March 31, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIIEW

IN THE MATTER OF: R A R

The Department of State made a determination on May 13, 1987 that R A R expatriated himself on June 11, 1975 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/ Ruotolo entered a timely appeal from that determination.

A single issue is presented: whether the Department has satisfied its burden of proving by a preponderance of the evidence that appellant intended to relinquish his United States nationality when he obtained Canadian citizenship. For the reasons that follow, we conclude that the Department has not carried its burden of proof. Accordingly, we reverse the Department's determination that he expatriated himself.

I

Appellant, R A R , acquired United States nationality by virtue of his birth at [redacted] He lived in the United States until 1960 when he went to Canada to attend university. He was awarded a masters degree in social work in 1967. In

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1/ In 1975, section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), read in pertinent part as follows:

> Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> (1) obtaining naturalization in a foreign state upon his own application,...

The Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (1986), amended subsection (a) of section 349 by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose his nationality by".

that year he married a Canadian citizen and acquired landed immigrant status, allegedly to qualify for employment in a health care institution of the Province of Nova Scotia Government. Appellant states that in June 1967 he reported for an U.S. armed forces physical examination in New Hampshire and was classified 1-Y (fit for service only in war time or national emergency). Three children were born to appellant and his wife in Canada in 1970, 1974 and 1979.

Appellant and his wife moved to the United States in 1970 where he attended the University of Pennsylvania which awarded him a doctorate. The family returned to Canada in 1973. In Halifax he started a consulting practice and taught at Dalhousie University. "By the spring of 1975," appellant stated in a declaration made in 1987,

> I realized that for the foreseeable future my residence would be Canada given my employment situation and social relationships. Given that realization it was and still is my belief that I should contribute to and participate in the social-cultural and political aspects of life of the place where I reside with my family. Therefore, I applied for Canadian Citizenship; however, with no intent of relinquishing my U.S. citizenship.

On June 11, 1975 appellant was granted a certificate of Canadian Citizenship after making the following oath of allegiance, as prescribed by the Canadian Citizenship Act:

> I, ..., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, 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.

Appellant states that in 1986 he considered moving back to the United States to go into business with his brother, and therefore consulted the Consulate General at Toronto in December "to seek affirmation of my U.S. citizenship status." He completed a form in which he gave personal information about himself and his family and acknowledged that he obtained naturalization in Canada. In reply to the question when and how he become aware that he might have a claim to U.S. citizenship, he asserted that: "I was born an American & I have never denounced it. Therefore, unless it was taken from me I would hope I still

have it." After the Canadian authorities confirmed that appellant had obtained naturalization, he completed a form titled "Information for Determining U.S. Citizenship," was interviewed, and responded to a number of supplementary written questions concerning the circumstances of his naturalization.

On March 31, 1987, a consular officer executed a certificate of loss of nationality in appellant's name, in compliance with section 358 of the Immigration and Nationality Act. 2/ The officer certified that appellant acquired United States nationality by birth therein; that he obtained naturalization in Canada upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The State Department approved the certificate on May 13, 1987, approval constituting an administrative holding of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. A timely appeal was entered.

II

The Immigration and Nationality Act prescribes that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state

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3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

> Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

upon his own application with the intention of relinquishing his nationality. 3/

The parties agree that appellant obtained naturalization in Canada upon his own application, and thus brought himself within the purview of the statute. Furthermore, he does not dispute the Department's contention that he obtained Canadian citizenship voluntarily. The sole issue for decision therefore is whether appellant intended to relinquish his United States nationality when he obtained that of Canada.

Whether a citizenship claimant intended to relinquish United States citizenship is an issue that the government must prove by a preponderance of the evidence. Vance v. Terrazas, 444 U.S. 263, 267 (1980). Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260. The intent the government must prove is the party's intent at the time he or she performed the expatriative act. Terrazas v. Haig, 653 F. 2d 285, 287 (7th Cir. 1981. Under the "preponderance of the evidence" rule, the government must prove that a party intended, more probably than not, to relinquish United States nationality.

In the case before the Board, the only contemporary evidence bearing on appellant's intent is the fact that he obtained naturalization in Canada and made an oath of allegiance to a foreign sovereign. These facts may be found to constitute some evidence of such intent. They are not, however, conclusive. Vance v. Terrazas, supra, at 261; King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). This being the case, appellant's words or conduct after he obtained naturalization are a proper subject of inquiry to determine whether, as the Department argues, circumstantial evidence will establish the requisite intent. Terrazas v. Haig, supra, at 288.

The Department submits that appellant's naturalization in Canada is an initial evidence of his renunciatory intent and that his overall attitude and "course of behavior," amply confirm that it was his intent in 1975 to relinquish citizenship. Continuing, the Department expressed the view that

> Throughout the years the appellant has demonstrated a total disinterest and lack of concern for his U.S. nation-

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3/ Section 349(a)(1). Text note 1, supra.

> ality. When viewed in its entirety, the appellant's course of conduct is susceptive only of one inference - behavior which is not that of a person desirous of maintaining his U.S. citizenship.

The Department particularizes its contention by noting that appellant did not inquire about the effect of naturalization on his United States citizenship before proceeding to obtain Canadian citizenship; did not register himself or his children as United States citizens; did not avail himself of absentee ballots to vote in U.S. general elections; did not file U.S. tax returns; did not hold himself out as an American citizen after being naturalized in Canada. "Appellant without hesitation decided in 1975 that it would be in his best interest to become a citizen of Canada," the Department states. "Now, he is interested in going into business in the United States with his brother; the advantage now is to be a U.S. citizen." In short, the Department argues appellant has undergone a change of heart and now regrets having given up his citizenship - thus permitting one to infer that it was his intention in 1975 to relinquish his United States nationality.

We find the Department's arguments unpersuasive.

The evidence dating from 1975 with respect to the issue whether appellant intended to relinquish citizenship leaves his specific intent at the time in doubt. His subsequent conduct, although showing indifference or inattentiveness to the rights and duties of United States citizenship, consists mainly of things left undone; there is no evidence of words or acts derogatory of United States citizenship. Granted, appellant would have been advised to have done the things he left undone, and in that way manifest an unmistakable intent to retain citizenship. But we find no discernible pattern in his words and conduct after naturalization that is more readily and more plausibly explained on grounds that he intended to relinquish citizenship than it is on any other grounds one might reasonably think of. In the Board's experience it is not atypical behavior for an American citizen who obtains the citizenship of a foreign country like Canada to be negligent about the rights and responsibilities of United States citizenship. In many cases like the one now before us, the probability that the citizen remained passive with respect to United States citizenship simply out of ignorance, inertia or preoccupation with other matters was so great that inferring intent to relinquish citizenship from such conduct has seemed unreasonable.

That appellant held himself out as a Canadian citizen after naturalization does not necessarily suggest that in 1975 he intended to relinquish United States nationality. After all, he became a Canadian citizen and as a matter of law was entitled to represent himself out as one. He alleged that he believed he acquired a second nationality by obtaining naturalization in Canada without losing his American citizenship, and articulated the notion in an affidavit dated August 11, 1988:

> ...
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> 6. I took the Canadian oath and considered myself to be a dual citizen of both Canada and the United States. I have always held myself out to be a dual citizen of both Canada and the United States.
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> 7. When my children were born, I assumed they were dual citizens as well, since I never questioned my status as a U.S. citizen. Many of my colleagues had children who were dual citizens. I was told by friends that my children might be required to choose one citizenship or the other when they were older. I planned to inquire, or let them inquire, as to what they needed to do when they got older.
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> 8. In the university community, I knew many people who held dual citizenship with Canada and other nations such as Bermuda and England. Many of my colleagues had children who were dual citizens either by virtue of being born in Canada of American parents or by being born to American and Canadian parents. The status of dual citizenship seemed fairly common, and I reasonably believed that I too had obtained such status.

The foregoing may be self-serving and vulerable to the charge that he should have sought official confirmation of his belief before acting. But his position is not implausible in the circumstances of his case, especially since he has submitted evidence to support his allegations. Two individuals who state they knew appellant before 1975 and are familiar with the facts and circumstances of his

naturalization declare that he made clear to them in 1975 he did not intend to relinquish United States citizenship. They also further declared that in their opinion he conducted himself as one who believed he was a dual national of Canada and the United States. Although given years after appellant's naturalization, the testimony of these two is entitled to fair weight.

We are thus led to the conclusion that the evidence of appellant's intent in 1975 to divest himself of United States citizenship is insubstantial. It follows that the Department has failed to carry its burden of proof.

III

Upon consideration of the foregoing, we conclude that the Department's determination that appellant expatriated himself should be and hereby is reversed.

Alan G. James, Chairman

Mary Elizabeth Hoinkes, Member

George Taft, Member