DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: T[redacted] F[redacted] L[redacted]

T[redacted] F[redacted] L[redacted] appeals an administrative determination of the Department of State, dated June 22, 1988, that she expatriated herself on January 9, 1980 under the provisions of section 349(a)(1) of the Immigration and Nationality Act, by obtaining naturalization in Canada upon her own application. 1/

A single issue is presented: whether appellant intended to relinquish her United States nationality when she obtained naturalization in Canada. For the reasons given below, it is our conclusion that the Department has not carried its burden of proving by a preponderance of the evidence that appellant intended to relinquish her United States nationality when she became a Canadian citizen. Accordingly, we reverse the Department's holding of loss of appellant's citizenship.

I

Appellant, T[redacted] [redacted] L[redacted], became a United States citizen by virtue of her birth at [redacted] on [redacted] Except for a year spent abroad, appellant

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

> 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...

lived in the United States from birth to 1974. In that year she moved to Canada to study at the University of Montreal for a career as a translator.. She has lived in Canada since. After completing her studies in Montreal, appellant moved to Ottawa to join her fiance, a Canadian citizen who also was a translator. They were married in the summer of 1979. When she applied for a position with the Terminology Directorate of the Bureau of Translation of the Canadian Government, she was informed that one of the requirements of the position was Canadian citizenship. In the summer or early fall of 1979 appellant applied for naturalization in Canada.

On January 9, 1980 appellant was granted a certificate of Canadian citizenship after she 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.

Shortly after obtaining naturalization, appellant was hired by the Canadian Government's Translation Bureau. A child was born in the autumn of 1980. In June 1986 she obtained a Canadian passport. It appears that she did not renew the United States passport which was issued to her by the Embassy at Ottawa in 1978 after it expired in 1983.

In the spring of 1988, eight years after her naturalization, appellant inquired at the Consular Section of the United States Embassy at Ottawa about her citizenship status. She states that she had believed for some years that she automatically lost her United States citizenship by obtaining naturalization in Canada, and wished to clarify what she had been told by a friend, allegedly a dual national of the United States and Canada, that she might not have lost her United States citizenship by becoming a Canadian citizen. After the Embassy received confirmation from the Canadian Citizenship authorities that appellant had been granted Canadian citizenship, appellant completed a form titled "Information for determining U.S. Citizenship;" and, for information purposes, filled out an application to be registered as a United States citizen. She was also interviewed by a consular officer.

On April 27, 1988, in compliance with the statute, a consular officer executed a certificate of loss of nationality

in appellant's name. 2/ The officer certified that appellant acquired United States nationality by birth therein; that she obtained naturalization as a citizen of Canada on January 9, 1980; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The State Department approved the certificate on June 22, 1988, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review. 22 CFR 7.3(a). Appellant filed this appeal pro se on September 26, 1988.

II

There is no dispute that appellant obtained naturalization in Canada upon her own application and thus brought herself within the purview of section 349(a)(1) of the Immigration and Nationality Act. 3/ The statute provides, however, that nationality shall not be lost unless the citizen performed the proscribed act voluntarily with the intention of relinquishing United States nationality.

Under law, it is presumed that one who performs a statutory expatriative act does so voluntarily, but the presumption may be rebutted by the person upon a showing by a

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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 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/ Text note 1 supra.

preponderance of the evidence that the act was not voluntary. 4/

Appellant has not assumed the burden of trying to prove that Canadian citizenship was forced upon her against her will. Thus, obviously, she has not rebutted the presumption that she acted of her own free will.

III

Even though appellant has not proved that her naturalization was involuntary, "the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas, 444 U.S. 252, 270 (1980) Under the statute, 5/ the Government must prove intent to relinquish citizenship by a preponderance of the evidence. Id. at 267. Intent may be expressed in words or found as a fair inference from proven conduct. Id. at 260.

Preponderance of the evidence means that in order to satisfy its burden of proof, the Department of State must establish that appellant, more probably than not, intended to relinquish her United States nationality when she became a citizen of Canada. See McCormick on Evidence, 3rd ed., section 339. The intent the Government must prove is the

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4/ 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 September 26, 1961 under, or by virtue of, the provisions of this chapter 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 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.

5/ Section 349(b) of the Immigration and Nationality Act. Text note 4, supra.

party's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

In its brief the Department contends that appellant's intent to relinquish her United States nationality is established by the following evidence:

> Here, the primary evidence of [redacted] intent at that time is that she became naturalized in a foreign state and that she took a non-renunciatory oath of allegiance to Canada. Ordinarily, these acts, standing alone, are not conclusive evidence of one's intent. See Vance v. Terrazas, supra. 4/ Here, however, Ms. Loring states that it was her understanding, apparently based on comments made by Canadian authorities when she was being naturalized, that she could not retain both nationalities. Nonetheless, she proceeded with the naturalization, in so doing making a choice between acquiring Canadian citizenship and retaining her American nationality.
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> T[redacted] L[redacted] conduct after her Canadian naturalization further demonstrates this intent to relinquish her U.S. citizenship. She made no attempt to ascertain the accuracy of her belief that she had lost her citizenship. Rather, for over seven years she proceeded on the assumption that she had had to choose between the two nationalities. Thus, acting on her conviction of expatriation, she identified herself as a Canadian at the U.S.-Canadian border, she voted and paid taxes in Canada and she did not register her daughter with American authorities.
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> 4/ [Footnote omitted.]

The only evidence of appellant's intent at the time she obtained Canadian naturalization is the fact that she performed an expatriative act and made a concomitant oath of allegiance to Queen Elizabeth the Second. It is settled that naturalization, like the other enumerated statutory acts of expatriation, may be highly persuasive, but is not conclusive, evidence of an intent to relinquish United States

citizenship. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J. concurring.) Making an oath of allegiance to a foreign sovereign or state may provide substantial evidence of intent to relinquish citizenship but alone is insufficient to prove renunciation. King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). An oath of allegiance that contains only an express affirmation of loyalty to the country whose citizenship is being sought, however, leaves "ambiguous the intent of the utterer regarding his present nationality." Richards v. Secretary of State, CV 80-4150 (memorandum opinion, C.D. Cal 1980) at 5.

Plainly, the direct evidence is insufficient to support a finding that appellant probably intended to relinquish her United States citizenship when she became a Canadian citizen. We must therefore review the circumstantial evidence -- appellant's proven conduct after her naturalization -- to determine whether it will establish the requisite intent. See Terrazas v. Haig, 653 F.2d at 288.

We do not agree with the Department on the evidential importance of the fact that appellant did not do a number of things, which, if done, would manifest an affirmative intent to retain United States citizenship,despite foreign naturalization. In many cases analogous to the one before the Board, we have taken the position, which we believe sound, that not voting or paying taxes (or filing tax returns) in the United States, not seeking consular advice before obtaining naturalization, not registering one's offspring as United States citizens are inadequate and unsatisfactory indicia of intent to surrender United States citizenship. They have little probative value because the explanation for not doing them could just as reasonably be laziness, indifference, lack of knowledge, absorption in other matters, as it could be a specifically formulated prior intent to relinquish United States citizenship. These facts do not speak for themselves on the issue of one's intent with respect to United States citizenship in a way that acts expressly derogatory of United States citizenship assuredly do.

That appellant took no steps until 1988 to clarify her citizenship status sheds no light on her state of mind in 1980. She contends that after 1980 she had "neither the time nor strength to look into something as important to me as U.S. citizenship," and supported that contention with credible evidence. Her health deteriorated between 1980 and 1985 as a result of working in a Canadian government building notorious for its indoor air pollution. She was forced to resign in 1985 and undergo extensive medical treatment, while being involved in litigation to recover damages for injury to her health. "Until 1988 I had no certain knowledge, by certificate or otherwise, of a loss of U.S. citizenship,"

appellant wrote to the Board, adding that:

> ...The matter lay buried under a myriad of other, survival-related concerns (the health of my baby daughter, my own deteriorating health, the financial and emotional security of my family). These effectively prevented me from seeing the situation clearly as regards my U.S. citizenship status.

While we will agree that appellant ought to have made time to sort out her citizenship status much earlier than she did, we are unable, considering the circumstances she describes so convincingly, to agree that her failure to do so likely had any relationship to her probable state of mind in 1980.

The decisive inquiry thus becomes whether the other evidence presented by the Department establishes, more probably than not, an intent in 1980 to relinquish her United States nationality. Specifically, does her belief, so disarmingly volunteered in 1988 when proceedings were instituted in her case by the Embassy in Ottawa, that she automatically lost her United States citizenship when she obtained naturalization in Canada, lead unerringly to the conclusion that she intended in 1980 to relinquish citizenship? Does the fact that she acted on the strength of that belief and obtained and used a Canadian passport instead of an American one evidence a renunciatory intent in 1980?

Without putting too fine a point on the matter, we may note that appellant's belief that she lost her United States nationality was not "knowledge." She received no official notice that obtaining foreign naturalization could lead to expatriation. She concedes that she did not make any prior inquiries about the possible implications for her United States citizenship of obtaining citizenship. "I know I thought I had lost my U.S. citizenship; it must have been a combination of impressions gained from the Canadian authorities and friends with some legal knowledge." Plainly, appellant did not "know" that she would lose her United States citizenship, but, as she stated in the questionnaire she completed at the Embassy in April 1988, she feared she might lose it. Nonetheless, for purposes of analysis, we will equate appellant's fear or belief with knowledge.

It is often said that if one knows the consequences, or at least possible consequences, of doing a particular act, one may be presumed to have intended that those consequences should ensue. But that conclusion is too facile. Appellant's knowledge is not at issue. Her state of mind in 1980 is at

issue. Knowledge and intent are separate and distinct concepts. The method of proving intent is a problem distinct from proving knowledge, even where the latter is also available. Wigmore on Evidence, section 300, 3rd edition. 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 she meant that that act should constitute a renunciation of United States citizenship. In short, a perception that she might lose her American nationality does not, standing alone, bespeak a renunciatory state of mind.

In the belief that she lost her United States citizenship by obtaining Canadian citizenship, appellant acted in a manner consistent with that assumption, until she learned in 1988 that she had not necessarily lost her citizenship. "For me it was entirely a matter of using valid rather than invalid documentation - or so I thought," appellant wrote to the Board. Continuing, she stated that:

> ...As I sat preparing this appeal I took out my U.S. passport and saw, with considerable surprise (and belated understanding) that the expiry date was in 1983 and that I could have used it during the period 1980-1983. Even when typing out my U.S. passport application this last spring, that realization did not dawn on me.
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> I thought that my Canadian citizenship had annulled my U.S. citizenship....
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> ...I assumed that using my U.S. passport while holding citizenship of another country could get me into trouble - and I was timid enough at the time to take my inquiries no further.
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> I learned what procedures must be followed by U.S. citizens at the border this past spring (1988), when I also

> learned that I had been a U.S. citizen all that time. I mention this matter again because there was absolutely no intention on my part of either negating United States citizenship or confirming/affirming Canadian citizenship. Since learning the correct procedure for entering the U.S., I have carefully followed it.

Since we are of the view that appellant's mere belief that she lost her United States citizenship is insufficient to establish that she had the requisite intent in 1980 to relinquish United States citizenship, we are unable to attach probative weight to the fact that she thereafter used Canadian documentation as a consequence of that perception.

Appellant, who is evidently an educated woman, has been negligent about her United States citizenship. She should have obtained consular advice before obtaining Canadian citizenship; she should have put aside the fear that she would learn she expatriated herself and clarified the issue promptly, thus avoiding clouding the issue of her intent by using a Canadian passport to enter the United States. That having been said, we do not think that a preponderance of the evidence shows appellant intended to expatriate herself in 1980 when she became a Canadian citizen. The Department has not carried its burden of proof.

IV

Upon consideration of the foregoing, we conclude that the Department's holding that appellant expatriated herself should be, and hereby is, reversed.

Alan G. James, Chairman

Warren E. Hewitt, Member

George Taft, Member