

## **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                               |

"Please refer to the disclaimer on page 0.1"

COURT DECISIONS OF INTEREST

"Please refer to the disclaimer on page 0.1"

## **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 after 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(1) 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.

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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(1)(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**

"Please refer to the disclaimer on page 0.1"

## **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(1) the intent of each paragraph is provided in the following:-

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(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 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 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**

"Please refer to the disclaimer on page 0.1"

## **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**

"Please refer to the disclaimer on page 0.1"

## **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