June 21, 1985

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: J[redacted] A[redacted] Mc[redacted]

This is an appeal from an administrative determination of the Department of State that appellant, J[redacted] A[redacted] M[redacted] expatriated himself on September 28, 1981 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

Since appellant concedes that he performed the expatriating act voluntarily, the sole issue presented is whether it was his intention to relinquish his United States citizenship. It is our conclusion that the Department has not carried its burden of proving that appellant's naturalization was accompanied by the requisite intent to divest himself of American citizenship. Accordingly, we reverse the Department's holding of loss of nationality.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481, 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 ose his nationality by --
>
> (1) obtaining naturalization in a foreign state upon his own application.

I

Appellant became a United States citizen by birth at [redacted] According to his submissions, he was educated in the United States; served in the United States Army from 1941 to 1945; and thereafter lived and worked in various parts of the United States. In 1975 he moved to Canada, as he put it, "for employment opportunity." In 1977 appellant obtained a United States passport from the Consulate General at Vancouver.

At age 56 appellant applied for naturalization in Canada because, as he later explained:

> I felt that because I would be living in Canada during the term of my employment I wanted to participate in activities and vote where possible in order to influence the surroundings and lifestyle that I would endure. My intention was to participate in society as a normal citizen in Canada while I resided there.

On September 28, 1981, after swearing the prescribed oath of allegiance, appellant was granted a certificate of Canadian citizenship. 2/ Appellant's wife, whose appeal we also decide today, also acquired Canadian citizenship upon her own application on September 28, 1981.

2/ The oath of allegiance to which appellant subscribed read:

> 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.

The record does not indicate how appellant's naturalization came to the attention of the American authorities. But appellant states that he consulted an attorney about his citizenship status in January 1982, and we may assume that it was he who approached the Consulate General at Winnipeg shortly thereafter. It appears that the Consulate General gave appellant a form to complete regarding his naturalization, "Information for Determining United States Citizenship." Appellant completed the form on March 31, 1982. In response to question 13: "Did you know that by performing the act described in item 7 above /obtaining naturalization in a foreign state/ you might lose U.S. citizenship?" appellant replied: "Yes - the United States does not permit dual citizenship."

Appellant also completed, for information purposes, an application for registration as a United States citizen.

Three months later on June 17, 1982 he executed another form: "Questionnaire for Determining Intent." He responded to two questions therein as follows:

> 6. Did you ever consult any U.S. official concerning the effect _____ (insert act(s) of expatriation performed) divesting of American (U.S.) citizenship in order to obtain Canadian citizenship. /the underscored words were inserted by appellant/ might have on your U.S. citizenship? If so, please set forth to the best of your recollection, with as much detail as possible, the substance of that consultation. If not, please explain the reasons you did not do so.
>
> Yes - a U.S. Embassy official from Winnipeg (while in Regina - by telephone) all of which led to the current application. We /appellant and his wife/ were advised we could reapply for American (U.S.) citizenship.
>
> 7. Did you make any attempt to avoid the performance of this act (these acts)? If so, describe all attempts in detail. If not, please explain the reasons why you did not do so.
>
> We could not avoid it as it was necessary to obtain Canadian citizenship assuming you mean "act of expatriation" - the Canadian authorities do not allow citizenship without first divesting U.S. citizenship; so we are now reapplying to be U.S. citizens and becoming "Dual Citizens (U.S. and Canada)."

Appellant states that sometime after he received Canadian citizenship and had filled in the above-mentioned forms, he had "a general discussion about this matter" with a consular officer at Winnipeg. There is, however, no account of such a discussion in the record. In July 1982 the Canadian authorities confirmed that appellant had become a Canadian citizen. On February 4, 1983 the Consulate General prepared a certificate of loss of nationality in appellant's name. 3/ The certificate recited that appellant had acquired United States citizenship at birth; 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.

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C., I501, provides:

> 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.

The Department approved the certificate on March 7, 1983, an action that constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to this Board.

The appeal was entered on December 2, 1983. Although appellant concedes that he acted voluntarily in obtaining Canadian citizenship, he maintains that it was not his intention to relinquish United States citizenship.

II

There is no dispute that appellant performed a valid statutory expatriating act. He concedes too that he became a Canadian citizen voluntarily: "I guess you could say my act of becoming a Canadian citizen was voluntary." Appellant thus does not undertake to rebut the legal presumption that one who performs a statutory act of expatriation is presumed to have done so voluntarily. 4/ Accordingly, we find that appellant's naturalization in Canada was an act of his free will.

4/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c) provides:

> Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. 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.

"But," the Supreme Court has held, "the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed by the statute, but also intended to relinquish his citizenship." Vance v. Terrazas, 444 U.S. 252, 261 (1980).

The appeal before us thus presents a sole issue: whether appellant's voluntary performance of a valid expatriating act was accompanied by the requisite intent to abandon United States citizenship.

The Department bears the burden under section 349(c) of the Immigration and Nationality Act (note 4) of proving by a preponderance of the evidence that appellant intended to relinquish United States citizenship. Vance v. Terrazas, 444 U.S. at 267. Intent may be expressed in appellant's words or found as a fair inference from proven conduct. Id. at 260. The intent to be proved is appellant's intent in 1981 when he became a citizen of Canada. Terrazas v. Haig, 653 F. 2d 285 (7th Cir. 1981).

Obtaining naturalization in a foreign state may be highly persuasive evidence of an intent to relinquish citizenship, but it is not conclusive evidence of such an intent. Vance v. Terrazas, 444 U.S. at 261.

The only evidence of appellant's intent in 1981 being his naturalization and swearing the oath incident to naturalization, his other words and conduct must be examined to determine whether it was probably his intent to relinquish United States citizenship.

The Department submits that appellant's own words reveal an intent to relinquish United States citizenship.

> In his "Questionnaire Concerning Intent" dated June 17, 1982, Mr. M[redacted] states in answer to question 7, as to whether he tried to avoid naturalizing, "The Canadian authorities do not allow citizenship without first divesting U.S. citizenship". This is a clear indication that he fully intended to relinquish his U.S. citizenship when he chose to naturalize. He also stated in the citizenship questionnaire at question 13 that the U.S. does not allow dual-nationality.

> The fact that he naturalized with that assumption with no attempt to do anything to preserve his U.S. citizenship supports the inference that his intention was to give up U.S. citizenship. It is noted that his later reply to the same question, prepared in support of this appeal, is contradictory. His statement in his notice of appeal that he only intended to have Canadian citizenship while in Canada and planned to re-apply for U.S. citizenship when he wanted to return to the U.S. is not contradictory to an inference that he intended to relinquish his U.S. citizenship. All the evidence, when examined as a whole, proves that his naturalization in Canada was a carefully considered, deliberate action to transfer his allegiance from the United States to Canada. That he now says his intent was not to relinquish his U.S. citizenship indicates only a change of heart, not what his intent was at the time of naturalization.

As we understand it, the Department is arguing that: (a) naturalization in a foreign state is expatriative; (b) appellant knew it was, yet proceeded; and (c) he therefore intended to lose his citizenship. We find this syllogism unpersuasive. Knowledge that certain consequences may flow from an act is not, without more, equatable to a will and purpose that such consequences shall ensue.

The citizenship case of Richards v. Secretary of State, 752 F. 2d 1413 (9th Cir. 1985) casts doubt on the soundness of the Department's position.

In Richards, petitioner obtained naturalization in Canada. In considering his intent the court said:

> The Afroyim principle /Afroyim v. Rusk, 387 U.S. 253 (1967)/wherein the Court said that loss of citizenship depends on the "assent" (intent) of the individual was reaffirmed in Terrazas, in which the Court stated that, "/i/n the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct." 444 U.S. at 260, 100 S.

> Ct. at 545 (emphasis added). If we were to hold that mere knowledge that Congress has designated an act an expatriating act is enough to make out specific intent, we would in effect be recognizing a congressional power to strip persons of their citizenship. Because, under Afroyim and Terrazas, Congress has no power to declare that the performance of particular acts shall automatically result in expatriation, mere knowledge that Congress has declared an act to be expatriating is not enough. Something more than knowledge that the act is an expatriating act under United States law must be shown.

The Department has not shown the "somthing more" that is required to prove intent to relinquish United States citizenship. Appellant's curious belief that if he proceeded with naturalization his American citizenship would only be suspended and that there would be no difficulty in "reapplying" to recover it, does not clearly supply the essential element of proof. We are at a loss to understand how he could have got such an impression from talking with a consular officer, as he said he did before proceeding with the application for naturalization. At best, however, it would appear that appellant made some attempt to find out what the consequences of naturalization would be for his United States citizenship, and after receiving information he did not fully understand but believed not completely discouraging, went forward. Appellant may have been naive, incautious or inattentive to the consular officer, but that he intended to surrender United States citizenship is not the exclusive conclusion to be drawn from appellant's words and conduct.

Appellant's conduct suggests absence of an intent to relinquish United States citizenship. Although he may have voted in Canada, that is not an act inconsistent with an intent to retain United States citizenship. There is nothing in the record to show that he obtained a Canadian passport or held himself out solely as a Canadian citizen. He has stated that he retains close connections with the United States through family and frequent visits. He has repeatedly stated to the Board in sworn statements that from his arrival in Canada to date he filed United States income tax returns, identifying the individuals or firm that prepared them. Absent proof that appellant did not

in fact file such returns, we are prepared to credit his assertions that he regularly performed this civic responsibility, and thus affirmatively showed an intent to retain United States nationality. 5/

In our view the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish United States citizenship when he voluntarily obtained naturalization in Canada.

5/ Commenting on affidavits appellant and his wife submitted regarding regular filing of U.S. income tax returns, the Department observed:

> The affidavits, although evidence of the M[redacted] ties to the United States, do not conclusively demonstrate their intent to maintain or relinquish U.S. citizenship when weighed against other evidence in the case. The affidavits indicate only that the Mollenhauers paid U.S. taxes from the time of their arrival in Canada in 1975 until 1983. Why they chose to pay U.S. taxes from 1981-1983, when they were fully aware that their naturalization in Canada in 1981 resulted in their loss of U.S. citizenship, remains unclear. One can only assume from their statements that they believed it would aid them in their plans to "reapply" for U.S. citizenship.

III

Upon consideration of the foregoing, we reverse the Department's determination of loss of appellant's United States citizenship.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Dissenting Opinion

I cannot agree with the Board's majority conclusion that the Department has failed to carry its burden of proving by a preponderance of the evidence that appellant intended to relinquish United States citizenship when he voluntarily obtained naturalization in Canada. In my view, the majority decision unconvincingly discounts key evidence and unreasonably faults the Department for the lack of additional evidence in the record.

The issue is the very narrow one of determining appellant's intent in 1981 when he became a citizen of Canada. The intent which the Board must establish may be expressed in words or found as a fair inference from proven conduct. The present case follows the pattern of numerous other similar cases decided by this Board in that the quantity of evidence bearing upon the appellant's intent at the time the expatriating act was performed is scanty. In reaching conclusions about the preponderance of the evidence I think that the Board should take care not to be misled into simply weighing the quantity of evidence tending to prove intent as against the quantity of evidence tending to disprove it. The critical judgment must be the probative force of the separate pieces of evidence which do exist. In the present case there is, in my judgment, evidence which clearly and sufficiently indicates the intent of the Mollenhauers at the time they undertook to acquire Canadian citizenship in 1981. This evidence lies in the words of the Mollenhauers themselves, as contained in the citizenship questionnaire and in the questionnaire concerning intent, both of which were filled out in 1982. This is the only evidence in the record that specifically bears upon the issue of intent. All other evidence of appellant's conduct which is cited by the Board only inferentially relates to intent. The Board must depend upon the good faith assistance of the parties concerned in determining the issue of their intent at a certain period. Unfortunately, the supplemental questionnaires submitted by the Mollenhauers in 1983 were not helpful in this regard.

I do not find any difficulty in upholding the Department's position in this case in the light of the decision of the U.S. Court of Appeals for the 9th Circuit in the case of Richards v. Secretary of State. The Board's majority decision contains a quote from that opinion to the effect that mere knowledge that Congress has designated an act an expatriating act is not enough to make out specific intent and that something more must be

shown. In the instant case something more than a mere knowledge has been shown. We have the appellant's words, written in 1982, which clearly establish his intent in 1981. In its opinion in the Richards case, the court discusses the factor of motivation and holds that an intent to renounce United States citizenship can be established by a person's words, even though at the time of renunciation the person may not have wanted to relinquish U.S. citizenship. On the basis of Mollenhauer's own words, he deliberately acted in 1981 to acquire Canadian citizenship, fully intending to give up United States citizenship. As he himself has said, he intended to re-acquire United States citizenship at some future time. The evidence of this intent of Mollenhauer is all that need concern the Board. The Board need not, in 1985, concern itself about understanding why Mollenhauer acted as he did in 1981. The Board has to take the words of Mollenhauer at their face value without seeking to understand possible misimpressions that Mollenhauer might have received from talking with a consular officer. It is not, in my view, for the Board to propose excuses for Mollenhauer now on the grounds that he may have been "naive, incautious or inattentive" in 1981. The Department has properly relied upon Mollenhauer's own words to justify its position that Mollenhauer intended in 1981 to renounce United States citizenship.

Warren E. Hewitt

Warren E. Hewitt, Member