D. THE EXTRADITION SUBMISSIONS

II. Would it be unjust or oppressive, having regard to all of the relevant circumstances, to surrender Ms. Boje to the United States of America?

A. The Law

i) Generally – Legislation and Definitions

428. Section **44(1)(a)** of the ***Extradition Act*** states:

> **44(1)** The Minister shall refuse to make a surrender order if the Minister is satisfied that
>
> > **(a)** the surrender would be *unjust or oppressive* having regard to all the relevant circumstances.

429. The terms "**unjust**" or "**oppressive**" or the expression "**unjust or oppressive**", in **section 44** of the ***Extradition Act*** are not specifically defined. This phrase was used in **section 17** of the ***Fugitive Offenders Act*** R.S.C. c. F-32, but no distinct criteria appear to have been developed by the Courts and each case appears to turn on its own facts and circumstances.

430. **The Concise Oxford Dictionary (1976)** defines the terms "**unjust**", "**oppressive**" and "**oppressed**" as:

> **unjust:** "not just, contrary to justice or fairness";
>
> **oppressive:** "oppressing; tyrannical; difficult to endure"; and,
>
> **oppressed:** "overwhelmed with superior weight or numbers or irresistible power; lie heavy on, weigh down (spirits, imagination, etc.); govern tyrannically, keep under by coercion, subject to continual cruelty or injustice".

431. **Black's Law Dictionary (4th Edition – 1957)** defines the terms "**oppression**" and "**unjust**" as:

> **oppression:** "the misdemeanor committed by a public officer, who under colour of his office, wrongfully inflicts upon any person any bodily harm, imprisonment, or other injury. 1 Russ. Crimes, 297; Steph. Dig. Crim. Law, 71. See U.S. v. Deaver, D.C.N.C., 14 F. 597. An act of cruelty, severity, unlawful exaction, or excessive use of authority. Ramsbacker v. Hohman, 80 Mont. 480, 261 P. 273, 276, an act of subjecting to cruel and unjust hardship; an act of domination. Baker v. Peck, 1 Cal. App. 2d 231, 36 P. 2d 404, 406."
>
> **unjust:** "contrary to right and justness, or to the enjoyment of his rights by another, or to the standards of conduct furnished by the laws. U.S. v. Ogelsby Grocery Co., D.C.Ga, 264 F. 691, 695; Komen v. City of St. Louis, 316 Mo. 9, 289, S. W. 838, 841.".

ii) <u>The General Case Law</u>

432. It is respectfully submitted that to determine whether conduct or events can be described as "unjust or oppressive" as a matter of Canadian law, one must look to the Canadian Constitution and, in particular, to the Canadian Charter of Rights and Freedoms and, even more particularly, to the "principles of fundamental justice". In ***Schmidt v. The Queen et al.*** **[1987] 33 C.C.C. (3d) 193 (S.C.C.)**, La Forest, J., at p. 14 said the following:

> "I should at the outset say that the surrender of a fugitive to a foreign country is subject to Charter scrutiny notwithstanding that such surrender primarily involves the exercise of executive ***[page214]*** discretion. In Operation Dismantle Inc. v. The Queen et al. (1985), 18 D.L.R. (4th) 481 at p. 491, [1985] 1 S.C.R. 441 at p. 455, 59 N.R. 1 at p. 15, Dickson J. (now C.J.C.), made it clear that "the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the Charter" and that even "disputes of a political or foreign policy nature may be properly cognizable by the courts" (p. 494 D.L.R., p. 459 S.C.R., p. 19 N.R.); see also Wilson J. at p. 498 D.L.R., p. 464 S.C.R., p. 25 N.R.
>
> I have no doubt either that in some circumstances the manner in which the foreign State will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. To make the point, I need only refer to a case that arose before the European Commission on Human Rights, Altun v. Germany (1983), 5 E.H.R.R. 611, where it was established that prosecution in the requesting country might involve the infliction of

> torture. Situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7. I might say, however, that in most cases, at least, judicial intervention should await the exercise of executive discretion. For the decision to surrender is that of the executive authorities, not the courts, and it should not be lightly assumed that they will overlook their duty to obey constitutional norms by surrendering an individual to a foreign country under circumstances where doing so would be fundamentally unjust."

Schmidt v. The Queen et al. **[1987] 33 C.C.C. (3d) 193 (S.C.C.)**, **at pp. 213 and 214.**

433. It is well settled that the principles of fundamental justice are not limited to procedural guarantees, but include substantive issues. The principles of fundamental justice are to be found in the basic tenets of our legal system, and their limits are for the Courts to develop within the acceptable sphere of judicial activity.

Reference re: Section 94(2) of the Motor Vehicle Act [1985] 2 S.C.R. 486 (S.C.C.) per Lamer, J. at pp. 512 – 513.

434. In the **Motor Vehicle Reference (supra)**, Lamer, J., (as he then was), articulated the following fundamental principle:

> "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the Charter of Rights."

Reference re: Section 94(2) of the Motor Vehicle Act [1985] 2 S.C.R. 486 (S.C.C.) per Lamer, J. at p. 492.

435. In ***Kindler v. Canada (Minister of Justice)*** **[1991] 2 S.C.R. 779 (S.C.C.)**, McLachlin, J. (as she then was), set out the test in extradition matters in relation to section 7 of the *Charter* and the criteria to be considered:

> "The test for whether an extradition law or action offends s. 7 of the Charter on account of the penalty which may be imposed in the

> requesting state, is whether the imposition of the penalty by the foreign state "sufficiently shocks" the Canadian conscience: Schmidt, per La Forest J., at p. 522. The fugitive must establish that he or she faces "a situation that is simply unacceptable": Allard, supra, at p. 572"….
>
> "Thus the reviewing court must consider the offence for which the penalty may be prescribed, as well as the nature of the justice system in the requesting jurisdiction and the safeguards and guarantees it affords the fugitive. Other considerations such as comity and security within Canada may also be relevant…"
>
> "…At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.
>
> In determining whether, bearing all these factors in mind, the extradition in question is "simply unacceptable", the judge must avoid imposing his or her own subjective views on the matter, and seek rather to objectively assess the attitudes of Canadians on the issue of whether the fugitive is facing a situation which is shocking and fundamentally unacceptable to our society."

Kindler v. Canada (Minister of Justice) **[1991] 2 S.C.R. 779 (S.C.C.) at p. 55.**

436. LaForest, J., while indicating substantial agreement with the judgment of McLachlin, J. (as she then was), went on to give his own reasons in part as follows:

> "In determining this question McLachlin J. rightly recognizes that the values emanating from s. 12 play an important role in defining fundamental justice in this context. Accordingly, this Court has held that extradition must be refused if surrender would place the fugitive in a position that is **so unacceptable as to "shock the conscience"**; see Canada v. Schmidt, [1987] 1 S.C.R. 500. [emphasis added]
>
> "……And it must be emphasized that we are trying to *assess the public conscience, not in relation to the execution of the death penalty in Canada, but in regard to the extradition of an individual under circumstances where the death penalty might be imposed in*

> *another country*. I should perhaps note that I do not think the courts should determine unacceptability in terms of *statistical measurements* of approval or disapproval by the public at large, but it is fair to say that they *afford some insight into the public values of the community*. For a similar approach, see Laskin C.J.'s reasons in Miller v. The Queen, [1977] 2 S.C.R. 680. These reasons have been of considerable influence in defining "cruel and unusual punishment" under the Charter; see R. v. Smith, [1987] 1 S.C.R. 1045; R. v. Lyons, [1987] 2 S.C.R. 309."
>
> ***Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779 (S.C.C.) at p. 10.**

437. **The Minister of Justice v. Jamieson** is an example of a case in which these principles and criteria were applied in Canada involving the United States of America. The Supreme Court of Canada in March of 1996 allowed an appeal from the judgment of the Court of Appeal of Quebec essentially for the reasons given be Baudouin J.A., who had dissented below.

***Minister of Justice v. Jamieson* [1996] 104 C.C.C. (3d) 575 (S.C.C.).**

438. Mr. Jamieson was a 26 year old who had sold 273 grams of a mixture containing cocaine to an undercover police officer in the State of Michigan in the U.S.A. in 1986. He was facing 20 to 30 years imprisonment in the State of Michigan for trafficking some 8 years before in roughly 10 ounces of the mixture. While the legislation provided for possible deviation where there were "substantial and compelling" reasons to do so, whatever sentence imposed would be without parole. He was ordered surrendered initially and proceedings to quash the committal were dismissed in superior court and on appeal, although Proulx J.A. dissented. The Supreme Court of Canada refused leave to appeal. In 1992, the then Minister of Justice, the Honourable A. Kim Campbell, authorized his surrender. His petition to quash that decision was denied but his appeal to the Quebec Court of Appeal was allowed with Baudouin J.A. dissenting.

***United States of America v. Jamieson* (1994) 93 C.C.C. (3d) 265 (Que. C.A.) at pp. 270 – 271.**

439. There were further aggravating facts in the case. Mr. Jamieson had conducted the transaction in the basement of his parents' home along with an accomplice, David Schultz. He sold $20,000 worth of the cocaine mixture to the undercover officer. After his arrest, a search of the

premises led to the seizure of additional quantities of cocaine, 2 lbs of marijuana, scales and 3 loaded weapons. After being admitted to bail, he absconded. He also admitted to the police that he had been trafficking in cocaine for 2 years.

United States of America v. Jamieson **(1994) 93 C.C.C. (3d) 265 (Que. C.A.) at p. 269 and p. 272.**

440. The co-accused, Schultz, was convicted and originally sentenced to 20 – 30 years imprisonment. When he was sentenced, there was no possibility of deviation from the mandatory minimum of 20 years. He appealed and, while his conviction was affirmed, he was remanded for re-sentencing because of amendments to the legislation subsequent to his conviction. These amendments reduced the minimum from 20 years to 10 and authorized sentencing judges to impose lesser sentences in the presence of substantial and compelling reasons for deviating from the mandatory minimum. The Court of Appeal authorized the sentencing judge to apply to the deviation and that decision was affirmed on appeal to the Michigan Supreme Court. Upon rehearing, the judge applied the deviation provision and imposed a sentence of either 4 to 30 years or 4 to 10 years. Schultz was given credit for the time already served in custody (1,290 days) and was apparently released soon after re-sentencing, having served 4 years.

United States of America v. Jamieson **(1994) 93 C.C.C. (3d) 265 (Que. C.A.) at pp. 271 – 272.**

441. The Minister of Justice, after studying the record and considering extensive written submissions, as well as a 2 hour personal meeting with Jamieson's counsel, decided to order his surrender to the American authorities for trial. In her decision, the Minister noted that Mr. Jamieson's position was supported by the decision of Proulx, J.A. in the Court of Appeal of Quebec. She also noted that a possibility had been broached that she could seek, on a discretionary basis, an assurance from the U.S. authorities to avoid the imposition of the 20 year mandatory minimum. She expressly addressed whether or not his surrender would violate section 7 of the *Charter*. In so doing, she expressly reviewed the decision in **Kindler**. There was no question about Mr. Jamieson's involvement in an illegal transaction and that it was planned, calculated and involved a hard drug. She noted that while he was not a seasoned criminal, it would have been "overstating the case to consider his involvement as one mistake in an otherwise exemplary life". He voluntarily chose to embark on cocaine trafficking. She noted drug trafficking to be a major source of criminal conduct and a very serious social problem in North America. The problem was apparently particularly serious in Detroit, Michigan. While

agreeing that a 20 year minimum would surpass any Canadian sentence for a similar offence, she did not feel that that factor alone could determine the constitutionality of his surrender. She said that previous Ministers of Justice and the Government of Canada had determined that the administration of criminal justice in the United States was sufficiently similar to our concepts of justice and fairness to warrant maintaining the existing Treaty held that Canada had confidence in the body of criminal law and the manner in which it was administered in the United States and that Mr. Jamieson would have the same opportunity, along with various appeals and other Constitutional safeguards. She noted that Mr. Jamieson was an American citizen who had committed a serious crime in a State whose legislature had democratically decided to respond to a grave problem of drug criminality by the imposition of stiff sentences. She said that it would be unacceptable to refuse extradition because Canada's approach to the problem was different, especially where the magnitude of the problem in Michigan was also different. She also noted that the majority of the Quebec Court of Appeal had concluded that the penalties were harsh but "not entirely arbitrary". After referring to the fact that Canada is a party to two multilateral conventions, namely the Single Convention on Narcotic Drugs and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the latter of which enhanced Canada's commitment to extradition of those charged with drug offences, she finally concluded that it was a matter of public policy and serious adverse consequences would flow from granting refuge to a person accused of a drug crime as persons could simply escape exposure to minimum penalties by fleeing to Canada and Canada would end up becoming a safe haven for such criminals. Such a situation, she said, was simply unacceptable.

United States of America v. Jamieson **(1994) 93 C.C.C. (3d) 265 (Que. C.A.) at pp. 273 – 275.**

442. Jamieson argued that his surrender would be contrary to section 7 of the *Charter* in light of section 12, namely the prohibition against cruel and unusual treatment or punishment. In other words, he focused solely on the "gross disproportionality" aspect of the sentence. The violation of other "principles of fundamental justice" were not asserted. Fish, J.A. with whom Beauregard, J.A. concurred, would have allowed the appeal on the basis of his finding that the average Canadian would find it shocking for Canada, pursuant to its treaty obligations, but bearing in mind its Constitutional requirements, to surrender Mr. Jamieson because he faced a punishment that was so grossly disproportionate as to "outrage the public conscience or be degrading to human dignity" following **R. v. Smith (supra)**. He also held that the Minister's decision did "offend the Canadian sense of what is fair, right and just", bearing in mind the criteria

referred to in **Kindler (supra)**.

United States of America v. Jamieson **(1994) 93 C.C.C. (3d) 265 (Que. C.A.) at p. 276.**

443. Fish, J.A. reviewed the decision of the Supreme Court of Canada in **Schmidt (supra)** and concluded that the situation faced by Mr. Jamieson upon extradition was "shocking and fundamentally unacceptable to our society" within the meaning of that case. The mandatory minimum of 20 years would not pass Constitutional muster based on **Smith (supra)** and that applying the criteria to the case it would violate section 7 of the Charter, notwithstanding the foreign justice system and considerations of comity and security and the due latitude and discretion vested in the Minister of Justice. In his view, the appellant stood no chance of establishing a "substantial and compelling reason" for departure from the statutory, mandatory minimum. He extensively reviewed the U.S. case law in that regard. He was of the view that a majority of Canadians, that is reasonably well informed Canadians, would consider that the situation facing Jamieson would shock the conscience and be simply unacceptable. He noted that Michigan alone among the 50 States in the United States of America that at that time provided for such harsh punishment. Notwithstanding that the U.S. law in question was democratically enacted and enforced by a legal system that he found similar to our own, he did not feel that those important factors bore on the length of the minimum sentence and on its mandatory nature or its truly unusual character. He would not have allowed Jamieson's surrender.

United States of America v. Jamieson **(1994) 93 C.C.C. (3d) 265 (Que. C.A.) at pp. 270 – 286.**

444. Baudouin, J. A., in dissent, took a different view. He said that he could not accept the conclusion of the majority "in this specific case". In his view, the crux of the problem was not the very severe Michigan State law and its reflection of a repressive philosophy that would probably be considered outdated in our country. He noted that the administrative decision under review involved considerations concerning the respective Treaties entered into by Canada and the fear of seeing criminals flood into Canada simply because the law in their own State was particularly severe. He emphasized that while the sentence was severe, the evidence indicated that the State of Michigan had a particularly serious problem with hard drugs and noted that the law was enacted by democratically elected persons that had based their policy of repression on a strict philosophy of

societal self-defence. He concluded that the sentence was not in and of itself, objectively speaking, arbitrary or capricious because it was determined in function of the quantity of the drug trafficked and the type of drug involved. He noted the maximum sentence and the possibility of deviation and what had occurred to the accomplice, Schultz. On reviewing the facts, he noted:

> "We are, therefore, not here faced with the case of a sentence of 20 to 30 years for possession of a mere marijuana cigarette".

He also considered the U.S. judicial system as being relatively similar to Canada's with little fear that Mr. Jamieson would not be able to properly defend himself and have the benefit of the procedural and substantive safeguards offered by the American legal system. He said further:

> "The issue is not to extol the virtues of our own system (much more liberal, it goes without saying), nor to put on trial the American system (very repressive) but only to decide whether the law and the justice system which will be applied to the person who will be extradited are unacceptable to our conscience."

Because this was a review of an administrative decision of the highest level, he could not convince himself that the tests laid down under the jurisprudence to refuse extradition had been met.

United States of America v. Jamieson **(1994) 93 C.C.C. (3d) 265 (Que. C.A.) at pp. 268 – 270.**

iii) <u>The *Charter* and the Principles of Fundamental Justice in Issue</u>

445. **Section 7** of the *Charter* provides as follows:

> **s. 7** "Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".
>
> **Section 7, *Canadian Charter of Rights and Freedoms***

446. It is respectfully submitted that the "principles of fundamental justice" that require consideration in the circumstances of this case are as follows:

a) The right to make full answer and defence.

Sections 7 and 11(d), *Canadian Charter of Rights and Freedoms;*

b) The right to an independent tribunal

Sections 7 and 11(d), *Canadian Charter of Rights and Freedoms;*

c) The "harm principle"

Section 7, ***Canadian Charter of Rights and Freedoms;***

d) The principle of "proportionality"

Section 7, *Canadian Charter of Rights and Freedoms;*

e) The right to be free from cruel and unusual treatment or punishment

Section 12, *Canadian Charter of Rights and Freedoms.*

a) <u>The Right to Full Answer and Defence</u>

447. A provision in a statute which denies a defendant the right to present a full and fair defence has been held to violate **section 7** because it violated the principles of fundamental justice.

Sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms;

***R. v. Seaboyer (sub nom R. v. Gayme)* [1991] 66 C.C.C. (3d) 321 (S.C.C.);**

***R. v. Rose* [1998] 3 S.C.R. 262; 129 C.C.C. (3d) 449 (S.C.C.);**

***R. v. Dersch et al.* [1990] 60 C.C.C. (3d) 132 (S.C.C.);**

***Stinchcombe v. The Queen* [1991] 68 C.C.C. (3d) 1 (S.C.C).**

b) <u>The Right to an Independent Tribunal</u>

448. **Section 11(d)** of the ***Canadian Charter of Rights and Freedoms*** provides that adjudication, where liberty is threatened, is to be conducted

by an "independent" and impartial tribunal. During the **7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders** held at Milan from August 26 – September 6, 1985, the **United Nations Congress** adopted the "**Basic principles on the independence of the judiciary**" and these basic principles were endorsed by the general assembly of the **United Nations in Resolution 40/32** on November 29, 1985, in **Resolution 40/146** on December 13, 1985. The preamble to the principles refers to the **Universal Declaration of Human Rights** and how it enshrines, among other things, the right to a fair hearing by competent, independent and impartial tribunal established by law. It also refers to the **International Covenants on Economic, Social and Cultural Rights** and **on Civil and Political Rights**, which guarantee the exercise of those rights. The "**Basic principles on the independence of the judiciary**" comprise 20 basic principles and the first 7 deal with the "independence" of the judiciary. The first principle requires such independence of the judiciary to be guaranteed by the State and enshrined in its constitution or law and makes it the duty of all government and other institutions to respect and observe the independence of the judiciary. Principles 2 – 4 provide specifically as follows:

> "2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, **without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, <u>from any quarter</u> or for any reason**.
>
> 3) The judiciary shall have **jurisdiction** over all the issues of a judicial nature and shall have **exclusive authority** to decide whether an issue submitted for its decision is within its competence as defined by law.
>
> 4) There **shall not be any inappropriate or unwarranted interference with the judicial process**, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."

"Legislative Facts", para. 229 at pp. 120 - 121, and paras. 232 and 233 at pp. 150 - 152.

c) <u>The "Harm Principle"</u>

449. Recently, the British Columbia Court of Appeal accepted that the "harm principle" was a "principle of fundamental justice" in Canada. In ***R. v.***

Malmo-Levine; R. v. Caine, the Court of Appeal reviewed the common law, Law Reform Commissions, the Federalism cases, and Charter litigation, and concluded that the "harm principle" was indeed a principle of fundamental justice within the meaning of **section 7** of the *Charter*. The Court found it to be a legal principle that was concise and that there was a consensus among reasonable people that it is vital to Canada's system of justice. The Court said at paragraph 134:

> "Indeed, I think that it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others".

The Ontario Court of Appeal agreed with this decision in its recent decision in ***R. v. Clay***, **([2000] O.J. No. 2788 (Ont. C.A.).) (infra)**

***R. v. Malmo-Levine; R. v. Caine* 2000 BCCA 335 at para. 134;**

***R. v. Clay,* [2000] O.J. No. 2788 (Ont. C.A.).**

d) <u>The "Proportionality" Principle</u>

450. In September of 1996, the Parliament of Canada passed **Bill C-41** into law bringing into force a new sentencing regime that now comprises ***Part XXIII – Sentencing*** in the ***Criminal Code of Canada***. These amendments set out for the first time in Canadian law the "purpose and principles of sentencing (**s. 718**), the fundamental principle (**s. 718.1**) that "<u>a sentence must be proportionate to the gravity of the offence and the degree responsibility of the offender</u>" and certain other sentencing principles (**s.718.2**) including:

> **d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and,
>
> **e)** all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

***Criminal Code of Canada,* Part XXIII – s. 718 – 718.2.**

451. Reflecting on the impact of these amendments, Southin, J.A., in ***R. v. Deen*** [1997] B.C.J. No. 2657, said on behalf of the British Columbia Court of Appeal that these amendments indicated that "….Parliament is of the

opinion that prison sentences are not necessarily the best way to deter crime and prevent recidivism. (para. 23)," and that, what was a fit sentence in 1995 is not necessarily a fit sentence in 1997 in light of Parliament's new approach (para. 26).

R. v. Deen **[1997] B.C.J. No. 2657 (B.C.C.A.) at paras. 23 and 26.**

452. **Section 718.1** which contains the **fundamental principle of sentencing**, namely the "**principle of proportionality**" is a "principle of fundamental justice". In this regard, see the judgment of Lamer, C.J.C. (as he then was) in ***R. v. M. (C.A.)*** [1996] 105 C.C.C. (3d) 327 **(**S.C.C.)at pp. 348 – 349. At p. 349, Lamer C.J.C. speaking for the Court said:

> "Within broader parameters, the principle of proportionality expresses itself as a constitutional obligation. As this court has recognized on numerous occasions, a legislative or judicial sentence that is grossly disproportionate, in the sense that it is so excessive as to outrage standards of decency, will violate the constitutional prohibition against cruel and unusual punishment under s. 12 of the Charter: see Smith, supra, at pp. 138-9; R. v. Luxton (1990), 58 C.C.C. (3d) 449 at p. 457, [1990] 2 S.C.R. 711, 79 C.R. (3d) 193; R. v. Goltz (1991), 67 C.C.C. (3d) 481 at pp. 491-2, [1991] 3 S.C.R. 485, 8 C.R. (4th) 82.".

R. v. M. (C.A.) **[1996] 105 C.C.C. (3d) 327 (S.C.C.) at paras. 40 and 41.**

453. With respect to the "**principle of proportionality**" generally, the Court said:

> "In both such circumstances, notwithstanding the lack of any explicit statutory ceiling on numerical sentences, Canadian courts have generally refrained from exploring whether there is indeed a limit on fixed-term sentences under the Code. Rather, guided by the legal obligation that a term of imprisonment be "just and appropriate" under the circumstances, courts have generally avoided imposing excessively harsh and onerous sentences which might test the potential legal ceilings governing the imposition of sentence. It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender. As Wilson J. expressed in her concurring judgment in Reference re: Section 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 at p. 325, 24 D.L.R. (4^{th}) 536, [1875] 2 S.C.R. 486:

> "It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel confidence in the fairness and rationality of the system."
>
> Cory J. similarly acknowledged the importance of "the principle of proportionality" in speaking for the court in R. v. M. (J.J.) (1993), 81 C.C.C. (3d) 487 at p. 494, [1993] 2 S.C.R. 431, 20 C.R. (4th) 295, noting that "[i]t is true that for both adults and minors the sentence must be proportional to the offence committed". Indeed, the principle of proportionality in punishment is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may only be imposed on those actors who possess a morally culpable state of mind. In discussing the constitutional requirement of fault for murder in R. v. Martineau (1990), 58 C.C.C. (3d) 353 at p. 360, [1990] 2 S.C.R. 633, 79 C.R. (3d) 129, I noted the related principle that "punishment must be proportionate to the moral blameworthiness of the offender", and that "those causing harm intentionally [should] be punished more severely than those causing harm unintentionally". On the principle of proportionality generally, see R. v. Wilmott, [1967] 1 C.C.C. 171 at pp. 178-9, 58 D.L.R. (2d) 33, 49 C.R. 22 (Ont. C.A.); Sentencing Reform: A Canadian Approach, supra, at p. 154."

R. v. M. (C.A.) **[1996] 105 C.C.C. (3d) 327 (S.C.C.) at para. 40.**

454. Indeed, the Supreme Court of Canada has viewed mandatory minimum sentences with Constitutional suspicion in light of **section 12** of the ***Canadian Charter of Rights and Freedoms.*** In ***R. v. Smith***, the Court struck down the mandatory minimum 7 years for importing cannabis into Canada in part because of a violation of the proportionality principle and, hence, the principles of fundamental justice, but particularly because the penalty could have resulted in a violation of **section 12**, namely the imposition of cruel and unusual treatment or punishment, in itself also a principle of fundamental justice, precluding gross disproportionality.

R. v. Smith **[1987] 34 CCC (3d) 97 (SCC).**

455. Consequently, there are very few mandatory minimum sentences legislated in Canada. Apart from 1st and 2nd degree murder, they relate primarily to firearms offences and the use of firearms in the commission of

offences and to second and third convictions for certain types of motor vehicle offences, such as impaired driving. Similarly, there are no sentencing guidelines in Canada as there are in the United States and, consequently, the sentencing process in Canada requires the judge to impose a fit sentence that is proportionate between the offence and the offender and it is the judge who exercises broad discretion in the individual circumstances of the case and not the prosecutor or the probation officer, as in the United States under Federal sentencing guidelines. It can be said that the Canadian criminal justice system is substantially in compliance with the "**Basic principles on the independence of the judiciary**" adopted by the United Nations in 1985, whereas this cannot be said for the United States of America. This is a major dissimilarity between our systems of criminal justice in relation to drug prohibition.

***R. v. M. (C.A.)* [1996] 105 C.C.C. (3d) 327 (S.C.C.);**

"Legislative Facts", Part III, (j), (ii), paras. 232 and 233.

456. In **Ex Parte Bennett** (1974) 17 C.C.C. (2d) 274, Mr. Justice Grant of the Ontario High Court of Justice in a fugitive offender case quoted with approval from **G. V. La Forest** in his book **Extradition to and from Canada** (1961) at p. 104 where he said, on the question of the seriousness of the charge, as follows:

> "The question whether a man should be surrendered from Canada should depend primarily on the seriousness with which the crime is regarded here, not in the foreign country:"

Ex Parte Bennett (1974) 17 C.C.C. (2d) 274 (Ont. H.C.) at p. 4.

457. In order to assess proportionality, it is essential to have regard to the nature of the offence and how it is viewed in Canada in terms of "seriousness" as well as the sentences or punishment customarily handed out in Canada in conjunction with a comparison to those threatened by the United States of America in the event of surrender pursuant to the extradition request. It is submitted that if the U.S. criminal justice procedure and sentence violate Canadian "principles of fundamental justice" in that the trial procedures to be followed may well deny full answer and defence, the penalties in the U.S.A. may well violate the "principle of proportionality" and probably the prohibition against the imposition of cruel and unusual treatment or punishment contrary to section 12 of the ***Canadian Charter of Rights and Freedoms***, then it would be "unjust" and additionally "oppressive", in those circumstances, to make the order of surrender to the United States of America.

458. In Canada, the maximum penalty for being a principal or a party to producing (cultivating) marijuana or conspiring to do so is 7 years – 3 years less than the U.S. minimum. There is no minimum in Canada.

Section 7, *Controlled Drugs and Substances Act*, Chapter C-38.8 – (1996, c. 19).

459. In the recent decision of the Ontario Court of Appeal in ***R. v. Parker***, a unanimous Court held that the current law prohibiting the possession of marijuana in Canada was unconstitutional in that it did not enable a patient to access medical marijuana. The Court gave the Federal Government one year within which to correct this situation. The Government has apparently decided not to seek leave to appeal this judgment to the Supreme Court of Canada and, consequently, a system for the use of marijuana for medical purposes will be in place in Canada by July 31, 2001.

R. v. Parker **(July 31, 2000) No. C28732 (Ont. C.A.);**

"Legislative Facts", Part III, subsection iii and Part V, subsection ii.

460. On June 2, 2000, all three members of the British Columbia Court of Appeal in **R. v. Malmo-Levine**; **R. v. Caine** concluded that the apprehension of a risk of harm to the public in Canada from the possession and use of marijuana was not large and, was not serious, significant or substantial. Two members of the Court described the risk as more than trivial or insignificant, thereby permitting Parliament to act and the Court to defer to Parliament's wisdom on the level of risk. Three members of the Ontario Court of Appeal subsequently agreed with this assessment in **R. v. Clay**, decided July 31, 2000. The dissenting member of the British Columbia Court of Appeal, Prowse, J.A., held that before the Government threatens a person's liberty with penal sanctions, the risk of harm to the public would have to be a serious, significant or substantial one. In other words, we do not view marijuana offences as serious matters or matters that present a serious risk to the public.

R. v. Malmo-Levine; R. v. Caine **2000 BCCA 335 (B.C.C.A.);**

R. v. Clay, **[2000] O.J. No. 2788 (Ont. C.A.).**

e) <u>The Right to be Free from Cruel and Unusual Treatment or Punishment</u>

461. In Canada, the Supreme Court of Canada in ***R. v. Smith*** (1987) 34 C.C.C. (3d) 97 (S.C.C.) held that the only mandatory minimum penalty that existed in our law, namely a 7 year mandatory minimum for the importation or exportation of any drug, contrary to section 5 of the then *Narcotic Control Act*, was unconstitutional. In analyzing whether or not the mandatory minimum violated the prohibition against the imposition of cruel and unusual treatment or punishment, contrary to **section 12** of the ***Canadian Charter of Rights and Freedoms***, the Court referred to **section 10** of the **English *Bill of Rights*** of **1688 (U.K.), c.2**, **article 7** of the **International Covenant on Civil and Political Rights (1966)**, to which Canada acceded in 1976, **article 3** of the **European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)**, **article 5** of the **Universal Declaration of Human Rights (1948)** and our own **Canadian Bill of Rights** (**1960)**, all of which contain a similar prohibition. The Court also reviewed at length all of the Canadian jurisprudence under the **Canadian Bill of Rights** and then went on to examine the meaning of **section 12** of the Charter and its Constitutional context. The Court stated that **section 12** governs the quality of the punishment and the effect that the punishment may have on the person on whom it is imposed. The effect of the punishment must not be grossly disproportionate to what would have been appropriate. In other words, under **section 12** of the Charter, the test is one of "gross disproportionality" because it is aimed at punishments that are more than merely excessive. Those that are merely excessive and, therefore, still disproportionate are subject to scrutiny under **section 7** of the Charter involving "proportionality" as a principle of fundamental justice and under the provisions available for the determination of fit sentences by appellate review through the provisions of the Criminal Code of Canada.

R. v. Smith **(1987) 34 C.C.C. (3d) 97 (S.C.C.) at pp. 138 – 139.**

462. To assess whether or not a particular sentence is "grossly disproportionate" the Court said that the following matters must be first considered:

(a) The gravity of the offence;

(b) The personal characteristics of the offender;

(c) The particular circumstances of the case.

These matters are considered to determine what range of sentence would have been appropriate to punish, rehabilitate or deter the particular offender or to protect the public from the particular offender. The question of deterrence of other potential offenders takes place at a later stage in the inquiry. The first stage requires determining whether the resulting sentence would be grossly disproportionate to what the particular offender deserves. When the legislature has enacted a provision that provides for a grossly disproportionate sentence, then the Court must also look at the purpose of the legislation and see if it overrides the factors affecting the individual offender in order to achieve some important societal objective.

R. v. Smith **(1987) 34 C.C.C. (3d) 97 (S.C.C.) at p. 139.**

463. In addition, the Court said that one must measure the effect of the sentence actually imposed. If it is grossly disproportionate to what would have been appropriate then it violates **section 12** of the *Charter*. The ”effect” of the sentence is a composite of many factors and is not limited to the quantum or the duration of the sentence but includes its nature and the conditions under which it will be applied. While length and nature may in certain circumstances be enough, in other circumstances it is a combination of factors which raises the matter to the level of a violation.

R. v. Smith **(1987) 34 C.C.C. (3d) 97 (S.C.C.) at p. 139;**

464. In analyzing **section 5(2)** of the ***Narcotic Control Act*** specifically, the Court pointed out that it was not simply because it was a mandatory minimum that the prohibition against cruel and unusual treatment or punishment was violated. The mandatory minimum was grossly disproportionate when examined in light of the wide net cast by **section 5(1)** in that it covered numerous substances of varying degrees of dangerousness and totally disregarded the quantity of the drug imported. Similarly, the purpose of the importation, whether for personal use or to traffic, whether or not the person had a previous record for offences of a similar nature or gravity, were all excluded from consideration. Thus, the law inevitably would result in some cases that would lead to an imposition of a term of imprisonment that was grossly disproportionate. It was the certainty, not just the potential, that offended **section 12** of the *Charter*. As the Court pointed out, even in the absence of the mandatory minimum, the section still had the potential to impose cruel and unusual punishment but only if a judge chose to do so by, for example, imposing “seven years or more on the ‘small offender’”. The effect of the mandatory minimum was to insert the certainty that in some cases a conviction for the offence would result in a violation of **section 12** by the imposition of the penalty.

R. v. Smith **(1987) 34 C.C.C. (3d) 97 (S.C.C.) at p. 143.**

465. The above factors established a *prima facie* violation of section 12, leading the Court to go on to consider whether or not the law could be saved under **section 1** of the *Charter*. The Court found that the objective of fighting against the importation and trafficking of "hard drugs" was without a doubt an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom. The Court also found that the means chosen was rational, thereby meeting the first prong of the "proportionality test". However, the Crown's attempt to justify the law failed the second prong of the "proportionality test" in that it did more than minimally impair the rights protected by **section 12**. The Court said "we do not need to sentence the small offenders to 7 years in prison in order to deter the serious offender". The net did not need to be so widely cast and the mandatory minimum could have been limited to the importation of certain quantities, certain specific narcotics, to repeat offenders or to a combination of these factors. Additionally, the Court noted that the mandatory minimum gave the Crown an unfair advantage in plea bargaining, causing the accused to be more likely to plead guilty to a lesser or included offence. Consequently, the minimum imprisonment provided for could not be justified under **section 1**. In conclusion, the Court also referred to the report of the **Canadian Sentencing Commission** entitled "**Sentencing Reform: A Canadian Approach, 1987**" in which that Commission recommended the abolition of mandatory minimum penalties for all offences except murder and high treason because existing mandatory minimum "served no purpose that can compensate for the disadvantages resulting from their continued existence".

"Sentencing Reform: a Canadian Approach", 1987, Canadian Sentencing Commission, ***R. v. Smith*** **(1987) 34 C.C.C. (3d) 97 (S.C.C.) at pp. 146 – 147;**

iv) <u>Ranges of Sentence – Marijuana Generally</u>

466. Leaving aside substantial importations and conspiracies involving large amounts of marijuana or hashish, the range of sentence for cultivation of marijuana in British Columbia is anywhere from an absolute discharge to up to 2 years less a day, provincial time. The high end of that range is rarely given to a first offender. Most first offenders would receive a substantial fine plus probation, 3 to 6 months incarceration with a recommendation that it be served on the Electronic Monitoring Program, or otherwise imposed as a conditional sentence pursuant to **section 742**

of the *Criminal Code*. Even large marijuana grow operations involving several thousand plants have resulted in conditional sentences. Most convictions for trafficking or possession for the purpose of trafficking of marijuana fall within the same range unless the amounts are very substantial.

Section 742, *Criminal Code of Canada*

v) <u>Range – Medical Marijuana</u>

467. With respect to medical marijuana cases, the case law is summarized in the "**Legislative Facts**" in **Part V, iii (b)** at pp. 229 –243. Many of these decisions predate **Parker (supra)** in the Ontario Court of Appeal which held the law to be unconstitutional, including the **section 56** exemption process because it failed to comply with "principles of fundamental justice". The federal Crown has elected not to seek leave to appeal that decision and, consequently, medical marijuana will be available for medically approved patients on or before July 31, 2001.

R. v. Parker **(July 31, 2000) No. C28732 (Ont. C.A.);**

"Legislative Facts", Part V, iii(b), pp. 229 – 243.

468. The British Columbia Court of Appeal in ***R. v. Lieph*** (1990) granted a conditional discharge to a man who was growing and possessing marijuana for a psoriasis condition. In ***R. v. Czolowski*** (1998) a conditional discharge was granted to a person who grew and used marijuana for his glaucoma. Similar sentences have been awarded to medical growers and users for polymyalgia rheumatica, and an absolute discharge was granted to a woman who grew it and used it for fybromyalgia. Approximately 77 medical marijuana users now have **section 56 exemptions** from the Minister of Health, including **Jim Wakeford** who uses it for HIV and AIDS. This leniency is extended to caregivers and middlemen/wholesalers for "Compassion Clubs", as well as growers for Compassion Clubs. In the case of **Richardson** (2000), a suspended sentence was given for 6 kilograms of marijuana in the trunk of a vehicle along with $6,000 in cash that was being held by him for the **B.C. Compassion Club Society**. In another case, **Slykerman** (2000), a man who grew and possessed it and provided some to the Compassion Club received a suspended sentence for 15 months. A major grower for the Compassion Club, **Bill Small** (2000), received an absolute discharge in the Supreme Court of British Columbia for his first offence and is appealing the $3,000 fine plus 12 months probation imposed by the Provincial Court for his second offence of growing for the Compassion

Club. A conditional discharge was recently granted in the case of **Kruse** (2000) who was growing marijuana for the **Universal Compassion Center** in Calgary, Alberta.

R. v. Lieph **[1990] B.C.D. Crim. Sent. 7408-01 (B.C.C.A.);**

R. v. Czolowski **(14 July 1998) No. 23347-01-D, Vancouver Registry (Prov. Ct. B.C.);**

R. v. Richardson (Jan. 26, 2000) North Van. 33558 (B.C. Prov. Crt.);

R. v. Slykerman **(March 1, 2000) Vancouver Registry No. 98973 (B.C. Prov. Ct.);**

R. v. Small **(March 10, 2000) Van. No. 103360-01-T (B.C. Prov. Crt.);**

R. v. Kruse **(31 May 2000) Nakusp Registry, No. 3189C (B.C. Prov. Ct.).**

469. Ultimately the seriousness of the crimes alleged against Ms. Boje should be gauged by the fact that when found in similar circumstances in Sechelt, British Columbia, in conjunction with **Mr. Small's** second operation, counsel for the Attorney General of Canada entered a stay of proceedings. In other words, while charges were laid, they were dropped. Arguably, in light of **Parker (supra)**, a *bona fide* medical grower, caregiver or medical user is involved in conduct that is non-criminal because it is unconstitutional to compel such persons to choose between their liberty and their health or the health of the patient they are assisting. It is submitted that such persons fall into the category referred to by Lamer, J. (as he then was) in the **Motor Vehicle Reference (supra)** as "a person who has not really done anything wrong" or as he said in **R. v. M. (C.A.) (supra)** are not "actors who possess a morally culpable state of mind". They do not cause harm intentionally or unintentionally - they do not cause harm at all. On the contrary, they are committed to reducing harm and, as such, are not "morally blameworthy". Certainly, this type of conduct is not regarded as serious in Canada and, arguably, given recent developments in relation to medical marijuana by our Federal Government, such conduct can be categorized as even less serious than the possession of a "mere marijuana cigarette" for recreational or non-medicinal purposes.

R. v. Parker **(July 31, 2000) No. C28732 (Ont. C.A.);**

R. v. M. (C.A.) **[1996] 105 C.C.C. (3d) 327 (S.C.C.);**

Reference re: Section 94(2) of the Motor Vehicle Act [1985] 2 S.C.R. 486 (S.C.C.).

B. Facts and Submissions

i) The Personal Characteristics of the Offender

470. Renee Boje, now of Roberts Creek, British Columbia, just turned 31. She was born on October 2, 1969, in Staten Island, New York. She is a citizen of the United States of America by birth. She is single, with no dependents. Her parents separated when she was 25 years old. Her father, David Boje, is a professor of business administration at the University of New Mexico. Her mother, Margaret Boje, works as a private nurse for children with AIDS and cancer in Staten Island, New York. She has 2 younger brothers, Jason, age 22 in Culver City, California and Raymond, 15, who is a student and lives with his mother on Staten Island.

471. Renee Boje attended high school in Culver City, Los Angeles, completing it in 1988. She went to Santa Monica Junior College in 1989. She obtained a Bachelor of Fine Arts from Loyola Marymount, Westchester, California in 1996. She has worked as a self-employed artist since graduating from college. Since coming to Canada in May of 1998, she has been unable to work because of her immigration status and has survived by doing volunteer work and on the donations and charity of others. She is in good health. She would like to remain in British Columbia, Canada, and become a Canadian citizen. She does not wish to ever return to the United States of America. She has diligently complied with all of her bail conditions, both in relation to her refugee status and her extradition status.

472. She has no prior criminal record or history of any kind whatsoever. After her arrest for the events that are the subject of the extradition proceedings and the subsequent dropping of the charges initially, she came to Canada on the advice of her then counsel, Kenneth Kahn. She came to British Columbia and to the Sunshine Coast. She was taken in by friends and associates in the “medical marijuana movement” and became involved in that movement resulting in her arrest on February 15, 1999, in Sechelt, British Columbia in a house in which there was a medical marijuana grow operation for the B.C. Compassion Club Society. The charges against her were dropped when William Small, the principle and a founder of the B.C. Compassion Club Society, pled guilty to the offence and received a fine plus probation.

ii. The Particular Circumstances of the Case

473. The particular circumstances of the case are set out in the "**Overview**" at paragraphs 1 – 10 of the "**Adjudicative Facts**" and thereafter in great detail summarizing the evidence adduced by both the Applicant, United States of America, and Ms. Boje before the Honourable Mr. Justice Catliff in the Supreme Court of British Columbia, during the judicial phases of the extradition proceedings.

"Adjudicative Facts", paras. 1 –10; paras. 11 – 74.

474. Essentially, Ms. Boje is charged as a minor party to the cultivation of a substantial amount of marijuana by Todd McCormick. He is now in solitary confinement in a U.S. Federal prison. He was assisted financially by the late Peter McWilliams, since deceased by choking on his own vomit as a result of nausea from his AIDS and cancer medications. He was not permitted, while on bail, to use marijuana as the only anti-nauseant that appeared to work for him and which was supported by his doctors. Mr. McCormick also suffered from cancer since the age of 2 with multiple recurrences throughout his life. After numerous surgical and other interventions and the use of substantial amounts of hard drugs to reduce the pain, Mr. McCormick found that the smoking of marijuana reduced his pain and enabled him to function reasonably normally. He had prescriptions and letters of authorization and recommendation from physicians for his use of marijuana. All of these events took place at a time after the passing of Proposition 215, a State referendum in the State of Californian which resulted in the passage of the *Compassionate Use Act* of 1996 which permitted patients authorized by their doctors to grown and use marijuana for medical purposes, with no limit on the number of plants. Mr. McCormick, with the assistance of Mr. McWilliams and others, was growing the plants for personal use and to determine the appropriate strains for appropriate illnesses and to write and publish a book on how to grow medical marijuana, since published on the internet.

"Adjudicative Facts", paras. 1 & 2, 11 – 74 and particularly 64(a) – (p) with respect to Mr. McCormick's medical condition;

Affidavit of Renee Boje, filed November 3, 1999, Appeal Book, Volume II, pp. 17 – 24, Exhibits "A" – "H";

Affidavit of Peter Durovic, sworn November 1, 1999, Exhibit "A".

475. Ms. Boje had met Mr. McCormick some 2 months before she was arrested. She was hired by Mr. McCormick to illustrate the proposed book as an artist. She was informed by Mr. McCormick and others as to his medical condition, the existence of his prescriptions and letters of support from physicians and the fact that what he was doing was lawful in the State of California under the *Compassionate Use Act* and that he had lawyers advising and supporting him. It is asserted that on July 29, 1997, Ms. Boje was seen by police surveillance over a 1 ½ hour period to move and water marijuana plants on the south side patio of the Bel Air mansion. It is asserted that upon her arrest, she admitted that she had been watering and moving marijuana plants and that she had been a regular visitor and helper to Mr. McCormick and that she believed that her actions were legal because what he was doing was for the purpose of medical research, because he had a prescription and letters of authorization and because of the *Compassionate Use Act*. It is asserted that she said she was paid a small amount for what she was doing but was willing to do it for free. Ms. Boje did not reside at the mansion but elsewhere in Los Angeles.

476. There is no evidence of Ms. Boje being involved in the distribution of marijuana or possessing it with such an intention, nor conspiring to do so. In this regard. The United States of America relies solely on the evidence of a Vancouver City police officer with no expertise in relation to medical marijuana and genetics in Canada or the U.S.A., who testified that an inference should be drawn that the marijuana was possessed for such distribution purposes simply because of the number of plants involved. This witness had never seen the plants and assumed that they were all female plants. She had seen no photographs and had no description other than the number and that there were several hundred clones. She knew that some people grew male plants for seeds. She was totally unfamiliar with both Canadian law and U.S. evidence with respect to the use of marijuana for medical purposes and the importance of different strains for different illnesses. Her opinions were based solely on the number of plants that she was told were present and she did not consider any other alternatives. She was not even aware of the *Compassionate Use Act* in the State of California. Her evidence was for the first time, based totally on a hypothetical question and her hypotheses and calculations were based solely on her experience in the Province of British Columbia.

"Adjudicative Facts", paras. 26 – 47.

477. Ms. Boje is charged with 2 out of 9 counts in the Indictment against all accused. The conspiracies are alleged to have commenced no later than

December of 1996 and continued to on or about December 14, 1997. It is asserted that Mr. McCormick hired Ms. Boje to assist with the cultivation and harvest of marijuana and compensated her with money or marijuana. Of the 182 overt acts alleged in furtherance of the conspiracy, apart from a general allegation against Ms. Boje and all other defendants in paragraph 99, the only specific reference and act alleged against her is the watering of the numerous plants on July 29, 1997 over a 1 ½ hour period.

"Adjudicative Facts", paras. 23 – 26.

478. There was evidence before the Court at the extradition hearing from Peter Durovic, a lawyer with an undergraduate degree in biochemistry and a doctorate degree in genetics from the University of British Columbia with respect to the results and findings of the **Institute of Medicine** study that was supported by the Executive Office of the President through the Office of the National Drug Control Policy and approved by the governing board of the National Research Council whose members were drawn from the Council of the National Academy of Sciences, the National Academy of Engineering and the Institute of Medicine. This report confirmed the existence of 66 cannabinoids in marijuana. Mr. Durovic deposed with respect to the nature of marijuana and how it is grown and how a breeder of marijuana strains, following the same vigorous scientific standards employed by Gregor Mendel, the father of classical genetics, the breeder would have to grow between 9,000 and 18,000 marijuana plants.

"Adjudicative Facts", paras. 65 – 71.

479. The evidence before the Court at the extradition proceedings also confirmed not only the existence of the *Compassionate Use Act* of 1966 in the State of California at the time of the alleged events but also that the States of Alaska, the District of Columbia, Oregon, Nevada, Washington and Arizona approved through similar State ballot initiatives the exemption of patients from State criminal penalties when they use marijuana for medicinal purposes. Details with respect to the laws and the development in these States and others that are ongoing were provided. The evidence clearly established a major political dispute between the U.S. Federal Government and the various States supporting the medical use of marijuana, including the various patients and their physicians and caregivers.

"Adjudicative Facts", para. 72(a) – (k).

480. The details of Mr. McWilliams and his background in the business of publishing, his medical situation and his treatment at the hands of the authorities was also detailed before the Court. After his initial arrest, he was denied his AIDS medication – which must be taken without fail 6 times a day, a regiment he had followed scrupulously for 28 months. This was denied him for 5 days. He was prevented from treating his life-threatening illness – a treatment approved by 4 physicians and 56.4% of the California electorate.

"Adjudicative Facts", para. 72(l)(i) – (xvi);

Affidavit of Peter Durovic, filed November 1, 1999, Appeal Book, Volume II, p. 94, Exhibit "L".

481. Subsequently, in the proceedings against McCormick and McWilliams on November 5, 1999, District Court Judge George King ruled that the "medical necessity" defense was not available to the defendants as a matter of law. This was because the U.S. *Controlled Substances Act* not only prohibits the use of marijuana but classifies it in Schedule 1 of that Act which means that Congress has explicitly determined that marijuana has no accepted medical use and no accepted safety for use under medical supervision. Consequently, the Court said that they could not assert the medical necessity defence as this would explicitly contradict a Congressional determination. The Government motion to preclude the defendants from asserting this defence and granted.

***USA Inc. v. Peter McWilliams, Todd McCormick, et al*, Memorandum and Order CR97-997(A)-GHK, U.S. District Court, Central District of California, Book of Authorities, Volume II, Tab 8;**

"Legislative Facts", Part IV, iii), c), para. 329(f).

482. In addition, the Court precluded the defendants from adducing any evidence with respect to the *Compassionate Use Act* or *Proposition 215*, their own medical conditions, their reliance upon the advice of counsel and the medical usefulness of marijuana. The Court ruled as follows:

> "In light of the Government's plan to dismiss its charges relating to intent to distribute, we need not decide the merits of the defendant's evidentiary proffers relating to Proposition 215, the defendant's medical conditions, their reliance on the advice of counsel and the medical usefulness of marijuana. We conclude that all of these proffers are irrelevant to the remaining charges of manufacturing marijuana".

***In the matter of the United States of America, Inc. v. Peter McWilliams, Todd McCormick, et al.,* (supra) pp. 3 – 4.**

483. In the result, Mr. McWilliams, because of his health condition, decided to take a plea bargain and to plead guilty to lesser offences that would get around the mandatory minimum in the discretion of prosecutor. He would face a penalty of up to 5 years imprisonment and there was a possibility that he would serve his sentence out of custody. However, his bail conditions prohibited him from using marijuana for medical purposes as recommended by his physician. He was required to submit to weekly urinalysis and had been told that if he failed, his mother's house would be seized. On June 14, 2000, Peter McWilliams died. He had apparently choked on his own vomit in his bathroom as a result of the nausea from his AIDS and cancer medications. Approximately one month later, the U.S. 9th Circuit Court of Appeals ordered the District Court to relax a previous injunction and to exempt patients who faced imminent harm and who have no effective legal alternative to marijuana use to be able to do so. While that ruling cleared the way for the Oakland Buyers Club to distribute marijuana for medical purposes to seriously ill patients, the decision was subsequently stayed by an emergency decision of the United States Supreme Court. The Supreme Court entered a temporary stay of the District Court Order pending further proceedings in the 9th Circuit Court of Appeals and further Order of the U.S.S.C.

"Adjudicative Facts", para. 73;

U.S.A. v. Oakland Cannabis Buyers Cooperative and Jeffrey Jones, U.S. Court of Appeals for the 9th Circuit, Sept. 13, 1999, case 98-16950, reversed by USSC on August 29, 2000, 58 U.S. 8/23/2000, Case Co. A145.

484. The defendant, Todd McCormick, also in an effort to avoid the mandatory minimums entered into a plea bargain that involved him entering a conditional plea to a lesser charge in the discretion of the prosecution. This would enable him to challenge the decision precluding his defences in the 9th Circuit Court of Appeal. It would mean, however, that he would be sentenced to 5 years imprisonment. He is now serving that sentence. When he sought a prescription from for Marinol to ease his pain, he was drug tested and his urinalysis proved positive for THC. Either the metabolites have lingered for a long time in his system as a result of using before coming to prison, or the test produced a false positive result, or Mr. McCormick was able to obtain marijuana while in a Federal prison. In the

result, he has been placed in solitary confinement, again without any medication for his chronic pain, here he continues to linger today.

Correspondence from Richard Cowan, dated October 16, 2000.

485. It is understood that all of the other defendants have struck plea bargains with the U.S. Federal Government. Efforts to obtain the details of these agreements from their counsel have been unsuccessful. It is believed that they have all agreed to keep silent on these matters and to testify against Ms. Boje if she is returned to the United States of America. They have entered into these agreements to avoid the mandatory minimum by pleading to lesser charges in the discretion of the District Attorney.

"Adjudicative Facts", para. 74.

iii) <u>The Gravity of the Offence</u>

486. The details of the specific offences charged against Ms. Boje and the others are contained in the "Adjudicative Facts" commencing at paragraph 16 and continuing through paragraph 26. She is essentially charged with conspiring to manufacture, distribute and possess marijuana with intent to distribute, manufacturing marijuana and aiding and abetting the manufacture of marijuana. The maximum penalty in the United States is life imprisonment, a $4 million dollar fine and a term of supervised release for 5 years. The minimum penalty, where 1,000 or more marijuana plants are grown, is, regardless of the weight, a mandatory minimum of 10 years for a first offenders and without eligibility for any form of parole during the entire term. In the second count, she is simply charged with manufacturing marijuana and aiding and abetting its manufacture and that offence carries the same penalties in the United States.

"Adjudicative Facts", paras. 16 – 22.

487. The equivalent offences in Canada are contained in **sections 5(2),** possession for the purpose of trafficking and **7(1),** production of a substance of the *Controlled Drugs and Substances Act* in conjunction with **section 21** (parties to an offence) and **465** (conspiracy), of our *Criminal Code of Canada*. The maximum penalty for an offence under **section 5(2)** of the *Controlled Drugs and Substance Act* is life imprisonment if the amount involved is over 3 kilograms. If under 3 kilograms, the maximum penalty is 5 years less a day. The maximum penalty for the production of cannabis (marijuana) is 7 years. There are no mandatory minimums. The presiding judge, depending upon the circumstances of the offence and the

offender, may impose a penalty in the Court's discretion ranging from an absolute discharge to the maximum provided. Part XXIII of the *Criminal Code* applies to the sentencing process.

Sections 5(2), 7(1) of the *Controlled Drugs and Substances Act* S.C. 1996, c.19*;*

Sections 21 and 465 of the *Criminal Code of Canada.*

488. Bearing in mind the facts alleged with respect to the circumstances of the offence and the background of the offender, the seriousness with which these crimes are regarded in Canada, particularly in medical marijuana circumstances, is reflected in the recent decisions of the Ontario Court of Appeal in **R. v. Parker.** There the Court held that it was unconstitutional in Canada for Parliament to prohibit the possession and use of a substance when a person wished to use it for a medical purpose and that it was wrong to force such persons to choose between their liberty and their health. In addition, the Court ruled that the **section 56** exemption process administered by the Minister of Health was also unconstitutional in that it did not comply with principles of fundamental justice. It provided for an absolute discretion without criteria as to whether an exemption should be granted or not. Some 77 persons are now exempt under that provision and able to possess and grow marijuana for their own medicinal use. The Federal Government has put out tenders for growers for a medical supply in Canada. The Government has chosen not to appeal the **Parker** decision and, consequently, in accordance with the terms of that judgment, a medical supply of marijuana is to be available by July 31st, 2001.

R. v. Parker **(July 31, 2000) No. C28732 (Ont. C.A.);**

Section 56, *Controlled Drugs and Substances Act*, supra.

489. The seriousness with which the crime is regarded in Canada, in the circumstances, is also reflected by the fact that the Attorney General of Canada directed a stay of proceedings in relation to Ms. Boje specifically when she was found and charged with participating in a similar, albeit smaller, medical grow operation in the Province of British Columbia.

R. v. Small **(March 10, 2000) Van. No. 103360-01-T (B.C. Prov. Crt.).**

490. Once again, the seriousness with which the crime is regarded in Canada is also reflected by the existence of Compassion Clubs as registered societies providing medical marijuana to thousands of patients who have prescriptions or letters from their doctors, including a significant number of the **section 56** exemptees. It is obvious that medical marijuana is being grown illicitly by individuals to supply these Compassion Clubs and that these Compassion Clubs are in the process of possessing marijuana for the purposes of distribution to medical patients. If Mr. McCormick and the late Mr. McWilliams were in British Columbia they would have been able, with the assistance of their physicians, to obtain medical marijuana and to use it on a regular basis without fear of interference by the police or other agents of the State. These activities are being carried on with the full knowledge of the police and other authorities, both municipal, provincial and federal, and with their tacit approval.

R. v. Richardson (Jan. 26, 2000) North Van. 33558 (B.C. Prov. Crt.);

R. v. Small (June 27, 2000) Van. CC991259 (B.C.S.C.).

491. Finally, the seriousness with which the offence is regarded here in Canada is also reflected by the granting of absolute and conditional discharges where permitted in relation to the cultivation of marijuana for one's own medical use or for the use of the Compassion Clubs and suspended sentences in relation to trafficking charges, where the discharge provisions are not available, in circumstances where the person is a wholesaler/middleman providing the marijuana to the Compassion Club. In other words, the Courts have imposed the least penalties available to them under the law in medical marijuana circumstances. No medical marijuana users or growers or caregivers have received sentences of imprisonment. At worst, fines and probations have been imposed.

The cases setting out these dispositions are at paras 446 – 469 supra.

iv) <u>The Criminal Justice System of the United States of America</u>

a) <u>The Denial of Full Answer and Defence</u>

492. As indicated above, the United States District Court of the Central District of California in the case of McWilliams and McCormick has expressly precluded the defendants from raising the medical necessity defence and directed counsel for the defendants that they were not to make any reference in whatever form to Proposition 215, the medical usefulness of

marijuana, the closed, single patient Investigative New Drug Program (IND), their reliance on the advice of counsel and the defendants' medical conditions. The Investigative New Drug Program (IND) is the one in which the U.S. Federal Government supplies marijuana to 8 patients each month for medical purposes and has been doing so since 1972. The Court followed a decision of the Court of Appeals of Minnesota in **State of Minnesota v. Gordon Leroy Hanson** (April 1, 1991) and declined to follow the cases of the **State of Washington v. Samuel Diana** (December 20, 1979), the **State of Florida v. Elvy Mussika** (December 28, 1988), and the case of **Kenneth Jenks v. The State of Florida** (June 13, (991). The decision is on appeal to the 9th Circuit pursuant to Mr. McCormick's conditional plea.

State of Minnesota v. Gordon Leroy Hanson**

W*ashington v. Diana*, Superior Court, Spokane Washington, March 4, 1981;

***Florida v. Musikka*, 17th Judicial Circuit, Broward County Florida, Case No. 68 4395 CFA 10, *The Florida Law Weekly*, 14 FL W 1 (Jan. 27, 1989);**

Kenneth Jenks v. The State of Florida, 582 So. 2d 676; 16 Fla. Law W. D 1601; [1991] FL-QL 1546.

493. It follows that, at present, if Ms. Boje was surrendered to the United States of America, the decision of Judge King remains the law in this case unless and until the 9th Circuit reverses. Consequently, she will be denied the opportunity to put forward the evidence about *Proposition 215* (the *Compassionate Use Act*), the medical condition of Mr. McCormick and Mr. McWilliams, their reliance on the advice of counsel and anything to do with the medical usefulness of marijuana, including references to the Government IND program. In other words, she will be precluded from making full answer and defence.

494. It is submitted that this amounts to a violation of the principles of fundamental justice in the section 11(d) aspect of section 7 of the *Canadian Charter of Rights and Freedoms.* It is submitted that the violation of "principles of fundamental justice" renders the proceedings as being contrary to justice and fairness and creates a situation that is "simply unacceptable" and "fundamentally unjust". It is submitted that such proceedings are "unjust or oppressive" within the meaning of section 44(1)(a) of the new *Extradition Act* and involves procedures that are so unacceptable that they offend the Canadian sense of what is fair, right and

just and amounts to a procedures that "shock the conscience" of ordinary Canadians, within the meaning given to those phrases by the Courts in considering the previous *Extradition Act* and procedure.

b) <u>The Lack of Independence of the Judiciary</u>

495. As submitted above, the **7th United Nations** Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in 1985 adopted the "**Basic principles on independence of the judiciary**". Portions of those basic principles have been set out at paragraph 448 above.

496. In Part II of the "Legislative Facts" document entitled the "**U.S. Criminal Justice System and the "Drug War" – circa 2000**", there is a section entitled "**The Lawyers and Judges Perspective**" and another one entitled "**The Police and Military Perspective**". These sections document disillusionment with the "War on Drugs" within law enforcement and the military, the defence bar and former prosecutors, two former U.S. Attorneys General and, most importantly, judges and particularly Federal court judges who see the issues from both sides. A prominent Seattle Defence Attorney describes the United States of America as having been "compromised, contaminated and corrupted by the war on drugs". He describes the Federal criminal justice system as "an insane, mindless, heartless, cruel car cursing, home seizing, family destroying monster out of control". He points to how Federal judges have been rendered toothless by legislative acts and appellate judicial decisions. He describes the Federal trial process as being coercive because of the powers that have now been given to the prosecutors. He says that it is rare for a Federal drug case to go to trial and that even the most active Federal defence attorneys only try 2 to 3 cases per year. The duty to disclose the case against the person is virtually non-existent until trial. Most of a defence attorney's time practicing in the Federal system is spent trying to make plea bargains to avoid the harsh results of the sentencing guidelines and the mandatory minimum terms of imprisonment. The prosecution determines what the charges will be and, hence, what the sentence will be within the guideline and thereafter the judge essentially rubberstamps the predetermined sentence. The evils he describes appear to reflect exactly the concerns expressed by the Supreme Court of Canada in **R. v. Smith (supra)** with respect to the unfair advantage given to the Crown in plea bargaining as a result of mandatory minimums resulting in accused persons pleading guilty to lesser or included offences to simply avoid the mandatory minimums.

"Pot Busts at, on (or Near) the Border", by Jeffrey Steinborn, May 18, 2000, Legislative Facts, Part III;

"Legislative Facts", Part II, paras. 135 – 140;

Smith v. The Queen [1987] 34 C.C.C. (3d) 97 (S.C.C.).

497. Significantly, many Federal judges have taken a stand against the mandatory minimums, sentencing guidelines and the Drug War. Apparently, over 86% of them are calling for the outright abolition of such minimum sentences. Some senior Federal judges have refused to hear drug cases because of their lack of discretion in sentencing and the lengthy sentences that they are mandatorily required to impose. The "**Voluntary Committee of Lawyers**" from 1927, created to repeal alcohol prohibition, has been revived in an effort to do the same with respect to the "Drug War". The members of this group consist of past presidents of the American Bar Association, former Attorneys General, senior judges, law professors, scientists, doctors and lawyers. In their dissents, speeches, letters and actions, they make the point that the courts are now unable to take into account all of facts and circumstances pertaining to the offence and the offender and to do individual justice in the circumstances. They no longer have any discretion in sentencing as this discretion has been given to non-judicial officers, such as the prosecutor and probation officer. Sentences are now imposed based on the weight of the drug or the number of plants and not on the circumstances of the offence and the offender. Draconian penalties have to be imposed on non-violent drug offenders with minimal criminal histories. While 86.4% of the district judges support changing current sentencing rules to increase their discretion, 70.4% support repealing most of the mandatory minimum sentencing laws and 82.8% of all District Judges feel that judges are the more appropriate decisions makers regarding the nature and severity of sanctions to be imposed.

498. These judges have served on the front lines of the criminal justice system from President Eisenhower through President Clinton. Many of them are former prosecutors. When judges made these decisions, they were at least impartial arbiters who made their decisions on the record and were subject to public scrutiny and appellate review. The Guidelines, while intended to produce uniformity and fairness, produced exactly the opposite. In particular, they result in tremendous disproportionality and extensive injustices and the oppression of citizens of the United States. The "War on Drugs" has eviscerated the protections that the U.S. Constitution guaranteed against government invasion of privacy and the seizure of homes and property. Civil liberties have been undermined and the first casualty in the war has been the truth. The Government has absurdly exaggerated and lied about the situation in relation to marijuana

and have transformed a chronic medical problem by lies and scare tactics into a bottomless political pit that costs federal taxpayers in excess of $17 billion dollars per year.

"Legislative Facts", Part II, paras. 142 – 143(a) – (p).

499. After 20 years on the bench judges are calling for an unequivocal end to drug prohibition, a dethroning of the drug czar and are describing the Federal drug laws to be a disaster. While many felt that before the guidelines there was unwarranted disparity in sentencing, but now they are taking the view that the "reform" of the system has resulted in the imposition of sentences that are neither just nor effective and, in fact, describe how the current system produces injustices as a result of the removal of judicial discretion and its transfer to prosecutors and probation officers. Judges are the unwilling executioners of mandatory minimums. Mandatory minimums are the result of political consideration and not individual decisions attempting to achieve some form of justice. One judge describes the American criminal justice system as a disgrace to a civilized nation that prides itself on decency and the belief in the intrinsic worth of every individual. He believes the current system to be a complete failure involving unbelievable financial waste in the commission of intolerable crimes against those victimized by the system. The guidelines and minimums are rejected by many federal judges as unfair, inefficient and ineffective. Some judges have resigned rather than take part in what they describe as an immoral, unjust and failed system. Some senior Federal judges have opted out of trying minor drug cases because of the mandated and unnecessarily harsh sentences that they are required to impose. They describe the guidelines as nonsensical in nature, inconsistent and arbitrary, particularly when they require the imposition of greater sentences on non-violent offenders to violent offenders. Some judges perceive the situation that has developed in the '80's and '90's as cruel and self-defeating, resulting in them becoming increasingly despondent. Not only is the current policy having a devastating impact on the rights of individual citizens, but the costs are seriously threatening the preservation of values that are central to democracy. The number of substantial injustices that have occurred under mandatory minimum sentences and non-discretionary guidelines have debased the rule of law by the imposition of disproportionate sanctions.

"Legislative Facts", Part II, paras. 143(s) – (ii).

500. The coordinator of the "**Voluntary Committee of Lawyers**", Michael Cutler, further asserts that there is a clear political dispute between the State of California and the United States Federal Government with respect

to the issue of medical marijuana and this dispute has become a highly charged political issue. The consistent theme of the comments from the eminent jurists is that the "Drug War" constitutes an irrational and anti-democratic policy that has caused more harm as a policy than drug abuse itself. It has vastly expanded the power of government to violate the privacy and autonomy of its citizens over matters that are uniquely personal and has permitted punishment by statutory fiat rather than based on the individual circumstances. These sentences are driven by political appointees, namely prosecutors instead of independent judges. The U.S. Government policy is entirely political and unrelated to matters of public health and safety or any other matter of legitimate Government concern. Approximately 50 senior Federal judges have refused to hear any more drug cases. Others have disobeyed sentencing rules and a few have resigned in protest. Judges are speaking out, writing articles and books in an effort to stop these laws from doing more harm than good.

"Legislative Facts", Part II, paras. 143(jj) – (nn) and 144.

501. It is respectfully submitted that these criticisms by judges, from all political persuasions, who are serving on the front line of the criminal justice system, coupled with support from the police and the military, the defence bar and certain prosecutors, clearly illustrates that the judiciary in the United States in no longer independent when it comes to the "Drug War". The current system precludes judges from deciding matters before them impartially and on the basis of the facts without any restrictions or improper influences from any court or for any reason. They no longer have exclusive authority to decide the issues submitted to them. There is clearly inappropriate and unwarranted interference in the judicial process. The judiciary is unable to ensure that the proceedings are conducted fairly and that the rights of the parties are respected.

"Basic Principles on the Independence of the Judiciary", Legislative Facts, Part III, paras. 232 and 233.

502. It is respectfully submitted that if Ms. Boje is surrendered to the United States of America she will be subject to mandatory minimum sentencing requirements, in this case 10 years, and to sentencing guidelines. The judge assigned to the case will not be independent and will not be able to protect her rights nor ensure that she is treated fairly and proportionately. The court will have not control over the power given to the prosecutor to essentially coerce her into a plea bargain to avoid a draconian sentence. It is respectfully submitted that this also amounts to a violation of the principles of fundamental justice in the section 11(d) aspect of section 7 of the *Canadian Charter of Rights and Freedoms.* The proceedings will be

contrary to justice and will be unfair and would be "simply unacceptable" and "fundamentally unjust" from a Canadian perspective. Such proceedings, it is submitted, are clearly "unjust or oppressive". If the process "shocks the conscience" of U.S. Federal court judges to the point where they are describing their own system as unjust and oppressive then it is highly likely that ordinary right-thinking Canadians will hold the same view.

c) <u>A Violation of the "Harm Principle"</u>

503. This principle of fundamental justice was recently recognized by the Court of Appeal for the Province of British Columbia in **R. v. Malmo-Levine; R. v. Caine (supra)** which was followed shortly thereafter by the decision of the Ontario Court of Appeal in **R. v. Clay (supra)**. It essentially stands for the **John Stewart Mill** principle that in a free society, one is entitled to do whatever one wants so long as one's acts or omissions do not directly impact upon others or society as a whole and do not present a reasoned apprehension of a risk of harm to others or to society as a whole. While the writings of Mill and others indicate that the risk of harm must be "serious" or "significant" before the Government can intervene, leaving aside vulnerable groups requiring protection, the question of what the level of risk should be before the government can intervene will be decided in the next few years by the Supreme Court of Canada. These cases will determine in Canada what limits exist on Parliament's power to criminalize conduct and will focus specifically on the question of the possession and use of drugs, as well as their distribution and cultivation. The evidence before these courts disclosed that the possession and use of marijuana does not present any direct harm to others, let alone a risk thereof unless coupled with other dangerous activities such as driving a car, flying a plane or operating complex machinery. The risk of harm to society generally lies primarily in concerns with respect to a burden on the health care system if the use of that drug becomes as prevalent as the use of alcohol and tobacco. It is feared that if drugs are legalized and prohibition repealed, that there will be significant increases in use leading to more chronic users, more problems with vulnerable groups and a resulting impact on the taxpayers through a burden on the health care system. There is no burden on the health care system at the present time of any significance and rates of use in Canada are far less than they were during the heyday of marijuana use, namely the late '60's and early '70's. Meanwhile, the harm caused by the drug prohibition laws in themselves are also well documented in these decisions.

R. v. Malmo-Levine**; **R. v. Caine **2000 BCCA 335 (B.C.C.A.);**

R. v. Clay, **[2000] O.J. No. 2788 (Ont. C.A.).**

504. It is respectfully submitted that in the case of a person attempting to assist a person with a medical problem when the marijuana the use is authorized by their physician, is engaged in conduct that is attempting to reduce harm for that individual and in the circumstances of this case for others by conducting the research indicated. Such conduct is directed to not only alleviating direct harm to the patient, but also the reasoned apprehension of a risk of harm to others and to society as a whole. In Canada, as a result of **Parker (supra)**, such conduct has been held to be acceptable and the law purporting to prohibit same has been held unconstitutional because it requires a patient to choose between his or her health and their liberty. The giving of an unfettered discretion to a Minister to decide whether or not a person can be exempt from the law without any set criteria for such a decision is also unconstitutional and contrary to the "principles of fundamental justice".

R. v. Parker **(July 31, 2000) No. C28732 (Ont. C.A.).**

505. It follows that the approach being taken in the United States generally with respect to medical marijuana and particularly in relation to this case involving the political dispute between the U.S. Federal Government and the State of California and, in particular, its *Compassionate Use Act*, its Buyers Clubs, physicians and patients is contrary to the "harm principle". By Canadian standards, the U.S. Federal Government is actively violating principles of fundamental justice in its aggressive attacks on medical patients, their physicians and caregivers and those endeavoring to help them and supply them with the drug that has proven effective for their medical conditions. While the U.S. Government has commissioned studies that have provided it with the evidence of therapeutic value, it still steadfastly refuses to move marijuana from Schedule I, notwithstanding the evidence. Such a position smacks of politics and is clearly irrational, arbitrary and insensitive to the plight of numerous Americans that are suffering from various debilitating diseases that could otherwise receive relief. This indifference on the part of the U.S. Government to their plight is simply cruel.

506. As pointed out by Conrad, Norris and Resner in their treaties to commemorate the 50th anniversary of the signing of the U.S. Universal Declaration of Human Rights entitled "**Human Rights and the U.S. Drug War**" and as amply illustrated in the photographs and commentary "**Shattered Lives – Portraits from America's Drug War**", patient after patient has been traumatized and abused and had their lives devastated and destroyed by the U.S. "War on Drugs" and how this war has violated

time and time again the various principles reflected in the **Universal Declaration of Human Rights**.

"Legislative Facts", Part III, paras. 228 – 231.

507. It is respectfully submitted that it follows that this amounts to yet a further violation of yet another principle of fundamental justice by the U.S. criminal justice system and, in particular, by the drug war. A review of the book "Shattered Lives" is all that is required in order to determine how unacceptable and how "shocking to the conscience" the United States criminal justice system has become. It is inimical to justice and fairness and would be fundamentally unacceptable in our Canadian society.

Section 7, *Canadian Charter of Rights and Freedoms*

"Shattered Lives – Portraits From America's Drug War", by Chris Conrad, Mikki Norris and Virginia Resner, 1998 Creative Xpressions

d) <u>A Violation of the Principle of Proportionality</u>

508. As set out above in paragraphs 450 – 453, the principle of "proportionality" is not only the fundamental principle in sentencing under Canadian law but is also a constitutional principle or "principle of fundamental justice". Given that the maximum penalty for the cultivation, manufacture or production of marijuana in Canada is 7 years regardless of the number of plants and the U.S. minimum in the circumstances is 10 years, there is obviously a violation of the proportionality principle by Canadian constitutional standards. Even if there was some evidence of Ms. Boje's participation in a scheme for the distribution of this marijuana so as to attract the charges of trafficking or possession for the purpose of trafficking which carry a maximum sentence of life imprisonment in Canada, it is clear from the sentencing decisions under Canadian law that even if the cultivation or the trafficking was for a non-medical purpose, she would not likely receive a sentence in excess of 2 years less a day, or Provincial time, perhaps coupled with probation and other sanctions. However, in a medical context, our courts have ruled in **Parker (supra)** that at least insofar as the patient is concerned, the law prohibiting such conduct is unconstitutional. Further, as set out in **Part V** of the "**Legislative Facts**" commencing at paragraph 373, the cases involving the prosecution of patients growing and using marijuana for their condition and the cases of those growing or assisting patients in one way or another have resulted in either absolute or conditional discharges or suspended sentences, namely the least available penalties open to the courts in the

circumstances. In other words, our courts have found it to be not contrary to the public interest to impose the least available sanction and, in the case of the discharges, to ensure that the individual does receive a criminal record. Furthermore, the decision of the Federal Government not to appeal **Parker (supra)** and the Federal Government policy in relation to **section 56** exemptions and the development of a supply of safe medical marijuana for patients clearly reflects not only the attitude of the Federal Government to this issue but the indicated support of in excess of 83% of the Canadian public on this question.

As reported by the *Globe and Mail*, November 4, 1997 (Sample size: 1,515), "Legislative Facts", Part IV, page 201, para. 318, vii;

"Legislative Facts", Part V, "Medical Marijuana in Canada and Current Issues", (a) "Legislation and Government Policy", paras. 360 – 363(a).

509. Bearing in mind the plea bargains negotiated by the other defendants in this case and the use by U.S. Federal prosecutors of the mandatory minimums to induce plea bargains to lesser offences and, thereby, lesser sentences, it is possible that the U.S. Government will indicate to the Minister that they will undertake not to imprison Ms. Boje and to simply have her serve a sentence on probation. It is respectfully submitted that, in that event, such a sentence would still be unfit and disproportionate by Canadian standards and in violation of the principles of fundamental justice. It is submitted that the way she was treated initially as reflected in the "Adjudicative Facts" already reflects sanctions that were excessive and disproportionate in the circumstances. If probation is offered, it will not doubt involve further strip searching and urinalysis with additional consequences if she fails to comply in the slightest way. Bearing in mind her political opinion and the way which she has expressed it, particularly since coming to Canada, it is very likely that she will be further prejudiced in the results. Once they have her in their clutches, we will no longer be able to protect her. In addition, she will receive a criminal record for having assisted an sick person grow medicine for himself and with a view to conducting research for the benefit of others. It is respectfully submitted that a criminal record, control over her liberty by probation by the United States criminal justice system and the likely consequences of such control, remain disproportionate to the conduct in question which, in Canada, would have resulted in a stay of proceedings or, at worst, an absolute or conditional discharge with no criminal record. Her conduct did not have the potential to cause harm to anyone but certainly had the potential to reduce harm. She did not really do anything wrong and to curtail her liberty in any way would violate the proportionality principle. What happened to Peter McWilliams and what is currently happening to

Todd McCormick provides an objective basis for a subjective fear of persecution. The attitude of the U.S. Federal Court Government to Canada's concerns and the requirements of International law is further illustrated in the case of Stanley Faulder.

Reference re: Section 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 at para. 434;

***R. v. Malmo-Levine*; *R. v. Caine* 2000 BCCA 335 at p. 459;**

Correspondence from Richard Cowan, dated October 15, 2000;

"United States of America: Adding Insult to Injury – the Case of Joseph Stanley Faulder", Amnesty International Report, August of 1997, Supporting Documents of the Refugee Submissions, Tab 5.

510. It must be recalled that for a sentence to be fit or to be "just and appropriate" under Canadian law, the quantum of sentence imposed should be broadly commensurate with the gravity of the offence and the moral blameworthiness of the offender. Ms. Boje's conduct does not involve moral blameworthiness but, on the contrary, a moral desire to help the sick. The offence, if indeed it can be called an offence, is at the very lowest end on the "growing" scale and does not warrant any further penalty. She has already suffered enough.

e) <u>A Violation of the Right to be free from "Cruel and Unusual Treatment or Punishment"</u>

511. Again, bearing in mind the decision of the Supreme Court of Canada in **R. v. Smith (supra)** which struck down the mandatory minimum of 7 years imprisonment and bearing in mind the fact that the maximum penalty for cultivation in Canada is 7 years, whereas the United States seeks to impose a minimum of 10 years, the imposition of such a sentence in the U.S. would clearly violate our prohibition against the imposition against cruel and unusual treatment or punishment as such a sentence would be grossly disproportionate to the circumstances of the offence as it would be so excessive as to outrage standards of decency. It would not be merely unfit and excessive.

***R. v. Smith* [1987] 34 CCC (3d) 97 (SCC);**

512. It is respectfully submitted that a review of the personal characteristics of Ms. Boje, the particular circumstances of the case, and the gravity of the offence illustrates that a 10 year minimum sentence in a U.S. Federal prison would be clearly disproportionate to what she deserves. Further, if one looks at the fact that the U.S. legislation provide for such a grossly disproportionate sentence, then having regard to the purposes of the legislation, it is submitted that it does not override the factors affecting the individual offender in order to achieve some important societal objective. It is incomprehensible to seek penalties of imprisonment of any kind for persons who has been attempting to help the sick under a democratically enacted State law.

R. v. Smith **[1987] 34 CCC (3d) 97 (SCC);**

513. Further, the Supreme Court of Canada in **R. v. Smith (supra)** indicated that section 12 of our Charter that prohibits the imposition of cruel and unusual treatment or punishment, governs not only the effect of the punishment but also its quality. One must ask what the effect of the sentence actually imposed would be, not simply because of the quantum or duration, but also because of the nature and conditions under which it would be applied. It is respectfully submitted that here the length and duration is enough to run afoul of section 12, but when one adds to the equation the nature of the current U.S. system and its consequences as detailed in Part II, (iii), of the "**Legislative Facts**", and its impact upon women and children as described at Part II, (iv) and the conclusions of **Amnesty International** and **Human Rights Watch** and the **United States General Accounting Office** with respect to the systemic abuse of women prisoners, then there can be no doubt that any amount of imprisonment for Ms. Boje, given her personal characteristics, the medical circumstances of the case and the nature of her alleged offence would clearly be not only grossly disproportionate but simply disproportionate in all of the circumstances.

"Legislative Facts", Part III, paras. 234 – 240;

Affidavit of Eugene Oscapella, sworn April 12, 2000;

Affidavit of Valerie Corral, sworn May 12, 2000;

Affidavit of Randall G. Shelden, sworn June 12, 2000;

<u>Race to Incarcerate – The Sentencing Project</u>, by Marc Mauer, the New Press, New York, 1999;

Reports of Amnesty International, "Supporting Documents of the Refugee Submissions", Tabs 1 – 6;

Reports of Human Rights Watch, "Supporting Documents of the Refugee Submissions", Tabs 1 – 6.

514. Following the rationale stated by the Supreme Court of Canada in **R. v. Smith (supra)**, it is submitted that the objective of fighting against the use of marijuana for medical purposes is not an objective of sufficient importance to warrant overriding a Constitutionally protected right or freedom in Canada. In Canada the means chosen, namely the use of the criminal law, is not rational and does not meet the first prong of the "proportionality test". Similarly, the law does more than minimally impair the rights protected by section 12. As the Court said in **Smith (supra)**, "we do not need to sentence the small offenders to 7 years in prison in order to deter the serious offender". Similarly, we do not need to prosecute the person who is genuinely attempting to assist a person involved with medical marijuana and to threaten them with sentences of any kind, let alone a minimum of 10 years in a U.S. Federal prison for women, in order to deter serious offenders. The net does not have to be so widely cast. Mandatory minimum sentences in the U.S., while limited to the numbers of plants, could have been limited to certain specific narcotics classified as "hard drugs", or to repeat offenders or to a combination of such factors. Clearly, the mandatory minimum does give an unfair advantage in plea bargaining to the prosecution and, when coupled with the denial of full answer and defence, makes a mockery of the justice process.

515. It is respectfully submitted that, for the above reasons, it would be clearly "unjust or oppressive" to surrender Ms. Boje to the United States of America. That the U.S.A. has become an oppressive government, particularly in relation to the "War on Drugs", is evident not only in relation to the drug war overall as documented in the "Legislative Facts", but also specifically with respect to marijuana and, even more particularly, medical marijuana. An examination of the materials in the "**Legislative Facts**" at Part IV, iii, (c), which documents the attacks by the Federal Government on the various States, their people, the sick and the threats to the doctors and caregivers. The extent of this "oppression" is brought into stark relief when one examines the information in the "Legislative Facts" **Section B**, Part IV, iii), (b) dealing with the early history of medical marijuana use and its current support and issues in the health community. Applying traditional health criteria to marijuana, such as the "therapeutic ratio" or "LD50", illustrates that it is a remarkably benign substance that would normally fall on the scale into the category of non-prescribed drugs with a

lower likely incidence of harm by significant proportions compared to aspirin.

"Medical marijuana in a time of prohibition", Lester Grinspoon, International Journal of Drug Policy, 10 (1999) 145 – 146.

516. In conclusion, it is respectfully submitted that Ms. Boje does fall into the category referred to by Mr. Justice Baudouin in **Jamieson (supra)**. Here we have a young woman facing a sentence of a minimum of 10 years for supporting, moving and watering the plants of a sick man endeavoring to help himself and his fellow patients under the authority of a State law that the U.S. Federal Government irrationally seeks to suppress. The U.S. Federal Government approach and its reflection of a repressive philosophy is outdated in this country. Canada's attitude towards medical marijuana is clear and has not resulted in large numbers of Americans or others fleeing to Canada to take advantage of our process. Even if they do in the future, such persons can hardly be considered "criminals". There is nothing in the evidence to indicate that the State of California or, in fact, the United States of American has a particularly severe problem with medical marijuana. Most importantly, while the U.S. Federal Government may claim that their law was enacted by democratically elected persons, it is in conflict with the law enacted by the democratically elected in the State of California as a result of State plebiscite. The Federal policy of repression, reflected in the U.S. Federal law, can hardly be justified on a strict philosophy of societal self-defence when medical marijuana is the issue. Further, while the U.S. judicial system may appear to be relatively similar to ours, it is now clear that the procedural and substantive safeguards traditionally offered have been eroded substantially in the name of the "War on Drugs". The way that the law will be applied to Ms. Boje, if surrendered, would be "unacceptable to our conscience". It is submitted that the factors considered by the Honourable Kim Campbell, then Minister of Justice at the time of **Jamieson (supra)**, do not apply to the facts and circumstances pertaining to Ms. Boje.

"Legislative Facts", Parts I, II, and III and, in particular, Part III, ii)(a) – (m);

"Shattered Lives – Portraits From America's Drug War", by Chris Conrad, Mikki Norris and Virginia Resner, 1998 Creative Xpressions;

Human Rights and U.S. Drug War" – A treatise to commemorate the 50th Anniversary of the signing of the UN Universal Declaration of Human Rights by Chris Conrad, Mikki Norris and Virginia Resner, 1999;

Affidavit of Eugene Oscapella, sworn April 12, 2000;

"This is Your Bill of Rights, On Drugs – How We the People Became the Enemy", by Graham Boyd and Jack Hitt, Harper's Magazine, December 1999, pp. 57 – 62;

III Extradition Issue – 44(1)(b)

A. The Law

517. Section 44(1)(b) of the **Extradition Act** states:

> 44(1) The Minister shall refuse to make a surrender order if the Minister is satisfied that:
>
> (a) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, **political opnion**, sex, sexual orientation, age, mental or physical disability or status or **that the person's position may be prejudiced for any of those reasons**.

518. There may well be a considerable overlap between the refusal of surrender between this ground for a refusal of surrender by the Minister of Justice under the *Extradition Act* and the role of the Minister of Justice in consultation with the Minister of Immigration in relation to the "convention refugee" claim pursuant to the *Immigration Act*. Normally, the convention refugee claim would be considered by the Convention Refugee Determination Board but because Ms. Boje is also subject to extradition, section 40(s) of the *Extradition Act* applies, thereby requiring the Minister of Justice to consider the convention refugee issue in consultation with the Minister of Immigration. We adopt the refugee submissions to the extent that they apply to this ground, under section 44(1)(b), independently and notwithstanding the overlap.

519. In this regard, the decision of the Supreme Court of Canada in **Canada (Attorney General) v. Ward [1993] S.C.J. No. 74 (S.C.C.)**, while a convention refugee case is nevertheless instructive in relation to that ground and this ground under section 44(1)(b) of the *Extradition Act*.

520. In **Canada (Attorney General) v. Ward (supra)**, La Forest, J. speaking for the majority extensively canvassed the meaning of the key terms contained in the definition of a "convention refugee" in section 2(1) of the *Immigration Act* and, consequently, the meaning of the term "political opinion" in the context of that section. Because of the overlap between the convention refugee claim and the grounds under section 44(1)(b) of the *Extradition Act*, the analysis in **Ward (supra)** is worth examining in some detail. Under the extradition ground, Ms. Boje is asserting that the U.S.A. is requesting her extradition for the purpose of prosecuting her or punishing her by reason of her political opinion or that her position in these extradition proceedings and, more importantly, if she is extradited may be prejudiced because of her political opinion.

521. In **Ward (supra)**, La Forest, J. said as follows with respect to the "fear of persecution" element:

> "More generally, what exactly must a claimant do to establish fear of persecution? As has been alluded to above, the test is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense. This test was articulated and applied by Heald J.A. in Rajudeen, supra, at p. 134:
>
> > 'The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.'"

Canada (Attorney General) v. Ward [1993] S.C.J. No. 74 (S.C.C.) at para. 64.

521. As submitted in the "Refugee Submissions", the subjective basis for the fear must have a connection or "nexus" to one of the enumerated grounds which, in this case, is her "membership in a particular social group or political opinion". In these circumstances, Ms. Boje's nexus for her claim to protection in Canada is tied to her political opinion in advocating in favour of "medical marijuana' and acting accordingly, contrary to the Federal laws of the United States of America but in accordance with the laws of the State of California where the events took place.

"Refugee Submissions" at paras. 393 – 400.

522. In **Ward (supra)**, La Forest, J. went on to discuss the objective of protecting a refugee's human rights and, in this regard, he said as follows:

> "Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:
>
> > 'CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'
>
> This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. Hathaway, supra, at p. 108, thus explains the impact of this general tone of the treaty on refugee law:
>
> > 'The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.'
>
> This theme sets the boundaries for many of the elements of the definition of "Convention refugee". "Persecution", for example, undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection"; see Hathaway, supra, at pp. 104-105. So too Goodwin-Gill, supra, at p. 38 observes that "comprehensive analysis requires the general notion [of persecution] to be related to developments within the broad field of human rights". This has recently been recognized by the Federal Court of Appeal in the Cheung case."

Canada (Attorney General) v. Ward **(supra) at paras. 89 – 91.**

523. The Court then went on to consider the meaning of "particular social group" and concluded as follows:

> "In distilling the contents of the head of "particular social group", therefore, it is appropriate to find inspiration in discrimination concepts. Hathaway, supra, at pp. 135-36, explains that the anti-discrimination influence in refugee law is justified on the basis of those sought to be protected thereby:

> ‘The early refugee accords did not articulate this notion of disfranchisement or breakdown of basic membership rights, since refugees were defined simply by specific national, political, and religious categories, including anti-Communist Russians, Turkish Armenians, Jews from Germany, and others. The de facto uniting criterion, however, was the shared marginalization of the groups in their states of origin, with consequent inability to vindicate their basic human rights at home. These early refugees were not merely suffering persons, but were moreover persons whose position was fundamentally at odds with the power structure in their home state. It was the lack of a meaningful stake in the governance of their own society which distinguished them from others, and which gave legitimacy to their desire to seek protection abroad.’
>
> The manner in which groups are distinguished for the purposes of discrimination law can thus appropriately be imported into this area of refugee law.”

Canada (Attorney General) v. Ward **(supra) at paras. 93 and 94.**

524. It is respectfully submitted that the information contained in the “Legislative Facts” illustrates the efforts by the U.S. Federal Government to marginalize the medical marijuana lobby, including physicians, caregivers and the patients themselves, and how they are unable to vindicate their basic human rights in their country even when resorting to the democratic process. The group is clearly such that its position is fundamentally at odds with the power structure in the United States Federal Government even though they enjoy success in their home State and that is shared by numerous other States. It is these factors which make Ms. Boje a suitable candidate for refugee status. It was lack of a meaningful stake in the governance of her own society that led her to Canada out of a fear that she would be persecuted because of her political position. She continues to fear that her position in the United States will be prejudiced because of her political opinion.

525. The Court in **Ward (supra)** adopts the following test for the meaning of “particular social group”:

> “Although not strictly necessary to this review, Mahoney J.A. addressed the question of whether this group could meet the

definition of Convention refugee. In doing so, he articulated the following test, at p. 737, proposed by counsel for the applicant:

> ' . . a particular social group means: (1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness and solidarity, or (4) *sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it*.'" [emphasis added]

Canada (Attorney General) v. Ward **(supra) at para. 95.**

526. The Court went on to define the categories of "particular social groups" as follows:

> "The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in Mayers, supra, Cheung, supra, and Matter of Acosta, supra, provide a good working rule to achieve this result. They identify three possible categories:
>
> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person."

Canada (Attorney General) v. Ward **(supra) at paras. 103 and 104.**

527. Finally, the Court discusses the meaning of the words “**political opinion**” and states the following:

> “Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as *persecution of persons on the ground "that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party*"; see Grahl-Madsen, supra, at p. 220. The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors. Grahl-Madsen's definition assumes that the persecutor from whom the claimant is fleeing is always the government or ruling party, or at least some party having parallel interests to those of the government. As noted earlier, however, international refugee protection extends to situations where the state is not an accomplice to the persecution, but is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real. The more general interpretation of political opinion suggested by Goodwin-Gill, supra, at p. 31, i.e., "*any opinion on any matter in which the machinery of state, government, and policy may be engaged*", reflects more care in embracing situations of this kind.
>
> Two refinements must be added to the definition of this category. *First, the political opinion at issue need not have been expressed outright*. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant.
>
> *Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs*. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.

Canada (Attorney General) v. Ward **(supra) at paras. 118 - 120.**

B. Facts and Submissions

528. It is respectfully submitted that the broad picture of the U.S. "War on Drugs" illustrates how the U.S. Government has become an oppressive regime, both domestically and internationally, using its superpower status to manipulate the media by misinforming and disinforming its citizens and others abroad in order to justify its continuing use of force both at home and abroad in furtherance of its agenda to ensure economic dominance and the ability to control populations both within and without its borders.

"Legislative Facts", Part I, v; Part II; Part III, ii, (a) – (m) and iii; Part IV, iii(a) – (c).

Affidavit of Paul David Wolf, sworn the 8th day of May, 2000

529. The facts establish that Ms. Boje met Mr. McCormick a few months before the incident leading to her arrest. It was her intention to do artwork for Mr. McCormick's book on "How to Grow Medical Marijuana". In this way, she would exercise her free thought, belief, opinion and expression and help communicate not only her view and those of Mr. McCormick but those of the medical marijuana lobby. She did so at a time and place when the laws of the State of California, as a result of the a public petition, Proposition 215, provided under the *Compassionate Use Act* that a person like Mr. McCormick could grow marijuana for his own medical condition without any limit on the number of plants. The purpose of his conduct and hers in assisting him was to benefit not only himself as a medical patient but hundreds and perhaps thousands of others who might benefit from the use of cannabis for their health and certainly from the acquisition of more knowledge as to which strains of marijuana would help particular illnesses. While the machinery of the State of California had addressed this issue, the machinery of the Federal Government claims superceding priority, even though historically, as a matter of U.S. Constitutional law, the power over criminal law resided with the U.S. States and not the Federal Government.

"Adjudicative Facts", paras. 12 – 13; 48 – 49; 62 – 63; 72(l)(i) - (xvi);

"Legislative Facts", Part I, v; Part IV, iii;

Affidavit of Paul David Wolf, sworn the 8th day of May, 2000

530. No doubt the United States of America will assert that the purpose of the request for extradition is to prosecute Ms. Boje and to punish her for the offences set out in the "Adjudicative Facts" which, at the end of the day,

come down to her aiding and abetting Mr. McCormick in growing his marijuana plants for medical purposes under the auspices of Proposition 215 or the *Compassion Use Act* of 1966 in California. The dispute between the Federal Government and the State of California, not to mention all of the other States that take a similar view to California and bearing in mind the position in Canada, clearly illustrates that this is a very "political" issue and that it is impossible to separate the politics from the alleged offences. The reality is that the U.S. Federal Government is using its claim to jurisdiction under the *Controlled Substances Act* to try and stamp out the use of medical marijuana by not only prosecuting growers, physicians and caregivers, but also prosecuting patients. Those who espouse the use of medical marijuana are clearly taking a political position and are expressing their "political opinion" both by their words and conduct and it also seems clear that such persons are being prejudiced because of their political opinion. The way that Ms. Boje was treated by the arresting SWAT team and subsequently before her release makes this evident. Similarly, the overall approach of the U.S. Federal Government to the medical marijuana issue from the mis-scheduling of the substance in Schedule 1 to the threats to the doctors if they prescribe to either revoke their licenses, charge them with criminal offences, bar them from access to medicare and medicaid or to outright revocation of their licenses as physicians, shows just how far they are prepared to go.

"Adjudicative Facts", paras. 48 - 56;

"Legislative Facts", Part III, ii(a) – (m) and iii; Part IV, i, ii and iii(a) – (c).
Affidavit of Paul David Wolf, sworn the 8th day of May, 2000.

531. A good example of how far the U.S. Federal Government is prepared to go in order to stifle free speech on this issue and in an effort to prejudice those who express this political opinion, is illustrated by the passage in 1998 by the U.S. Congress of the 1999 District of Columbia *Appropriations Act* as part of the **Consolidated and Emergency Supplemental Appropriations Act of 1988**. It was **section 171** of that Act, known as the **Barr Amendment**, that provided that none of the funds contained in the Act could be used to be ballot initiative which sought to legalize or otherwise reduce penalties associated with the possession and use and distribution of any Schedule 1 substance or any THC derivative. This legislation was introduced to specifically target **Initiative 59**, the legalization of marijuana for medical treatment of 1998 in the District of Columbia. The initiative appeared on the ballot anyway because the absentee ballots had been printed and the election law prevented it from changing them afterwards. The residents of Washington, D.C. did vote on the medical marijuana question but the District of Columbia Board of

Electors interpreted the **Barr Amendment** as preventing them from releasing the results of the vote. In other words, the U.S. Congress intentionally sought to deprive the District of Columbia voters of any opportunity to consider a viewpoint that it disfavoured. This was the first time in U.S. history that the results of an election had been suppressed. Fortunately, the courts ordered that the results be released and they revealed the support of 69% of the voters. Representative Barr was not deterred. He subsequently introduced the fiscal year **2000 Appropriations Act** intended to prevent the District from enacting **Initiative Measure 59** by prohibiting any of the funds provided for in the Act being used for such a purpose.

"This is Your Bill of Rights, On Drugs – How We the People Became the Enemy", by Graham Boyd and Jack Hitt, Harper's Magazine, December 1999, pp. 57 – 62;

"Legislative Facts", Part IV, para. 323.

532. As Graham Boyd and Jack Hitt put it in "This is Your Bill of Rights, On Drugs – How We the People Became the Enemy":

> "Most Americans consider the right to free speech, adopted as the First Amendment to our Constitution, to be unassailable. But in less than thirty years the tacticians of the drug war have found ways to erode this bedrock liberty. in 1996 voters in California, by referendum, permitted doctors to recommend marijuana as part of medical therapy. Alarmed that states were breaking ranks, the federal drug czar, General Barry McCaffrey, threatened to arrest any doctor who merely *mentioned* to a patient that marijuana might alleviate the suffering caused by AIDS, cancer, or other serious illnesses. Still, by last year, voters in seven states had approved the medical use of marijuana. In November 1998 an initiative in the District of Columbia tried to do the same. For almost a year no one knew whether the referendum had passed, because Rep. Bob Barr (R., Ga.) impounded the $1.65 million it would have cost to tally the vote. Finally, last September, the courts overruled Barr. Seven out of ten D.C. voters had decided in favor of legalization. Refusing defeat, Barr pushed a bill through Congress that blocked the spending needed to enact the new law. As fallback, Barr has also proposed a joint resolution of Congress to simply overturn by fiat the will of the people expressed freely and fairly at the ballot box."

"This is Your Bill of Rights, On Drugs – How We the People Became the Enemy", by Graham Boyd and Jack Hitt, Harper's Magazine, December 1999, p. 150.

533. Ms. Boje is a young woman with no criminal history. She wanted to use her artistic talents to illustrate a book on how to grow medical marijuana for a man suffering from a debilitating illness. She did not want to do harm to anyone, quite the contrary. In Canada, she would not be pursued for such conduct and, if she was, we know that she would receive a stay of proceedings or an absolute or conditional discharge. Upon her arrest in the United States, she was abused and mistreated over a relatively brief period of time before her release. The charges were dropped and she fled to a country that takes a position much more consistent with her political opinion and that of the State of California and other States and where she would not be prejudiced because of her political opinion. In Canada, she can assist the sick through the use of medical marijuana without a fear of repercussions or repression. For some reason, the charges were reinitiated and the United States of America continues to aggressively seek her return for conduct that would arguably either not amount to a criminal offence in Canada at all or that would be treated very leniently by way of a stay of proceedings or an absolute or conditional discharge. We know that it happened to Mr. McWilliams when he was in prison and when he was on bail. We have heard what is happening to Mr. McCormick while he is in prison. The other codefendants have been ominously silent. Are they in fear of repercussions if they speak out? Will their position be prejudiced if they express their political opinion? If the U.S. Federal Government is prepared to threaten doctors for merely mentioning to a patient that marijuana might alleviate their suffering, thereby suppressing their free speech, and if the U.S. Government is prepared to go to the extent of attempting to suppress the results of a free and fair democratic vote, then we can imagine what they might do to Ms. Boje, if surrendered.

534. It is respectfully submitted that we cannot take a chance on her surrender. It is not her minor acts that they want her for. The evidence supports a subjective fear of persecution that is well-founded in an objective sense. The subjective basis for her fear is connected to her membership and participation in that particular social group that espouses the use of medical marijuana and that has the support of the State of California and numerous other States against the contrarian position of the U.S. Federal Government. Her human rights are threatened by the U.S. Federal Government because of her position which is fundamentally at odds with the Federal power structure and the threats of criminal prosecution against her and others in her group, including the doctors and patients, this position prevents her from having a meaningful stake in the governance of her own society and has given her a legitimacy in her desire to seek protection abroad. This group, “The Medical Marijuana Movement”, clearly shares a temporary but voluntary status with the purpose of their

association being fundamental to human dignity to such an extent that they should not be required to alter it. It is submitted that the tests set out in **Ward (supra)** are clearly met in the circumstances. She is a human rights activist advocating the cause of medical marijuana, a cause that is subjected to significant oppression and repression by the United States Federal Government.

IV Extradition Issue – 46(1)(c)

A. The Law

535. Under section 46 of the **Extradition Act**, the Minister is mandatorily require to refuse to make a surrender order if she is satisfied that the conduct in respect of which the extradition is sought is a "political offence or an offence of a political character".

536. In **Re Commonwealth of Puerto Rico and Hernandez (1972) 8 C.C.C. (2d) 433 (Ont. Co. Ct.)**, the Court had this to say about the meaning of those terms:

> "The question, "What is an offence of a political character?" is very difficult to answer. The crime of murder is normally a non-political offence, but it may be found to be a political offence in the light of the circumstances existing when it is committed. My reading of the cases referred to me and the lengthy comments of the Judges in the Courts concerned leave me with the conviction that **the very wide variety of circumstances that can exist which might give rise to an allegation of "political character" would make it impossible to attempt to be specific as to its meaning**…." [emphasis added]

> In Re Castioni (1890), 60 L.J. 22, Denman, J., used the following words which have since been quoted in other cases [at p. 27]:

> > 'I think that in order to bring the case within the words of the Act, and to avoid extradition for such an act as an act of murder, which is one of the extradition offences, it must be at least shewn that the act which is done is being done in furtherance of, and as a sort of overt act in the course of and with the intention of assisting in a political matter, such as a political rising consequent upon a great dispute between two parties in the State as to which is to have the government in its hands -- that it must be something of that sort ***[page441]***

> before it can be brought within the meaning of the words used in the Act.'
>
> I have italicized the words "at least" and "great" as they have sometimes been overlooked."

Re Commonwealth of Puerto Rico and Hernandez (1972) 8 C.C.C. (2d) 433 (Ont. Co. Ct.), pp. 7 and 8.

537. In **Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461 (Ont. Co. Ct.)** also examined the law applicable to the issue of the political character of an extradition offence. The Court reviewed a number of authorities, including **Re: Levi (1897), 1 C.C.C. 74** and **Re: Fedorenko (No. 1) (1910), 17 C.C.C. 268; 20 Man. R. 221; 15 W.L.R. 369** sub nom **Re: Fedorenko; Re: Meunier, [1894] 2 Q.B. 415**. In neither case was the offence found to be of a political character in the circumsances.

> "In **Re Levi** it was stated at p. 77:
>
> > 'If it should be found that the offence is of a political character, or that the offence is not an extradition crime, the prisoner must be discharged; but otherwise, if the evidence is such as would justify committal for trial in Canada, or shows that the prisoner has been convicted, it is the duty of the Extradition Commissioner to send the fugitive criminal to jail to await the proper requisition from the foreign Government and the warrant of the Minister of Justice for his surrender. '
>
> **Re: Levi (1897), 1 C.C.C. 74 at p. 77**

Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461 (Ont. Co. Ct.).

538. The Court then went on to consider the English cases. The first case considered **R. v. Governer of Brixton Prison, Ex P. Kolezynski** where Lord Goddard, C. J. stated at p. 550:

> "The precise meaning of this difficult section has not yet been made the subject of judicial decision and textwriters have found it difficult of explanation, but in my opinion the meaning is this: if in proving the facts necessary to obtain extradition the evidence adduced in support shows that the offence has a political character the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the

prisoner may show that in fact the offence is of a political character. Let me try to illustrate this by taking a charge of murder. The evidence adduced by the requisitioning state shows that the killing was committed in the course of a rebellion. This at once shows the offence to be political; but if the evidence merely shows that the prisoner killed another person by shooting him on a certain day, evidence may be given, and under section 9 the magistrate is bound to receive it, to show that the shooting took place in the course of a rebellion. Then if either the magistrate or the High Court on habeas corpus or the Secretary of State is satisfied by that evidence that the offence is of a political character, surrender is to be refused. In other words, the political character of the offence may emerge either from the evidence in support of the requisition or form the evidence adduced in answer. [emphasis added]

Thus a killing committed in the course of a rebellion would have a political character.

Re Meunier, [1891] 2 Q.B. 415, held that anarchist killings are not political offences.

In **Re Castioni**, [1891] 1 Q.B. 149, Denman, J., laid down the following principle at p. 156:

> 'I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shewn that **the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between the two parties in the State as to whch is to have the government in its hands**, before it can be brought within the meaning of the words used in the Act….' [emphasis added]

Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461 (Ont. Co. Ct.).

539. The Court also considered in **Schtraks v. Government of Israel, [1964] A.C. 556**, where the House of Lords considered the problem of crimes "of a political character" on an application for a writ of habeus corpus which had been refused by a Divisional Court [1963] 1 Q.B. 55 sub nom. **R. v. Governer of Brixton Prison, Ex. p. Schtrakes**] and with leave was

appealed to the House of Lords. The charge was one of perjury and the appeal was eventually dismissed. The issue of political character was raised by Lord Reid stated the following at p. 581:

> "The purpose of the subsection as a whole is to enable an accused to show that an apparently non-political offence such as murder or arson **was really of a political character**, and he can try to do that by proving **the circumstances** in which it was committed.
>
> And then, at p. 582:
>
> > 'It can therefore be said that these alleged offences were committed **in a political context**, and that the action of the grandfather and the **appellant received considerable political support**.'
>
> But, in my opinion, it does not follow that the offences were of a political character.
>
> And, at p. 583:
>
> > 'We cannot enquire whether a "fugitive criminal" was engaged in a good or a bad cause. A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is is as much within the Act s the follower of a Garibaldi. But not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge I would not think that that could be called a political offence. So it appears to me that ***the motive and purpose of the accused in committing the offence must be relevant and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause*** and quite a different thing to commit the same offence for an ordinary criminal purpose.'"

Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461 (Ont. Co. Ct.).

540. Waisberg Co. Ct. J. again considers **Schtraks v. Government of Israel**, when Viscount Tadcliffe refers to the problem at p. 589 as follows:

> "What then is an offence of a political character? The courts, I am afraid, have been asking this question at intervals ever since it was first posed judicially in 1890 in **re Castioni**, and **no definition has yet emerged or by now is everly likely to**. Indeed it has come to

> be regarded as something of an advantage that there is to be no definition. I am ready to agree in the advantage so long as it is recognised that the meaning of such words as "a political offence," while not to be confined within a precise definition, does nevertheless represent an idea which is capable of description and needs description if it is to form part of the apparatus of a judicial decision.

Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461 (Ont. Co. Ct.).

541. His Lordship went on to present what seemed to Viscount Tadcliffe to be the most reasonable and practical formula at pp. 591-2 in his judgment in **Schtraks (supra)**:

> " In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at **odds with the State that applies for his extradition on some issue connected with the political control or government of the country**. The analogy of "political" in this context is with "political" in such phrases as "**political refugee"**, "**political asylum**" or "**political prisoner**." It does indicate, I think, that the requesting State is after him **for reasons other than the enforcement** of the criminal law in its ordinary, what I may call its common or international, aspect. It is this idea that the judges were seeking to express in the two early cases of In **re Castioni** and In **re Meunier** when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power: and in my opinion it is still necessary to maintain the idea of that connection. It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that **the idea of political opposition as between fugitive and requesting State is not lost sight of**: but it would be lost sight of, I think, if one were to say that all offences were political offences, so long as they could be shown to have been committed for a political object or with a political motive or for the furtherance of some political cause or campaign. There may, for instance, be all sorts of contending political organisations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders."

Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461 (Ont. Co. Ct.).

542. Lord Evershed in **Schtraks v. Government of Israel** put it this way at p. 598:

> "that the exception was intended for the protection of those who had sought political asylum in this cournty from the repressions of their own countries."

Re State of Wisconsin and Armstrong, [1972] 3 O.R. 461 (Ont. Co. Ct.).

B. Facts and Submission

543. It is respectfully submitted that the following quotations that appeared in the May, 1999 and December 1999 issues of **Harper's Magazine** (and reprinted together in the December, 1999 issue) succinctly illustrate the "political" nature of character of the offences forming the basis for the "Drug War" over the last 20 – 30 years.

> "From 1970 to 1998, the inflation-adjusted revenue of major pharmaceutical companies more than quadrupled to $81 billion, 24 percent of that from drugs affecting the central nervous system and sense organs. Sales of herbal medicines now exceed $4 billion a year. Meanwhile, the war on Other drugs escalated dramatically. Since 1970 the federal antidrug budget has risen 3,700 percent and now exceeds $17 billion. More than one and a half million people are arrested on drug charges each year, and 400,000 are now in prison. These numbers are just a window onto an obvious truth: We take more drugs and reward those who supply them. We punish more people for taking drugs and expecially punish those who supply them.
>
> *Joshua Wolf Shenk, "America's Altered States" (May 1999)*
>
> …."The militarization of the rhetoric supporting the war on drugs rots the public debate with a corrosive silence. The political weather turns gray and pinched. People who become accustomed to the arbitrary intrusions of the police also learn to speak more softly in the presence of political authority, to bow and smile and fill out the printed forms with the cowed obsequiousness of musicians playing waltzes at a Mafia wedding."

Lewis Lapham, "A Political Opiate" (December 1989)"

"This is Your Bill of Rights, On Drugs – How We the People Became the Enemy", by Graham Boyd and Jack Hitt, Harper's Magazine, December 1999, pp. 57 – 62;

544. In September 1989, the Federal Government of the United States, under the administration of President George Bush, declared a War on Drugs. The enemies in this war are both foreign powers, thus involving U.S. foreign policy, and a significant domestic enemy, thus involving the criminal law.

"Legislative Facts", Part I, iii, paras. 87 – 89; Part V; Part III, ii(a) – (m); Part IV, ii(a) – (d).

545. The Government of the State of California, being the people of California and their elected representatives, put the issue of legalizing marijuana for medical purposes to a voter initiative in Proposition 215. "The primary purpose of the law is to provide a specified group of patients with an affirmative defence to the charge of possession or cultivation of marijuana, the defence of medical necessity". The initiative was endorsed by a multitude of health care professionals and patient advocacy groups.

"Adjudicative Facts", paras. 2, 49 & 50;

"Legislative Facts, Part IV, iii(a)- (c);

Affidavit of Michael Cutler, sworn June 1, 2000, paragraph 27, Exhibit "GG", The New England Journal of Medicine, August 7, 1997, Vol. 337, No. 6, "Reefer Madness – The Federal Response to California's Medical-Marijuana Law" by George J. Annas;

Affidavit of Paul David Wolf, sworn the 8th day of May, 2000.

546. The facts of the Boje case occurred after Proposition 215 passed into law, and centre on her involvement at a medical marijuana grow operation. The case against Renee Boje is a Federal case at odds with a state law passed by a democratic process and expressing the will of the people. As set out in **Re Castioni (supra)**, the elements defining an offence of a political character require:

> "….it must be as least shown that the act which is done is being done in furtherance of, and as a sort of overt act in the course of

> and with the intention of assisting in a political matter, such as a political rising consequent upon a great dispute between two parties in the State as to which is to have the Government in its hands….."

It is respectfully submitted that the first element is clearly present. Ms. Boje was engaged in assisting Todd McCormick with his book on the subject of cultivating medical marijuana. The intention of publishing the book was to disseminate the long-suppressed critical information required by medical marijuana users to grow their own medicine. As such, it was an "overt act in the course of and with the intention of assisting in a political matter".

547. It is respectfully submitted that the second requisite element is also clearly present in that the political issue at stake must involve "a great dispute between two parties in the State as to which is to have the government in its hands". The two parties in the present dispute, namely the people of the State of California on the one hand and the federal authorities on the other, are involved in a dispute "as to which is to have the government in its hands" regarding the jurisdiction relating to the control and access to medical marijuana. Given the express willingness and determination of the Federal agencies to continue the prosecution of medical marijuana users in the state of California despite the democratically asserted will of the people of California to recognize medical marijuana use, the current situation is properly characterized as "a great dispute", between two parties in the country as to which is to have the Government in its hands over this issue. In the circumstances surrounding this "great dispute", it is to be born in mind that there are at least, as of May, 2000, 12 other U.S. States that have medical marijuana laws on their statute books and 4 others that have medical marijuana measures that have been approved but not yet enacted.

"Legislative Facts, Part IV, iii(a) – (c), para. 325;

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548. The **Schtraks v. Government of Israel, [1964] A.C. 556** decision holds that *"the motive and purpose of the accused in committing the offence must be relevant and may be decisive"* in an extradition hearing where the issue of the political nature of the offence is raised. The motive and purpose of the marijuana grow operation at McCormick's residence was to conduct essential research into the cultivation of *medical* marijuana, and to publish the findings for an electorate which recognizes the significance and validity of medical marijuana. There is no evidence presented by the U.S.A. requesting State that the motive was any other (ie: involvement in

the black market, street level sales, etc.). In other words, whereas the political character of the offence does not emerge from the evidence in support of the requisition, it does emerge from the evidence adduced in answer and from the "Legislative Facts" which provide the full context for the situations in the circumstances.

***Schtraks v. Government of Israel,* [1964] A.C. 556, as referred to in *Re State of Wisconsin and Armstrong*, [1972] 3 O.R. 461 (Ont. Co. Ct.);**

"Legislative Facts", Part I – IV.

549. As further stated in **Schtraks (supra)**, in an offence of a "political character", the ***"fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country"***. In the circumstances of this case, the political control relates to which level of the U.S. Government, State or Federal, is the appropriate body to control the supply of medical marijuana to patients. Ms. Boje is in the camp supported by California's Proposition 215 and the other similar States and is opposed to the efforts by the Federal Government in attempting to regain control over this issue.

Schtraks (supra);

"Legislative Facts", Part IV, iii(a) – (c).

550. The decision in **Schtraks (supra)** requires some connection by the "political offence" with an uprising, disturbance, insurrection, civil war or struggle for power. While there is clearly a struggle for power going on and there is an uprising on behalf of the State of California and other States that are similarly minded, it is the U.S. Federal Government that has declared "war" and that is creating the disturbance and insurrection. There is no violence involved on the part of those seeking to maintain control over this issue by the States. The violence comes solely from the U.S. Federal Government drug warriors in their continuing zeal to raid, arrest and prosecute *bona fide* medical users, their assistants, caregivers and even their physicians. There is a clearly political opposition between Ms. Boje, the various States that support medical marijuana and all of the individuals and organizations supporting medical marijuana and the U.S. Federal Government. Here, the people of California and the people of other States, as well as the democratically elected legislators of these States have through peaceful means expressed the will of the people on the question of medical marijuana. It cannot be said that the U.S. Federal Government is simply standing apart and is concerned only to enforce the criminal law that has been violated by the protestors. The U.S. Federal Government continues to maintain "marijuana" in Schedule 1 of the

Controlled Substances Act. The effect of this, as illustrated in the cases and specifically in this case where the defence was denied, means that essentially marijuana has no known medical use. This is contrary to not only what the **Institute of Medicine** Report, commissioned by the U.S. Federal Government, says, but is also contrary to what the United States Drug Enforcement Administrations Law Judge Francis Young found, namely that marijuana was "one of the safest therapeutic drugs known", and the findings of the 1972 Presidential Commission, known as the **Schafer Commission**, and formerly entitled "**The National Commission on Marijuana and Drug Abuse**". Which, in its report entitled "Marijuana: A Signal of Misunderstanding" (1972) concluded that marijuana prohibition posed significantly greater harm to the user than the use of marijuana itself.

"Legislative Facts", Part IV, iii(a), "The Medical Evidence, paras. 282 – 288;

Affidavit of Paul David Wolf, sworn the 8th day of May, 2000

"Medical marijuana in a time of prohibition", Lester Grinspoon, International Journal of Drug Policy, 10 (1999) 145 – 146.

"**Legislative Facts", Part IV, C, paras. 303 – 306;**

***USA Inc. v. Peter McWilliams, Todd McCormick, et al*, Memorandum and Order CR97-997(A)-GHK, U.S. District Court, Central District of California, Book of Authorities, Volume II, Tab 8.**

551. In view of the above, it is submitted that if marijuana is recognized by science and the medical community, both within the United States and Canada, as having beneficial therapeutic effects in relation to a number of illnesses and diseases, then the continued obstinate refusal on the part of the U.S. Federal Government to at least reschedule the drug to accord with scientific reality makes it clear that this is "political" conduct driven by "political considerations" and that the Federal Government can hardly be said to be "standing apart" in some sort of dispassionate, objective sense with a concern to solely enforce the criminal law. The evidence is overwhelmingly to the contrary. If one adds to the mix the Canadian position in contrast to that of the U.S. Federal Government and consistent with those various States supporting medical marijuana, there can be no doubt that this issue is highly "political" and that the persecution of Ms. Boje is clearly for a "political offence" or an "offence of a political character".

“Legislative Facts”, Parts IV and V;

Correspondence of Richard Cowan, dated October 15, 2000;

Correspondence from Woody Harrelson, dated October 15, 2000.

552. For the reasons states above, it is respectfully submitted that Ms. Boje should not be surrendered to the United States of America because the conduct in respect of which her extradition is sought is a “political offence” or an “offence of a political character” within the meaning of section 46(1)(c) of the Extradition Act.