May 29, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER **OF:** M[redacted] A[redacted] C[redacted]

This case is before the Board of Appellate Review on the appeal of M[redacted] A[redacted] C[redacted] from an administrative determinati[redacted]he ep[redacted]nt of State dated June 23, 1989 that she expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

For the reasons given below, we conclude that although appellant voluntarily obtained Canadian citizenship, she lacked the necessary intent to relinquish her United States citizenship. Accordingly, we reverse the Department's holding that she expatriated herself.

I

Appellant, M[redacted] A[redacted] C[redacted], nee Christman, acquired the nationality of the United States by birth at Buffalo, New York on October 28, 1945. She was educated in the United States, and in 1970 went to Canada where she studied at the University of Ottawa. Awarded a master of education degree in 1971, she was hired by the Canadian Forces Base, Ottawa North School Board, as a special education teacher. She states that she was required to become a Canadian citizen to obtain a

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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; ...

permanent teaching certificate. "In order to continue teaching and be self-supporting....I became a Canadian citizen," she explained in a letter to the Board (October 1989). Continuing, she wrote:

> ...My intentions were motivated by economic and career considerations. A shortage of teaching positions accompanied by a surplus of qualified teachers made my job security tenuous. It was never my intention to renounce United States Citizenship. Had I chosen most any other career to pursue, I could have had the choice of remaining a Landed Immigrant in Canada. Unfortunately elementary teaching requires teachers to be Canadian Citizens before permanent teaching certificates are issued. I was single at the time and saw no other option to maintain employment.

The record shows that Mrs. Comeau acquired Canadian citizenship under section 10(1) of the Canadian Citizenship Act of 1946 on January 15, 1976. On that date she made the prescribed oath of allegiance:

> 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 married a Canadian citizen in 1981.

In March 1989 appellant visited the United States Embassy at Ottawa to apply to be registered as a United States citizen. She did so, she informed the Board, because she had recently read an article in a Toronto newspaper "which indicated dual citizenship was a possiblility." It appears that Mrs. Comeau assumed she had lost her United States citizenship as a result of acquiring Canadian citizenship. (The Board notes that the Canadian Citizenship Act of 1977 recognizes dual citizenship. An individual who is a Canadian citizen and who becomes a citizen of, say, the United States, does not lose Canadian citizenship.)

Appellant completed a form titled "Information for determining U.S. Citizenship," and was interviewed by a consular officer. On March 31, 1989, in compliance with the requirements of section 358 of the Immigration and Nationality

Act, a consular officer executed a certificate of loss Of nationality in appellant's name. 2/ In that paper, the officer certified that appellant became a United States citizen by birth in the United States; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

The Embassy forwarded the certificate and supporting documents to the Department under cover of a detailed memorandum recommending approval of the certificate. The Department agreed with the Embassy's recommendation and on June 23, 1989 approved the certificate. Approval constitutes an administrative determination of loss of nationality from which an appeal may be taken to the Board of Appellate Review.

Mrs. [redacted] filed this appeal in October 1989.

II

The parties agree 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. 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.

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.

Under law, it is presumed that one who performs a statutory expatriative act does so voluntarily, but the presumption may be rebutted by the actor upon a showing by a preponderance of the evidence that the act was not voluntary. 3/

Appellant states that she obtained Canadian citizenship soley because she was required to do so in order to maintain employment. "Had I chosen most any other career to pursue," she wrote to the Board, "I could have had the choice of remaining a Landed Immigrant in Canada." Appellant has not attempted to develop a case of economic duress; indeed she suggests that she might well have had alternatives to teaching but did not wish to pursue them. Clearly, her decision to become a Canadian citizen was freely made. She has not rebutted the presumption that she performed the expatriative act 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 expatriative act was performed with the necessary intent to relinquish citizenship." Vance v. Terrazas, 444 U.S. 252, 270 (1980). The standard of proof is 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

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 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.

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

The Department asserts that appellant's naturalization in Canada is the initial evidence of her intent to relinquish United States citizenship. Such intent is confirmed by her overall attitude, course of conduct and lack of concern about her American citizenship, the Department argues. Specifically, the Department sees in appellant's post-naturalization conduct evidence to support its contention that she had the requisite intent: she identified herself as a Canadian citizen; voted in Canadian elections; never registered at the United States Embassy; was aware of the significance of her actions "yet expressed no regret and sought no assistance for thirteen years thereafter." It is the opinion of the Department that appellant's behavior does not indicate an intention to retain her U.S. citizenship.

In this case we confront a very familiar fact pattern and arguments offered by the Department of State contending that the facts, when considered in their entirety, demonstrate that appellant intended in 1976 to relinquish her United States citizenship. We find the Department's arguments in the instant case no more persuasive than we have in scores of cases like it where we have concluded that the Department did not carry its burden of proof.

The evidence that appellant intended to relinquish her citizenship in 1976 dating from that time will not, of course, support a finding of intent to surrender citizenship. 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 relinqiush 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.

Since the contemporary evidence in this case is scant, our judgment must turn on what reasonable inferences may be drawn from appellant's proven conduct after she obtained naturalization. Circumstantial evidence may (or may not) establish a prior intent to divest oneself of citizenship. See Terrazas v. Haig, 653 F.2d at 288.

Appellant's conduct after her naturalization consists solely of acts of omission. We have consistently maintained that acts of omission have little probative value in establishing whether a person intended at some earlier time to relinquish citizenship. Things, even important things like the exercise of civic rights and duties, may be left undone for reasons totally divorced from any specific intent with respect to one's citizenship. Appellant's explanation of her acts of omission strikes us as perfectly plausible.

> I assumed I had lost my citizenship as a result of receiving Canadian citizenship January 15, 1976 and acted accordingly in the following ways. When entering the United States I identified myself as a Canadian since I had clear documentation for this. I did not enquire about citizenship rights for my daughter (born January 5, 1983) as I assumed she would not qualify because I had 'lost' my United States Citizenship. I would be very pleased to be able to register her as a United States citizen should my appeal be accepted. I did not vote in the United States elections since I resided in Canada and believed residency was a requirement to vote. I have not paid United States income tax (except the amount normally withheld from stock dividends) because I was working and residing here.
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> ...
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> I realize now that I should have sought consular advice prior to applying for Canadian Citizenship. My failure to do so was not the result of any intention on my part to renounce my United States Citizenship. Instead, my actions since acquiring Canadian Citizenship have been the result of misinformation or lack of correct and complete information concerning my status as a United States citizen.

Appellant's conduct was not untypical of people in her situation, and it does not necessarily show that she intended to relinquish her citizenship years earlier. Acts of omission have an ambiguous quality which is not true of affirmative acts or words expressly derogatory of United States citizenship. In this case, appellant performed no act which could rationally be described as hostile to the United States. Neither in 1976 nor later did she specifically do anything which indicates that she meant her naturalization in Canada in 1976 to constitute a renunciation of citizenship. See Richards v. Secretary of State, 752 F.2d 1413, 1420 (9th Cir. 1985). Granted, appellant was indifferent about her United States citizenship. She may have thought she had lost her citizenship by obtaining Canadian citizenship, but that does not excuse her from not sorting out her status long before she did so. She only made matters difficult for herself by putting the matter of her citizenship aside for so long. That said, we are not persuaded that her conduct probably was that of one who in 1976 willed loss of American nationality. The Department has not carried its burden of proof.

IV

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

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Warren E. Hewitt, Member