C. THE REFUGEE SUBMISSIONS

I. Is Renee Boje a person who by reason of a well founded fear of persecution for reasons of her membership in a particular social group or, because of her political opinion, a person who is outside the country of her nationality and is unable or, by reason of that fear, is unwilling to avail herself of the protection of that country?

On September 13, 1999, the Minister, pursuant to Section 15 of the *Extradition Act* S.C. 1999, c. 18*,* issued an Authority to Proceed which, pursuant to Section 69.1(2) of the *Immigration Act* R.S.C. 1985, c. I-2, placed the onus upon the Department of Justice to consider the protection issues raised by the extradition warrant, particularly if the extradition request is for a conduct that is of a more political nature as opposed to a purely criminal one.

i) Definition

392. Section 2(1) of the *Immigration Act* defines a "convention refugee" as follows:

(a) Convention refugee means any person who by reason of a well founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(1) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country or .... but does not include any person to whom the convention does not apply pursuant to Section E or F of Article 1 thereof, which sections are set out in the Schedule to that *Act* [Section 2.2(i)] of the *Immigration Act*).

ii) Requisite Proof

393. First, for a person to receive protection as a Convention refugee under the above-noted definition, the applicant must show that there is a well-founded fear of persecution (which is the **subjective basis** of the claim). This fear must have

a connection to one of the enumerated grounds noted above (this is often referred to in refugee law as the ***nexus*** of the claim). Finally, as our jurisprudence does not consider all harm inflicted against individuals as justifying the need for protection, the **objective basis** of the claim in terms of the conditions in the country of origin must also be examined.

iii) Subjective Fear

394. In refugee law, a **Personal Information Form**, (PIF) is treated as a sworn statement, and, accordingly, should be treated as one in this instance. It is evident from Ms. Boje's Personal Information Form that there is no question that she has a subjective fear of returning to United States. Ms. Boje has no criminal record, is 30 years old and a college graduate. She had no prior run-ins with the authorities prior to her arrest in 1997.

395. As well, it is evident from her PIF that Ms. Boje was subjected to a systematic course of action by police authorities and prison officials designed to humiliate, intimidate and degrade her and also to pressure her into providing evidence against other, more important, co-accused. She was subjected to no less than nine strip searches in three days and male prison guards witnessed these strip searches despite the fact that, at 100 lbs, Ms. Boje is no threat to anyone.

396. Ms. Boje also has a general knowledge of the terrible conditions of the American prisons. More specifically, she is aware of what Mr. McCormick is facing and of what Mr. McWilliams, who has passed away, had faced in the United States since their imprisonment, including denial to Mr. McWilliams of his AIDS medication.

397. She also fears returning to the United States because she faces a minimum ten-year prison term. It is submitted that, as she does not have a criminal record and that she committed an act that was legal according to California law and was motivated by a desire to help people and not for financial gain, that a ten-year prison term sounds like the end of one's life. Clearly, this was not in Ms. Boje's mind, proportionate to the alleged act or omission committed. Therefore, there is no doubt that Ms. Boje's fear is reasonable.

iv) Nexus: Political Opinion

398. Ms. Boje, by participating in an activity that she undertook in 1997, has found herself labelled as a **medical marijuana activist**. As she strongly believes in Proposition 215 and in the cultivation and use of marijuana for medicinal purposes, this is probably a well-founded characterization.

399. Consequently, the nexus of her claim to protection in Canada is tied most appropriately to her political opinion, as what she is advocating is still against Federal law in the United States. The infamous American "War on Drugs" policy means that she is the enemy, regardless of her motivations, intentions, or reasoned arguments if she goes beyond argument and participates, as she is alleged to have done, in aiding and abetting the cultivation of marijuana for medical purposes.

400. Certainly, there is no question that the American Federal authorities view her as a marijuana activist. Profiles of her case have appeared in the **Globe and Mail**, the **Vancouver Province**, **ABCnews.com**, **Glamour** magazine (published in November of 1999) as well as many other publications, and have increased this perception. In addition, Ms. Boje has been very vocal and open about denouncing the actions of the United States authorities in many forums, having addressed students at York University, and even hosted her own radio show (the *"***Healing Herb Hour***"*). There is no question, therefore, her political opinion has been called into question and provides her nexus to an enumerated ground.

v) Objective Basis

a) Can prosecution be persecution?

b) Can prosecution be persecution in the United States specifically?

c) Can prosecution constitute inhumane treatment or cruel and unusual punishment, such that Canada is morally obligated to protect individuals from extradition?

a) <u>Can prosecution for ordinary offences constitute persecution?</u>

401. A person who has been prosecuted for an offence that also provides for a term of imprisonment has some sort of justifiable grounds to fear return to the country where the prosecution would occur (which, in this case, is also on the surface an offence in Canada). It is also very clear in our jurisprudence that not all prosecutions constitute "persecution" as defined in our jurisprudence.

402. Our Federal Court of Appeal in the case of ***Musial v. Canada (Minister of Employment and Immigration*)** held that a person punished for having violated a law of ordinary or general application is punished for "the offence committed not for the political opinions that may have induced to him to commit it". In that case, the Board ruled that the applicant, who violated the laws of his country of origin by evading military service, merely feared prosecution or punishment for that offence in accordance with those laws. The Court ruled that he could be said to fear prosecution, even if he was prompted to commit the offence by his strongly held political beliefs.

***Musial v. Canada (Minister of Employment and Immigration)* [1982] 1 F.C. 294 at para. 13.**

403. The Court, however, left open the possibility of an applicant demonstrating that if, in a particular case, punishment would be so disproportionate to the offence that the applicant might fear other reprisals from the State that go beyond the actual prosecution, the individual could still make out a successful refugee claim. Our law also clearly provides that reprisal legislation in violation of international human rights norms, whether a law of general application in the country of origin or not, could give a rise to well-founded fear of persecution.

404. Similarly, in the case of ***Chaudri v. Canada (Minister of Employment and Immigration)***, **[1986] F.C.J. No. 363 (F.C.A.)**, the Court found that prosecution can certainly constitute persecution in some circumstances. In the above noted case, the applicant was a citizen of Pakistan. Subsequent to his arrival in Canada, he had received the summons to appear before military court under provisions of a marshall law ordinance. His claim was rejected by the Refugee Board, but the Federal Court quashed the decision of the Board and found that, in the circumstances of this particular case, the applicant feared persecution, not prosecution. There was evidence before the Board that at least two other persons similarly situated to the applicant had received marshall summonses and

had been detained for a period up to 12 months and had been harassed and even tortured. There was evidence of a lack of due process of law and a political motivation to the criminal prosecution. Under those circumstances the Court in ***Chaudri v. Canada (Minister of Employment and Immigration)*** found that:

> "the whole gravamen of the applicant's case is not that he feared being lawfully imprisoned and tortured, but rather he will, in fact, receive the same treatment as his two companions. Will be recalled if the latter had engaged in the same activities as the applicant and had received the same sort of summons... as I have previously stated, "the marshall law summons forms the very foundation of the applicant's fear of persecution."

See *Chaudri v. Canada (Minister of Employment and Immigration)*, [1986] F.C.J. No. 363 (F.C.A.) at p. 4.

405. Similarly in the case of ***Ababio v. Canada (Minister of Employment and Immigration)*** **(1988) 5 Imm. L.R. (2d) 172 (F.C.A.)**, the applicant testified that he was fearful of returning to Ghana as he would be arrested and tortured because of his participation in an abortive coup attempt. The Court quashed the decision of the Board rejecting the claim, ruling that the fact that the applicant feared more than a mere "questioning" upon his return, because of the participation in a coup attempt, was grounds to justify a claim to be a Convention Refugee. The serious nature of the punishment was found to be a relevant factor in the analysis as to whether prosecution might constitute persecution. Moreover, the Court specifically considered the fact that the applicant might suffer sanctions that went beyond the punishment, as a result of a prosecution.

406. Specifically recognized were the effects of Sections 57 and 58 of the "***United Nations High Commissioner for Refugees Handbook***" which provides that:

> Section 57: the above distinction [between persecution and prosecution] may however be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition.
>
> Section 58. secondly, there may be cases in which a person besides fearing prosecution or punishment for a common law crime may also have a well-founded fear of persecution. In such cases, the person concerned is a refugee.

407. It is submitted, therefore, that denying protection or refugee status (whichever the case may be) in such cases would grant legitimacy to repressive legislation merely because that legislation is of a general application. Our courts have rejected this view and have cautioned authorities not to, out of hand, dismiss claims for protection merely because the law in question is of a general application.

408. This is what was specifically recognized in our jurisprudence by Mr. Justice MacGuigan of the Federal Court of Appeal in the case of ***Zolfagharkhani v. Canada*** **(15 June 1993) Action No. 8-520-91 (Fed. C.A.),** where the Court considered the question of whether conscientious objection can constitute persecution. Ms. Justice MacGuigan ruled that each case must be decided on its own particular facts and that when the Court assesses whether or not a claim to refugee status based on conscientious objection can be sustained, the tribunal must examine the following aspects:

> "after this review of the law, I now venture to set out for some general propositions relating to the status of an ordinary law of general application in determining the question of persecution:
>
> 1. the statutory definition of Convention Refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
>
> 2. but the neutrality of an ordinary law of a general application, vis-a-vis the five grounds of refugee status, must be judged objectively by Canadian tribunals and courts when required.
>
> 3. In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe be given a presumption of validity and neutrality, and the onus should be on the claimant, as is generally the case in refugee matters, to show the laws were either inherently or for some other reasons persecutory.
>
> 4. It will not be enough for the claimant to show that a particular regime is generally oppressive but rather the law in question is persecutory in relation to a Convention ground."
>
> ***Zolfagharkhani v. Canada*** **(15 June 1993) Action No. 8-520-91 (Fed. C.A.) at para. 19.**

409. The Court found that the ruling government would treat the applicant's conscientious objection as an unacceptable political act. Therefore, the Court ruled that a person is entitled to violate an ordinary law of a general application, if compliance with the law would result in violation of accepted international norms. In such circumstances, prosecution for the violation of such law can constitute persecution.

410. Many courts have followed Justice MacGuigan's dicta in relation to the issue of the disproportionality of the sentence given the actual nature of the offence allegedly committed. In the case of ***Abranov v. Canada (Minister of Citizenship and Immigration)*** **(15 June 1998) Action Imm-3576-97**, the Court quashed the determination of the CRDD that the applicant was not a Convention refugee because the Board failed to consider that punishment of undue proportion by the State for military evaders can be considered persecution. In that case, the applicant was facing a long jail term.

411. Professor James Harthaway in his seminal book "**The Law of Refugee Status**", 1991, Butterworths Toronto, Canada, is of the view that although persecution and prosecution are not coterminous, neither are they mutually exclusive. Because both the contents and implementation of the criminal law are within the control of the state of origin, Professor Harthaway takes the view that it is possible for a government with persecutory intent to use the criminal law as a means for oppressing its opponents. In such circumstances, it makes no sense to treat those at risk of politically inspired abuse of the criminal law as fugitives from justice; they are rather potentially at risk of persecution and may be properly be assessed as refugees.

See "*Law of Refugee Status*", 1991, Butterworths Toronto, Canada at pp. 170-172.

412. In conclusion, the Minister, as the tribunal in this matter and as the decision maker, must decide whether protection is warranted and must review the case based on the following guidelines set by the jurisprudence:

a. A harm feared as a result of the prosecution must be serious enough to qualify as persecution;

b. Evidence must be assessed which indicates the prosecution is linked to the applicant's membership in one of the five grounds (in our case, political opinion), then a decision maker must assess:

i) the motivation of the applicant for refugees status when the offence was committed;

ii) the motivation of the government pursuing the prosecution;

iii) whether the punishment for the offence is disproportionate to offence itself;

iv) the human rights record of the prosecuting country;

v) the status of the country's judicial system. There of course is a presumption of a fair trial (but it is open to the applicant to adduce evidence to rebut that assumption);

vi) the nature of the law under which the individual has violated. If compliance with the law would result in violation of international legal norm, then prosecution for refusal to comply with the law could be persecutory;

vii) the nature of the under which the individual would be prosecuted. If the law itself is such that it violates international legal norms by arbitrarily punishing acceptable behaviour then prosecution under such a law could be persecutory.

b) <u>Can prosecution be persecution in the United States specifically?</u>

i) Is there an objective basis to Ms. Boje's claim for protection?

413. For there to be an objective basis, the judicial system of the United States must be examined, as well as its prison system and other elements. On the surface, the United States has a legal system very similar to ours. Based on the common law, it provides for its citizens to be presumed innocent and requires proof on a high standard of their guilt. There are constitutional safeguards afforded to accused and laws passed by democratically elected State governments (and the Federal Government) are subject to Constitutional scrutiny. Clearly, the United States is not Pakistan, Iran, Honduras or Yugoslavia in this regard.

414. Nevertheless, it is our submission that our client does have a well-founded fear based on her political opinion because of the severe disproportionality of the minimum sentence that she faces compared with the crime that she committed,

as detailed in the "Adjudicative Facts", and because of the evidence of the mistreatment of women inmates in U.S. prisons, which is well-documented. This is the result of the safeguards noted above being set aside in the cases of people involved in the "War on Drugs".

ii) Appalling Prison Conditions

415. In the materials entitled "**Supporting Documents of the Refugee Submissions**", there are reports by **Amnesty International** strongly condemning the American prison system. At **Tab 4**, in its entirety, is the report titled, "**No Part of My Sentence - Violations of the Human Rights of Women in Custody***"*, put forward in March of 1999. This 64-page report includes description of Valley State Prison for Women, the prison that Ms. Boje would most likely have to go to if convicted. At page 12, there is disturbing comment in relation to the impact of the "War on Drugs" on a number of women prisons in the United States:

> "without any fanfare, the War on Drugs has become a war on women, and it has clearly contributed to the explosion in women's prison population...While the intent of get tough policies was to rid society of drug dealers and so called king-pins, over a third (35.9%) of the women serving time for drug offences in the nation's prisons are serving time solely for "possession."

The *"*War on Drugs" is cited as one of the reasons for the tripling of U.S. women's prison population from 47,000 in 1985 to some 138,000 in 1997 (see p.28). At page 13, it states unequivocally that penalties appear excessive for the nature of crime.

416. **Amnesty International** takes the view that there has to be more proportionality in the United States, and it is suggested that they be brought into line with international standards.

"Report of the 8th UN congress on the Prevention of Crime and Treatment of Offenders", 1990, footnote 50, Tab 5, Supporting Documents of the Refugee Submissions.

417. Another concern cited is the limitation on the sentencing discretion of judges with respect to people who have committed violations of the drug laws. These laws often adversely affect many women. For example, women who have a very

subordinate role in drug dealing may have very little information to offer in order to be eligible for more lenient sentences imposed on people who assist the police and the prosecution or are simply never charged under the same statutes.

This is a phenomenon known to the United States and the report cites a 1994 study by the Department of Justice which found women are over-represented among low level drug offenders who are non-violent, had minimal or no prior criminal history, and were not principal figures in criminal organizations or activities. The report also comments at length about the discrimination against female inmates and the more limited rights female inmates have in terms of prison services (pp. 15-18).

418. Finally, the Amnesty report focuses on sexual abuse as well as the use of restraint and other offences against women prisoners in California and, specifically, at Valley State Prison. The report's recommendations, although extensive, have thus far been dismissed by the U.S. State Department and Department of Justice as "overactions". Also, Amnesty International's annual reports on the United States (**Tabs 1- 3**) all comment on the deplorable conditions of U.S. prisons and the discrimination and abuse suffered by women and minority prisoners.

Annual Report on the United States of American, Amnesty International, 1197 – 1999, Tabs 1 – 3, Supporting Documents of the Refugee Submissions.

419. An extensive study similar to the one done on Valley State Prison was also undertaken by **Amnesty International** entitled *"***Ill-treatment of Inmates in Maricopa Country Jails, Arizona***"*, reproduced at **Tab 6***,* which was prepared in August of 1997. This study shows that the problems noted above are not limited only to California jails, but are pervasive all over the United States. It cannot be said therefore that Ms. Boje's fears would be any less justifiable if she was sent to prison in New York, for example, rather than California.

"Ill-treatment of Inmates in Maricopa Country Jails, Arizona", Amnesty International, 1997, Tab 6, Supporting Documents of the Refugee Submissions.

420. **Amnesty International's** criticisms have been echoed by **Human Rights Watch**. Their 1999 report regarding the United States is enclosed at **Tab 7**. The report condemns the United States for taking no action to curb abuses by police

officers and prison guards who are only rarely taking to task for many prisoners. On page 3, Human Rights Watch condemns conditions in custody:

> *"*In many jails, prisons, immigration detention centers and juvenile detention facilities, confined individuals suffered from physical mistreatment, excessive disciplinary sanctions, barely tolerable physical conditions, and inadequate medical and mental health care. Unfortunately, there was little support from politicians or the public for reform*."*
>
> **"United States: Human Rights Developments", Human Rights Watch World Report 1999, at p. 3, Tab 7, Supporting Documents of the Refugee Submissions.**

421. In 1998, **Human Rights Watch** reports that no less than 1.7 million people were either in prison or in jail reflecting an incarceration rate of 564 per 100,000 residents, double the rate of a decade before. It is estimated that approximately one in every 117 adult males is in prison. Echoing the concerns of **Amnesty International**, **Human Rights Watch's** focus was maximum security prisons in Indiana, where the findings were no less shocking than in California and New York. Abusive conducts by guards, excessive use of physical force, excessive isolation controls were all well-documented. California was singled out for guard abuse especially (see pp. 4-5)

"United States: Human Rights Developments", Human Rights Watch World Report 1999, at pp. 4 and 5, Tab 7, Supporting Documents of the Refugee Submissions.

iii) <u>Limitations of the U.S. System</u>

422. As is extensively reported by both **Amnesty International** and **Human Rights Watch**, Congress and State legislators have painstakingly limited the ability of courts to restrict sentences for first time offenders in drug cases in the U.S. Mandatory minimums have considerably curbed judicial independence and, coupled with a new phenomenon (explained below), increasingly removed the courts from their judicial common law supervisory powers over correctional facilities.

423. At **Tabs 11 and 12** are reports from the **American Civil Liberties Union** from 1996 in relation to the growth of State legislation at taking away the oversight power from American courts. Previously, Federal Courts had the mandate to order improvement of prison facilities, and/or amelioration of prisoners'

conditions. This power has now been eroded by a rash of legislation aimed at undermining the authority of the Federal judiciary.

424. Is the United States, therefore, a country where one can presume to have a fair hearing and to expect reasonable penal proportion to a person's committed crime? Absolutely not. In many respects, the actions of the United States authorities are those of a rogue nation which pays lip service to human rights, but which flaunts international law at every term. At **Tab 5** you will find **Amnesty International's** report entitled "**Adding Insult to Injury: the case of Joseph Stanley Faulder**". In this well-known case, **Amnesty International's** longstanding concerns over the administration of justice of the United States, including the grossly deficient trial procedures, inadequate appellate review, as well as blatant violations of international law and the absence of any meaningful clemency process, were all brought out in bold relief.

The authorities in Texas failed to inform Mr. Faulder after his arrest that he could seek assistance from his Consulate, an essential legal right guaranteed to all detained foreigners under the Vienna Convention on consular relations. Despite the fact that no physical evidence of any kind linked Mr. Faulder to the crime, he was speedily convicted and sentenced to death based on a statement he made to police under duress. Despite vigorous Canadian protests and criticisms from the United Nations, Texas authorities refused to do anything about Mr. Faulder's case. Is this a country from which one can expect fairness in judicial process? The answer is no, and nowhere is this more evident than in drug cases.

"Adding Insult to Injury: the case of Joseph Stanley Faulder", Amnesty International Report, November, 1998, Tab 5, Supporting Documents of the Refugee Submissions.

c) <u>Can prosecution constitute inhumane treatment or cruel and unusual punishment, such that Canada is morally obligated to protect individuals from extradition?</u>

425. The statute under which Ms. Boje has been charged will likely result in the conviction of at least aiding and abetting in the manufacture of marijuana. If she is convicted, it will result in a mandatory minimum of 10 years in prison. Bearing in mind the mitigating aspect that her conduct was intended to help a sick person grow his own medicine and conduct research to determine what would not only help him but others best, this same offence in Canada would be unlikely to attract more than a suspended sentence and would probably result in an absolute or conditional discharge - the lowest possible penalty available in Canadian criminal law which would not ultimately result in a criminal record and would not prejudice

her ability to travel elsewhere. It is, therefore, hard to conceive of anyone referring to the U.S. mandatory minimum sentence requirement as being "proportionate" to the gravity of the offence and the degree of responsibility of the offender.

426. The United States takes the view that the manufacture of marijuana is a serious criminal activity that should be punished accordingly. The legislation does not, however, discriminate between people who cultivate marijuana to assist others, and those who cultivate marijuana merely for profit. We would submit that this is a major consideration and one that the Canadian law has slowly evolved to recognize, at least in terms of it penal sanctions.

427. Because of an inflexible policy "War on Drugs", the United States has really declared "war" on marijuana. 43% of all drug arrests that occurred in the United States are for marijuana and more than five million Americans were arrested on marijuana related charges during the past 10 years alone. Repeated recommendations by National Commissions to stop the practice of arresting marijuana smokers have been constantly ignored.

It is respectfully submitted that for all of the above reasons that Ms. Boje's refugee claim should be accepted.

Dated this _____ day of October, 2000

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