July 23, 1985

DEPARTMENT OF *STATE*

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S[redacted] L[redacted] B[redacted]

S[redacted] L[redacted] B[redacted] has taken this appeal from an administrative determination of the Department of State that she expatriated herself on August 16, 1973 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 appeal presents a single issue for decision: whether appellant intended to relinquish her United States nationality when she obtained Canadian citizenship. We conclude that the Department has not carried its burden of proving that appellant had the requisite intent to abandon citizenship, Accordingly, we reverse the Department's holding of her expatriation,

I

Appellant acquired United States citizenship by birth at [redacted] She was educated in the United States. In 1963 she went to the United Kingdom where in 1964 she married a British citizen, In 1967 appellant and her husband moved to Canada. It appears that she obtained a United States passport in Toronto around 1968, and registered her daughter there as a United States citizen in 1970.

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, . . .

Appellant applied to be naturalized in Canada, and on August 16, 1973, after swearing the prescribed oath of allegiance, she was granted a certificate of Canadian citizenship, 2/ In 1977 appellant travelled to the United Kingdom where she spent a year, returning to Canada in the summer of 1978.

In October of 1983 appellant inquired about her United States citizenship status at the Consulate General in Toronto. At the request of the Consulate General, she completed the standard questionnaire "Information for Determining U.S. Citizenship", and, for information purposes only, an application for registration as a United States citizen. In the questionnaire appellant stated that she had initiated contact with the Consulate General because: "I am trustee in my father's will and the law of the state to which he has moved (N.C.) states that a

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2/ The oath of allegiance to which appellant subscribed reads as follows:

> I, S[redacted] [redacted] B[redacted] 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.

trustee must be an American citizen." She also stated that she had voluntarily chosen Canadian citizenship: "A strong family belief that if you live in a country you must accept full responsibility for living there, including voting." And she acknowledged that she thought she might lose her American citizenship by obtaining naturalization in Canada, "but as I was living in Canada I felt I must accept my residence. Don't approve of foreigners living in the US without taking out American citizenship." It is not clear from the record whether appellant was interviewed by a consular official.

After receiving confirmation from the Canadian authorities of appellant's naturalization, the Consulate General executed a certificate of loss of nationality in appellant's name on December 16, 1983. 3/

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C., 1501, 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 certificate recited that appellant acquired United States citizenship by birth therein; 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.

In forwarding the certificate of loss of nationality to the Department for approval, the consular officer summarized some of appellant's statements in the questionnaire, and added: "Mrs. B[redacted] travelled to the United Kingdom in July 1977 with a Canadian passport." Appellant has confirmed that she did so.

The Department approved the certificate on January 16, 1984, approval being an administrative determination of loss of citizenship from which an appeal, properly and timely filed, may be taken to this Board. The appeal was entered on October 29, 1984.

Appellant concedes that she acquired Canadian citizenship voluntarily, but maintains that it was not her intent to relinquish her United States citizenship.

II

To be valid, a statutory expatriating act must be performed voluntarily in accordance with applicable legal principles. Perkins v. Elg, 307 U.S. 325 (1939).

It is not disputed or contested that appellant performed an act prescribed by statute as expatriative, and did so voluntarily.

However, even though an expatriative act has been performed voluntarily, the question remains whether it was performed with the intention of relinquishing United States citizenship. Vance v. Terrazas, 444 U.S. 252 (1980).

The Court held in Terrazas that the Government must prove, by a preponderance of the evidence, that the individual intended to relinquish citizenship. 444 U.S. at 261. Intent, the Court said, may be shown by a person's 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 the statutory expatriating act was performed. Terrazas v. Haig, 653 F. 2d 285 (7th Cir. 1981).

The Department's case that appellant intended to relinquish United States citizenship when she obtained Canadian citizenship rests on three propositions:

1) Appellant voluntarily obtained naturalization in Canada - highly persuasive evidence of an intent to abandon United States citizenship;

2) She knew that naturalization in a foreign state might cause her "to lose my American citizenship," nevetheless proceeded to acquire Canadian citizenship;

3) Appellant's actions demonstrate her belief that she is no longer a U.S. citizen. The Department cites the following factors in support of this contention:

> Appellant never consulted with U.S. consular officials in Toronto concerning the rights and responsibilities of a dual national. Since her naturalization Appellant has travelled exclusively using a Canadian passport. Her last U.S. passport was issued in 1968 and expired around the time of her Canadian naturalization. Although she maintains that she naturalized in Canada because she wanted the right to vote there, she has not, since her naturalization in Canada, attempted to vote as an absentee in a U.S. election. Nor has she filed U.S. tax returns. If Appellant in truth believed she were a dual national, she would have taken steps to acknowledge these rights and responsibilitites. In addition, although Appellant registered her daughter's birth with the U.S. Consulate in 1970, since her naturalization in Canada she has failed to maintain current registration for either herself or her child.

Obtaining naturalization in a foreign state may, of course, be highly persuasive evidence of an intent to relinquish United States citizenship, but it is not, as the Supreme Court said in Terrazas, 444 U.S. at 261, conclusive evidence of such intent; naturalization, without more, will not support a finding of intent to abandon citizenship.

There is no undisputed evidence of appellant's intent contemporaneous with her naturalization. She argues, however, that when she attended the naturalization ceremony on August 16, 1973 she showed an intent to retain United States citizenship by objecting to the declaration printed on the form of oath of allegiance which read in pertinent part: "I...hereby renounce all fidelity and allegiance to any foreign sovereign or state...". According to appellant, a court officer gave her the oath form before the naturalization ceremony took place and told her that it was not required that she subscribe to the renunciatory clause. 5/ Then, appellant has stated, "either she or the official struck the clause," and she signed the oath which the official attested.

Exactly what occurred on August 16, 1973 is disputed by the Department and appellant. Both have made independent inquiries of Canadian officials about the procedures that were followed at that time.

The Department on January 23, 1985 submitted a letter from the Canadian Embassy in Washington, dated January 22, 1985, which read in pertinent part as follows:

> Miss L[redacted] G[redacted], Citizenship Branch, Secretary of State Department, Ottawa, has confirmed that the old oath of allegiance forms were used until new forms could be printed. However, the old form was amended to reflect the change by striking out the renunciatory clause, by hand or by typewriter. This was done by Citizenship authorities, not by the person concerned, before the oath was administered and signed.

5/ Prior to April 3, 1973 applicants for Canadian citizenship were required to renounce previous allegiance, On April 3, 1973 the Federal Court of Canada declared the regulations providing for the making of such a renunciation ultra vires. It appears that for an unspecified period after the Court's decision the old forms of renunciatory declaration and oath of allegiance were used, the renunciatory clause being stricken by hand or typewriter before the applicant signed the oath.

In its brief the Department cited the foregoing letter to refute appellant's contention that the renunciatory language had not been stricken before she saw it and that the oath was presented to her before, not after, the naturalization ceremony.

Appellant asserts in her reply brief that the renunciatory clause was stricken by hand after she objected to it and before the oath was administered by the presiding judge.

The Department, however, in a memorandum dated April 1, 1985 submitted that:,

> Once again, the Department has verified the Canadian naturalization procedures with the Canadian Government. The procedures are, as follows: (1) The applicant for naturalization completes application forms. (These forms do not include the document from which Appellant claims she struck the renunciatory clause.); (2) the applicant attends a courtroom naturalization ceremony with several hundred other applicants. They repeat the oath aloud, in unison; (3) The applicants then approach the front of the courtroom, verify their address on the form, and sign the form. Appellant claims this is the document she altered. The applicants do not see this document until they have already sworn to the oath aloud.
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> Canadian officials stress that the form that appellant signed had the oath stricken in advance, and therefore, before Appellant saw the document. It would have been contrary to Canadian law if the official had not crossed through the oath before the ceremony.

In rebuttal, counsel for appellant asserted on April 12, 1985 that:

> I affirm, under penalty of perjury, that on April 9, 1985, Marie Anderson, a Citizenship Officer at the Toronto-St. Clair office of Canadian Citizenship Registration, told me by telephone that (1) it was "very possible" that

> Mrs. B[redacted] received and signed the form before she repeated the oath in the courtroom ceremony: (2) in the 1970's the signing of the form often preceded the courtroom ceremony in order to enhance "the beauty of the ceremony"; and (3) the courtroom ceremony precedes the signing of the form under the current procedure due to "legal considerations".

Appellant declared, in an affidavit accompanying counsel's foregoing statement, that:

> ...
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> 5. I deny that I either received or signed the form after the courtroom ceremony.
>
> 6, I recall that (a) prior to taking the oath in the courtroom, I met in a small room with an officer of the Citizenship Court; (b) the officer then gave me the form; (c) I read the form and objected to the renunciatory clause; (d) the officer told me that the clause was not required; (e) either I or the officer struck the clause by hand; (f) I signed the oath and the officer attested my signature; (g) I then went to the court-room; (h) the presiding judge made a speech and then administered the oath to me and the others.

It is plausible that appellant saw the oath of allegiance with the renunciatory clause before the naturalization ceremony took place, And we are prepared to accept that she registered some concern about the renunciatory language, previously stricken or not, and thus indicated unwillingness to give up her United States citizenship, We are, however, unable to agree with the contention in appellant's reply brief that: "Mrs. B[redacted] recollection that she objected to the renunciation stands uncontradicted and conclusively establishes that she did not intend to relinquish her United States citizenship when she became a Canadian." Her contentions are not, in our judgment, sufficiently supported by the evidence to warrant our stopping at this point,

We disagree with the Department's contention that because appellant stated in the questionnaire she filled out at the Consulate General in Toronto in 1983 she knew she might lose United States citizenship, she intended to abandon that citizenship. Mere knowledge that an act may have adverse consequences cannot be equated to an intent that such consequences should result from doing the act. Since intent may be conceived of apart from knowledge, the mode of proving intent is a problem distinct from that of proving knowledge. 11 Wigmore on Evidence 301, 1940 ed. Thus, knowing that Congress has designated an act as expatriating is not in itself sufficient to warrant a finding of intent to relinquish citizenship. See Richards v. Secretary of State, 752 F. 2d 1413, 1420 (7th Cir. 1985):

> ...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.

To determine appellant's intent we are required to focus attention on appellant's conduct after she became a citizen of Canada, determining whether that conduct exhibits a posteriori her state of mind in 1973,

There is nothing of record to show that appellant, in word or action, expressed a clear intent to forfeit United States citizenship. Excepting (arguably) her use of a Canadian passport, her actions were not inconsistent with an intent to retain United States citizenship, The oath of allegiance she swore to the British Crown is ambiguous as to her intent, there having been no renunciatory clause in the oath. Given the fact that appellant and her husband decided, for what we may assume were valid reasons, to settle in Canada, her living, voting and paying taxes there are not, without more, reliable indicators of an

ntent to abandon United States citizenship. On its face, her ıse of a Canadian passport may have been inconsistent with Jnited States citizenship. But we note that she apparently ısed that passport only once to travel to the United Kingdom. :t is notim plausible that she decided to use a Canadian pass- ›ort as a matter of convenience, not because she no longer :onsidered herself to be a United States citizen; re-entering Canada after travelling abroad would certainly have been easier for her than, say, if she had carried a United States passport. Furthermore, there is no evidence that appellant used the Canadian passport to enter the United States. Her actions showed as much an intent to seek the protection of Canada while travelling abroad as an intent to relinquish United States citizenship.

Appellant's other conduct amounts really to non-action, Rfter naturalization, she did nothing for a number of years to affirm her United States citizenship, did not vote in the United States or file U.S. income tax returns. Let one thing be quite clear: we think appellant showed a regretable indifference to the rights and obligations of United States citizenship. But is the fact that she was neglectful of those civic responsibilities and rights probative of an intent in 1973 to relinquish citizenship? One might, of course, infer from such conduct that appellant intended to transfer her allegiance to Canada. It is our view, however, that an inference of such intent is not the only rational conclusion one might reasonably reach in evaluating appellant's actions. To argue that non-performance of the rights and duties of American citizenship indicates an intent to relinquish citizenship is to argue that citizenship may be lost whenever duties of citizenship are shirked. The force of that proposition is not readily apparent.

Appellant has not said why she abstained for several years from taking any steps to affirm her United States citizenship, so we can only speculate. It would not be idle to assume that preoccupation with her life in Canada, procrastination, carelessness, a sense of confidence that she would remain a United States citizen because she had not specifically made a declaration of renunciation, or any number of other factors could explain why she was neglectful of the responsibilities of a United States citizen, There is room for serious doubt that she intended to demonstrate that she was no longer a United States citizen.

After a careful review of the record before us, it is far from clear that when appellant obtained naturalization in Canada

her intent was to abandon United States citizenship. Even putting the least favorable construction on appellant's conduct, we are left with serious doubts about her specific intent in 1973.

In our view, therefore, the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended to divest herself of United States citizenship when she became a citizen of Canada.

III

Upon consideration of the foregoing, we reverse the Department's determination of January 16, 1984 of appellant's loss of nationality.

Alan G. James, Chairman

George Taft, Member

CONCURRING STATEMENT

I fully agree with the Board's conclusion that the Department's holding of expatriation in the matter of Sandra Lee Browne should be reversed. I add this statement of concurrence because, in my view, the Board's opinion fails in one respect to give proper weight to one aspect of the appellant's case which I consider to be of key importance, In determiningthe state of mind of the appellant at the time of commission of the expatriating act, I think that the better evidence lies in the words and/or actions of the person concerned at the time the act was committed rather than in the inferences which may or may not be drawn from actions or lack thereof during the period after the expatriating act was performed. I therefore attach special significance to the appellant's testimony concerning the issue of renunciation of U.S. citizenship as it was posed through the use of the old forms by the Canadian authorities with the renunciatory language stricken. Both the Department and appellant are agreed that the old form was used and that special attention must have been drawn to the renunciatory language by the fact that it had been crossed out. In my mind, appellant makes a convincing argument that her intent not to give up U.S. citizenship can be demonstrated by her insistence that the renunciatory language be stricken from the form before she would sign it. Assuming that this evidence is to be given credence, it must be regarded as strongly supportive of appellant's position as to her intent at the time she committed the expatriating act. In my judgment, the Department's intended rebuttal of appellant's recital of the circumstances concerning the striking of the renunciatory clause from the form fails. The Department relies on evidence which apparently comes through or from an officer of the Canadian Embassy in Washington, who has provided assurances about the usual Canadian naturalization procedures, On the other hand, the appellant claims, through statements made under oath, that the assertedly normal procedures, whatever they may be today, were not followed in her case on August 16, 1973, The appellant offers supporting testimony from a Canadian official as to the possibility of an irregular procedure in 1973. Consequently, there is in my mind strong credible evidence which directly indicates the appellant's intent at the time she committed the expatriating act, This together with the Department's failure to put forward any direct evidence of appellant's intent at that time, fully justifies the Board's conclusion that the Department's holding of expatriation should be reversed.

Warren E. Hewitt

Warren E. Hewitt, Member