléments objectifs qui peuvent appuyer un ou des témoignages qui sont susceptibles d'être le fruit de l'intérêt pécuniaire du témoin et de se mettre en garde contre les impressions externes favorables au niveau du comportement.

Lenteur, témoin parle très lentement – car il ment et cherche ses mots ou s'agit-il de sa situation quotidienne?

Le juge Ferguson du Banc de la Reine de l'Ontario a traité du contentieux *Stuart c. Thomson,* [1893] O.J. No. 155, 23 O.R. 503. Sa Seigneurie a déclaré au paragr. 23: "… Thomson gave his evidence very slowly, but this was, I think, owing to his personal manner…" Donc, ce

constate élimine les arguments à savoir que le témoin s'exprimait lentement en raison du fait qu'il était à chercher ses mots, ne sachant pas la vérité, et que celle lenteur trahit le fait de mentir.

Manière de témoigner – et le comportement – commentaires d'ordre général

L'affaire *Day c. Brown*, [1871] O.J. No. 284, 18 Gr. 68, contient les enseignements de juge Spragge qui a déclaré que :

> 7 But the circumstances here were not of such cogency; they were only suspicious, and the Master having himself seen the witnesses, having observed their demeanour, and not only their answers, but their mode of answering; their appearance, manner, and the many minor circumstances attending the examination of witnesses which give to, or detract from the value of oral testimony, had materials for forming a more correct judgment as to the weight to be attached to it, than any one from merely reading the evidence can possibly have. [Soulignement ajouté.]

Le juge Burbridge a déclaré ce qui suit dans l'arrêt *American Dunlop Tire Co c Goold Bicycle Co*, 6 ExC.R. 223:

> 6 … I have had the opportunity on more occasions than one of watching very closely the demeanour of these witnesses when giving their evidence on the question now in issue and whatever discrepancies there may be in their evidence - and no doubt there are some and whatever comment it may be open to - and there is no doubt it is open to some comment - they have appeared to me desirous of telling the truth as far as they knew it. There was nothing in the demeanour of either of them, or in the manner in which they gave their evidence, to lead me to the conclusion that either of them was wilfully giving false testimony. …" [Soulignement ajouté.]

Poursuivant dans la veine de la juxtaposition du vocable « demeanour » et des mots « manner of testifying », le juge Gwynne relève ce qui suit dans l'arrêt *Ryan c Ryan*, [1881] S.C.J. No. 7, 5 S.C.R. 387. Je note qu'il ne fait pas mention de « manner » ou d'autres mots hormis « demeanour ». Ainsi :

> … The learned Chief Justice of the Court of Queen's Bench, who tried the case without a jury and himself heard all the witnesses give their evidence, found as a matter of fact that, not only was the respondent's possession in its commencement that of a servant, agent, or caretaker for his father, but that this relationship continued throughout until the father's death in 1877, and so that the respondent never had any estate of the nature of a tenancy whether by the year, or at will, or otherwise. Now, this is just one of those cases in which a Court of Appeal should not reverse the finding upon matters of fact of the Judge who tried the cause and had the opportunity of observing the demeanour of the witnesses, unless the evidence be of such a character as to convey to the mind of the Judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. So far from that being capable of being said in this case, the finding of the learned Chief Justice appears to be perfectly justified by the evidence… [Soulignement ajoute.]

Le juge Blake a écrit ce qui suit au paragr. 25 de l'arrêt *Mulholland c. Merriam*, [1873] O.J. No. 158, 20 Gr. 152:

> 25 … In order to do away with, or materially vary the effect of a written instrument, the evidence adduced for the purpose must be conclusive [*Lewis v. Robson*, 18 Gr. 395]. It is not sufficient that the mind may be led to doubt whether the paper truly sets out what the agreement of the parties to it may have been. Here, I think, if I looked at the documents on the one side and contrasted them with the evidence adduced on behalf of the defendant, and this evidence of the defendant and his witnesses was admissible and to be relied on, I should have determined that there was sufficient to shew that the instrument did not truly express the agreement of the parties, and that the plaintiff should give the defendant credit for $200, the value of the Branchton lot. But the Judge who took the evidence was not impressed favourably with the witnesses examined on the part of the defendant; he could not place confidence in them, and I therefore think it impossible that on such testimony the transaction, as it plainly appears without this evidence, can be varied as is here sought [*Sanderson v. Burdett*, 18 Gr. 417]. There are cases, no doubt, in which it is proper for the Appellate Court to consider on which side is the weight of evidence, and to vary a decree based upon what it may conceive to be a misapprehension in that respect; but it is impossible for this Court, in such a case as the present, to review the impression made upon the Judge before whom the witnesses were examined, and to say, notwithstanding the demeanour and appearance of the witness, and his manner in giving his evidence, which impressed the Court below with his untruthfulness, want of candor, or forgetfulness, we will give a credit to his testimony refused by him who has had peculiar advantages to aid in a correct conclusion upon its worth. [Soulignement ajouté]

Relevons maintenant le paragr. 5 du jugement du juge en chef Davie dans le cadre du dossier *Canadian Pacific Railway c. McBryan*, [1896] B.C.J. No. 43, 5 B.C.R. 187:

> "… When conclusions of fact are arrived at in the Court of first instance they are not lightly interfered with in a Court of Appeal, but when there are no findings of fact it may be open to question how far the Court of Appeal is justified in itself acting as a Court of first instance, and endeavouring to ascertain the facts; it has not the witnesses before it, and has had no opportunity of judging of their manner and demeanour. In a case such as this a description of the locus in quo from the witnesses themselves would be of advantage, and perhaps a view of the scene of dispute might be of greater advantage still. We could, of course, refer the case to the Court below for findings and reasons, but as delay over another high water might be injurious, perhaps ruinous, it is probably more in the interests of justice and in keeping with the policy of the Judicature Acts, that the Court should pronounce the best opinion it can upon the materials before it.

Voir aussi le paragr. 8 de l'arret *Houghton (Township) v Freeland*, [1879] OJ No 196:

> 8 … His evidence was given clearly and consistently, and, as far as I could judge from his manner and demeanour, truthfully. There was nothing to lead to any well grounded suspicion that he had used the moneys for his own purposes, or retained them for his own use, dishonestly using the occasion of the fire to cover a fraud. … It becomes then a

> question of credibility, and I see no sufficient reason for disbelieving the evidence of the defendant.

Au demeurant, relevons l'arret *Meharg v. Lumbers*, [1896] O.J. No. 11.

Manière de témoigner – et le comportement - il ne s'agit pas d'un test infaillible au niveau des constats de crédibilité

Le rapport de l'arrêt *Douglas c. Ward*, [1864] O.J. No. 245, 11 Gr. 39, contient les commentaires suivants qui sont très pertinents, de la plume du juge Mowat, qui a aussi été premier ministre de l'Ontario, :

> 43 I believe that the impression my brother Spragge formed of the son from his manner in giving evidence, was unfavourable to him. But in regard to the father the reverse was the case. The father's manner was like that of an honest witness; but though a truthful or an untruthful manner is an aid, and often a valuable aid, in judging of the credibility of a witness, it is certainly no infallible test of it. Falsehood is often able to clothe itself in the garb of truth; and I must say that I think the disputed facts here are of such a character that, under the acknowledged circumstances of the case, they ought not to be held established by the unsupported evidence of any witness so mixed up with all that is suspicious about the transactions in controversy as Joseph Ward was, no matter who such witness may be, or how plausible may be his tone, language, and demeanour in giving his testimony. I think also that even Joseph's deposition, when carefully considered, is open to much (sic) observation. [Soulignement ajouté.]

Dans le cadre d'un jugement majoritaire concordant, le juge Moss a écrit ce qui au paragr. 37 et au paragr. 38 de *Ball c. Parker*, 1 O.A.R. 593:

> 37 The decision does not seem to have proceeded in any degree upon the estimate which the learned Judge formed of the credibility of the witnesses. It is not one of the cases in which, from the conflicting nature of the testimony, demeanour and manner are valuable auxiliaries in the attainment of the truth, and in which therefore the greatest weight is due to the opinion of the tribunal which has enjoyed the advantage of hearing and observing the witnesses while under examination. Even in such a case we must always keep it present to our mind that the Judge did possess this advantage beyond the Court, and make due allowance for it at any point where it could possibly have formed an element in the formation of judgment. [Soulignement ajouté.]
>
> 38 But as was pointed out in *Re Glannibanta*, L. R. 1 P. D. 283, the parties are entitled as well on questions of fact as on questions of law to demand the decision of the Appellate Court. The argument against reversing the decision of the Judge who had the living witnesses before him may be pushed too far. It is well answered by Bramwell J.A., in *Bigsby v. Dickinson*, 4 Ch. D. 28. While bearing in mind the superior advantage which the learned Judge possessed, and while making fall allowance for this, we are bound to

> consider whether his inferences and conclusions are, in our opinion, well founded.[16] [Soulignement ajouté.]

Mémoire – comportement et – en général

Le juge Blake a écrit ce qui suit au paragr. 25 de l'arrêt *Mulholland c. Merriam*, [1873] O.J. No. 158, 20 Gr. 152:

> 25 … In order to do away with, or materially vary the effect of a written instrument, the evidence adduced for the purpose must be conclusive [*Lewis v. Robson*, 18 Gr. 395]. It is not sufficient that the mind may be led to doubt whether the paper truly sets out what the agreement of the parties to it may have been. Here, I think, if I looked at the documents on the one side and contrasted them with the evidence adduced on behalf of the defendant, and this evidence of the defendant and his witnesses was admissible and to be relied on, I should have determined that there was sufficient to shew that the instrument did not truly express the agreement of the parties, and that the plaintiff should give the defendant credit for $200, the value of the Branchton lot. But the Judge who took the evidence was not impressed favourably with the witnesses examined on the part of the defendant; he could not place confidence in them, and I therefore think it impossible that on such testimony the transaction, as it plainly appears without this evidence, can be varied as is here sought [*Sanderson v. Burdett*, 18 Gr. 417]. There are cases, no doubt, in which it is proper for the Appellate Court to consider on which side is the weight of evidence, and to vary a decree based upon what it may conceive to be a misapprehension in that respect; but it is impossible for this Court, in such a case as the present, to review the impression made upon the Judge before whom the witnesses were examined, and to say, notwithstanding the demeanour and appearance of the witness, and his manner in giving his evidence, which impressed the Court below with his untruthfulness, want of candor, or forgetfulness[17], we will give a credit to his testimony refused by him who has had peculiar advantages to aid in a correct conclusion upon its worth. [Soulignement ajouté]

Mémoire des évènements, après plusieurs années, et le comportement

Beatty c. Neelon, [1885] O.J. No. 7, 12 O.A.R. 50, un dossier que le juge-en-chef Hagarty a décidé avec ses collègues Burton, Patterson et Osler, nous fait cette leçon, au paragr. 60 :

> 60 The evidence is most contradictory; the defendants most distinctly denying that the representations sworn to by the plaintiffs were ever made. There are material discrepancies on some points on both sides. The case does not strike me as one in which any serious importance is to be attached to the demeanour or appearance of the witnesses.

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16 Voir *North British & Mercantile Insurance Co v Tourville*, (1895), 25 SCR 177.

17 Récemment, j'ai lu les mémoires d'Alex Trebek, The Answer Is … Reflections on my Life, Simon & Schuster, New York, N.Y., 2020, et j'ai bien goute ce commentaire, à la page 4 : « … When I was younger, i had a great memory. I didn't forget anything. Now my memory is fading, and I feel I'm in the same boat as Mark Twain, who in his seventies said he remembered only things that never happened…"

> They were giving evidence of transactions and conversations that had taken place seven or eight years ago, and it would have been strange if their recollections could have been uniformly clear.

Mensonges et comportement – règle générale

Le juge Blake a écrit ce qui suit au paragr. 25 de l'arrêt *Mulholland c. Merriam*, [1873] O.J. No. 158, 20 Gr. 152:

> 25 … In order to do away with, or materially vary the effect of a written instrument, the evidence adduced for the purpose must be conclusive [*Lewis v. Robson*, 18 Gr. 395]. It is not sufficient that the mind may be led to doubt whether the paper truly sets out what the agreement of the parties to it may have been. Here, I think, if I looked at the documents on the one side and contrasted them with the evidence adduced on behalf of the defendant, and this evidence of the defendant and his witnesses was admissible and to be relied on, I should have determined that there was sufficient to shew that the instrument did not truly express the agreement of the parties, and that the plaintiff should give the defendant credit for $200, the value of the Branchton lot. But the Judge who took the evidence was not impressed favourably with the witnesses examined on the part of the defendant; he could not place confidence in them, and I therefore think it impossible that on such testimony the transaction, as it plainly appears without this evidence, can be varied as is here sought [*Sanderson v. Burdett*, 18 Gr. 417]. There are cases, no doubt, in which it is proper for the Appellate Court to consider on which side is the weight of evidence, and to vary a decree based upon what it may conceive to be a misapprehension in that respect; but it is impossible for this Court, in such a case as the present, to review the impression made upon the Judge before whom the witnesses were examined, and to say, notwithstanding the demeanour and appearance of the witness, and his manner in giving his evidence, which impressed the Court below with his untruthfulness, want of candor, or forgetfulness, we will give a credit to his testimony refused by him who has had peculiar advantages to aid in a correct conclusion upon its worth. [Soulignement ajouté]

Mensonges peuvent réussir à cacher la vérité surtout si la manière de témoigner est de nature à berner le juge

Le rapport de l'arrêt *Douglas c. Ward*, [1864] O.J. No. 245, 11 Gr. 39, contient les commentaires suivants, de la plume du juge Mowat, qui a aussi été premier ministre de l'Ontario, qui sont très pertinents:

> 43 I believe that the impression my brother Spragge formed of the son from his manner in giving evidence, was unfavourable to him. But in regard to the father the reverse was the case. The father's manner was like that of an honest witness; but though a truthful or an untruthful manner is an aid, and often a valuable aid, in judging of the credibility of a witness, it is certainly no infallible test of it. Falsehood is often able to clothe itself in the garb of truth; and I must say that I think the disputed facts here are of such a character that, under the acknowledged circumstances of the case, they ought not to be held established by the unsupported evidence of any witness so mixed up with all that is

> suspicious about the transactions in controversy as Joseph Ward was, no matter who such witness may be, or how plausible may be his tone, language, and demeanour in giving his testimony. I think also that even Joseph's deposition, when carefully considered, is open to much (sic) observation. [Soulignement ajouté.]

Nature humaine et le comportement – exemple d'un jugement qui met l'accent sur le gros bon sens qui nous influence à ne pas gaspiller de l'argent

Davis (Re), [1871] O.J. No. 307, 3 Chy. Chrs. 277, un jugement de la plume du juge Mowat, relate ce qui suit au paragr. 11 quant à la décision du premier juge de faire un examen de chaque témoin pour juger, entre autres, de leur apparence:

> 11 The marriage of these parties was a marriage of affection, as each of them took occasion to tell me. The husband said that they had been "keeping company" for three years before their marriage; and that his means had enabled him, and would still enable him, to keep her in greater comfort than, from her father's narrow income, she has ever known in her father's house. If all that is so, and if the husband has always treated his wife properly, how is it that she is now so unwilling to live with him? Why is it that her parents desire to burden their narrow income with her maintenance? and why is it that the wife and her parents voluntarily bring on themselves the reproach and unhappiness to all parties which are inseparable from the separation of a man and his wife? Looking at the affidavits and sill the circumstances, I am not prepared to say, that the wife's explanation of the separation is not more probable than any other. A comparison of the appearance and demeanour of the parties (which my interview with each of them enabled me to make) did not in my mind help the case of the husband. [Soulignement ajouté.][18]

Norme de contrôle classique – palier d'appel n'a ni vu ni entendu le témoignage

Les motifs qu'a déposé le juge Spragge dans le dossier *Orr c. Orr*, [1874] O.J. No. 236, 21 Gr. 397, 21 Gr. 397, nous offrent un aperçu révélateur en ce qui a trait à cette question, et qui illustre la situation au début de la période de notre survol. Ainsi,

> 91 … I do not propose to refer to the many cases in which Appellate Courts have expressed their extreme unwillingness to find differently, upon questions of fact, from the Court appealed from, where the latter has had the advantage, - an advantage that can scarcely be overestimated - of seeing the witnesses, of hearing them give their evidence, of observing their demeanour, and the thousand circumstances that go to the value or worthlessness of evidence, upon which it is simply impossible that any person merely reading evidence can form an accurate judgment. It is surely to be assumed that a Judge who has heard the witnesses, has attached its due weight, and not more than its due weight, to the evidence of the several witnesses; that he has properly held the evidence of one entitled to little weight, for lack of honesty or accuracy, or mental capacity; the evidence of another entitled to no weight at all, for some or all of these reasons; while he may give entire credence to the evidence of a third. He may be wrong certainly, but he is

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18 Voir aussi *McAlpine v. How*, [1862] O.J. No. 281, au paragr. 7.

> infinitely more likely to be right than any Judge merely reading the evidence, and who cannot know the relative value of the evidence of different witnesses. I am perfectly aware that these observations are trite; but they involve a principle that is sometimes lost sight of, and which it would be dangerous to impair.

Je cite maintenant les motifs du juge Strong dans l'arrêt *Grasett c. Carter*, (1884), 10 S.C.R. 105 :

> The judgment in this court in the case of Picton, 4 Can. S.C.R. 648, and the authorities there referred to, especially the case of *Gray v. Turnbull*, L.R. 2 Sc. App. 53, in the House of Lords, which are binding upon us, show that in a case of direct conflict of testimony, such as we have presented here between Mr. Carter on the one side, and Dr. Temple and his architect and builder on the other, as to what was done on the morning on which the excavations for the foundations of the house were began, the finding of the primary judge is to be regarded as decisive, and should not be overturned in appeal by judges who have not had the advantage, as the judge at the trial had, of seeing the witnesses and observing their demeanour under examination. [Soulignement ajouté.][19]

Le pourvoi intitulé *Campbell c. Grieve*, (1892), 20 S.C.R. 331, [1892] S.C.J. No. 16, contient les commentaires qui suivent, de la plume du juge-en-chef Ritchie :

> The facts in reference to this charge can hardly be said to be in dispute, nor is there any conflict of testimony. The only witnesses examined were Gowing the voter, the witness Winters who, it is alleged lent the money to the voter, and Stock who advanced the money to enable the alleged loan to be made to the voter. The determination of the case therefore depends upon whether or not proper inferences have been drawn by the court below, and the case is therefore open to the reconsideration of the appellate court. [Soulignement ajouté.]

Sire Ritchie, ayant démontré qu'il ne s'agit pas d'un cas où la norme de contrôle classique s'applique, a poursuivi ainsi:

> Baggallay J.A. in the *Glannibanta Case*, 1 Pro. Div. 387, says:
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> > In the course of the argument on behalf of the plaintiffs we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in Admiralty cases, and particularly in the cases of the "*Julia*", 14 Moo. P.C. 210, and the "Alice", L.R. 2 P.C. 245, to the effect, that if in the Court of Admiralty there was conflicting evidence, and the judge of that court having had the opportunity of seeing the witnesses and observing their demeanour, had come, on the balance of testimony, to a clean and decisive conclusion, the Judicial Committee would not be

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19 Voir aussi *R. v. Woods*, [1897] B.C.J. No. 63, 5 B.C.R. 585, 2 C.C.C. 159 (C.A.), au paragr. 3, le paragr. 16 de l'arret *Weegar v. Grand Trunk Railway Co.*, [1893] O.J. No. 95, le paragr. 14 de *Weeks (Re)*, [1876] O.J. No. 252 et *Hope v. Davidson*, [1873] O.J. No. 75, 33 U.C.R. 550 ainsi que *In re Christie and Toronto Junction*, [1895] O.J. No. 7, *McEwan v. Milne*, [1884] O.J. No. 209 et *McKinstry v. Furby*, [1864] O.J. No. 32.

> disposed to reverse such decision, except in cases of extreme and overwhelming pressure; and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the Admiralty Division as to the question of fact upon which its decision was based.[20]

> Now, we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that 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 neither seen nor heard the witnesses, and should make due allowance in this respect. [Soulignement ajouté.]
>
> In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary it would appear that his judgment in fact proceeded upon the inferences which he drew from the evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence as well as the evidence itself made the subject of elaborate and able discussion on both sides. [Soulignement ajouté.][21]

Le juge Patterson, dissident quant au résultat en raison du fait qu'il a tranché qu'il était question d'un jugement sur le crédit du témoignage, a dit :

> In the head note to the case of *Grasett v. Carter*, 10 Can. S.C.R. 105, in this court the doctrine is very clearly stated:

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[20] *Armstrong c. Gage*, [1877] O.J. No. 199, 25 Gr. 1, une décision du juge Proudfoot, contient ces remarques fort utiles :

> 118 I have not been certified upon what evidence the Master arrived at his conclusion. It does not appear, from anything I see upon the depositions, that the Master at all proceeded on the manner or demeanor of the witnesses. But the parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that 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 neither seen nor heard the witnesses, and should make due allowance in this respect: *The Glannibanta* [L.R. 1 Prob. & D. 283].

[21] Voir aussi *Nasmith v. Manning*, [1881] S.C.J. No. 8, 5 S.C.R. 417, *Larue v. Deslauriers*, (1881), 5 S.C.R. 91 et le paragr. 20 de *Robertson v. Smith; Ogden v. Robertson*, [1874] O.J. No. 225.

> When there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination.

De poursuivre le juge Patterson :

> I have always thought that the proper principle on which appeals should be dealt with when the judgment directly appealed from has reversed a decision on a question of fact was stated by Lord O'Hagan in a case of *Symington v. Symington*, L.R. 3 Sc. App. 415, 424, some five years later in date than *Gray v. Turnbull*, L.R. 2 Sc. App. 53, but found in the same volume of the reports.
>
> On the first question we have been fairly pressed by the argument that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity from their demeanour before himself, should not have his decision lightly set aside. And undoubtedly the value of vivâ voce testimony can be much better ascertained by those who hear it than by those who know it only from report. But there is this peculiarity in the present case, **that the Lord Ordinary has put us somewhat in his own position and enabled us, so to speak, to see with his eyes when he states the impression produced upon him by the principal witness** ... Besides we are concerned, directly, not with the judgment of the Lord Ordinary, but with that which overruled it; and the latter we ought to affirm unless we are satisfied of its error. [Soulignement simple et foncé ajouté.] [22]

Ce qui est d'intérêt est que les phrases en noir identifient les efforts du juge de bien décrire les éléments du comportement qui étaient en jeu, un fait rare. Exprimé autrement, le juge des faits a expliqué pourquoi le comportement était de sorte à donner lieu au résultat précis.

L'arrêt *Russell c. Lefrançois*, (1883), 8 S.C.R. 335, a fourni au savant juge Taschereau l'occasion de se prononcer à ce sujet :

> Et dans "*The Glannibanta*, 1 P. and Ad. Div. 283," la Cour d'appel disait:
>
> That the parties were entitled to have the decision of the Court of Appeal, on questions of fact as well as on questions of law, and that the court could not 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. The court added that, 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 evinced by their demeanour, but otherwise, in cases where it depends upon the drawing of inferences from the facts in evidence.

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[22] Voir *Hale v. Kennedy*, [1883] O.J. No. 55, 8 O.A.R. 157, au paragr. 13.

Et dans *Bigsby v. Dickinson*, 4 Ch. Div. 24, la cour décide que:

> Although the Court of Appeal, when called on to review the conclusion of a judge of first instance after hearing witnesses vivâ voce, will give great weight to the consideration that the demeanour and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet, it will in a proper case act upon its own view of conflicting evidence.

Dans cette dernière cause James, L.J., disait:

> Of course, if we are to accept as final the decision of the court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened, but then that would be doing away with the right of appeal in all cases of nuisance for there never is one brought into court in which there is not contradictory evidence.

Le juge Gwynne, plus tard membre de la Cour suprême du Canada, a noté à ce sujet au paragr. 14 de *Pritchard c. Walker*, [1874] O.J. No. 154, 24 U.C.C.P. 434 : « In the opinion of the learned Chief Justice who tried the case, the Court can decide on the questions of fact arising in this case as readily as he could himself at the trial, as the evidence was not contradictory, and nothing would depend on the demeanor of the witnesses or their manner of giving their evidence."

Les motifs qu'a déposé le juge Strong dans le dossier *Morrison c. Robinson*, [1872] O.J. No. 224, 19 Gr. 480, nous offrent un aperçu révélateur en ce qui a trait à cette question, en rappelant aussi à notre mémoire les circonstances qui distinguent le principe et qui permettent de ne pas appliquer la règle générale de « non-ingérence » :

> 15 … It is true that the Master had the opportunity of seeing the witnesses and of observing [them] therefore, if the decision of the question of fact depended altogether on the credit to be given to direct testimony of conflicting witnesses, I should, on the principle laid down in *Day v. Brown*, unhesitatingly adopt the Master's finding. <u>But it must be remembered that that rule only applies where the evidence being directly contradictory there are no circumstances pointing to the probability of one statement rather than to that of others</u>. Now, I find in the present case, a circumstance which, in my judgment, would be quite sufficient to outweigh in favour of the evidence of Perry the statement of Mr. Davy, even if his memory were clear, and his denial explicit, neither of which, however, is the case. That most important fact is the conduct of Mr. Davy in allowing Mr. Perry to continue to hold this mortgage undischarged long after the notes to Gillespie, Moffatt & Co., were paid; and also to retain the title deed… The circumstantial evidence, therefore, strongly confirms the direct testimony of Mr. Perry, and there is nothing to oppose to it but the statement of Mr. Davy, who speaks distrustfully of his own memory, and gives no satisfactory reason for not calling for the discharge of the mortgage and the delivery up of the title deed. [Soulignement ajouté.]

L'avocate doit s'évertuer à découvrir une telle preuve objective dans les cas où la preuve subjective de comportement est apte à nuire au succès de sa cliente.

Le juge Moss a contribué à ce débat au paragr. de l'arrêt *In re Randolph*, [1877] O.J. No. 13, 1 O.A.R. 315 :

> 42 The language of Sir R. Baggallay J.A., in delivering the judgment of the Court of Appeal in the case of *The Glannibanta*, L. R. 1 P. D. 287, is a very recent exposition of the principles which should guide an Appellate Court in reviewing a decision upon facts by a Judge who had enjoyed the advantage of seeing the witnesses and observing their demeanour: "Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that 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 neither seen nor heard the witnesses, and should make due allowance in this respect. In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned Judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary, it would appear that his judgment in fact proceeded upon the inferences which be drew from the evidence before him, and which we have really the some means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence, as well as the evidence itself, made the subject of an elaborate and able discussion on both sides."

Le prochain jugement d'intérêt est *Gibson c North Easthope (Township*), [1894] OJ No 46, 14 C.L.T. 503, 21 O.A.R. 504, un jugement qui contient ces remarques du juge d'appel Osler, au paragr. 66. Ces observations sont utiles afin de relever les décisions qui ne sont pas à l'abri d'intervention en appel sur la base de l'avantage du premier juge d'avoir vu et entendu les témoins :

> 66 … The case is not one which depends upon the trial Judge's view of witnesses' credibility founded upon their appearance and demeanour, as neither Meredith J., nor the Judges of the Queen's Bench Division, saw the witnesses but acted upon the evidence as reported. We are, therefore, in the same position as any judge who has passed upon the evidence to form an opinion upon it.

Genereux c. Cuthbert, [1884] SCJ No 4, 9 S.C.R. 102, nous offre ces commentaires du juge Gwynne en rapport à l'examen du comportement des témoins dans le contexte des litiges impliquant des allégations de fraude électorale, et la quasi-impossibilité de démontrer que le premier juge s'est trompé en ce qui a trait aux constats de faits. Ainsi :

> I adhere to the opinion already expressed by me more than once, that in these election cases upon the trial of the matters of facts raised <u>in which so much depends upon the manner in which the witnesses give their evidence -- their intelligence -- and the degree of credibility to be attached to each, we, sitting in appeal from the judgment of a learned judge, who having had the advantage of seeing and hearing the witnesses give</u>

> their evidence, has passed upon the matters of fact, should never overrule his finding, unless (a thing which, when the evidence is wholly oral -- not contained in any written document -- it is difficult to conceive to be possible) the evidence is of such a nature as to convey to our minds an irresistible conviction that the finding of the learned judge upon those mere matters of fact is clearly erroneous. It may be that in some cases, upon reading the evidence as taken down, and without the light thrown upon it by the demeanor of the witnesses, I might arrive at a different conclusion from that arrived at by the learned judge, but that would allow no justification for my overruling -- upon mere matters of fact -- his judgment formed under advantages, which, sitting in appeal, I have not, and cannot have; but when the appeal is, or in so far as it is, upon a point or points of law, it is a different matter. Then it becomes my duty to express my opinion upon the law involved in the points appealed, according to the best and utmost of my independent judgment. [Soulignement ajouté.]

Le prochain jugement insiste sur l'absence d'une situation privilégiée du premier juge. Ainsi, *Fawcett c. Burwell*, [1880] O.J. No. 190, 27 Gr. 445, un jugement de l'hon. Proudfoot, rapporte ce qui suit au paragr. 15 :

> 15 That I understand was the finding of the Master at London; and it is no violation of the rule laid down in *Day v. Brown* [18 Gr] if I differ from the Master in Ordinary, if he considered, as it is said he did though it does not so appear in his judgment, that the $400 was rent upon the unimproved value, - because he did not see the witnesses and he could have had no reason from demeanour or manner, for attaching more credit to one than to another. And upon the weight of evidence. I think the $4110 was rent at the improved value, and I agree with the Master who saw the witnesses. [Soulignement ajouté.]

Ayant cité l'affaire *Day c. Brown*, [1871] O.J. No. 284, 18 Gr. 68, il sied de relever les enseignements de juge Spragge qui a déclaré ce qui suit dans cette affaire :

> 7 But the circumstances here were not of such cogency; they were only suspicious, and the Master having himself seen the witnesses, having observed their demeanour, and not only their answers, but their mode of answering; their appearance, manner, and the many minor circumstances attending the examination of witnesses which give to, or detract from the value of oral testimony, had materials for forming a more correct judgment as to the weight to be attached to it, than any one from merely reading the evidence can possibly have. If upon an appeal involving the question of the weight to be attached to oral testimony, the Judge hearing the appeal should overrule the Master, he would run a great risk of being in the wrong; and setting aside the judgment of the Master in a case where, from his superior means of forming a correct judgment, he would be the more likely to be right. We think that the learned Vice Chancellor, in overruling this appeal, proceeded upon a correct principle, and that his order must be affirmed, and with costs. [Nous avons souligné.]

Le juge Taschereau s'est prononcé de cette façon quant à la norme de contrôle dans le cadre de l'affaire *North British & Mercantile Insurance Co c Tourville*, [1895] SCJ No 84, 25 RCS 177, 1895 CanLII 68 :

> 192 The case falls under the exceptions foreseen in all the decisions wherein the general rule was followed, and the following have their full application; indeed, they enlarge the duties of a Court of Appeal further than is required to justify the allowance of this appeal:
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> > The judicial committee is not bound by the decision of the court below upon a question of evidence, although in general it will follow it, *Canopa v. Larios* (2 Kn. 276).
> >
> > 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, *The Glannibanta* (1 P.D. 283). [Soulignement ajoute.]

And in *Bigsby v. Dickinson*, 4 Ch. D. 24, it was held that:

> > Although the Court of Appeal, when called on to review the conclusion of a judge of first instance, after hearing vivâ voce, will give great weight to the consideration that the demeanour and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet it will in a proper case act upon its own view of the conflicting evidence." "Of course," said James, L.J. in that same case, "if we are to accept as final the decision of the court of first instance in every case where there is a conflict of evidence our labours would be very much lightened, but then, that would be doing away with the right of appeal in all cases of nuisance, for there never is one brought into court in which there is not contradictory evidence."

Le juge Cameron a écrit ce qui suit au paragr. 29 de l'arrêt *Culverwell c. Birney,* [1884] O.J. No. 172. Ces observations viennent très près d'un standard élevé avant que l'intervention soit justifiée:

> > 29 … and so the learned judge's finding is not altogether unsupported as to the agency; and as the question of the defendants' knowledge of the fact that plaintiff was to receive a commission from Bradford depends upon the credit given to the witnesses, the learned judge was in a better position to form an opinion than this court can be as he had the advantage of seeing the witnesses and observing their demeanour. I am not in a position to say he came to an absolutely wrong conclusion. … [Soulignement ajouté.]

Cela étant, à ce stade, de nouveau je cite le juge Gwynne :

> > If there are any cases in which more than in others we should inflexibly adhere to the rule that we should not in appeal reverse upon mere matters of fact the judgment of the judge who tries the cause, having himself heard all the evidence, unless the matter of the

> evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong but is erroneous, they are these election cases, in which so much depends upon the manner in which the witnesses give their evidence, and upon the degree of credit to be attached to them respectively. A judge sitting in appeal, not having before him the demeanor which the judge who tried the petition had, assumes a grave responsibility, and indeed, as it seems to me, exceeds the legitimate functions of an appellate tribunal when he pronounces the judgment of the judge of first instance in such cases to be erroneous upon anything short of the most unhesitating conviction.

Voir aussi *Cimon v Perrault*, [1881] SCJ No 2, 5 S.C.R. 1 et *Minnie (The) c. Canada*, (1894), 23 S.C.R. 478.

Un jugement du Manitoba**,** *Doidge c. Mimms*, [1900] M.J. No. 3, 13 Man. R. 48 (C.A.) rapporte ces commentaires du juge Richards :

> 34 As the evidence before this Court is not the full evidence given, but merely the learned County Court Judge's notes taken for the purpose of refreshing his own memory after having first heard the evidence in full, and as we have not the benefit of seeing the parties and judging of their evidence and demeanour, and as there is nothing to show what view the learned Judge took of the plaintiff's own evidence, I do not feel in a position to decide whether a contract to pay the original plaintiff for her own use has or has not been proved.

Relevons maintenant le paragr. 5 du jugement du juge en chef Davie dans le cadre du dossier *Canadian Pacific Railway c. McBryan*, [1896] B.C.J. No. 43, 5 B.C.R. 187:

> "… When conclusions of fact are arrived at in the Court of first instance they are not lightly interfered with in a Court of Appeal, but when there are no findings of fact it may be open to question how far the Court of Appeal is justified in itself acting as a Court of first instance, and endeavouring to ascertain the facts; it has not the witnesses before it, and has had no opportunity of judging of their manner and demeanour. In a case such as this a description of the locus in quo from the witnesses themselves would be of advantage, and perhaps a view of the scene of dispute might be of greater advantage still. We could, of course, refer the case to the Court below for findings and reasons, but as delay over another high water might be injurious, perhaps ruinous, it is probably more in the interests of justice and in keeping with the policy of the Judicature Acts, that the Court should pronounce the best opinion it can upon the materials before it.

Walsh v Nattrass, [1869] OJ No 151 rapporte ce qui suit au paragr. 10 :

> 10 Whether the opinion which the learned judge formed of the evidence was correct or not, that is, whether another judge might or not have formed a different opinion from the evidence, is not, I think, a point which we are called upon to decide. The public policy of the law will, I have no doubt, be sufficiently protected by leaving that point to the discretion of the judge who tries the case, and who, <u>from the demeanour of the witness, the general context of her narrative and the modes of expression made use of by her</u>, can

> best determine whether or not she intends to convey by her evidence a charge of felony. [Nous avons souligné.]

Photo du témoin lors de son témoignage – non-existence d'une telle preuve empêche un recours viable en appel car la juge a vu et entendu le témoin

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « look » du témoin. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le jugement du juge en chef nous informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

La question qui se pose aujourd'hui est la suivante : la norme de contrôle devrait-elle être revue en fonction du fait que certains procès, ou le témoignage à tout le moins, sont captés sur bande et capables d'être joués pour le palier d'appel?

De façon générale, plusieurs jugements de l'époque font ressortir l'impossibilité de reproduire pour une cour d'appel ce que la juge de première instance a vu et entendu. À ce sujet, le juge Moss a écrit ce qui suit au paragr. 219 de l'arrêt *McManus c. McManus*, [1876] O.J. No. 299, 24 Gr. 118:

> 19 We think, therefore, that the plaintiffs' bill should have been dismissed on the mere ground that their case was not satisfactorily proved by their own evidence. We have arrived at this conclusion irrespective of the evidence given on behalf of the appellant. We have treated the case as if the learned Judge had wholly discredited the witnesses called by the appellant, although we are not informed whether in fact thus was his view. If he did so, it must have been from their demeanour, or other circumstances which, though observable in Court, cannot be reproduced on the recorded depositions. Their statements do not involve any self-contradictions, or inherent improbability. Their veracity was not impeached in any formal manner. Their evidence, which is directly opposed to the truth of the plaintiffs' case, or to the existence of any trust in the father, would certainly have tended to excite doubt, and to create difficulty, even if the plaintiffs' case had been stronger. It is to be remembered that in such cases as the present it is for the plaintiff to satisfy the mind of the Court with seasonable certainty. If he fails to do

> this, the Court is certainly justified in making the negative declaration that it cannot find that the alleged trust has been established. [Soulignement ajouté.]

Plaider, le comportement de la personne qui plaide

Young v Saylor, [1893] OJ No 156, nous fournit un rare (et bref) exemple du comportement d'une personne qui plaide. Voir la page 515. Par ailleurs, le juge en chef Draper a observé dans l'affaire *R. v. Toronto (City) (Division Court, Judge)*, [1864] O.J. No. 69, 23 U.C.R. 376:

> 6 The power of punishing contempts by fine is given by statute to the judge of a division court, (a) and such a power, though, like any other power by which a man becomes as it were a judge in his own cause, and can exercise his authority without any direct control, and perhaps without any responsibility, it is dangerous as open to abuse, is nevertheless found indispensable. Contempts are perhaps the most undefinable of offences, for they may consist in looks and demeanour as well as in positive acts and expressions, and though our statute uses the word "wilfully insults," it does not appear to me to change the application or extent of the power given. [Soulignement ajouté.]

Port du témoin, dans le cadre de l'examen de son comportement

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « look » du témoin, au sens de son port. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le jugement du juge en chef nous informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Les mots qui sont soulignés illustrent bien que le « look », que je traduis tant par le regard que par l'aspect, se distingue des mots « conduct – conduite », « carriage – le port » « tones of voice – tons de la voix » et « evidence of surprises – preuve du jeu de la surprise ». Il est évident que si l'on scrute les dictionnaires, on s'aperçoit que les différents mots sont assez proches l'un de l'autre et que ce n'est que des poussières qui les distinguent.

Pour sa part, le juge Drake a ajouté ces commentaires au paragr. 86 :

> 86 It must be remarked that Cameron was, in the opinion of the trial judge, a very unsatisfactory witness. A witness' demeanour in the box is often better evidence of his veracity than the answers he gives; a jury have the advantage of seeing the witness as well as hearing him, and forming an opinion of his evidence which no Court of Appeal can possibly do, reading only from the notes of evidence as printed. […] [Soulignement ajouté.]

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath*, jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[23] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Preuve circonstancielle et le comportement – silence d'une partie dans le cadre d'une situation qui devrait soulever une objection

The President, Directors and Company of The Bank of Upper Canada c Widmer, [1832] OJ No 6, 2 U.C.Q.B. (O.S.) 256, un procès civil entendu par le juge Macaulay nous fournit ces enseignements sur ce qu'on désigne aujourd'hui à titre de la règle *Christie*:

> 103 … Assuming as a settled principle, that whether there is any evidence, is a question for the court; and whether the evidence is sufficient, for the jury; and that the assent of a party, or his approval or adoption of an act, may be inferred from his silence, or demeanour and conduct, especially under circumstances in which duty or interest would prompt dissent or disavowal; and admitting that the assent of the members of the board of directors, as a board, or their approval or adoption as a board, of the spoliation of the defendant's bond as proved in this case, might be inferred from the silence and demeanour of the members present, and be regarded as a quasi act and assent,

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Voir, au demeurant, 27 R.C.S. 13.

> approval or adoption of the board, and sufficient to excuse the defendant from all legal liability as for a tort at the suit of the corporation; still I do not think the evidence offered in proof thereof satisfactory … [Nous avons souligné.]

« Qui dit vrai? » est une question qui se distingue de la question « quel poids accorder au témoignage? » en fonction du comportement

Le juge Proudfoot a déposé un de plusieurs jugements concordants dans l'arrêt *Peterkin c. McFarlane*, [1884] O.J. No. 107, 9 O.A.R. 429. Il sied de relever les observations suivantes et j'ai souligné un passage afin de mettre en relief que la preuve du comportement vient en aide afin d'aider la juge à répondre à deux questions de fait :

> 224 There is no doubt a considerable conflict of testimony, and, according as the learned Judge believed or disbelieved the witnesses, there was ample evidence to support a decree for plaintiff or for defendant. With regard to the evidence at the former hearing the Chancellor says: "There was much in the evidence of Burke and McKenzie, especially in that of Burke, which I discredited. I thought him untruthful, and that the weight of evidence preponderated in favour of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor and the many circumstances which aid a Judge of fact, before whom evidence is given, to form a correct judgment as to its truthfulness, and the weight properly due to it." [Soulignement ajouté.]

Par souci de commodité, répétons que la cour a nuance entre les questions si le témoin a dit la vérité et la question du poids qu'on peut accorder aux paroles du témoin, si la preuve est digne de foi. Réduit à une expression plus simple, la première question est à savoir si la preuve est crédible; le cas échéant, quelle fiabilité lui accorder?

Regard, l'aspect du témoin, dans le cadre de l'examen de son comportement

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « look » du témoin, au sens de son regard ou aspect. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le jugement du juge en chef nous informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Les mots qui sont soulignés illustrent bien que le « look », que je traduis tant par le regard que par l'aspect, se distingue des mots « conduct – conduite », « carriage – le port » « tones of voice – tons de la voix » et « evidence of surprises – preuve du jeu de la surprise ». Il est évident que si l'on scrute les dictionnaires, on s'aperçoit que les différents mots sont assez proches l'un de l'autre et que ce n'est que des poussières qui les distinguent.

Pour sa part, le juge Drake a ajouté ces commentaires au paragr. 86 :

> 86 It must be remarked that Cameron was, in the opinion of the trial judge, a very unsatisfactory witness. A witness' demeanour in the box is often better evidence of his veracity than the answers he gives; a jury have the advantage of seeing the witness as well as hearing him, and forming an opinion of his evidence which no Court of Appeal can possibly do, reading only from the notes of evidence as printed. […] [Soulignement ajouté.]

Réputation, du témoin, à subir un examen tout comme la question du comportement

Le juge Taschereau a écrit ces commentaires au paragr. 92 de l'affaire *Paradis v. Canada*, 1 Ex.C.R. 191 :

> 92 … To the testimony of all the witnesses examined before me, however, I attach great weight, as well from their well known respectability as from their demeanour in the box. The fact that Davie has an interest in the result of the case does not detract from the weight I attach to his evidence. I consider his evidence unimpeachable, under whatever circumstances given. To the testimony of the claimant himself I attach full credence, and the impression he made upon me, when he gave his deposition in court, I cannot but take into consideration when weighing the evidence he gave before the Arbitrators. I ordered these witnesses out of court, and they gave their evidence out of the presence of each other." [Soulignement ajouté.]

Aujourd'hui, l'avocate qui cherche à obtenir de tels commentaires de la juge devrait satisfaire à des exigences de preuve assez poussées quant à leur preuve de bonne réputation dans la communauté.

Scruter le témoignage de façon insigne, devoir de la juge

Le juge Ferguson du Banc de la Reine de l'Ontario a traité du contentieux *Stuart c. Thomson*, [1893] O.J. No. 155, 23 O.R. 503. Sa Seigneurie a déclaré au paragr. 23: "… I think I observed the witnesses as they gave the evidence most carefully; that I detected nothing in their demeanour to warrant me in thinking that they were unworthy of belief…"

Dans le même sillon, l'hon. Spragge a déclaré dans *Brouse c Stayner*, [1869] OJ No 261, 16 Gr. 553:

> 9 The evidence upon this point is conflicting, and that to an unaccountable degree. I have gone over it carefully since the hearing, and while not only what was said, but the manner in which it was said, and the appearance and the demeanor of the witnesses was fresh in my recollection. It is impossible to reconcile it; but many of the discrepancies may be accounted for without imputing wilful falsehood to the witnesses. If it were a cardinal point in the case, it would be necessary for me to come to some conclusion upon it. .... [Soulignement ajouté.]

Quant à lui, le juge Strong a dit au paragr. 5 de l'arrêt *Williams c Jenkins*, [1871] OJ No 265: "At the conclusion of the hearing I stated that I found the facts in the plaintiff's favor, as I could not have failed to do after hearing the evidence and observing the demeanour of the witnesses, particularly the unsatisfactory examination of both the defendants. I am satisfied that there was a deliberate intention on the part of both Jenkins and Palmer to cheat the plaintiff…" Voir aussi le paragr. 12 de l'affaire *Logie v Young; Logie v Austin*, [1863] OJ No 242.

Silence, d'une partie, dans le cadre d'une situation qui devrait soulever une objection – le rôle du comportement de cette partie

The President, Directors and Company of The Bank of Upper Canada c Widmer, [1832] OJ No 6, 2 U.C.Q.B. (O.S.) 256, un procès civil entendu par le juge Macaulay nous fournit ces enseignements sur ce qu'on désigne aujourd'hui à titre de la règle *Christie*:

> 103 … Assuming as a settled principle, that whether there is any evidence, is a question for the court; and whether the evidence is sufficient, for the jury; and that the assent of a party, or his approval or adoption of an act, may be inferred from his silence, or demeanour and conduct, especially under circumstances in which duty or interest would prompt dissent or disavowal; and admitting that the assent of the members of the board of directors, as a board, or their approval or adoption as a board, of the spoliation of the defendant's bond as proved in this case, might be inferred from the silence and demeanour of the members present, and be regarded as a quasi act and assent, approval or adoption of the board, and sufficient to excuse the defendant from all legal liability as for a tort at the suit of the corporation; still I do not think the evidence offered in proof thereof satisfactory … [Nous avons souligné.]

Surprise du témoin, dans le cadre de l'examen de son comportement

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « look » du témoin. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le jugement du juge en chef nous informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice,

> evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Les mots qui sont soulignés illustrent bien que le « look », que je traduis tant par le regard que par l'aspect, se distingue des mots « conduct – conduite », « carriage – le port » « tones of voice – tons de la voix » et « evidence of surprises – preuve du jeu de la surprise ». Il est évident que si l'on scrute les dictionnaires, on s'aperçoit que les différents mots sont assez proches l'un de l'autre et que ce n'est que des poussières qui les distinguent.

Pour sa part, le juge Drake a ajouté ces commentaires au paragr. 86 :

> 86 It must be remarked that Cameron was, in the opinion of the trial judge, a very unsatisfactory witness. A witness' demeanour in the box is often better evidence of his veracity than the answers he gives; a jury have the advantage of seeing the witness as well as hearing him, and forming an opinion of his evidence which no Court of Appeal can possibly do, reading only from the notes of evidence as printed. […] [Soulignement ajouté.]

Au total, l'importance que l'on accordait au « whole demeanour » devait certes nuire aux chances de succès en ce qui avait trait aux témoins et parties qui étaient des étrangers au sens de membres de groupes culturelles ou linguistiques, notamment les autochtones.

Témoignage, contraste avec le comportement – exemple de

Les motifs dans l'affaire *Burrows c Leavens*, [1881] OJ No 230, 29 Gr. 475, signé de la plume du juge Boyd, nous informe de ce qui suit au paragr. 6 :

> 6 … The husband is dead, but he is spoken of as possessed of less intelligence than a German witness named Gethardt who was examined. Gethardt was a friend of the family, and was told by the solicitor to go to the wife, and explain the document she was to sign. What explanation he made is not disclosed, but it is plain from his demeanour and evidence that he could not explain what be himself did not understand. … [Soulignement ajouté].

Tons de voix du témoin, dans le cadre de l'examen de son comportement et de l'appréciation de la crédibilité

Harper c. Cameron, [1893] B.C.J. No. 41, 2 B.C.R. 365, un jugement de la Cour suprême de la Colombie-Britannique siégeant en banc, avec la participation du juge en chef Begbie et les juges Walkem et Drake, nous aide à bien cerner la notion du « tone of voice » du témoin. Les trois membres de la formation étaient d'avis de rejeter l'appel. Le jugement du juge en chef nous

informe de ce qui suit au paragr. 61, et ces commentaires non pas été contredit par les deux autres membres de la formation.

> 61 […] Upon an examination involving a question of fraud, perhaps the most important thing to be noticed - perhaps more important than his verbal statement - is the conduct of the party himself, his look and carriage and whole demeanour: the tones of the voice, evidences of surprise, etc. This we cannot have. No photograph of the man's manner or the tones of his voice can be introduced before judges on appeal. The impression of the learned judge at the trial as to Cameron's demeanour and the effect produced on his mind is briefly but emphatically dealt with in two or three lines of his judgment, and there can be little doubt that the jury formed the same opinion of Cameron's knowledge and intentions. [Soulignement ajouté.]

Les mots qui sont soulignés illustrent bien que le « look », que je traduis tant par le regard que par l'aspect, se distingue des mots « conduct – conduite », « carriage – le port » « tones of voice – tons de la voix » et « evidence of surprises – preuve du jeu de la surprise ». Il est évident que si l'on scrute les dictionnaires, on s'aperçoit que les différents mots sont assez proches l'un de l'autre et que ce n'est que des poussières qui les distinguent.

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Le rapport de l'arrêt *Douglas c. Ward*, [1864] O.J. No. 245, 11 Gr. 39, contient les commentaires suivants, de la plume du juge Mowat, qui a aussi été premier ministre de l'Ontario, qui sont très pertinents en rapport a la question si le ton de la voix du témoin est utile au niveau des constats de crédibilité. Ainsi:

> 43 I believe that the impression my brother Spragge formed of the son from his manner in giving evidence, was unfavourable to him. But in regard to the father the reverse was the case. The father's manner was like that of an honest witness; but though a truthful or an untruthful manner is an aid, and often a valuable aid, in judging of the credibility of a witness, it is certainly no infallible test of it. Falsehood is often able to clothe itself in the garb of truth; and I must say that I think the disputed facts here are of such a character that, under the acknowledged circumstances of the case, they ought not to be held established by the unsupported evidence of any witness so mixed up with all that is suspicious about the transactions in controversy as Joseph Ward was, no matter who such witness may be, or how plausible may be his tone, language, and demeanour in giving his testimony. I think also that even Joseph's deposition, when carefully considered, is open to much (sic) observation. [Soulignement ajouté.]

En d'autres mots, l'avocate doit plaider que la cour doit toujours scruter les éléments objectifs qui peuvent appuyer un ou des témoignages qui sont susceptibles d'être le fruit de l'intérêt pécuniaire du témoin et de se mettre en garde contre les impressions externes favorables au niveau du comportement. Au demeurant, citons l'avocat d'une partie qui a plaidé au paragr. 9 que : « … The evidence shews that the tone, demeanour, and words in this case all exceeded the occasion…"

Voix trop faible et la preuve du comportement

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath*, jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513.[24] Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

Ce passage illustre bien la non-étanchéité des examens de la preuve par la juge. En effet, la juge du procès a tenu compte de l'ensemble des témoins d'une partie qui prit l'allure d'un chœur grec, et du comportement de chaque témoin, et de leur façon de rendre leur preuve. À tour de rôle, il est question du comportement en général, et puis de la façon hachurée, évasive, hésitante et détournée d'exprimer le témoignage. Et, enfin, il est question des yeux et de la voix, surtout du fait qu'on ne pouvait entendre ou à peine un témoin.

Yeux « détournés » du témoin et la preuve du comportement

Le juge Crease, à titre de juge de la Cour supérieure de la Colombie-Britannique, a rendu l'arrêt *Adams v. McBeath*, jugement qui a été porté en appel devant les juges McCreight, Walkem et Drake, publié sous les renvois [1894] B.C.J. No. 47, 3 B.C.R. 513. Le paragr. 69 du jugement dont appel a été formé se lit ainsi :

Voir, au demeurant, 27 R.C.S. 13.

> 69 I confess that in view of the facts discovered during the trial, I could not follow the learned counsel for the defence in his emphatic eulogy on the disinterested nature of the defendant's benevolence, or in the implicit reliance which he bespoke for his "unshaken" testimony in the box. If he and his family who repeated the alleged promises, of several years standing, almost in the very same words, like the "chorus" of the Greek play, are to be believed, the defendant must have been for years desirous of exercising his benevolence on his old friend by getting him into his house; though always put off with a polite promise: "If I go to live anywhere else, I will come to you." Making all allowance for the want of culture on which his counsel dwelt, the defendant's mode of delivering his evidence in the box, was to me as a jury, the reverse of satisfactory. His demeanour, the manner of delivery, a description of which could not possibly find its way into a reporter's notes, form a most important factor in weighing the value of his evidence. It was halting, circuitous and evasive; and uttered with averted eye, in so low a voice that with the most unremitting attention it could not be clearly heard. His own counsel within a few feet in front of him more than once experienced this difficulty, and impelled him to speak up. [Soulignement ajouté.]

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Le juge Spragge a fait ces remarques au paragr. 6 de l'arrêt *Gray v. Coucher,* [1868] O.J. No. 348, 15 Gr. 419 :

> 6 … I do not think it would be safe to hold the fact of notice established by the evidence of Thomas Gray: his demeanour in the witness box impressed me unfavourably; he answered some questions evasively; and appeared to hesitate before answering in order to see the bearing of the questions and the effect of his answers upon the interest of the parties. He exhibited, I thought, a strong bias for the plaintiff, from a desire, as I thought probable, to save his father from the consequences of his act. He did not seem to me entirely reliable. Then he is contradicted in regard to his previous dealing with the same property…

Conclusion

Dans le cadre de la discussion du titre « Photo du témoin lors de son témoignage – non-existence d'une telle preuve empêche un recours viable en appel car la juge a vu et entendu le témoin », j'ai dit : « La question qui se pose aujourd'hui est la suivante : la norme de contrôle devrait-elle être revue en fonction du fait que certains procès, ou le témoignage à tout le moins, sont captés sur bande et capables d'être joués pour le palier d'appel? » Si, de fait, nous sommes en mesure de permettre à la Cour d'appel de voir et d'entendre les témoignages aussi bien que la juge du procès, il nous semble que toute cette question de retenue doit être revue.

Au demeurant, je souhaite que l'avocate qui va tenter de convaincre les paliers d'appel de « corriger » cette règle d'intervention limitée va trouver des jugements utiles dans ce document de travail.