December 11, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: E[redacted] B[redacted]

Appellant, E[redacted] B[redacted] has taken this appeal to the Board of Appellate Review from an administrative determination of the Department of State that she expatriated herself on April 17, 1959 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The only issue for decision presented by this appeal is whether appellant intended to relinquish her United States citizenship when she acquired that of Canada. It is our conclusion that appellant lacked the requisite intent to terminate her United States citizenship. We will, accordingly, reverse the Department's determination of loss of her nationality.

I

Appellant acquired United States nationality by birth at [redacted] When she was approximately five years of age, appellant was taken to Canada by her parents where she has resided continuously. On June 17, 1947 she married a British subject, who had been born in Canada. The Canadian authorities deemed that she had, through her marriage, acquired British nationality. 2/

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

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, . . .

2/ Letter from the Canadian Citizenship Registration Branch, Sydney, Nova Scotia to the United States Consulate General at Toronto, August 20, 1984.

Appellant applied for naturalization in Canada. A certificate of citizenship was granted to her on December 9, 1959 after she had taken the following oath of allegiance on April 17, 1959: [3/]

> I, E[redacted] B[redacted] residing at Downsview, Ontario, 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 fulfill my duties as a Canadian citizen, so help me God.

The grant of Canadian citizenship was made pursuant to section 10(2) of the Canadian Citizenship Act of 1946, as amended, which provided that the Minister might grant a certificate of citizenship to any person who was a British subject and who satisfied the Minister that he or she possessed the requisite statutory qualifications for citizenship. [4/]

3/ Appellant stated to the Board when she entered the appeal that:

> ...The reason I applied for a /sic/ Canadian citizenship was so that I could vote in Canadian elections - municipal, provincial and federal. I had married a Canadian in 1947 (see copy of certificate); had children in the school system (born 1949, 1950, and 1953) and felt I should become more involved in Canadian society.

4/ The Canadian authorities have stated (letter cited in note 2, supra) that:

> An administrative error was noted, however, in that Ms. B[redacted] could only have derived British subject status through marriage, if she married her husband prior to January 1, 1947, but in fact, the marriage took place on June 17, 1947 with the marriage certificate being seen at that time.
>
> It should be pointed out, however, that the grant of Canadian citizenship under section 10(2) of the former Act, still stands, as there is no provision in the present Citizenship Act to cancel any certificates of citizenship which were granted under the former Act.

When appellant approached the United States Consulate General at Toronto in 1982 (presumably to clarify her citizenship status), her naturalization in Canada came to the attention of the Consulate General. She completed a form for determining United States citizenship in July 1982 and submitted it to the Embassy. On August 11, 1982 the Consulate General prepared a certificate of loss of nationality in appellant's name in compliance with the provisions of section 358 of the Immigration and Nationality Act. 5/

The Consulate General certified that appellant acquired United States nationality at birth; that she obtained naturalization in Canada upon her own application; and concluded that she thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

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

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.

In recommending approval of the certificate, the Consulate General said in part:

> Mrs. B[redacted] was naturalized as a citizen of Canada on April 17, 1959 under Section 10(2) of the Canadian Citizenship Act. On that date she subscribed to the oath of allegiance to the British Crown which also included the oath of renunciation of her former nationality. 6/

The Department approved the certificate on August 31, 1982, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to this Board. Notice of appeal was given by appellant's solicitors in March 1983. Appellant's principal contention is that she did not intend to relinquish United States citizenship when she obtained naturalization in Canada.

II

Althoagh the statute provides that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state upon his own application, expatriation may not result unless the proscribed act was performed voluntarily and with the intention of relinquishing United States nationality. Vance v. Terrazas, 444 U.S. 252 (1980).

6/ As noted above, applicants for naturalization in 1959 under Section 10(2) of the Canadian Citizenship Act were required only to swear an oath of allegiance to the British Crown.

Under the applicable Citizenship Regulations, applicants for naturalization who were not British subjects were required until 1973 to make a renunciatory declaration. Section 19(1)(b) of those regulations was declared ultra vires by the Federal Court of Canada on April 13, 1973.

Appellant does not dispute that she obtained naturalization in Canada upon her own application. We must therefore inquire whether she did so voluntarily.

By law a person who performs a statutory act of expatriation is presumed to have done so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was done involuntarily. 7/

The burden therefore is on appellant to show that she acquired Canadian citizenship against her fixed will and intent. Appellant did not, however, address that issue in her submissions to the Board. Indeed, her answers to the questions in the form for determining United States citizenship in 1982 and her letters to the Board leave no doubt that she acted voluntarily; by her own submission she wanted to become more involved in Canadian life (note 3, supra).

It is our conclusion that appellant became a Canadian citizen voluntarily.

7/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c) reads in pertinent part as follows:

(c)...Except as otherwise provided in subsection (b) any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily,

III

In determining the second question presented by the appeal - whether appellant intended to relinquish her United States nationality in obtaining naturalization in Canada - we must apply the rule in Vance v. Terrazas, supra. Therein the Court stated that it is the Government's burden to prove by a preponderance of the evidence that the citizen intended to relinquish citizenship. Intent may be shown, the Court said, by the party's own words or found as a fair inference from proven conduct. And as the United States Court of Appeals for the 7th Circuit has made clear, intent is to be established as of the time the expatriative act was performed. Terrazas v. Haig, 653 F. 2d 285 (1981).

Obtaining naturalization in a foreign state may be highly persuasive evidence of an intent to terminate United States citizenship, but it is not conclusive evidence of such an intent. Vance v. Terrazas, citing Nishikawa v. Dulles, 356 U.S. 129 (1958). Swearing an oath of allegiance to a foreign sovereign or state may also be evidence of intent, but standing alone is insufficient to prove a will and purpose to relinquish citizenship. Xing v. Rogers, 463 F. 2d 1188 (1972).

As we have seen, appellant swore a simple oath of allegiance to the British Crown; she did not make, nor was she required to make, a declaration of renunciation of all other allegiance. Both the Consulate General at Toronto and the Department in its brief erroneously asserted that appellant had made a renunciatory declaration. Both should have known that under section 10(2) of the Canadian Citizenship Act of 1947 a renunciatory declaration was never required of persons who at the time of their application were, or were deemed to be, British subjects.

Apart from appellant's act of naturalization and her oath of allegiance, there is no direct evidence of her intent. We must therefore inquire whether the circumstantial evidence surrounding her naturalization - appellant's proven conduct - provides the requisite evidence.

The Department argues that:

> ...In all the years she has resided in Canada, Mrs. B[redacted] has had very little contact with the United States beyond personal relations with her family. She has not been documented with a United States passport, although she has used a Canadian passport. She has not voted in U.S. elections nor filed United States

> tax returns. She has not registered as a U.S. citizen at the Consulate. In these circumstances the fact of her naturalization is highly persuasive that she intended to relinquish her United States citizenship when she naturalized as a Canadian.

We do not find these arguments persuasive.

Given her circumstances, it is hardly surprising that appellant has had "very little contact with the United States." Taken to Canada as a very young child, the pattern of appellant's life was in good measure conditioned by her parents. Appellant's long residence in Canada was, it seems plain, dictated by family considerations, a legitimate reason for living abroad. As the Supreme Court has said, a native born citizen is free to live abroad indefinitely without suffering loss of citizenship; living abroad in no way evidences a voluntary renunciation of nationality and allegiance. 8/

Nor, given the orientation of appellant's life, do we find it significant that she did not cultivate close ties with the United States.

8/ Schneider v. Rusk, 377 U.S. 163, 196 (1964).

Granted, appellant would have been prudent to have protected her citizenship by documenting herself (and her chiidren) as a United States citizen. That she did not does not compel one to conclude that she did not consider herself a United States citizen after her naturalization. It is as possible that she did not document herself as a United States citizen simply because of lack of knowledge or perceived need, as it is that she had intended in 1959 to divest herself of United States citizenship.

Without a legal residence in the United States apparently until recently (she stated that she now owns a condominium in Florida), appellant could not vote in United States elections. Without ostensible income from United States sources, appellant might not have realized that she should file United States tax returns.

Appellant's use of a Canadian passport might suggest an intent to hold herself out exclusively as a Canadian, but it is no more than suggestive of such intent, particularly given the absence of any evidence of record that appellant used a Canadian passport to enter or leave the United States. Could it not be that she used a Canadian passport as a matter of convenience, not in witting derogation of her allegiance to the United States?

The Department's case that appellant intended to relinquish United States citizenship when she became naturalized in Canada rests heavily on appellant's not doing a number of things that if done would have buttressed her claim that she did not intend to surrender her United States citizenship. But such acts of omission inherently have an ambiguous quality as far as one's intent to relinquish or retain United States citizenship is concerned. Being ambiguous, they lack sufficient concreteness to be reliable pointers to appellant's intent at the critical point in time with respect to her United States citizenship.

IV

Upon consideration of the foregoing analysis, the Board concludes that the Department has failed to carry its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States citizenship when she obtained naturalization in Canada upon her own application.

Accordingly, the Department's determination of loss of appellant's United States nationality is hereby reversed.

Alan G. James, Chairman

James G. Sampas, Member

George Taft, Member