Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et procureur général du Canada

The Honourable / L'honorable Irwin Cotler, P.C., O.C., M.P./c.p., o.c., député
Ottawa, Canada K1A 0H8

JUN 15 2005

Mr. John W. Conroy, Q.C.
Conroy & Company
Barristers and Solicitors
2459 Pauline Street
Abbotsford, British Columbia V2S 3S1

Dear Mr. Conroy:

I write in response to the submissions you have made on behalf of your client Ms. Renée Boje regarding her surrender to the United States of America.

By diplomatic note dated March 3, 1999, the United States of America requested the extradition of Ms. Renée Boje, an American citizen born October 2, 1969, for the purpose of prosecution. She is subject to an indictment filed June 30, 1998, in the U.S. District Court, for the Central District of California in Los Angeles, California, which charges her with:

- conspiracy to manufacture, distribute and possess with intent to distribute marijuana, in violation of Title 21, United States Code, section 846; and

- manufacturing and aiding and abetting the manufacture of marijuana or causing to be manufactured more than 1,000 marijuana plants, that is 4,116 plants, in violation of Title 21, United States Code, section 841(a)(1) and Title 18, United States Code, section 2.

The evidence against Ms. Boje in support of the extradition request indicates that between December 1996 and December 1997, Mr. Peter McWilliams, a co-accused of Ms. Boje, financed the creation of several marijuana cultivation sites, one of which was allegedly run by another co-accused, Mr. Todd McCormick, and located in a Bel Air, California, residence. On July 29, 1997, U.S. police officers were conducting surveillance at the Bel Air residence and observed Ms. Boje and another alleged co-conspirator moving and watering some of the 4,116 marijuana plants which were found in the residence when the police raided it later that day.

Ms. Boje and one of her roommates were detained on leaving the Bel Air home and advised of their *Miranda* rights. They are alleged to have said that they met Mr. McCormick at a 'head shop' two months previously and to have admitted to watering and moving the marijuana plants that day and on other occasions during the two month period. They claimed that Mr. McCormick's actions were legal because they were for the purpose of medical research. They are also reported to have said that Mr. McCormick told them that he had a prescription from a California doctor to cultivate and smoke marijuana, as well as prescriptions in at least one other state and two other countries. He also had a license to cultivate marijuana under California state law. Ms. Boje said that she was paid for the work but that she "would do it for free."

On February 9, 2000, following an extradition hearing, the Honourable Mr. Justice Catliff of the Supreme Court of British Columbia committed Ms. Boje for extradition on all of the offences set out in the Authority to Proceed, namely:

- conspiracy to produce cannabis (marijuana) contrary to section 7(2)(*b*) of the *Controlled Drugs and Substances Act* and section 465(1)(*c*) of the *Criminal Code;*

- production of cannabis (marijuana) contrary to section 7(2)(*b*) of the *Controlled Drugs and Substances Act*;

- conspiracy to possess cannabis (marijuana) for the purposes of trafficking contrary to section 52) of the *Controlled Drugs and Substances Act* and section 465(1) of the *Criminal Code*;

- possession of cannabis (marijuana) for the purposes of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*;

- conspiracy to traffic in cannabis (marijuana) contrary to section 5(1) of the *Controlled Drugs and Substances Act* and section 465(1) of the *Criminal Code*.

Ms. Boje has appealed the decision of the extradition judge.

You have made extensive submissions to me asking that I not order the surrender of Ms. Boje. Your submissions were made on the following dates: April 13, 2000; April 19, 2000; June 12, 2000; July 25, 2000; August 29, 2000; September 18, 2000; September 19, 2000; October 20, 2000; October 26, 2000; November 21, 2000; May 8, 2001; June 18, 2001; August 10, 2001; September 5, 2001; May 13, 2002; May 30, 2002; May 23, 2002; and July 9, 2003.

In addition to your submissions, Ms. Boje personally wrote to me on September 23, 2004, to bring to my attention the fact that she uses marijuana as part of her religious practice as a Gnostic and to reiterate her concerns about prison conditions in the United States of America. You and Ms. Boje have provided me with information indicating that women are subjected to sexual and other violent abuses in U.S. prisons. Ms. Boje also sent me two videotapes and a CD-Rom containing footage shot inside a prison in Brezoria County, Texas, and a television segment of a journalist who spent time in a prison for women.

You have submitted that the surrender of Ms. Boje should be refused on the following three grounds:

I. It would be unjust or oppressive to surrender Ms. Boje to the United States of America as a result of:

- Her personal circumstances, including her use of marijuana as a religious sacrament;

The particular circumstances of the case:

i. The California *Compassionate Use Act*;
ii. Her minor role in the alleged conspiracy;
iii. The potential for a lengthy sentence;
iv. Limitations on full answer and defence;

The criminal justice system of the United States of America:

i. Violation of the harm principle;
ii. Violation of the right to be free from cruel or unusual treatment or punishment.

II. The extradition of Ms. Boje is sought to prosecute or punish her for her political opinion.

III. The conduct alleged against Ms. Boje is a political offence or an offence of a political character.

As a preliminary matter you have requested disclosure of two letters the contents of which were summarized in a memorandum dated April 25, 2002, entitled "United States of America v. Renee Boje – Request for Extradition – Summary of the Case and Submissions." In the memorandum, reference is made to two letter writers who urged that I send Ms. Boje back to the United States of America.

In considering your request, I have reviewed the decision of the Ontario Court of Appeal in *United States of Mexico* v. *Hurley* (1997), 116 C.C.C. 3d) 414 (Ont. C.A.). In that case, counsel for Mr. Hurley argued that the then Minister of Justice had breached his duty of fairness by failing to disclose to Mr. Hurley, the person sought, correspondence sent to the Minister by, *inter alia,* family members of the victim. At the judicial review of the surrender order in that case, the Court held that the Minister's duty of fairness was complied with in the case because the person sought was made aware of the substance of the communications.

I have placed no reliance on these letters, and they have formed no part of my consideration of the issues in this case or in my determination of whether to order the surrender of Ms. Boje. As such, and in view of the fact that you have been made aware of the substance of the letters, I decline to make such disclosure to you.

I thank you for the submissions you have made to me. They were of assistance in carrying out my responsibilities under the *Extradition Act*.

A decision to refuse surrender is justifiable only on compelling grounds related to specific provisions of the *Extradition Act* (the Act), the *Treaty on Extradition between Canada and the United States of America* (the Treaty) or where surrender would be contrary to the *Canadian Charter of Rights and Freedoms* (the Charter).

I have fully considered this case and the relevant law. After careful review, I have decided to order the surrender of Ms. Boje to the United States of America. My reasons for coming to this conclusion are set out below.

I. Surrender Would be Unjust or Oppressive – section 44(1)(*a*) of the *Extradition Act*

Ms. Boje's Personal Circumstances

You submit that it would be unjust or oppressive to surrender Ms. Boje for trial in the United States of America. You refer to Ms. Boje's personal characteristics and situation as a young, university-educated woman with no criminal record who, since coming to Canada, has married and become a mother. You submit that the decision of the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 requires that I consider the best interests of the Canadian born child and treat that as an important factor in my decision-making in this case.

The Supreme Court of Canada in *United States* v. *Burns* (2001), 151 C.C.C. (3d) 97 set out personal circumstances that would import exceptional weight in determining whether surrender would be in accordance with the principles of fundamental justice.

Such circumstances include: "youth, insanity, mental retardation or pregnancy of a fugitive which, because of its paramount importance, may control the outcome of the Kindler balancing test on the facts of a particular case".

I have considered the undoubtedly negative effect that my decision to order the surrender of Ms. Boje will have on her son. I have also had regard to the following considerations.

Generally, persons accused of crimes in Canada cannot escape criminal prosecution in Canada on the basis that a prosecution against them would have serious consequences for their child or other family members. Indeed, Canadian courts have the power to take an accused away from his or her dependent family members when refused bail or convicted of a criminal offence and sentenced to a period of incarceration. Recently, the Ontario Court of Appeal in *R.* v. *Spencer* (August 3, 2004) held that the adverse effects that the imposition of a jail term would have on the children of a convicted drug courier could not justify the imposition of a sentence below the accepted range.

I have, as requested by Ms. Boje, considered her use of marijuana as a religious sacrament in making my surrender decision. In so doing, I have had regard to the decision of the Ontario Court of Appeal in *R.* v. *Baldasaro* [1996] O.J. No. 712 (Ont. C.A.). In that case, the Court held that the use of cannabis as a religious sacrament does not exempt people from the application of existing criminal prohibitions to the possession and trafficking of marijuana nor can it serve as a defence to criminal charges. As religious marijuana use does not exempt a person in Canada from criminal liability for marijuana offences, I decline to refuse to surrender on this basis. The effect of Ms. Boje's religious beliefs on the outstanding charges against her in the United States of America, is a matter that can be dealt with by the American trial court.

While Ms. Boje's personal circumstances are factors I have considered they must be weighed against Canada's international commitments. Her circumstances are not uncommon. It cannot be said, in this particular case, that Ms. Boje would face a situation that is sufficiently shocking to the Canadian conscience to render her surrender "simply unacceptable." Refusal to surrender Ms. Boje on this basis would not be justified.

The Particular Circumstances of this Case

You submit that the following particular circumstances of Ms. Boje's case make it unjust or oppressive to order her surrender, namely:

i. The California *Compassionate Use Act;*
ii. Ms. Boje's minor role in the alleged conspiracy;
iii. The potential for a lengthy sentence;

iv. Limitations on the ability to make full answer and defence.

(i) The California *Compassionate Use Act*

You submit that Ms. Boje undertook the conduct alleged against her in an effort to assist two individuals, Mr. McWilliams and Mr. McCormick, who were cultivating a large number of marijuana plants to develop different strains of the plant for medicinal purposes. You argue that Ms. Boje believed that her actions were legal pursuant to the *Compassionate Use Act*. You also argue that the existence of differing approaches to marijuana regulation on the part of the federal and state governments is sufficient reason to deny Ms. Boje's surrender.

I understand that the effect of the *Compassionate Use Act* (CUA) is to decriminalize the possession and cultivation of marijuana for medical purposes in certain situations under California state law. The CUA does not, however, affect the applicability of the U.S. federal *Controlled Substances Act* which continues to prohibit marijuana possession, distribution, and cultivation.

American officials have informed me that the conduct alleged against Ms. Boje would not fall within the purview of the CUA, and would constitute a violation of California state law as she is neither a patient, nor a caregiver with a medical recommendation for marijuana use. Moreover, the quantity of marijuana involved likely would be found to be too large to justify its production for personal medical purposes. Finally, even if Ms. Boje mistakenly believed that what she was doing was legal, mistake of law is not a defence under American or Canadian law.

You assert that there is a major political dispute between the U.S. Federal and several state governments on the issue of marijuana use for medical purposes. I note that even if Ms. Boje were able to claim a "medical marijuana exemption" any conflict with American federal drug laws would be a matter of foreign law to be considered by the American trial court.

In my view neither Ms. Boje's belief that her actions were legal, nor the possible conflict between state and federal legislation in the United States of America raise a basis to refuse surrender on the facts of this case.

(ii) Ms. Boje's minor role in the alleged conspiracy

You submit that the role Ms. Boje is alleged to have played in the conspiracy is minor and that there is no evidence of her involvement in trafficking marijuana or possessing it for that purpose. You argue that her minor role coupled with the grossly disproportionate sentence to which she may be subject are additional circumstances which make it unjust to order her surrender.

I note that Mr. Justice Catliff considered the evidence and found a sufficient basis to commit Ms. Boje for extradition on all the charges set out in the Authority to Proceed, including conspiracy to traffic marijuana. That decision will be reviewed by the British Columbia Court of Appeal in Ms. Boje's appeal against committal. The determination of the precise nature and extent of Ms. Boje's role in the conspiracy alleged is a task for the foreign court. I will not refuse the surrender of Ms. Boje on this basis. I address your submissions below regarding the severity of the sentence to which she may be subject on conviction.

(iii) The potential for a Lengthy Sentence

You submit that the sentence that Ms. Boje will receive if convicted in the United States of America is out of proportion to the gravity of the offence for which she has been charged. You submit that marijuana offences are viewed very differently in Canada than in the United States of America and that this is another factor which makes it unjust or oppressive to surrender Ms. Boje. Moreover, you argue that there is insufficient discretion in the hands of the sentencing judge and this results in a breach the principles of fundamental justice in "the section 11(*d*) aspect of section 7 of the Charter." You submit that by deciding which charges will be laid, it is the American prosecutor, rather than the judge, who determines the length of sentence to be imposed upon conviction.

You point to the following indicators which you say illustrate that marijuana offences are viewed far less seriously in Canada:

- the decision of the Ontario Court of Appeal in *R. v. Parker* (2000), 146 C.C.C. (3d) 193;
- Canada's statutory scheme allowing for the possession and use of marijuana for medical purposes;
- the existence of "Compassion Clubs" that provide medical marijuana to thousands of patients who have prescriptions from their doctors; and
- the imposition by the courts of the most lenient sanctions available.

You submit that in Canadian law "proportionality" is both a fundamental principle of sentencing and a principle of fundamental justice and that the surrender of Ms. Boje to face trial in a system that does not respect the principle of proportionality would be unjust or oppressive. You submit that if Ms. Boje were to be convicted in Canada, the most severe penalty she would be likely to receive would be a sentence of two years less a day, possibly coupled with probation. In the medical marijuana context, you submit, Canadian prosecutions of patients or those assisting patients to grow marijuana have resulted in the imposition of absolute or conditional discharges or suspended sentences, the most lenient dispositions available to the courts under the circumstances.

If Ms. Boje is surrendered, you contend, the minimum sentence for the offences with which she is charged is 10 years' imprisonment. In your submission, even if the U.S. government undertook not to imprison Ms. Boje and to permit her to serve her sentence on probation, this would still be an unfit and disproportionate sentence because she has suffered enough and did not do anything wrong.

You point to the many U.S. District Court judges who are calling for the abolition of minimum sentences and the majority who support increasing judicial discretion in the sentencing process as evidence that it would be unjust or oppressive to surrender Ms. Boje to the United States of America.

In the United States of America, the maximum penalty for the offences alleged against Ms. Boje is life imprisonment, a fine of $4 million and a term of supervised release of five years. The minimum penalty is a mandatory ten years' imprisonment with no possibility of parole. In Canada, the maximum penalty for the equivalent offence of possession of over three kilograms of marijuana for the purpose of trafficking is life imprisonment. The punishment for the equivalent Canadian offence of producing cannabis is seven years' imprisonment.

In light of your concerns, my officials contacted the U.S. Office of International Affairs to determine to what extent a judge can depart from the mandatory minimum sentence provided for by statute. I have been informed by American authorities that the imposition of a mandatory minimum sentence is subject to certain exceptions. One of these exceptions is the absence of a criminal record. I note that Ms. Boje has no criminal history and it would appear therefore, that she may be eligible for an exemption from the imposition of the mandatory minimum sentence.

The American authorities have further indicated that as a result of the recent U.S. Supreme Court decisions in *United States* v. *Booker and United States of America* v. *Fanfan*, 125 S.Ct. 738 (2005), the American Sentencing Guidelines are now only advisory, and the court is free to exercise its discretion to impose any reasonable sentence within the range set by statute. The Sentencing Guidelines will have no effect on the applicability of the mandatory minimum sentence, however, as its imposition is regulated by statute.

I should also note that it is highly speculative to formulate an opinion on what the prosecution in either Canada or the United States of America would ultimately succeed in proving at a trial, or what sentence the trial judge will ultimately impose, if Ms. Boje is convicted. The evidence alleged against Ms. Boje is not yet proven. She is sought not to serve a sentence, but to be put on trial.

With the exception of the death penalty, nothing in the Treaty or the Act allows me to refuse surrender based on the penalty applicable in the Requesting State. The question, therefore, becomes whether it would be a Charter breach to surrender Ms. Boje to face the penalties applicable in the United States of America.

In considering whether surrendering Ms. Boje to the United States of America where she *may* spend a significant amount of time in custody would be unjust or oppressive, I have to bear in mind Canada's treaty commitment together with the following basic tenets of Canada's legal system acknowledged by the Supreme Court of Canada in *United States* v. *Burns*, [2001] 1 S.C.R. 283:

- Justice is best served in the jurisdiction where the crime was allegedly committed and harmful impact felt; and

- Extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice.

I also note that the Supreme Court of Canada has repeatedly upheld surrender decisions where the person sought for extradition was potentially facing a lengthy mandatory minimum sentence upon conviction in the requesting state, which sentence would be a far greater one than that which would be imposed in Canada. See for example *U.S.A.* v. *Jamieson* (1994), 93 C.C.C. (3d) 265 (Que. C.A.). affd. [1996] 1 S.C.R. 465; *U.S.A.* v. *Ross* (1994), 93 C.C.C. (3d) 500 (B.C.C.A.), affd. [1996] 1 S.C.R. 469. See also the B.C.C.A decision in *Gwynne* v. *Canada (Minister of Justice)* (1998), 50 C.R.R. (2d) 250 leave to appeal denied (1998), 52 C.R.R. (2d) 188 (S.C.C.).

Although Ms. Boje may receive a longer sentence in the United States of America than she would in Canada, this is not a sufficient reason to deny surrender. I am of the view that surrendering Ms. Boje to the United States of America to serve a lengthy sentence if convicted would not be "shocking to the conscience" or unjust or oppressive in light of the maximum potential sentence of life imprisonment that she would face were she convicted of the same offence in Canada.

(iv) Limitations on the ability to make full answer and defence.

You submit that at the American trials of Ms. Boje's co-accused, Messrs McWilliams and McCormick, neither was permitted by the court to adduce evidence of the *Compassionate Use Act*, their own medical conditions, their reliance on the advice of counsel or evidence related to a defence of medical necessity. You submit that these same limitations will be imposed on Ms. Boje and consequently it would be unjust or oppressive to order her surrender.

You submit that full answer and defence will be denied to Ms. Boje in the United States of America in that at her trial she will not be permitted to:

- raise the defence of medical necessity;
- make reference to Proposition 215 which resulted in the passage of the *Compassionate Use Act*, decriminalizing, under state law, the possession and cultivation of marihuana for medical purposes under certain conditions;
- lead evidence of the medical conditions of her co-accused Messrs McCormick and McWilliams;
- lead evidence of reliance on the advice of counsel;
- lead evidence of the medical usefulness of marijuana.

You submit that if Ms. Boje faces trial in the United States of America the limitations placed on her ability to call a defence under American law amount to a breach of the section 11(*d*) aspect of section 7 of the Charter and that it would shock the conscience of Canadians to return Ms. Boje to face a trial under these circumstances.

I have been informed by American authorities that in prosecutions under the U.S. Federal *Controlled Substances Act* no evidence may be led by accused persons of the medical value of marijuana. Although there are limitations on the nature of the evidence that an accused person may call in defence of U.S. federal marijuana charges, I have been advised that it is possible to take into account this information in the context of a sentencing hearing. In *United States* v. *Rosenthal* (2003) 266 F. Supp. 2d 1091, a District Court judge in California held that evidence of a mistaken belief in a legal exemption to grow marijuana could be taken into account at a sentencing hearing, though not permitted by the court to be called at trial. This information resulted in a significant downward departure in the sentence that was otherwise called for by the U.S. Sentencing Guidelines.

I am mindful of the fact that accused persons in Canada do not have an unbridled right to call evidence or rely on any defence they choose at their trials. In Canada, evidence of the medicinal value of marijuana has been introduced in criminal trials in the context of pre-trial Charter applications, but not as a defence at trial. In any event, I note that the Supreme Court observed in *Schmidt* v. *the Queen* (1987), 33 C.C.C. (3d) 193 that "there is nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours with different checks and balances."

I also bear in mind the observations of the Supreme Court of Canada in *United States of America* v. *Allard* [1987] 1 S.C.R. 3, that the trial when it takes place will be held in the foreign jurisdiction subject to its rules and procedures.

As a result of the foregoing, I am of the view that it would not breach Ms. Boje's section 7 Charter rights to be surrendered to the United States of America to be tried in accordance with the rules of their criminal justice system.

I. The criminal justice system of the United States of America

You submit that it is unjust or oppressive to surrender Ms. Boje for trial in the United States of America because the criminal justice system violates the "harm principle" as well as Ms. Boje's right to be free from "cruel or unusual treatment or punishment."

(i) Violation of the harm principle

You submit that in Canada it is a principle of fundamental justice that one is entitled to do whatever one wants as long as one's actions do not harm others or society as a whole. You submit that the conduct alleged against Ms. Boje in helping to grow marijuana for medical use was aimed at reducing harm both to particular individuals and society generally. Since the conduct alleged against Ms. Boje in the United States of America was aimed at reducing harm you submit that it would shock the Canadian conscience to surrender her.

In continuing to criminalize the possession and use of marijuana despite evidence of its therapeutic value, the U.S. government, you submit, is violating the harm principle. You assert that in *Parker*, the Ontario Court of Appeal recognized that such behavior is not criminal. You rely on the British Columbia and Ontario Courts of Appeal decisions in *R. v. Malmo-Levine; R.* v. *Caine* (2000), 145 C.C.C. (3d) 225 (B.C.C.A.); and *R.* v. *Clay* (2000), 146 C.C.C. (3d) 276 (O.C.A.), respectively, in support of your submission arguing that these decisions have accepted the harm principle as a principle of Canadian criminal law.

As you are aware, having acted as counsel to Mr. Caine, these decisions were appealed to the Supreme Court of Canada and heard together as a consolidated appeal on May 6, 2003. In reasons released December 23, 2003, the Supreme Court found that there was at least some reason to be concerned about marijuana consumption and since the harm is not *de minimis*, it is up to Parliament to determine what penalty should attach to marijuana offences. The Court rejected the assertion that the harm principle is a principle of fundamental justice: "In short, there is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offence" (*R.* v. *Malmo-Levine; R.* v. *Caine, and R.* v. *Clay, supra.).*

As our own Supreme Court has rejected the harm principle as a principle of fundamental justice, I am satisfied that the fact that the harm principle is not recognized in the United States of America is irrelevant to my determination with respect to whether to surrender your client, and therefore, I decline to refuse to surrender Ms. Boje on this basis.

(ii) Violation of the right to be free from "Cruel and Unusual Treatment or Punishment"

You submit that surrendering Ms. Boje in this case will be a violation of her right to be free from cruel and unusual treatment or punishment and that therefore it is unjust or oppressive for me to order her surrender. Your submission in this respect has two aspects. The first is that the sentence that she will face if convicted will be so lengthy it will in itself amount to cruel and unusual treatment or punishment. Second, you argue that the conditions in U.S. prisons constitute cruel and unusual treatment or punishment.

You submit that the penalty in the United States of America is grossly disproportionate to the circumstances of Ms. Boje's case amounting to cruel and unusual treatment or punishment, particularly having regard to the fact that Ms. Boje was attempting to help sick people who were apparently acting under the authority of state law. You submit that in the medical marijuana context in Canada, prosecutions of patients or those assisting patients to grow marijuana have resulted in discharges or the imposition of suspended sentences. To surrender Ms. Boje to the United States of America to face such a disproportionately high sentence would, you submit, be unjust or oppressive. You submit Ms. Boje's conduct falls into the category contemplated by Mr. Justice Baudouin of the Québec Court of Appeal in the *Jamieson* case to which I have referred above wherein His Lordship implied that extradition to face a 20- to 30-year sentence for the possession of a marihuana cigarette might be unlawful. As set out above, I am of the view that the possibility that a lengthy sentence may be imposed against Ms. Boje if she is convicted does not, in itself, render her surrender unjust or oppressive.

You assert that the right to be free from cruel and unusual treatment or punishment guaranteed by section 12 of the Charter refers not only to the length of a prison sentence but also to the conditions in which it is served. You have submitted to me reports produced by Amnesty International and other similar organizations which recount physical and sexual abuse of women inmates in the U.S. prison system. Ms. Boje also provided to me videotapes of guards mistreating male prisoners in a jail in Brezoria County, Texas, and containing a segment of a U.S. news programme in which a journalist toured a U.S. woman's prison.

During her extradition hearing, Ms. Boje submitted an affidavit describing her treatment by police and prison authorities in the United States of America while she was detained for two days following her arrest in July 1997. She says that while she was in custody she asked repeatedly to speak to a lawyer, a right she was granted only after being detained for the better part of a day. She says she was treated aggressively both verbally and physically by police and corrections officials and that she was strip-searched approximately 15 times, sometimes within view of male guards who made threatening and lewd comments and gestures.

On December 23, 2003, my counsel provided to the Office of International Affairs of the U.S. Department of Justice a copy of Ms. Boje's affidavit and asked whether the United States of America had any information about the allegations contained therein.

American authorities have advised that:

- Ms. Boje was arrested at 5:30 p.m. on July 29, 1997, and detained until July 30, 1997, at 10:17 p.m. She was initially detained at a fire station nearby the scene of her arrest. She was then taken to Drug Enforcement Administration (DEA) headquarters for booking and processing including the taking of a photograph and fingerprints.
- No one at the DEA can recall whether Ms. Boje was strip-searched while in custody at DEA headquarters, although standard procedure dictates that female prisoners are strip-searched only if a female agent is available. If there was a female agent available, Ms. Boje would have been strip-searched in a windowless room.
- Upon her arrival at the Metropolitan Detention Centre, adjacent to the DEA office, at approximately 3:15 a.m. on July 30, 1997, standard procedure is for inmates to be strip-searched by a guard of the same gender upon arrival. It was also standard procedure for female inmates to be taken to a private room outside the view of any male guards or inmates for such a search. The room has a six-inch square window.
- At 7:23 a.m. on July 30, 1997, Ms. Boje was taken by the DEA to the adjacent courthouse where she was held in the courthouse lock up pending her appearance before a federal judge that day. The DEA did not strip-search her at that location.
- Once bail was set, she was remanded to the custody of the U.S. Marshals who, not regarding her as a high-risk inmate, would not have searched her.
- She was returned to the Metropolitan Detention Centre where standard procedures required that she be strip-searched by a female guard in a private area outside the view of male guards.

While the arrest and booking process would no doubt have been very difficult for Ms. Boje, who has no prior involvement with the police, it is not substantially different from the arrest and booking process in Canada and I am therefore of the view that it would not shock the conscience of Canadians, that Ms. Boje was strip searched in keeping with standard U.S. practices.

As you are aware, pursuant to subsection 40(2) of the Act, my officials consulted with the Minister of Citizenship and Immigration who responded on May 23, 2002, and November 26, 2003. Ms. Boje has made a claim for refugee status in Canada on the basis that she fears persecution in the United States of America. In her Personal Information Form filed with Immigration authorities and dated May 12, 1999, Ms. Boje states she fears that brutalisation and harassment by authorities in U.S. jails will be used as a means to pressure her to testify against her co-accused Mr. Todd McCormick. She states that she believes she is being politically persecuted in the United States of America for her belief in the medicinal value of cannabis.

As part of the consultative process, officials with the Department of Citizenship and Immigration (CIC) conducted a risk assessment with respect to torture within the meaning of Article 1 of the *Convention Against Torture* and with respect to a risk to life or to cruel and unusual treatment or punishment, pursuant to subsections 97(*a*) and (*b*) of the *Immigration and Refugee Protection Act*. After having considered Ms. Boje's concerns and examining reports of Amnesty International regarding prison conditions in the United States of America, the Minister of Citizenship and Immigration concluded there were no substantive grounds to believe that she will be tortured and it is unlikely that her life will be at risk or that she will be subject to other cruel and unusual treatment or punishment should she be returned to the United States of America.

Notwithstanding the conclusions of CIC, I am nonetheless required to ensure that the decision to surrender Ms. Boje does not violate her section 7 Charter rights (See *Suresh* v. *Canada,* [2002] 1 S.C.R. 3). I am satisfied that you have not established a substantial risk of torture or persecution. In coming to that conclusion, I have taken into account your submissions, the opinion supplied to me by CIC, and the nature of the jurisdiction to which Ms. Boje's surrender is sought. I take comfort in the fact that the American judicial system operates in a manner that Canadians would recognize as providing an accused with due process of law and the right to fundamental justice (see *R.* v. *Schmidt* (1987), 33 C.C.C. (3d) 193 (S.C.C.)). In my view, Ms. Boje's outstanding request for refugee status does not provide a reason to refuse surrender.

I am supported in my view by the fact that in entering into an extradition treaty with the United States of America, our Executive has determined that the United States of America judicial system is a just one. Moreover, the United States of America is legally bound to comply with the international treaties it has ratified. These include the *International Covenant on Civil and Political Rights*

(which protects the fundamental rights i.e. the right to life, the right to freedom of expression, of conscience, and association, the right to be free from arbitrary arrest or detention, the right to freedom from torture or ill-treatment and the right to a fair trial) and the *Convention Against Torture* (which requires the prohibition and punishment of torture in law and in practice).

If Ms. Boje is not surrendered, Canada would be denying our extradition partner's treaty request and allowing Ms. Boje to escape trial. The important interest of society in ensuring that a fugitive is brought to justice for a proper determination of his or her guilt or innocence would not be attained.

I am mindful of section 44 of the Act which requires me to refuse surrender if I am satisfied that it would be unjust or oppressive having regard to all the relevant circumstances. I have conducted "a balancing on the facts of the case of the applicable principles of fundamental justice" (*R.* v. *Kindler* (1991), 67 C.C.C. (3d) 1 (S.C.C.) and *United States* v. *Burns* (2001), 151 C.C.C. (3d) 97 (S.C.C.)) and concluded that the issues you raise do not provide a reason to refuse surrender.

I am not persuaded that the length of the sentence that Ms. Boje may serve if convicted nor the conditions under which she may serve it would amount to cruel and unusual punishment such that they would shock the Canadian conscience and compel me to refuse her surrender.

I am not persuaded that, individually or collectively, the factors you submit make it unjust or oppressive to surrender Ms. Boje, require that I refuse to order her surrender.

II. The extradition of Ms. Boje is sought to prosecute or punish her for her political opinion.

You submit those who espouse the use of marijuana are taking a political position and are expressing their political opinion both by their words and actions. You argue that the U.S. federal government is said to be threatening Ms. Boje's human rights because her position is fundamentally at odds with the federal power structure. In support of the contention that the extradition of Ms. Boje is sought to prosecute her for her political opinion, you point to the dispute between the U.S. federal and California State governments over the decriminalization of marijuana for medical use and say that the issue is clearly "political" making it impossible to separate the politics from the alleged offences. You refer to what you say are examples of repression by the U.S. federal government of those who advocate in favor of the use of marijuana for medical purposes such as the threatening of doctors with license revocation if they prescribe

marijuana for medical purposes. Relying on case law in the refugee context, you submit that Ms. Boje is part of a particular social group, namely those who espouse the medicinal use of marijuana, which causes her to have a well-founded fear of persecution.

By virtue of section 44(1)(*b*) of the *Extradition Act*, I am required to refuse Ms. Boje's surrender if I conclude the United States of America has requested Ms. Boje's extradition for the purpose of prosecuting her for her political opinion. I must, therefore, consider the motives of the United States of America in seeking the extradition of Ms. Boje.

I am mindful of the decision in *Libman* v. *Quebec (Attorney General)* (1997), 151 D.L.R. (4th) 385 (S.C.C.) in which the court held that the notion of "political opinion" in paragraph 44(1)(*b*) of the Act is similar to the "freedom of thought, belief, opinion and expression" in sub-section 2(*b*) of the Charter.

I have also considered the decision of the Supreme Court of Canada in *Ross* v. *New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1 which endorsed a two step process for establishing a violation of freedom of expression under section 2(b) of the Charter. First there must be a determination of whether the conduct falls within the sphere of conduct protected by the Charter. Second, it must be determined whether the purpose or effect of the government action was to restrict freedom of expression. In *Ross*, the Court made clear that it is the attempt to convey meaning that is the essence of the interest that is protected under section 2(*b*) of the Charter.

I have concluded that Ms. Boje's extradition should not be refused on the basis that the United States of America is seeking to prosecute or punish her for her political opinion or that her position will be prejudiced by reason of her political opinion. The conduct alleged against Ms. Boje is that she was tending and watering some of the 4,116 marijuana plants being grown in a private, rented mansion in Bel Air, California. I am not satisfied that this conduct can be viewed as an expression of political opinion. Though it may be argued that all human activity conveys meaning, I am not persuaded that Ms. Boje's conduct could properly be characterized as an "attempt to convey meaning" which would engage section 2(*b*) of the Charter.

Nor am I satisfied that the United States of America is seeking the return of Ms. Boje to punish her for her political beliefs as a medical marijuana proponent. There is clearly a difference in approach between the U.S. federal and California State governments on the question of the use of marihuana for medical purposes. This difference of approach has been found to be constitutional by the United States Supreme Court in *United States* v. *Oakland Cannabis Buyers Cooperative* (2001), 532 U.S. 483 (U.S.S.C.). The United States of America federal authorities continue to take steps to enforce the law. The fact that there is a difference in policy between the federal

government and several state governments on the issue of medical marijuana use does not convert every prosecution under the federal *Controlled Substances Act* into a politically motivated prosecution.

You submit that Ms. Boje is part of a particular social group, namely those who espouse the medicinal use of marijuana that causes her to have a well-founded fear of persecution. In considering your submission in this regard, I have found guidance in the decision of the Canadian Immigration and Refugee Board in *Steven Kubby et al. v. Minister of Citizenship and Immigration* (R.P.D.), VA2-01374 (Dauns, November 17, 2003).

Mr. Kubby, a medical marijuana user, was acquitted of marijuana charges and convicted of possession of psylocin and mescaline in the State of California. The Immigration and Refugee Board rejected Mr. Kubby's claim that he had a well-founded fear of persecution in the United States of America arising from his use of marijuana. In so doing the Board examined aspects of the criminal justice system of the United States of America, starting with the presumption that the American judicial system is fair and independent. It found no evidence of a political motivation to the prosecution observing that "the U.S. Constitution and its entire system of justice are devised to afford individual civil liberties and extensive fundamental rights."

I am similarly not persuaded that there is any evidence that the United States of America is seeking to punish Ms. Boje for her political opinion, and consequently I will not refuse to make a surrender order on this basis.

III. The Conduct in respect of which extradition is sought is a political offence or offence of a political character – Section 46(1)(*c*) of the Act

You submit that Ms. Boje undertook the conduct alleged against her in furtherance of a political matter that is the dispute between the federal authorities and the State of California as to which level of government will determine the issue of the control of, and access to, medical marijuana. Consequently, you submit that I must refuse to surrender Ms. Boje pursuant to section 46(1)(*c*) of the Act which states that I shall refuse to order the surrender of a person who is sought for extradition in relation to a political offence or an offence of a political character. In determining whether an act is political you submit the motive of the alleged offender is relevant. In that regard you rely on the 1964 decision of the House of Lords in *Schtraks* v. *Government of Israel* [1964] A.C. 556. You state that the motive and purpose of the marijuana grow operation at the McCormick residence was to conduct essential research into the cultivation of medical marijuana in order to publish the findings for an electorate which recognizes the significance and validity of medical marijuana.

Section 45 of the Act states that the reasons for refusal set out in the applicable Treaty will prevail over the reasons provided for in section 46 and 47 of the Act. By virtue of article 4(2)(*a*) of the Treaty the conduct for which the extradition of Ms. Boje is sought is exempted from the category of political offence or offence of a political character. This is so because Canada and the United States of America are parties to the multilateral *1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, known commonly as the *1988 Geneva Drug Convention*. The conduct for which the United States of America seeks to prosecute Ms. Boje is conduct for which Canada and the United States of America have undertaken to extradite individuals wanted for prosecution pursuant to this multilateral 1988 Convention.

Even if the *1988 Geneva Drug Convention* and article 4(2)(*a*) of the Treaty did not operate so as to exempt the conduct of which Ms. Boje stands charged from consideration as a political offence, I have considered whether her conduct could be characterized as being a political offence or offence of a political character. In considering your submissions in this respect, I have been guided by two cases in particular, *Wisconsin (State)* v. *Armstrong* (1973), 10 C.C.C. (2d) 271 (Fed.C.A.), leave to appeal to the Supreme Court of Canada refused (1973), 10 C.C.C. (3d) 271n (S.C.C.) and *Gil* v. *Canada (Minister of Employment & Immigration)* (1994), 25 Imm., L.R. (2d) 209 (Fed.C.A.).

In *Wisconsin*, the Federal Court of Appeal rejected the notion that the offences were political or of a political character, finding that there was no evidence of Mr. Armstrong's motivation and purpose in committing the alleged offences. Sweet D.J. held, referring to the decision of Viscount Radcliffe of the House of Lords in *Schtraks* v. *Government of Israel* (1962), [1964] A.C. 556 (U.K.H.L.) on which you rely, that an individual cannot escape prosecution by unilaterally declaring the alleged illegal conduct to be political. Sweet D.J. also concluded that a political offence argument must be closely scrutinized when the target of the alleged criminal activity is a non-governmental entity.

In the *Gil* decision, the Federal Court of Appeal considered an appeal of the rejection of Mr. Gil's refugee claim. Hugessen J.A. used the "incidence test" to determine whether the charges leveled against Mr. Gil in Iran were political in nature. The test is two-pronged:

- Is there an uprising to alter or abolish the existing government;
- Was the charged offence committed in furtherance of the uprising?

By these measures, Ms. Boje's claim that the offences alleged against her are political or of a political character, fail. There is no evidence that she undertook the alleged conduct at the time as a political act. Though there is a difference in approach as

between the U.S. federal and California State government this does not constitute a struggle between political factions. Ms. Boje's actions were not undertaken in the context of an uprising.

I am not persuaded that the extradition of Ms. Boje is sought to prosecute her for a political offence or an offence of a political character. I decline to refuse her surrender on this basis.

I have considered all the above noted matters both separately and cumulatively and have concluded that they have raised no basis upon which to refuse Ms. Boje's surrender. I have determined that there are no other considerations that would justify a refusal to surrender and I have, therefore, signed the warrants ordering the surrender of Ms. Boje to the United States of America to stand trial.

Thank you for bringing the particular circumstances of this case to my attention. Considering your submissions and the circumstances of this case, I have decided to order the immediate surrender of Ms. Boje to the United States of America.

Yours sincerely,

Irwin Cotler