

[Featured Case Comment, February 2016](#)

## **Scaffolding Collapse – Project Manager Sentenced to 3.5 Years**

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[Her Majesty the Queen v Vadim Kazenelson, 2016 ONSC 25](#)

A recent decision of the Ontario Superior Court of Justice (*Her Majesty the Queen vs. Vadim Kazenelson, 2012 ONSC 25*) deals with the duty imposed on project managers to take reasonable steps to prevent bodily harm to workers and highlights the possible severe consequences of a breach of this duty.

Metron Construction Corporation ("Metron") was engaged to repair and restore the concrete balconies of two eighteen-story apartment buildings in the City of Toronto. Metron hired Vadim Kazenelson as its project manager to oversee the completion of this work. The project was to be completed by November 30, 2009, but was delayed prior to its commencement. As a result of the delay, the Owner offered Metron a \$50,000.00 bonus if the project was completed by the end of December 2009.

In order to complete the work, Metron used motorized swing stages which were suspended from the roofs of the buildings to provide workers with access to the balconies on the various floors. On December 24, 2009, six workers stepped onto the swing stage. It collapsed, sending five workers plummeting thirteen stories to the ground below, killing four of them. On the day in question, there were six workers using the swing stage as opposed to the usual two, but only two lifelines in place to protect the workers from a fall.

Mr. Kazenelson was subsequently charged with four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm for his role in the incident. Mr. Kazenelson was ultimately convicted of all five offences and sentenced to three and a half years imprisonment on each count, to be served concurrently.

Justice MacDonnell stated:

*"Section s. 217.1 of the Criminal Code imposes a legal duty on everyone who has the authority to direct how another person does work or performs a task*

*"to take reasonable steps to prevent bodily harm to that person or any other person arising from that work or task". It was not disputed that in his role as project manager Mr. Kazenelson was subject to that legal duty.*

*As a matter of law and of industry practice every person working on a swing stage must be protected from the danger of a fall. To comply with that obligation at the Kipling site, Metron employed a 'fall arrest system'. A fall arrest system includes a full body harness with a lanyard that attaches to a vertical lifeline, which in turn is anchored to an independent fixed support on the roof of the building. Only one worker at a time may use a lifeline. Put another way, every person working on a swing stage must be attached to a separate lifeline. The applicable provincial legislation, industry standards, and the training courses provided to the industry by the Construction Safety Association of Ontario (CSAO) make it clear that the requirement that every worker who steps onto a swing stage be protected by a fall arrest system at all times is the fundamental rule for the protection of worker safety.*

*Mr. Kazenelson was well aware of this fundamental rule...".*

The Court found that while it was not Mr. Kazenelson's duty to personally inspect the swing stages every morning, he breached the duty imposed on him by failing to take any steps to prevent the workers from using the swing stage once he became aware that there were an insufficient number of lifelines in use. In failing to act, the Court held that Mr. Kazenelson showed a wanton and reckless disregard for the lives and safety of the workers and that his omissions amounted to criminal negligence.

In determining that Mr. Kazenelson breached his duty, the Court held that the duty imposed by section 27(1) of the *Occupational Health and Safety Act* (duty of supervisor to provide protective devices which must be used), as well as *O. Reg. 213/91* (the "*Construction Regulation*") (dealing with fall arrest systems) are instructive in identifying the steps it would be reasonable for a person subject to a duty under section 217.1 of the *Criminal Code* to take to prevent bodily harm in the workplace.

The Court held:

*"... a term of imprisonment is necessary to adequately denounce Mr. Kazenelson's conduct and to deter other persons with authority over workers and potentially dangerous work places from breaching the legal duty set forth in Section 217.1 of the Code to take reasonable steps to prevent bodily harm from befalling those workers".*

It is interesting to note that in separate proceedings, Metron pleaded guilty to criminal negligence causing death and was initially fined \$200,000.00. The Crown appealed. The Ontario Court of Appeal allowed the appeal and increased the fine to \$750,000.00. The Court of Appeal held:

*"The respondent was convicted of a very serious offence. It is a different and more serious offence than those found under the OHSA. As mentioned, the site supervisor's role should not serve to diminish the gravity of the offence. The intent of Bill C-45 is to trigger responsibility by the corporation for the conduct and supervision of its representative".*

[Editor's note – see [Legal Update 118, December 2013](#) for a discussion of the Ontario Court of Appeal decision with respect to the corporate liability.]

These decisions serve an important reminder of the importance of strictly adhering to work place safety requirements and of the potential criminal exposure of those involved in construction projects.

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