

J. McDonald → R. Finnelly
R. v. Redenbach

circ "tv diary" file wf

OTTAWA K1A 0G2

April 14, 1981

File: 81-7-1-2-USA

FLA-1007

Dear Mr. Burke,

RE: U.S.A. vs David K. Hensel

Thank you for your letter of April 8 concerning a recent marijuana seizure off the coast of Nova Scotia. It is understood that a sample of marijuana was submitted for testing to the Halifax regional laboratory of Health and Welfare Canada by the RCMP, and that the resulting "certificate of analysis" may be required to be produced at the upcoming criminal trial in the Maine courts. As a result, the U.S. law enforcement authorities have also requested your personal attendance at trial for the purpose of giving evidence relating to the certificate of analysis.

In view of the Department of External Affairs' responsibility for the conduct of Canada's international relations, you have asked us to set out the Canadian Government's policy regarding the appearance before foreign judicial or legislative bodies of officials of the federal government. We are able to set out the following general principles and specific guidelines.

Invitations to Canadian officials to testify or otherwise appear before foreign judicial or legislative bodies have no status since the foreign authority has no jurisdiction in Canada over Canadians; hence Canada and its officials have the exclusive right not to accept such invitations.

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Mr. R. B. Burke
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A number of exceptions have been made to this general rule and Canadian officials have often been authorized to appear before foreign tribunals or legislative bodies. The acceptance is based on a careful assessment in each case of a number of criteria and conditions which are summarized below.

(a) It must be in Canada's national interest to permit such appearances;

(b) Whether the information sought can be provided in another form such as a written statement;

(c) The appearance must be on a purely voluntary basis;

(d) Officials appear on their personal capacity on the basis of their knowledge/expertise on a particular subject, and not on behalf of the Canadian Government;

(e) The questioning process or the testimony given must not relate to the conduct of inter-governmental affairs or to matters at issue between Canada and the country concerned. Nor should it deal with Canadian Government policy or the policy-making process.

(f) The presentation/testimony should be limited to the factual and technical aspects of the subject;

(g) The presentation/testimony should not be given under oath.

Of course these general guidelines must be flexible enough to meet differing requirements. We note the interest of your Department in collaborating with the U.S. justice officials and we concur that it would be proper for you to do so in this case. If acceptable, the information should be provided to the court by diplomatic note using the diplomatic channel. It might be in the form of a deposition, attaching as an exhibit the analysis certificate. If this is not acceptable, it would be in order for you to attend personally providing that you indicate to U.S. Attorney Delahanty and to the Maine court

- that your appearance is on a voluntary basis

- that you are appearing in your private capacity as an expert witness

- that your testimony will be limited to the factual and technical aspects of the subject
- that under these conditions you are prepared to give your testimony on oath.

Our concerns relate of course to the issues of sovereignty. It is hoped that the foregoing is helpful in clarifying the issues involved in invitations by one State to officials of another State to appear in front of judicial/legislative bodies of the foreign State.

Yours sincerely,

F. A. Mathys

F.A. Mathys
Director
Legal Advisory Division