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Comments:

Re: EMERY, Marc – Extradition Request by the United States of America – Minister's decision on surrender

Please refer to the attached correspondence and confirm receipt by calling me at the above noted number or, preferably, by e-mail at landerso@justice.gc.ca. Please note that the original will follow via priority post. Thank you.

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Yes

No

Pages (+1):

8

Date:

May 10, 2010

Time

12:08 pm

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Department of Justice
Canada

Ministère de la Justice
Canada

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**BY FACSIMILE and
PRIORITY POST**

May 10, 2010

Mr. Ian Donaldson
Donaldson's
Barristers
490-1090 Homer Street
Vancouver, British Columbia
V6B 2W9

Dear Mr. Donaldson:

RE: Marc Scott EMERY - Request for extradition to the United States of America


This is to inform you that on May 10, 2010, the Minister of Justice ordered your client's surrender to the United States of America. As such, please find herewith the Minister's reasons along with a copy of the Order of Surrender.

Please note that subsection 62(1) of the *Extradition Act* provides that:

*"No person may be surrendered
(b) if an appeal or a judicial review in respect of a matter arising under this Act, or any appeal from an appeal or judicial review, is pending, until after the date of the final decision of the court on the appeal or judicial review.*

If it is not your intention to apply for judicial review of the Minister's decision regarding surrender, please advise us and we will make immediate arrangements for Mr. Emery's surrender to the United States of America.

Yours truly,


Lisa Anderson, Senior Paralegal
International Assistance Group
Litigation Branch, Criminal Law Division

c.c. Kerry Swift, Counsel, International Assistance Group, BC Regional Office

Att.

Minister of Justice
and Attorney General of Canada



Ministre de la Justice
et procureur général du Canada

The Honourable / L'honorable Rob Nicholson, P.C., Q.C., M.P. / c.p., c.r., député
Ottawa, Canada K1A 0H8

MAY 10 2010

Mr. Ian Donaldson
Donaldson's
Barristers
490-1090 Homer Street
Vancouver, British Columbia
V6B 2W9

Dear Mr. Donaldson:

I write in response to the submissions which you have made on behalf of your client, Marc Scott Emery, regarding his potential surrender to the United States of America (the United States).

By diplomatic note dated July 18, 2005, the United States formally requested the extradition of Marc Scott Emery, also known as "the Prince of Pot", a Canadian citizen born on February 13, 1958. Mr. Emery is wanted to stand trial in the United States District Court for the Western District of Washington in Seattle, on the following charges:

- Conspiracy to manufacture marijuana, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 846;
- Conspiracy to distribute marijuana seeds, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 846; and
- Conspiracy to engage in money laundering, in violation of Title 18, United States Code, Sections 1956(a)(2)(A) and 1956(h).

The evidence submitted by the United States alleges that Mr. Emery was the owner of Marc Emery Direct, a business located at 307 West Hasting Street, Vancouver, British Columbia. Mr. Emery, along with his employees, Mr. Gregory Keith Williams and Michelle Rainey-Fenkarek sold marijuana seeds, equipment used to grow marijuana and related products from the business premises in Vancouver, and through the internet. Customers could purchase marijuana seeds by going to the store; by ordering seeds by telephone and picking them up in person at the store; or by placing orders through the internet website for subsequent shipment by regular mail. According to the

Canada

website for Cannabis Culture (www.cannibusculture.com), a magazine that Mr. Emery owned,

Mr. Emery stated that he sold more than 4,000,000 marijuana seeds, approximately seventy-five percent of which were sold to customers in the United States.

During the course of the investigation, U.S. undercover agents purchased marijuana seeds at Mr. Emery's Vancouver store. Undercover agents also placed orders to purchase marijuana seeds from Marc Emery Direct using the mail order forms on the website. In return, marijuana seeds were shipped by mail from Marc Emery Direct to the purchasers in the United States.

The U.S. marijuana growers who purchased marijuana seeds sent payment to Mr. Emery and his co-accused in Canada using Western Union wire transfers and/or money orders. The business is alleged to have generated millions of dollars in illegal profits.

On July 22, 2005, an Authority to Proceed (ATP) was issued pursuant to section 15 of the *Extradition Act* (the Act) authorizing the representative of the Attorney General of Canada to seek your client's committal in the Supreme Court of British Columbia for the following Canadian offences corresponding to the conduct allegedly committed:

- Conspiracy to produce Cannabis (marihuana) contrary to section 7(1) of the *Controlled Drugs and Substances Act* and section 465(1)(c) of the *Criminal Code* (between in or about September, 1995 and May 26, 2005);
- Conspiracy to traffic in Cannabis contrary to section 5(1) of the *Controlled Drugs and Substances Act* and section 465(1)(c) of the *Criminal Code* (between in or about September, 1995 and May 26, 2005; and
- Conspiracy to launder the proceeds of crime contrary to sections 462.31 and 465(1)(c) of the *Criminal Code* (between May 26, 2000 and May 26, 2005).

On July 29, 2005, at the request of the United States, Mr. Emery was arrested on a warrant obtained pursuant to section 16 of the Act.

On October 20, 2008, pursuant to section 23(1) of the Act, the July 22, 2005 ATP was substituted to remove the reference to the Canadian offence of conspiracy to launder the proceeds of crime and to add reference to the Canadian offence of conspiracy to possess property obtained by crime contrary to sections 354 and 465 of the *Criminal Code*.

On September 10, 2009, Mr. Emery consented to his committal for extradition on the offences set out in the ATP dated October 20, 2008. Accordingly, on September 28, 2009, the Honourable Madam Justice MacKenzie of the Supreme Court of British Columbia (the extradition judge) ordered Mr. Emery's committal into custody. On November 17, 2009, Mr. Emery was released on bail pending my decision on surrender.

On January 4, 2010, you made submissions to me. You have not contested

Mr. Emery's surrender, but have requested that I restrict my order of surrender to the American offence in relation to which Mr. Emery has agreed to plead guilty. You have provided me with documentation relating to the plea agreement between Mr. Emery and the U.S. prosecution service.

Alternatively, you submit that if I decide to surrender Mr. Emery on the American offences for which his extradition is sought, I must seek an assurance from the United States that Mr. Emery will only be prosecuted in the United States for the offence in respect of which he has agreed to plead guilty.

I wish to thank you for the submissions which you have put before me. They have assisted me in carrying out my responsibilities under the Act.

As a general rule, my discretion to refuse surrender is justifiable only on compelling grounds related to specific provisions of the Act, the *Treaty on Extradition between Canada and the United States* (the Treaty) or where surrender would be contrary to the principles of fundamental justice as guaranteed by the *Canadian Charter of Rights and Freedoms* (the Charter).

I have given full consideration to this case and the relevant law. After careful review of all of the materials before me, I have decided to order Mr. Emery's unconditional surrender to the United States on the American offences for which his extradition was sought.

In making my decision on surrender, I have considered Mr. Emery's sections 6 and 7 Charter rights, as well as whether surrender would be either unjust or oppressive in the circumstances of this case.

Mr. Emery's rights under the Charter

Given that Canada would have jurisdiction to prosecute Mr. Emery for his alleged conduct, I have considered whether surrender would unjustifiably violate Mr. Emery's constitutional right to remain in Canada as guaranteed by section 6(1) of the Charter and the principles laid down by the Supreme Court of Canada in its decisions in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *United States of America v. Kwok* (2001), 152 C.C.C. (3d) 225; and *Lake v. Canada (Minister of Justice)* (2008), 230 C.C.C. (3d) 449.

In this case, the documentary evidence submitted by the United States in support of its extradition request was provided to counsel for the Attorney General of Canada, British Columbia Regional Office, the competent authority to conduct a prosecution against Mr. Emery in this matter. Counsel for the Attorney General of Canada considered the directions of the Supreme Court of Canada in the *Cotroni* case and concluded that prosecution in relation to the alleged conduct ought to occur in the United States.

As Minister of Justice acting under section 40 of the Act, my role in the extradition process is essentially political in nature (*United States of America v. Kwok, supra; Lake v. Canada (Minister of Justice), supra*). As such, I have no authority to interfere with the exercise of discretion not to prosecute Mr. Emery, nor is it my role to direct the relevant investigative authorities to pursue an investigation or lay charges against him. In refusing to do so, I am mindful of the importance of investigatorial and prosecutorial independence from political pressure.

I am nonetheless required to ensure that the decision to extradite does not unduly infringe Mr. Emery's section 6(1) *Charter* rights (*United States of America v. Cotroni, supra; Lake v. Canada (Minister of Justice), supra*).

In my view, it is appropriate in the circumstances of this case to yield to the superior interest of the United States in prosecuting this matter.

Mr. Emery is alleged, along with his co-accused, to have operated a marijuana seed distribution business in Vancouver, British Columbia. Although Mr. Emery's conduct in furtherance of this criminal activity took place in Canada, the alleged offences were cross-jurisdictional in nature.

While a Canadian prosecution was possible based on these allegations, I accept that the Canadian authorities have yielded in good faith to the interests of the American authorities in prosecuting this matter. In the circumstances of this case, I see nothing improper in this regard. The Canadian evidence consists primarily of the testimony of law enforcement officers who conducted surveillance while U.S. undercover agents went to Mr. Emery's Vancouver store to purchase marijuana seeds and subsequently took control of the marijuana seeds as the agents left the store. This evidence is easily transportable to the United States.

On the other hand, the American evidence consists of the materials seized from the marijuana grow operations in the United States as well as the evidence of the cooperating witnesses in the United States who are expected to testify that they started their marijuana grow operations with seeds obtained from Marc Emery Direct in Vancouver.

I have considered the specific factors set out by the Supreme Court of Canada in *United States of America v. Cotroni, supra*, as well as Canada's treaty obligation. Having weighed all of these factors separately and cumulatively, I conclude that it would not unjustifiably violate Mr. Emery's rights under section 6 of the *Charter* for him to be extradited to face trial in the United States.

I have also taken into account Mr. Emery's section 7 *Charter* rights and considered whether surrender would be unjust or oppressive. In that regard, I 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.)). I have been mindful of the fact that "[s]ection 7 of the

Charter is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition" (*United States v. Burns, supra*). I have also considered the values underlying other sections of the *Charter* in determining whether surrender would violate section 7 of the *Charter* or otherwise be unjust or oppressive. After doing so, I conclude that Mr. Emery's surrender would not be unjust or oppressive, nor would it result in a violation of his constitutional rights.

The Order of Surrender

You have requested that I order your client's surrender to the United States only on the American offence to which he has agreed to plead guilty. You point out that on September 1, 2009, Mr. Emery signed a plea agreement with the U.S. prosecution service. You add that it was on this basis that Mr. Emery consented to his committal for extradition and that the extradition judge ordered Mr. Emery's committal. You submit that to order your client's surrender only on the charge to which he will plead guilty will ensure that specialty is respected, and respect the principles of international comity. Additionally, you submit that it would be in the public interest as it will promote the resolution of matters without lengthy and contentious extradition proceedings.

Section 58 of the Act provides me with the option to describe in my order of surrender, either: the offence(s) in respect of which extradition is requested; the conduct for which committal was ordered; or the conduct for which Mr. Emery is surrendered. As such, I do not have the option of ordering surrender on the specific offence which is the subject of Mr. Emery's plea agreement.

Accordingly, I am unable to accede to your request.

Assurances

Alternatively, you submit that if I should decide to order Mr. Emery's surrender on the offences for which his extradition was sought by the United States, my surrender order should be conditional upon receipt of an assurance from the United States that Mr. Emery can only be prosecuted for the offence regarding which he has agreed to plead guilty.

Under section 40(3) of the Act, I am permitted to seek any assurances that I deem appropriate before surrendering a person sought. The seeking of assurances is dependent on my preliminary determination that surrender without assurances would be contrary to the principles of fundamental justice or that there is some other compelling reason for me to exercise my discretion in this regard. Neither conclusion is merited in this case.

In *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1 (S.C.C.), the Supreme Court of Canada found that section 7 of the *Charter* is concerned not only

with the act of extradition but also the potential consequences of the act of extradition. I must be satisfied that Mr. Emery's surrender without assurances would not "shock the conscience" (*United States of America v. Burns, supra*). I conclude that my refusal to seek assurances would not make Mr. Emery's surrender to the United States to face the outstanding charges "shocking to the conscience".

I have considered your submissions with regard to the need for assurances and have concluded that they are neither required nor appropriate in the circumstances of this case. I am satisfied that a prosecution based on the offences for which Mr. Emery's extradition is sought is justified and it is not my role to limit or interfere with the manner in which that prosecution is conducted. The terms and conditions of any plea agreement that Mr. Emery may enter into with the United States' Attorney's Office are between him and the United States. It is not my role to enforce that agreement.

Conclusion

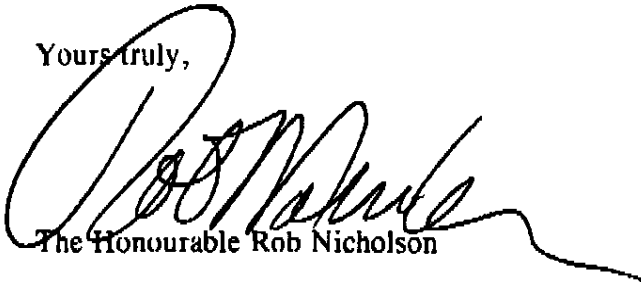
I have considered, both separately and cumulatively, all of the submissions which you have made on Mr. Emery's behalf and conclude that Mr. Emery's unconditional surrender to the United States on the offences for which his extradition was sought would not be unjust or oppressive under all of the circumstances. I have also determined that there are no other considerations which would justify ignoring Canada's obligations under the treaty with the United States.

Based on Mr. Emery's consent to committal, the extradition judge committed him on the Canadian offences set out in the ATP. I am, therefore, satisfied that the conduct which underpins the American offences for which extradition is sought would be criminal under Canadian law. Accordingly, I have signed warrants ordering Mr. Emery's surrender on the offences of:

- Conspiracy to manufacture marijuana, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 846;
- Conspiracy to distribute marijuana seeds, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 846; and
- Conspiracy to engage in money laundering, in violation of Title 18, United States Code, Sections 1956(a)(2)(A) and 1956(h).

I want to thank you for bringing Mr. Emery's particular circumstances to my attention.

Yours truly,



The Honourable Rob Nicholson



CANADA

ORDER OF SURRENDER
ARRÊTÉ D'EXTRADITION

(Section 58 and 60 *Extradition Act*)
(Articles 58 et 60 de la *Loi sur l'extradition*)

Form 7/ Formulaire 7
Sections 58-60 • Order of surrender
Articles 58 & 60 – Arrêté d'extradition

TO THE KEEPER OF THE
AU RESPONSABLE DE/DU

NORTH FRASER PRETRIAL CENTRE

and to
et à

the United States Marshals Service hereby
designated in accordance with s. 58(e) of the
Extradition Act

and to
et à

all peace officers in Canada hereby designated in
accordance with s. 58(e) of the *Extradition Act*

and to
et à

the keeper of any other institution to which
Mr. Marc Scott Emery is brought

I ORDER the surrender of
J'ORDONNE la remise de

**MARC SCOTT EMERY A.K.A. "THE PRINCE
OF POT"**

To
à

the United States of America

for the offences of:
au regard des infractions
suivantes:

- conspiracy to manufacture marijuana, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 846 (Count 1);
- conspiracy to distribute marijuana seeds, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 846 (Count 2); and
- conspiracy to engage in money-laundering, in violation of Title 18, United States Code, Sections 1956(a)(2)(A) and 1956(h) (Count 3),

as set out in the Indictment, No. CR 05 0217, filed in the United States District Court for the Western District of Washington on May 26, 2005.

I FURTHER ORDER
the Keeper, to deliver
J'ORDONNE EN OUTRE au
responsable ci-haut de livrer

**MARC SCOTT EMERY A.K.A. "THE PRINCE
OF POT"**

into the custody of
à la garde de

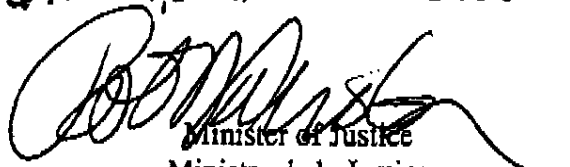
the persons designated above in accordance with
s. 58(e) of the *Extradition Act*

Who have the authority to receive,
hold in custody and convey
Autorisée à recevoir et à maintenir
sous garde

**MARC SCOTT EMERY A.K.A. "THE PRINCE
OF POT"**

into the territory over which the United States of America has jurisdiction,
et à l'amener dans le ressort de

Dated at *Ottawa, On.*, this **MAY 10 2010**


 Minister of Justice
 Ministre de la Justice