Legislative Summary **LS-631E**

BILL C-9: AN ACT TO AMEND THE TRANSPORTATION OF DANGEROUS GOODS ACT, 1992

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LEGISLATIVE HISTORY OF BILL C-9

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	2 February 2009	First Reading:	**26 March 2009**
Second Reading:	13 February 2009	Second Reading:	**28 April 2009**
Committee Report:	**11 March 2009**	Committee Report:	**7 May 2009**
Report Stage:	**23 March 2009**	Report Stage:	**12 May 2009**
Third Reading:	**25 March 2009**	Third Reading:	**13 May 2009**

Royal Assent: **14 May 2009**

Statutes of Canada **2009, c. 9**

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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BACKGROUND

On 2 February 2009, the Honourable John Baird, Minister of Transport, Infrastructure and Communities, introduced Bill C-9, An Act to amend the Transportation of Dangerous Goods Act, 1992, in the House of Commons. Bill C-9 is identical to Bill C-56, which was introduced in the 2nd Session of the 39th Parliament, and which died on the *Order Paper* with the dissolution of Parliament.

The *Transportation of Dangerous Goods Act, 1992*, which received Royal Assent on 23 June 1992, was designed to promote public safety during the transportation of dangerous goods. The proposed amendments aim to enhance security and safety during the transport of dangerous goods. As amended by Bill C-9, the Act would remain focused on the prevention of incidents during the offering for transport, handling, transporting and importing of dangerous goods. According to information provided by Transport Canada, it would also enable a prevention program and a response capability for the Government of Canada in the event of a security incident involving dangerous goods.(1)

When the *Transportation of Dangerous Goods Act, 1992* was enacted, there was an informal commitment to Parliament to begin a review of the Act after 10 years. In 2002, Transport Canada began such a review, starting with safety issues. In the summer of 2003, the review was expanded to include security. In March 2004, the department began holding public consultations in cities across Canada. Since June 2005, the department has also hosted several meetings with provincial and territorial governments and industry to discuss potential

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) Transport Canada, "Retabling of the Bill – Amending the Transportation of Dangerous Goods Act," rev. 3 February 2009, http://www.tc.gc.ca/tdg/consult/actreview/menu.htm.

amendments to the Act. Discussions have continued at each of the meetings of the Federal-Provincial-Territorial Task Force on Dangerous Goods, which are held twice a year and which include officials from each province and territory. Discussions have taken place as well at the meetings of the Minister's Transportation of Dangerous Goods General Policy Advisory Council, which also occur twice a year and whose members are industry representatives, industry association members, shippers, modal representatives, union representatives, first responders, and members of the public. In addition, departmental officials have indicated that provincial and territorial governments will continue to be consulted during the development of regulations once Bill C-9 comes into force.

A. Highlights

The notable amendments to the *Transportation of Dangerous Goods Act, 1992* fall into two categories: 1) safety amendments and 2) new security requirements.

1. Safety Amendments

The most significant amendments to the Act that would result from Bill C-9 with respect to safety are those that would:

- reconfirm that the *Transportation of Dangerous Goods Act, 1992* applies uniformly throughout Canada to both intra-provincial and inter-provincial transportation;
- reinforce and strengthen the Emergency Response Assistance Plan Program, including the use of emergency response assistance plans to respond to an actual or anticipated "release" of dangerous goods during their transportation;
- enable inspectors to inspect any place where a means of containment is being manufactured, repaired or tested;
- change the concept of "importer" so that it would be clearer who the importer in Canada is for purposes of meeting the obligations under the Act; and
- enable a shipping record to be used in court as evidence of the presence of dangerous goods in a means of containment.

2. New Security Requirements

The most important amendments to the Act that would result from Bill C-9 with respect to new security requirements are those that would:

- require security plans and security training;

- require that prescribed persons must hold transportation security clearances in order to transport dangerous goods, and the establishment of regulatory authority in relation to appeals and reviews of any decision in respect of those clearances;
- enable the use of security measures and interim orders (as are currently used in the *Public Safety Act, 2002* and certain other federal Acts); and
- enable regulations to be made in a number of additional areas, including those that would provide a means of tracking dangerous goods during transport and those that would require the reporting of the loss or theft of dangerous goods.

DESCRIPTION AND ANALYSIS

Included below are descriptions of the most significant amendments to the *Transportation of Dangerous Goods Act, 1992* that would result from Bill C-9 being enacted into law.

A. Interpretation (clauses 1, 2)

Clause 1 of the bill amends section 2 of the Act by repealing a number of current definitions, changing certain others, and adding definitions. One of the most notable changes is the proposed change in the definition of a "safety requirement," which now includes a requirement that must be met by persons engaged in designing, manufacturing, repairing, testing or equipping a means of containment used or intended to be used in importing, offering for transport, handling or transporting dangerous goods. A definition of "security requirement" is added. Another important definition not contained in the existing Act is that of a "release" in relation to dangerous goods. Newly added definitions are also provided for a "compliance mark" and a "dangerous goods mark," both of which are considered to fall within the definition of a "safety mark" for purposes of the Act.

Clause 2 of the bill adds a new section 2.1 to the Act to provide that a person who is named in a shipping record accompanying dangerous goods or a means of containment on entry into Canada as the person in Canada to whom the goods or the container is to be delivered is deemed to be importing the goods or container. This provides clarity as to who is considered to be an importer for purposes of the Act.

B. Application of Act (clause 3)

Section 3(2) of the current Act provides that the 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. Clause 3 replaces that provision with a new provision that stipulates that in addition to its application in Canada, the Act applies to vessels and aircraft outside Canada that are registered in Canada. This change reconfirms that within Canada the Act (for which the constitutional basis is the federal criminal law power provided for in section 91(27) of the *Constitution Act, 1867*) is applicable uniformly throughout Canada to the transportation of dangerous goods, including the movement of dangerous goods entirely within a province and not involving a federally regulated shipper/carrier.

C. Safety and Security Requirements (clause 4)

Section 5 contains a general prohibition against persons importing, offering for transport, handling or transporting dangerous goods unless, among other things, the person complies with prescribed safety requirements. Clause 4 adds prescribed security requirements to section 5. An amendment requiring the use of a means of containment that is required or permitted under the regulations has also been added.

Clause 4 also adds section 5.1 to the Act to provide a prohibition against a person designing, manufacturing, repairing, testing or equipping a means of containment used or intended to be used in importing, offering for transport, handling or transporting dangerous goods unless the person complies with all prescribed safety requirements.

D. Transportation Security Clearances (clause 5)

Clause 5 adds sections 5.2(1) and (2), regarding transportation security clearances, to the Act. Proposed section 5.2(1) prohibits a prescribed person from importing, offering for transport, handling or transporting dangerous goods in a prescribed quantity or concentration (or within a prescribed range of quantities or concentrations) unless the person has a transportation security clearance granted under section 5.2(2). The latter section provides authority for the minister, for purposes of the Act, to grant or refuse to grant a transportation security clearance to any person or to suspend or revoke such a clearance.

E. Compliance Marks and Dangerous Goods Marks (clause 6)

Section 6 currently prohibits a person from displaying 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. Clause 6 replaces this prohibition with proposed sections 6 and 6.1. Proposed section 6 prohibits a person from affixing or displaying on a means of containment a prescribed "compliance mark" in respect of the manufacture, repair or testing of the means of containment, unless the manufacture, repair or testing was done in compliance with all safety requirements and safety standards applicable to that compliance mark. Proposed section 6.1 prohibits a person from affixing or displaying on dangerous goods, a means of containment or a means of transport a prescribed "dangerous goods mark" if the mark is misleading as to the presence of danger or the nature of any danger.

F. Emergency Response Assistance Plans and Security Plans (clause 6)

Clause 6 also replaces the current section 7 regarding emergency response assistance plans (ERAP) with a newly worded provision. Proposed section 7(1) prohibits a person from importing, offering for transport, handling or transporting dangerous goods in a prescribed quantity or concentration (or within a prescribed range of quantities or concentrations) unless the person has an ERAP approved under the section before a) importing the dangerous goods; b) offering the dangerous goods for transport; or c) handling or transporting the dangerous goods, in the case where no other person is required to have an ERAP under paragraph (a) or (b) in respect of that handling or transporting. According to proposed section 7(2), the ERAP must outline what is to be done to respond to an actual or anticipated release of the dangerous goods in the course of their handling that endangers, or could endanger, public safety.

Proposed section 7(3) permits the minister to approve the ERAP for a specified period, if the minister believes on reasonable grounds that it can be implemented and will be effective in responding to such a release. Proposed section 7(4) permits the minister to grant an interim approval of the plan for a specified period before finishing the investigation of the matter to be considered for approval under section 7(3) if the minister has no reason to suspect that the plan cannot be implemented or will be ineffective in responding to such a release. Proposed section 7(5) adds a number of new circumstances under which the minister may revoke an

approval of an emergency response assistance plan. They include the following: 1) in the case of an interim approval, where the minister subsequently believes on reasonable grounds that the plan cannot be implemented or will be ineffective in responding to such a release; 2) the minister believes on reasonable grounds that there has been a release of dangerous goods to which the plan applies (or that such a release has been anticipated) and that the plan was not used to respond to the actual or anticipated release; or 3) a direction made in respect of the plan under section 7.1(*a*) has not been complied with.

Clause 6 also adds sections 7.1 to 7.3 to the Act. Proposed section 7.1 stipulates that the minister may, if he or she believes that doing so is necessary for the protection of public safety, a) direct a person with an approved ERAP to implement the plan, within a specified reasonable time, in order to respond to an actual or anticipated release of dangerous goods to which the plan applies; or b) authorize a person with an approved ERAP to implement the plan in order to respond to an actual or anticipated release of dangerous goods if the minister does not know the identity of any person required under section 7(1) to have an ERAP in respect of the release.

Proposed section 7.2(1) requires the minister to compensate (in accordance with the regulations) any person who is authorized to implement an ERAP under paragraph (b) of proposed section 7.1 for expenses that are incurred by the person as a result of implementing the plan. According to proposed section 7.2(2), the compensation must be paid out of the Consolidated Revenue Fund.

Proposed section 7.3, regarding security plans, is also new. Proposed section 7.3(1) requires that before a prescribed person imports, offers for transport, handles or transports dangerous goods in a quantity or concentration (or within a range of quantities or concentrations) that is specified by regulation, the person must have undergone security training (in accordance with the regulations), have a security plan that meets the requirements of proposed section 7.3(2), and have implemented the plan in accordance with the regulations. According to proposed section 7.3(2), the plan must, in accordance with the regulations, set out measures to prevent the dangerous goods from being stolen or otherwise unlawfully interfered with in the course of the importing, offering for transport, handling or transporting.

G. Means of Containment (clause 8)

Clause 8 adds section 9(3), which allows the minister to direct a person who repaired or tested a standardized means of containment to issue a notice of defective repair or defective testing to the person for whom it was repaired or tested, or to publish the notice in a manner such that it is likely to come to that person's attention, if the minister believes that the person who repaired or tested the standardized means of containment a) failed to comply with an applicable safety requirement or safety standard; and b) affixed to, or did not remove from, the standardized means of containment the safety mark that indicates the safety requirement or safety standard had been complied with.

H. Inspectors (clause 12)

Clause 12 adds a new section, 13(2), to prohibit any person, when a qualified person is exercising powers under proposed section 15(3), from a) failing to comply with any reasonable request of the qualified person; b) knowingly making any false or misleading statement either orally or in writing to the qualified persons; or c) otherwise obstructing or hindering the qualified person.

I. Monitoring Compliance (clauses 14, 16, 17)

Section 15 currently sets out the powers of an inspector for the purpose of ensuring compliance with the Act. Clause 14 replaces section 15 with sections 15(1) to (3). Current section 15(*a*) concerning when an inspector may conduct an inspection is generally repeated in proposed section 15(1), with the added reference to the inspector's power of inspection if the inspector believes on reasonable grounds that in or on the place or means of transport, there are means of containment being manufactured, repaired or tested on which a compliance mark is displayed or will be affixed.

Proposed section 15(2) sets out the extensive powers the inspector has in the course of carrying out an inspection under section 15(1).

Proposed section 15(3) provides that an inspector may authorize any qualified person to enter any place or means of transport that the inspector may enter under section 15(1) and to exercise any of the powers set out in proposed section 15(2).

Clause 16 adds section 16.1 to the Act. According to proposed section 16.1(1), if an inspector or a person authorized under proposed section 15(3) opens anything, or requests that it be opened, for inspection or for the taking of a reasonable quantity of anything that is sealed or closed up, the inspector must provide the person who has control of the thing that was opened with a certificate (in prescribed form) as proof that it was opened for the purpose described above. Under proposed section 16.1(2), the person to whom the certificate is provided is neither civilly nor criminally liable in respect of any act or omission of the inspector in the course of inspection, but is not otherwise exempt from compliance with the Act.

Clause 17 generally reworks current sections 17(1) to (4) into proposed sections 17(1) to (3) but adds in proposed section 17(1) that an inspector may, under circumstances outlined in the Act, remove to an appropriate place any means of containment used to handle or transport dangerous goods. It also adds section 17(4) to provide that a direction may be issued under section 17 only to a person who, at the time of the non-compliance or any time afterward, owns, imports or has the charge, management or control of the dangerous goods or means of containment.

J. Duty to Respond (clause 18)

Clause 18 replaces the current section 18(1), adding in particular the duty to report an accidental release of dangerous goods so as to also include an anticipated release and the requirement that it be reported if the release endangers, or could endanger, public safety. It also adds section 18(3), which provides that if dangerous goods in excess of a prescribed quantity or concentration are lost or stolen during their handling or transporting, any person who had the charge, management or control of the goods immediately before the loss or theft must report it to every person prescribed for purposes of the provision.

K. Intervention (clause 19)

Clause 19 rewords current sections 19(1) and (2) concerning grounds for intervention by an inspector so that they become proposed section 19(1), but with a number of changes. Current section 19(3) (concerning when a direction may be issued under section 19) then becomes proposed section 19(2) but with the addition that a direction issued under proposed section 19(1) may also be issued to a person who is required under section 7 to have an ERAP that applies to the actual or anticipated release of dangerous goods.

L. Personal Liability (clause 19)

Clause 19 also replaces the current section 20 concerning instances where persons are absolved of personal liability, either civilly or criminally, in respect of acts or omissions in good faith under the Act. In proposed section 20 is a new requirement that there be no negligence. Other amendments are made to take into account certain other proposed amendments to the current Act.

M. Disclosure of Information (clause 23)

Clause 23 includes the following addition to section 24(1): information relating to security obtained under section 15(2)(*d*) is privileged under the Act. Clause 23 also replaces section 24(4) concerning exceptions to the prohibition against a person knowingly communicating privileged information (or allowing it be communicated) to any other person or allowing any other person to have access to the information and adds an additional exception.

N. Regulations, Security Measures, and Orders (clauses 25, 26, 28**, 29**)

1. Clause 25

Section 27(1) currently authorizes the Governor in Council to make regulations generally for carrying out the purposes and provisions of the Act, including regulations respecting the lengthy list of matters enumerated therein. Clause 25 makes some changes to that list and also authorizes an extensive number of new regulations regarding matters related to the proposed amendments to the Act.

2. Clause 26

a. Section 27.1

Clause 26 adds sections 27.1 to 27.7 to the Act. Proposed section 27.1(1) authorizes the Governor in Council to make regulations specifically concerning the *security* of the importing, offering for transport, handling or transporting of dangerous goods, including regulations respecting the list of matters included therein, such as regulations respecting security clearance applications, suspensions and revocations, security training, and regulations regarding the tracking of dangerous goods during transport. Proposed section 27.1(2) authorizes the regulations to refer to any document, in whole or in part, as it exists when the regulations are made.

b. Section 27.2

Sections 27.2 to 27.5, proposed in clause 26, concern security measures. Proposed section 27.2(1) authorizes the minister to make security measures respecting the security of the importing, offering for transport, handling or transporting of dangerous goods. However, under proposed section 27.2(2), the minister may make a security measure in relation to a particular matter only if a) a regulation could be made in relation to the matter under proposed section 27.1(1); and b) the publication of the regulation would compromise the security of the importing, offering for transport, handling or transporting of dangerous goods or would endanger public safety. According to proposed section 27.2(3), a security measure comes into force immediately when it is made, but the minister must review it within two years of the day on which it was made and within every following two years to determine whether the disclosure of the subject matter would no longer compromise the security of the importing, offering for transport, handling or transporting of dangerous goods or endanger public safety. If the minister determines this is the case, section 27.2(4) stipulates that the minister must a) within 23 days, publish a notice in the *Canada Gazette* that sets out the substance of the security measure and states that proposed section 27.5(1) no longer applies in respect of the security measure; and b) repeal the security measure before the earlier of one year after the day on which the notice is published and the date of the regulation made under proposed section 27.1(1). When the above notice is published, under proposed section 27.2(5), proposed section 27.5(1) ceases to apply in respect of the security measure.

Proposed section 27.2(6) stipulates that, before making a security measure, the minister must consult with any person or organization that the minister considers appropriate in the circumstances. However, there is an exception if, in the minister's opinion, the security measure is immediately required (proposed section 27.2(7)).

c. Section 27.3

Under proposed section 27.3(1), subject to any restrictions or conditions the minister specifies, the minister may authorize his or her deputy to make security measures whenever the deputy feels that the measures are immediately required for public safety, provided that the conditions in proposed section 27.2(2) are met. A security measure comes into force immediately when it is made but expires 90 days after that unless the minister or his or her deputy repeals it earlier (proposed section 27.3(2)).

d. Section 27.4

According to proposed section 27.4(1), a security measure may provide that it applies in lieu of or in addition to any (security) regulation under proposed section 27.1(1). Proposed section 27.4(2) states that if there is a conflict between such a regulation and a security measure, the security measure prevails.

e. Section 27.5

According to proposed section 27.5(1), unless the minister states under proposed section 27.2(4) that proposed section 27.5(1) does not apply in respect to a security measure, no person other than the person who made the security measure is permitted to disclose its substance to any other person unless the disclosure is required by law or is necessary to give effect to the security measure.

Proposed section 27.5(2) stipulates that if, in any proceedings before a court or other body having the jurisdiction to compel the production or discovery of information, a request is made for the production or discovery of any security measure, the court or other body must, if the minister is not a party to the proceedings, cause a notice of the request to be given to the minister and, in camera, examine the security measure and give the minister a reasonable opportunity to make representations with respect to it. Under section 27.5(3), if the court or other body concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest in the security of the importing, offering for transport, handling or transporting of dangerous goods, the court or other body must order the production or discovery of the security measure, subject to any restrictions or conditions that it considers appropriate, and may require any person to give evidence that relates to the security measure.

f. Section 27.6

Proposed section 27.6 concerns interim orders. Proposed section 27.6(1) authorizes the minister to make an interim order that contains any provision that may be contained in a security regulation under proposed section 27.1(1) if the minister believes that immediate action is required to deal with an immediate threat to the security of the importing, offering for transport, handling or transporting of dangerous goods or to public safety. Under proposed section 27.6(2), subject to any restrictions or conditions the minister specifies, the minister may authorize his or her deputy to make an interim order whenever the deputy believes

that the above circumstances exist. According to proposed section 27.6(3), an interim order comes into effect immediately when it is made but ceases to have effect on the earliest of a) 14 days after the day on which it was made, unless it is approved by the Governor in Council; b) the day on which it is repealed; c) the day on which a security regulation made under proposed section 27.1(1), with the same effect as the interim order, comes into force; and d) the day that is two years after the day on which the interim order is made or that is at the end of any shorter period that the interim order specifies.

Under proposed section 27.6(4), an interim order must be published in the *Canada Gazette* within 23 days of its being made. A copy of each interim order must be tabled in each House of Parliament within 15 days of the day on which it is made (proposed section 27.6(5)) or, if a House is not sitting, it may be sent to the Clerk of the House in order to comply with section 27.6(5) (proposed section 27.6(6)).

g. Section 27.7

Clause 26 also adds proposed section 27.7 to the Act. According to proposed section 27.7(1), security measures and interim orders are not statutory instruments for the purposes of the *Statutory Instruments Act*. Section 27.7(2) adds that no person can be found to have contravened any security measure, or any interim order that has not been published in the *Canada Gazette* under proposed section 27.6(4) at the time of the alleged contravention, unless it is proven that, at the time of the alleged contravention, the person had been notified of the security measure or interim order or reasonable steps had been taken to bring its contents to the notice of those persons likely to be affected by it. Under proposed section 27.7(3), a certificate signed by the minister or the secretary of the Department of Transport and stating that a notice containing the security measure or interim order was given to persons likely to be affected by it or that reasonable steps had been taken to bring its purport to their notice is, in the absence of evidence to the contrary, proof that notice was given to those persons.

3. Clause 28

Clause 28 amends section 29 concerning the ministerial power to make orders fixing fees or charges to be paid to include the power to make such orders regarding fees to be paid in relation to applying for transportation security clearances in section 5.2(2), equivalency certificates described in section 31(1), and approvals or registrations under the Act.

4. Clause 29

The House of Commons Standing Committee on Transport, Infrastructure and Communities amended clause 29 to add proposed section 30(3) to the Act to allow that committee or, if that committee is not in existence, the appropriate committee of the House, to review any regulations made under the Act, either on its own initiative or on receiving a written complaint regarding a specific safety concern. The proposed provision also empowers the committee to hold public hearings and to table a report on its review in the House of Commons.

As in the case of the relevant House committee, the Standing Senate Committee on Transport and Communications amended clause 29 to add proposed section 30(4) to the Act to allow that committee or, if that committee is not in existence, the appropriate committee of the Senate, to review any regulations made under the Act, either on its own initiative or on receiving a written complaint regarding a specific safety concern. The provision also empowers the committee to hold public hearings and to table a report on its review in the Senate.

O. Certificates and Directions (clause 30)

Clause 30 replaces the current section 31 regarding equivalency permits (which concerns safety) and emergency permits to reflect that they are now being referred to as "equivalency certificates" and "emergency certificates" respectively and the proposed section also introduces a new kind of certificate, a "temporary certificate." Proposed section 31(2.1) permits the minister, if in the public interest, to issue a temporary certificate authorizing any activity to be carried out in a manner that does not comply with the Act. According to proposed section 31(2.2), no action lies against the federal Crown, the minister, his or her deputy or any person employed in the Department of Transport for anything done or omitted in good faith in proposed section 31(2.1).

P. Offences and Punishment (clauses 30, 32, 35)

Section 33 of the Act provides for either a summary conviction or an indictable offence for anyone who contravenes or fails to comply with the provisions of the Act. It also spells out the penalties. Clause 30 replaces the current section 33 with proposed section 33(1), which expressly provides for such an offence for any person who contravenes a provision of

a) the Act; b) a direction issued under specified provisions of the Act; c) the regulations; d) a security measure; or e) an interim order. Proposed section 33(2) sets out the penalties that were previously set out in section 33, depending on whether the person is charged under summary conviction or indictment.

Section 35 currently provides that proceedings by way of summary conviction may be instituted at any time within, but no later than, two years after the day on which the subject matter of the proceedings arose. Clause 32 amends that section to extend the two-year period to five years.

Section 42 currently provides that 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. Clause 35 amends section 42 to, among other things, change the reference to a safety mark to reference to a dangerous goods mark (or another mark likely to be mistaken for a dangerous goods mark) and the reference to a prescribed document to a shipping record so that, in a prosecution, evidence that a means of containment or transport bore a dangerous goods mark or was accompanied by a shipping record is, in the absence of evidence to the contrary, proof of the presence and identification of dangerous goods indicated by the dangerous goods mark or other mark or shipping record.

Q. Coming into Force (clause 37)

Clause 37 provides that the provisions of the bill come into force on a day or days to be fixed by order of the Governor in Council.