PART III

GENERAL

Exemption

23.(1) The importation of a controlled product that is to be labelled or repackaged in Canada is exempt from the application of section 14 of the Act in respect of the requirements to obtain or prepare a material safety data sheet with respect to the controlled product and to have a label applied to the controlled product or container in which the controlled product is packaged on the following conditions:

(*a*) subject to subsection (2), the supplier provides to an inspector in each province into which the controlled product is imported, on or before the date of importation, a statement indicating

(i) that he intends to import the controlled product,

(ii) the nature of the controlled product to be imported,

(iii) the address of the premises in the province at which the controlled product is to be labelled or repackaged, and

(iv) the provinces into which the controlled product is to be imported; and

(*b*) the supplier, if so requested by an inspector in a province into which the controlled product is imported, provides to the inspector

(i) a sample of the controlled product on or before the date of importation,

(ii) the proposed dates and places of importation, and

(iii) the approximate quantity of the controlled product to be imported.

(2) A statement provided in accordance with paragraph (1)(*a*) is valid in respect of the importation of that controlled product to those premises for a period not exceeding three years from the date the supplier provides the statement to the inspector.

(3) An importer who imports a controlled product in accordance with subsection (1) shall obtain or

prepare a material safety data sheet in respect of the controlled product in accordance with the Act and these Regulations before the controlled product is used or sold.

(4) An importer who imports a controlled product in accordance with subsection (1) shall apply a label to the controlled product or to the container in which the controlled product is packaged in accordance with paragraph 14(*b*) of the Act

(*a*) where the controlled product is delivered to the address of the importer for his use or for sale, before the controlled product is used or sold; and

(*b*) where the controlled product is imported to the address of the person to whom the importer has sold the controlled product, before the controlled product is used by that person.

(5) Paragraph (4)(*b*) does not apply where the person to whom the importer sold the controlled product undertakes in writing to apply a label to the controlled product or to the container in which the controlled product is sold in accordance with paragraph 13(*b*) of the Act.

INTERPRETATION / DISCUSSION of SECTION 23

A supplier may import a controlled product without labels or MSDSs under the circumstances specified in this section. Subsections 23(1) and (2) relate to obligations on the supplier (i.e., importer) on or before the importation of the product. Subsections 23(3), (4) and (5) relate to obligations on the supplier after importation of a product under this exemption, but prior to selling or using the product.

New Substances Notification: The Domestic Substances List (DSL) identifies substances that, for the purposes of the *Canadian Environmental Protection Act*, are not subject to the *New Substances Notification Regulations*. Substances that are not on the DSL are subject to notification and their potential for adverse environmental and human health effects must be assessed before they can be manufactured in, or imported into, Canada. A copy of the reporting guidelines may be obtained by contacting: Domestic Substances List Project, Commercial Chemicals Evaluation Branch, Environment Canada, 14th Floor, Place Vincent Massey, 351 St. Joseph Blvd., Hull, Québec, K1A 0H3; by facsimile at (819) 953-7155 or at the toll free number (1-800) 567-1999.

Subsections 23(1) and (2):

On the date of, or prior to, importation of any controlled product without MSDSs or labels, a supplier must provide an inspector with a notice which includes all of the information listed in subparagraphs 23(1)(*a*)(i) to (iv). This notice will be sufficient for importations of all products listed in the notice and that are labelled or repackaged at the premises listed in the notice for a period of three years.

The "nature of the product" means the product identifier and a general description of the product such as acid, base, biological hazard, flammable liquid, organic solvent.

The following example illustrates where notices must be sent and the minimum information that must be included in each notice:

> *Scenario:* A supplier intends to import unlabelled controlled products to three centres located in Calgary, Edmonton and Montreal where they will be repackaged and labelled. What steps must the supplier take to comply with this section of the *CPR*?
>
> *Action required:* The supplier must provide one notice to an Alberta inspector and one notice to a Quebec inspector. Both notices must state the information in subparagraphs (i) and (ii). The notice to the Alberta inspector must include the repackaging locations in Calgary and Edmonton and reference to the fact that he/she is also importing into Quebec. The notice to the Quebec inspector must include the address of the repackaging plant in Montreal and reference to the fact that he/she is also importing into Alberta.

The notification requirements could also be met for a three year period by preparing a list of all products imported and their nature and destinations and forwarding it to all provinces affected. If additional products are imported and/or new destinations are chosen, then supplementary notification to the provinces would be necessary.

An inspector in any province into which a controlled product is imported under this exemption may request from the supplier a sample of the product as per 23(1)(*b*)(i) or further importation details as per 23(1)(*b*)(i) and (ii). The importation details that may be requested are limited to details on products imported into the inspector's province.

Subsections 23(3), (4) and (5):

When a controlled product is imported under the exemption in subsection 23(1) and (2), it must be brought into compliance with WHMIS label and MSDS requirements prior to being used or sold in Canada.

Paragraph 23(4)(*b*) and subsection 23(5) recognize and allow for the situation where an importer in Canada imports a controlled product not labelled in accordance with WHMIS directly to a third party in Canada to whom he/she has sold the product. In this situation, the supplier (importer) must ensure that the product has WHMIS labels applied to it before the third party uses it. The supplier is relieved of this obligation only if he/she has a written statement from the third party that the product will be labelled by the third party prior to being used.

Manner of Disclosing Information

24.(1) The information required to be disclosed on a material safety data sheet of a controlled product shall be disclosed at the time of the sale of the controlled product in English and in French on a single material safety data sheet or on two material safety data sheets.

(2) Where a supplier transmits a material safety data sheet in respect of a controlled product, the information shall be disclosed on the material safety data sheet in English or in French, or both, in accordance with the request of the person to whom the controlled product is sold or, where the person does not specify the language in which the information shall be transmitted, the information shall be transmitted in English or in French, whichever is used in the course of the sale between the supplier and the person.

(3) The information required to be disclosed on the label of a controlled product or the container in which a controlled product is packaged shall be disclosed in English and in French.

INTERPRETATION / DISCUSSION of SECTION 24

Section 19 of the *CPR* specifies the information that must be disclosed on a WHMIS supplier label. As reflected by subsection 6.2.1 of the Report of the WHMIS Steering Committee, the original WHMIS tripartite consensus group agreed that "the supplier label would be in both official languages".

Canada, as a signatory to the World Trade Organization (WTO) Agreement (formerly GATT Agreement) and the NAFTA Agreement has both rights and obligations under the Agreements on Technical Barriers to Trade (TBT Agreements) which are sub-agreements found in both documents. Both the WTO and NAFTA TBT agreements clearly state that *members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be made more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.*

For the purposes of the TBT agreements, "Legitimate Objectives" are defined as *inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end uses of products.*

The discussion of this issue prompted Health Canada to investigate the use of Spanish from a legal perspective. The ensuing legal opinion advised that subsection 24(3) of the *CPR* does not prohibit the use of Spanish within the WHMIS border of a supplier label. This legal opinion would also preclude a CIC policy to the contrary; {ref.: IWCC Policy Paper No. 2}.

Form of language: The *CPR* does not specify the specific form of language of English or French that is

to be used on labels and MSDSs. Thus, any form of language "option" provided by, for example, common word processing programs would be acceptable.

Subsections 24(1) and (2):

The supplier must provide a MSDS in the official language or languages requested by the purchaser or, when no preference is stated, in the language used in the course of the business transaction. Suppliers must have prepared MSDSs in both English and French by the time they begin selling the product. This is to ensure that there are no delays in transmitting information in one language where it has been requested in that language. A request for an MSDS in both languages can be met by having information in both languages on a single MSDS or two MSDSs, one in English and one in French.[1]

Note: The *HPA* does not place any obligations on exporters of controlled products to Canada. Section 14 of the *HPA* places a legal requirement on the Canadian importer of a controlled product to obtain or prepare a MSDS as a condition of importation. If the importer imports a controlled product solely for use in his or her workplace, it is only necessary to obtain or prepare the MSDS in the official language(s) used in the importer's workplace. If, however, the Canadian importer sells the product for use in a workplace in Canada, as required by subsection 24(1), the importer, (who would now be a supplier subject to section 13 of the *HPA*), must have the MSDS available in both English and French at the time of sale although, as provided for by subsection 24(2), it may be necessary to transmit the MSDS to the purchaser in only one of the official languages.

Subsection 24(3):

Labels must be in both English and French. It is acceptable to have both English and French information within one WHMIS border or to have the English and French information within two separate WHMIS borders. However, if the second option is used, hazard symbols must be disclosed on both the English and the French labels.

The stipulations of this subsection do not preclude the use of other languages in addition to English and French.

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[1] The publication *Vocabulary of Hazardous Materials in the Workplace*, Catalogue No. S52-2/215-1993, ISBN 0-660-57958-8, consists of a list of terms used in the regulations and other documents specifically dealing with WHMIS. This document is useful particularly to those tasked with the translation of WHMIS-type information.

25. The information required to be disclosed on a material safety data sheet, on a label of a controlled product or on a container in which a controlled product is packaged shall not be disclaimed or contradicted by information in respect of the controlled product that is

(*a*) not required under the Act; and

(*b*) disclosed on the material safety data sheet, the label, the controlled product or the container. [SOR/97-543; s. 17]

INTERPRETATION / DISCUSSION of SECTION 25

The prohibition of disclaimers and contradictory statements has been included to ensure that information on containers and MSDSs will not send conflicting messages to users of the product that would lead to confusion about the hazards posed by the product. The prohibition of disclaimer statements was meant to refer to information that directly or indirectly refuted information required on the MSDS. Statements which qualify toxicological test results are allowed under the conditions specified in section13 of the *CPR*.

The following example of a disclaiming statement is clearly unacceptable:

> "Although this product meets the carcinogenicity criteria there is no substantial proof that it causes cancer."

The following are examples of disclaiming statements that are not prohibited under this section:

> "The information contained herein is based on data considered accurate. However, no warranty is expressed or implied regarding the accuracy of these data or the results obtained from the use thereof;" and

> "This company assumes no responsibility for personal injury or property damage to vendees, users or third parties caused by the material. Such vendees or users assume all risks associated with the use of the material." The fact that the above disclaiming statements are not prohibited under Section 25 is based on an opinion of the status of these statements and not their desirability. (It should be borne in mind that such civil liability disclaimers do not operate to limit or reduce supplier/employer liabilities arising from the *HPA* statute); {ref.: PIS No.16}. These disclaiming statements, however, do not diminish in any way the responsibility of a supplier under the *HPA* to provide accurate information.

Qualifying" of risk phrases: The term "risk phrase" is defined in section 2 of the *CPR*. The following question has been raised: to what extent, if any, can a supplier of a WHMIS controlled product qualify the hazard associated with the controlled product on the label of a controlled product? Subparagraph 19(1)(*e*)(i) of the *CPR* requires only that the supplier state risk phrases that identify "a hazard that may arise from the

nature of the controlled product" and that are "appropriate to the controlled product".

What is "appropriate" is a question of fact for each product. Therefore, a label that identifies a reasonably foreseeable hazard as determined from the suppliers knowledge of the particular controlled product in question will comply with the requirements of subparagraph 19(1)(*e*)(i). Additional qualifiers that explain the hazard and indicate the nature and circumstances of the risk that may result from that hazard are not prohibited.

The obligation under subparagraph 19(*e*)(i) of the *CPR* to report a hazard is qualified in the definition of "risk phrase" to those hazards that "may arise from the nature of the controlled product". "May" is an auxiliary verb that qualifies the meaning of the verb "arise" by expression ability, competency, possibility, probability or contingency; (ref.: *Black's Law Dictionary*). Therefore, a supplier would not appear to be obliged to report improbable or impossible hazards or hazards that wold require improbable interventions before they could occur.

Subparagraph 19(*e*)(i) requires that suppliers disclose risk phrases that are "appropriate to the controlled product" or, in the French version, "qui conviennent au produit contrôlé". Neither "appropriate" nor "convenir à" are defined in the Act or the *CPR*. "Appropriate" is defined in *Webster's New World Dictionary* as "right for the purpose; suitable; fit; proper" and has been judicially considered to embrace "a concept of suitableness, proper, and fitting to the particular situation.: Kodellas v. Saskatchewan (Human Rights Commission) (1989) 60 D.L.R. (4th) 143 (Sask. C.A.) The word "appropriate as used in the phrase "appropriate advice" was construed in Levitt v. Carr [1992] 4 W.W.R. 160; 8 C.P.C. (3d) 101 (B.C.C.A.) to:

> "Refer to the nature of the inquiry to be made as revealed by the facts within the means of the plaintiff's knowledge. In this sense, "appropriate" means suitable in the circumstances of those facts."

Similarly, "convenir à" is defined in *Le Robert et Collins Senior* as "être appropriée à; être utile à; être agréable à". In Kodellas v. Saskatchewan (Human Rights Commission), supra, the adjective "convenable" was defined as "appropri" and found to convey the meaning of being "appropriate in the circumstances."

The use of the adjective "appropriate" and the adjectival clause "qui convienent au" implies, therefore, that the risk phrase should fulfil the purpose of describing with some accuracy the actual hazards that may foreseeably arise from the nature of that particular controlled product. The work "appropriate" conveys the idea that the risk phrase should reflect the knowledge of the supplier about the product and the circumstances in which the product is to be used and stored. The risk phrase, therefore, should reflect hazards that are reasonable foreseeable in the circumstances in which the controlled product may be expected to be used or stored.

Further, the use of the definite article "the" in the phrase "to the controlled product" also implies that the risk phrase should be determined by the supplier on a case by case basis; that is, the risk phrase must be appropriate to the particular product that is being labelled. Tailoring the risk phrase to the particular product, therefore, would accord with the wording of subparagraph 19(*e*) (i). The inclusion of qualifying language like "prolonged overexposure" or "when used in a respirable form" in a risk phrase, therefore, would conform with both the letter and the spirit of section 19 of the *CPR*.

Information in Respect of Exemptions

26. (1) A supplier who, pursuant to subsection 11(1) of the *Hazardous Materials Information Review Act*, files a claim for exemption from a requirement to disclose information in respect of a controlled product on a material safety data sheet or on a label shall, in respect of the sale or importation of the controlled product or any controlled product having the same product identifier, disclose on the material safety data sheet and, where applicable, on the label of the controlled product or container in which the controlled product is packaged the date that the claim for exemption was filed and the registry number assigned to the claim under the *Hazardous Materials Information Review Act*.

(2) The requirements of subsection (1) apply in respect of a supplier who receives notice of a decision that the claim for exemption is valid

(*a*) if there is no appeal of the decision under subsection 20(1) of the *Hazardous Materials Information Review Act*, for a period not exceeding 30 days after the expiry of the appeal period; [SOR/2001-254, s. 8] and

(*b*) if there is an appeal of the decision under subsection 20(1) of the *Hazardous Materials Information Review Act*, for a period not exceeding 30 days after the expiry of all periods for the making of an appeal or an application for judicial review in respect of the decision on appeal. [SOR/2004-317, s. 1]

INTERPRETATION / DISCUSSION of SECTION 26

There are a few items of information normally required on MSDSs and labels that a supplier may not have to disclose because he/she has a specific exemption from disclosing that information under the *Hazardous Materials Information Review Act* (*HMIRA*). Sections 26 and 27 of the *CPR* prescribe the information that must be disclosed on the label and MSDS in place of the information which is the subject of a claim for exemption. This replacement information will enable users of the product to determine the status of claims for exemptions. Also, this replacement information may be used in a medical emergency to obtain further information about the product from the Hazardous Materials Information Review Commission (HMIRC).

The supplier may be exempt under the *HMIRA* for one of two reasons. First, a supplier is exempt during the period that the claim is being processed by the HMIRC (including possible appeals) to ensure that sales of the product are not held up by delays in processing the claims. Second, a supplier will be exempt for a three year period if his/her claim for exemption is granted. An exemption is granted or disqualified as soon as a decision on the claim is reached **and** the appeal period following that decision expires without an appeal being filed. The replacement information that the supplier is required to disclose will vary depending on the status of the exemption under the *HMIRA* at the time of sale of the product.

Section 26 deals with the replacement information required if the supplier is exempt because he/she has filed a claim with the HMIRC and the claim is being processed. The supplier must disclose in place of the exempt information: (1) the date of filing; and (2) the registry number of the claim. The date of filing is the date that the HMIRC receives the claim for exemption from the supplier. The HMIRC will assign a registry number that is unique for that claim. The supplier must receive this replacement information from the HMIRC before he/she begins to sell the product with exemptions.

When a claim for exemption is granted, the above-noted replacement information may be used on MSDSs and labels related to sales of that product within 30 days.

Paragraph 26(2)(*b*) provides that where a decision is made that the claim for exemption is valid but the decision is appealed, subsection 26(1) continues to apply "for a period not exceeding 30 days after the expiry of all appeal periods in respect of the decision on appeal". The reference to the time period for making an "appeal" was intended to also include the time period for the making of an application for judicial review under the *Federal Court Act*. Paragraph 26(2)(*b*) is intended to refer to applications for judicial review. Therefore, the reference in paragraph 26(2)(*b*) to the "expiry of all appeal periods in respect to the decision on appeal" has been amended [SOR/2004-317] to read the "expiry of all periods for the making of an appeal or an application for judicial review in respect of the decision on appeal".

Section 27 specifies what replacement information must be disclosed after this 30 day period.

If a claim for exemption is disqualified, a notice sent by the HMIRC or appropriate appeal body will state the time frame in which the supplier has to comply with the law. If there is no appeal of this decision, for all sales of the product subsequent to this specified time, the supplier must disclose the information for which a claim for exemption was disqualified or cease sale of the product in the Canadian market.

27. A supplier who receives notice of a decision made pursuant to the *Hazardous Materials Information Review Act* that his claim or a portion of his claim for exemption from a requirement to disclose information in respect of a controlled product on a material safety data sheet or a label is valid shall, during the period beginning not more than 30 days after the final disposition of the claim and ending on the last day of the exemption period, in respect of the sale or importation of the controlled product or any controlled product having the same product identifier, disclose on the material safety data sheet and, where applicable, on the label of the controlled product or container in which the controlled product is packaged the following information:

(*a*) a statement that an exemption has been granted;

(*b*) the date of the decision granting the exemption;

(*c*) the registry number assigned to the claim under the *Hazardous Materials Information Review Act*; [SOR/88-555, s. 5] and

(*d*) the generic chemical identity of the controlled product or ingredient as required by section 16 of the *Act*. [SOR/97-543, s. 18]

INTERPRETATION / DISCUSSION of SECTION 27

This section deals with the replacement information required on an MSDS or label in place of the information the supplier is exempt from disclosing because he/she has been granted an exemption under the *HMIRA*. For further details refer to the discussion under section 26 of the *CPR*.

The following replacement information is required on MSDSs and labels of products sold after 30 days following the granting of an exemption and before three years following the date of an unappealed decision that a claim is valid:

- that an exemption is granted;
- the date when the unappealed decision was made that the claim is valid;
- the registry number; and
- the generic chemical identity of the controlled product or ingredient(s).