April 18, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: Wi[redacted] C[redacted] L[redacted]

The Department of State made a determination on February 10, 1983 that W[redacted] C[redacted] L[redacted] expatriated himself on December 18, 1970 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon his own application. 1/ Five years later L[redacted] entered an appeal from that determination.

As an initial matter, the Board must determine whether, despite the delay in entering the appeal, the Board may entertain the case. For the reasons that follow, we conclude that the appeal is time-barred, and accordingly dismiss it for want of jurisdiction.

I

Appellant, W[redacted] C[redacted] L[redacted], became a United States citizen by virtue of his birth at [redacted] After studying in Canada for several years, he received a bachelor of arts degree from the University of British Columbia in 1964. In the autumn of 1966 appellant entered Canada as a permanent resident and has lived there since.

1/ In 1970, section 349(a)(1) 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. 3655 (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".

Appellant graduated from the Faculty of Law of the University of British Columbia in 1970. After graduation, he obtained a position as an articled student in a law firm in Kamloops, British Columbia. 2/ Very shortly before his articling was to begin, he learned that he could not be articled because he was neither a British subject nor a Canadian citizen. 3/ Thanks to the intervention of the principal to whom he was to be articled, appellant's naturalization was accelerated. Late in 1970 he was called on short notice to the chambers of a county court judge in Kamloops who admitted him to Canadian citizenship on December 18, 1970 after he had signed the following declaration/oath of allegiance:

> 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.

Having thus achieved the required citizenship status, appellant began articles on January 2, 1971 and completed them on January 4, 1972. On the latter date he was called to the Bar of British Columbia and admitted as a solicitor of the Supreme Court of British Columbia.

In 1982 appellant made inquiries of the United States Consulate General at Vancouver about the citizenship status of his children. It appears that appellant married a United States citizen shortly before moving to Canada in 1966. Three children were born to the couple in Canada, one sometime prior to December 18, 1970, two after that date.

2/ In British Columbia, all graduate law students must article for at least one year before being called to the Bar.

3/ The legal Professions Act of British Columbia then in force provided that no person might be articled unless he or she was a British subject or a Canadian citizen.

After appellant informed the Consulate General that he had obtained naturalization in Canada, the Consulate General obtained confirmation thereof from the Canadian authorities. Having given appellant notice that he might have expatriated himself, the Consulate General asked him to complete a form for determining United States citizenship. This appellant did in October 1982, and was interviewed by a consular officer. On October 14, 1982, in compliance with the provisions of section 358 of the Immigration and Nationality Act, the consular officer executed a certificate of loss of nationality. 4/ Therein he certified that appellant acquired United States nationality by virtue of his birth therein; acquired the nationality of Canada through naturalization upon his own application: and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Consulate General forwarded the certificate and supporting documents to the Department under cover of a memorandum in which it recommended that the Department not approve the certificate, The Consulate General's memorandum read in pertinent part as follows:

> Mr. [redacted] states that he became a Canadian citizen in order to complete his law degree and that he did not have the intention at that time to reside

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

> 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 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.

> permanently in Canada. Attached is a letter from the Law Society of British Columbia which states that at the time Mr. [redacted] was studying in Canada an 'articling' student had to be a British subject which was accomplished by his naturalization as a Canadian citizen. Mr. [redacted] parents continue to reside in the United States and he visits them every other year. He has not voted in U.S. elections nor has he filed U.S. income tax returns since he came to Canada. He came to our attention in January of 1982 when he enquired at the Consulate regarding the citizenship status of his children whom he desired to have U.S. citizenship.
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> In view of the above it is the opinion of the Consular Officer that it was not Mr. [redacted] intent to relinquish his U.S. citizenship when he became a Canadian citizen in 1970. Consequently the Certificate of Loss of U.S. Nationality prepared in his case should be disapproved.

The Department did not share the Consulate General's opinion. On February 10, 1983 it approved the certificate.

The Department informed the Consulate General that it considered that appellant obtained Canadian citizenship with the intention of relinquishing his United States nationality. "Our conclusion was based on the following facts," the Department stated.

> ...(a) he has not filed U.S. income tax and has not voted in U.S. elections since his move to Canada in 1966. (b) he has not kept his U.S. citizenship documentation current. (c) contrary to his recollection, the oath Mr. [redacted] took to Canada in 1970 in connection with is [sic] naturalization contained renunciatory language. (c) [sic]

his contact with the consulate in 1982 for the purpose of registering his children was his first since his naturalization in 1970. (e) his statement 'I expected acceptance of my new citizenship to be something much more substantial that [sic] it was' implies a transfer of allegiance. (f) he was aware of the possibility that Canadian naturalization might jeopardize his U.S. citizenship status. However, there is no indication he made any inquiries of either Canadian or U.S. officials and (g) he admits he thought he may have lost U.S. citizenship after his naturalization in Canada.

Approval of a certificate of loss of nationality constitutes an administrative determination of expatriation from which a timely and properly filed appeal may be taken to the Board. [redacted] entered this appeal on April 29, 1988.

II

The appeal presents a threshold issue: whether the Board may assert jurisdiction to decide this appeal on the merits. We may not exercise jurisdiction unless we conclude that the appeal was entered within the limitation prescribed by the applicable regulations, for timely filing is mandatory- and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if we find that the appeal was not entered within the applicable limitation, the-only proper course would be to dismiss it.

Under regulations presently in force, the time limit for filing an appeal from the Department's determination of loss of nationality is one year "after approval by the Department of the certificate of loss of nationality or a certificate of expatriation." Section 7.5(b)(1) of Title 22, Code of Federal Regulations (1988). The regulations require that an appeal filed after one year 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. 22 CFR 7.5(a). These regulations entered into force on November 30, 1979,

Federal regulations prescribe that when a certificate of loss of nationality is forwarded to the person to whom it relates, such person shall be informed of the right of appeal to this Board within one year after approval of the

certificate. 22 CFR 50.52 (1988). Notice of the right of appeal is conveyed to the affected party by information printed on the reverse of the certificate of loss of nationality.

The Consulate General at Calgary forwarded a copy of the approved certificate of loss of nationality to [redacted] around April 1, 1983. On the reverse of the certificate there was information about the right of appeal, but the procedures cited were those in force from November 29, 1967 to November 30, 1979. The appeal information on the certificate that was sent to appellant read in pertinent part as follows.

> *Any* holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22 Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American embassy or Consulate or through an authorized attorney or agent in the United States

Under the regulations in effect prior to 1979, a person who contended that the Department's administrative holding of loss of nationality in his case was contrary to law or fact was entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review. 22 CFR 50.60 (1967-1979).

Since appellant was not informed that he had only one year within which to take an appeal from the Department's determination of loss of his nationality, we consider it only fair to apply the more flexible limitation of "reasonable time." Therefore the question for decision becomes whether appellant's waiting five years to seek appellate review of loss of his citizenship might be deemed reasonable in the circumstances of the case.

Reasonable time is a term that has been exhaustively defined. In general, whether an appeal has been taken within a reasonable time depends on the facts and circumstances of the particular case. Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931). In determining whether an appeal has been filed within a reasonable time, the courts consider a number of variables: whether a legally sufficient reason has been given for filing of the appeal at the time it was filed: possible prejudice to the opposing party: the practical ability of the moving party to

learn earlier of possible grounds for relief; and the interest in finality of litigation. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981); Lairsey v. Advance Abrasives Co., 542 F. 2d 928, 940 (5th Cir. 1976). The reasonable time limitation thus makes allowance for the intervention of unforseen circumstances beyond the moving party's control that might prevent him from entering an appeal within a short delay from the time the decision or judgment which is being appealed from was taken. At the same time, the limitation presupposes that one will seek relief with the promptitude of an ordinary prudent person,

Appellant urges the Board to deem his appeal timely and decide his case on the merits. He states that in 1983 when he received the certificate of loss of his nationality "I did not have any real knowledge of the review process and certainly could not point to any factors that may have been overlooked or any principles that were incorrectly applied in my case. and I therefore did not contemplate an appeal." 5/ He could only "presume" at that time that State Department and other officials knew what they were doing and had decided "under correct principles and correct facts." Furthermore, he had not been given "the

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5/ Appellant cites the appeal information on the reverse of the certificate of loss of information which reads in part as follows:

> Unless you have new or additional evidence to submit, or you believe that the holding of loss of nationality was contrary to the law or to the facts in your case it is unlikely that an appeal will be successful.
>
> Your appeal must clearly show the basis upon which it is made. If it contains statements of facts and circumstances which you did not mention when your case was previously considered or which are different from the facts and circumstances shown previously you should support these new statements with the best evidence obtainable,

material I now have from your [the Board's] office to look behind the decision that went against me." 6/

It was not until early in **1988,** appellant stated, that he had occasion to talk with an "immigration consultant" in Vancouver about his citizenship case. He continued:

> ...In the course of that discussion we somehow got around to talking about my circumstances which continue to concern me and I relayed the attempt that I had made in **1983** to get confirmation that I had never given up my U.S. citizenship. This gentleman advised me that all such hearings held by non-Canadian authorities ususally, [sic] if not always, base their decision on the assumption that all applicants for Canadian citizenship overtly and willfully renounce their previous nationality.
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> To say that this information came as a shock to me would not be an overstatement.
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> I immediately made enquiries as to what, if anything, I could do at that late date in an attempt to have an appeal heard with respect to the **1983** finding. The basis of that appeal would be that I never intended to renounce my U.S. Citizenship, and any assumption to the contrary was incorrect. 7/

6/ Appellant apparently refers to the leaflet the Board sent him on loss of United States citizenship, a publication of the Bureau of Consular Affairs. The leaflet sets out principles of statutory and case law that govern determination of loss of nationality.

7/ In his pleadings, appellant submitted that he did not recall being asked at his naturalization hearing to make a renunciatory declaration. However, as we have seen, he did in fact sign a statement that he renounced all other allegiance. When a copy of that declaration was sent to him, appellant acknowledged his signature, but repeated

> As a result of those enquires, the appeal is now before you.
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> While I must have been aware back in 1983 that I could probably appeal the ruling that went against me, I was unaware of any ground or grounds upon which to base that appeal. Those grounds only became known to me in early 1988. Immediately upon becoming aware of the grounds I initiated this appeal.

We do not agree that [redacted] has alleged circumstances that show his failure to take an earlier appeal was justifiable. Plainly, his not appealing sooner was a circumstance of his own making. He acknowledges that he knew in 1983 he had the right of appeal: obviously he had read the appeal information on the reverse of the certificate of loss of his nationality, Granted, the appeal information was not specific about what would constitute prima facie grounds of appeal. But he cannot excuse remaining passive in the face of knowledge that he had lost his nationality and might appeal the decision of loss. The appeal information on the reverse of the certificate was precise about what he might do to get more information about an appeal:

> Any holding of loss of United States nationality may be appealed to the Board of Appellate Review in the Department of State. The regulations governing appeals are set forth at Title 22 Code of Federal Regulations, Sections 50.60 - 50.72. The appeal may be presented through an American Embassy or Consulate or through an authorized attorney or agent in the United States.

7/ (cont'd)

that he had "no recollection of ever having seen or read the first capitalized paragraph dealing with renunciation of allegiance and fidelity to any foreign sovereign or state of whom or of which I may at that time have been a subject or citizen." He did not appreciate the significance of the document he signed. If he renounced his citizenship, it was by mistake.

...

For additional information about appeals and to obtain copies of the provisions of the Code of Federal Regulations, consult the nearest American Embassy or Consulate or the Board of Appellate Review, Department of State, Washington, D.C. 20520.

"While I am a lawyer by profession, I have no experience whatsoever in matters such as are the subject of this appeal," appellant wrote to the Board. Appellant's lack of experience in nationality law, and related appellate procedure is irrelevant to the issue whether he was justified in not taking an earlier appeal. He must be judged by the standard one would apply to the ordinary prudent man. It seems to us that an ordinary prudent man who was truly distressed by loss of his United States citizenship would follow the guidance given him by the information on the reverse of the certificate of loss of nationality; if he wanted to do something to reverse the decision of his expatriation, surely he would have written to the Board without delay to find out how he might proceed. and what grounds might constitute a prima facie case. Appellant [redacted] did nothing' for five years until he chanced to be enlightened about the principles applicable to determination of loss of United States nationality.

Appellant was curiously negligent about a matter to which he now tells us he attaches great importance, not only for himself but his two daughters who were born in Canada after he performed the expatriative act. Nothing impeded him from obtaining the information he required to enter an early appeal: he alone was responsible for the fact that no appeal was made until more than five years after the Department decided that he had expatriated himself.

We cannot say with certainty whether if the appeal had been entered in, say, **1983** or **1984** the Department would have been better able than it is now to meet the appellant's substantive arguments that he lacked the requisite intent in 1970 to relinquish United States citizenship. But clearly, if we were to allow the appeal, the Department would be just that much more disadvantaged by the delay.

In sum, appellant's unexcused delay of over five years in taking an appeal was unreasonable in the circumstances of this case. The interest in finality of litigation is therefore entitled to great weight.

III

Upon consideration of the foregoing, we find the appeal time-barred. As a consequence, the Board is without jursidiction to consider the case. The appeal is hereby dismissed.

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

Alan G. James, Chairman

Howard Meyers, Member

George Taft, Member