DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

The Department of State determined on April 29, 1988 that [redacted] expatriated himself on September 17, 1980 under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon his own application. 1/ Dr. [redacted] appeals.

The sole issue for the Board to decide is whether the Department has carried its burden of proving that appellant intended to relinquish United States citizenship when he obtained naturalization in Canada. For the reasons given below, we conclude that the Department has not met its burden of proof. Accordingly, we reverse the Department's determination of loss of appellant's nationality.

I

Appellant, [redacted], acquired United States nationality by virtue of his birth at Geneva, Illionis on December 12, 1940. He lived in the United States until 1970 when he moved to Canada. In 1971 he married a Canadian citizen. They have two children who were born in Canada, one prior to his naturalization, one after. Appellant is now a university professor of history.

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; or ...

Appellant applied for naturalization, and on September 17, 1980 was granted a certificate of Canadian citizenship. At that time he made the prescribed oath of allegiance which reads as follows:

> 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 acquired a Canadian passport in 1984. (Previously he held a United States passport which he did not renew when it expired in 1980.)

Early in 1988 appellant inquired at the United States Consulate General in Montreal about his citizenship status. He did so because, as he put it in the standard questionnaire executed by persons who have performed an expatriative act, he was invited to participate in an academic exchange in California, and expected to reside in the United States for about a year, beginning in the summer of 1988.

Appellant's naturalization having come to light, the Consulate General obtained confirmation thereof from the Canadian authorities, and informed appellant he might have expatriated himself. As noted above, he was asked to and did complete a questionnaire to facilitate determination of his citizenship status. He also completed an application for a passport. On March 30, 1988, an officer of the Consulate General executed a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act. 2/ The certificate recited that appellant

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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

acquired United States nationality by virtue of his birth in the United States; that he acquired the nationality of Canada by virtue of naturalization upon his own application; and thereby expatriated himself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Department of State approved the certificate on April 29, 1988, approval constituting an administrative determination of loss of nationality which may be appealed to the Board of Appellate Review. An appeal was entered through counsel on April 13, 1989.

II

There is no dispute that appellant obtained naturalization in a foreign state upon his own application pursuant to the laws of that state. He thus brought himself within the purview of section 349(a)(1) of the Immigration and Nationality Act. He concedes that he became a Canadian citizen of his own free will, thus two of the three conditions for loss of United States nationality have been met in appellant's case. The sole issue for the Board to determine therefore is whether, as the Department contends, appellant intended to relinquish United States citizenship when he acquired Canadian citizenship.

The rule is well-established that intent to relinquish citizenship is an issue that the government must prove. Vance v. Terrazas, 444 U.S. 252, 270 (1980). The standard of proof is a preponderance of the evidence. Id. Proof by a preponderance means that the existence of the fact to be proved - intent to relinquish citizenship - is more probable than its non-existence. 3/ Intent to relinquish citizenship may be established by a party's words or found as a fair inference from his proven conduct. Id. at 260. It is the government's burden to establish the party's intent at the time he performed the expatriative act, not at some later date. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

2/ (Cont'd.)

> 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.

3/ McCormick on Evidence, sec. 339, 3rd ed.

The State Department's brief advances the following arguments in support of its position that appellant here intended to relinquish his United States citizenship:

> Mr. [redacted] naturalization in Canada is the initial evidence of his intent to abandon his United States citizenship. An overall attitude and course of behavior often reflect 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.
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> After appellant's naturalization, he identified himself soley as a Canadian. Upon entering the United States, he would identify himself as a Canadian. He applied for a Canadian passport in 1984 and used it for travel abroad. His behavior does not indicate an intention to retain his U.S. citizenship.
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> Mr. [redacted] never consulted with the Consulate prior to his naturalization and has stated that he was fully aware that dual citizenship was not guaranteed and that he might lose his citizenship. Yet, the fact remains that he naturalized anyway. He accepted the fact that he was a Canadian and not a U.S. citizen as he states that he did not beleive [sic] that it was legitimate for him to identify himself as a U.S. national until it was confirmed. Yet, he never sought confirmation until his circumstances changed. He naturalized, exhibiting a disinterest and unconcern for his status as a U.S. citizen.
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> Mr. [redacted] states that he naturalized since his life was centered in Canada. Nataralization was 'a reasonable step.' (Questionnaire, pg. 3) He does not state a motive accept [sic] that it appeared to be the natural thing to assume the citizenship of the land that he had made his home.
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> Appellant is an educated man cognizant of the ramifications of his actions. He may not have wanted to jeopardize his U.S. citizenship, but the fact remains that he did apparently without

> hesitation. Now the situation has changed, and he desires to resume his U.S. citizenship. The priorities that existed in 1980 have dissipated. However, 'American citizenship cannot be put on and taken off like a cloak, willy nilly to suit economic advantage or disadvantage.' Cantoni v. Acheson, 88 F.Supp. 576, 578 (N.D. Cal. 1950).

We are not persuaded that the existence of the fact the Department attempts to prove - appellant's intent to relinquish his United States citizenship - is more probable than its non-existence.

A salient feature of this case, like so many others appealed to the Board, is that there is little direct evidence of appellant's intent at the time he performed the expatriative act. Performing a statutory expatriative act may be highly persuasive evidence of an intent to relinquish citizenship, but it is not conclusive evidence thereof. Vance v. Terrazas, 444 U.S. at 261. Appellant also made an oath of allegiance upon being granted Canadian citizenship but that oath is inconclusive on the issue of his intent, being ambiguous with respect to that issue. Richards v. Secretary of State, CV 80-4150, slip op. (C.D. Cal. 1982).

In this case we revisit scores of cases that have been appealed to the Board where a party obtained naturalization in Canada, made a non-renunciatory oath of allegiance and thereafter neglected to do a series of things which if done would have established unmistakably an intent not to relinquish U.S. citizenship. The key question in the case now before the Board, as in those other cases, is whether appellant's post-naturalization conduct is so expressive of an intent to transfer his allegiance from the United States to Canada that one might fairly say such conduct, when linked with his naturalization in a foreign state, is sufficient proof that when he became a Canadian citizen in 1980 he probably intended to relinquish United States citizenship.

We begin by addressing the Department's argument that since appellant knew naturalization in a foreign state is expatriative the fact that he proceeded to obtain it is evidence that he intended to relinquish United States citizenship. We find that argument unpersuasive. It is fundamental that knowledge and intent are separate concepts. Proof of one does not necessarily prove the other. Mere knowledge that an act is expatriative is not enough to establish a person's specific intent with respect to United States citizenship. Something more than knowledge must be shown. Richards v. Secretary of State, 752 F.2d 1413, 1420 (9th Cir. 1985). A United States

citizen effectively renounces his citizenship by performing a statutory expatriative act only if he means the act to constitute a renunciation of that citizenship. Id. The Richards court found that the plaintiff meant his act of obtaining naturalization in Canada to constitute renunciation of his American citizenship because he expressly declared that he renounced all allegiance and fidelity to the United States.

In the case before the Board, however, appellant performed an expatriative act but did nothing at the relevant time to show that he meant that that act should constitute a renunciation of United States citizenship. In short, a perception that he might lose his American nationality does not necessarily attest to a renunciatory state of mind.

We are unable to give determinative evidential weight to the fact that appellant did not consult United States authorities before obtaining naturalization; register his children as citizens; vote in United States elections or file U.S. income tax returns. An intent to relinquish United States citizenship when he acquired Canadian citizenship does not necessarily or more plausibly account for his not doing those things than many other conceivable motives. Whether acts of omission show anything more than appellant's failure to act with utmost care is in our opinion debatable. Nor do we think one should be categoric in concluding that because appellant identified himself after naturalization as a Canadian citizen he undoubtedly meant in 1980 to relinquish his United States citizenship. He duly became a Canadian citizen in 1980. Under Canadian law he had every right to use Canadian documentation to travel abroad.

In a statement dated March 18, 1988, appellant stated that "since I have not until now actively sought confirmation of my U.S. status, I have believed that it was not legitimate for me to identify myself as a U.S. citizen until such confirmation was forthcoming." While one might fault him for not seeking confirmation of his citizenship status long before he did so, uncertainty whether he was entitled to obtain American documentation is not an implausible explanation why he used Canadian documentation.

In sum, the record here shows that appellant was negligent about protecting his American citizenship and negligent about exercising the privileges and responsibilities of American citizenship. A highly educated person such as he might be expected to act more responsibly. But negligence and intent to relinquish United States citizenship are not correlative.

The preponderance of the evidence does not establish that appellant intended in 1980 to relinquish his United States citizenship. Accordingly, we conclude that the Department has not met its burden of proof.

III

Upon consideration of the foregoing, we hereby reverse the Department's determination that appellant expatriated himself when he obtained naturalization in Canada upon his own application.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard Meyers, Member