



## 2009 Niagara International Moot Court Competition

### Third/Final Round Problem Clarifications (Jan 20/2009)

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1. *When Marc Jones e-mailed the technical data to his senior officer in China, do we know if he used any kind of encryption program to safeguard the contents of the e-mail?*

ANSWER: Marc Jones used encryption software normally used by Government of Canada to send internal emails.

2. *Had Marc Jones sent the e-mail at the request of his superior, or of his own volition?*

ANSWER: Marc Jones sent the email without a specific request. However, the document was expected by his superior.

3. *In paragraph 19 of the Compromis, it states that the US immediately terminated the May 17, 2007 agreement, and that the US demanded that Canada take steps to restrict access to ITAR-controlled information. Exactly how was the agreement terminated? (by verbal conversation? in writing? no notice at all?) And, how were the demands regarding the restriction of access made? (verbally? in writing? via a third party?)*

ANSWER: Previously answers in Clarifications #2.

4. *When the Captain of the Bernier realized they were being towed to Barrow did he protest?*

ANSWER: The Parties have not agreed to the facts. Canada takes the position that the Captain of the *Bernier* communicated that the *Bernier* should be towed to the nearest Canadian port. The United States takes the position that Captain of the *Bernier* was on the *Bernier* and did not demonstrate his protestation until at Barrow. The United States accepts and acknowledges that the Captain of the *Bernier* communicated that the *Bernier* should be towed to the nearest Canadian port.

5. *Are the laptops Canadian government property, or personal property?*

The laptops at issue (except Mr. Williams' laptop) are the property of the Government of Canada.

6. *Separate from the towing of the Bernier, what was the official Canadian reaction to the seizure of the laptops and the detention of Canadian citizens?*

ANSWER: The *Compromis* and previous Clarifications #2 provide the answer to this question.

7. In question 13 of the second clarifications, you state that it was 'usual' that there was no official marking on the ITAR material. Did the US know that this was a consistent Canadian practice?

**ANSWER:** *Yes, the United States knows that ITAR-related documents do not normally have any "official markings". The practice is usual beyond Canada and is not unique in this fact pattern.*

8. Was the *Bernier* in Canadian territorial waters?

**ANSWER:** *As previously stated on more than one occasion -*

*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.*

9. Was the *Healy* in contact with any rescue coordination centre or sub-centre? If so, did they receive any direction from the rescue coordination centre or sub-centre?

**ANSWER:** *Yes to both questions.*

10. We are concerned with the answer to question 2 in the second clarifications. It should not be open to the teams to add a new issue, such as whether the detention of Mr. Hakemi was a violation of his human rights under international law. Can you clarify your response to question 2 in the second clarifications?

**ANSWER:** *No - clarifications are not necessary. Further, the answer to question 2 in Clarifications #2 does not refer to "human rights" under international law. The question posed that was answered in Clarifications #2 also does not mention "human rights".*

11. The facts of the Compromis state that the TAA was entered into at some point in 2006 or before. This is implied based on paragraphs 4 and 5 which state that a TAA was signed and that in 2006 the *Bernier* was sold and leased back from Wolff and Harland and all proper notifications under the TAA took place. Thus, this had to occur before the May 17, 2007 agreement.

**ANSWER:** *Yes - correct.*

12. The agreement between Canada and the U.S. was entered into on May 17, 2007. Answer 21 to the first round problem clarifications states that the TAA referenced the May 17, 2007 agreement. Was this a misstatement? Was the TAA with Lockheed entered into before the May 17th Agreement between the U.S. and Canada as the original Compromis implies?

**ANSWER:** *The TAA with Lockheed entered into before the May 17th Agreement. The clarification attempted to provide useful information to the students. As a technical matter, the TAA does not actually refer to the May 17, 2007 Agreement. However, it does specifically state*

*that BIS must be notified for any re-export or other technical data to any person who is not an employee of the Canadian Department of Defense and related sub-departments. The parties are encouraged to review the May 17, 2007 Agreement for the precise language.*

13. When, exactly, was Canada informed that some officers had been detained and/or arrested, and who was informed (i.e. the *Compromis* states that the Prime Minister was informed on Sept 5, but not whether other minor officials were informed before then)? Also, who informed the Canadians (aka what American officials)?

**ANSWER:** *Immediately, as some of the detained persons are representatives of the Government of Canada. One or more of the Canadian persons from the *Bernier* notified superiors in Ottawa immediately as the detention occurred.*

14. Were any Canadian officials informed that the US would be processing the passengers of the *Bernier*, if so, who and when?

**ANSWER:** *Yes, the representatives of the Government of Canada were informed at the time of arrival in Anchorage. However, notification of the intention to process the crew of the *Bernier* was not provided prior to the actual processing.*

15. Were any Canadian officials informed that the 4 crew members were selected for secondary interviews and searches, if so who and when?

**ANSWER:** *Yes. The persons selected were informed at the time of their selection.*

16. Was a Canadian flag flown on the *Bernier*?

**ANSWER:** *Yes.*

17. How long was Mr. Hakemi detained and what procedures was he subject to?

**ANSWER:** *See *Compromis* and earlier clarifications.*

18. Did Mr. Chang state that he was a representative of Canada before he was searched?

**ANSWER:** *Yes.*

19. Did the US suspect Mr. Jones of ("he fit the profile of") a child sexual tourist, or just sexual tourism?

**ANSWER:** *The U.S. CBP have not provided any information in writing. There is no evidence about the specific reasons for the US CBP officer's decision.*

20. Were the detained individuals (the 4 crew members) promptly released?

**ANSWER:** *The *Compromis* is clear.*

21. Our team has contacted the Canadian Embassy, the United States State Department, and attempted to contact Mr. Negroponte to obtain a copy of the "Agreement," the former two have not even heard of it and have no records of it--- how are the teams supposed to argue if there was a material breach of an Agreement that is unobtainable, or whether such an Agreement would constitute a treaty under international law?

**ANSWER:** *The May 17, 2007 Agreement is publicly available.*

22. How many nautical miles was the *Bernier* from Barrow, Alaska when it was rescued by the *Healy*?

**ANSWER:** *See the Compromis for the agreed facts.*

23. Were the *Bernier* passengers immediately transferred onto the *Healy* (while at sea) before it towed the vessel back to Barrow, or did the Canadians arrive at Barrow on the *Bernier*?

**ANSWER:** *Some Canadians were on the Healy and some Canadians were on the Bernier to guide its towage.*

Did the crew of the *Bernier* communicate to the *Healy* that they wished to be towed to the nearest Canadian port, or was it someone from the Canadian mainland?

**ANSWER:** *Yes. This was previously asked and answered.*

24. Would you describe the towing of the *Bernier* as a rescue or refuge situation?

**ANSWER:** *The author has not and will not make such a legal conclusion.*

25. Were there any environmental risks associated with the breakdown of the *Bernier*?

**ANSWER:** *No - The Compromis is clear and does not refer to any form of spillage.*

26. Was the crew of the *Bernier* placed on the *Healy* once the *Bernier* was taken in tow by the *Healy*?

**ANSWER:** *No.*

27. Is the following correct, "The Captain of the *Bernier* requested towing to a Canadian Port of Call," and "The nearest Canadian ports had adequate repair facilities"?

**ANSWER:** *Yes.*

28. Mr. Chang was arrested for E.A.R violations. Is it the U.S.'s position that these alleged E.A.R. violations violated the May 17<sup>th</sup> Agreement?

**ANSWER:** *This is not a question for the author of the moot problem to answer.*

29. Are the goods in question governed by the EAR despite being "ITAR controlled defense articles" as stated in the May 17<sup>th</sup> Agreement?

**ANSWER:** *This is not a question for the author of the moot problem to answer.*

30. The *Bernier* starts to take on water 15 nautical miles east of the Canada/United States arctic waters border. The *Healy* radios that the *Bernier* is 2 nautical miles outside of U.S. territory. Has the *Bernier* physically moved or are these two different perspectives on the same location?

**ANSWER:** *The Bernier drifted and moved to bring itself upon the ice so that repairs could be attempted.*

31. Were the crew of the *Bernier* under constant surveillance by US authorities between their arrival in Barrow and their arrival in Anchorage? If so, which US agency conducted the surveillance?

**ANSWER:** *The facilities at Barrow are small. Neither the US nor Canada take the position that the crew of the Bernier were under constant surveillance from the time of their arrival in Barrow to their travel to Anchorage. In fact, a few of the crew members of the Bernier joined the crew members of the Healy for hot coffee at a local café.*