Transport Canada
Safety and Security
Dangerous Goods

Transports Canada
Sécurité et sûreté
Marchandises dangereuses

Transportation of Dangerous Goods Act, 1992

“BEHIND THE WORDS”

“An Act to promote public safety in the transportation of dangerous goods.”

An informal guide to the 1992 Act for Inspectors.

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Canada

TRANSPORTATION OF DANGEROUS GOODS ACT, 1992

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“Please refer to the disclaimer on page 0.1”

INTRODUCTION

This guide has been prepared for the use of inspectors appointed under the Transportation of Dangerous Goods Act, 1992. Its purpose is to provide, for each section of the Act, comments on the meaning of the section, and where relevant, comments on policy relating to the application of the section.

The page number in the lower right corner consists of two numbers separated by a decimal point. The first number is the same as the section number being described. The second number is used to number the pages for a given section in sequence.

It is recognized that some interpretations or policies will change if there is a court decision requiring this. When appropriate, relevant court decisions will be added.

Each page is dated on the upper right corner and amendments will be dated when they are issued.

Inspectors are reminded that the word province includes the Yukon and the Northwest Territories.

DISCLAIMER

Users of this guide are reminded that it is prepared for the convenience of reference only and that, as such, it has no official sanction. In particular all comments contained under the headings “Behind the Words” or “Court Decisions of Interest” are solely for discussion purposes.

Any comments on this guide would be most welcome, and can be directed to:

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Transport Dangerous Goods Directorate (ASD)
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Place de Ville, Tower C, 9th floor
Ottawa, Ontario K1A 0N5

“Please refer to the disclaimer on page 0.1”

SECTION 1

Short Title

1. This Act may be cited as the *Transportation of Dangerous Goods Act, 1992*.

BEHIND THE WORDS

The Short Title has been changed to distinguish it from the previous Act by adding the date 1992. When referenced the date must appear. For example: *Transportation of Dangerous Goods Act, 1992; TDG Act, 1992; or TDGA, 1992*.

SECTION 2 - "Accidental release"

"accidental release" means, in relation to dangerous goods, an unplanned or accidental

(a) discharge, emission, explosion, outgassing or other escape of dangerous goods, or any component or compound evolving from dangerous goods, or

(b) emission of ionizing radiation that exceeds a level established under the "Nuclear Safety and Control Act";

BEHIND THE WORDS

The Act was established to promote public safety in the transportation of dangerous goods by ensuring there is no situation in which the potential danger inherent in dangerous goods is accidentally realized. Although the definition of accidental release as it appears includes accidental releases of dangerous goods not involved in transportation, the defined phrase is only used in Sections 18, 19 and 21, in the phrase "accidental release of dangerous goods from a means of containment being used to handle or transport dangerous goods."

There is also the provision in the Act to distinguish between accidental releases above or below prescribed amounts as appropriate (Section 18).

An unloading of dangerous goods as intended is not an accidental release.

An accidental release is not an offence under the *TDGA, 1992*. However if it is a result of, for example, improper containment or handling the improper containment or improper handling of the containment could be an offence. Observe also that whereas a means of containment may have been in compliance prior to an accident, if it has been damaged it may be in a state of non-compliance following the accident.

RELATED SECTIONS

Section 18
Section 19
Section 21

COURT DECISIONS OF INTEREST

SECTION 2 - "Dangerous Goods"

"dangerous goods" means a product, substance or organism included by its nature or by the regulations in any of the classes listed in the schedule;

BEHIND THE WORDS

The TDG Regulations provide a series of criteria and tests against which products to be shipped can be assessed to determine whether or not they are dangerous goods according to the Regulations. Dangerous goods are those products, substances or organisms which by their nature satisfy one or more of the test conditions or are specifically designated as a dangerous good by the Regulations notwithstanding any tests.

Some extra comments should be added with respect to waste dangerous goods. The TDG Regulations deal with three types of waste as dangerous goods. The first is those dangerous goods that have "served their purpose" and are now a waste, but retain sufficient danger that they are dangerous goods. These are referred to as waste dangerous goods and, in general, their shipping name is as it was before, with the word "waste" placed in front. Thus "nitric acid" becomes "waste nitric acid".

The second category of wastes that are treated as dangerous goods are those waste "streams" which can reasonably be expected to be dangerous, although the danger may vary from day to day. For example, biomedical waste from a hospital operating room may be infectious on some days and not on others. Indeed, on some days it may be difficult to know. Thus, some goods are identified as waste dangerous goods because of their origin. Examples are: Waste Type 7 *(waste water treatment sludges from the chemical conversion coating of aluminum); and Waste Type 97 (decanter tank tar sludge from coking operations).*

The third category of regulated wastes is referred to in the regulations as "dangerous waste" and is composed of those wastes whose test values (using lechate toxic tests) exceed established safe limits. These wastes are identified during transport as they do require special care if released in an accident due to their potential for detrimental impact on the environment.

There are other wastes regulated by Environment Canada, and further wastes regulated by some Provincial Ministries of Environment. With respect to **acute** hazards in a transportation accident, in Ontario, the general hierarchy of acute danger is: dangerous goods, waste dangerous goods, waste streams designated as dangerous goods, waste identified as dangerous as a result of a lechate toxic test, other Environment Canada designated waste, and still other Provincial Ministry of the Environment designated waste.

COURT DECISIONS OF INTEREST

SECTION 2 - "Handling"

"handling" means loading, unloading, packing or unpacking dangerous goods in a means of containment or transport for the purposes of, in the course of or following transportation and includes storing them in the course of transportation;

BEHIND THE WORDS

This definition uses the word "in" (**in** a means of containment) to include words such as "in", "into", "onto", and "from". Loading provides the concept of **into** a means of containment or **onto** a means of transport, unloading provides the concept of **from** a means of containment or transport and packing or unpacking allows for all concepts.

The definition includes the phrase "includes storing them in the course of transportation". Clearly included would be the parking of a trailer unit overnight awaiting a new tractor unit where the cargo is not disturbed in any fashion. In a situation where material is taken off one truck and placed in a warehouse to be picked up later by several delivery vans it begins to become more difficult to determine if this is storage in the course of transportation, or storage as a warehousing function. Reference to documentation might help, e.g., has it arrived at consignee location or is it still en route? An extreme example is the containers of PCB contaminated material at St-Basile-le-Grand which, at the time of writing, have sat in those containers for three years. The material is packed and ready for transport. Is this storage in the course of transportation? What of those containers which left St-Basile-le-Grand, travelled to England, and are now in Baie Comeau awaiting their next move?

The department recognizes that with an estimated 27 million shipments annually of dangerous goods a determination of "storage in the course of transportation" must at times be made on a case-by-case basis.

COURT DECISIONS OF INTEREST

SECTION 2 - "Import"

"import" means import into Canada, and includes transporting goods that originate from outside Canada and pass through Canada to a destination outside Canada, except when the goods are being transported on a ship or aircraft not registered in Canada;

BEHIND THE WORDS

The Transportation of Dangerous Goods Program is founded on the activities of the consignor who is the person who must determine if goods being shipped are dangerous or not. As well as other activities the consignor must correctly classify, mark and package the dangerous goods before allowing them to be transported. The program depends upon the consignor (most often the manufacturer) carrying out his/her activities correctly.

This raises the concern of how to deal with a shipment which originates outside of Canada. There must be some mechanism of ensuring that the initial activities of classification, documentation, marking and packaging have been carried out correctly before the goods are transported within Canada. In the 1980 *TDG Act* the attempt was made to deal with this by requiring that anyone shipping dangerous goods into Canada must have in Canada an agent to represent them. Unfortunately the only involvement of such an agent in Canada was to receive documents on behalf of the shipper. In practical terms there was no-one responsible under Canadian law for consignor activities and no-one who could be prosecuted to ensure compliance occurred.

To correct this, the *TDGA, 1992* places responsibility on a person subject to Canadian law to ensure that at the time of import into Canada the dangerous goods or means of containment satisfy Canadian law.

Questions can be raised as to who the actual importer into Canada may be e.g. the consignee, the carrier,... No cases have yet been heard in court but it is anticipated that the determination of who is the actual importer into Canada is possible.

The definition excludes goods transported in a ship or aircraft that is not registered in Canada and that are not to be unloaded in Canada. This recognizes that traditionally these means of transport are regulated by their country of registration just as the *TDG Act, 1992* regulates, in subsection 3(2), dangerous goods outside Canada that are carried on a ship or aircraft registered in Canada.

Included under the definition of import are those goods transported in a truck or train that transits Canada, e.g., by train from Maine through New Brunswick and back into Maine or by truck from Washington to Alaska through Alberta and the Yukon.

It is noted that subsection 3(3) provides that the Act does not apply to the extent that its application is excluded by a regulation or a permit. Currently, there is a regulation setting aside certain emergency response assistance planning requirements for transits of less than 70 km.

RELATED SECTIONS

Section 3 - Exclusions

COURT DECISIONS OF INTEREST

SECTION 2 - "Inspector"

"inspector" means a person designated as an inspector under subsection 10(1);

BEHIND THE WORDS

The Act provides for the establishment of inspectors whose duties are to conduct inspections to determine if compliance is being achieved. This extends to the gathering of evidence in cases in which non-compliance is observed or suspected, possibly leading to enforcement action. There are other duties and authorities assigned to inspectors throughout the Act such as those directed toward ensuring safety in the case of an actual or imminent accidental release of dangerous goods from a means of containment being used to handle or transport dangerous goods.

An inspector is not automatically designated according to his/her function, position, or how the inspector was hired. A person is only designated as an inspector once the Minister (through his/her designate) is convinced that the person can properly carry out the duties of an inspector. Any person may be appointed as an inspector although, in practice, this is restricted to federal and provincial civil servants.

RELATED SECTIONS

Section 10	-	Designation of an inspector; use of an inspector's designation card

COURT DECISIONS OF INTEREST

SECTION 2 - "Means of Containment"

"means of containment" means a container or packaging, or any part of a means of transport that is or may be used to contain goods;

BEHIND THE WORDS

In the 1980 Act there were definitions for container and packaging. These have been removed frorn the *TDGA, 1992* as no distinction is needed to be made between the two within the Act. The current definition includes all means used to contain goods and includes those parts of a means of transport which serve this function.

There is a distinction between that part of a means of transport used to contain goods (e.g., the tank forming part of a tank truck) and the means of transport (e.g., truck) itself. This distinction is made as the Act and Regulations are intended to deal extensively with certain means of containment (e.g., prescribe design and performance standards for tanks mounted on a truck chassis or rail car frame) and to a much lesser extent with respect to means of transport (e.g., there are safety marks which must in certain circumstances be affixed to means of transport to indicate danger due to what is being transported).

COURT DECISIONS OF INTEREST

SECTION 2 - “Means of transport”

“means of transport” means a road or railway vehicle, aircraft, ship, pipeline or any other contrivance that is or may be used to transport persons or goods;

BEHIND THE WORDS

This definition is intended to encompass all contrivances used to transport persons or goods.

The primary reason for including a definition for means of transport is that in some circumstances these are to be marked with placards to provide information. The Explosives Vehicle Certificate program also requires that means of transport be defined.

COURT DECISIONS OF INTEREST

SECTION 2 - "Minister"

"Minister" means the Minister of Transport;

BEHIND THE WORDS

Although the definition is very straight forward, less straight forward could be a determination of who can carry out the duties and responsibilities of the Minister. For example, section 25 provides that the Minister may conduct research alone or in cooperation with others. In this case one or several of the Minister's officials would act on his/her behalf. The same is true of section 23. This can be referred to as administrative delegation.

It was decided to place a limit in several sections on who could act for the Minister and this was done by using a phrase such as "The Minister or a person designated for the purposes of this section..."

COURT DECISIONS OF INTEREST

SECTION 2 - "Prescribed"

"prescribed" means prescribed by regulations of the Governor in Council;

BEHIND THE WORDS

Although "prescribed" means prescribed by Regulations of the Governor in Council, Section 27 provides that the Regulations may refer to any document as it exists when the Regulations are made and to certain specifically named documents as these are amended from time to time. Thus, the regulations incorporate into themselves other documents. Some of these, in turn, incorporate other documents. Currently, about 100 standards are referenced directly.

RELATED SECTIONS

Subsection 27(2) - Referencing documents

COURT DECISIONS OF INTEREST

SECTION 2 - "Public Safety"

"public safety" means the safety of human life and health and of property and the environment;

BEHIND THE WORDS

The word "public" in public safety has two meanings. The first is to emphasize that the Act includes third party safety, going beyond the business undertaking to apply to the general public. The second sense is not as readily apparent and is why the definition is given. It is that public safety includes the safety of not only people but also of property and the environment. This latter, the environment, is treated as a concept of its own in the Act.

RELATED SECTIONS

Paragraph 34(1)(i) - Referencing environmental problems in their own right

COURT DECISIONS OF INTEREST

SECTION 2 - “Safety Mark”

“safety mark” includes a design, symbol, device, sign, label, placard, letter, word, number or abbreviation, or any combination of these things, that is to be displayed

(a) on dangerous goods, on means of containment or transport used in handling, offering for transport or transporting dangerous goods, or at facilities used in those activities, and

(b) to show the nature of the danger or to indicate compliance with the safety standards prescribed for the means of containment or transport or the facilities;

BEHIND THE WORDS

The definition of safety mark provides that safety marks can be divided into one of two categories. The first category is those safety marks that are used to show compliance with safety standards prescribed for a means of containment, transport or facilities. The second category is those safety marks that are used to show the nature of danger existing due to the presence of dangerous goods.

Examples of the first type would be the United Nations mark placed on fiberboard boxes to show the boxes conform with the UN Performance Standards, and TC or CTC marks placed on cylinders. Note that no dangerous goods need be present.

Examples of the second type are placards and labels.

COURT DECISIONS OF INTEREST

SECTION 2 - "Safety Requirements"

"safety requirements" means requirements for handling, offering for transport or transporting dangerous goods, for reporting those activities and for training persons engaged in those activities;

BEHIND THE WORDS

This definition is used when establishing that regulations can be developed with respect to handling, offering for transport or transporting dangerous goods, for reporting those activities and for training persons engaged in those activities. Taken in isolation, the definition would appear to allow for a wide variety of requirements with respect to transporting dangerous goods. However, the preamble to the Act (An Act to Promote Public Safety in the Transportation of Dangerous Goods), and the general nature of the remaining sections of the Act ensure that safety requirements must actually relate to safety. Section 13 of the *Interpretation Act* provides that the preamble of an enactment shall be read as a part thereof intended to assist in explaining its purport and object.

For example, included within "safety requirements" are CSA and CGSB standards for the selection of packagings for use with specific dangerous goods. These are different from safety standards which address the design, construction or performance of packagings without regard to their application. Please note that when the words "safety" and "standards" are used together in this document in the phrase "safety standards" they become a defined phrase.

COURT DECISIONS OF INTEREST

SECTION 2 - "Safety Standards"

"safety standards" means standards regulating the design, construction, equipping, functioning or performance of means of containment or facilities used or intended to be used in handling, offering for transport or transporting dangerous goods;

BEHIND THE WORDS

As with the definition of "safety requirements" this definition is limited to the concept of public safety. Observe that not every standard followed in manufacturing a means of containment is automatically a "safety standard". Only those standards relating to the activities or performances noted in the definition **and** which are required to be followed by regulation (see paragraph 27(1)(j)), are "safety standards". Please note that when the words "standards" and "safety" are used together in this document in the phrase "safety standards" they become a defined phrase.

Safety standards may be, but are not limited to, documents published by a standards writing organization, a government or an industry organization and which are identified by regulations under this Act.

COURT DECISIONS OF INTEREST

SECTION 2 - "Ship"

"ship" includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, without regard to method or lack of propulsion;

BEHIND THE WORDS

The definition of ship used is taken from the *Canada Shipping Act*. As dangerous goods moved in bulk by ship are covered by the *Canada Shipping Act*, and as the *Transportation of Dangerous Goods Act, 1992* is intended to cover all other movements of dangerous goods by ship, the definition of ship used in the two Acts must be the same in order to ensure that no activities intended to be regulated are left unregulated because of a gap created by two different definitions of the word "ship".

COURT DECISIONS OF INTEREST

SECTION 2 - "Shipping Record"

"shipping record" means a record that relates to dangerous goods being handled, offered for transport or transported and that describes or contains information relating to the goods, and includes electronic records of information;

BEHIND THE WORDS

This definition expands the definition of shipping document used in the *TDGA* of 1980 to include electronic records of information. The phrase shipping document will continue to be used extensively in the regulations to refer to a document which must accompany a shipment.

When used within the Act the meaning of shipping record is restricted to information necessary for the administration and enforcement of the Act.

RELATED SECTIONS

Section 15 - Inspecting electronic records of information

COURT DECISIONS OF INTEREST

SECTION 2 - "Standardized Means of Containment"

"standardized means of containment" means a means of containment in relation to which a safety standard has been prescribed.

BEHIND THE WORDS

To answer the question of whether or not a specific means of containment is a standardized means of containment one must determine if a safety standard has been prescribed for that particular means of containment. If a safety standard has been prescribed, then the definition is satisfied.

To be a safety standard prescribed for a particular means of containment it must at least be, following from the definition of safety standard, that the means of containment is used or intended to be used in handling, offering for transport or transporting dangerous goods. Although adding the words "and which is used or intended to be used in handling, offering for transport or transporting dangerous goods" to the end of the definition of standardized means of containment may have made the definition clearer these words already apply due to the definition of safety standards.

It is important to note that any means of containment "passed off" by a manufacturer, importer, distributor, etc., as meeting a standard **must** be treated by an inspector as a standardized means of containment. The words "passed off" are taken from the Criminal Code and can be viewed as doing anything to cause a potential customer, user, etc., to believe that the means of containment is a standardized means of containment. For example, a means of containment marked with a safety mark indicating compliance with a standard must be viewed as a standardized means of containment.

It is possible for a standardized means of containment (e.g., marked) to fail to meet the prescribed standard. Such containers continue to be subject to the *TDGA, 1992* and, in fact, are in non-compliance.

RELATED SECTIONS

Section 6	-	Means of containment must satisfy claims made
Section 8	-	Standardized means of containment must be marked

COURT DECISIONS OF INTEREST

SECTION 3

Application of the Act

3.(1) This Act is binding on Her Majesty in right of Canada or a province.

(2) This Act applies in relation to all matters within the legislative authority of Parliament, including dangerous goods outside Canada that are carried on a ship or aircraft registered in Canada.

(3) This Act does not apply to the extent that its application is excluded by a regulation made under paragraph 27(1)(e) or a permit issued under section 31.

(4) This Act does not apply in relation to:

(a) any activity or thing under the sole direction or control of the Minister of National Defence or in circumstances in which it is prescribed to be under that Minister's sole direction or control;

(b) commodities transported by a pipeline governed by the National Energy Board Act or the Oil and Gas Production and Conservation Act or by the law of a province; or

(c) dangerous goods confined only by the permanent structure of a ship.

BEHIND THE WORDS

1(1) Binding on Her Majesty in right of Canada or a province.

This means that federal and provincial government ministries, departments, agencies and other entities must comply with the Act (except as occurs under 3(3) and 3(4)(a)).

3.(2) General Application

The approach used in the *TDG Act* of 1980 in its application section led to actual or potential difficulties with interpretations in court involving reporting, training and constitutional matters. Subsection 3(2) of the *TDGA, 1992* makes it clear that the Act applies with respect to matters within the legislative authority of Parliament. With this wording there can be no conflicts at the level of the Constitution Act. However, what may develop will be an interpretation of what the federal government authority covers. Questions under this heading would be dealt with on a case-by-case basis should matters be presented to a court for resolution. See also the discussion on section 4.

3.(3) Exceptions - Regulations and permits.

Given that subsection 3(2) establishes the Act as being applicable to a wide range of events, including transporting a small can of compressed gas (soft drink) from a store to a house, there must be a provision to exempt from the Act certain activities which really do not need to be regulated. The current regulations establish exemptions for items such as the transportation of limited quantities, consumer commodities, and dangerous goods within a plant's boundary.

3.(4) Other exceptions

This subsection excludes those activities that are sufficiently governed otherwise.

(a) In practice National Defence provides a level of safety at least equivalent to that provided by this Act during normal events.

Paragraph (a) is expanded in the regulations to set out the circumstances in which an activity or thing is considered to be under the sole direction or control of the Minister of National Defence.

(b) The activities excepted are regulated elsewhere.

(c) With respect to paragraph 3(4)(c), the Act excludes dangerous goods confined only by the permanent structure of a ship as these dangerous goods are fully regulated by the *Canada Shipping Act.*

RELATED SECTIONS

Section 4 - Comments relating to legislative authority of Parliament

COURT DECISIONS OF INTEREST

SECTION 4

Federal-Provincial Administrative Agreements

4.(1) The Minister may

(a) with the approval of the Governor-in-Council, enter into an agreement with one or more provincial governments with respect to the administration of this Act; and

(b) subject to such terms and conditions as the Governor-in-Council may specify in the approval, agree to amendments to the agreement.

(2) The Minister shall make the agreement public.

BEHIND THE WORDS

Some provincial officials have observed that it is possible to enter into agreements without so stating in legislation. However, they feel this section ensures these agreements would be more durable and binding. Both provincial and federal officials favour continuing the federal/provincial partnership which now exists.

Associated with the administration of the dangerous goods program by the federal government and the provinces is the question of how the federal and provincial Acts and regulations interact. For the most part, the *TDG Act, 1992* is enabling legislation with the bulk of requirements and prohibitions contained in the regulations. The federal TDG regulations are developed in consultation with the provinces, are adopted not only by the federal Act but by provincial Acts as well, and are viewed as joint regulations.

It is possible that there can be offences under the federal Act only, under a provincial Act only and actions which may appear to an inspector to be offences under the federal Act and a provincial Act at the same time. In this latter case the question arises as to which Act to reference when laying an information. This question pushes to the heart of the area of application of the federal *TDG Act, 1992*. The present federal view is that as the Act may be an exercise of the criminal law constitutional head of power, an inspector appointed under the *TDG Act, 1992* need only reference the *TDG Act, 1992*.

COURT DECISIONS OF INTEREST

SECTION 5

General Prohibition

5. No person shall handle, offer for transport, transport or import any dangerous goods unless

(a) the person complies with all applicable prescribed safety requirements;

(b) the goods are accompanied by all applicable prescribed documents; and

(c) the means of containment and transport comply with all applicable prescribed safety standards and display all applicable prescribed safety marks.

BEHIND THE WORDS

At first glance it might appear that since the phrase “prescribed documents” appears in (b), they are not considered to be a safety requirement. Otherwise wouldn’t they already be included in (a)? The reason both paragraphs (a) and (b) are needed, and why “prescribed documents” are still a safety requirement, is due to imported goods. Paragraph (a) requires that “persons” comply with certain requirements. If all involved persons were in Canada, paragraph (b) may not be needed. But, as nearly 70% of the chemicals used in Canada are imported (Canada also exports a considerable quantity), and the consignors of these are not subject to Canadian law, paragraph (b) is required to ensure the consignor’s duties have been satisfied when the goods arrive in Canada.

Section 5 is the first section of the Act which leads to an offence. Section 5 requires that certain things be done or not done. Similar sections are sections 6, 7, 8, 9, 13, 14, 18 and 23. Each of these by itself does not establish an offence, however, when read in conjunction with section 33 offences are defined.

In addition, non-compliance with any regulations made pursuant to paragraphs 27(1)(h), (i), (l), (n) or (r) is not to occur. Again, as a result of section 33, any such non-compliance is an offence.

Non-compliance with a direction issued under 9(2), 17(3) or (4), 19(2) or 32(1) is not permitted pursuant to subsection 13(2), and is an offence under section 33.

Section 34 allows for the creation of a court order, makes it an offence not to comply with the order, and establishes the punishment. Note that section 33 did not cover court orders.

The phrase “the goods are accompanied by all applicable prescribed documents” contains within it the meaning that these documents must be properly completed and correctly describe the situation which they purport to describe. (e.g. the classification used is correct) Indeed Section 42 accepts such documents as prima facie proof of the information they show or indicate.

Finally, this is the first section to use the words “offer for transport” and “transport” with respect to a prohibition. As observed earlier, (see definition of import) the program is based upon the consignor (shipper) first conducting his/her activities. There can be cases where one person could be both the consignor (shipper) and the carrier. In this instance, and as will be made clear in the regulations, the same person can offer for transport and transport, and in consequence is responsible for both consignor as well as carrier duties. There does not have to be a second person before consignor activities (offer for transport) have a meaning.

RELATED SECTIONS

Section 2	-	Definition of import
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

Section 5 Transportation of Dangerous Goods Act, 1992
Regulation: 7.39

R. vs Neptune Food Suppliers Ltd.

03-03-95, B.C. Provincial Court,

Convicted under Part 7 for **failing to segregate foodstuffs** from dangerous goods that consisted of fiberboard boxes containing 4 x 4 litre plastic jugs of sodium hydroxide solution.

Fine of $500 on one count and made an Order under Section 34 of the TDG Act, 1992 to make a payment of $750 to the research fund.

Section 5 Transportation of Dangerous Goods Act, 1992
Regulation: 5.1

R. vs Acklands Limited.

04-12-95, Saskatchewan Provincial Court,

Convicted under Part 5 for **not placarding vehicle** transporting dangerous goods that consisted of fiberboard box of Organic Dibenzoyl Peroxide UN2087 contained in 4 - 100gm plastic tubes.

Fine of $2,500 on one count and made an Order under Section 34 of the T.D.G. Act, 1992 to make a payment of $5,000 to the research fund.

Section 5 Transportation of Dangerous Goods Act, 1992
Regulation: 9.2

R. vs C.P. Express and Transport Ltd.

09-13-94, Quebec Provincial Court,

Convicted under Part 5 for **not labeling dangerous goods** that had been repackaged. There was also a conviction under Part 9 in respect of untrained employee handling dangerous goods.

Fine of $5,000 on each count and an Order under Section 34 of the TDG 1992 to make a payment of $20,000 to the research fund.

R. v 612372 Ontario Inc.
R. v Federal Batteries Ltd.
R. v ROL Handicrafts Limited
R. v Recochem Inc.
R. v Basime Halef
R. v Canadian Pacifique Express & Transport
R. v Canadien Airline International
R. v Manfried Leidtke
R. v Wray's Fire Equipment (Kingston) Ltd.
R. v Cooper Energy Services Ltd.
R. v F.W. Woolworth (Canada) Ltd.
R. v Powell River Barge (1985) Ltd.
R. v I Med Oxygen Ltd.
R. v K & W Pipe Canada Ltd.
R. v Baisley & Richer
R v Ray Kronewit
R. v Grace Dearborn Inc.
R. v Woolworth Canada Inc.
R. v Wajax Industries Limited
R. v Purolator Courier Ltd.
R. v Neptune Food Suppliers Ltd.
R. v Acklands Ltd.
R. v Aslchem International Inc.
R. v Laboratoire Choisy Ltee.

SECTION 6

Misleading Safety Marks

6. No person shall display a prescribed safety mark on a means of containment or transport, or at a facility, if the mark is misleading as to the presence of danger, the nature of any danger or compliance with any prescribed safety standard.

BEHIND THE WORDS

The intent of this section is to ensure that:

a) when a safety mark is used to show the nature of danger there is a danger present and it is correctly identified; and,

b) if there is a safety mark on a means of containment indicating compliance with a safety standard then that means of containment must satisfy the standard indicated by that safety mark. Note that if a safety mark appears on a means of containment it **must** be treated as a standardized means of containment. Please refer back to the comments on the definition of a standardized means of containment.

The word “misleading” was chosen to allow cases such as the delivery of empty fibreboard boxes in a knocked-down state which have pre-printed labels on them. In this instance the labels would not be misleading. Similarly, a placard may be placed on a tank truck prior to loading without being misleading. As with some other sections of the Act, given the large number of dangerous goods movements annually, it may be that the judgement of whether or not the presence of a safety mark is misleading must be decided on a case-by-case basis. Consideration should be given to the apparent intention of the individual with respect to any wish to deceive the public as to the nature of the goods or means of containment.

The most common application of this section, with respect to placards, will be to prohibit the placement of placards on means of containment or transport thereby indicating a danger when no danger is present.

With respect to a standardized means of containment (and hence a means of containment used or intended for use in transporting dangerous goods), Sections 5, 6 and 8 can be summarized by noting that the standardized means of containment must be marked to show the standard it purports to meet; it must in fact be in compliance with this standard; and it must be used when the dangerous goods require such containment.

RELATED SECTIONS

Section 2	-	Standardized means of containment
Section 5	-	Correct means of containment to be used
Section 8	-	Standardized means of containment must be marked

COURT DECISIONS OF INTEREST

Section 6 Transportation of Dangerous Goods Act, 1992

R. vs Laidlaw Environmental Services Ltd.

17-10-94, B.C. Provincial Court

Accused corporation had contracted a clean-up job that involved the removal of chemicals from an abandoned electroplating shop near Kamloops. During the course of the clean-up drums of chemicals were improperly labeled as flammable products when, in fact, they were acids. When the acids were poured into metal drums a reaction occurred that gave rise to a significant plume of smoke that drifted over the City of Kamloops and caused some evacuation of residences.

Fine of $5,000 was imposed in respect of one charge of displaying prescribed safety marks that were misleading as to the nature of the danger present.

R. v Laidlaw Environmental Services Ltd.

SECTION 7

Emergency Response Assistance Plan

7.(1) Before offering for transport or importing any quantity or concentration of dangerous goods prescribed for the purposes of this section, a person shall have an emergency response assistance plan that is approved under this section and outlines what is to be done if there is an accident in transporting the dangerous goods.

(2) The Minister or the designated person may approve the plan, either indefinitely or for a specified period, where the Minister or person believes on reasonable grounds that it is capable of being implemented and will be effective in responding to any accident in transporting the dangerous goods.

(3) The Minister or the designated person may approve the plan pending an investigation of the matters to be considered under subsection (2) if the Minister or the designated person has no reason to suspect that the plan is incapable of being implemented or will be ineffective.

(4) The Minister or a designated person may revoke the approval where

(a) the Minister or the designated person has requested changes to the plan that he or she believes on reasonable grounds are needed to make it effective and the changes have been refused or have not been made; or

(b) the Minister or the designated person believes on reasonable grounds that the plan is no longer capable of being implemented.

BEHIND THE WORDS

Some dangerous goods involved in an accident may continue to hold the potential for harm after the initial accident has occurred. For example, a tank car containing a compressed or flammable gas may be in a state or circumstance that there is concern about the tank itself rupturing. For some special dangerous goods, as described in Schedule XII of the regulations, emergency response assistance plans must be in place before these products are shipped. Section 7 of the *TDG Act, 1992* was established to ensure the provision of specialized expert advice to supplement normal emergency response activities.

In most cases this burden falls upon the consignor, who is often the manufacturer, as he/she is the expert with respect to the characteristics of the product and has selected the means of containment. Assume for the remainder of this paragraph

that the consignor is in Canada. As observed in the comments on Section 5, the same person could offer and transport, being both consignor and carrier. The person who prepares the shipment for transport (offers) is responsible for the emergency response assistance plan.

If the consignor is not in Canada, the importer is responsible for the plan.

In practice, when someone wishes to ship (or import) a Schedule XII substance he/she will submit a summary of an emergency response assistance plan (ERAP) and normally will receive temporary approval without delay. Once the plan has been examined carefully by those designated for this purpose (Section 12) and confirmed to be acceptable, the approval will continue. If the plan is found to be unacceptable, interim approval of the plan would be cancelled. The result would be that the person offering or importing would not be complying with Subsection 7(l) if he/she continued to ship or import. Section 33 establishes this as an offence.

If a person, following a cancellation of approval (or denial of approval), wished to submit a new plan without much change, expecting another "automatic" approval, subsection 7(3) would apply in that the Minister would have reason to suspect the new plan is incapable of being implemented or being effective and "automatic" approval need not be granted.

The right to appeal against a revocation decision or a denial of approval will be provided under paragraph 27(1)(s).

The following discussion of emergency response planning and emergency response activities should be useful.

Most transportation accidents do not involve dangerous goods. Of those that do almost all are caused by reasons other than the dangerous goods.

When an accidental release occurs there is often a great deal of similarity between the effect in a transportation setting and the effect within a fixed facility such as a manufacturing site or a warehouse. One important difference is that for a transportation accident involving dangerous goods, some of the required specialized knowledge and equipment may initially be at a site remote from the accident.

Section 7 of the *TDG Act, 1992* was established to ensure the provision of specialized expert advice to supplement normal emergency response activities. Essentially the goal of this section is to ensure that the person held responsible under the *TDG Act, 1992* to develop such a plan is capable of ensuring that the appropriate experts, equipment, etc., are available to assist in the response to an

imminent accidental release, stop an actual release or mitigate the impact of the released dangerous goods.

An ERAP is directed toward ensuring the provision of this expert industry advice and assistance. It is not a complete plan which obviates the need for normal emergency planning. Indeed, with respect to response to imminent or actual accidental releases, it is made clear in section 19 that the *TDG Act, 1992* does not apply to response actions undertaken by provincial employees including fire and police services (unless by the nature of the event they also fall into one of the regulated categories).

Essentially, Section 7 ensures that with respect to certain dangerous goods as set out in the regulations, someone in Canada is responsible for ensuring that an appropriate response plan to prevent or mitigate an accidental release is in place.

The activation of an ERAP was discussed during consultation with industry. It became apparent that there was concern that should industry develop a response capability they may be summoned to any accident to which they could effectively respond ranging from a mishap in a high school chemistry lab to a transportation accident involving a company with no response capabilities. Thus **direct** activation of a plan was not included in Section 7.

In many circumstances, the activation of an emergency response assistance plan would be undertaken by industry itself to protect its own interests (e.g., the product, the means of containment, goodwill, liability) or in response to a request from fire or police emergency services. On the other hand, if a situation occurs wherein an emergency response assistance plan should be activated and it is not, paragraph 7(4)(d) would allow the Minister or designated person to revoke approval of the plan.

In some circumstances, Section 19 can be used to require the activation of an emergency response assistance plan. However, it cannot be used to require the activation of response activities **through a self-help network** such as those that Canadian industry have established. These networks of response teams that act for each other provide a response potential better than what could be legislated. Please refer to Section 19 for a discussion on how these networks are encouraged by the Act.

A description of each of the four subsections of Section 7 follows:

Subsection 7(1): This subsection requires that prior to offering for transport or

importing certain dangerous goods, an approved emergency response plan must be in place. You are advised to review the definition of import which includes transiting Canadian territory. It is also important to note that if a plan is revoked for any reason the person wishing to offer for transport or import cannot legally do so.

Subsection 7(2): The procedure to be followed will be that upon receipt of what appears to be a reasonable initial application, interim approval, subject to review, will be granted. At a later time, once the review and any required modifications have taken place, the plan will be given an indefinite approval. Nevertheless, even with an indefinite approval, this can be revoked for cause as made clear in subsection 7(4).

The TDG Directorate has available for reference by anyone required to establish an emergency response assistance plan, a guidebook on the critical elements of such a plan and how these are assessed by the Directorate. It is also noted that compliance with CAN/CSA Z731-M91 “Emergency Planning for Industry” is not necessary but would certainly be sufficient to satisfy Transport Canada requirements.

It is anticipated that the persons designated to approve these plans will be those occupying the positions of Director General; Director, Response and Compliance; and, Chief, Response Operations.

It is important that the officer conducting the investigation of a plan resulting in a recommendation for approval remain familiar with the plan in the event the plan is activated with respect to a particular accident. It is expected that in most cases in which a plan is industry activated, notification will be given to the TDG Directorate with the request to confirm that the plan is appropriate for the situation. An affirmative response will be viewed (and is intended to be viewed) as a direction issued under subparagraph 19(3)(b) and, in consequence, Section 20 relating to liability protection for the response team will take effect. Please refer to the comments on Sections 19 and 20.

Subsection 7(3): This subsection allows the rapid temporary approval of an emergency response assistance plan, and also provides for a refusal. Thus, a company that submitted plan no. 1, which was later reviewed and found to be inadequate, could not resubmit this as plan no. 2 and expect immediate temporary approval. In such a case the Minister or the designated person could refuse if he/she suspected that the “new” plan is incapable of being implemented or will be ineffective.

Subsection 7(4): Paragraph (a) is clear. In practice, unless the difficulties with the plan are severe, an initial draft report showing deficiencies will be produced prior to a formal report requesting changes. Even with a formal report there could be a time interval specified to allow for the requested changes to be made.

Paragraph (b) refers to a situation such as the lapsing into disrepair of response equipment. In practice, revocations would be expected to occur under paragraph (a).

RELATED SECTIONS

Section 5	-	Comments on consignor also being the carrier
Section 12	-	Description of those to approve ERAP
Section 19	-	Restriction on activities and persons subject to an ERAP
Section 20	-	Liability protection for emergency response teams
Section 33	-	Establishes offences
Section 34	-	Court orders
Paragraph 27(1)(s)	-	Appeals

COURT DECISIONS OF INTEREST

SECTION 8

Marking of a Standardized Means of Containment

8. No person shall sell, offer for sale, deliver, distribute, import or use a standardized means of containment unless it displays all applicable prescribed safety marks.

BEHIND THE WORDS

This section ensures that a means of containment that is "passed off" as a standardized means of containment shall be marked with the relevant safety mark(s) before it is sold, offered for sale, delivered, distributed, imported or used. The words "passed off" are taken from the Criminal Code and can be viewed as doing anything to cause a potential customer, user, etc., to believe that the means of containment is a standardized means of containment. For example, a means of containment marked with a safety mark indicating compliance with a standard must be viewed as a standardized means of containment.

Section 6 would ensure that once such a mark is put on a means of containment the means of containment must satisfy the standard so indicated. Section 5 ensures that only the "correct" means of containment are used to transport dangerous goods.

RELATED SECTIONS

Section 5	-	Proper means of containment must be used
Section 6	-	Means of containment must satisfy claims made
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

See trademark provisions of the Criminal Code, Sections 406 to 414. Also Trademarks Act R.S.C. 1985 T-13.

Section 8 Transportation of Dangerous Goods Act, 1992

R. vs Wray's Fire Protection (Kingston) Ltd

09-21-94, Ontario Provincial Court,

Charged under Section 8 with unlawfully **delivering** a standardized means of containment which did not display all applicable prescribed safety marks.

Accused company requalified cylinders before being registered with Transport Canada. Markings on cylinders were not prescribed safety marks as no registration number was included.

Court imposed a fine of $2,500 and made the following order under Section 34 of the TDG Act, 1992.

"Order pursuant to Section 34(1) of the Transportation of Dangerous Goods Act for re-certification of all cylinders certified during the period from January 1st, 1993 to November 1st, 1993."

R. v Wrays Fire Protection (Kingston) Ltd.

SECTION 9

Notices of Recall or Defective Construction

9.(1) A manufacturer or importer of standardized means of containment shall keep records of the persons to whom the manufacturer or importer supplies the means of containment.

(2) Where the Minister or a person designated for the purposes of this section believes on reasonable grounds that any standardized means of containment are unsafe for handling or transporting dangerous goods, the Minister or the designated person may direct the manufacturer or importer who supplied them to issue notices of defective construction or recall to the persons to whom they were supplied.

BEHIND THE WORDS

Suppliers and importers are required to keep records of their direct customers in accordance with regulations (27(1)(l)). When a standardized means of containment is believed, on reasonable grounds, to be unsafe for the transportation of dangerous goods, a notice (defective construction or recall) may be required to be sent to these customers. Such grounds may be the results of inspections or tests on other similar means of containment, i.e. built at the same time, by the same manufacturer, by the same method, with similar materials or to the same design, etc.

Subsection 9(1): The records of the transaction will relate only to the first exchange of ownership. That is, a manufacturer will be required to keep records of the customers (distributors, users...) to whom he/she provides a product directly. There is no requirement for further record keeping through the chain of distribution.

Note that a standardized means of containment can range from a fiberboard box to a railway tank car.

Subsection 9(2): Should a notice of defective construction be issued, a safety mark indicating compliance with a safety standard on such means of containment could be required to be removed pursuant to Section 17 (non-compliance with Section 6).

Larger containers such as railway tank cars may be the subject of a notice of defective construction or notice of a recall. In this context a recall may be a statement by the manufacturer or importer that he/she will accept the means of containment for repair. Specifics of the recall would be established on a case by case basis and would have to be very carefully considered.

As with any offence, failure to comply could result in the application of Section 33 or Section 34.

There may be instances when the application of Section 9 would not be successful in protecting public safety. For example, the means of containment have passed through several owners or the manufacturer or importer is no longer in existence. In such circumstances Section 32 may be more appropriate by providing a direction to the current owner, operator or person who has possession, charge, management or control of the suspect means of containment.

RELATED SECTIONS

Section 6	-	Means of containment must satisfy claims made
Subsection 13(2)	-	Together with Section 33 establishes offences
Paragraph 27(1)(l)	-	Regulations on records
Section 32	-	Protective directions
Section 33	-	Establishes offences
Section 34	-	Court orders

COURT DECISIONS OF INTEREST

SECTION 10

Designation of Inspectors

10.(1) The Minister may designate persons or classes of persons whom the Minister considers qualified to act as inspectors for the purposes of this Act or any of its provisions and the Minister may revoke the designations.

(2) The Minister shall furnish every inspector with a certificate of designation as an inspector showing the purposes, classes of dangerous goods, means of containment or transport and places for which the inspector is designated.

(3) On entering any place or inspecting anything, an inspector shall show the certificate to the person in charge of the place or thing if the person requests proof of the inspector's designation.

BEHIND THE WORDS

Subsection 10(1) allows for the designation of specific persons or for the designation of classes of persons to be inspectors. In practice, a class of person has not been designated by the Minister or his/her designate.

Subsection 10(2) allows for the restriction of inspector authorities to specific portions of the Act, classes of dangerous goods, etc. The usual restrictions are by mode or with respect to Section 19 (as a result of liability concerns).

Subsection 10(3) requires that an inspector show his/her certificate to the person in charge of the place if requested. In practice, an inspector should voluntarily present his/her card.

RELATED SECTIONS

Section 2	-	"Inspector"
Section 19	-	Intervention authorities relating to actual or imminent accidental releases

COURT DECISIONS OF INTEREST

SECTION 11

Certificate of (Intrusive) Inspection

11.(1) Where an inspector opens anything for inspection, or takes a sample of anything that is sealed or closed up, the inspector shall provide the person who has the charge, management or control of the thing with a certificate in prescribed form as proof that it was opened for that purpose.

(2) The person to whom, or for whose benefit the certificate is provided is not liable, either civilly or criminally, in respect of any act or omission of the inspector in the course of the inspection or taking of the sample, but is not otherwise exempt from compliance with this Act and the regulations.

BEHIND THE WORDS

The conditions which must be met before subsection 11(1) is effective are:

- the inspector must be the person who opens or takes the sample; and
- the thing opened must have been “sealed” or “closed up”.

With respect to the first condition, if someone other than the inspector conducts the physical activity, some judgement on the part of the inspector can be exercised with respect to a certificate. If a certificate is requested, or if it appears such a certificate might be of benefit to the person who opened the thing or initially took the sample, it is to be provided. If the thing is not opened “voluntarily” and the inspector himself / herself conducts the opening or taking of a sample, a certificate must be provided.

With respect to the second condition, the words are “closed up”, not simply “closed”. This provides an inspector with some latitude. For example, opening a door into an office, or into the van of a truck, would not require a certificate. Neither would opening the unsealed doors of a container or looking under a tarpaulin.

The purpose of this section is to provide proof that the person having charge, management or control (e.g., the carrier) did not open the item in question in case that person is accused of causing any contamination or of removing any missing product.

There is no requirement in the Act for a federal inspector to re-seal or re-close anything that he/she has opened, however, when appropriate an inspector must do this and keep a record of his/her action. Failure to do so would leave the federal government in the position of being accused of allowing contamination or loss of some or all of the transported goods.

RELATED SECTIONS

Paragraph 15(b) - Opening and inspecting

COURT DECISIONS OF INTEREST

SECTION 12

Designation of Persons to Approve Plans and Permits and to Issue Directions

12.(1) The Minister may designate persons to approve emergency response assistance plans under Section 7 or to issue directions under subsection 9(2) or 32(1) or permits under subsection 31(1) and the Minister may revoke the designations.

(2) The Minister may designate persons or classes of persons to issue permits under subsection 31(2) and the Minister may revoke the designations.

BEHIND THE WORDS

Reference	Purpose	Intended to include:
Section 7	Provides for the Minister to designate individual persons to approve emergency response assistance plans.	- Director General; - Director, Response and Compliance; - Chief, Response Operations
Subsection 9(2)	To issue directions requiring Notices of Recall or Defective Construction.	- Director General; - Director, Regulatory Affairs or Response and Compliance; - Chief, Scientific Services
Subsection 32(l)	To issue Protective Directions	- Assistant Deputy Minister; - Director General; - Director, Regulatory Affairs
Subsection 31(l)	To issue Equivalency Permits.	- Director General; - Director, Regulatory Affairs or Response and Compliance; - Chief, Permits or Scientific Services
Subsection 31(2)	To issue Emergency Permits	- Director General; Director, Regulatory Affairs or Response and Compliance; - Chief, Response Operations

SECTION 13

Inspector Authorities, Directions

13.(l) When an inspector is exercising powers or carrying out duties and functions under this Act, no person shall

(a) fail to comply with any reasonable request of the inspector;

(b) knowingly make any false or misleading statement either orally or in writing to the inspector;

(c) except with the authority of the inspector, remove, alter or interfere in any way with anything detained or removed by or under the direction of the inspector; or

(d) otherwise obstruct or hinder the inspector.

(2) No person shall contravene or fail to comply with a direction issued under subsection 9(2), 17(3) or (4), 19(2) or 32(l).

(3) For greater certainty, a direction referred to in subsection (2) is not a statutory instrument for the purposes of the *Statutory Instruments Act*, but no person shall be convicted of an offence under that subsection unless the person was notified of the direction and, if any applicable regulations have been made under paragraph 27(1)(t), the notification was in accordance with the regulations.

BEHIND THE WORDS

This section essentially establishes the authorities of an inspector during an inspection by setting out how he/she or she must be responded to.

Note that no person shall fail to comply with any reasonable request of the inspector. However, this does not have the same force of compulsion as Sections 9, 17, 19 and 32. Paragraph 13(l)(a) allows for a refusal should the request be unreasonable. The determination of reasonable is, in the first instance, made by the inspector. If not reasonable by his/her standards it would not be requested. If the request is refused and a direction under 9, 17, 19 or 32 is not appropriate, the only recourse for the inspector is to accept the refusal, while considering if a prosecution should be pursued relating to the interpretation of reasonable.

Subsection 13(3) provides that the directions referenced in 13(2) must be complied with immediately, regardless of notice periods or other procedures contained in the *Statutory Instruments Act*. Naturally, the person to be bound by the direction must have knowledge of the direction.

RELATED SECTIONS

Section 9	-	Notices of defective construction or recalls
Section 17	-	Directions in case of non-compliance
Section 19	-	Intervention relating to actual or imminent accidental releases
Section 32	-	Protective directions

COURT DECISIONS OF INTEREST

SECTION 14

Financial Responsibility

14.(1) No person shall handle, offer for transport, transport or import dangerous goods, or manufacture or import standardized means of containment, unless the person is financially responsible in accordance with the regulations.

(2 A person who handles, offers for transport, transports or imports dangerous goods, or manufactures or imports standardized means of containment, shall provide the prescribed proof of financial responsibility to an inspector who requests the proof.

(3) This section does not apply to Her Majesty in right of Canada or a province or to the entities named in Schedules II and III to the *Financial Administration Act.*

BEHIND THE WORDS

The Regulations may establish activities and classes of dangerous goods for which a person must be able to prove financial responsibility before handling, offering for transport, transporting or importing dangerous goods or manufacturing or importing standardized means of containment. For example, with respect to trucks, the regulations are expected to require proof of insurance to the levels now set uniformly by the provinces across Canada, i.e., one million dollars for dangerous goods and two million dollars for dangerous goods as listed in Schedule XII of the Regulations. This will be proposed through the normal regulation making procedures. Currently, the only other category being actively considered is for those persons responsible for an ERAP. Consideration may be given at a future date to requiring financial responsibility for manufacturers or importers of standardized means of containment.

Enforcement of this section is expected to be conducted in the same way as the verification of a person's automobile insurance. That is, during the course of an inspection, an inspector will request to see proof of financial responsibility which would be provided in the form of an insurance card, proof of a bond or some other document deemed acceptable as a result of regulation. It is emphasized that proof will only be required when specifically requested by an inspector pursuant to regulations.

This section will not apply to federal and provincial government departments, nor to certain crown corporations.

Regulations could allow for conditions under which persons may satisfy the Minister that they self-insure to a satisfactory level.

There is no requirement for the form in which the financial responsibility must be to satisfy the conditions of the section. On a case-by-case basis it may be acceptable to have insurance, a bond, other financial instruments, etc.

RELATED SECTIONS

Section 9	-	Funds may be required to provide the notices, or to deal with the recalls
Section 22	-	Funds may be required to compensate the government for its expenses
Section 33	-	Establishes offences
Section 34	-	Funds may be required to satisfy a court order

COURT DECISIONS OF INTEREST

SECTION 15

Monitoring Compliance

15. For the purpose of ensuring compliance with this Act, an inspector may

(a) subject to Section 16, at any reasonable time, stop any means of transport and enter and inspect any place or means of transport if the inspector is designated to inspect it and believes on reasonable grounds that on it or in it there are

(i) dangerous goods being handled, offered for transport or transported,

(ii) standardized means of containment,

(iii) books, shipping records, emergency response assistance plans or other documents that contain any information relevant to the administration or enforcement of this Act, or

(iv) computer systems that may be used to examine any information that is contained in or available to the computer systems and is relevant to the administration or enforcement of this Act;

(b) open and inspect, or request the opening and inspection of, any means of containment for which the inspector is designated if the inspector believes on reasonable grounds that it is being used to handle or transport dangerous goods or to contain dangerous goods offered for transport;

(c) for the purpose of analysis, take a reasonable quantity of anything the inspector believes on reasonable grounds to be dangerous goods; and

(d) examine and make copies of any information contained in any books, shipping records, emergency response plans or other documents, or in any computer systems, that the inspector believes on reasonable grounds contain any information relevant to the administration or enforcement of this Act.

BEHIND THE WORDS

This section essentially sets out the activities which an inspector may engage in when conducting inspections.

Should it come to an issue of seizing items for evidence outside the scope of this section, the inspection would be more properly classified as an investigation and an inspector’s actions would be guided by and authorized under the search and seizure provisions of the Criminal Code.

With respect to subparagraph 15(a)(iv), the intention is to treat a computer terminal normally linked to a host computer at a remote site as though the terminal and host computer were at the site of the inspection. The words “or available to” are meant to refer to any information which can be accessed by the terminal without requiring other than automated action at the host system.

With respect to paragraph 15(c), it may be that a reasonable quantity is all the dangerous goods.

With respect to paragraph 15(d), this paragraph should be read in conjunction with paragraph 13(1)(a) to ensure that if assistance is required in acting under paragraph 15(d) it can be obtained.

RELATED SECTIONS

Section 2	-	“Shipping record”
Paragraph 13(1)(a)	-	Assistance in operating the computer to be provided

COURT DECISIONS OF INTEREST

SECTION 16

Search Warrant

16.(1) An inspector may not enter a dwelling-place except with the consent of the occupant or under the authority of a warrant.

(2) Where on ex parte application a justice, as defined in Section 2 of the Criminal Code, is satisfied by information on oath that

(a) the conditions for entry described in Section 15 exist in relation to a dwelling-place,

(b) entry is necessary for any purpose relating to the administration or enforcement of this Act, and

(c) entry has been refused or there are reasonable grounds for believing that entry will be refused,

the justice may at any time sign and issue a warrant authorizing the inspector named in the warrant to enter the dwelling-place subject to any conditions that may be specified in the warrant.

(3) The inspector who executes the warrant shall not use force unless the inspector is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

RELATED SECTIONS

With respect to subsection 16(3), although the wording permits the inspector to use force it is expected this would be exercised through the peace officer and only secondarily, if at all, through the inspector. It is difficult to think of an **inspection**, other than of abandoned goods, where force would be used. An investigation may require the use of force. Normally, this event should be limited to such things as breaking a window to gain entry or forcing a lock.

COURT DECISIONS OF INTEREST

SECTION 17

Remedying Non-Compliance

17.(1) Where an inspector believes on reasonable grounds that any dangerous goods are being handled, offered for transport, transported or imported in a way that does not comply with this Act, the inspector may detain the dangerous goods until satisfied that they will be handled, offered for transport, transported or imported in compliance with this Act.

(2) Where an inspector believes on reasonable grounds that any standardized means of containment is being sold, offered for sale, delivered, distributed, imported or used in a way that does not comply with this Act, the inspector may detain the means of containment until satisfied that it will be sold, offered for sale, delivered, distributed, imported or used in compliance with this Act.

(3) The inspector may also take any other measures necessary to remedy the non-compliance, or direct any person who owns, imports or has the charge, management or control of the dangerous goods or means of containment to take the necessary measures.

(4) Where the dangerous goods or means of containment originate from outside Canada and the inspector believes on reasonable grounds that measures to remedy the non-compliance are not possible or desirable, the inspector may direct that the goods or means of containment not be imported or that they be returned to their place of origin.

BEHIND THE WORDS

Three sections that should be read together are Sections 17, 18 and 19. Section 17 provides for immediate action which can occur to bring something into a safe state, i.e., correct non-compliance. Section 18 requires immediate action should there be an actual or imminent accidental release. Section 19 provides for specific immediate action to occur under direction when there has been or there is imminent, an accidental release.

In an instance of non-compliance, in addition to the provision to prosecute for an offence, this section provides an inspector with a means of ensuring the protection of public safety, i.e., that the non-compliance be corrected forthwith. Section 17 provides that an inspector may detain dangerous goods or standardized means of containment until the inspector is satisfied that they will be handled, offered for transport, transported or imported in compliance with the Act. It is acceptable that the dangerous goods be safely removed from the transportation process thereby no longer being in conflict with the Act.

There may be situations where detention by itself may not be sufficient to ensure the removal of non-compliance (e.g., the detention of a consignment of waste dangerous goods where the cost of removing non-compliance exceeds the value of the waste and the means of transport). In such a situation another provision of Section 17 provides that an inspector may take any measures to remedy the non-compliance or direct certain people to take them. Paragraph 27(1)(t) provides for notification, effect, duration and appeal of any such direction. Section 22 allows the Crown to recover any costs it incurs as a result of these measures. Please refer to the comments on that section.

Section 17 should be considered together with subsection 13(1), reasonable request and Section 20, liability protection if a direction is issued.

The following are some options in cases of non-compliance:

i) Allow the dangerous goods or means of containment to proceed to their destination even while in non-compliance. It may be safer to move the consignment than try to correct the non-compliance in the field. See below on estoppel certificate.

ii) Allow movement to a different location, which may or may not be the ultimate destination, where detention is exercised until non-compliance is removed. See below on estoppel certificate.

iii) Detain immediately until non-compliance is removed or corrected.

iv) As the purpose of a detention is to ensure the removal of non-compliance, an inspector detaining something is exercising powers and carrying out duties and functions of the Act. Thus, under paragraph 13(1)(a) an inspector in such a situation may request that certain actions take place to achieve the removal of non-compliance and if these are reasonable they are not to be refused. This could be combined with (i), (ii) or (iii) above.

v) An inspector, in one of the preceding situations, may direct that certain things happen. Note that this invokes Section 20. It is preferred that this be the second last option chosen.

vi) An inspector, in one of the preceding situations, may incur expenses directly or by engaging the services of a third party in order to remove the non-compliance. This could lead to a claim by the Crown under Section 22. It is preferred that this be the last option chosen.

Estoppel Certificate: If an inspector advises a person that he/she can conduct a specific activity and he/she will not be prosecuted, and the person conducts that activity, he/she is protected from prosecution. The concept is that of issuing an estoppel certificate and is an acceptable practice in certain circumstances. Note that no actual certificate is provided.

A good example of the preceding is dealing with a rail car that is not in compliance. In such a situation an inspector can provide an undertaking not to prosecute for non-compliance should the railway move the car according to agreed upon conditions proposed by the railway. The procedure would be for the railway to propose the move and conditions and the inspector to then provide the undertaking if appropriate. The movement would not be by direction and responsibility for the car would reside with the railway. An analogy can be made with a peace officer who allows a motorist to drive home with a burnt out headlight.

In both subsections (1) and (2) the responsibility for the charge, management and control of the dangerous goods and the means of containment remains with the person who had these responsibilities prior to the detention, estoppel decision request, direction, or physical intervention.

Subsection 17(3) provides that an inspector may direct that necessary measures occur. Such a direction can be given to the person who owns, imports or has charge, management or control of the dangerous goods or means of containment. In this situation, and only with respect to the specific terms of a direction, some liability protection is established under Section 20. Except for the specific terms, no responsibilities change.

In the case in which a detention is not successful (reference 17(l) or (2)) and a direction issued under 17(3) is not implemented, the inspector may take necessary measures on his/her own. For example, he/she may request the services of a commercial company, which would be paid for initially by the government, and for which a recovery of costs would be made pursuant to Section 22.

Since a recovery of costs under Section 22 will have to show that reasonable attempts were made to have the costs incurred directly by the person against whom the financial assessment will be made, an inspector must prepare full and complete documentation of the circumstances and of the actions taken. Unlike the similar situation in Section 19, if it is a Section 17 action there would be no actual or imminent accidental release and, hence, the time necessary to provide appropriate notice before acting unilaterally would probably exist. In the case of Section 19, time pressures due to the actual or imminent accidental release could greatly compress the notification and response process.

Please refer to Section 22 concerning emergency contracting.

Subsection 17(4) provides that dangerous goods or means of containment can be refused entry into Canada. The phrase “or that they be returned to their place of origin” allows for action to occur should the dangerous goods or means of containment be discovered after their importation. It is observed that this subsection is also permissive in nature and would allow, if it were necessary, for dangerous goods not in compliance to enter the country in cases where the alternative of denying entry would create a serious unsafe situation. Examples of the wide spectrum of choices which come to mind are a container on board a ship leaking a corrosive that would endanger the safety of the ship were it required to remain on board. At the other extreme would be a truck at a border crossing containing dangerous goods for which no documentation exists.

Questions have been asked relating to compensation to be paid to persons directed to conduct specific actions. Within the context of this Act, given that the matters arise out of a situation of non-compliance, the obtention of a conviction for an offence allows a court to award damages under Section 34. This is independent of any other means of compensation.

RELATED SECTIONS

Subsection 13(1)	-	Reasonable request to be complied with
Subsection 13(2)	-	Together with Section 33 establishes offences
Section 19	-	If an actual or imminent accidental release is involved
Section 20	-	Liability protection for persons complying with a direction
Section 22	-	Emergency contracting, government may recover costs it incurs in removing non-compliance
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

SECTION 18

Duty to Report and Provide Emergency Response

18.(1) Where an accidental release of dangerous goods in excess of a prescribed quantity or concentration occurs or is imminent from a means of containment being used to handle or transport dangerous goods, any person who at the time has the charge, management or control of the means of containment shall report the occurrence or imminence of the release to any person prescribed for the purposes of this section.

(2) Every person required to make a report shall, as soon as possible in the circumstances, take all reasonable emergency measures to reduce or eliminate any danger to public safety that results or may reasonably be expected to result from the release.

BEHIND THE WORDS

Three sections which should be read together are Sections 17, 18 and 19. Section 17 provides for immediate action that can occur to bring something into a safe state, i.e., correct non-compliance. Section 18 requires immediate action should there be an actual or imminent accidental release. Section 19 provides for specific immediate action to occur under direction when there has been or there is imminent an accidental release.

In subsection 18(l), the accidental release may be from any means of containment, not just a standardized means of containment.

The people to whom reports must be made are chosen by the provinces before they are added to the dangerous goods regulations. Most provinces have opted for local police forces.

Subsection 18(2) requires that all reasonable emergency measures be taken by the person required to make a report. This subsection does not require each driver of a truck carrying dangerous goods to become an emergency response expert. Instead it requires that “reasonable” emergency measures be taken and this word “reasonable” can be construed as meaning reasonable for the person responding in the circumstances. In some instances this may involve activation of a fire suppression device or simply the placement of warning signs to keep people away.

As the purpose of the initial report is to enable emergency response to take place

as rapidly as possible, there is the implied duty to report immediately. The regulations made pursuant to paragraph 27(l)(r) clarify this by defining a dangerous occurrence and requiring for these an immediate report. However, it is recognized that in some instances it may be more reasonable to first report and then engage in temporary emergency response measures while in other circumstances it may be more reasonable to engage in immediate reasonable emergency response measures and following this make a report.

RELATED SECTIONS

Paragraph 27(1)(r)	-	Subsequent regulations require immediate reporting
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

SECTION 19

Intervention

19.(1) An inspector may take any measure referred to in subsection (2) where the inspector believes on reasonable grounds that it is necessary to prevent an imminent accidental release of dangerous goods from a means of containment being used to handle or transport the dangerous goods, or to reduce any danger to public safety resulting from the accidental release.

(2) The inspector may

(a) remove or direct a person described in subsection (3) to remove the dangerous goods or means of containment to an appropriate place;

(b) direct a person described in subsection (3) to do anything else to prevent the release or reduce any resulting danger, or direct the person to refrain from doing anything that may impede its prevention or the reduction of danger; or

(c) take any other measure described in Section 15.

(3) A direction may be issued to

(a) any person who owns, imports or has the charge, management or control of the dangerous goods or means of containment when the release occurs or becomes imminent, or at any time afterward;

(b) any person who is responding to the occurrence or imminence of the release in accordance with an emergency response assistance plan approved under Section 7; or

(c) any person who causes or contributes to the occurrence or imminence of the release.

BEHIND THE WORDS

Three sections which should be read together are Sections 17, 18 and 19. Section 17 provides for immediate action that can occur to bring something into a safe state, i.e., correct non-compliance. Section 18 requires immediate action should there be an actual or imminent accidental release. Section 19 provides for specific immediate action to occur under direction when there has been or there is imminent an accidental release.

Subsections 19(1) and (2) are essentially those that were contained in the TDG Act of 1980 with the added provision that intervention may occur when an accidental release is imminent. In addition, actions which can be prohibited or required are now restricted to preventing an imminent accidental release of dangerous goods or reducing any danger resulting from an accidental release of dangerous goods. Paragraph 27(1)(t) provides for regulations respecting notification, effect, duration and appeal.

The identification in 19(3) of the persons to whom a direction may be issued clarifies that no person not connected with the situation, product or means of containment can be directed to conduct emergency response.

Subsection 19(3)(b) was added for two reasons. The first was to encourage industry cooperation. Canadian industry has developed response plans for actual or imminent accidental releases of dangerous goods. Often these plans provide for mutual help such that a consignor from one part of the country may call upon a consignor in a different location to conduct the actual emergency response. As substitute teams cannot be “directed” to respond, the liability protection provided in Section 20 cannot apply in the absence of subsection 19(3)(b). The second reason for 19(3)(b) was to allow an inspector to require changes in the implementation of an ERAP if these are appropriate in the circumstances.

Generally speaking, action that can be directed under subsection 19(1) is to prevent a leak, stop or slow down a leak or neutralize the effect of a released product. It is observed that once the situation is stabilized further directions, such as offloading the product from a damaged means of containment to an approved means of containment, could occur under Section 19 if a new release was considered to be imminent or could be required or permitted under Section 17 if, for example, the damaged container is no longer in compliance.

Paragraph (a) of subsection 19(2) includes the repositioning of leaking highway tank trucks.

Paragraph (b) of subsection 19(2) allows an inspector to issue a direction in an emergency directly threatening public safety. Again, the objective is to prevent a leak, stop a leak or neutralize any released product. Directions under this paragraph should not extend beyond these boundaries. Note that many officials normally involved in emergency response such as provincial officials, police or fire fighters are not included in the group of persons to whom a direction can be issued under subsection 19(3).

Paragraph (a) of subsection 19(3) ensures that at all times during an emergency there is someone subject to direction.

Paragraph (b) of subsection 19(3) is clear. However, to ensure that a person does fall into this category he/she must either have declared that he/she is involved in implementing an approved emergency response assistance plan or there must be evidence to show this.

Paragraph (c) is, to some extent, open-ended. However, its application should be infrequent and when invoked its application should be clearly appropriate.

Reference should be made to the discussion on Section 22 if there is any consideration of emergency contracting.

RELATED SECTIONS

Subsection 13(2)	-	Requires compliance with directions
Section 20	-	Liability protection for persons complying with a direction
Section 22	-	Emergency contracting, government may recover costs it incurs in removing non-compliance
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

SECTION 20

Emergency Response Liability Protection

20. A person directed or required under subsections 17(3) or (4), 18(2) or 19(2) to do or refrain from doing anything is not personally liable, either civilly or criminally in respect of any act or omission in the course of complying with the direction or requirement or doing any reasonable thing incidental to it, unless it is shown that the act or omission was in bad faith.

BEHIND THE WORDS

The intent of Section 20 is to remove liability from a person who is directed to do something that he/she would not normally do. As the federal government is providing this comfort, it can be suggested that it is, in turn, inviting some liability. For example, if an inspector directs someone to do something in a specific fashion the federal government may be liable for some responsibility with respect to consequences linked to the specific action.

The following is quoted from Treasury Board of Canada Circular No. 1990-1, T.B. No. 812546, file No. 2425-05-0, of January 4, 1990.

> " **Policy Statement**
>
> (a) The Crown will indemnify a servant against personal civil liability incurred by reason of any act or omission within the scope of the servant's employment or duties and will make no claim against that servant based upon such personal liability, if the servant acted honestly and without malice.
>
> (b) In any case not covered in (a), where there are extenuating circumstances:
>
> (i) a Deputy Head may determine the extent to which servants may be indemnified, provided the full amount of the indemnification does not exceed $25,000; and
>
> (ii) the Treasury Board may determine the extent to which servants may be indemnified when the full amount of the indemnification exceeds $25,000.

(c) Nothing in this policy affects any obligation of the servant to the Crown in respect of the care, custody or control of money, or the application of Chapter 38 of the Queen's Regulations and Orders for the Canadian Forces.

(d) Notwithstanding this policy, the Crown may discipline a servant in respect of an incident which is the subject of a claim or suit."

Under 17(3) or (4) the protection arises from a direction.

Under 18(2) the protection is automatic.

Under 19(2) the protection arises from a direction.

Approving the use of an emergency response assistance plan for a particular accident in the form of a direction of a general nature would probably not involve the Crown in any more responsibility than it had already incurred in approving the original emergency response assistance plan.

If an inspector behaves in accordance with the TB Guidelines, any liability would be directed toward the Crown and not the individual inspector.

RELATED SECTIONS

Subsections 17(3), 17(4), 18(2) and 19(2)
Section 7 - Approval of an ERAP and the implied duty to activate such plans when appropriate

COURT DECISIONS OF INTEREST

SECTION 21

Inquiries

21.(1) Where an accidental release of dangerous goods from a means of containment being used to handle or transport dangerous goods has resulted in death or injury to any person or damage to any property or the environment, the Minister may direct a public inquiry to be made, subject to the *Canadian Transportation Accident Investigation and Safety Board Act*, and may authorize any person or persons that the Minister considers qualified to conduct the inquiry.

(2) For the purposes of the inquiry, any person authorized by the Minister has all the powers of a person appointed as a commissioner under Part I of the *Inquiries Act*.

(3) The person or persons authorized to conduct the inquiry shall ensure that, as far as practicable, the procedures and practices for the inquiry are compatible with any investigation procedures and practices followed by any appropriate provincial authorities, and may consult with those authorities concerning compatible procedures and practices.

(4) As soon as possible after the inquiry is concluded, the person or persons authorized to conduct the inquiry shall submit a report with recommendations to the Minister, together with all the evidence and other material that was before the inquiry.

(5) The Minister shall publish the report within thirty days after receiving it.

(6) The Minister may supply copies of the report in any manner and on any terms that the Minister considers proper.

BEHIND THE WORDS

As a result of the *Canadian Transportation Accident Investigation and Safety Board Act* most inquiries would be conducted by the Transportation Safety Board. Section 21 would allow the possibility of conducting an inquiry with respect to a road accident. However, the possibility of such an inquiry under the TDG Act, 1992 is very low.

COURT DECISIONS OF INTEREST

SECTION 22

Recovery of Costs and Expenses

22.(1) Her Majesty in right of Canada may recover the costs and expenses reasonably incurred while taking any measures under Section 17 or 19.

(2) The costs and expenses may be recovered jointly and severally from any persons who, through their fault or negligence or that of others for whom they are by law responsible, caused or contributed to the circumstances necessitating the measures.

(3) For the purposes of proceedings under this section, a defendant engaged in an activity in relation to which this Act applies shall be presumed to have been at fault or negligent unless it is established, on a balance of probabilities, that the defendant and any others for whom the defendant is by law responsible took all reasonable measures to comply with this Act and the regulations.

(4) All claims under this section may be sued for and recovered by Her Majesty in right of Canada with costs in proceedings brought or taken for the claims in the name of Her Majesty in right of Canada in any court of competent jurisdiction.

(5) This section does not limit or restrict any right of recourse or indemnity that any person who is liable under subsection (1) may have against any other person.

(6) No civil remedy for any act or omission is suspended or affected by reason only that the act or omission is an offence under this Act or gives rise to liability under this section.

(7) Nothing in this section relieves an operator, as defined in Section 2 of the *Nuclear Liability Act*, from any duty or liability imposed on the operator under that Act.

(8) Proceedings in respect of a claim under this section may be instituted no later than two years after the day the events in respect of which the proceedings are instituted occurred or became evident.

BEHIND THE WORDS

Subsection 22(3) is presumptuous since it assumes that the government would have acted on its own under Section 17 or 19 only after having provided direction to the extent normally possible given the circumstances, and not having received a satisfactory reaction. Full and complete documentation of the circumstances and any actions taken is required. It is recognized that in some instances sufficient

time may not be available for oral notice, registered letter, serving of documents, etc., establishing that the government would act to protect public safety and subsequently recover expenses from those obliged to act who refrained from taking action. Excellent documentation of this must be established.

Subsection 22(3), which presumes that certain expenses must be paid even though the time period to provide notice to a defendant could be greatly compressed, is required to ensure the federal government does not automatically accept any costs of response measures that should be borne by a consignor, carrier, importer, etc. Note that if non-compliance is involved, which need not always be the case, Section 34 provides another method a court may use to provide for the payment of government and other person's costs if a conviction is obtained.

The Treasury Board policy on emergency contracting applies only in cases of a bona fide emergency which is defined in the policy's terms as a situation that may reasonably be expected to result in unacceptable delays to essential services, or to pose a serious threat to health, safety, or property.

Unless:

a) it is impossible to contact a Surface Group Regional Director, the Director General, TDG Directorate, or the Assistant Deputy Minister, Safety and Security;

b) no delays are possible with respect to contracting for services, or a part of required services; and

c) the services cannot be acquired as the result of a direction (the appropriate person is not subject to a direction, or refuses),

the inspector is to contract for the minimum service needed through the voice recording devices of CANUTEC. Caution is advised. If it is clearly a case of setting aside a Treasury Board Policy to protect public safety in a serious emergency, this is to take place.

If the accident occurs outside of business hours and it is impossible to contact, for example, the consignor, Section 22 would still apply. The argument would be that the consignor knows his/her product, that accidents may happen and if not contactable he/she may have actions taken on his/her behalf that he/she will have to pay for.

RELATED SECTIONS

Sections 17 & 19	-	Expenses can be incurred by the government
Section 34	-	Provides an alternate means of recovering expenses in the event of a conviction

COURT DECISIONS OF INTEREST

SECTION 23

Notice for Disclosure of Information

23.(1) The Minister may, by registered mail, send a written notice to any manufacturer, distributor, or importer of any product, substance or organism requesting the disclosure of information relating to the formula, composition or chemical ingredients of the product, substance or organism and any similar information the Minister considers necessary for the administration or enforcement of this Act.

(2) A person who receives a notice shall disclose the requested information to the Minister within the time and in the manner specified in the notice.

BEHIND THE WORDS

The department has two reasons for requiring the disclosure of information relating to a formula, composition or the chemical ingredients of a product, etc.

The first has to do with verification that a particular product is or is not dangerous. In such an instance it is required that the information requested be provided.

The second reason to require the information may arise with respect to the Canadian Transportation Emergency Centre (CANUTEC), which is operated by Transport Canada to provide a 24-hour emergency response information service. To provide information accurately in an emergency, it may be appropriate for the department to request certain information from the manufacturer or importer of a particular chemical at a time prior to the emergency when the information can be obtained.

RELATED SECTIONS

Section 33 - Establishes offences

COURT DECISIONS OF INTEREST

SECTION 24

Privileged Information

24.(1) The following information is privileged:

(a) information disclosed under Section 23 and information of a similar nature obtained by an inspector under Section 15; and

(b) information in a record of a communication between any person and the Canadian Transport Emergency Centre of the Department of Transport relating to an accidental release of dangerous goods that occurred or appeared to be imminent.

(2) Information is not privileged to the extent that it

(a) relates only to the dangerous properties of a product, substance or organism without revealing its formula, composition or chemical ingredients; or

(b) is required to be disclosed or communicated for the purposes of an emergency involving public safety.

(3) Despite any other Act or law, no person shall be required, in connection with any legal proceedings, to produce any statement or other record containing privileged information or to give evidence relating to it unless the proceedings relate to the administration or enforcement of this Act.

(4) No person to whom privileged information has been provided shall knowingly communicate it or allow it to be communicated to any person, or allow any other person to inspect or have access to the information, except

(a) with the consent in writing of the person who provided the information or from whom it was obtained; or

(b) for the purposes of the administration or enforcement of this Act.

BEHIND THE WORDS

Two types of information are privileged. The first is information provided by industry under Section 23, or of a similar nature uncovered under Section 15.

The second relates to any discussion between CANUTEC and any person, including emergency response teams such as local police or fire departments, related to an actual or imminent accidental release. Information at the beginning of an incident is often sketchy and comments made or requests for information and guidance at that time could be misleading as to the capacity of response teams to act correctly in the circumstances. As CANUTEC is not a mandatory service, we wish to ensure it will continue to be used by emergency response personnel without fear that their inquiries for advice can later be obtained and misinterpreted by a third party.

Subsection 24(4) ensures that the information remains privileged regardless of who may hold it.

RELATED SECTIONS

Section 15	-	Obtaining privileged information through inspections
Section 23	-	Obtaining privileged information in response to a request
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

SECTION 25

Technical Research and Publication

25. The Minister may

(a) conduct, alone or in cooperation with any government, agency, body or person, whether Canadian or not, programs of technical research and investigation into the development and improvement of safety marks, safety requirements, safety standards and regulations under this Act and coordinate the programs with similar programs undertaken in Canada; and

(b) have information relating to the programs or their results published and distributed in a form and manner that are most useful to the public, the Government of Canada and the governments of the provinces.

BEHIND THE WORDS

This section provides the department with the authority to conduct research into various aspects of the dangerous goods program including the properties of chemicals (leading to proper safety requirements), the properties of means of containment (safety standards) and physical events such as the explosion of a gas liquified under pressure when there is a rupture of the means of containment (safety requirements).

The section is also referenced in Section 34 with respect to what can be required to be done with respect to research by a person convicted of an offence.

COURT DECISIONS OF INTEREST

SECTION 26

Advisory Councils

26.(1) The Minister may, by order,

(a) establish one or more advisory councils to advise the Minister on matters concerning existing or proposed safety marks, safety requirements and safety standards or on any other matters specified in the order;

(b) specify the period or periods during which the councils are to serve; and

(c) provide for any matters relating to the councils or their members as the Minister considers necessary.

(2) The Minister may determine the membership of any advisory council after any consultation that the Minister considers appropriate with the representatives of the transportation and related industries, the governments of the provinces, other interested persons and bodies and the public.

BEHIND THE WORDS

This section has enabled the establishment of the Minister's Advisory Council on the Transportation of Dangerous Goods. There are 25 seats on the Council, only one of which, the Chair, is occupied by a federal public servant. The remaining individuals are nominated for a period of two years. The Council meets approximately every six months and acts similar to a board of directors with respect to the dangerous goods program. Represented on the Council are individuals proposed by the Association of Fire Chiefs, the Association of Police Chiefs, the Association of Canadian Municipalities, the Canadian Council of Motor Transport Administrators (representing the provinces), labour unions, and a variety of industry associations including manufacturers, consignors, carriers and consignees. In addition, one seat is reserved for an individual to be proposed by an environmental non-government organization.

Observers can be authorized to attend meetings of the Council.

COURT DECISIONS OF INTEREST

SECTION 27

Regulations

27.(1) The Governor-in-Council may make regulations generally for carrying out the purposes and provisions of this Act, including regulations

(a) prescribing products, substances and organisms to be included in the classes listed in the schedule;

(b) establishing divisions, subdivisions and groups of dangerous goods and of the classes of dangerous goods;

(c) specifying, for each product, substance and organism prescribed under paragraph (a), the class, division, subdivision or group into which it falls;

(d) determining or providing the manner of determining the class, division, subdivision or group into which dangerous goods not prescribed under paragraph (a) fall;

(e) exempting from the application of this Act and the regulations, or any of their provisions, the handling, offering for transport, transporting or importing of dangerous goods in any quantities or concentrations, in any circumstances, at any premises, facilities or other places, for any purposes or in any means of containment that may be specified in the regulations;

(f) prescribing the manner of identifying any quantities or concentrations of dangerous goods exempted under paragraph (e);

(g) prescribing circumstances in which any activity or thing is under the sole direction or control of the Minister of National Defence;

(h) prescribing circumstances in which dangerous goods must not be handled, offered for transport or transported;

(i) prescribing dangerous goods that must not be handled, offered for transport or transported in any circumstances;

(j) prescribing safety marks, safety requirements and safety standards of general or particular application;

(k) prescribing quantities or concentrations of dangerous goods in relation to which emergency response assistance plans must be approved under Section 7;

(l) prescribing the manner in which records must be kept under Section 9, the information that must be included in the records and the notices that must be given under that section;

(m) governing the issuance of notices under Section 9;

(n) prescribing shipping records and other documents that must be used in handling, offering for transport or transporting dangerous goods, the information that must be included in those documents and the persons by whom and the manner in which they must be used and kept;

(o) governing the qualification, training and examination of inspectors, prescribing the forms of the certificates referred to in Sections 10 and 11 and prescribing the manner in which inspectors must carry out their duties and functions under this Act;

(p) prescribing the manner of determining the financial responsibility required under subsection 14(1) and prescribing the form of proof that may be requested under subsection 14(2);

(q) prescribing quantities or concentrations of dangerous goods for the purposes of subsection 18(1);

(r) prescribing persons to receive reports under subsection 18(l), the manner of making the reports, the information that must be included in them and the circumstances in which they need not be made;

(s) prescribing the manner of applying for, issuing and revoking approvals of emergency response assistance plans under Section 7 or permits under Section 31 and providing for the appeal or review of a refusal to issue an approval or permit or a revocation of it;

(t) providing for the notification of persons directed to do anything under Sections 9, 17, 19 or 32, for the effect duration and appeal or review of those directions and for any other incidental matters; and

(u) prescribing the manner in which amounts are to be paid under paragraph 34(1)(d).

(2) The regulations may refer to any document as it exists when the regulations are made and, for the purpose of prescribing alternative ways of complying with this Act may refer to any of the following documents as amended from time to time:

(a) the International Maritime Dangerous Goods Code published by the International Maritime Organization;

(b) the Technical Instructions for the Safe Transport of Dangerous Goods by Air published by the International Civil Aviation Organization; and

(c) Title 49 of the Code of Federal Regulations of the United States.

BEHIND THE WORDS

Subsection 27(1): Comments on each paragraph follow.

(a) Certain named products are assigned in Lists I and II to specific classes.

(b) The nine classes as listed in the schedule are further subdivided in the regulations. When the Act refers to a schedule it is the schedule included in the Act.

(c) This is accomplished in Lists I and II.

(d) This provides for tests so that any product, substance or organism can be assigned to a class, division, sub-division or group.

(e) This provides for making exemptions from the Act when the Act is found to be too broad in nature. For example, a soft drink in a can should not be considered dangerous goods simply because a gas under pressure is involved.

(f) This is required to enable the application of paragraph (e).

(g) These circumstances are set out in the regulations.

(h) These circumstances are set out in the regulations.

(i) This is often accomplished by identifying the dangerous goods by name.

(j) This is one of the most significant regulation making authorities and allows for a wide application as it includes all safety marks, all safety requirements and all safety standards.

(k) This essentially has been accomplished through the establishment of Schedule XII of the Regulations.

(l) Regulations have not yet been made under this paragraph.

(m) Regulations have not yet been made under this paragraph.

(n) This paragraph is the same as in the *TDG Act* of 1980 except that in place of shipping records the term shipping documents was used. Recall that shipping records include all shipping documents plus electronic records. The regulations relevant to shipping documents are continued in the regulations. Regulations regarding shipping records that are not shipping documents, i.e., electronic records, have not yet been prepared.

(o) Regulations essential under this paragraph have been completed.

(p) Regulations under this paragraph have not yet been made.

(q) Regulations under this paragraph have been established.

(r) Regulations under this paragraph have been established and the persons to receive reports have been identified by the respective provincial governments.

(s) Regulations to be established under this paragraph have not been completed, however, both procedures have been in place for a considerable period of time.

(t) Regulations under this paragraph have not yet been made.

(u) The regulations have yet to be developed to set out the procedure for a convicted person to pay an amount to be used to conduct research. It is expected that it could be in the form of providing funds to the Transportation Development Centre, or a similar institution, to contract for the required research.

Subsection 27(2): The first part of this subsection allows a regulation to adopt by reference material existing at the time the regulation is made, such as standards. The referenced material would not have to be reproduced as part of the text of the regulation and, hence, printed in the Canada Gazette, etc.

With respect to the second part of subsection 27(2) the general principle being reflected is that any person to be regulated must have the opportunity within Canada to make representation concerning the regulations prior to these regulations taking effect. Thus, the three external documents which may be referred to as amended from time to time can only be referred to as an alternate to existing regulations. In practice, the regulations will reference, for example, a specific IMDG Code by date. This will be the mandatory Code, but industry will have the option of following any subsequent IMDG Code as amended. That is, industry will be able to follow either the specific version of the Code named in the regulations, or any of the

subsequently amended versions. The version named in the regulations will be revised to the most recent version each time the regulations are amended.

Title 49 of the Code of Federal Regulations of the United States is referenced as amended from time to time to ensure that reciprocity makes sense. The reciprocity sections in the regulations state that certain goods may be shipped from the United States into Canada if they comply with either CFR 49 or with the Canadian regulations. There are similar provisions for shipments in the other direction. If the *TDG Act, 1992* and regulations only referenced CFR 49 as of a particular point in time we would find that we may be requiring someone to ship from the United States to Canada following an outdated set of regulations or following the Canadian regulations when both may be impossible for a consignor to achieve prior to actual arrival in Canada. It is more reasonable to accept material shipped from the United States if it is in compliance with current American law. For this reason CFR 49 is referenced as amended from time to time.

As a point of interest relating to, the validity of the regulations made under the 1980 Act, Section 36 of the Interpretation Act provides that when an enactment is repealed and another enactment is substituted therefor, all regulations made under the repealed enactment remain in force and shall be deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead.

COURT DECISIONS OF INTEREST

SECTION 28

Non-Compliance with Regulations

28. No person shall contravene or fail to comply with a provision of any regulation made under paragraph 27(1)(h), (i), (l), (n) or (r).

BEHIND THE WORDS

This section is required because sections establishing provisions (i.e. 5, 6, 7, 8, 9, 13, 14, 18 and 23) and hence creating offences pursuant to Section 33, do not cover the regulations identified in this section. Consequently, for these to lead to offences this section is needed.

RELATED SECTIONS

Paragraph 27(1)(h)	-	Prohibitions on transport
Paragraph 27(1)(i)	-	Prohibitions on transport
Paragraph 27(1)(l)	-	Record keeping
Paragraph 27(1)(n)	-	Record keeping
Paragraph 27(1)(r)	-	Accident reporting
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

SECTION 29

Ministerial Fees Orders

29.(1) The Minister may make orders prescribing any fees or charges, or the manner of calculating any fees or charges, to be paid

(a) for services or the use of facilities provided by the Minister in the administration of this Act; or

(b) in relation to filing documents or applying for or issuing permits or approvals under this Act.

(2) Her Majesty in right of Canada or a province and the entities named in Schedules II and III to the Financial Administration Act are not liable to pay the fees or charges.

BEHIND THE WORDS

This section will initially be used to establish a fee for filing an application for an equivalency permit under subsection 31(1).

In addition, fees are intended to be assessed for inspections requested by a company. The fee to be assessed in such cases would be a flat rate. Expenses for travel would apply only if the travel was outside of Canada.

Note that Section 30 requires that such fees be established in the same fashion as regulations i.e., through publication in the Canada Gazette.

Fees would not be paid by federal or provincial departments nor by certain Crown corporations.

It is not an offence under this Act to decline to pay a fee or charge. However if the fee or charge is not paid the services, etc., need not be provided. Further, if the services, etc., were first provided, there is a contractual requirement to pay the fee or charge.

RELATED SECTIONS

Section 30	-	Advance notice must appear in the Canada Gazette
Section 31	-	Equivalency permit

COURT DECISIONS OF INTEREST

SECTION 30

Proposed Regulations and Orders to be Published

30.(1) Subject to subsection (2), a copy of each regulation the Governor-in-Council proposes to make under Section 27 and each order the Minister proposes to make under Section 29 shall be published in the Canada Gazette and a reasonable opportunity shall be afforded to interested persons to make representations to the Minister with respect to the regulation or order.

(2) No proposed regulation or order need be published more than once, whether or not it is amended affer that publication as a result of representations made by interested persons.

BEHIND THE WORDS

This section ensures that a person to be regulated has an opportunity to make representation on proposed regulations or orders before they become law.

COURT DECISIONS OF INTEREST

SECTION 31

Permits (Equivalency or Emergency)

31.(1) The Minister or a person designated for the purposes of this subsection may issue a permit authorizing any activity to be carried on in a manner that does not comply with this Act if the Minister or designated person is satisfied that the manner in which the authorized activity will be conducted provides a level of safety at least equivalent to that provided by compliance with this Act.

(2) The Minister or a person designated for the purposes of this subsection may issue a permit authorizing any activity to be carried on in a manner that does not comply with this Act if the Minister or designated person is satisfied that the authorized activity is necessary to deal with an emergency in which there is danger to public safety.

(3) A permit issued under subsection (2) is not a statutory instrument for the purposes of the Statutory Instruments Act and may be issued orally, but must be reissued in writing as soon as practicable and the writing is conclusive of its content.

(4) A permit may include terms and conditions governing the authorized activity and non-compliance with any of the terms or conditions invalidates the permit.

(5) A permit may authorize the activity in terms of the persons who may carry on the activity and the goods or means of containment that it may involve.

(6) The Minister or a person designated for the purposes of subsection (1) may revoke a permit issued under that subsection where the Minister or designated person is no longer satisfied of the matter described in that subsection or the regulations have been amended and address the activity authorized by the permit.

(7) The Minister or a person designated for the purposes of subsection (2) may revoke a permit issued under that subsection where the Minister or designated person is no longer satisfied of the matter described in that subsection.

BEHIND THE WORDS

Subsection 31(l) refers to permits of an equivalent level of safety.

Unfortunately the word “permit” evokes the wrong characterization of what is actually happening. A better phrase is “equivalency permit”. It is observed that the permit is not a permission which is necessary to allow industry to operate but rather it is a document that allows industry to operate in a manner different from that required under the law.

Applications for equivalency permits may involve considerable research on the part of the government. Currently the average turnaround time for such an equivalency permit is 90 days.

The words “level of safety at least equivalent to” were deliberately chosen and are distinct from “level of safety equal to or better than”. The next four paragraphs elaborate this point. They can be skipped over without any loss of continuity.

If we know that for every 100 times we perform a particular task there is one accident, we describe the probability of an accident as being 1/100 or 0.1. If the probability of an accident is much lower, for example if we can expect one accident for every 10,000 occasions, then the probability of an accident is 1/10,000 or 10^{-4}. When the probability of an accident is low enough one describes the situation as being safe. For example, most countries accept a probability of 10^{-6} or lower as safe and needing no further study. This allows for discussing safety in terms of the number of failures permitted and may, for example, lead to statements such as:

> “If the probability of a specific means of containment breaking open in a routine fall during transport (e.g. off the tail end of a truck) is 10^{-4} or higher it is unsafe and should not be used.
>
> If the probability is between 10^{-4} and 10^{-6} it should undergo examination and possibly not be used.
>
> If the probability is 10^{-6} or lower it is safe and can be used.”

Using the preceding “language”, a proposed event A provides an equivalent level of safety to event B if the probability of failure with event A is no more than that of event B plus 10^{-6}. Depending on circumstances, this increase could be as much as 10^{-4} and still be acceptable.

Presented in a less formal fashion, if in a particular circumstance the absence of a specific requirement changes the probability of failure by a very small number, the two situations are equivalent. Thus, if they are “more or less equal”, they are equivalent.

Also acceptable under the concept of equivalent level of safety is to **raise** the probability of a particular sub-event if there is a corresponding **decrease** in other sub-events.

Subsection 31(2) allows for the issuance of emergency permits. In this instance there is no obligation expressly stated in the Act to ensure that the issuance of the emergency permit will, taking all factors into account, result in reduced risk to public safety. However, this must be borne in mind when issuing emergency permits. Generally, emergency permits relate to allowing an increase in risk for a specific event knowing that overall the total risk is lowered. It is expected that emergency permits will be issued rarely.

An emergency permit can be issued to respond to an emergency not involved in transportation.

Subsection 31(3) provides that an emergency permit may be issued orally, need not be processed as a Statutory Instrument and must be re-issued in writing as soon as practicable.

Subsection 31(4) provides that an equivalency or emergency permit need not simply exempt someone from certain sections of the Act or regulations but, in fact may establish other conditions which must be followed. Further, non-compliance with any of the terms or conditions invalidates the permit and a continuation of the activity may be an offence against the TDG Act, 1992.

Subsection 31(5) provides that in some circumstances it is reasonable for the "effect" of the permit to "travel" with specific dangerous goods or means of containment. For example, an equivalency permit for a consignor to use an alternate means of containment must clearly apply to the means of containment. It is not reasonable for the use of this alternate means of containment to become an offence simply because one of the distributors did not also apply for the same equivalency permit. In general, attempts will be made to keep equivalency or emergency permits restrictive and their applicability narrow to the extent possible

Subsection 31(6) recognizes that over time many equivalency permits will stimulate changes to the regulations which in turn will obviate the need for the equivalency permits. Consequently equivalency permits could be revoked should the facts of the situation or the regulations change.

Subsection 31(7) provides for the revocation of an emergency permit.

Paragraph 27(1)(s) provides for establishing regulations relating to the application, refusal, issuance, revocation and appeal of either type of permit.

RELATED SECTIONS

Paragraph 27(l)(s) - To establish regulations

Section 29 - Fees for filing an application for an equivalency permit

COURT DECISIONS OF INTEREST

SECTION 32

Protective Directions

32.(1) The Minister or a person designated for the purposes of this section may, if satisfied of the matters described in subsection (2), direct a person engaged in handling, offering for transport, transporting or importing dangerous goods, or supplying or importing standardized means of containment to cease that activity or to conduct other activities to reduce any danger to public safety.

(2) The Minister or the designated person must be satisfied that the direction is necessary to deal with an emergency that involves danger to public safety and cannot be effectively dealt with under any other provision of this Act.

(3) The Minister or a designated person may revoke the direction where the Minister or person is satisfied that the direction is no longer needed.

BEHIND THE WORDS

A protective direction can only be issued when it is necessary to deal with an emergency involving danger to public safety that cannot be dealt with effectively under any other provision of the *TDG Act, 1992*. Further, such a direction must be specific to a person. A person includes an individual, company or legal entity. It also provides that the Minister or designated person may revoke the direction when the Minister or designated person is satisfied that the direction is no longer needed.

As an example of the usefulness of this section, should a problem with a defined type of means of containment be suspected, a direction may be issued to require that a specified (e.g., levels of confidence) statistical sample be inspected (parameters or protocol of inspections defined) within a given timeframe. This would allow a study to be conducted without placing all the means of containment out of service until each was determined to be safe.

The result of the sample inspection could indicate that the best course of action would be to order the removal from service of all the means of containment, the phasing-in of a compulsory inspection program over a specific time period or the determination that initial indications were incorrect and the designated means of containment may remain in service (subject to normal inspections).

RELATED SECTIONS

Subsection 13(2)	-	Combined with Section 33 establishes offences
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

SECTION 33

Punishments: Fines and Imprisonment

33. Every person who contravenes or fails to comply with a provision of this Act is guilty of

(a) an offence punishable on summary conviction and liable to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence; or

(b) an indictable offence and liable to imprisonment for a term not exceeding two years.

BEHIND THE WORDS

Fine levels were not increased from 1980 for offences punishable on summary conviction.

However, with reference to proceeding under indictment and due to the absence of a limit on a monetary fine in 33(b), under the sentencing provisions of the Criminal Code there is no limit to the fine which can be assessed.

RELATED SECTIONS

Section 5	-	Notes on the offence making sections of the Act
Section 34	-	Court orders
Section 36	-	Continuing offences

COURT DECISIONS OF INTEREST

SECTION 34

Punishments: Court Orders

34.(1) Where a person is convicted of an offence, the court may make an order having any or all of the following effects:

(a) prohibiting the person for a period of not more than one year from engaging in any activity regulated under this Act;

(b) requiring the person to provide compensation, whether monetary or otherwise, for any remedial action taken or damage suffered by another person arising out of the commission of the offence;

(c) requiring the person to do anything that will assist in repairing any damage to the environment arising out of the commission of the offence; or

(d) requiring the person to conduct programs of technical research and investigation into the development and improvement of safety marks, safety requirements and safety standards, or to pay an amount in the manner prescribed to be used to conduct the research.

(2) The court may make the order in addition to any other punishment imposed on the person and shall have regard to the nature of the offence and the circumstances surrounding its commission.

(3) The total value of what the person may be required to do under paragraphs (1)(b) to (d) in relation to a single offence must not exceed one million dollars.

(4) If the person contravenes or fails to comply with the order, the person is guilty of:

(a) an offence punishable on summary conviction and liable to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence; or

(b) an indictable offence and liable to imprisonment for a term not exceeding two years.

BEHIND THE WORDS

This is a new provision. With respect to subsection 34(l) the intent of each paragraph is provided in the following:

(a) If there is an activity that is regulated under the Act, the convicted person can be prohibited from engaging in that activity for up to one year. The wording allows for the inclusion of any number of activities up to and including all activities regulated by the Act. For example, a specific person can be prohibited from selling standardized means of containment for up to a year should the court so wish.

The prohibition is with respect to the person (includes corporations, etc.) regardless of that person's circumstances. Thus, should a director of a company be convicted of an offence and be ordered not to engage in an activity regulated under the Act for up to one year, this prohibition would stay with that person regardless of his/her changing circumstances, e.g., employment.

(b) It is not certain how widely the court will interpret this paragraph. It was intended to at least provide that any person convicted of an offence can be required to make appropriate restitution to volunteer fire departments.

(c) This is a very interesting paragraph when it is compared with Paragraph (b). In paragraph (b) there is the ability to make restitution for damage suffered by another person. Paragraph (c) recognizes another form of damage other than damage suffered by a person. In this case it is damage to the environment and the court can require actions to occur to assist in repairing damage to the environment without having to make reference to any person suffering damage.

(d) This paragraph provides, as a penalty, that research be conducted into improving public safety. It recognizes that some non-compliance activities may have occurred because the person convicted did not have a full understanding of the consequences of his/her actions. This paragraph would enable a court to require the person convicted of the offence to conduct research relating to, for example, the consequences of an accidental release (e.g., research safety requirements to prevent damage resulting from an accidental release). The regulations have yet to be developed to set out the procedure for a convicted person to pay an amount to be used to conduct research. It is expected that it could be in the form of providing funds to the Transportation Development Centre, or a similar institution, to contract for the required research.

Subsection 34(2) provides that an order under Section 34 may be issued regardless of any other punishment.

Subsection 34(3) places a cap on the value of the obligation which can be imposed on a person. This is $1 million with respect to each offence. This provides, for example, that a person convicted of three different offences relating to the same event would be subject to a limit of $3 million rather than $1 million.

Subsection 34(4) establishes that it is an offence not to comply with the issued order. Although the action ordered may be as high as $1 million, and the fine for non-compliance appears to be only $50,000, attention is drawn to Section 36 which states that if an offence is committed or continued on more than one day, the person who has committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed or continued. That is, if there is non-compliance with the order over a period of 10 days, the total assessment could be $500,000 ($50,000 per day.) In addition there would still be the requirement to comply with the initial order.

RELATED SECTIONS

Section 25	-	Research the Minister can undertake
Section 36	-	Continuing offence

COURT DECISIONS OF INTEREST

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Wray's Fire Protection (Kingston) Ltd.

09-21-94, Ontario Provincial Court,

Charged under Section 8 with unlawfully delivering a standardized means of containment which did not display all applicable prescribed safety marks.

Court imposed a fine of $2,500 and made the following order under Section 34 of the TDGAct, 1992.

"Order pursuant to Section 34(1) of the Transportation of Dangerous Goods Act for re-certification of all cylinders certified during the period from January 1st, 1993 to November 1st, 1993."

The Court based the order upon the wording of 34(1)(b) which permits an order having the effect of 'requiring the person to provide compensation, whether monetary or otherwise, for any remedial action taken or damage suffered by another person arising out of the commission of the offence.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Cie Graphique de Fournitures Edward

08-03-93, Quebec Provincial Court,

Company pleaded guilty to three charges under Section 6 of the TDG Act and the Court ordered payment of $9,000 to be applied to research projects as provided for in Section 34 of the Act.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Acklands Limited.

04-12-95, Saskatchewan Provincial Court,

Convicted under Part 5 for **not placarding vehicle** transporting dangerous goods that consisted of fiberboard box of Organic Dibenzoyl Peroxide UN2087 contained in 4 - 100gm plastic tubes.

Fine of $2,500 on one count and made an Order under Section 34 of the TDG Act, 1992 to make a payment of $5,000 to the research fund.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Grace Dearborn Ltd.

04-12-95, Saskatchewan Provincial Court,

Convicted of 2 counts offering for transport dangerous goods that were contained in an Intermediate Bulk Container that did not bear dates of manufacture and/or requalification as required by Part 7 of the regulations.

Fine of $2,500 on each count and made an Order under Section 34 of the T.D.G. Act, 1992 to make a payment of $5,000 to the research fund.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs C.P. Express and Transport Ltd.

09-13-94, Quebec Provincial Court,

Convicted under Part 5 for not labeling dangerous goods that had been repackaged. There was also a conviction under Part 9 in respect of untrained employee handling dangerous goods.

Fine of $5,000 on each count and an Order under Section 34 of the TDG Act, 1992 to make a payment of $20,000 to the research fund.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Sodisco Inc.

01-25-93, Quebec Provincial Court,

In an early application of Section 34 of the TDG Act 1992, Judge Crochitiere ordered the payment of $7,500 to be made to Transport Canada for research purposes. This amounted to $1,500 per count for charges laid under Section 4 of the TDG Act. 1980-81-82-83 c. 36.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Canadian Pacific Limited

01-06-94, Ontario Provincial,

Accused pleaded guilty to one count under Section 6(1) of the TDG Act, 1980-8182-83 c.36. The Court utilized the provisions of the TDG Act 1992 to order the payment of $7,000 to a research project.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Distribution Quebec Dentaire Inc.

10-20-93, Quebec Provincial Court,

Judge Roy ordered payment of $16,000 to Transport Canada for research in the BLEVE project as a result of convictions on four charges under Section 5 of the TDG Act 1992.

Section 34 Transportation of Dangerous Goods Act, 1992
Regulation: 10.11

R. vs Laboratoire Choisy Ltee.

04-13-93, Quebec Provincial Court,

Judge Bergeron ordered the payment of $4,000 per count on three convictions under Section 5 of the TDG Act 1992 to be made to Transport Canada for research purposes. As a result $12,000 has been made available to a research project.

SECTION 35

Limitation Period for Summary Conviction Offences

35. Proceedings by way of summary conviction may be instituted at any time within, but not later than, two years after the day on which the subject-matter of the proceedings arose.

BEHIND THE WORDS

The limitation on commencing proceedings by summary conviction is two years from the day on which the alleged contravention occurred.

COURT DECISIONS OF INTEREST

SECTION 36

Continuing Offence

36. Where an offence is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed or continued.

BEHIND THE WORDS

The wording of this section is similar to other Acts of Parliament. It has been interpreted to be applicable in situations where the non-compliance could actually be corrected from one day to the next. For example, it is recognized that a direction to correct the non-compliance of a specific railway tank car may not be satisfiable within one day. In such circumstances, it would not be expected that an offence would be considered a separate offence for each day. However, no attempts to begin to give effect to such a direction on a second day could be treated as a continuing offence.

An offence continuing over more than one day is not a subsequent offence in terms of Section 33 on the second and following days.

COURT DECISIONS OF INTEREST

SECTION 37

Venue

37. A complaint or an information in respect of an offence may be heard, tried or determined by any competent court of criminal jurisdiction in a province if the accused is resident or carrying on business within the territorial jurisdiction of that court although the matter of the complaint or information did not arise in that territorial jurisdiction.

BEHIND THE WORDS

This section allows for a choice of courts within a province and also for choosing to have an offence heard either in the province in which the alleged infraction occurred or in any province in which the accused resides or is carrying on business.

COURT DECISIONS OF INTEREST

Section 37 Transportation of Dangerous Goods Act, 1992

R. vs Decade Electronics Ltd.

03-29-93, B.C. Provincial Court,

In a prosecution of two counts under the TDG Act, 1980-81-82-83, c. 36, Judge Husband addressed himself to the provisions of Section 9 of that Act (Sec. 37 of TDG Act 1992) and found that by shipping dangerous goods to a customer in Langley, B.C. the Court was empowered to hear a charge that alleged the offence to have been committed in Toronto, Ontario when dangerous goods were “handled and offered for transport”.

SECTION 38

Prosecution of a Corporation

38. In any prosecution for an offence, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence.

BEHIND THE WORDS

The effect of this section is to allow for the prosecution of a corporation regardless of the situation of the corporation's employee or agent, i.e., prosecuted or not, found guilty or not, sentenced or not.

RELATED SECTIONS

Section 34	-	If a corporation can be prosecuted, so also can its officials, directors or agents

COURT DECISIONS OF INTEREST

SECTION 39

Prosecution of Officers, etc., of a Corporation

39. Where a corporation commits an offence, an officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted for the offence.

BEHIND THE WORDS

Section 38 provided that one could "pass over" an employee and go directly to a corporation with respect to a prosecution. Section 39 extends this such that one can pass over the employee and the corporation and go directly to an officer, director or agent of the corporation. In actual practice one would expect that the officer. director or agent to be prosecuted would have been made aware of the specific offence. It must be clear that the officer, director or agent had directed, authorized, assented to, acquiesced in or participated in the commission of the offence. Thus to proceed under this section, unless prior knowledge is clearly certain, an inspector should have advised the officer, director or agent of the circumstances. In addition, even if prior knowledge is certain, it might be reasonable to advise a specific individual who is considered by the inspector to be an **agent** of the corporation that he/ she is viewed as an agent.

It may be reasonable in some instances to prosecute officers rather than a corporation if it is envisaged there will be an order (Section 34) to prohibit the officer from engaging in certain activities for a particular period of time. This would then apply regardless of whether or not the individual changed employment.

As a result of Sections 38 and 39, when an employee or agent of a corporation commits an offence, any one of the three levels of employee, company and officer may be prosecuted regardless of the situation of the other two. Thus, none, one, two or three could be found guilty and punished as the Act provides.

RELATED SECTIONS

Section 34	-	Court orders
Section 38	-	Prosecution of a corporation

COURT DECISIONS OF INTEREST

SECTION 40

Due Diligence Defence

40. No person shall be found guilty of an offence if it is established that the person took all reasonable measures to comply with this Act or to prevent the commission of the offence.

BEHIND THE WORDS

This section can be described as the defence of due diligence. It provides not only a potential defence for an individual but also for a corporation or officer, director or agent of a corporation.

COURT DECISIONS OF INTEREST

SECTION 41

Evidence

41.(1) In any prosecution for an offence, a certificate, report or other document, appearing to have been signed by the Minister or by an inspector, is admissible in evidence without proof of the signature or official character of the person appearing to have signed it and, in the absence of evidence to the contrary, is proof of the matters asserted in it

(2) In any prosecution for an offence, a copy made by an inspector under Section 15 and appearing to have been certified under the inspector's signature as a true copy is admissible in evidence without proof of the signature or official character of the person appearing to have signed it and, in the absence of evidence to the contrary, has the same probative force as the original would have if it were proved in the ordinary way.

(3) No certificate, report or copy shall be received in evidence unless the party intending to produce it has, before the trial, served on the party against whom it is intended to be produced, reasonable notice of that intention together with a duplicate of the certificate, report or copy.

BEHIND THE WORDS

Unless the accused brings evidence to the contrary, certain documents will be admissible without further proof required that the inspector signed them, assuming the notice provisions in 41(3) have been complied with.

COURT DECISIONS OF INTEREST

SECTION 42

Safety Marks and Shipping Documents as Prima Facie Evidence

42. In any prosecution for an offence, evidence that a means of containment or transport bore a safety mark or was accompanied by a prescribed document is, in the absence of evidence to the contrary, proof of the information shown or indicated by the safety mark or contained in the prescribed document.

BEHIND THE WORDS

This section provides that safety marks and prescribed documents may be used as prima facie evidence. That is, they are proof of the information shown or indicated unless more substantial information is provided to show they are incorrect.

This section also removes the requirement to draw samples from a means of containment if there are documents available which describe the contents of the means of containment.

If there are conflicting documents, or documents conflicting with the placard, then clearly one of the two is in error and there would be a contravention arising from Sections 5 and 33.

RELATED SECTIONS

Section 5	-	Documents and safety marks must be correct
Section 33	-	Establishes offences

COURT DECISIONS OF INTEREST

SECTION 43

Consequential Amendments
Access to Information Act

43. Schedule II to the *Access to Information Act is* amended by deleting the reference to

Transportation of Dangerous Goods Act
Loi sur le transport des marchandises dangereuses

and the corresponding reference to subsection 23(5).

BEHIND THE WORDS

This section removes reference to the *TDG Act* of 1980 from the *Access to Information Act.*

COURT DECISIONS OF INTEREST

SECTION 44

Consequential Amendments

Access to Information Act

44. Schedule II to the said Act is further amended by adding thereto, in alphabetical order, a reference to

Transportation of Dangerous Goods Act, 1992
Loi sur le transport des marchandises dangereuses, 1992

and a corresponding reference to subsection 24(4).

BEHIND THE WORDS

This section amends the *Access to Information Act* to reference the *Transportation of Dangerous Goods Act, 1992*.

COURT DECISIONS OF INTEREST

SECTION 45

Consequential Amendments

Canadian Environmental Protection Act

45. Paragraph 43(4)(a) of the *Canadian Environmental Protection Act* is repealed and the following substituted therefor:

(a) any dangerous goods, within the meaning of the *Transportation of Dangerous Goods Act, 1992,* that are a waste, within the meaning of the regulations made under that Act; or

BEHIND THE WORDS

This section corrects the reference to the *TDG Act* in the *Canadian Environmental Protection Act.*

COURT DECISIONS OF INTEREST

SECTION 46

Consequential Amendments
Regarding Bill C-13

46. If Bill C-13, introduced in the third session of the thirty-fourth Parliament and entitled An Act to establish a federal environmental assessment process, is assented to, then, on the later of the day on which this Act is assented to and the day on which that Act is assented to, Section 81 of that Act is repealed.

BEHIND THE WORDS

The *Transportation of Dangerous Goods Act* of 1980 was to be modified by Bill C-13 of the Third Session of the Thirty-Fourth Parliament. It was expected that Bill C-13 would pass and be proclaimed well in advance of the enactment of the *Transportation of Dangerous Goods Act, 1992*. When it became apparent that this would not occur, and given that Bill C-13 was beyond a reasonable amendment stage, this section was introduced to ensure that the amendment contained in Bill C-13 would not inadvertently apply to the *Transportation of Dangerous Goods Act, 1992.*

COURT DECISIONS OF INTEREST

SECTION 47

Repeal of TDG Act (of 1980)

47. The *Transportation of Dangerous Goods Act* is repealed.

BEHIND THE WORDS

This repeals the *Transportation of Dangerous Goods Act,* Chapter T-19; it has now been replaced by the *Transportation of Dangerous Goods Act, 1992*.

COURT DECISIONS OF INTEREST