December 14, 1988

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIIEW

IN THE MATTER OF: E[redacted] W[redacted] F[redacted]

This case is before the Board of Appellate Review on the appeal of Ed[redacted] W[redacted] F[redacted] from an administrative determination of the Department of State, dated October 14, 1986, that he expatriated himself on June 20, 1973 under the provisions of section 349(a)(l) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/

There is a single issue to decide: whether the Department has proved that appellant intended to relinquish his United States citizenship when he obtained Canadian citizenship. For the reasons given below, we conclude that the State Department has not satisfied its burden of proof. Accordingly, we reverse the Department's holding of loss of appellant's United States nationality.

I

Appellant acquired United States nationality by birth at [redacted] He was educated in California and served in the United States Marine Corps from 1942 to 1946. In 1951 he married a United States citizen, They have four children, one born in the United States, three in Canada: all are United

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1/ In 1973, section 349(a)(l) 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,...

Pub. L. No. 99-653, 100 Stat. 365 (Nov. 14, 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".

States citizens. Until **1954** appellant and his family lived in the United States. In that year he moved to Canada to start a subsidiary of an American company. He remained in Canada until **1963** when he was transferred to the United States. Three years Later appellant returned to Canada as President of Trans Canada Credit Corporation, a U.S. company, and vice president of its parent company, a Canadian-owned corporation.

Appellant states that early in **1973**, a controlling shareholder of the parent company, "impressed with my achievement level," informed him that he was in line to become president of the parent company. If appellant aspired to succeed to. that position, he would have to acquire Canadian citizenship.

Appellant applied for Canadian citizenship in March **1973**. On June **20, 1973** he 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.

He obtained a Canadian passport in **1976**. In **1978** appellant's wife obtained Canadian citizenship through naturalization.

In the spring of **1985**, when appellant and his wife applied for passports at the American Consulate General in Calgary, their respective naturalizations came to the attention of U.S. authorities. Both filed out forms titled "Information for Determining U.S. Citizenship." Thereafter, the Consulate General asked the Canadian authorities to confirm the couple's naturalization. After confirmation had been received, an officer of the Consulate General, in September **1985**, in compliance with the requirements of section **358** of the Immigration and Nationality Act, executed a certificate of loss of nationality in the name of appellant's wife. 2/

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

The consular officer forwarded the certificate to the State Department under cover of a memorandum, dated December 4, 1985, in which he recommended that the certificate not be approved, on the grounds that there was insufficient evidence to establish that appellant's wife intended to relinquish her United States nationality when she acquired that of Canada. The Department agreed with the opinion of the consular officer, and did not approve the certificate of loss of nationality.

The Consulate General did not process appellant's case at the same time as his wife's. According to appellant, the delay in processing his case was due to the fact that the Consulate General had misplaced his application for a passport, a fact he states the Consulate General conceded. Processing of appellant's case was completed on September 12, 1986 when, as required by law, a consular officer executed a certificate of loss of nationality in appellant's name. (Note 2, supra).

The officer certified that appellant acquired United States nationality by virtue of birth in the United States: 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. In recommending that the Department approve the certificate of loss of nationality, the consular officer attempted to distinguish appellant's case from that of his wife, and cited the report he made on appellant's wife's case in December 1985 which reads in part as follows:

2/ Cont'd.

> See. 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

...Mrs. [redacted] had four children, three of which [sic] were born in Canada, which [sic] she states she registered with the Consulate General in Toronto. She also states that she accompanied both sons when they reached 18 to register with Selective Service in the Toronto Consulate. She was issued a U.S. passport ...in 1975 in Toronto.

Mrs. [redacted] naturalized as a citizen of Canada June 12, 1978 under the provisions of Section 5-1 of the Citizenship Act. She stated that as a teacher in the province of Ontario she had to be a citizen of Canada in order to practice her profession. She was issued a Canadian passport in May 1980 in Toronto. She always states her place of residence when crossing the border to the **U.S.** and gives her place of birth if asked. She has never been asked to produce documents when traveling to the U.S. She has voted in the U.S. and in Canada and has filed **U.S.** income tax forms in 1971 and 72. She currently pays real estate taxes in San Diego on property which she is part owner.

Mrs. [redacted] appears to be a dutiful citizen of both Canada and the United States. She states it was not her intention to relinquish her United States citizenship when she naturalized and hoped that the U.S. government would understand that it was a job requirement.

2/ Cont'd.

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 consular officer informed the Department that he considered the profile for appellant quite different from that of his wife.

> ...Although he [appellant] has stated that he did not intend to 'denounce' his U.S. citizenship, he was under the impression that naturalization in a foreign country was cause for Loss of U.S. citizenship. He says Canadian sources told him he would lose his U.S. citizenship and American friends advised him he would not 'lose U.S. citizenship unless he 'denounced' his U.S. citizenship formally to a duly authorized U.S. authority.
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> During his personal interview with the consular officer, Mr. [redacted] stated that he contacted the Consulate General in Toronto and asked about dual citizenship. He was told that he would lose his U.S. citizenship if he naturalized in Canada. He then spoke to a university friend, currently a judge in Los Angeles. His friend advised him that he would have no trouble 'getting it back' if he lived in the U.S. for three years as his wife was a U.S. citizen.. ..
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> ...He stated that he and his wife deliberately held off on having his wife naturalize, precisely so she could sponsor him back into the United States.. ..
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> . Mr. [redacted] filed U.S. income tax forms up until 1973, he voted in the U.S. up until 1972. When asked why he discontinued voting and paying taxes he stated that he thought he couldn't vote anymore because he no longer was a citizen and that he was told he didn't have to file income tax returns any longer because he no longer was a citizen. When he entered the United States he says he 'answered questions of birth and

> residence honestly.' He does not state what questions he was asked by INS, but stated that when asked his citizenship he replied that he was a Canadian citizen ('as I would reply now until you tell me I can reply differently'). He applied for a Canadian passport in Toronto September 30, 1976 and used it for international travel shortly thereafter.
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> ...He states that he documented all three children as U.S. citizens born abroad and was registered with the U.S. Consulate in Toronto from early 1956. He states that he accompanied his two sons to the U.S. Consulate in Toronto to register for Selective Service when they turned eighteen (subsequent to Mr. [redacted] naturalization) and that that evidences his continuing loyalty to the U.S.
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> Mr. [redacted] also stated that he was a US Marine and that naturalizing in Canada was 'the most painful thing I've ever done in my life,' Me adds that he wrote to the US Social Security Administration at least once every two years to ascertain what US Social Security benefits he would be entitled to upon retirement. He has submitted photocopies of the replies as evidence of his continuing interest in maintaining his US ties. He adds that as soon as he retires in two years the family plans to move back to the United States.

The Department on October 4, 1986 approved the certificate, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. The appeal was filed in December **1987.** 3/

3/ Although the appeal was filed two months after the allowable time, we deem it timely. Federal regulations

The statute provides that a national of the United States shall lose his nationality by voluntarily obtaining naturalization in a foreign state upon his own application with the intention of relinquishing his nationality. 4/

There is no dispute that appellant duly obtained naturalization in Canada upon his own application. His case thus falls clearly within the purview of the statute. The first issue to be decided thus is whether he acted voluntarily.

Under section 349(c) of the Immigration and Nationality Act, there is a presumption that one who performs a statutory expatriating act does so voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was involuntary. 5/ In order to prevail on the issue of

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3/ Cont'd.

prescribe that an appeal shall be filed within one year after the Department approves a certificate of loss of nationality. 22 CFR 7.5(b)(1). However, for good cause shown, the Board may extend the time for filing. 22 CFR 7.5(a). Here it appears that appellant began the appeal process in August 1987, within the time limit, by consulting the Consulate General at Calgary about how he might file an appeal. In the circumstances, it would be harsh and unfair to penalize appellant for a marginally late filing, particularly since the Department has not raised the issue.

4/ Note 1 supra.

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

> (c) 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,

voluntariness, appellant must come forward with evidence sufficient to show that he acted against his will.

Appellant did not address the issue whether he obtained Canadian citizenship voluntarily. In any event, it is evident from the facts presented to the Board that although appellant may have been under some pressure from the controlling stockholder of his company to adopt Canadian citizenship, that pressure in no way appears coercive.

Appellant has not, obviously, rebutted the legal presumption that he voluntarily obtained naturalization in Canada.

III

It remains to be determined whether appellant had the requisite intent to relinquish his United States nationality when he obtained that of Canada.

Under the Supreme Court's holding in Vance v Terrazas, 444 U.S. 252, 263 (1980), the government bears the burden of proving that appellant performed the statutory expatriating act with the intent of relinquishing his United States citizenship. The government must prove intent by a preponderance of the evidence. Id. at 267. Intent, the Court declared, may be expressed in words or found as a fair inference from the party's proven conduct. Id. at 260. It is the individual's intent at the time the expatriating act was performed that the government must prove. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981). Under the "preponderance of the evidence" rule, the Department must prove that appellant intended, more probably than not, to surrender his United States citizenship.

5/ Cont'd.

> 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.

Pub. L. No. 99-653, 100 Stat. 3655 (Nov. 14, 1986), repealed subsection (b) but did not redesignate subsection (c), or amend it to delete reference to subsection (b).

In this case, 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. In themselves these facts will not support a finding of intent to relinquish citizenship, although they may constitute some evidence of such intent. Vance v. Terrazas, supra, at 261: King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). It should also be noted that making a non-renunciatory oath of allegiance to a foreign sovereign leaves ambiguous the intent of the utterer with respect to his United States citizenship. Richards v. Secretary of State, CV 80-4150, memorandum opinion, (C.D. Cal. 1982): aff'd., 752 F.2d 1413 (9th Cir. 1985).

There being insufficient direct contemporary evidence to support a finding that appellant intended to relinquish United States nationality, we must inquire whether circumstantial evidence will establish the necessary intent. Terrazas v. Haig, supra, at 288.

The Department submits that appellant's naturalization in Canada is the initial evidence of an intent to relinquish United States citizenship, and contends that the facts do not support his professed lack of intent. "An overall attitude and course of behavior often reflects an individual's disinterest and lack of concern in his or her U.S. citizenship and permits an inference of an intent to relinquish U.S. citizenship," the Department asserted in its brief.

The Department points out that appellant was informed by U.S. authorities before the event that obtaining naturalization in a foreign state could result in loss of his citizenship; nonetheless, he proceeded to obtain Canadian citizenship, "exhibiting a disinterest and unconcern for his status as a U.S. citizen." The Department seems to suggest that because he acted knowingly he intended to expatriate himself. In the Department's opinion, appellant's conduct after he obtained Canadian citizenship manifests a prior intent to relinquish American nationality. If, despite naturalization, he intended to retain citizenship, he would have done certain things and would have left others undone, the Department maintains. Specifically, the Department singles out the following conduct as demonstrating that appellant did not intend in 1973 to retain his United States citizenship:

> After Appellant's naturalization, he identified himself as a Canadian. He stopped voting in the U.S. and paying taxes because he no longer

> thought he was a citizen. Upon entering the United States, he would identify himself as a Canadian. He applied for a Canadian passport in 1976 and used it for international travel. His behavior does not indicate an intention to retain his U.S. citizenship. He also stated that his wife did not naturalize when he did, in order that she could sponsor him back to the United States.

If it is the Department's contention that appellant's knowledge that expatriation would result from obtaining Canadian naturalization manifests an intent that expatriation should result, we cannot agree. Intent and knowledge are different concepts. "Since intent may be conceived of apart from knowledge, the mode of proving intent is a problem distinct from that of proving knowledge.'' II Wigmore on Evidence, section 301, 3rd Ed. Thus, knowledge alone is insufficient to support a finding of intent to relinquish citizenship. 6/

6/ A classic dissent of Holmes is apposite here.

> I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue.. .But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

Abrams v. United States, 250 U.S. 616, 626, 627 (1919).

In Richards v. Secretary of State, 753 F.2d 1413, 1420, 1421 (9th Cir. 1985) the court made it clear that knowledge alone that an act is expatriative is insufficient to warrant a finding of loss of citizenship.

> As we read Afroyim and Terrazas, a United States citizen effectively renounces his citizenship by performing an expatriating act only if he means the act to constitute a renunciation of his United States citizenship. 6/ In the absence of such an intent, he does not lose his citizenship simply by performing an expatriating act even if he knows that Congress has designated the act as an expatriating act. By the same token, we do not think that knowledge of expatriating law on the part of the alleged expatriate is necessary for loss of citizenship to result. Thus, a person who performs an expatriating act with an intent to renounce his United States citizenship loses his United States citizenship whether or not he knew that the act was an expatriating act, and, indeed, whether or not he knew that expatriation was possible under United States Law.
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> [6/ footnote omitted].

Intent, therefore, must be proved by evidence other than mere proof of knowledge. In Richards, for example, the petitioner made an oath of allegiance upon obtaining naturalization in Canada that included an express renunciation of all other allegiance. He also later stated to United States authorities that: "I didn't want to relinquish U.S. citizenship but as part of the Canadian citizenship requirements I did so." 753 F.2d at 1422. Richards' statements coupled with his use of a Canadian passport to enter the United States, and registration at an American university as a foreign student supplied abundant evidence, in the court's judgment, of a renunciatory intent.

Appellant in the case before the Board made no renunciatory declaration upon being granted Canadian citizenship. Nor is there a discernible pattern in his words and proven conduct that is more readily and plausibly explained on grounds that he intended to relinquish his United States citizenship than it is on wholly different grounds.

As we have seen, the officer who processed appellant's case at the Consulate General in Calgary reported to the Department that appellant stated he did not do certain things - vote or pay taxes in the United States - and did do certain things - identify himself upon crossing the U.S./Canadian border as a Canadian citizen - because he no longer considered himself to be a United States citizen. We do not propose to dispute the consular officer's recollection of what appellant volunteered to him during the interview. We do not consider it fair, however, to accord decisive evidential weight to mere oral statements appellant may have made thirteen years after he obtained naturalization in Canada. (It should be noted that appellant did not make these points in the citizenship questionnaire he completed in June 1985.) In any event, if appellant stated in **1986** that he believed in **1973** he had lost his United States citizenship, such a statement is not, for the reasons given above, sufficient to support a finding that in **1973** he intended to relinquish United States citizenship.

The kinds of things that the Department points out appellant did not do or did do because he believed he was no longer a United States citizen are not, in any event, in themselves dispositive of the issue of his intent in **1973.**

As a criterion to gauge prior intent to relinquish United States citizenship, the fact that an American citizen who lives abroad does not vote in U.S. general elections is of doubtful value, especially since participation in such elections is so persistently low. Appellant's statement - he understood that only military personnel posted abroad might vote - explains his non-voting quite as plausibly as the hypothesis that he considered himself ineligible to vote because he believed he had relinquished, and intended to relinquish, his citizenship a number of years earlier.

While conceding that he did not pay income taxes or file returns in the United States after **1973,** appellant suggested that he had no U.S. tax liability because he was already paying a heavy income tax in Canada. The Department has neither disputed this statement nor shown a nexus between his non-activity with respect to U.S. taxes and appellant's specific intent in **1973** when he obtained Canadian citizenship.

Nor should importance be attached to the fact that appellant used a Canadian passport to make one trip abroad. He had a right to use a Canadian passport; moreover, there is no evidence he ever used it to enter and leave the United States.

Even if, on occasion, appellant identified himself as a Canadian to United States authorities at the border, we are not prepared to conclude that his doing so manifested a prior intent to relinquish United States citizenship. He might simply have found it convenient to say he was a Canadian. In point of fact, he had become a Canadian, and was legally entitled to acknowledge that he was one.

Finally, we consider it appropriate to comment on the apparent anomaly that the Department determined in 1985, on essentially similar facts, that appellant's wife lacked the requisite ihtent to relinquish citizenship when she obtained naturalization in Canada in 1978, while it determined in 1986 that appellant had such an intent in 1973.

Appellant had prior knowledge that obtaining naturalization in a foreign state is an expatriative act. It is reasonable to assume that his wife also had such knowledge before she obtained naturalization in Canada, having learned from appellant the advice he was given by the Consulate General at Toronto. With that knowledge each proceeded to obtain Canadian citizenship. Neither voted in the United States after 1972; neither paid U.S. income taxes (or filed returns) after 1972 or 1973. Both obtained Canadian passports; appellant in 1978, his wife in 1980. Perhaps appellant's wife always identified herself at the U.S./Canadian border as a United States citizen, while appellant did not do so. We cannot attach much weight to such a distinction between the two cases for reasons we have set out above. Another apparent distinction between the cases of husband and wife is appellant's reported statement that he and his wife deliberately held off on her obtaining naturalization in Canada so that she might eventually sponsor him to return to the United States to live. It seems strange that appellant would volunteer such a statement in 1986 since her naturalization in 1978 ostensibly vitiated any plans they arguably had for her to avoid putting her United States citizenship at risk. In short, it seems to us that the Department would have been warranted if it had concluded that appellant, no less than his wife, lacked the requisite intent to relinquish United States citizenship.

Having carefully weighed the evidence, we are not persuaded that it establishes with fair probability that appellant intended to relinquish his United States nationality when he sought and obtained Canadian citizenship. It follows that the Department has not met its burden of proof.

IV

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member