



2009 NIAGARA INTERNATIONAL MOOT COURT PROBLEM

INTERNATIONAL COURT OF JUSTICE

COMPROMIS

**BETWEEN
CANADA (APPLICANT) AND THE UNITED STATES OF AMERICA
(RESPONDENT) TO SUBMIT TO THE INTERNATIONAL COURT OF JUSTICE
THEIR DIFFERENCES REGARDING THE *BERNIER***

jointly notified to the Court on 24 October 2008

****COMPROMIS****

1. Effective May 17, 2007, the United States Department of State, Directorate of Trade Controls, and the Government of Canada's Department of National Defence Canadian Forces (DND) reached an agreement -- through an exchange of letters -- to permit certain dual nationals in Canada (i.e., persons holding Canadian citizenship and nationality of another country) to work on certain military projects that are subject to export control requirements under the US International Traffic in Arms Regulations (ITAR) (the "May 17, 2007 Agreement"). The May 17, 2007 Agreement authorizes certain categories of DND personnel who are Canadian citizens and who hold a minimum secret-level security clearance to access defence articles and services that have been lawfully exported to Canada under the ITAR pursuant to DDTC authorization.

2. On August 26, 2008, Canadian Prime Minister Stephen Harper announced that the Government of Canada would invest \$100 million in a geo-mapping project in the Canadian North. The announcement states:

The Canadian Government will use the full tools of modern geological science to encourage economic development and defend Canadian sovereignty throughout the North.

As I've said before, 'use it or lose it' is the first principle of sovereignty in the Arctic. To develop the North, we must know the North. To protect the North, we must control the North. And to accomplish all our goals for the North, we must be in the North.

The geo-mapping program will combine field research and advanced scientific analysis to provide Canadians with a fuller assessment on the extent of mineral and energy resources in the Canadian North. This information will help generate additional investment and economic development in Canada's Northern communities.

We know from over a century of northern resource exploration that there is gas in the Beaufort, oil in the Eastern Arctic, and gold in the Yukon. There are diamonds in Nunavut and the Northwest Territories, and countless other precious resources buried under the ice, sea and tundra. But what we've found so far is merely the tip of the proverbial iceberg. Managed properly, Canada's share of this incredible endowment will fuel the prosperity of our country for generations. And geo-mapping will pave the way for the resource development of the future.

3. On August 27, 2008, Prime Minister Harper announced the Government of Canada's intention to expand the application of the AWPPA from 100 to 200 nautical miles and to implement mandatory ship reporting to NORDREG for vessels destined for Canada's Arctic waters. Prime Minister Harper delivered the following remarks in Tuktoyaktuk, the Northwest Territories, Canada:

Today our Government is further strengthening Canada's control over our Arctic environment with two important announcements. First, our government will introduce legislation to expand the reach of the Arctic Waters Pollution Prevention Act. The act currently limits Canada's ability to regulate Arctic shipping to within just 100 nautical miles from our coastline. We intend to double our jurisdiction to 200 nautical miles, the full extent of Canada's exclusive economic zone as recognized under the United Nations convention on the law of the sea. This will give us jurisdiction over an additional half million square kilometres of our waters, roughly equivalent to the land mass of one of our prairie provinces.

Second, the Government will amend the Canada Shipping Act to require vessels entering Canadian Arctic waters to report to the Coast Guard's NORDREG reporting system. Under current NORDREG rules, reporting is voluntary. But our changes will make reporting mandatory. This law will apply to all Canadian waters north of 60.

These measures will send a clear message to the world: Canada takes responsibility for environmental protection and enforcement in our Arctic waters. This magnificent and unspoiled ecological region is one for which we will demonstrate stewardship on behalf of our country, and indeed, all of humanity.

4. The Canadian Coast Guard Ship Captain Joseph-Elzéar Bernier (the Bernier) is a Canadian Coast Guard vessel (affectionately called the "1908 Original Vessel" by its sailors given its poor condition) that has patrolled the Arctic waters for decades. Notwithstanding that the Bernier is one of the oldest Canadian Coast Guard vessels, it has been equipped with modern technology, including Lockheed Martin maritime systems that were developed in the United States. The Lockheed Martin maritime systems on the Bernier were legally exported under the US ITARs. The Canadian DND signed a technical assistance agreement (TAA) with Lockheed Martin as required by the United States Bureau of Industry and Security (BIS) under the U.S. Export Administration Regulations (EAR) and ITARS.
5. In 2006, the Government of Canada raised money for the purchase of additional DND equipment by entering into a sale-leaseback transaction of certain DND assets. The Bernier was one of the assets that was sold and leased-back to the Government of Canada under a 15 year lease. The terms of the sale and subsequent lease included all equipment on the Bernier at the time. As a result of this financing transaction, the owner/lessor of the Bernier is Wolff and Harland, a publicly traded company registered in Canada, and the lessee is the Government of Canada. At the time of the sale-leaseback transaction, all proper notifications took place and, in particular, the United States was notified for the purposes of export controls as required by the technical assistance agreement.
6. On August 30, 2008, the Bernier was patrolling the Canadian arctic waters at a point within 200 nautical miles of Tuktoyaktuk and Sachs Harbour on Banks Island. According to the navigational equipment on the Bernier, it broke down and started

to take on water in the Beaufort Sea, 15 nautical miles east of the Canada/United States arctic waters border.

7. The *Bernier* sent out a distress call, which was answered by the United States Coast Guard Cutter *Healy* (the *Healy*), which was in the Arctic at the time conducting Phase 5 of its Arctic Summer 2008 mapping exercises. The *Healy* reached the *Bernier* on September 1, 2008. Upon locating the *Bernier*, the *Healy* communicated to US command that the location of the *Bernier* was outside United States territory by two nautical miles and more than 100 nautical miles from the shores of Banks Island as well as at least 195 nautical miles from Tuktoyaktuk. The communication also noted that there was “extensive ice” floating in the area near the *Bernier*. The Captain of the *Healy* determined that neither Sachs Harbour nor Tuktoyaktuk Harbour would have the capability to repair the *Bernier*. As a result, the Captain of the *Healy* decided to tow the *Bernier* to Barrow, Alaska.
8. Upon arrival in Barrow very late on September 1, 2008, the 57 crew members of the *Bernier* were invited to disembark as they were wet and cold as a result of their efforts to keep the *Bernier* from sinking. The United States Coast Guard, in consultation with shipyard employees in Barrow, determined that it would take up to a week to repair the *Bernier* to a level that would allow it to travel on its own power to a Canadian port for more extensive repairs. On September 2, 2008, the US Department of Homeland Security (DHS) flew the crew members of the *Bernier* from Barrow, Alaska to Anchorage, Alaska where there were hotels at which the crew could stay while the *Bernier* was being repaired.
9. Upon arrival at Anchorage on September 2, 2008, the crew of the *Bernier* was greeted by representatives of the US Customs and Border Protection (CBP). DHS/CBP determined that the crew of the *Bernier* had entered the territory of the United States of America upon arrival in Barrow, Alaska and needed to be processed as all persons that arrived at a port of entry were required to be processed. Ultimately, CBP selected 4 crew members for secondary interviews and searches.
10. Simon Chang, a Canadian citizen born in Vancouver, British Columbia in 1967, was selected for a secondary search. Mr. Chang is a representative of Canada’s DND and he has the DND’s highest security certificate. As an engineer, Mr. Chang had kept his laptop in his possession as he left the *Bernier*. Mr. Chang maintains on his laptop copies of technical data concerning the various systems on the *Bernier*. Despite Mr. Chang’s protests, CBP took a copy of the laptop’s hard drive.
11. On September 4, 2008, Mr. Chang was arrested for offences under the EAR. The supporting affidavit from a CBP officer averred that CBP had reviewed all of the emails sent from and received by Mr. Chang’s laptop computer and determined that Mr. Chang had allowed his teenage daughter, Eve, to use his laptop computer. Mr. Chang and his wife had adopted Eve in 1995 from China and Eve possessed dual Canadian/Chinese citizenship. CBP did not return Mr. Chang’s laptop to him in order to keep the information as evidence.

12. CBP also selected Marc Jones for a secondary search during which Mr. Jones revealed that he was recently in Thailand during a two-week leave and travels to Thailand on an annual basis. Born in 1956 in Newfoundland, Mr. Jones is a Canadian citizen. Mr. Jones was the second most senior officer on the *Bernier* and had the highest DND security clearances. During the secondary search and after the CBP officer was informed of Mr. Jones' trips to Thailand, CBP seized Mr. Jones's laptop to search for child pornography. A subsequently affidavit averred that CBP processed Mr. Jones to secondary inspection because he "fit the profile of a sexual tourist."
13. Upon review of Mr. Jones's laptop, CBP did not find any evidence of child pornography and learned that Mr. Jones had lost a daughter during the 2004 Indian Ocean Tsunami. The numerous emails contained on the laptop repeatedly revealed that Mr. Jones' trips to Thailand were to engage in charitable activities rebuilding areas devastated by the Tsunami and that he did this in memory of his daughter.
14. CBP also determined that Mr. Jones had sent emails to a senior officer in headquarters of DND (who likewise had the highest level of security clearances) where Mr. Jones had attached secret technical data relating to the maritime systems of the *Bernier* that were subject to the TAA. It appeared from the email exchange that recipient of the email had been at the 2008 Beijing Summer Olympics to watch the Michael Phelps swimming races, and had responded to Mr. Jones's emails from Beijing, China. Based on the wording of the emails, it appeared that the senior officer had downloaded the technical data while in China. CBP did not return Mr. Jones's laptop to him in order to keep the information as evidence.
15. David St. John Williams was selected for a secondary search. He was a Canadian citizen who was born in Cuba in 1932, arriving when his Canadian parents were sent to Cuba for 4 years to work for a Canadian insurance company. He was an outside consultant hired by the Canadian Government to develop a plan for the mapping of the Arctic. He did not have top security clearances.
16. David St. John Williams was interrogated by CBP for 18 hours over 3 days. The focus of the questioning was whether he was given access to any of the defence related data concerning the *Bernier*. Mr. Williams consistently responded that he was an expert in geographic mapping and was hired to perform specific tasks that did not require any review of any data relating to the vessel. 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*.
17. Aasif Hakemi was selected for a secondary search. As a Canadian citizen born in Montreal, Quebec in 1980, he was an officer in the DND on the *Bernier*. He joined DND three years earlier after completing his Masters in Engineering from MIT. Mr. Hakemi's parents fled to Canada from Afghanistan in 1978 within weeks of the Soviet deployment of the 40th Army into Afghanistan. CBP seized Mr. Hakemi's laptop, cell phone, and MP3 and found no evidence of wrongdoing. His name did not appear on any of the United States restricted or denied persons lists (the "watch

lists”). However, several persons on the watch lists had the family name “Hakemi.” After a week of detention, CBP granted entry to Mr. Hakemi.

18. On September 5, 2008, on the eve of calling an election in Canada, Prime Minister Harper was notified that DHS and CBP seized laptops of Canadian Department of Defence officers on the *Bernier*, and that some officers had been detained and/or arrested. Mr. Harper believed that the US’s towing of the *Bernier* to Barrow, Alaska was a violation of international law on the grounds that the *Bernier* had been in Canadian waters and should have been taken to a Canadian port. Prime Minister Harper sent a diplomatic note to US President Bush, US Secretary of State Condoleezza Rice, and US Department of Homeland Security Secretary Michael Chertoff. However, Prime Minister Harper did not make announcements to the media for fear that the publicity would affect public opinion during the election.
19. Secretary Michael Chertoff and Secretary Condoleezza Rice determined that the towing, as well as the resulting searches and detentions were performed in accordance with international and US laws. Moreover, they determined that the information gathered as a result of the detentions and searches was in violation of the May 17, 2007 Agreement. Consequently, the US immediately terminated the May 17, 2007 Agreement. The US also demanded that Canada’s DND immediately take steps to restrict access to ITAR controlled items to any person with dual citizenship involving any one countries listed in Section 126.1 of the ITARs, and to provide non-disclosure agreements from any representative who had access to ITAR controlled goods or technical data since May 17, 2007.
20. On October 21, 2008, Canada filed a dispute with the International Court of Justice (ICJ) relating to the seizure of the *Bernier*, the searches/detentions, and the termination of the May 17, 2007 agreement.

Issues presented to the ICJ

1. Canada requests that the ICJ determine:
 - A. Was the *Bernier* properly towed from Canadian waters, and if so, should it have been towed to a Canadian port of call?
 - B. Did the seizure of laptops of DND personnel and third party contractors by US-CBP amount to a breach of the US’s international obligations?
 - C. Was the termination of the May 17, 2007 Agreement in breach of international law?
2. The United States requests that the ICJ determine:
 - A. Was the *Bernier* assisted in the most appropriate manner?
 - B. Was the seizure of laptops of DND personnel and third party contractors consistent as a normal practice under international law?

- B. Did Canada breach 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?

Final Notes by the Author:

- The problem represents a hybrid of real facts and hypothetical facts. All agreements referred to within the Problem are real documents.
- The author recognizes the US position regarding ICJ jurisdiction. The students are not to argue jurisdictional issues as to the manner in which the dispute has been brought before the ICJ.
- The Problem raises issues that concern the domestic law of the Parties. However, the problem does not focus on the constitutionality of the measures from a domestic perspective. The focus should be on the obligations of Canada and the United States under international law.
- The problem highlights a number of issues that are the subject of extreme debate in legal communities. The author does not intend for the problem to be viewed as criticism of any country or administration. The problem is drafted so that the advocates can debate issues from the perspective of the US and Canada. Students are encouraged to avoid political debates, except to the extent that there is some way to incorporate a political position with a legal position.
- Several of the legal issues are matter of first impression in international tribunals. Students are encouraged to approach the issues as new legal issues and to find legal mechanisms to justify the positions that each State is advancing.
- Students are to avoid at all costs negative stereotyping. A challenge in this moot is to discuss some of the profiling issues in a politically correct and factual manner.