March 21, 1990

DEPARTMENT OF STATE

Decision No. 90-6 BOARD OF APPELLATE REVIEW

IN THE MATTER OF: T N B

This is an appeal from an administrative determination of the Department of State that appellant, T N B , expatriated himself on September 2, 1971, under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon his own application. 1/

The Department made its administrative determination of loss of nationality on March 29, 1983. Appellant entered an appeal from that determination on March 31, 1989, six years later. The Board is thus faced with the threshold issue whether the appeal was timely filed. For the reasons that follow, we conclude that the appeal is time-barred under governing limitations, and, accordingly, dismiss it for lack of jurisdiction.

I

Appellant, T N B , became a citizen of the United States by birth at [redacted], Illinois on [redacted]. He joined the United States Navy in 1961 and served for four years. After three years of reserve duty he was honorably discharged in 1967. Appellant moved to Canada in 1966.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), reads:

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality -
>
> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; ...

In 1971, appellant applied for naturalization in Canada. According to appellant, his employer, Alberta Government Telephones, required that he hold Canadian citizenship as a condition of his continued employment. On September 2, 1971, appellant took the required oath of allegiance, renounced his foreign nationality, and became a citizen of Canada.

The renunciatory declaration and oath of allegiance as then prescribed by Canadian law and regulations read:

> I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen.
>
> 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 lived in Canada for the next eleven years. He married a Canadian citizen by whom he had a child born in Canada. In February 1982, he resumed living in the United States. He resided in Illinois, and later that year moved to the state of Washington. According to appellant's brief, he continued to be employed in the communication field, working for Save Net Communications and Cellular One as a telephone technician from 1982 to April 1986. He then moved to Alta Loma, California, where he is employed by Pac Tel Cellular.

It appears that sometime in November 1982 appellant telephoned the United States Consulate General (hereinafter "the Consulate") at Calgary. An entry in the records of the Consulate states:

> Mr. B phoned this office in late November and spoke to the consul. He mentioned he came to Canada in 1966 and became Canadian in 1971 but he wants to go home now. He stated he became Canadian because 'he thought he would be here forever.'
>
> The consul told him to come in and ask for Citizenship Section. She informed him that he would most likely have to enter as an immigrant but that we had to do a citizenship clarification first. EAM 11/29/82.

Appellant visited the Consulate in January 1983. He completed a questionnaire to facilitate determination of his citizenship status, and was interviewed by a consular officer. Following confirmation by Canadian authorities that appellant had acquired Canadian citizenship under section 10(1) of the Canadian Citizenship Act, a consular officer, on March 15, 1983, executed a certificate of loss of United States nationality in appellant's name, as required by law. 2/ The certificate set forth that appellant acquired the nationality of the United States by virtue of his 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 (hereinafter "the Act").

The Department of State approved the certificate on March 29, 1983, an action that constitutes an administrative determination of loss of nationality from which an appeal may be taken to this Board.

On April 12, 1983, the Consulate forwarded the certificate of loss of nationality to appellant by registered mail at an address in Calgary which appellant had given the Consulate at the time of his visit to that office in January 1983. The envelope was returned marked "unclaimed". The Consulate then wrote an unregistered letter to appellant on May 13, 1989, informing him of the attempted delivery of the document to him and requesting him to call. Failing to receive

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2/ 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.

any response, the Consulate returned to the Department the approved copy of the certificate of loss of nationality. The Consulate stated: "...we can only assume that he does not wish to receive the document or that he has already returned to the United States to reside."

In November 1988, appellant applied for a United States passport at the Post Office in Ontario, California. The regional director of the Passport Agency in Los Angeles disapproved his application by letter dated February 1, 1989, having found that he had expatriated himself by obtaining naturalization in Canada in 1971. The regional director also informed the appellant that, if he believed that the Department's holding of loss of United States nationality was incorrect, he may wish to write directly to the Board of Appellate Review about the matter.

Appellant entered an appeal on March 31, 1989. He contends that his naturalization in Canada was not performed voluntarily with the intention of relinquishing United States nationality. 3/

II

As an initial matter, we must determine whether the Board may consider and determine this appeal. To exercise jurisdiction the Board must conclude that the appeal was filed within the limitation prescribed by the governing regulations. The courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960)). Costello v. United States, 365 U.S. 265 (1961). If an

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3/ It may be observed that this case raises, on its face, a question with respect to the authority of the Secretary of State to determine appellant's nationality status. Under section 104(a) of the Immigration and Nationality Act, 8 U.S.C. 1104, the Secretary is authorized to administer and enforce the provisions of the Act and all other immigration and national laws relating to "the determination of nationality of a person not in the United States."

Appellant, here, obtained naturalizaiton in Canada on September 2, 1971, and resumed living in the United States in February 1982. The Consulate General at Calgary, on March 15, 1983, executed a certificate of loss of United States nationality in appellant's name, which the Department of State approved on March 19, 1983. Appellant was then residing in the United States. It would, thus, appear that appellant was not "a person not in the United States" when the Department (Secretary of State) made its determination of loss of nationality.

appellant does not enter an appeal within the applicable limitation and does not show good cause for filing after the prescribed time, the Board would lack jurisdiction over the appeal.

Under federal regulations, the limitation on taking an appeal to the Board is one year after approval by the Department of the certificate of loss of nationality. 4/ The regulations further provide that an appeal filed after the prescribed time shall be denied unless the Board determines, for good cause shown, that the appeal could not have been filed within one year after approval of the certificate. 5/

4/ 22 C.F.R. 7.5(b) (1989) reads:

> (b) Time limit on appeal. (1) A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatriation.

5/ 22 C.F.R. 7.5(a) (1989) reads:

> (a) Filing of appeal. A person who has been the subject of an adverse decision in a case falling within the purview of sec. 7.3 shall be entitled upon written request made within the prescribed time to appeal the decision to the Board. The appeal shall be in writing and shall state with particularity reasons for the appeal. The appeal may be accompanied by a legal brief. An appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time.

Here, the Department approved the certificate of loss of United States nationality on March 29, 1983. Appellant therefore had until March 29, 1984, to take an appeal from the Department's adverse determination. He did not enter the appeal, however, until March 31, 1989, five years after the allowable time. Appellant's delay in seeking appellate review of his case may be excused only if he is able to show a legally sufficient reason for not acting within the prescribed time.

Appellant argues that his delay in taking an appeal is justified and that the appeal should be allowed. Appellant contends that he did not realize he had expatriated himself until 1989 when his application for a passport was denied on the grounds that he was not a citizen. Prior to that time, he said that he relied on the advice of a consular officer with whom he allegedly consulted in 1971 prior to his obtaining naturalization in Canada. Appellant stated that he was informed that, if it was a requirement of his employer that he obtain Canadian citizenship, "he could reverse the procedure if need be." He did not allegedly receive any written confirmation explaining "the ramifications of his becoming a naturalized Canadian citizen." Relying on the advice of the consular officer, appellant stated that he proceeded to obtain Canadian citizenship in order to continue employment with Alberta Government Telephones.

Appellant stated that he also relied on the advice of border officials of the Immigration and Naturalization Service (INS) upon his reentry into the United States in February 1982. He said that he recalled completing a form presenting himself as a United States citizen born in Chicago, Illinois. As stated in appellant's brief: "The INS border officials informed him that it appeared he took out Canadian citizenship. Mr B was told by the INS officials, however, if he was to return to Chicago, Illinois, that he could take up residency without any problems using his social security card." Appellant said that he was assured that he would not have any problem in resuming residence in the United States and was allowed to enter. Because he was not told at the border that his United States citizenship was endangered, appellant stated that he resumed his residency in the United States believing that he was a United States citizen.

Apart from appellant's affidavits, executed on May 19, 1989, and September 5, 1989, the record is devoid of any corroborative evidence relating to his alleged discussions with a consular officer in 1971, prior to his naturalization in Canada, and with an INS officer at the border in February 1982 when, he said, he resumed residency in the United States. It should be noted in this connection that in February 1982 the certificate of loss of United States nationality in appellant's case had not yet been executed by the Consulate or approved by the Department. It was not until March 1983 that the certificate was executed and approved.

Appellant argues further that he never received a copy of the certificate of loss of nationality and that the first time he actually was aware of his loss of United States citizenship was when his passport application was disapproved in 1989. As noted above, the efforts of the Consulate to forward appellant a copy of the certificate of loss of nationality were unavailing. Twice it had endeavored to reach appellant at the address that he gave the Consulate at the time of his visit in January 1983. If thereafter he returned to the United States, it is not unreasonable to consider that he had an obligation to inform the Consulate of his correct mailing or forwarding address.

We are not persuaded, however, that appellant first became aware of his loss of citizenship in 1989 when his passport application was disapproved. The record shows that in his citizenship questionnaire of January 11, 1983, he stated that he knew that by obtaining naturalization in Canada he might lose United States citizenship, but that he was told that dual citizenship was possible. Also when asked by a consular officer, during appellant's interview on January 11, 1983, whether he assumed he would lose his citizenship by becoming a Canadian citizen, appellant responded "Yes".

In a memorandum, dated March 15, 1983, the Consulate reports the interview:

> T N B came to the office to discuss his U.S. citizenship status. He informed the interviewing officer that he had naturalized in 1971 and that he was told by people going through this that he could have dual citizenship if he kept his U.S. passport up. He was asked if he had kept his passport us [sic] and he replied 'no'. Mr. B stated that he had been working for Alberta Government Telephones and that it had been a requirement of employment for him to become a citizen of Canada; however, he has submitted no evidence to support this statement. The interviewing officer then asked if he had children. He said 'yes'. He was then asked if he had inquired whether the child had claim to U.S. citizenship and he replied 'no, he was born after I became a Canadian'. The consular officer then asked 'Did you assume you would lose your U.S. citizenship by becoming a Canadian?', Mr. B replied 'Yes'.

In light of the available record, we are unable to conclude that appellant was unaware of his possible loss of United States citizenship when he obtained naturalization in Canada in 1971. He knew at the very least that he had put his United States citizenship in peril when he renounced all allegiance and fidelity to the United States, swore allegiance to Queen Elizabeth the Second, and pledged to faithfully observe the laws of Canada and fulfil his duties as a Canadian citizen. As appellant confirmed in his citizenship questionnaire and consular interview in January 1983, he believed he might lose his citizenship by acquiring Canadian citizenship.

Thus, even if he did not receive a copy of the certificate of loss of nationality, he had sufficient information which should have led him after completing his citizenship questionnaire and consular interview in January 1983, to inquire at the Consulate concerning his citizenship status. In failing to make any inquiries, he cannot be said to have exercised reasonable care or shown interest in recovering his United States citizenship. It is firmly settled that implied notice of a fact is legally sufficient to impute actual notice to a party. The law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it. United States v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th Cir. 1939). Knowledge of facts putting a person of ordinary prudence on inquiry is the equivalent of actual knowledge, and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945 (6th Cir. 1939). If appellant had any questions as to his citizenship status or how he might appeal a finding of loss of United States citizenship, he could, of course, have inquired at the Consulate.

The principal purpose of the requirement for timely filing of an appeal is to compel the taking of such action within a reasonable time when the recollection of the circumstances or events upon which the appeal is grounded is fresh in the minds of witnesses and records are still available. Limitations are also designed to insure the finality and repose of decisions. Unreasonable lapses of time cloud a person's recollection of events and also make it difficult for the trier of fact to determine the case, particularly where the record is incomplete or lost or obscured by the passage of time.

Appellant, in our view, permitted an unreasonable period of time to elapse before entering an appeal. He endeavors to justify the delay on the grounds that he had not received a copy of the certificate of loss of United States nationality and that he believed that he had not lost his United States citizenship. As noted before, he alleged that he was told by a consular officer prior to his naturalization in Canada in 1971 that he

would not thereby lose his United States citizenship status, and by an INS officer in 1982, upon his reentry to the United States, that he could take up residency in the United States without problems. It would be difficult, if not impossible, after the passage of so many years to address appellant's unsupported allegations. Appellant has not offered a legally sufficient reason to justify the delay. In the circumstances of this case, we believe that the unexcused delay of six years in taking an appeal was unreasonable. 6/

III

On consideration of the foregoing, we find that the appeal was not taken within one year after approval of the Department of the certificate of loss of United States nationality and that no good cause was shown that the appeal could not have been filed within the prescribed time. The appeal is time-barred, and, as a consequence, the Board lacks jurisdiction to consider the case. The appeal is hereby dismissed. 7/

6/ With respect to the question of the timeliness of the appeal, the Department stated in its submission to the Board that, in the circumstances, it would interpose no objection to the Board's consideration of the appeal, which was filed six years after the certificate of loss of nationality was approved. The circumstances which the Department mentions are: 1) appellant's contention that he was not aware of his loss of citizenship until he was informed of the disapproval of his passport application in February 1989, and, 2) the Consulate's unsuccessful attempts to deliver a copy of the certificate of loss of nationality to appellant. The Department does not argue that these circumstances constitute good cause for the delay and therefore render the appeal timely. It simply recites the circumstances and states in effect its acceptance of the Board's exercise of jurisdiction over the appeal, if the Board so decides. Whether the Board should exercise jurisdiction over an appeal filed after the prescribed time is, of course, a matter for the Board to decide.

7/ The fact that the Board has dismissed an appeal for lack of jurisdiction does not in itself operate to bar the Department of State from taking such administrative action as it may deem appropriate to correct manifest errors of fact or law. Memorandum of Davis R. Robinson, Legal Adviser, Department of State, December 27, 1982. Exercepted in 77 Am. J. of Int'l. L. 298 (1983).

Given our disposition of the case, we do not reach the other issues that may be presented.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member