December 1, 1989

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: C[redacted] W[redacted] D[redacted]

This is an appeal from an administrative determination of the Department of State, dated July 8, 1987 that appellant, C[redacted] W[redacted] D[redacted], expatriated himself on October 27, 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/

The dispositive issue presented is whether the State Department has carried its statutory burden of proving that appellant intended to relinquish United States nationality when he obtained naturalization in Canada. For the reasons given below, it is our conclusion that the Department has met its burden of proof. Accordingly, we affirm the Department's holding of loss of his citizenship.

I

Appellant, C[redacted] W[redacted], acquired United States nationality by birth at [redacted] He graduated from college in 1956 and thereafter served in the United States Army for two years, being honorably discharged in 1958. He lived in the United States until 1964 when his employer transferred him to its international head office in Canada. According to a statement appellant made on November 28, 1988, his employer and a second company for which he worked advised him to obtain a Canadian

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

> Sec. 349. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality --
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> (1) obtaining naturalization in a foreign state upon his own application, or upon an application filed by a duly authorized agent, after having obtained the age of eighteen years; ...

passport, "[s]ince I was working in Canada and travelling extensively throughout the world." (Appellant was issued a United States passport in 1964, a few months before he entered Canada. He did not renew it when it expired.) Appellant began proceedings for naturalization as a Canadian citizen, and on October 27, 1970 was granted a certificate of Canadian citizenship, pursuant to section 10(1) of the Canadian Citizenship Act. (Appellant's wife, A[redacted] S[redacted] D[redacted]s, whose appeal we also decide today, also obtained Canadian citizenship on October 27, 1970.)

There is no copy in the record of the oath of allegiance appellant made upon being granted Canadian citizenship, but the Board takes note that persons naturalized in 1970 pursuant to section 10(1) of the Canadian Citizenship Act were required to subscribe to the following declaration and 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.

Appellant does not contend that he did not subscribe to the above declaration and oath of allegiance

Sometime after his naturalization appellant was employed by the Canadian subsidiary of another United States corporation and worked in both Canada and the United States. In 1987 he ended his service with that company, and in preparation to return to the United States or work abroad, inquired of the United States Embassy at Ottawa about renewing his passport. At that time his naturalization in Canada came to the attention of United States authorities. He was interviewed by a consular officer, completed a form titled "Information for Determining U.S. Citizenship," and an application for a passport. On June 10, 1987 a consular officer executed a certificate of loss of nationality in

appellant's name, as required by law. 2/ The certificate set forth that appellant acquired United States nationality by birth at Richmond, Virginia and that he obtained naturalization in Canada upon his own application, thereby expatriating himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Department of State approved the certificate on July 8, 1987, approval constituting an administrative determination of loss of nationality which may be appealed to the Board of Appellate Review.

The United States Embassy at Ottawa by registered letter, dated August 6, 1987, forwarded to appellant a copy of the certificate of loss of nationality that was approved in his name. The letter was signed for by someone at appellant's last known Canadian address on August 19, 1987. It appears that sometime before the letter reached appellant's address he and his wife had left Canada and gone to Lesotho where he had obtained a work contract.

On November 28, 1988 appellant addressed a letter to the Board from Maseru stating that he wished to appeal the Department's holding of loss of his United States nationality.

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

> 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.

II

As an initial matter, the Board must determine whether it may exercise jurisdiction over this appeal. Since timely filing being mandatory and jurisdictional the Board's jurisdiction depends upon whether the appeal was filed within the limitation on appeal prescribed by the applicable federal regulations. United States v. Robinson, 361 U.S. 220 (1961). The limitation on appeal to the Board is set forth in section 7.5(b)(1) of Title 22, Code of Federal Regulations, 22 CFR 7.5(b)(1), which reads as follows:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact shall be entitled to appeal such determination to the Board upon written request made within one year after approval of the Department of the certificate of loss of nationality or a certificate of expatriation.

The regulations further provide that an appeal filed after the prescribed time shall be denied unless the Board determines for good cause shown that the appeal could not have been filed within the prescribed time. 22 CFR 7.5(a).

After approving the certificate, the Department sent a copy to the Embassy to forward to appellant. On the reverse of the certificate was information about making an appeal, including the time limit on appeal. The Embassy forwarded the certificate to appellant under cover of a letter, dated August 6, 1987, which it sent to the address where he lived when his case was processed. The Embassy's letter informed appellant that there was enclosed a certificate of loss of nationality which had been approved by the Department. The letter further informed appellant that he might appeal the Department's decision to this Board. However, instead of citing the present federal regulations, 22 CFR Part 7 (1987), the letter set forth in detail the appeal procedures that were superseded eight years earlier. After explaining how to draft an appeal, the Embassy's letter concluded as follows:

> No formal application for reconsideration need be made, but the appeal to the Board of Appellate Review must be made in writing within a reasonable time after receiving notice of the Department's administrative holding of loss of nationality. [Emphasis supplied.]

The federal regulations which were in force prior to November 1979, 22 CFR 50.60 (1967-1979) prescribed that:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review

Appellant gave the following reason for not appealing sooner when he wrote to the Board on November 28, 1988, to enter the appeal:

> ...Some months ago, after the letter from Dean Haas [a consular officer of the Embassy at Ottawa] finally caught up with us in Lesotho (after going to our old address, our daughter's address, who had moved, and eventually to Africa), I enquired with the U.S. Embassy here to have the finding appealed.

Under either of the two limitations on appeal of which appellant was apprised when he received the certificate of loss of his natinality, we are of the view that his appeal should be deemed timely.

What constitutes reasonable time depends upon the facts of the individual case. Generally, the courts consider whether the opposing party has been prejudiced by the delay and whether the moving party has some good reason for failure to take the appropriate action sooner. Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930-931 (5th Cir. 1976), quoting 11 Wright & Miller, Federal Practice and Procedure, section 2866 at 228-229.

Appellant has not said when he received the consular officer's letter, but if, as we may assume, it followed the circuituous route described, it may not have arrived in Maseru until a number of months after August 1987, possibly not until early in 1988. Appellant entered the appeal within, as he put it, "some months" after I received the consular officer's letter. Such a relatively short delay is almost by definition not unreasonable. Furthermore, bearing in mind the shortness of the delay, it is difficult to perceive any prejudice to the Department by appellant's not appealing until he did.

What constitutes good cause also depends upon the circumstances of the particular case. In general, to establish good cause for taking an action belatedly, one must

show that circumstances which were largely unforeseeable and beyond one's control intervened to prevent one from taking the required action.

Appellant seems to have taken reasonable precautions to ensure that his mail would reach an address from which it would be forwarded, but did not apparently foresee that in the meantime his daughter would move, thus causing a further delay in mail catching up with him. Since circumstances which appellant largely could not foresee and over which he had no control intervened to delay receipt of information appellant needed to make an appeal, we consider that he has shown good cause within the meaning of 22 CFR 7.5(a) why he could not appeal within the one-year limitation. We will therefore proceed to consider the appeal on the merits.

III

It is undisputable that appellant duly obtained naturalization in Canada upon his own application and thus brought himself within the purview of section 349(a)(1) of the Immigration and Nationality Act. The Act provides, however, that citizenship shall not be lost unless the expatriative act was performed voluntarily with the intention of relinquishing United States nationality. The first issue is whether appellant became a Canadian citizen voluntarily.

In law it is presumed that one who performs a statutory act of expatriation does so voluntarily, but the actor may rebut the presumption upon a showing by a preponderance of the evidence that the act was involuntary. 3/ Appellant has not attempted to refute the presumption that he acted voluntarily. And the record makes it plain that he acted of his own free will, for he acknowledges that he thought it

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3/ Section 349(b) of the Immigration and Nationality Act, 8 U.S.C. 1481(b), reads as follows:

> (b) 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. 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

would be advantageous to his business career to hold a Canadian citizenship.

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

IV

Even though appellant has not met his burden of proof that he became a Canadian citizen involuntarily, it remains to be determined whether he intended to relinquish United States citizenship when he obtained naturalization in Canada.

Intent to relinquish citizenship is an issue that the government must prove. Vance v. Terrazas, 444 U.S. 252 (1980). Intent may be proved by a persons's words or found as a fair inference from proven conduct. Id. at 260. The standard of proof is a preponderance of the evidence. Id. at 267. Proof by a preponderance means that the government must show that it was more probable than not that appellant intended to forfeit his United States nationality when he acquired Canadian citizenship. 4/ The intent the government must prove is the party's intent at the time the expatriative act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The Department submits that appellant's oath of allegiance to Canada and declaration renouncing all other

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3/ (Cont'd.)

> 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.

4/ "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its non-existence. 12/ [footnote omitted] Thus the preponderance of evidence becomes the trier's belief in the preponderance of probability."

McCormick on Evidence (3rd ed.), Section 339.

allegiance speak for themselves. Ordinarily such statements should be accepted as a manisfestation of the citizen's intent to relinquish United States nationality, argues the Department, noting that appellant's words at the critical time are the only contemporaneous evidence of his specific intent.

If a United States citizen voluntarily obtains naturalization in a foreign state, such an act may be persuasive evidence of an intent to relinquish United States nationality, although it is not conclusive evidence of such intent. Vance v. Terrazas, supra, 444 U.S. 252, 261. And if a citizen also makes an express declaration of renunciation of all other allegiance, the courts have held that such words constitute very strong evidence of an intent to relinquish citizenship. The rule was clearly stated in Richards v. Secretary of State, 752 F.2d 1413, 1417 (9th Cir. 1985). "[T]he voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship." See also Meretsky v. U.S. Department of Justice, et al., No. 86-5184. Memorandum Opinion (D.C. Cir. 1987). There the plaintiff made a declaration of allegiance identical to that made by appellant "The oath he took renounced that [United States] citizenship in no uncertain terms." At 5.

In short, the case law makes it clear that adverse legal consequences usually will ensue if one voluntarily makes an express renunciation of United States nationality while performing a statutory expatriating act. Nonetheless, the trier of fact may not conclude from such acts that a citizenship-claimant intended to relinquish citizenship, unless satisfied that the person acted not only voluntarily but also knowingly and intelligently, and that there are no other factors that would warrant a finding that there was a lack of intent to relinquish citizenship. Terrazas v. Haig, supra; Richards v. Secretary of State, supra.

That appellant knowingly and intelligently applied for and accepted Canadian citizenship seems beyond question. In 1970 he was 35 years old, schooled and evidently an experienced businessman.

Nor do we find in the facts of record any elements that would warrant our concluding that in 1970 appellant probably lacked the requisite intent to relinquish United States nationality.

Obtaining naturalization in a foreign state and making an oath of allegiance that includes renunciation of all other allegiance are highly persuasive evidence of an intent to abandon United States nationality. To overcome or negate the probative value of such strong evidence, there must be other

factors, no less concrete and compelling, that manifest a will or purpose not to relinquish United States citizenship.

"It was not my intent to relinquish my U.S. citizenship when I acquired Canadian citizenship and passport," appellant wrote to the Board on November 28, 1989, "because I was asked to do this to facilitate business travel." He suggested in that letter that a number of considerations supported his contention that he lacked the requisite intent:

> a. I had been raised, educated in the U.S. and served in the U.S. Army in the U.S. and Europe with distinction.
>
> b. I owned my homeplace plus a farm in the U.S. (on which I filed U.S. tax returns) for many years until my mother went into a nursing home. I continue to own property in the U.S.
>
> c. Both of our children were born in the U.S. All of my relatives are in the U.S.
>
> d. I never surrendered my passport to authorities; it was only when I enquired about renewing it in Ottawa that it was not returned to me.

We are unable to agree that the factors appellant cites are entitled to greater evidential weight than the explicit evidence that dates from the time he performed the expatriative act. Those factors evidence good citizenship at various times in appellant's life, but they do not establish that he was incapable of relinquishing his American citizenship in 1970 to achieve a desired objective. The evidence of a renunciatory intent at the relevant time is strong and persuasive; the evidence of lack of intent is at best marginal. There simply is not sufficient qualitative evidence to cast doubt on appellant's probable intent in 1970. As a consequence, the Board has no latitude under the law and applicable court decisions to accept his contrary contentions, however sincerely they are put forward.

We are thus led to the conclusion that the Department has carried its burden of proving that appellant intended to relinquish his United States nationality in 1970 when he obtained naturalization in Canada upon his own application.

V

Upon consideration of the foregoing, we hereby affirm the Department's holding that appellant expatriated himself.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Warren E. Hewitt, Member