Must Suppliers Disclose ‘Confidential Business Information’ on SDSs?



SITUATION

In June 2016, a supplier develops a new chemical solution for cleaning machine parts. The formula for the solution contains an ingredient that the supplier’s competitors haven’t yet discovered. But the solution is a ‘hazardous product’ under WHMIS 2015. And under the *Hazardous Products Regulations*, suppliers of hazardous products are required to list the products’ ingredients on the safety data sheet (SDS). The supplier has invested a lot of time, money and other resources in developing the new formula and fears that listing the secret ingredient on the SDS will compromise its ‘confidential business information.’

QUESTION #1

The supplier can unilaterally decide not to disclose the secret ingredient on the product’s SDS. True or False’

ANSWER: False

EXPLANATION: The statement is false because the supplier can’t decide *on its own* not to disclose the secret ingredient on a hazardous product’s SDS. Under WHMIS 2015, a product’s SDS must fully disclose all hazardous ingredients in the product, its toxicological properties, any safety precautions workers

need to take when using the product and the first aid treatment required in the event of exposure.

When a supplier (or an employer) wants to be exempt from having to disclose 'confidential business information' (CBI), such as the chemical identity and/or concentration of a trade secret hazardous ingredient or the name of a toxicological study that identifies such an ingredient, the *Hazardous Materials Information Review Act* permits it to file a claim for an exemption with Health Canada. (Until April 2013, such applications were submitted to the Hazardous Materials Information Review Commission.) After Health Canada gets a completed exemption form and the appropriate fee, a unique Registry Number is assigned to the claim and notification is sent to the supplier, indicating the Registry Number and the date of filing.

In evaluating the supplier's claim for a CBI exemption, Health Canada will consider whether:

- The information is confidential to the supplier;
- The supplier has taken measures that are reasonable in the circumstances to maintain the information's confidentiality; and
- The information has actual or potential economic value to the supplier or the supplier's competitors because it's confidential and the disclosure of the information would result in a material financial loss to the supplier or a material financial gain to the supplier's competitors.

QUESTION #2

If the supplier gets a CBI exemption, it will never have to disclose the secret ingredient on the product's SDS. True or False'

ANSWER: False

EXPLANATION: The answer is false because a CBI exemption doesn't last forever. While the supplier's claim for an exemption is being considered, it must place the Registry Number and the date of filing on the relevant SDS in place of the claimed CBI. If Health Canada grants the exemption, the supplier doesn't have to disclose the CBI on the SDS for *three years*. (Note that the supplier may appeal Health Canada's denial of a CBI exemption.) However, once the exemption expires, the supplier must either:

- Refile the claim for exemption;
- Disclose all the CBI on the hazardous product's SDS; or
- Remove the product from the Canadian market.

QUESTION #3

If the supplier gets a CBI exemption, it must still make a limited disclosure about the secret ingredient. True or False'

ANSWER: True

EXPLANATION: The answer is true because suppliers must disclose on the SDS the generic chemical identity (GCI) of the hazardous product or secret ingredient. Health Canada determines the acceptability of a GCI as part of the review process of the claim for exemption. The GCI should mask some part of the actual chemical name'providing a degree of anonymity or ambiguity'while retaining some part of the parent structure of the chemical and certain important radicals to provide some link with the hazard information disclosed on the SDS.