

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.

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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(1) 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

"Please refer to the disclaimer on page 0.1"

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(1), 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(1)(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 off-loading 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

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|------------------|---|--|
| 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 subsection 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.

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- (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 Queens 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, such an inquiry under the *TDG Act, 1992* is considered extremely remote.

COURT DECISIONS OF INTEREST

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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

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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, Surface;
- 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

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|------------|---|---|
| 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(1), 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 section 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.

"Please refer to the disclaimer on page 0.1"

- (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