



## 2009 Niagara International Moot Court Competition

### Second Round Problem Clarifications (Dec 15/2008)

---

1. *The compromis refers to the "May 17, 2008 Arrangement" as an "Agreement" even though officially it is referred to as "arrangement" only. Please clarify whether it is an "Agreement" or an "Arrangement."*

Canada and the United States agreed to the arrangement. It is both an Agreement and an "Arrangement".

2. *The issues raised in the compromis only raise questions regarding the legality of the seizure of the properties belonging to those Canadian personnel detained due to the border check; is the issue of the legality of the search of all Canadian personnel and seizure of persons beyond the scope of the issues presented to the Court?*

I do not agree with the statement that the *Compromis* only raise questions regarding the legality of the seizure. Any issue raised by the facts may be brought to the ICJ. Please read the Final Note by the Author.

3. *What U.S. customs facilities exist at Barrow? What capacity does U.S. Customs have to search persons entering the United States at Barrow?*

This would be a real fact. Students should conduct their own research to determine such facts and make their own conclusions of the relevancy of the information.

4. *How is "Bernier" pronounced?*

Try it. It is a French name. Find news clips about Canada's former Minister of Foreign Affairs.

5. *How did the Captain know that the Canadian facilities were inadequate? Did he/she consult with US or Canadian SRR's to gather this information?*

There is nothing in the *Compris* that indicates that the Captain "knew" that the Canadian facilities were inadequate. The fact of the matter is that the Canadian facilities were adequate in the circumstances. The Captain of the *Healy* made that judgment.

**6. What was the reason for USCBP's seizure of Mr. Chang's laptop, or was it based solely upon his status as a candidate for secondary search?**

There is no evidence about the specific reasons for the US CBP officer's decision or the decision of the secondary officer.

**7. What was Mr. Chang's protest to the CBP regarding his laptop? Did he assert that there was government information or property on the laptop?**

Mr. Chang indicated that he was a representative of the Government of Canada and that, in the circumstances, the US CBP did not have authority to seize his laptop. Mr. Chang also indicated that his laptop contained confidential information belonging to the Government of Canada and that US CBP could not seize his laptop and could not access the confidential and proprietary information. Mr. Chang further indicated that US CBP has not provided any reasons to seize his government laptop and that he needed to keep the laptop in his possession at all time to protect the interests of the Government of Canada. Finally, Mr. Chang argued that US CBP needed to go through official channels and get permission to seize the laptop. He argued that the US CBP officer needed to get permission from Washington Headquarters, the Secretary of Homeland Security and that Canada's permission need to be obtained at the highest levels.

**8. In what order did the secondary searches occur?**

In the order set out in the *Compromis*.

**9. Were these the only 4 individuals who took laptops off of the *Bernier*?**

No.

**10. In the clarifications, it states that the *Bernier* was found 15 nautical miles outside the U.S. border, but in the *compromis* it states that it started taking on water at 15 nautical miles, and was found 2 miles outside the border. What is correct?**

The *Bernier* was located at 2 nautical miles. All that is relevant for the purposes of the *Compromis* is that the Parties have agreed that the *Bernier* was outside U.S. territorial waters.

**11. Should question C for the United States ask if there is a breach, does that justify American withdraw? Should that issue be addressed?**

The United States requested that the ICJ determine if Canada breached the May 17, 2007 Agreement as a result of the unauthorized access of Eve Chang to the technical data, and the unauthorized access of David St. John Williams to technical data, and the unauthorized download of Mark Jones's emailed technical data and, if yes, whether it was justified in withdrawing from the May 17, 2007 Agreement as a result of the breach.

**12. How did the U.S. notify Canada of its withdraw from the May 17 Agreement?**

During Canada's election campaign, there was a discussion between the U.S. Secretary Rice and then Canadian Minister of Foreign Affairs Fortier.

**13. Was the material on the laptops clearly marked as ITAR material?**

The technical data was known to be ITAR regulated material, but there was no official statement that the material was subject to the ITARs. This is usual. All ITAR regulated material was encrypted and password protected.

**14. The answer to clarification #15 of the first set of clarifications states that the *Bernier* was outside US territorial waters as agreed upon by the parties, and paragraph 7 of the *Compromis* states that the *Bernier* was two nautical miles outside of US territory. Which is the appropriate language, "territorial waters" or "territory," and if the former does that refer to the waters within 12-nautical miles of the land-sea boundary?**

The *Bernier* was not within 12 nautical miles of the land-sea boundary.

**15. Was the *Bernier* located east of the 141st meridian at the time of the rescue?**

The facts are clearly stated in the *Compromis*. All that is relevant for the purposes of the *Compromis* is that the Parties have agreed that the *Bernier* was outside U.S. territorial waters.

**16. Was Mr. David St. John Williams the only member of the *Bernier* that was NOT a DND personnel?**

No.

**17. What was the agreement, if any, between the Department of National Defence and the Department of Fisheries and Oceans for the use of Department of National Defence personnel and equipment? Was the expedition carried out by the Department of National Defence or the Department of Fisheries and Oceans?**

No agreements between DND and the Department of Fisheries and Oceans have been put into evidence. The expedition that carried out by the Government of Canada. Resources included resources from more than one government department.

**18. Paragraph 16 states that the CBP did not find any evidence that David St. John Williams had access to, and , or had had any technical data relating to the *Bernier*. Issue 2 (C) presented to the ICJ by the United States asked, "Did Canada breach the May 17, 2007 Agreement as a result of ... the unauthorized access of David St. John Williams to technical data." Please clarify whether St. John Williams had access to technical data?**

David St. John Williams did not have access to any technical data. Paragraph 16 of the *Compromis* is clear. CBP seized Mr. Williams's laptop, cell phone, and MP3 recorder, and did not

find any evidence that he had access to, and, or had any technical data relating to the *Bernier*.

**19. Did the senior official who downloaded technical information in China utilize a Chinese internet service provider or other means (i.e., satellite, cellular signal) to download the information?**

He was at a hotel. He plugged his laptop into the Internet service offered by the hotel.

**20. Did the senior official located in China have sole and exclusive possession of the computer used to download the information?**

Yes.

**21. Is the full text of the letters constituting the May 17th Agreement publicly available?**

Please do the research to find out what is and what is not publicly available.

**22. At what point did the Captain of the *Bernier* become aware that the *Bernier* was being towed to a US port of call?**

At the start of the towed voyage, the *Healy* headed south and the Captain of the *Bernier* was under the understanding that the *Bernier* was going to be towed to Canada. When the *Healy* started to move west, instead of east, the captain of the *Bernier* became aware that the *Bernier* was not being towed to Tuktoyaktuk.

**23. Are/were there any dual citizens aboard the *Bernier*?**

No evidence of dual citizenship has been put forth relating to the crew of the *Bernier* – besides Mr. David St. John Williams was born in Cuba to Canadian parents. However, Mr. Williams has never referred to himself as a Cuban and only had Canadian citizenship.

**24. How did the U.S. select passengers for searches? Was it random, or was there a methodology?**

There is no evidence on how the selection process is undertaken. However, US CBP officers are trained on how to make selections, which includes appearance of the traveller, ability of the traveller to answer questions, witnessing nervousness of the traveller, and profiling.

**25. Do any of the people on the vessel, the *Bernier*, hold dual citizenship?**

See above.

**26. How long were Mr. Chang and Mr. Jones detained?**

Mr Chang was detained for 4-6 hours and then released. When he was arrested, he was detained until the crew was entitled to return to the *Bernier*. Mr. Jones was detained for 4-6 hours.

**27. Were the crew members on the *Bernier* displaying proper badges when they were brought onto the U.S. soil?**

Yes – they had proper identification. However, they did not have their diplomatic passports because prior to their initial embarkation they never intended to enter the United States. As a result, the diplomatic passports were not obtained from the vault at DND.

**28. Paragraph 11 states that Mr. Chang was arrested for offences under the EAR. What was Mr. Chang charged with and under which provision of the EAR was Mr. Chang arrested?**

Please conduct the research.

**29. With respect to the description of the location of the *Bernier*, what is meant by "U.S. territory"? Does that refer to the U.S. territorial water or the U.S. territory including the EEZ? Or was the *Bernier* located on the high sea?**

Please see above.