

Jail Term for BC Safety Violator: It's Not Quite What You Think...

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Originally published in *Employment Update* (February 2012)



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Nearly eight years have passed since the *Criminal Code of Canada* (the “*Criminal Code*”) was amended to create potential criminal liability on employers for health and safety violations in the workplace. Bill C-45 augmented existing provincial occupational health and safety laws by creating criminal negligence provisions under the *Criminal Code*. It established a duty on employers to protect health and safety in the workplace.

An employer in British Columbia is set to serve jail time related to safety infractions that endangered his workers. Unexpectedly, however, it was not the *Criminal Code* amendments that formed the basis for the jail sentence, but the finding that the employer was in contempt of court.

Background

On January 24, 2012, Arthur Moore, who ran an asbestos abatement and drywall removal business under the name AM Environmental, was sentenced to incarceration for a period of 60 days. Mr. Moore's incarceration stemmed from his refusal to obey an injunction obtained by BC's Workers' Compensation Board, which restrained him from doing business in the asbestos abatement and drywall removal industry. Mr. Moore had allegedly used employees, some as young as 14, to remove asbestos during demolition, without providing masks or other safety measures.

Despite the injunction, Mr. Moore continued to operate his business, under various names. As a result, the Board brought contempt proceedings against him.

Court Proceedings

Although the BC Superior Court declined to make a finding of contempt, the Board was ultimately successful on appeal. The BC Court of Appeal had this to say about his actions:

His misconduct grievously endangered workers under his direction. Unless he can some way mitigate his indifference to the lives and safety of his workers and his open defiance of the injunction, his misconduct requires a severe response.

The BC Court of Appeal found Mr. Moore guilty of contempt and remitted the matter back to the lower court for sentencing, at which time a sentence of incarceration for 60 days was ordered.

No Criminal Prosecution

The sentencing judge made it clear that Mr. Moore was being sentenced for civil contempt of court only. The Judge left it open to the Board to bring charges related to the underlying safety infractions. It appears, however, that no such prosecution has yet commenced. If no prosecution is

undertaken in this case it does raise some questions about Bill C-45 prosecutions more generally.

Bill C-45 Prosecutions

Workplace safety advocates no doubt expected that the amendments to the *Criminal Code* would mark a shift towards criminal prosecutions in occupational health and safety matters in addition to charges or fines under provincial health and safety legislation. In reality, however, we have seen very little movement in this regard. It may well be the case that existing penalties and fines in provincial occupational health and safety legislation, which can be very onerous indeed, are deemed sufficient in most cases. It may also be the case that in determining an approach to take the Crown is mindful that provincial occupational health and safety offences are strict liability offences and, accordingly, the Crown has a lower onus than in respect of a *Criminal Code* offence.

To date there have been approximately ten prosecutions under the Bill C-45 amendments, one of which was a private prosecution. Of these cases, two prosecutions are pending. Of the remainder, in three instances the charges were withdrawn or stayed, two cases resulted in acquittals, one guilty plea was entered and just one conviction obtained. With respect to the conviction, the defendant in *R v Scrocca*, was sentenced to two years less a day, however, his sentence was suspended and he did not serve any jail time.

Conclusion

Whether this case marks a shift towards a willingness to impose a jail term related to safety infractions remains to be seen. The two pending prosecutions noted above are high profile cases, *R v Metron Construction et al.* and *R v "Queen of the North" (BC Ferry Services Inc.)*, and it will be interesting to see whether jail time is imposed if convictions are obtained. We will continue to keep you updated as these cases progress, and on Bill C-45 prosecutions more generally.

If you have any questions about this article, or workplace health and safety matters more generally, please contact the author, or another member of our Employment and Labour Group. ■