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MATTERS OF FAITH AND CONSCIENCE: A TURNING POINT IN THE TAKING OF OATHS IN CANADA

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Abstract

The global expansion of the British Empire brought to its colonies British legal traditions. Non-British peoples and cultures had to adapt to these imposed legal traditions, but also left their own indelible marks of change. Following years of immigration in Canada, change was necessitated across the social order to accommodate new faiths and cultural practices of non-British origin. One example involved the taking of court oaths, a practice that in the British legal tradition traces its roots to the Protestant Christian faith. Focusing on the example of court oaths, we argue that as immigration surged at the turn of the 20th century, and Canadian society increasingly became religiously diverse, Canadian courts responded to this diversity when shaping the law of oaths. In 1913 a Nova Scotia case, *Curry v. The King*, was argued before divided courts up to the Supreme Court of Canada on the question of what binds a sworn oath: the religious forms of oath taken or the conscience of the oath taker regardless of their faith. The precedent established remains good law today and is one illustration of how courts successfully wrestled with issues of religious diversity and accommodation in the emerging multi-cultural society of early 20th century Canada.

INTRODUCTION

“Justice is conscience, not a personal conscience but the conscience of the whole of humanity. Those who clearly recognize the voice of their own conscience usually recognize also the voice of justice.” - Alexander Solzhenitsyn¹

Access to courts of justice is a fundamental right in western societies. The ability to stand before your accusers and offer evidence in your defense is essential to our right to security of the person. However important this right is, there exist in Canada gate-keeping mechanisms that historically and contemporarily limit a person’s access to this venue. One of these is the requirement of oaths in court.

Sopinka, in *The Law of Evidence in Canada*,² wrote that historically in common law, according to the leading case *Omichund v. Baker*³, a witness, “in order to be competent to give evidence, had to demonstrate a belief in some Supreme Being and had to be sworn according to the witnesses own custom” (p. 680). Yet this was a qualified belief. In *Bell v. Bell* (1899)⁴ for example, a key witness was deemed incompetent because he held to a belief in God, “but not in a future state of punishments and rewards.”⁵ This is no longer the requirement in Canada. A witness can be considered competent without belief in retribution or even a divine being. The oath itself, Sopinka argued, has no religious significance for many adults. Taking an oath merely adds to the solemnity of the proceeding and “increases the witness’s perception of the importance of telling the truth in court”.⁶ The oath then today adds to the sense of moral obligation that binds one’s conscience. The focus has shifted to the legal consequences of telling the truth. Today witnesses have the option of affirming rather than swearing if they so prefer based on the

¹ Solzhenitsyn, Alexander, Letter, Oct. 1967, from Solzhenitsyn to three students (published in *Solzhenitsyn: A Documentary Record*, "The Struggle Intensifies," ed. by Leopold Labedz, 1970).

² Sopinka, John, Lederman, Sidney, and Bryant, Allan, *The Law of Evidence in Canada*, Toronto: Butterworths, 1999, p. 680.

³ *Omichund v. Barker*, Willes, 538, 26 E.R. 15, S.C. 1 Atk. 21, Note: Omichund is also spelled Omychund.

⁴ 34 N.B.R. 615 (S.C.).

⁵ *Ibid.*, para. 32.

⁶ *Supra*, note 2 at 681.

grounds of conscientious scruples.⁷ The penalties for false testimony under oath or affirmation are the same. But this is the current practice. How did we come to this point?

There have been several significant developments in the history of court oaths from their European roots to later Canadian uses and innovations. One such innovation will be the focus of this paper. This is the case of *Curry v. the King* (1913)⁸. In this case, Ronald Curry was alleged to have perjured himself during the trial of John J. MacDonald. It was alleged that during the course of a provincial election in North Sydney, Nova Scotia, McDonald had approached Curry in order to buy his vote for D.D. McKenzie for the price of four bottles of liquor and two dollars. Mr. Curry denied ever meeting Mr. MacDonald though on examination this was found to be false. He was found guilty of perjury and sentenced.

This case was not remarkable, and it might have ended right there. However, Curry's lawyer, J.W. Madden would argue that Curry had not been properly sworn as a witness and therefore could not be found guilty of perjury. As we shall consider below, in response to differing religious beliefs, the British court system had evolved different forms of oath-taking for different religious groups. Mr. Curry had been sworn using an inappropriate form. The question then arose: was Mr. Curry under oath when he gave his evidence to the court. The case proceeded to the Nova Scotia Court of Appeal where four justices were divided. Without a clear majority, the conviction was upheld.⁹ The case finally went to the Supreme Court of Canada who settled the matter and established a Canadian precedent which still stands today as good law and opening the door for later innovations. The following paper will briefly trace the historical practice of oath taking in the UK tradition and its religious and cultural accommodations up to the Curry case. We shall turn to the arguments in the Nova Scotia Court of Appeal and Supreme Court of Canada decisions themselves and their implications. Finally, we will consider particularly the Nova Scotia Court of Appeal decision against the social-historical context. We shall

⁷ *Supra*, note 2 at 683.

⁸ 47 N.S.R. 176, 21 C.C.C. 273 (SC), affirmed (1913) 48 S.C.R 532, 22 C.C.C. 191.

⁹ It should be noted that the Nova Scotia Reports erroneously indicated that the conviction was quashed. There was a correction that appeared in a case note in *Reports and Notes*, (1914) 50 *Can. L. J.* (N.S.) 75 that the appeal was dismissed with costs.

then consider the Court of Appeal decision against its socio-historical contexts and consider how it might have been either indicative or counter to period thinking. Finally we hope to draw out from the case study the ideas and conditions that make this particular step forward in enhancing religious and cultural rights in Canadian courts.

A BRIEF HISTORY OF WITNESS OATHS

The Beginnings

Oaths are very ancient. There is a wealth of examples we could offer for the use of oaths as a form of self-curse in the Ancient Near East.¹⁰ We read of various oath rituals in the Hebrew Bible, for example, in the stories of Abraham¹¹ and later Jacob¹² requiring an oaths by placing a hand under the thigh and invoking the “the LORD, the God of heaven and earth.” The phrase “God of heaven and earth” has a long relationship with the practice of covenant making in the Ancient Near East where heaven and earth act as witnesses to the covenant between a deity and the people¹³. These and other oath stories reflect standard cultural practices of Bronze and Iron Age Palestine. There are also references to the use of oaths in Greek and Roman societies. Zeus was thought to strike perjurers with lightning.¹⁴ Aristotle is said to have characterized an oath as “an unsupportable statement supported by an appeal to the gods”.¹⁵ It was Constantine in the fourth century that instituted a debatably Christian form of oath in state legal proceedings.¹⁶ Witnesses were then required to be sworn and this was later adapted into the Justinian code: “we have long since directed that witnesses, before they give their testimony, must be put under the sanctity of an oath...”¹⁷ Although this was portrayed as a Christian practice, there has been a long history of theological controversy over the New Testament foundations for this practice.¹⁸ Several

¹⁰ Ireland, The Law Reform Commission, *Report on Oaths and Affirmations*, LRC 34-1990, Dublin, para. 2.5, n. 24. Online: http://www.lawreform.ie/publications/data/volume8/lrc_59.html.

¹¹ *Holy Bible, The*, New International Version, The International Bible Society, 1984, Genesis 27:2-3.

¹² *Ibid.*, Genesis 47:29-31.

¹³ Wenham, Gordon, *Genesis 16-50, Word Biblical Commentary*, Dallas, Texas, Word Books, 1994, p. 141.

¹⁴ Silving, Helen, *Essays in Criminal Procedure*, Buffalo, Dennis, 1964, pp. 5-6.

¹⁵ *Supra*, note 10 at para. 2.5, n. 26.

¹⁶ *Supra*, note 10 at 2.5, n. 27, see *Constitution of Naissus*.

¹⁷ Blume, Fred, *Annotated Justinian Code*, Timothy Kearley, ed., “De Testibus (concerning Witnesses)”, *Justinian Code*, 528, 4.20.9. Online: <http://uwacadweb.uwyo.edu/blume&justinian/>.

¹⁸ France, R.T., *Matthew*, Grand Rapids, MI, William B. Eerdmans Press, 1985, p. 124-125.

passages have been interpreted to expressly forbid oaths. Matthew 5:34 states: “Do not swear at all: either by heaven, for that is God’s throne; or by the earth, for it is his footstool....” This became a contentious issue during the Protestant reformation when Anabaptists such as Zwingli rejected all oath-taking.¹⁹ Other reformers such as Calvin interpreted these passages as rejections of idle, rash or indirect oaths and supported the use of oaths by magistrates.²⁰ Throughout the medieval period there remained the belief in this “appeal to supernatural sanctions”.²¹ Wigmore observed that “it was not a matter of weighing the credibility of a sworn statement; the thought was rather that such an appeal could not be made with impunity.”²² Thus a sworn witness who remained unharmed after testifying was presumed to have been adjudged by God to have spoken the truth.²³

The History of British Accommodations

Up to 1744 in England, only Christians “were deemed to possess the belief necessary to be sworn as witnesses.”²⁴ Lord Coke in the *Institutes of the Laws of England* (1797) maintained that “the oath ought to be accompanied by the fear of God”, God being the Christian one.²⁵ There were some practical exceptions. In *Robeley v. Langston* (1667)²⁶ it was held that Jews could be sworn on the *Old Testament* since this testament was also considered part of the Word of God.²⁷ In *Omichund v. Barker*²⁸ the chancery court challenged the view that only Christians could be competent witnesses. Barker had become greatly indebted to a Hindu merchant in Calcutta. He fled to England and the Hindu merchant Omichund followed and launched his case there. The question considered was whether depositions of witnesses examined under oaths sworn according to ceremonies of

¹⁹ Zwingli, Huldreich, *In Catabaptistas strophas elenchus*, 1527, p. 406.

²⁰ Calvin, Johannes, *Institutes of the Christian Religion*, ed. John McNeill, Philadelphia, Westminster Press, 1960, 2.8.26-28, p. 391ff.

²¹ Pollock, Sir Frederick, “English Law before the Norman Conquest”, *Select Essays in Anglo-American Legal History*, vol. 1, Boston, Little, Brown and Company, 1907, p. 92.

²² Wigmore, J., *Evidence in Trials at Common Law*, rev. Chadbourn, J., 1976, para. 1816.

²³ *Ibid.*

²⁴ *Supra*, note 10, p. 6.

²⁵ 4 *Institutes*, London, E. and R. Brooke, 1797, p. 279.

²⁶ 2 Keeble, 315; 84 E.R. 196 (K.B.).

²⁷ *Supra*, note 10, p. 6.

²⁸ *Supra*, note 3.

their religion could be admitted as real evidence. Lord C.J. Willes challenged Coke's contention that "an infidel cannot be a witness."²⁹ Interestingly, he answered theology with theology and stated "we are commanded by our Saviour to do good to all men and not only the household of faith."³⁰ Farther he argued "it is a little mean narrow notion to suppose that no one but a Christian can be an honest man."³¹

Willes drew on a reconstruction of the history of oaths to demonstrate that oaths were not peculiar to Christianity as were communion and baptism. If they were they could be restricted to Christians but this was not the case. He concluded "the forms indeed of an oath have since varied, and have always been different in all countries according to the different laws, religion and constitution of these countries. But still the substance is the same which is that God in all of them is called upon as a witness to the truth of what we say."³² Omichund established in common law the requirement that witness can be sworn according to whatever form would bind their conscience according to their religion. This placed an obligation on the court to ask what form of oath would do so. One limitation still existed: those with no religious belief or no belief in retribution could not be sworn and admitted as a competent witness.³³

This act of accommodation was a practical necessity in the religiously and culturally diverse British Empire. Without it, the judicial wheels would have ground to a halt. However with this new concession came the challenge of implementing it. As early as 1657 Dr. Owen, Vice Chancellor of Oxford had refused the usual manner of kissing the Bible, and swore with an upraised hand.³⁴ This would become the accepted Scottish form of the oath.³⁵ In *Fachina v. Sabine* (1738)³⁶ and *King v. Morgan* (1764)³⁷ Muslims were permitted to swear on the Koran. Jews, as seen above, could swear on the Old Testament,

²⁹ *Ibid.*, p. 1312.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*, p. 1314.

³³ *Ibid.*, p. 1315.

³⁴ "Assumpsit", *Dutton v. Colt*, 2 Sid. 6, 82 E.R. 1225 (K.B.).

³⁵ *Walker's Case 1788*, 1 Leach 498, 168 E.R. 351.

³⁶ *Fachina v. Sabine* (1738), 2 Stra. 1104, 93 E.R. 1061.

³⁷ *R. v. Morgan* (1764), 1 Leach 54, 168 E.R. 129.

the Grantham for Sikh's, the Zend Vesta for Parsee's.³⁸ A Hindu witness touched the hand and foot of a Brahmin priest and a judge in India brought a cow into the court for a witness to touch to bind his conscience.³⁹ In a Chinese chicken oath, a live chicken was decapitated in a B.C. courtroom after incineration of the written oath.⁴⁰ Breaking of saucers⁴¹ and snuffing of candles have also been used in oath rituals. In a Canadian case, *R. v. Pah-Mah-Gay*,⁴² and aboriginal witness who was not a Christian and had no oath ritual associated with his beliefs was considered a competent witness because he believed in a supreme being and an afterlife. *Omichund* was a significant step in multi-cultural accommodation but at the same time created additional burdens on the court system.

THE CANADIAN LEGAL CONTEXT

It is 1913, in a Halifax Nova Scotia courtroom. Curry's lawyer has argued that Curry was sworn according to Scottish form by raising his right hand rather than kissing the Bible. Curry, it was argued, was not Scottish and was not asked by that court what form of oath would bind his conscience as was established by *Omichund v. Barker*. If it was determined Curry was not appropriately sworn his conviction for perjury would be quashed. If he wasn't under oath he cannot commit perjury.

The court was divided. C.J. Townshend and J.E. Graham followed very closely the reasoning of Willes in *Omichund*. For Christians the clear form was to be sworn on a copy of the gospels. Exceptions were made for conscience as was the case for Scottish Covenanter. Curry fell under no exceptions. Graham concluded: "In my opinion the oath was not properly administered, not having been upon the gospels...I think for this reason the conviction should be quashed..."⁴³

Justices Russell and Drysdale approached the question differently. Both also citing Willes, they focused on his comments that the oath was not particularly Christian. Russell wrote "if the essential part of the oath is the calling of God to witness the truth the

³⁸ *Supra*, note 10, p. 7.

³⁹ NSR, *supra*, note 8, para. 24.

⁴⁰ *R. v. AhWooley* (1902), 9 B.C.R. 569, 8 Can. Cr. Cas. 25 (S.C.).

⁴¹ *R. v. Entrehman* (1841), Car. & M. 372.

⁴² (1920), 20 U.C.R. 195 (Q.B.).

⁴³ NSR, *supra*, note 8, p. 14.

affirmation about to me made I can see no reason why the assent of the witness to the formula and his objection to it may not be as well expressed by holding up his hand as by kissing or otherwise touching a copy of the Bible.”⁴⁴ They understood Willes as making a clear distinction between what is essential to the validity of the oath and the variable ceremonies. In their eyes, Curry indicated his intent to be bound by his oath as demonstrated by his active participation in the ritual. His conscience was bound and he willfully perjured himself. With an evenly divided bench, the conviction was upheld.

The Supreme Court of Canada concurred with Russell and Drysdale in upholding the conviction. The Chief Justice wrote: “If he did not, in these circumstances take an oath, that is, call God to witness the truth of what he was about to testify to, I am at a loss to understand what these words mean.”⁴⁵ The conviction was upheld and a new standard was established. The conscience not the ritual now bound the witness in Canadian courts.

What remained puzzling was the rationale behind a Nova Scotia court choosing to challenge the established tradition. Was it merely the distaste of letting Curry off? Had questions of religion been problematic in Nova Scotia courts? To address this question we turned to both to 1913 Nova Scotia’s cultural contexts.

THE NOVA SCOTIA CULTURAL CONTEXT

Religion and Cultural Demographics

What did the socio-cultural face of Nova Scotia look like in 1913? In 1913 statistically and culturally, Nova Scotia was predominately English in character. The *Fifth Census of Canada* (1911)⁴⁶ found that of the population of nearly half a million people (n=492,338)⁴⁷, almost 36% were English, 11% Irish, and 30% were Scottish by ethnic origin.⁴⁸ The French population during the period accounted for another 11% of the population. The remaining 12% of classifications comprised 10% other Europeans (Germans, Austro-Hungarians, Belgians, Rumanians, Bulgarians, Polish, Dutch, Swiss,

⁴⁴ *Ibid.*, p. 17.

⁴⁵ SCR, supra, note 8, para. 33.

⁴⁶ Canada. Census and Statistics Office, *Fifth Census of Canada 1911*, vol. 2, Ottawa, Canada.

⁴⁷ *Ibid.*, p. 445.

⁴⁸ *Ibid.*, p. 186.

Scandinavians, Russians, Greeks and Italians), 0.5% Asians (Chinese, Japanese, and Indian), 0.2% Jewish and 1.3% Negro. The remaining 0.7% was unspecified. Although there were 21 different ethnic origins recorded, the majority (92%) of Nova Scotians surveyed during this census were Canadian born.⁴⁹

What was the religious character of Nova Scotia during this period? The dominant faith group in 1911 was of course Christian, distributed among five principal denominations: the largest being Roman Catholic at 29% (n=144,991), followed by Presbyterians at 22% (n=109,560), Baptists at 17% (n=83,854), Anglicans at 15% (n=75,315) and Methodists at 12% (n=57,607).⁵⁰ These five groups accounted for 95% of the Nova Scotia population. The high proportion of Roman Catholics is attributed to the large French population as well as the significant Irish Catholic population. Although numerically large these groups lacked the political clout of the less numerous groups, like the largely English Anglicans and Methodists. Another 4.6 % of the population was affiliated with approximately 40 different Christian denominations, sects or movements. Although forty is notable, Nova Scotia was not as diverse religiously in many respects as other areas of Canada. Not surprisingly the 1911 census recorded only 0.4% (n=2,148) of the population declaring a religion other than Christian or no religion. The majority of these were Jewish (0.2%, n=1,360) with the next largest group those claiming to be “agnostics” (n=87), “no religion” (n=637) or socialists (n=21). Several interesting aspects of these data are seen here, the wide discrepancy between those claiming Indian or Asian descent (n=2,053),⁵¹ and those actually recorded as practicing Eastern Religions (n=43).⁵² The 1911 census found only 5 practicing Buddhists, 13 practicing Confucians, 25 practicing Mohammedans, no practicing Shintos, no practicing Sikhs and no practicing Hindus. Those without religion represented only 0.1% of the Nova Scotia population, less than a third of the Canadian average of 0.38%. Another interesting statistic is the absence of anyone classified as “Pagan” in Nova Scotia, a distinction shared by only Prince Edward Island. This category is likely to include Aboriginal beliefs as well as animist or folk

⁴⁹ *Ibid.*, p. 445.

⁵⁰ *Ibid.*, pp. 24-25.

⁵¹ *Ibid.*, p. 195.

⁵² *Ibid.*, p. 25.

religious beliefs among immigrants. Two important conclusions might be drawn from these statistics. First, the population of those who were not ethnically from the United Kingdom was small (21%) and those ethnically considered non-European was less than 2% of the population and unlikely to be considered a significant economic or political force. The second conclusion we might draw is that although the Christian religion was overwhelmingly dominant in Nova Scotia; popular allegiances were divided among five significant denominational groups. No single sectarian body could dominate public life as happened in other parts of Canada. Let us now turn to more qualitative data to understand public perceptions of ethnic and religious diversity in Canada.

The Immigration Experience

Halifax was no stranger to immigration during this time. Owen Carrigan in his study of the immigrant experience in Halifax during the period⁵³, described Halifax as playing a significant role as a major point of entry to Canada for soldiers, British settlers, and later immigrants and refugees since its founding in 1749. He went on to note how this role became official with Confederation and the passing of the Canada Immigration Act in 1869 establishing an immigration office in Halifax, and subsequently, in 1881, declaring the city an “official port of entry”.⁵⁴ He notes the *Reports of Immigration Agents* recorded that in the years 1913-1914, 75,060 immigrants arrived in the port of Halifax. It is difficult to determine exact numbers since, as Carrigan noted, “arrivals in the port of Halifax were categorized as cabin passengers and immigrants. All steerage passengers were assumed to be immigrants but cabin passengers were not.”⁵⁵ Immigrants were generally well cared for when they arrived in Halifax and facilities were continually being upgraded to accommodate the needs of the new arrivals. Translation services were provided as well as medical services, with particular concern for children and women. Carrigan stated that women immigration officers and train conductresses were appointed to care for the particular needs of women and children.⁵⁶ Besides the support provided by the Red Cross,

⁵³ “The Immigrant Experience in Halifax, 1881-1931”, (1988) 20 *Canadian Ethnic Studies*, p. 28.

⁵⁴ *Ibid.*, p. 29.

⁵⁵ *Ibid.*, p. 29.

⁵⁶ *Ibid.*, p. 30.

there were a number of local societies such as the Charitable Irish Society, North British Society, St. Georges Society, the Halifax Red cross and numerous church groups that offered care to new arrivals.⁵⁷ It was noted that the small Jewish community of Halifax “frequently aided co-religionists who arrived in Halifax without means to purchase a train ticket or who had problems of one kind or another.”⁵⁸ The *American Jewish Yearbook*⁵⁹ records that in the space of twenty years (1891-1911) the Jewish population in Nova Scotia grew from 31 to 1,360 so this might not have been an uncommon occurrence. The attitude toward new arrivals seemed welcoming and “doubtlessly there were individual problems but there was no evidence of administrative hostility, indifference or neglect. Complaints that were noted, were made against particular individuals rather than specific ethnic groups.”⁶⁰ Carrigan offered one particular example of the local population’s attitude toward the new arrivals: the arrival of the Doukhobors in 1899-1900 fleeing Czarist Russia. Coverage of their plight in the local paper resulted in an outpouring of community support. One labour representative is quoted as declaring “that they brought something to this country more valuable than manpower, ‘Men who would stand by their principles, no matter how much suffering it cost them’.”⁶¹ It was been pointed out that the Halifax attitude contrasted sharply with the Doukhobours experience in the West.

Despite the cordial welcome, Halifax itself actually attracted few immigrants. By 1931 Halifax was still 86.15% Canadian born.⁶² Carrigan believed that Canadian immigration policies that encouraged agricultural immigrants for the west largely accounted for this. One example of a 1913 publication aimed at Polish immigrants featured a map of Canada that highlighted Quebec to British Columbia with the Atlantic Provinces unnamed and barely discernable.⁶³ Halifax did remain very discernibly English, “from the architecture of the Victorian Public Gardens to the British Army Parades, the English

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *American Jewish Yearbook*, vol. 14, p. 424.

⁶⁰ *Supra*, note 53, p. 32.

⁶¹ *Ibid.*

⁶² *Ibid.*, p. 33.

⁶³ *Ibid.*, p. 34.

stamp was evident.”⁶⁴ Yet, it is noted that most immigrants who stayed in Halifax had good prospects and immigration agents frequently reported that most arrived to families members, friends and jobs waiting.⁶⁵ We certainly cannot overlook the reality that class distinctions created economic barriers for many immigrants and racial distinctions alienated others; particularly Blacks, Jews and Asians. We can agree with Carrigan that the immigrant experience in Halifax during the period was “mixed”.⁶⁶ For the local population their experience with immigration was generally a good one. Then as today, Haligonians were accustomed, Carrigan concluded, to hearing foreign accents and mingling with people from different countries.⁶⁷ Perhaps most significant is his conclusion that “there was no immigrant group large enough to be perceived as a cultural or economic threat to the local population.”⁶⁸

We can conclude from this brief survey of the socio-religious context of Nova Scotia in 1913, that Nova Scotians were familiar with a diversity of immigrants and their religious beliefs. Some groups such as the Jewish community may have been more prominent than the few Hindu followers, but no group was perceived as a threat to the way of life of the Christian English majority. They therefore could be received as objects of charity and accommodation. As we shall now consider, the real challenge of multicultural and multi-religious accommodation would arise from within the majority itself, fragmented, as we have seen, into five significant and equal Christian denominational groups closely tied to leading European ethnic groups.

RELIGION AND THE PUBLIC GOOD

Nova Scotia Courts and Religion

When we first asked “where does one look to find the public attitude towards the role of conscience and religion” we first turned to the records of the courts themselves to understand what the courts’ attitude might have been toward religious issues. To answer

⁶⁴ *Ibid.*, p. 35.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p. 39.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

the question briefly, there appeared to be little interest in religious matters by the courts, at least at the higher court level. A search of court decisions, prior to the Curry case considering religious questions, found only two, *R. v. Watson and Kenway* (1896)⁶⁹, and *R. v. Halifax Electric Tramway Co.* (1898)⁷⁰. The first case dealt with the conflicting right of free passage of a public highway with the right of religious assembly. In this case members of the local Salvation Army were convicted under a provincial statute of a summary offense and fined for blocking a public thoroughfare and failing to heed a constable when asked to move. It was noted in that decision that aside from the provincial statute, the defendants could also have been charged under the Criminal Code, but the lesser charge was used. A British case was cited in which Herbert Booth, the son of the Salvation Army founders William and Catherine Booth, was charged when he gathered two thousand persons including bands in the square of Whitchurch, Hampshire, England.

The point made in each case was that religious observance provided no exception from the laws imposed on everyone. The second Nova Scotia case concerned the legislative grounds prohibiting companies undertaking business on Sunday. Interestingly, this same issue was still debated in the Nova Scotia Assembly as recently as 2006.⁷¹ It appears then that the Nova Scotia courts rarely had to address religious issues and did not address any cases dealing with religious matters beyond the trial level courts in the fifteen years prior to Curry. In fact, the brief newspaper accounts of the Curry case in the Halifax Herald and the Halifax Chronicle both focused on the election implications rather than any religious ones. Little insight can be drawn from these two cases save that there was a stated intention to protect the public interest in an equitable fashion for all Nova Scotia citizens.

A Parallel Discussion?

We did discover however that there was a dominant discussion occurring around the theme of religion and conscience in the Nova Scotia provincial education system in the decades leading up to the *Curry* decision. “The promotion of morality” wrote Robert

⁶⁹ 6 C.C.C. 331 (N.S. Co. Ct.).

⁷⁰ 1 C.C.C. 424 (N.S.S.C.).

⁷¹ “Province to Remove Restrictions to Sunday Shopping”, News Release, Premier’s Office, Oct. 4, 2006, <http://www.gov.ns.ca/news/details.asp?id=20061004007>.

Bédard, “has always been regarded as a function of the school throughout the history of education in Nova Scotia.”⁷² In the late 19th century, Nova Scotian society, like most of the western world, was wrestling with the challenges of industrialization and the growth of cities. Bédard argued that “Nova Scotia provides an interesting illustration of the wider movement for moral education at the turn of the century. Further, as seen above, Nova Scotia lacked the cultural and religious commonalities that some regions possessed and it has been argued that Schools became then the means to build the common morality and common nationality.”⁷³

The question then arose: what would the common morality look like? Bédard outlined the tensions that developed in this debate: “most educators”, he wrote “indeed most citizens, in Nova Scotia professed Christianity, associated the development of moral virtue with religion, and linked society’s perceived moral dangers with want of sufficient religious knowledge and piety.”⁷⁴ This raised the problem of whose version of religious knowledge and piety would become the standard. There were five dominant views of Christianity and a strong Jewish community in Nova Scotia. It was for this reason that in the 1860s the government of Premier Charles Tupper rejected legislative guarantees for confessional schools, pressed for by Catholic Archbishop Connolly,⁷⁵ in favour of a single public school system where religion could be taught only after hours. A gentlemen’s agreement did allow for schools built and staffed by Catholics to be leased to the public school board and this practice continued until the turn of the century. In the 1892 then Premier Fielding attempted to shift control of one prominent Halifax school to provincial administration resulting in open conflict with Archbishop O’Brien. Premier Fielding would argue that teachers were “simply not capable of instructing all denominations in the Scriptures”⁷⁶ while O’Brien countered that “secular education is not helpful to morality; such is the conclusion educationists are compelled to admit.”⁷⁷

⁷² Bedard, Robert Nicholas, “Moral Education in Nova Scotia”, (1984) 14:1 *Acadiensis*, p. 49.

⁷³ *Ibid.*, p. 50.

⁷⁴ *Ibid.*, p. 51.

⁷⁵ “Archbishop Cornelius O’Brien”, *Dictionary of Canadian Biography*, vol. 13, 1901-1910, Rose, George Maclean, ed., Toronto, University of Toronto Press, p. 774.

⁷⁶ *Supra*, note 72, p. 52.

⁷⁷ “Current Thought on Secular Education”, 1903, 17 *The Educational Review*, p. 65.

This debate was reflected in the *Educational Review*, the regional journal for school teachers. One editorial declared that “even reading the Bible without comment is sectarian teaching; if the Bible used was the Revised Standard Version, it was anti-Catholic; if the Douai Version, it was anti-Protestant. Concentration on the Old Testament discriminated against the Christian, and on the New Testament against the Jew.”⁷⁸ Another editorial proposed that “our present school system provides Christian non-sectarian education, which is all we can reasonably hope for from a system framed and partially supported by the state.”⁷⁹ The government backed down on the advice of Wilfred Laurier,⁸⁰ so as not to repeat the similar Manitoba School Question crisis.⁸¹ Although the publicly funded school system would remain secular, private denominational schools offering a religious curriculum would continue alongside them.

In both the religious and public schools the moral example of the teachers became of chief importance in communicating morality to their students. Prospective teachers had to be certified by a minister of religion or two justices of the peace that

“the moral character of said candidate is good, and such as to justify...that the said candidate will be disposed to inculcate by precept and example a respect for religion and the principles of Christian morality, and the highest regard for truth, justice, love of country, loyalty, humanity, benevolence, sobriety, industry, frugality, chastity, temperance, and all other virtues.”⁸²

On this point both public and sectarian schools could agree. Yet consensus on the methodologies for teaching morality remained elusive. Bédard noted that “most writers and teachers in the province preferred indirect moral instruction woven into daily lessons, usually through didactic or edifying stories.⁸³ In private denominational schools morality could be taught as part of the religious curriculum, but the public system never did arrive at a set curriculum. History eventually became the subject through which moral values would be taught. An editorial in *The Educational Review* observed “in a country where religious

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, p. 64.

⁸⁰ *Supra*, note 72, p. 52.

⁸¹ For a detailed discussion of the crisis see Clark, Lovell, ed., *The Manitoba School Question: Majority Rule or Minority Rights?* Toronto, The Copp Clark Publishing Company, 1968. See also “Manitoba Schools Question”, Wikipedia, http://en.wikipedia.org/wiki/Manitoba_Schools_Question.

⁸² *Supra*, note 72, p. 56.

⁸³ *Ibid.*, p. 58.

instruction is banished from its schools, what a considerable opportunity has the teacher during the history lesson to inculcate high moral principles on the minds of his pupils.”⁸⁴ Bédard summed up the direction of moral education in Nova Scotia with two significant quotations: “all ethical systems arrive at substantially the same rules of life”,⁸⁵ and “those who teach...should understand that morals, public and private, have not been revealed once for all from Heaven...but are being constantly defined and clarified by the hard experience of humanity.”⁸⁶

In many respects, this appeared to be the same conflict that we saw played out in the courts during the Curry case. Can morality and ethics be shorn from religious forms? Are all “rules of life” in the end the same, and is it the deeds of moral people through which we come to understand ethics? Is it the conscience that binds us?

Biographical Notes

It may never be possible to know with certainty where the Justices stood in respect to the education debate. However, their biographical information may suggest their positions. We found it worth noting that of the four Justices in the Curry case, the two who voted to maintain the religious forms of oaths were the two older justices both whom attended private denominational schools. Chief Justice Sir Charles J. Townshend, the eldest on the bench at age 69, was the son of a notable Nova Scotia Anglican minister, the Rev. Canon George Townshend⁸⁷. He was also an active lay member of the Anglican Church of Canada and was appointed a delegate both to the diocesan and provincial synods.⁸⁸ He was educated at *King’s Collegiate* and *King’s College*, both Anglican schools.⁸⁹ Justice in Equity Sir Hon. Sir Wallace Graham was the next oldest on the bench at 65.⁹⁰ Graham’s attendance at *Acadia College*, a Baptist institution⁹¹ suggests a Baptist

⁸⁴ “Sectarian Education”, 1890, 32 *The Educational Review*, p. 169.

⁸⁵ *Supra*, note 72, p. 57, n. 42.

⁸⁶ *Ibid.*, p. 63, n. 72.

⁸⁷ *Supra*, note 75, p. 632.

⁸⁸ *Ibid.*, p. 633.

⁸⁹ Reginald, Harris, *Catalogue of Portraits of the Judges of the Supreme Court of Nova Scotia and other Portraits*, Law Courts, Halifax, N.S., 1929, p. 33.

⁹⁰ *Ibid.*, p. 35.

upbringing. Graham practiced law in Halifax with Charles Tupper, former premier of Nova Scotia, and likely would have been familiar with the education debate.⁹² The two justices who upheld the conviction were the two younger justices, Russell and Drysdale. Justice Hon. Benjamin Russell was 64 at the time.⁹³ He was born in Dartmouth and studied at *Halifax Grammar School*⁹⁴, a publicly funded school, and *Mt. Allison College*, originally established as a Wesleyan Methodist school and by 1862 was a public degree granting college.⁹⁵ Justice Hon. Arthur Drysdale was the youngest being only 56 at the hearing of the case.⁹⁶ He was born in New Annan and was educated in local public schools.⁹⁷ (p. 81). We found the parallels intriguing and hopefully further biographical research can clarify the positions these men may have held on the subject of religion in the public sphere.

CONCLUSION

Our research has raised new questions worthy of exploration. However, we have arrived at several conclusions. First, although Nova Scotians were very aware of religious and cultural diversity, immigration did not significantly impact their lives. Most immigrants were passing through and Nova Scotians could afford to be gracious and generous hosts during the immigrants' temporary stay. Accommodating religious and cultural differences was seldom burdensome. Second, Nova Scotians religious and cultural divisions arose not from without but from within, in the form of five significant religious bodies, none possessing enough political and economic clout to influence public policy but yet significant enough to pose problems for government. It was in this context that the government took steps to exclude sectarian religious involvement in public life, certainly in the public education system, and we would argue also in the practice of the courts. Rather than attempting to accommodate moral instruction to the preferences of the sectarian religious bodies, the province chose a common and technically "neutral" secular

⁹¹ "Our History", *About Acadia University*, online: <http://www.acadiau.ca/generalInfo/aboutAcadia/history.html>.

⁹² *Supra*, note 90.

⁹³ *Ibid.*, p. 77.

⁹⁴ Akins, Thomas Beamish, *History of Halifax city*, Toronto, Ont., Canadiana, 1967.

⁹⁵ "Historical Sketch", *Mt. Allison University*, online: http://www.mta.ca/hr/employment/mount_allison.htm.

⁹⁶ *Supra*, note 90, p. 81.

⁹⁷ *Ibid.*

morality. Rather than simply adopt the forms of accommodation for court oaths established in the British system, the Nova Scotia courts chose to distinguish between the religious forms of oaths and a common appeal to conscience regardless of the form. Nova Scotia's leadership in 1913 was making conscious choices about multi-cultural accommodation. They were not choosing a pluralistic approach but sought a common standard for all Nova Scotians. Whether this was effective as an educational approach is for others to debate. As a judicial approach, tying court oaths to conscience helped set the stage for wider access to the courts for decades of new immigrants and native born Canadians.

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