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Conscientious Objection and Canadian Citizenship

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Notes and Comments

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Can a conscientious objector become a Canadian citizen? One might be forgiven for supposing that the answer was, self-evidently, Yes. Mr. and Mrs. Thorburn Jensen discovered, to their chagrin, that the courts took a different view.[1]

Before examining the Jensen case in detail, it may be useful to review the treatment of conscientious objectors in Canada, particularly in wartime.

Conscientious objection is not a recent phenomenon in Canada. In 1873, twelve Russian Mennonites journeyed to Canada to review the possibility of widespread immigration, and, specifically, to discuss the status of conscientious objection with government officials.[2] After extensive negotiation, they received a letter from Mr. John Lowe, Secretary to the Minister of Agriculture, promising ". . . an entire exemption from military service . . . to Mennonites".[3] On August 13th, 1873 this promise was confirmed by order in council. A decade later, the first *Militia Act* exempted from military service "Any person bearing a certificate from the Society of Quakers, Mennonites or Tunkers, or any inhabitant of Canada, of any religious denomination, otherwise subject to military duty, but who, from the doctrines of his religion, is averse to bearing arms and refuses personal military service . . .".[4] In 1898 Doukhabors were specifically granted military exemption[5], and the following year an order in council granted Hutterites ". . . the fullest assurance of absolute immunity from military service, not only to those who have already settled, but also to those who may

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1. *Re Jensen* (1976), 67 D.L.R. (3D) 514
2. The history of this arduous expedition and further detail on the negotiations may be found in E.K. Francis, In Search of Utopia: The Mennonites in Manitoba (Altona: D. W. Friesen and Son, 1955) c. 2
3. The letter is reproduced in full in Francis, *Id.* at 44-5.
4. S.C. (1883) 46 Vict. c.11, s.15
5. Woodcock and Avakumovic, *The Doukhabors* (Ottawa: McClelland and Stewart, Carleton Library series, 1977) at 137

settle in the future."[6]

But what was expedient to grant in peacetime, when federal policy actively sought settlers for an expanding West, became difficult to maintain in the face of wartime resentment from Canadians whose husbands, sons and relatives were dying in defence of their country. The *Dominion Elections Act* of 1916 disenfranchised all conscientious objectors.[7] Although exemptions continued to be granted throughout the first world war to those who could prove membership in an historic "peace" church, individual objectors incurred public obloquy and scorn as "slackers". On occasion, Mennonite churches were desecrated .[8] By 1918 public resentment of conscientious objectors was sufficiently inflamed that the Honourable J.A. Calder, Minister of Citizenship & Immigration, promised a law: ". . . that no man shall be allowed to come to this country unless he is prepared to carry his full share of the military burden".[9] On May 1st and June 9th, 1919, the government of Canada ". . . owing to the results of the war . . ." passed orders in council forbidding further immigration to Canada of Doukhabors, Hutterites and Mennonites (who, in common, hold conscientious objection as a principal religious tenet) because of their unwillingness ". . . to assume the duties and responsibilities of Canadian citizenship".[10] By 1921, wartime passions had abated, and this restrictive order in council was quietly rescinded.[11]

So far as it is possible to discover, no denials of citizenship because of conscientious objection occurred before, during or after

6. P.C. 1676, August 12, 1899. This order in council was rescinded on April 8, 1919.

7. R.S.C. 1916, c.6, s.67

8. "When the soldiers returned, groups of veterans forced themselves into the Rosthern Mennonite Church, cursed, and hurled the pulpit Bible between the benches. An attempt was made to bring a cow into the church . . . A black flag was hung from the church steeple."
H. Frank Epp, *Mennonite Exodus* (Altona: D. W. Friesen and Son, 1962) at 98-9

9. *Id.* at 99

10. The order in council also cited their ". . . peculiar customs, habits, modes of living, and methods of holding property"; P.C. 923 (May 1, 1919) and P.C. 1204 (June 9, 1919).

11. The Honourable J.A. Calder, Minster of Citizenship and Immigration, who was instrumental in the enactment of the restrictive regulation was also instrumental in its repeal On October 14, 1921 he wrote to a Mennonite minister:
"I have thought about this matter . . . and I am sure that the regulations of the immigration law forbidding certain classes of conscientious objectors will be removed during the war. I personally have no doubt that they will be dropped again."
Quoted in Epp, *supra*, note 8 at 103

the first world war. This may be because most conscientious objectors were Mennonites who refused combatant status but were, in most cases, willing contributors either financially, or by alternative service, to a victorious outcome.[12]

On December 10, 1939 Canada declared war on Germany and, on June 21, 1940 Royal assent was given to the *National Resources Mobilization Act.* The regulations made thereunder authorized compulsory military service but included an absolute exemption for Mennonites and Doukhabors (unlike previous legislation Quakers, Tunkers and Hutterites were not mentioned), and a qualified "postponement . . . until further notice" for conscientious objectors of other religious denominations.[13]

Alternative service for conscientious objectors took three particular forms: first, work camps in National Parks or at Forest Experimental Stations; second, service in agriculture or designated essential industries; or, third, service with the Royal Canadian Army Medical Corps or the Canadian Dental Corps. Compulsory deductions (ranging from $25 to $60 monthly) were made from salaries paid to those in alternative service; money so collected was sent to the Red Cross. The total number of Canadian conscientious objectors in the second world war was approximately 10,800 of whom 7,500 were Mennonites.[14]

Jehovah's Witnesses did not fare as well. On July 4, 1940 they were declared to be "an illegal organization" under the Defence of Canada regulations.[15] Mere membership in the sect was an offence. This draconian measure appears to have been prompted less by their conscientious objection than by their proselytizing inroads, particularly among Roman Catholics in Quebec, and by their allegedly seditious literature.[16] Charles Morrell, then Secretary to Chief Justice Sir Lyman Duff, reported that between July and December 1940, twenty-nine Jehovah's Witnesses were prosecuted, convicted and sentenced to a cumulative total of 300 months

12. Some Mennonites initially objected to buying Victory Bonds or contributing to the Red Cross. But when they received assurances that their donations would be used for charitable purposes, most gave generously. It is estimated that Mennonites contributed more than 700,000 dollars to Victory Bonds (on which many refused to accept interest) and, in 1918 alone, more than 100,000 dollars to the Red Cross. Francis, *supra,* note 2 at 188

13. P.C. 10924, December 1, 1942

14. I have drawn the information in this paragraph from Epp, *supra,* note 8 at 328-331.

15. Defence of Canada Regulations, Canada Gazette, vol. 74 (1941), s.39(c)

16. *Cf. Boucher* v. *The King,* [1951] S.C.R. 265

in prison, either for membership or possessing witnesses' literature.[17] In 1943, acting upon the recommendation of a parliamentary committee, the government deleted Jehovah's Witnesses from the Defence of Canada Regulations subversive list.[18] Again one finds no recorded denials of citizenship to conscientious objectors during, or immediately after, the second world war.

The *Canadian Citizenship Act* requires an applicant to personally appear before the Citizenship Court for examination and to produce such evidence as the Court may require as to his fitness for citizenship.[19] Section 10 enumerates criteria, some objective[20], others subjective[21], on which the Court must be satisfied. Section 10(1) (f) requires the applicant to satisfy the Court "that he has an adequate knowledge of the responsibilities and privileges of Canadian citizenship and intends to comply with the Oath of Allegiance . . .". The Oath of Allegiance states:

> I, A.B., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.
>
> So help me God.[22]

In 1968 four Jehovah's Witness applicants from Yale County, British Columbia were refused citizenship because the Citizenship Court held conscientious objection to be incompatible with the "responsibilities and privileges of Canadian citizenship". They appealed.[23]

Kerr J. (of the Exchequer Court) sitting as a Judge of the Citizenship Appeal Court carefully reviewed the leading American decisions[24] culminating in the 1946 decision of the U.S. Supreme Court in *Girouard* v. *U.S.*, holding that conscientious objection is

17. M. James Penton, *For God, Church and Freedom: The Struggle of Jehovah's Witness for Religious Freedom in Canada,* (publication pending), Manuscript, p. 145
18. P.C. 8002, October 14, 1943
19. R.S.C. 1970, c.C-19, s.26
20. For example, age (21), residency (Canadian residency for at least 12 of the 18 months immediately preceding application), lawful admission to Canada, etc.
21. For example, "good character" and "adequate knowledge" of French or English
22. *Canadian Citizenship Act, supra,* note 19 Schedule II
23. *Re Almaas et al,* [1969] 2 Ex. C.R. 391
24. *U.S.* v. *Schwimmer* (1928), 279 U.S. 644; *U.S.* v. *Macintosh* (1930), 283 U.S. 605; *U.S.* v. *Bland* (1930), 283. U.S. 636

not a bar to citizenship.[25] In concurring with this view, Kerr, J. pointed out that neither the *Citizenship Act* nor the Oath of Allegiance expressly, or by necessary implication, require military service. He alluded to the fact that military service in Canada has traditionally been on a voluntary basis, and conscription has been invariably regarded as a distasteful measure of last resort. He concluded:

> It is beyond dispute that persons who refuse to serve in the Armed Forces because of religious beliefs may still serve Canada well in other ways in peace and in war. They can be good citizens, notwithstanding their refusal to serve in the Armed Forces.[26]

Since the Citizenship Appeal Court may be a final appellate court[27], one might reasonably have concluded that the issue had been conclusively resolved, at least in respect of Jehovah's Witnesses. Not so.

Thorburn and Bente Jensen immigrated to Canada in 1955. In their two decades in Canada prior to their citizenship application, they had lived in British Columbia and Ontario. Both were gainfully employed. Neither had a criminal record. Since they subsequently became my clients, it might be thought indecorous, or at least partial, for me to describe their integrity and personal character; this is Addy J.'s assessment:

> Both appellants impressed me as being good, honest people with a deep religious faith which they translated into action in their daily lives. They are members of the movement known as Jehovah's Witnesses, the husband being an ordained minister of that faith. He fulfils his duties as a minister without remuneration of any kind. He is a painter by trade and has apparently made a financial success of it. Both he and his wife are apparently strong believers in the work ethic and have never taken advantage of the social benefits provided for in our society. They are both interested in helping their fellow man and in preserving family

25. (1945), 328 U.S. 61 at 64 (per Douglas J.)
"Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants."

26. *Re Almaas, supra,* note 23 at 399

27. *Canadian Citizenship Act, supra,* note 19 at s. 31 (5):
"Upon the hearing of an appeal brought pursuant to this section, the Citizenship Appeal Court may confirm or reverse the decision of the court appealed from and a decision confirming a decision of the court appealed from is final and conclusive."

> ties and the sanctity of marriage and they are so motivated by reason of their faith. It was amply demonstrated how they, with some degree of success, constantly seek to rehabilitate alcoholics and other persons who, in their view, have strayed from the path of righteousness. Their children are exceptionally clean-cut and alert and the family from all appearances is a model one.[28]

The Jensens' first application for citizenship came on before His Honour Judge Lane in Prince Edward County on August 17, 1973. At all stages, Mr. and Mrs. Jensen clearly indicated that they were prepared to swear the Oath of Allegiance.

Presumably to satisfy himself on the Jensens' knowledge of the "responsibilities and privileges of Canadian citizenship" Judge Lane embarked on a series of questions about military service. Not only were the questions hypothetical, they required responses without foreknowledge of the contingencies which might again lead Canada into war. To all these hypothetical questions the Jensens replied that they would refuse, on religious grounds, to actively or passively assist in war. Judge Lane pronounced himself "disturbed" by their answers, and reserved his decision, taking the rather questionable step of "referring the matter back to the Department".[29] The transcript does not disclose what, if anything, the Department said or did.

On October 16, 1973 Judge Lane gave written reasons denying citizenship. "Except for their prejudice which arises by virtue of their religion, Jehovah's Witness" Judge Lane wrote, he was satisfied that ". . . they would be satisfactory citizens and had complied with the requirements of the various sections of the Act."[30] Insofar as one can extract a ratio (a difficult task from such skimpy, muddled reasons) it appears to be this: "These applicants should not be granted citizenship unless they are prepared to take on *some* responsibilities of that citizenship".[31] In the very next line, Judge Lane characterizes the Jensens' conscientious objection as ". . . a refusal to take on *any* responsibilities of citizenship". But whether he meant "some" or "any" responsibilities, his statement is clearly contradicted by the evidence before him. That evidence established that the Jensens accept and, in an exemplary manner,

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28. *Re Jensen, supra,* note 1 at 515
29. *In Re Thorburn Jensen,* Transcript of Reasons for decision of His Honour Judge Lane, unreported, October 16, 1973, p.1
30. *Id.*
31. *Id.* at 3

discharge all the responsibilities of citizenship except military service; the necessary implication is that Judge Lane held that active military service, or at least a declared willingness to engage in non-combatant service (e.g. as a stretcher bearer) is a prerequisite to a grant of Canadian citizenship.

The *Citizenship Act* provides an appeal to a Citizenship Appeal Court and its decision, if confirming the Court of first instance, is ". . . final and conclusive".[32] On April 8, 1976 Addy J., sitting as a Citizenship Appeal Court Judge, confirmed a denial of citizenship to the Jensens.

At the appellate hearing, Mr. Jensen was again subjected to extensive hypothetical questions.[33] As there was no nominal respondent (no one, at any stage, opposed the Jensens' application for citizenship) Addy J. appointed Mr. Frederick Chenoweth as *amicus curiae*. In a written memorandum to the Court, after the hearing, Mr. Chenoweth criticized this hypothetical questioning as "unduly speculative" and "inappropriate" and concluded:

> I submit that in light of the clear demonstration of the very desirable nature of this applicant and in light of his past and proposed contribution to the community that such speculation without clear breach of the requirements of the Citizenship Act cannot be grounds for denying this application.[34]

Nevertheless, Addy J. upheld the denial of citizenship. He purported to distinguish Kerr J.'s prior decision in *Re Almaas* as limited to conscientious objection to active military service, and not extending to a refusal, like the Jensens', of non-combatant service.[35] With respect, this is unconvincing. All appellants in *Re Almaas* were Jehovah's Witnesses (in fact, acquaintances of the Jensens) whose beliefs were, in all respects, identical to theirs.

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32. *Supra,* note 27

33. Some of the questions seem quaint in this age of nuclear and neutron weaponry: *e.g.*

"He would refuse, for instance, in his capacity as a painter to paint a cannon. He stated, however, that he would not refuse to paint the windows of any factory manufacturing cannons as he believed that this might be sufficiently remote from the war effort . . .".

Re Jensen, supra, note 1 at 516

34. Memorandum of *Amicus Curiae,* at 1 and 4

35. ". . . the specific issue in the case (i.e. *Re Almaas*) was whether there was a duty to join the Armed Forces and not with a total refusal to participate in any way in an activity which would contribute directly to the prosecution of a war, such as in the present case."

Re Jensen, supra, note 1 at 518

Objection to active or passive military involvement derives from beliefs common to all Jehovah's Witnesses: (1) that war is evil; (2) that followers of Christ must "return good for evil"; and (3) where God's laws conflict with the laws of man, the former are to be obeyed. What distinguishes *Re Almaas* is not the appellants' theological position which was identical, but the treatment of that position by two respective judges.

Having distinguished *Re Almaas,* at least to his own satisfaction, Addy J. then concluded that the lower court was correct in denying the Jensens' citizenship. The ratio is expressed in the final paragraph of his judgement:

> . . . I am not prepared, as counsel for the appellants has invited me to do, to declare that our law has changed to the extent that a citizen is not obliged to faithfully contribute directly to the prosecution of a war in which Canada may be engaged because he objects to war on moral or religious grounds. To come to the aid of one's country in time of war and to help bring about the defeat of its enemies has, from the beginning of our history, been regarded as one of the most fundamental, important and basic duties of a subject and I am not prepared by judicial decision to state that that duty no longer exists for I am convinced that it does and will continue to do so until changed by Parliament.[36]

Would a grant of citizenship to the Jensens have involved dispensing "by judicial decision" with a legal duty? No law of Canada currently imposes the duty to which Addy J. refers, ". . . to faithfully contribute directly to the prosecution of a war", on anyone, citizen or non-citizen. On those very rare occasions since 1883 when such a duty has been imposed, exemption has always been provided for conscientious religious objectors. I do not question the authority of the State to compel military service. Clearly it may do so.[37] But it has not done so. And when, in the past, it has done so, it has carefully made provision for men of conscience like Thorburn Jensen. To have granted Jensen's citizenship would have confirmed, not changed, Canadian law; by effectively overruling *Re Almaas* it was Addy J.'s judgement which changed Canadian law and required Parliamentary action to reverse.[38]

Addy J. gave short shrift to the argument based on the Canadian

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36. *Id.* at 520-21
37. *Cf.* B.N.A. Act, s.91(7)
38. *Citizenship Regulations,* S.O.R. 77-127, s.15(iv) B, discussed *infra*

Bill of Rights.[39] Section 1 of that statute — so fulsome in proclamation, so deracinated in interpretation — declares that "There have existed and shall continue to exist . . ." certain fundamental freedoms, including freedom of religion; section 2 then directs Courts to so construe and apply federal laws (like the *Citizenship Act*) as not to ". . . abrogate, abridge or infringe" these fundamental freedoms. Given this direction from a statute which the Chief Justice of Canada recently characterized as "quasi-constitutional"[40]; given the prior decision of the Citizenship Appeal Court in *Re Almaas;* given that no law of Canada requires military service; and given that both the *Citizenship Act* and the Oath of Allegiance are silent about military obligations, it would hardly have required a flight of judicial innovation to grant Mr. and Mrs. Jensen citizenship.

It is important to re-emphasize that the Jensens were prepared, at all times, to swear the Oath of Allegiance. But Addy J. held that the Oath's statement "I will faithfully observe the laws of Canada" was ". . . clearly intended to include all of the laws and all of the duties both present *and future*".[41] It is submitted that this interpretation is both erroneous and dangerous. Erroneous, because only present laws and duties are enforceable. One cannot commit a future crime or tort, nor can one assume a future commitment, the terms of which are undefined. One may have assumed a duty in the past; one may assume a duty now; but one cannot "assume" a future duty. Surely the Oath's reference to "duties" and "laws of Canada" means duties and laws now existing, not those which may exist at some speculative, unknowable future date. Dangerous, because if Addy J. is correct, all conscientious applicants of any religion, or indeed of no religion, might be refused citizenship based on speculation as to what future laws may require. Who, for example, having in mind the sordid experience of Nazi euthanisia laws, would be prepared to swear unconditional future obedience to domestic law sight unseen?

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39. ". . . the common law does not grant nor does the Canadian Bill of Rights give to any citizen the right to invoke his own interpretation of the will of God, or of any of His precepts, as a valid motive for avoiding the duties of a citizen as they are defined and imposed by the State and it matters not whether the interpretation originates from the individual himself or from the precepts of a recognized religion."
Re Jensen, supra, note 1 at 519

40. *R.* V. *Hogan* (1975), 48 D.L.R. (3d) 427 at 443

41. *Re Jensen, supra,* note 1 at 520; emphasis added.

The essential confusion of this judgement is nicely summed up in one line; Addy J. states: "As to the suitability of the applicants in time of peace, I entertain not the slightest doubt . . ."[42] What is one to make of this? Are we presently at war?

It is also respectfully submitted that Addy J.'s judgment ignored existing realities and past practice. The existing reality is that Thorburn Jensen was 46 years old; his wife was 43. Is it likely that they will be required by the government of Canada to commence military service in the foreseeable future? The past practice is the laudable initiative of the Canadian government in providing exemption for conscientious objectors. In the unhappy event that Canada should again become embroiled in war, is there any reason to believe that the government would be less solicitous of preserving religious liberty than it has been in the past? And is it not passing strange that Thorburn Jensen was denied citizenship for a refusal to bear arms at a time when the willingness of citizens to bear, and use, arms, especially handguns, has prompted government to introduce gun control legislation?

Had Addy J's judgement been the last word on this question it would have demonstrated how little we have learned since Oliver Wendell Holmes half a century ago wrote these words:

> I had not supposed hitherto that we regretted our inability to expel them [i.e. Quakers] because they believe more than some of us do in the teachings of the Sermon on the Mount.[43]

Fortunately, the story has a somewhat happier ending. Section 31 (5) of the *Citizenship Act* made Addy J's judgement ". . . final and conclusive". Judicial review was precluded because the Citizenship Appeal Court is, by statute[44], ". . . a superior Court of record" and therefore not a ". . . federal board, commission or other tribunal" within the meaning of section 28 of the *Federal Court Act*. On Mr. Jensen's behalf representations were made to the Secretary of State, the Minister responsible for citizenship, which resulted in a new section being added to the citizenship regulations designed to preclude such a result in future.[45] The regulations establish criteria to assist a judge to more precisely determine whether or not an applicant ". . . has an adequate knowledge of

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42. *Id.* at 515
43. *U.S.* v. *Schwimmer, supra,* note 24 at 655
44. *Citizenship Act, supra,* note 19 at s. 31 (2)
45. A new *Citizenship Act* was proclaimed in force on February 15, 1977. S.C. 74-75-76, c.108; *cf. Citizenship Regulations, supra,* note 38

Canada and of the responsibilities and privileges of citizenship".[46] But the section now specifically precludes questions "where the person is a conscientious objector by reason of his religion, [of] his obligation to Canada during time of war".[47]

Mr. and Mrs. Jensen are eligible to re-apply for citizenship, and these new regulations probably ensure that citizenship will be granted this time. It is more difficult to explain why, after four years of waiting and fruitless litigation, they should want to commence the process afresh. Also it is disappointing that one of the last, if not the very last, citizenship judgement under the old Act should have been so illiberal, confused and myopic. As one who acquired by birth that citizenship which the Jensens so deservedly claimed, I cannot but feel that the Court's decision cheapened my own citizenship.

I do not contend that it is easy to reconcile the claim of the individual to religious liberty with the claim of the State to national security. Conscientious objection poses intriguing jurisprudential questions, but the exigencies of war may require that speculation yield to fighting. I understand that. But in time of peace, one hopes for a reflective, less jingoistic analysis of the State's tolerance of conscientious objection.

When Christ replied to the Pharisees' trick question about man's loyalities: "Render therefore unto Caesar the things which are Caesar's; and unto God the things which are God's"[48] it was a splendid example of His wisdom. In addition to being witty and ironic, répartee at its best, Christ's answer did not attempt to blur the distinction between Caesar's claims and God's. Instead it acknowledges man's dual loyalty, but requires each person, in his own time, to discern and strike an appropriate balance between these conflicting obligations.

Thorburn Jensen, and a minority of conscientious objectors like him, strike a balance which precludes active or passive military involvement. Because this is a minority choice does not *ipso facto* make it a foolish choice or an illegal choice. When the American courts confirmed the denial of citizenship to a conscientious objector, Holmes J. dissented:

> . . . if there is any principle of the Constitution that more

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46. *Id.* at s.15
47. *Id.* at s.15 (IV) B
48. Mark, 12:17

> imperatively calls for attachment than any other it is the principle of free thought, not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.[49]

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49. *U.S.* v. *Schwimmer, supra,* note 24 at 654-5