

Managing Occupational Health and Safety Risks for Employers in the Agricultural Sector: An Overview

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Agenda

1. OHS Obligations for Agricultural and Farm Operations
2. Requirements to Ensure a Safe and Healthy Workplace
3. Rights and Obligations Following an Accident





OHS OBLIGATIONS ON AGRICULTURAL AND FARMING OPERATIONS





General

Jurisdictional Considerations

- Agriculture is an area of shared federal/provincial jurisdiction under the *Constitution Act, 1867*.
- Two key statutes to consider:
 - *Saskatchewan Employment Act*
 - *Canada Labour Code*
- This presentation focuses predominantly on *The Saskatchewan Employment Act*



General

Who has responsibilities under the SEA?

- Employer
- Supervisor
- Worker
- Self-employed
- Contractors
- Prime contractors (at certain multi-employer worksites)
- Owners
- Suppliers

Note: a person/company can fall into more than one category.



Overlapping Duties

Owner Duties

- Ensure compliance with Act, particularly in instances of residual control

Employer Duties

- General Duty
- Training
- Supervision

Supervisor Duties

- Ensure the health and safety of workers
- Ensure workers comply with the legislation

Worker Duties

- Take reasonable care to protect self and others
- Co-operate with others exercising duties under the legislation



Who is responsible?

- Regulation s. 1-4
- In some cases, several parties share the same duty
- In Saskatchewan, where more than one party has a duty, responsibility for any OH&S matter lies “**primarily**” with the party with the “**greatest degree of control**” over a requirement
- If party with greatest degree of control fails to comply, then other parties must comply if possible for them to do so



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OCCUPATIONAL HEALTH AND SAFETY PROGRAMS



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OHS Programs

- Farming and ranching operations are required to establish and OHS Program
- An OHS Program must be established and designed in consultation with:
 - the occupational health committee;
 - the safety representative; or
 - the workers, if there is no occupational health committee and no safety representative

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POWERED MOBILE EQUIPMENT



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Powered mobile equipment

In general, employees must be trained in order to operate any powered mobile equipment (“PME”) – see Part 11 of the OHS Regulations





Powered mobile equipment

Farming and Ranching Exemption:

- All employers must ensure workers are trained to operate powered mobile equipment except persons engaged in a farming or ranching operation – s. 11-2 of the OHS Regulations
- Other obligations, such as ensuring that the operator is wearing a seat belt still apply.



HAZARDOUS PRODUCTS



Hazardous products

Definition of “hazardous products” is contained in the *Hazardous Products Act (Canada)*:

means any product, mixture, material or substance that is classified in accordance with the regulations in a category or subcategory of a hazard class listed in Schedule 2





Hazardous products

Restrictions on use of hazardous products

- Employers must ensure hazardous products are not handled by workers unless all requirements of the legislation are met, including:
 - Labelling;
 - Identifiers;
 - Safety data sheets
 - Worker education; and
 - Worker training

- See Part 22 of the OHS Regulations



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PERSONAL PROTECTIVE EQUIPMENT



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Personal protective equipment

PPE is required where an employer cannot reasonably protect the health and safety of workers through work practices or administrative controls

In general, if a worker is exposed to a risk of injury in the course of work, the employer must ensure workers use suitable PPE





Personal protective equipment

The following are examples of PPE required by the Regulations in certain situations that may apply to farms:

- Respiratory equipment;
- Approved protective headwear;
- Eye and face protectors;
- Skin protection;
- Protective footwear;
- Hand and arm protection;
- Hearing protection; and
- Fall protection.

See Part 7 of the OHS Regulations for specific PPE requirements

LOCK-OUT TAG-OUT



Lock-out Tag-out

Section 10-6 of the OHS Regulations requires that machines and power tools are locked out before a worker performs:

- Repair, test or adjustment of a machine

Specifically, employers must have a written lock-out process that is made available to its workers.

If the lock-out process requires physically applying a lock to the machine, the employer must supply each worker a lock and key



Lock-out Tag-out

If a machine requires cleaning, lubrication or adjustment while the machine is moving or energized, an employer must:

- Develop and implement written work practices and procedures;
- Ensure that workers are trained; and
- Ensure that a copy of the written practices and procedures are readily available to the workers.

(Section 10-7 of the OHS Regulations)



MACHINE SAFETY



Machine Safety

Employers must ensure that machines are:

1. Operated by competent workers, and
2. The workers are informed of the risks and trained in the safe use of the machine

(Section 10-1 of the OHS Regulations)





Machine Safety

Safeguards

- Many workplace injuries are the result of ineffective safeguards.
- The Ministry of Labour and Crown prosecutors are specifically targeting safeguard related contraventions.
- “Safeguard” is defined as:

A guard, shield, wire mesh, guardrail, gate, barrier, safety net, handrail, or other similar equipment that is designed to protect the safety of workers, but does not include PPE

(Section 1-2 of the OHS Regulations)





Machine Safety

Other specific machine safety obligations:

- Ensuring stopping devices are readily identifiable and within easy reach of the operator;
- Not permitting workers to leave machines unattended unless they are immobilized or enclosed by a safeguard;
- Start-up warning systems where workers are endangered by moving parts on start-up;
- Grinding machines are safeguarded and operated in compliance with manufacturer recommendations;
- Chain saws have operated guards and are operated responsibly;
- Saw blades that develop cracks are replaced.

See Part 10 of the OHS Regulations for all machine safety obligations





Lock-out & Machine Safety

R. v Sommer Green Forages (Unreported, December 2020)

- Fatal accident involving use of farming equipment.
- The charge stemmed from a workplace fatality that occurred on October 25, 2019, near Broderick, Saskatchewan. While clearing the teeth on the roller of a baler, the worker became entangled, resulting in the worker's death.
- The company was charged with failing to ensure that before a worker undertakes the maintenance, repair, test or adjustment of machine other than a power tool, the machine is locked out and remains locked out during that activity if not doing so would put the worker at risk, resulting in the death of a worker.
- \$70,000 penalty (inclusive of 40% Victim Surcharge).

DEALING WITH ANIMALS



Dealing with animals

R v. 324007 Alberta Ltd., operating as Heartland Livestock Services

- Worker suffered serious facial injuries after being struck by a gate while trying to get a heifer into a holding pen.
- The employer pled guilty to failing to provide and maintain plant, systems of work and working environments that ensure the health and safety of workers.
- The employer received a \$100,000 total fine.
- Just because the Regulations do not contain animal specific provisions does not mean you are exempt
- Consider how the duties discussed today may apply to your operation



DUE DILIGENCE & REASONABLE CARE





Three factors

- **Three factors considered in establishing a due diligence defence**
 1. **Foreseeability** — could a reasonable person have expected that something could go wrong?
 2. **Preventability** — was there an opportunity to prevent the injury or incident?
 3. **Control** — who was the responsible person present who could have prevented the incident?



DUE DILIGENCE CASE LAW



Due Diligence Case Law

R v 101009484 Saskatchewan Ltd. (Robwel Constructors), 2011 SKPC 31

- Contractor was hired to de-ice pipes at a mine
- An employee of the contractor was killed when he was struck in the face by a pipe that was being cleaned and had whipped unexpectedly past protective barriers
- An air compressor that had also been turned to an unsafe level was a contributing factor to this accident
- The employer was charged under OHS legislation with a variety of offences relating to a failure to ensure safety, including a failure to ensure that workers did not undertake work that they were not trained for



Due Diligence Case Law

R v 101009484 Saskatchewan Ltd. (Robwel Constructors)

- All charges against the contractor were dismissed
- The Court did not accept that the employee had been instructed to turn up the air compressor to an unsafe level
 - **The employer had given clear instructions not to turn the air compressor to an unsafe level**
 - If the air compressor had been turned up to an unsafe level, this was a unilateral act by the employee
- Concrete barriers existed to prevent the pipe from whipping, the contractor could not have been expected to know that it the pipe would have bypassed these barriers



Due Diligence Case Law

R v Viterra Inc.

- Worker employed at grain terminal near Rosetown
- Worker was asked to check why grain was flowing slowly into grain receiving pit
- For an unknown reason, worker entered the grain receiving pit
- When he stepped onto the grain, he was engulfed and suffocated
- Employer charged under *Canada Labour Code* with six offences relating to the worker's training, instruction and supervision



Due Diligence Case Law

R v Viterra Inc.

- All charges against the employer were dismissed
- Crown failed to prove *actus reus* of any offence
- Employer was duly diligent in any event
- Court held that the *actus reus* is not established by proof of an accident
- Employer was found duly diligent on basis of worker's training and education, including in relation to confined spaces



RESPONDING TO WORKPLACE ACCIDENTS



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Accident Reporting and Notifications

Must report a fatality or serious injury to OHS Division – s. 2-2 of the Regulations.

- “Serious injury” not defined
- Reportable non-fatal injury is one “that will require a worker to be admitted to a hospital as an in-patient for a period of 72 hours or more”.

In case of fatality in workplace context, additional reporting requirement to Peace Officer **or** Coroner’s Office – Coroner’s Act - s. 7(1)(g).

Doesn’t matter whether RCMP or local police have been called the OHS Division must be called. Must follow the legislation.





Accident Reporting and Notifications

Who, what, when, where and how

- **2-2(1)** An employer or contractor shall give notice to the division as soon as is reasonably possible of every accident at a place of employment that:
 - causes or may cause the death of a worker; or
 - requires admission to a hospital as an in-patient for 72 hours or more.
- Notice must include the name of worker; name of employer; date, time and location of the accident; circumstances related to the accident; apparent injuries; and the name and contact information for a contact person in case additional info is required.
- In case of death, notice needs to be given by telephone **and** in writing.



Accident Reporting and Notifications

- “Dangerous occurrences” also need to be reported by **employers, contractors or owners** – section 2-3 *OHS Regulations, 2020 (Sask)*
- Nebulous definition
- Must give notice of every dangerous occurrence **whether or not a worker sustains injury.**
- Includes certain structural failures (e.g., scaffolds, trench, formwork), electrical contact, premature or accidental detonation of explosives, failure of a crane, hoist or powered mobile equipment, failure of respirators.





Investigation by Authorities

- Upon receiving notification of a workplace fatality, RCMP or local police will attend upon the scene and conduct interviews.
- Ministry of Labour – OHS Division will conduct its own “inspection” or “investigation”. Can take weeks to complete.
- Initial inspections can involve (s. 3-63 of the *Act*):
 - Occupational Health Officers attending at the site
 - Photographing the location of the incident
 - Requiring the demonstration of machinery, equipment, etc.
 - Conducting tests and taking samples
 - Requiring production and inspection of books and records (also removing books and records to make copies)



Investigation by Authorities

- Warrants will describe the expanded authority of the officer to search, enter, or seize in investigations. **Powers of the OHS officers are limited to those provided by the warrant.**
- Powers will include OHS officer authority to:
 - enter and search any named premises or vehicle during the time(s) indicated
 - seize and remove from any place, premises or vehicle searched anything that may be evidence of an offence
 - open and examine the contents within any trunk, box, bag, parcel, closet, cupboard or other receptacle that the officer finds in the place, premises or vehicle



Statutory Investigation Requirements

“Employer” must **investigate** accidents that cause death, require admission to a hospital as an in-patient for a period of 24 hours or more, or constitutes a “dangerous occurrence” **as soon as is reasonably possible** - s. 3-18 and s. 3-20 of the Regulations





Statutory Investigation Requirements

The **investigation** needs to be done by:

- the co-chairpersons or their designates;
- the employer and the representative; or
- where there is no committee or representative, the employer.

The **written report** is prepared “in consultation with” the co-chairpersons or their designates. (see s. 3-18 and s. 3-20 of the Regulations).





Statutory Investigation Requirements

- The s. 3-18 and s. 3-20 Written Reports
 - A description of the accident
 - Any graphics, photographs or other evidence that may assist in determining the cause or causes of the accident
 - An explanation of the cause or causes of the accident
 - The immediate corrective action taken
 - Any long-term action that will be taken to prevent a similar accident in the future or the reasons for not taking action



Interviews and Statements to OHS

Two major components of the investigation:

- **Comments made during initial inspection of scene by OHS**
- **Follow-up investigation by OHS, with witness statements**

There are three different types of interviews conducted by OHS officers:

- 1) Voluntary interview
- 2) “Required”/Compelled interview
- 3) Interview involving *Charter* caution and police warning

*Is there really a voluntary interview with OHS?



Interviews and Statements to OHS

- In Saskatchewan, need to consider implications of s. 3-67 of *The Saskatchewan Employment Act*

3-67(1) Subject to subsection (2), an occupational health officer **may require** any person who the occupational health officer has reasonable cause to believe possesses any information respecting a work related fatality, serious injury or allegation of harassment **to attend an interview and provide full and correct answers to any questions that the occupational health officer believes it necessary to ask.**

(2) An interview held pursuant to subsection (1) is to be held in the absence of persons other than:
(a) **a person nominated** to be present by the person being interviewed; and
(b) any other persons whom the occupational health officer **may allow** to be present.

(3) No person shall fail to comply with a requirement imposed on the person pursuant to this section.





Interviews and Statements To OHS

- In Saskatchewan, OHS Division has been taking the position that lawyers are not allowed to sit in on the employee's interview unless the interview is "required".
- Individual will be required to provide full and complete answers to the occupational health officer's questions as part of this interview. No option to decline this interview request – to do so is to violate the Act.
- **The individual should take advantage of the "nominee" process**
 - **Legal Counsel (Internal or External) can attend if requested by the employee**





Privilege considerations

- **Types of Privilege**
 - **Solicitor- Client Privilege**
 - **Litigation Privilege**





Privilege considerations

- ***R. v. Bruce Power Inc.*, 2009 ONCA 573**

- Where an employer has taken the step of protecting a sensitive, detailed internal accident investigation report properly with solicitor-client privilege, that report is not subject to seizure by OHS

- ***Alberta v. Suncor Energy Inc.*, 2017 ABCA 221**

- Court of Appeal confirmed that statutory obligations to conduct investigations do not preclude legal privilege. However, the claim of privilege will need to be carefully considered.





R v Husky Energy Inc., 2017 SKQB 383

■ **Facts:**

- Investigation arising out of a pipeline leak. Statutes also required an investigation to be conducted.
- The Crown wanted disclosure of documents related to a report Husky had prepared under applicable legislation.
- Search warrant executed.





R v Husky Energy Inc., 2017 SKQB 383

▪ Saskatchewan Court of Queen's Bench determined:

- *Suncor* followed.
- The existence of a statutory obligation to report on an incident does not necessarily preclude claims of litigation privilege in material created during an investigation conducted, in part, to comply with that reporting obligation.
- However, claims of privilege cannot be asserted in bulk. Privilege can only be claimed on a document by document basis.
- Many documents created from investigation after the oil spill incident were created for the dominant purpose of litigation.





Privilege considerations

▪ **Takeaways from *Bruce Power, Suncor and Husky***

- Clarify in writing the role of in-house counsel—legal capacity vs business capacity
- Retain specialist OHS Counsel ASAP to advise on privilege and/or conduct investigation
- Engage, direct and supervise external consultants through legal counsel and document the purpose of their retainer in writing
- Consider having in-house counsel or external counsel lead and/or conduct the investigation
- Implement “*Investigation Charter*” where warranted



Privilege considerations

■ Takeaways from *Bruce Power, Suncor and Husky*

- Document the purpose of the investigation and the purpose for the creation of documents during the course of the investigation. The circumstances at the time rather than hindsight will dictate whether a claim of privilege will be upheld
- Create a limited team to be involved in OHS investigations and ensure they are trained on legal privilege
- Consider preparing a privileged report independently of s. 3-18 /s. 3-20 Written Report
- Communicate the purpose of the investigation to those involved with it—for example, advise all witnesses the investigator interviews that the investigation is being conducted for the purpose of obtaining legal advice and is strictly confidential





Q&A

THANK YOU FOR ATTENDING!

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