

# An Evolution in Canadian Judging

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In my first column I chose a very specific topic (recusal on the basis of reasonable apprehension of bias) that easily flowed over our shared border. In this column, I intend to significantly broaden the analysis.

Here I will examine what I describe as an evolution (or revolution) that is occurring in the manner in which Canadian trial judges render judgment and how they are reviewed on appeal. Interestingly, this evolution is entirely free of any statutory basis. I hope it will provide American judges some insight into what is expected of their Canadian counterparts and cause them to consider how the Canadian experience relates to their own work and standards.

## THE SCOPE OF THE ANALYSIS

A column does not provide space for a review of an entire judicial system. So I intend to look at two changes that highlight how Canadian judging is evolving, under the following headings:

1. the requirement for reasons; and
2. the potential death of demeanour as a basis for the assessment of the credibility of witnesses.

Let us start with the requirement for reasons.

## REASONS FOR JUDGMENT

The provision of reasons by Canadian trial judges had traditionally been a source of little appellate court comment because there was no such requirement at common law.<sup>1</sup> For instance, in 1994, the Supreme Court of Canada indicated in *R. v. Burns* that a judge is “not required” to give reasons:

Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal . . . . This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the

accused’s guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.<sup>2</sup>

Eight years later in *R. v. Sheppard*,<sup>3</sup> a dramatic change occurred. The Supreme Court of Canada would subsequently say that its “approach to [the] question ha[d] evolved.”<sup>4</sup>

In *Sheppard*, the Supreme Court of Canada set aside a conviction on the basis that the trial judge’s reasons were insufficient. In doing so, the Court created what has been described as a “freestanding error of law” justifying the setting aside of a verdict solely on the basis of “inadequacy of reasons.”<sup>5</sup> The Supreme Court of Canada held in *Sheppard* that trial judges are required “to state more than the result.”<sup>6</sup> The Supreme Court created the following common-law test for appellate determination as to whether a trial judge’s reasons are sufficient:

The trial judge’s duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge’s decision.<sup>7</sup>

This appears both simple and revolutionary in comparison to *Burns*. Accordingly, after *Sheppard*, the issue of the adequacy of trial judges’ reasons became a matter of significant appellate consideration in Canada. Such questions as when will a judge’s reasons be sufficient; what must reasons contain; and how much or how little is required, were subjects of appellate debate. The overturning of convictions on the basis of insufficient reasons was no longer uncommon.<sup>8</sup>

The issue became such a common basis for appellate intervention in Canada that the Supreme Court granted leave to appeal in a number of cases involving the adequacy of the trial judges’ reasons. The results of these appeals have helped to clarify the governing standards, but they also appear to constitute a series of significant steps back from the bold initiative the Supreme Court of Canada set out in *Sheppard*. Let me explain.

## Footnotes

1. See *R. v. R.E.M.*, [2008] 3 S.C.R. 3, ¶ 8 (Can.).
2. *R. v. Burns*, [1994] 1 S.C.R. 656, ¶ 18 (Can.) (citations omitted).
3. [2002] 1 S.C.R. 869 (Can.).
4. See *R. v. Gagnon*, [2006] 1 S.C.R. 621, ¶ 12 (Can.).
5. See *R. v. Wolynech*, 2015 ONCA 656, 2015 CarswellOnt 14700, ¶ 54 (Can. Ont.).
6. *Sheppard*, [2002] 1 S.C.R. 869, ¶ 33.
7. *Id.* ¶ 55. The entirety of the trial judge’s reasons consisted of the following statement (at paragraph 2): “Having considered all the

testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.”

8. See, e.g., *R. v. Szabo*, 2002 BCSC 635 (Can. B.C.); *R. v. Wojcik*, 2002 MBCA 82 (Can. Man.); *R. v. Edgett*, 2002 NBQB 205 (Can. N.B.); *R. v. Garbowski*, 2003 BCSC 487 (Can. B.C.); *R. v. P.J.C.*, 2003 BCCA 332 (Can. B.C.); *R. v. Hamstra*, 2004 ABQB 156 (Can. Alta.); *R. v. Gray*, 2007 NBQB 364 (Can. N.B.).

The next appeal to reach the Supreme Court of Canada on the issue of sufficiency of reasons was *R. v. Gagnon*.<sup>9</sup> In *Gagnon*, the Quebec Court of Appeal, relying on *Sheppard*, had set aside a conviction on the basis that the trial judge's reasons insufficiently dealt with credibility issues. The Supreme Court of Canada, in reinstating the conviction, indicated that appellate review of a trial judge's reasons for assessing credibility must be undertaken with the understanding that it can be "very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events."<sup>10</sup> Thus, reasons for credibility determinations are not necessary, and appellate review should concentrate on whether there was a basis for the trial judge's conclusion.

Similarly, in *R. v. R.E.M.*,<sup>11</sup> the Supreme Court of Canada reversed the British Columbia Court of Appeal's decision to overturn a number of sexual-assault convictions on the grounds of inadequate reasons, in particular as regards the trial judge's failure to sufficiently refer to the accused's evidence. The Supreme Court did so despite noting that the trial judge in convicting the accused "did not clearly explain which of the offences were proved by . . . [the] evidence [that] had been led."<sup>12</sup>

Interestingly, the Supreme Court of Canada commenced its analysis in *R.E.M.* by declaring "that 'it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision'. A criminal trial, where the accused's innocence is at stake, is one such circumstance."<sup>13</sup> The Court then stated:

In summary, the law has progressed to the point where it may now be said with confidence that a trial judge on a criminal trial where the accused's innocence is at stake has a duty to give reasons.<sup>14</sup>

However, the Court upheld the convictions, despite the failure of the trial judge to explain why he disbelieved the accused's evidence, on the basis that such an explanation was not required:

[T]he trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It fol-

lowed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required.<sup>15</sup>

In *R. v. Dinardo*, the Supreme Court of Canada indicated that in "a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt."<sup>16</sup> However, in *R.E.M.* (decided after *Dinardo*), the Court said that trial judges may wish to "spare" an accused person they are convicting from "unflattering" comments concerning his or her credibility:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.<sup>17</sup>

#### WHAT IS REQUIRED OF CANADIAN JUDGES?

In *R.E.M.*, the Supreme Court answered this question by stating that "what is required is that the reasons, read in the context of the record and the submissions on the live issues in the case, show that the judge has seized the substance of the matter. Provided this is done, detailed recitations of evidence or the law are not required."<sup>18</sup>

Despite these comments, Canadian appellate courts continued to set aside convictions because of insufficient reasons. In *R. v. Clouthier*,<sup>19</sup> for instance, the Ontario Court of Appeal set aside a conviction for robbery because the trial judge failed to deal with certain portions of the evidence in convicting the accused. The court indicated that

while trial judges are not required to make reference to every piece of evidence, there is a duty to consider the evidence in its entirety, not simply the evidence that inculcates the accused. In my view, the failure to deal with two items that tended to exculpate the appellant—the balaclava and the evidence as to the height of the robber—amounts to an error of law sufficient to justify setting aside these convictions.<sup>20</sup>

9. [2006] 1 S.C.R. 621 (Can.).

10. *Id.* ¶ 20.

11. [2008] 3 S.C.R. 3 (Can.).

12. *Id.* ¶ 6.

13. *Id.* ¶ 10 (emphasis added).

14. *Id.* ¶ 14.

15. *Id.* ¶ 66.

16. [2008] 1 S.C.R. 788, ¶ 23 (Can.).

17. *R.E.M.*, [2008] 3 S.C.R. 3, ¶ 49.

18. *Id.* ¶ 43. In a somewhat amusing context, the Court of Appeal chastised the trial judge in the case of *M. v. M.* for rendering judgment through the use of a "post-it note." 2011 NLCA 57 (Can. Nfld.).

19. 2012 ONCA 636, 2012 CarswellOnt 11924 (Can. Ont.).

20. *Id.* ¶ 16.

Similarly, in *R. v. M.J.E.B.*,<sup>21</sup> the Alberta Court of Appeal held that “where there is conflicting evidence on a key issue, and the contradiction must be resolved by an assessment of credibility, there is an obligation on a trial judge to explain how he has resolved those contradictions in assessing reasonable doubt.” As we will see, the Supreme Court of Canada would reject this proposition a year later.

Eleven years after *Sheppard*, the Supreme Court of Canada returned to the sufficiency of reasons yet again, this time in the case of *R. v. Vuradin*.<sup>22</sup>

In *Vuradin*, the accused was convicted of a number of sexual offenses. The Supreme Court of Canada described the trial judge’s reasons as “sparse” and “not directly” addressing the accused’s evidence.<sup>23</sup> However, the convictions were affirmed.

The Supreme Court of Canada indicated that it found the trial judge’s “sparse” reasons sufficient because

a trial judge’s failure to explain why he rejected an accused’s plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant’s evidence and the accused’s evidence conflicted, the trial judge accepted the complainant’s evidence. No further explanation for rejecting the accused’s evidence is required as the convictions themselves raise a reasonable inference that the accused’s denial failed to raise a reasonable doubt.<sup>24</sup>

Thus, it appears that when the evidence of a complainant and the accused conflict, a Canadian trial judge is not required to explain why he or she rejected the testimony provided by the accused if the judge’s reasons demonstrate that where the complainant’s evidence and the accused’s evidence conflicted, the trial judge accepted the complainant’s evidence. In *R. v. R.J.C.*,<sup>25</sup> the British Columbia Court of Appeal stated that the accused was “entitled to know why his evidence was rejected.” However, this comment simply cannot be reconciled with the Supreme Court of Canada’s decision in *Vuradin*.

Finally, though not a decision concerning the sufficiency of reasons, the Supreme Court of Canada’s decision in *Cojocar v. British Columbia Women’s Hospital and Health*<sup>26</sup> is a further illustration of how the Court has diminished what it had described as a “duty to give reasons.”

In *Cojocar*, the trial judge, in rendering judgment, reproduced in his reasons large portions of the written submission of the plaintiffs’ counsel—321 paragraphs of the 368 were copied from the plaintiffs’ written submission.

The Supreme Court of Canada said:

[W]hile it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not without more permit the decision to be set aside. Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside.<sup>27</sup>

As to the judicial role and judgment writing, the Supreme Court declared that the “scope for judicial creativity is narrow, but not non-existent.”<sup>28</sup> The Court also indicated, somewhat unkindly in my view, that “lack of originality alone [is not] a flaw in judgment-writing; on the contrary, it is part and parcel of the judicial process.”<sup>29</sup>

#### WHERE ARE WE NOW IN CANADA?

The debate over sufficiency of reasons has not ended. For instance, in *R. v. Labelle*,<sup>30</sup> the Ontario Court of Appeal set aside a conviction because the trial judge failed to give “an explanation of why” he did not have a reasonable doubt on the basis of contradictions in the complainant’s evidence. Similarly, in *R. v. Kennedy*, the Saskatchewan Court of Appeal, in setting aside a conviction, referred to the trial judge having failed to comment upon the “credibility” of the Crown’s main witness, though the trial judge had made several comments upon the “weight” of this witness’ evidence.<sup>31</sup> This seems a rather weak distinction.

Shortly after *Sheppard*, one appellate court judge suggested that the decision represented “a significant change in the law with respect to a trial judge’s duty to give reasons.”<sup>32</sup> However, as we have seen, this did not turn out to be true. This is illustrated by the decision of the New Brunswick Court of Appeal in *R. v. Crowley*, in which the court held that a “successful appeal from a verdict in a judge alone trial on the grounds there were insufficient reasons, or the trial judge did not apply the burden of proof, should be ‘rare.’”<sup>33</sup>

#### CONCLUSION (REASONS)

So, what can Canadian judges conclude from all of this? What lessons should American judges take from the Canadian experience?

It is clear that reasons are required in a wide range of situations and that in providing reasons Canadian judges must illustrate that they have seized the substance of the matter before them; their reasons must be intelligible, allowing for

21. 2012 ABCA 119, 2012 CarswellAlta 708, ¶ 25 (Can. Alta.).

22. [2013] 2 S.C.R. 639 (Can.).

23. *Id.* ¶ 4. The trial judge in *Vuradin* simply stated: “In the end, notwithstanding [the appellant’s] denial, I have no reasonable doubt that the [appellant] did commit the acts which [the complainant] described.” *Id.* ¶ 6.

24. *Id.* ¶ 13 (citing *R.E.M.*).

25. 2014 BCCA 184, 2014 CarswellBC 1339, ¶ 32 (Can. B.C.).

26. [2013] 2 S.C.R. 357 (Can.).

27. *Id.* ¶ 1.

28. *Id.* ¶ 33.

29. *Id.* ¶ 31. For a critical review of this decision, see Alain Roussy, *Cut-and-Paste Justice: A Case Comment on Cojocar v. British Columbia Women’s Hospital and Health Centre*, 52 ALTA. L. REV. 761 (2015).

30. 2014 ONCA 77, 2014 CarswellOnt 871, ¶ 5 (Can. Ont.).

31. 2015 SKCA 32, 2015 CarswellSask 188, ¶¶ 31, 35-42 (Can. Sask.).

32. *R. v. Szabo*, 2002 BCSC 635, 2002 CarswellBC 3723, ¶ 35 (Can. B.C.).

33. 2015 NBCA 61, 2015 CarswellNB 437, ¶ 11 (Can. N.B.).

appellate review of the reasoning process utilized. Having said this, the standard required for reasons to be deemed sufficient has been set at a very low level in Canada despite what appeared to be a dramatic change after *Sheppard*.<sup>34</sup> It is also clear, despite the brief reference in *R.E.M.*, that written reasons are not required. This does not mean that written reasons do not play an invaluable role in the administration of justice or that judges should not be encouraged to write often, but that is different from a requirement to write.<sup>35</sup>

It appears that when the evidence of a complainant and the accused conflict, a Canadian judge is not required to explain why he or she rejected the testimony provided by the accused (even if “plausible”) if the judge’s reasons demonstrate that where the complainant’s evidence and the accused’s evidence conflicted, the trial judge accepted the complainant’s evidence.<sup>36</sup>

This, of course, does not mean that a Canadian trial judge is prohibited from explaining his or her reasons for rejecting a “plausible” explanation provided by an accused person, and there is great benefit to the administration of justice in judges doing so, particularly in writing. A written judgment can add significantly to a litigant’s perception of fairness.<sup>37</sup> The importance of procedural fairness should not be underestimated. In *Laing v. R.*, the Judicial Committee of the Privy Council noted (in the context of what reasons are required by appellate courts) that the “guiding principle is one of fairness. The appellant is entitled to be assured that his case has been properly considered and to know why his appeal did not succeed.”<sup>38</sup>

I think a trial judge should have great difficulty, where an accused person testifies at a trial and denies having committed the offence, in rejecting his or her testimony without explaining why.

Having considered the evolution of reasons for judgment in Canada, let us now consider some recent Canadian developments in the use of a witness’ demeanour to assess credibility.

## DEMEANOUR

In Canada, demeanour has traditionally been seen as having an “intangible effect” on determining credibility.<sup>39</sup> How does the witness look while testifying? Do they make eye contact? Are they nervous? What is their demeanour while testifying?<sup>40</sup> These questions and consideration of such factors as “the tone of [the witness’] voice, the look on his face, and any hesitation he had in answering the questions”<sup>41</sup> have historically been seen as important considerations for Canadian trial judges in assessing credibility. In *R. v. N.S.*, the Supreme Court of Canada stated that it “is a settled axiom of appellate review that deference should be shown to the trier of fact on issues of credibility because trial judges (and juries) have the ‘overwhelming advantage of seeing and hearing the witness—an advantage that a written transcript cannot replicate.”<sup>42</sup> But we may be moving away from such an approach in Canada. A recent example is the Ontario Court of Appeal’s decision in *R. v. Rhayel*.<sup>43</sup>

## THE CASES

In *Rhayel*, the accused was convicted of sexual assault. The charge alleged that the accused retained the services of the complainant, a sex worker, and sexually assaulted her when she refused to have sexual intercourse with him without a condom.

The accused appealed from conviction, contending that the trial judge erred by “overly relying on the complainant’s demeanour in assessing her credibility.”<sup>44</sup>

The Ontario Court of Appeal suggested that there is a growing understanding of the fallibility of evaluating credibility based on the demeanour of witnesses. It is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom. One of the dangers is that sincerity can be and often is misinterpreted as indicating truthfulness.<sup>45</sup>

34. In *R. v. Williamson*, for instance, the Manitoba Court of Appeal held that though the “trial judge’s oral reasons are, at times, difficult to follow and are not well organized. . . . when they are read in conjunction with the record of the evidence and the submissions of counsel, the foundations of the trial judge’s decision are clearly discernible.” 2015 MBCA 16, 2015 CarswellMan 41, ¶ 10 (Can. Man.).

35. One author has noted that only a written judgment exposes “the court’s decision to public scrutiny . . . . In no other way can it be known whether the law needs revision; whether the court is doing its job, whether a particular judge is competent.” George Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 200-01 (1967). See also Judge Richard A. Posner, *Judges Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1448 (1995) (suggesting that “the judge, by not writing, will be spared a painful confrontation with the inadequacy of the reasoning that supports his decision”). Nothing “better exposes any fallacies in your ideas than reading them in cold type.” J.O. WILSON, *A BOOK FOR JUDGES* 80 (1980).

36. The Ontario Court of Appeal has noted that “the Supreme Court of Canada has repeatedly said, a reasoned acceptance of a complainant’s evidence is a basis by itself for rejecting an accused’s evidence.” *R. v. J.C.*, 2013 ONCA 495, 2013 CarswellOnt 10029, ¶ 7

(Can. Ont.). Similarly, the Alberta Court of Appeal, in *R. v. C.E.*, noted that a trial judge’s “failure to specifically advert to, or explain why an accused’s plausible denial did not raise a reasonable doubt is not fatal to a conviction.” 2014 ABCA 321, 2014 CarswellAlta 1756, ¶ 10 (Can. Alta.).

37. In *R. v. Zinck*, the Supreme Court of Canada stated: “Deficiencies in reasons may sometimes require quashing an order for the sake of the perceived fairness and the transparency of the criminal process.” [2003] 1 S.C.R. 41, ¶ 37 (Can.).

38. [2013] UKPC 14, ¶ 15 (appeal taken from Berm.).

39. See, e.g., *R. v. Lifchus*, [1997] 3 S.C.R. 320, ¶ 29 (Can.). See also *California v. Green*, 399 U.S. 149, 158 (1970).

40. See *R. v. Gray*, 2012 ABCA 51, 2012 CarswellAlta 223, ¶ 23 (Can. Alta.).

41. See *R. v. Ceal*, 2012 BCCA 19, 2012 CarswellBC 80, ¶ 47 (Can. B.C.).

42. [2012] 3 S.C.R. 726, ¶ 25 (Can.) (concerning a witness who wished to wear a niqab that covered her face except for her eyes while testifying).

43. 2015 ONCA 377, 2015 CarswellOnt 7586 (Can.).

44. *Id.* ¶ 64.

45. *Id.* ¶ 85 (citations omitted).

The Court of Appeal indicated that “it is important for trial judges to bear in mind that, to the extent possible, they should try to decide cases that require assessing credibility without undue reliance on such fallible considerations as demeanour evidence.”<sup>46</sup>

The Court of Appeal concluded:

[T]he trial judge took an overly confident view of his ability to assess the complainant’s credibility by reference to her demeanour. This reliance is particularly troubling in the circumstances of this case because the demeanour assessment was based on evidence that was not subjected to contemporaneous cross-examination, further weakening any possible value it had in assisting the trial judge evaluate the complainant’s credibility.

In many cases, this error may not be of great moment. But here, it mattered. Combined with the error of admitting the videotaped statement for the truth of its contents, this error provided the backdrop against which the trial judge gauged the complainant’s and the appellant’s account of what transpired when they engaged in sexual activity in the car.<sup>47</sup>

Similar comments were made in a recent decision of the New Zealand Court of Appeal. In *R. v. Taniwha*,<sup>48</sup> the accused was convicted of rape after a trial by judge and jury. On appeal, he argued that the trial judge erred in failing “to give a tailored direction relating to the evidential significance” of the complainant’s “demeanour in the witness box.” The accused suggested that there exists a “developed consensus as to the importance of juries not placing undue significance on the demeanour of a witness when assessing their reliability and credibility.”<sup>49</sup>

The New Zealand Court of Appeal dismissed the appeal. The Court of Appeal explained that “the risk is not so much placing reliance on demeanour evidence *per se*. Rather, the real risk arises through considering demeanour evidence in isolation from other evidence and relevant factors.”<sup>50</sup> However, the Court of Appeal also agreed “that in light of the known poten-

tial for misinterpretation of visual or oral cues given by a witness, some modification is appropriate to the more traditional jury directions on demeanour.”<sup>51</sup> It recommended that juries should be directed to consider the demeanour of a witness as a “valuable aid” in assessing whether a witness is credible. Interestingly, the court suggested that in a “she said/he said” type of case, demeanour “may assume greater importance in the absence of other factors such as inconsistency or any inherent implausibility.”<sup>52</sup>

However, despite the strong language used in *Rhayel*, reliance on demeanour in assessing credibility of witnesses is far from dead in Canada. For instance, in the recent decision of *R. v. Crowley*, the New Brunswick Court of Appeal indicated that “deference is owed to a trial judge’s assessment of the evidence, as they are in a ‘unique’ position to see and hear witnesses.”<sup>53</sup> Interestingly, two of the reasons provided by the trial judge in *Crowley* for rejecting the accused’s evidence was that he appeared “stressed” during his testimony and kept his replies to a “bare minimum.”<sup>54</sup> This hardly seems a basis for disbelieving a person’s evidence.<sup>55</sup>

In *R. v. B.G.G.*,<sup>56</sup> the Manitoba Court of Appeal made similar comments on the role of demeanor in assessing the credibility of a witness. Their comments may be considered by some as a reflection of an outdated approach:

This case is one wherein, as the judge correctly noted, credibility is the core issue. In dealing with cases of this kind, the trial judge is required to closely consider and review the testimony given by the witnesses. That exercise includes not only the evidence given, but his/her observation of the conduct and demeanor of the witnesses as they testify. Thus, the trial judge is in a much preferred position to that of appellate judges in making credibility findings. For this reason, demeanor conclusions are virtually unassailable on appellate review, and deference is owed to trial judges in respect of findings of fact, even more so findings of credibility, and the drawing of inferences based thereon.<sup>57</sup>

Interestingly, the Canadian Judicial Council in its model

46. *Id.* ¶ 89.

47. *Id.* ¶¶ 93-94.

48. [2015] NZCA 434 at [2] (N.Z.).

49. *Id.* at [13].

50. *Id.* at [16].

51. *Id.* at [18].

52. *Id.*

53. 2015 NBCA 61, 2015 CarswellNB 438. ¶ 11 (Can. N.B.) (emphasis added).

54. *Id.* ¶ 13. In a rather strange case, a conviction was overturned on the basis that the trial judge, in assessing the accused’s credibility, relied on the “reactions of his trial counsel to the evidence adduced.” *R. v. Ohenhen*, 2015 ONCA 506, 2015 CarswellOnt 10128, ¶ 4 (Can. Ont.).

55. In *Pinard-Byrne v. Linton (Dominica)*, a defamation case, the trial judge, in deciding in favor of the plaintiff, described the defendant’s evidence as follows: “[L]’s demeanour in the witness box was more consistent with personal animosity towards the claimant rather than an unbiased search for truth.” [2015] UKPC

41, [23] (appeal taken from Dominica). On appeal, Lord Clarke stated, “The judge was in a unique position to reach that conclusion because LL had given evidence before him.” *Id.* ¶ 33.

56. 2015 MBCA 76, 2015 CarswellMan 457 (Can. Man.).

57. *Id.* ¶ 16. The decision of the Queensland Court of Appeal in *Bulsey & Anor v. Queensland* illustrates a quite different approach to appellate review of credibility findings. [2015] QCA 187 (Austl.). In *Bulsey*, the Court of Appeal held that if a trial judge’s finding of credibility is “contrary to compelling inferences,” it can be reversed even “giving full weight to the advantage of the trial judge in seeing and hearing the evidence unfold at the trial.” *Id.* ¶ 71. Interestingly, this decision also involved the following ground of appeal: “Appeal ground 1 contends that the trial judge’s delay in giving judgment with reasons prejudiced the appellants’ case ‘in that the delay was detrimental to the quality of recall by His Honour of the actual testimony of witnesses and the attendant assessment of reliability and credibility of witnesses including that of the [a]ppellants.’” *Id.* ¶ 56.

jury instructions (which are referred to in *Taniwha*) recommends an approach that combines the nebulous reference to “the witness’s manner” with a caution not to make it the “most important factor” in assessing credibility:

What was the witness’s manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.<sup>58</sup>

**CONCLUSION (DEMEANOUR)**

So, what can Canadian trial judges learn from these decisions, and what lessons can American judges take from them?

Foremost, in my view, is that the days of Canadian trial judges placing significant reliance on the demeanour of a witness in determining credibility may be over. A compelling argument can be made that findings of credibility should be made based on logic, rationality, and most importantly, the quality of the evidence presented. Trial judges have experience, but we do not have any magical powers or crystal balls to look into the hearts of witnesses to determine if they are being truthful. Thus, reliance on evidence, confirmation, and corroboration may encapsulate a new approach to judging. The dangers of relying on our impressions of witnesses’ demeanour in the witness box to determine their truthfulness may (and some would argue should) be coming to an end.

**CONCLUSION**

Obviously, judging is a role subject to significant changes as the law unfolds. The Canadian experience in reasons and demeanour suggest that that what is expected of a judge is

always evolving. Canadian judges will have to grapple with these two issues for some time to come.

Though presented separately, the issues of reasons for judgment and the role demeanour plays in assessing credibility are subtly intertwined. If reasons for conviction do not require an explanation for the rejection of an accused person’s “plausible” denial of wrongdoing, then no one will know if the trial judge placed too much reliance on demeanour. As pointed out by the Ontario Court of Appeal in *R. v. T.M.*,<sup>59</sup> reliance on demeanour can lead to a trial judge drawing “inferences about a witness’s credibility from the witness’s demeanour while that witness is testifying . . . even though the witness is not given an opportunity to explain any particular mannerisms while testifying.” This would appear contrary to the essential nature of procedural fairness.

Hopefully for American judges, this column will be useful in not only explaining the Canadian context, but in considering your own role as judges.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up is Hard to Do: A Trial Judge’s Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial Judges’ Journal. Judge Gorman’s work has been widely published. His latest article is *Ours Is to Reason Why: The Law of Rendering Judgment*, 62 *Criminal Law Quarterly* 301 (2015). Comments or suggestions to Judge Gorman may be sent to [wgorman@provincial.court.nl.ca](mailto:wgorman@provincial.court.nl.ca). For United States judges who may want to read in full one of the Canadian decisions referred to here, you can contact Judge Gorman and he will forward a copy to you by email.

58. NAT’L JUDICIAL INST., MODEL JURY INSTRUCTIONS, at 9.4[10].

59. 2014 ONCA 854, 2014 CarswellOnt 16750, ¶ 62 (Can. Ont.).

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 depending on exchange rate)



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**Answers to Crossword**  
 from page 168

O	N	E	R	W	A	S	E	S	W	A	T
R	E	A	T	E	S	T	E	S	T	E	R
E	T	O	R	O	B	N	B	L	E	V	S
N	D	U	R	A	V	L	B	O	L	V	E
L	E	N	N	E	A	T	R	E	S	T	L
P	E	R	I	D	S	P	A	N	S	P	A
V	E	I	D	E	O	E	O	B	P	A	N
T	L	A	T	S	T	U	D	S	T	L	O
S	B	I	L	A	T	R	A	R	E	L	S
S	E	W	E	D	S	I	R	E	D	S	
S	E	D	A	R	I	S	T	A	C	K	
Y	E	C	O	H	A	C	O				
A	N	S	I	Z	E	H	I	S	A	N	T
L	D	A	L	E	O	R	E	G	S	U	R
O	U	O	D	E	B	A	S	E			