

**MIS**  
MAKE IT SAFE

VANCOUVER

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# WorkSafeBC Update

## 2024 Make It Safe

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MITHALAWGROUP

# Understanding WorkSafeBC

## Workers Compensation Act

# Understanding WorkSafeBC

W

WORKPLACE SAFETY

Primary Law: OHS Regulation

Administered by Prevention Officers

Risk: Penalties and Prosecution

C

CLAIMS FOR INJURIES

Primary Law: Claims Manual

Administered by claims managers

Risks: Claims Costs

A

ASSESSMENTS

Primary Law: Assessments Manual

Administered by Assessment Officers

Risks: Audits

# Understanding WorkSafeBC



WORKPLACE SAFETY

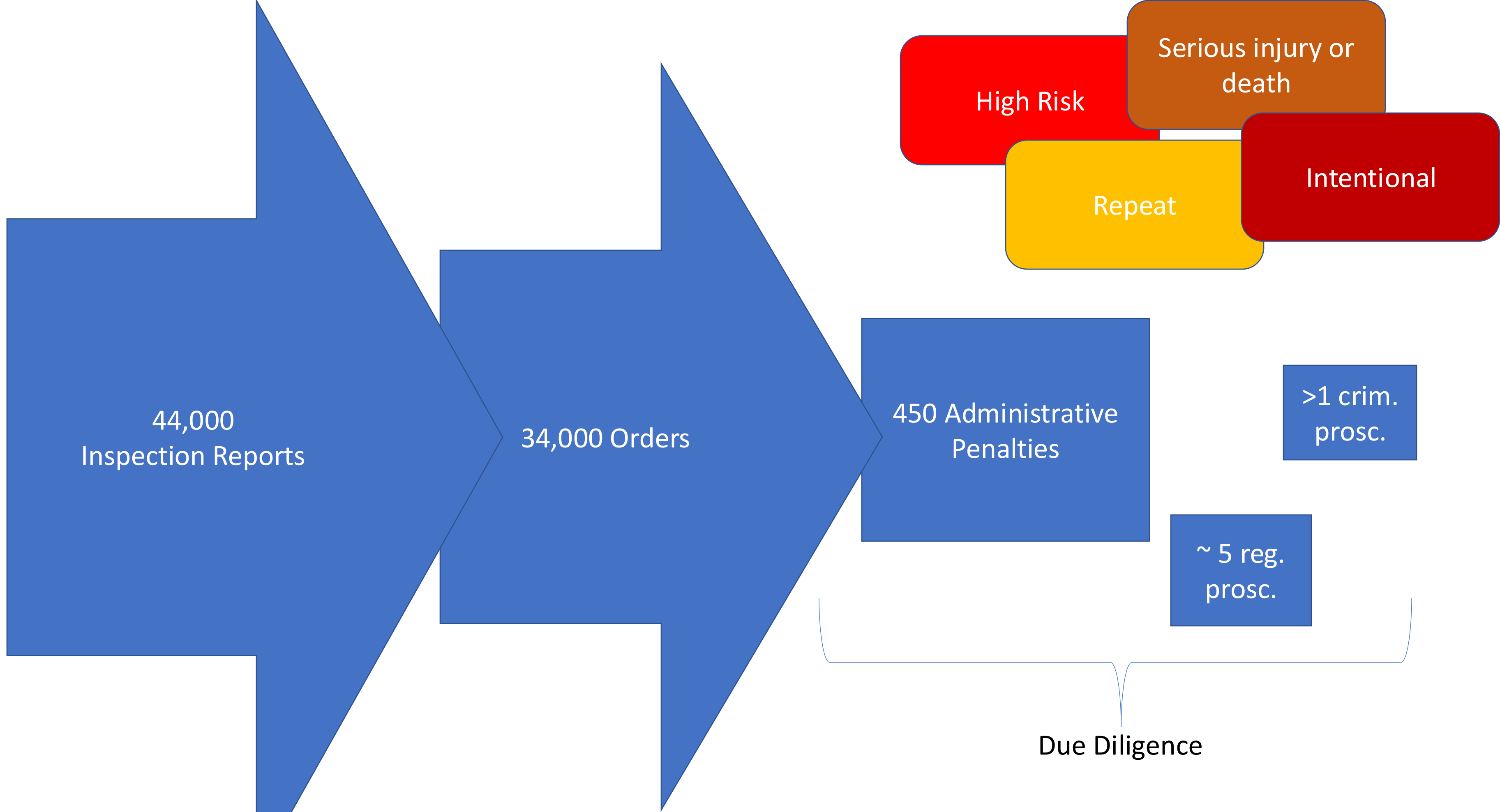
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Risk: Penalties and Prosecution

Points where you may interact with us:

- Changes to the OHS Regulation
- Ensuring policies are compliant
- Dealing with serious incidents



# Who is in jeopardy?

## Administrative

- Orders are almost always issued to employers (often the corporate entity)
- Orders to workers (including supervisors) possible but relatively rare
- Penalties to employers only

## Regulatory Charges

- The employer
- Individuals directly involved, including supervisors
- “an officer, director or agent” who “authorizes, permits, or acquiesces”

## Criminal Code

- S. 220 – Criminal Negligence causing death
- Marked departure from standard of care
- Duty holders
- Employer, supervisor, workers

# Stage 1: The Incident – immediate response

- Render first aid and contact emergency services
- Secure the scene – offence to disturb the scene other than to protect persons/property (s. 68(2) of the Act)
- Duty to “*immediately*” report to WorkSafeBC (s. 68(1) of the Act) including:
  - Fatality/serious injury
  - Major structural failure or collapse
  - Major release of a hazardous substance
  - Fire or explosion with potential to cause serious injury



# Stage 1: Considerations



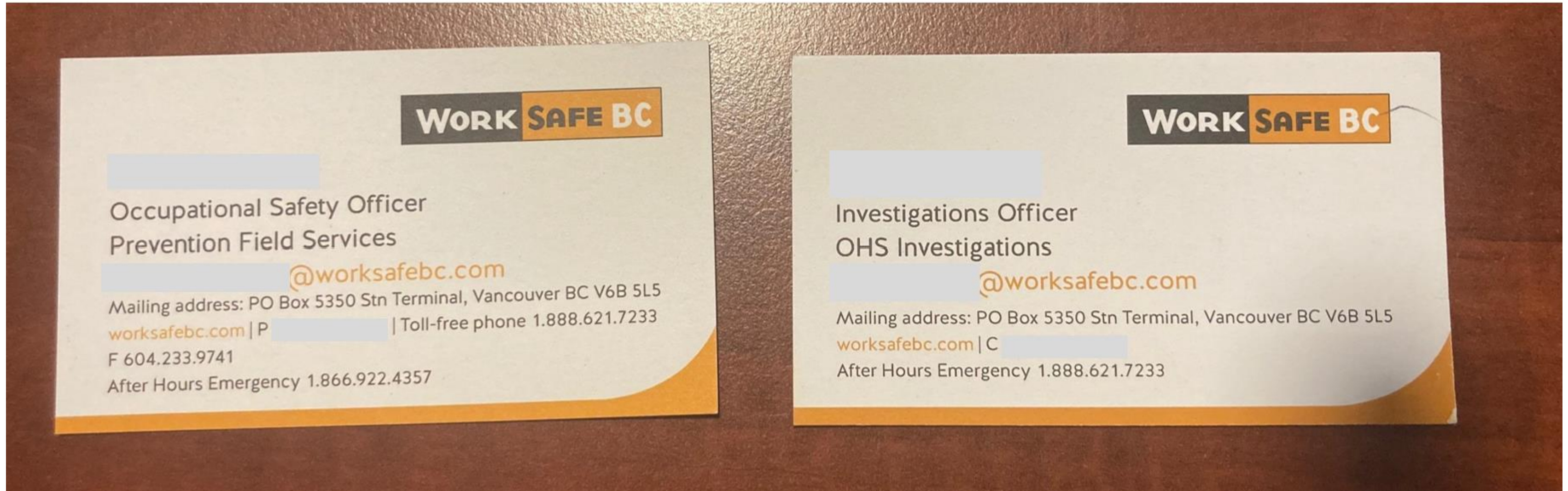
# Stage 2: the Regulators arrive

- First responders – fire and ambulance – often first to arrive
- Police (RCMP or municipal police), may further secure the scene
- WorkSafeBC will arrive

# Stage 2: the Regulators arrive

- **Prevention Officers**, aka “Occupational Safety Officer”, “Health and Safety Officer”, “Safety Officer”, “Hygiene Officer”
  - They issue orders for non-compliance and at times recommend penalties
  - Employers/workers have an obligation to assist, including answering questions and providing documents
- **Investigations Officers**, aka investigator, or OHS investigator in orders and at times penalties. They do not investigate for the purposes of prosecution, though evidence given to them may be obtained by investigative officers, including via warrant
  - Investigate “for cause”, aka “regulatory investigation”, aimed at identifying the cause of the incident and recommending corrective action. Usually results in orders and penalties
  - Employers/workers have an obligation to assist, including answering questions and providing documents
  - BUT also investigate for purposes of a potential prosecution – at which point the *Charter* applies

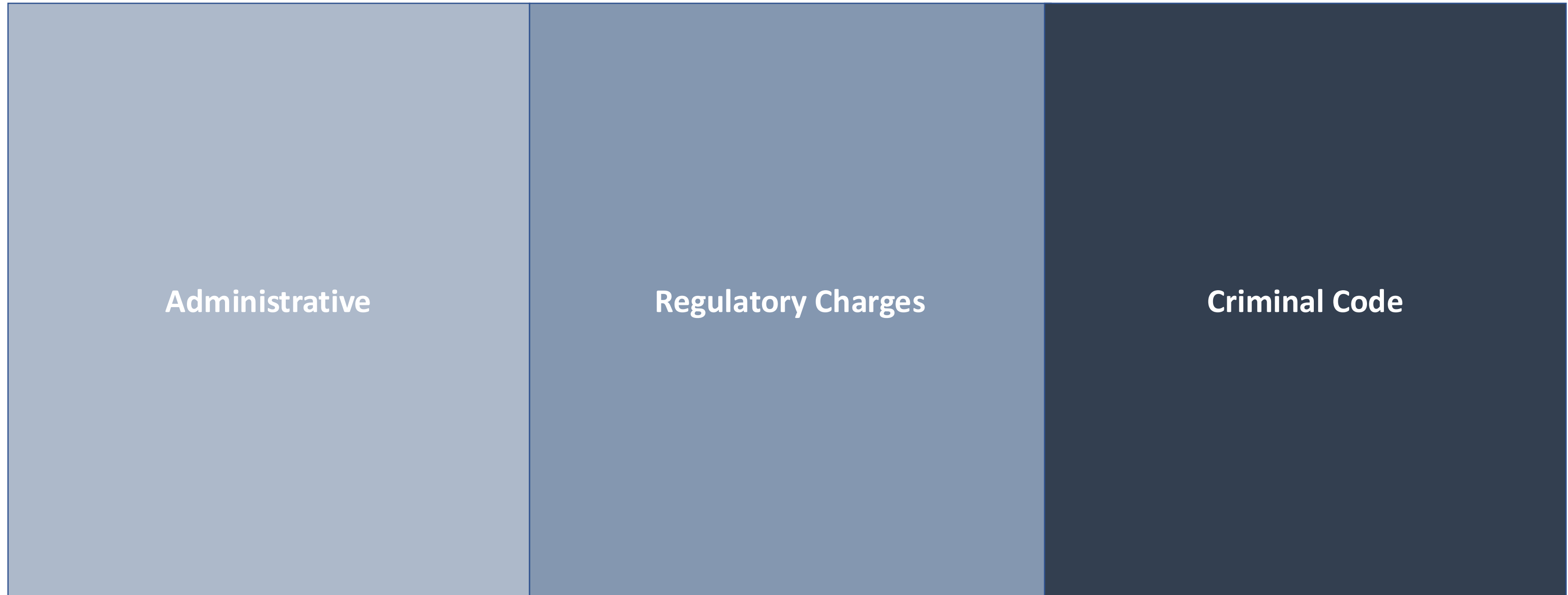
# Spot the difference



# Stage 2: Regulators are always adversarial

- *WCB v. Seattle Environmental*, 2020 BCCA 365
- [31] ... *Jarvis* does not stand for the drawing of a hard-line “point in time” analysis in all cases. That approach was helpful in the context of a taxpayer subject to a civil audit and potential reassessment. ... **In contrast regulatory inspections always take place, broadly speaking, in a “penal” or “adversarial” context because the powers of entrance and inspection to ensure compliance with an Act or regulations always raise the spectre of charges under the Act ...**

# Stage 2: Considerations



# Stage 3: The Employer's investigation

- Employer's preliminary incident investigation report is due to WorkSafeBC within 48 hours! Final report due in 30 days.
- Offence to provide false statements to WorkSafeBC
- Anything you say may be used against you. In WCAT A2001261:
  - "This [statement in the employer's report] is the most damning statement, from the employer's perspective, because it appears to concede that the organization of the work was not optimized for safety, and that supervision was also lacking."

# Stage 3: Considerations





# Stage 4: Site inspections

- WorkSafeBC prevention officer can inspect any part of the workplace without a warrant, same for IO if still “for cause”
  - Employer has right to accompany
- IO may obtain warrants if for prosecution
- Police will carry out searches via warrant

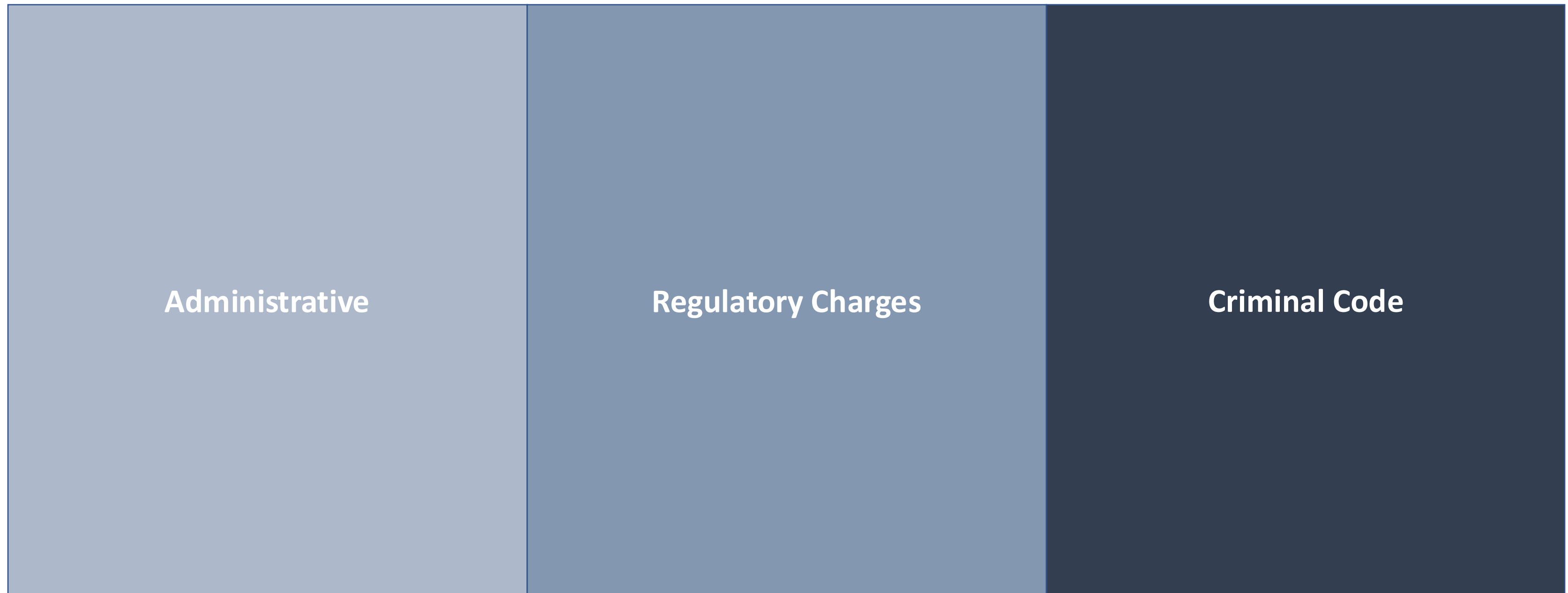
# Stage 4: Site inspections



# Stage 5: Interviews

- Prevention Officers ask questions; obligation to answer
- Investigation Officers can compel interviews *IF they are still in the “for cause” investigation*
  - Person being interviewed has the right to have someone present
- Investigation Officers will ask for voluntary interviews if it is a prosecutorial investigation
- Police Officers will only carry out voluntary interviews

# Stage 5: Considerations



# Stage 6: Document production

- WorkSafeBC prevention officer will ask for due diligence docs
- WorkSafeBC's Investigations Officers will usually compel document production if still for cause
  - Typical requests: workplace procedures, training records, video footage, names of witnesses, etc.
- Police will obtain warrants to seize records
- WorkSafeBC requests may cover documents seized by police

# What is Due Diligence?

- In the legal context, due diligence is a defence to regulatory offences.
- There are two branches to the defence:
  - Foreseeability, aka innocent mistake of fact
  - Reasonable measures

# What is Due Diligence?

- Due diligence is not a general standard of care. It is specific to the incident or offence.
- *R. v. Imperial Oil*, 2000 BCCA 553 (CanLII)  
*The focus of the due diligence test is the conduct which was or was not exercised in relation to the “particular event” giving rise to the charge, and not a more general standard of care.*

# What is Due Diligence?

- Due diligence is not perfection. A1702851 (Re), 2018 CanLII 135138 (BC WCAT):

[56] As acknowledged in a number of WCAT decisions, due diligence does not require perfection, and the defence of due diligence recognizes that there has been a violation. In other words, an employer may have acted with due diligence even though the violation occurred.



# Results

- Most WorkSafeBC investigations stay in the for cause realm. Reports produced within a year, and usually result in orders and penalties being issued.
- There is a 2-year limitation on laying regulatory charges
- There is no limitation on laying Criminal Code charges

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Recent changes affecting claims:

- As of November 2022, claim suppression
- As of January 2024:
  - Duty to co-operate
  - Duty to maintain employment

# Claim suppression – s. 73(2)

*(2) An employer or supervisor must not, by agreement, threat, promise, inducement, persuasion or any other means, seek to discourage, impede or dissuade a worker of the employer, or a dependant of the worker, from*

*(a) making or maintaining an application for compensation under the compensation provisions, or*

*(b) receiving compensation under the compensation provisions.*



# Duty to Co-operate - s. 154.2

- Duty on both worker and employer
- Must co-operate with each other and with WCB - communicate, id'ing “suitable work”, provide info to WCB
- Breach for worker – loss of benefits
- Breach for employer – penalty



# Duty to Co-operate - s. 154.2

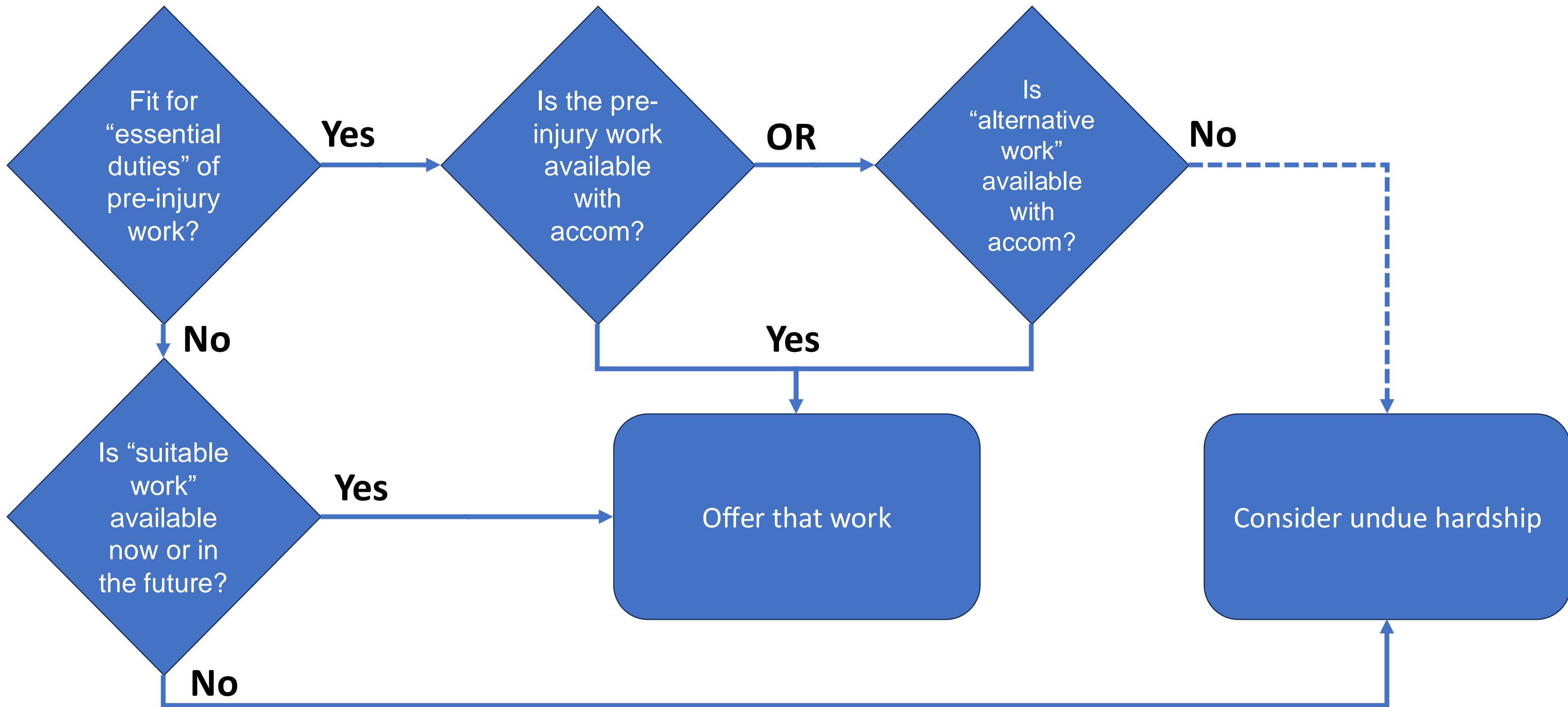
- “Suitable work” is a new term
- Proposed policy: “work that is safe, productive, and consistent with the worker’s functional abilities and skills”

# Duty to maintain – s. 154.3

Duty only applies if:

- worker was employed for 12 months pre-injury
- Employer regularly employs 20 or more workers

Duty lasts for 2 years from the date of injury



***\*the duty to accommodate is engaged throughout!***



# Collective Agreements

(1) If ... [a duty] conflicts with a term of a collective agreement that is binding on an employer in relation to a worker, the section in conflict prevails to the extent that it affords the worker a greater benefit than the term of the collective agreement.

(2) ... does not operate to displace a term of the collective agreement that deals with seniority.

# Terminating after return?

Termination within 6 months of a return to work is *deemed* to be a breach of the duty to maintain. WCB may issue penalty to employer.

Deeming will not apply if employer can prove there was another reason. Burden is on the employer.

# Penalties

Type of Breach	Small ER (\$800k payroll)	Large ER (\$80m payroll)
Claim suppression	\$8,000	\$800,000
Duty to co-operate	Claim costs, up to \$116k	
Duty to maintain	Greater of: year of wages up to \$116k OR \$58k, pro-rated for compliance	

# RTW just got more valuable?

The duty to co-operate and maintain (and the penalties) *only apply* to claims where there is wage loss.

*(2) This Division applies in relation to an employer and a worker of the employer if, because of an injury that arose out of and in the course of the worker's employment, the worker has been disabled from earning full wages at the work at which the worker was employed at the time of the injury.*

# Questions?