

Leave to Intervene in Sudbury v. Ontario (Ministry of Labour) Appeal to Supreme Court of Canada

Date: March 2, 2022

To: City Council

From: City Solicitor

Wards: All

SUMMARY

The City Solicitor is seeking authority for the City to bring a motion for leave to intervene in a Supreme Court of Canada case that will consider whether, under the Ontario *Occupational Health and Safety Act ("OHSA")*, a municipality has the responsibilities of an "employer" in respect of work that was or ought to have been performed by the contractor's employees on a construction work site.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council authorize the City Solicitor to bring a motion seeking leave to intervene in the appeal of *The Corporation of the City of Greater Sudbury v. Her Majesty the Queen in Right of Ontario (Ministry of Labour, Training and Skills Development)*, File 39754, before the Supreme Court of Canada, and to intervene in the appeal if granted leave by the Court.

FINANCIAL IMPACT

The City will incur some minor expenses for filing materials at the Supreme Court of Canada and, if leave is granted, participating in the appeal. These are estimated to be less than \$10,000.00 and will be paid for by the Engineering and Construction Services Division.

DECISION HISTORY

None

COMMENTS

Interpaving and Sudbury charged under the OHSA

In 2015, The Corporation of the City of Greater Sudbury ("Sudbury") hired Interpaving Limited ("Interpaving") to undertake water main repairs along Elgin Street in downtown Sudbury. As part of the construction project, in September, 2015, Interpaving was completing road resurfacing work at a signalized intersection.

A woman was struck and killed by a grader reversing in the intersection. Two particular safety issues were identified that contributed to her death:

1. Interpaving's grader was reversing without the assistance of any signaller; and
2. There was no fence preventing pedestrians from entering the construction area.

The Ministry of Labour, Training and Skills Development (the "Ministry") laid several charges against Interpaving for offences under the OHSA. Interpaving pled guilty and was convicted.

Sudbury was also charged with offences under the OHSA. The charges at issue on the appeal are the charges that Sudbury, as an employer, failed to ensure the grader was operating with the assistance of a signaller; that it failed to ensure there was a fence between the public way and the construction; and it failed to develop and implement a traffic protection plan. Sudbury pled not guilty and a trial was conducted.

As the trial judge found, Sudbury did have employees on the construction site; these employees inspected the work for compliance with the contract requirements. On particular occasions, where safety issues were identified, Sudbury staff raised those issues with Interpaving. Sudbury staff were not responsible for actually completing any of the construction work.

Sudbury's position at the trial and on appeal is that it is not an employer within the meaning of the OHSA just because it had field inspectors on site from time to time.

Sudbury was acquitted at trial of the charges that it breached duties owed as an employer.

The Ministry appealed the Ontario Court of Justice trial decision to the Superior Court of Justice, which upheld the trial decision. The Ministry appealed again to the Ontario Court of Appeal.

Ontario Court of Appeal Decided Sudbury was an "Employer"

Overtaking the decisions of the Ontario Court of Justice and Ontario Superior Court of Justice, the Court of Appeal found that Sudbury met the definition of an employer. It remitted the question of whether Sudbury had exercised due diligence as an employer

back to the trial court for reconsideration in accordance with its reasons. There has been no reconsideration of the question of whether Sudbury exercised due diligence as yet; whether this step is necessary depends upon the outcome of the appeal to the Supreme Court.

Sudbury Received Leave to Appeal to the Supreme Court of Canada

In 2021, Sudbury sought and was granted leave to the Supreme Court of Canada.

Issue of Who is an Employer on a Construction Site Raises Important Issues

As is well known, the City undertakes billions of dollars in construction work annually.

The City's contracts with construction companies specify that the construction companies are responsible for ensuring compliance with the requirements of the OHS Act to ensure the safety of their workers and members of the public.

At the same time, City inspectors periodically attend construction sites across the City to inspect the quality of the work and ensure compliance with contract requirements. The City's inspectors do not carry out construction work.

If the OHS Act is interpreted so as to assign the City the responsibility of "employer" at each construction site where the City's own staff attend to conduct quality inspections, the scope of responsibility and potential liability for the City may be greatly expanded. This creates potentially significant risk because, of course, City inspectors are not present at all times and will be unable to identify risks arising when they are not present. Moreover, even when they are present, inspectors may not recognize all risks that the construction company will or should be aware of and have trained their employees on because it is the construction company that has the particular expertise necessary for the project being undertaken. This is why the City endeavours to contract with companies competent to carry out their work safely and specifies that all work must be carried out in compliance with the OHS Act and all other applicable laws.

Motion for Leave to Intervene at the Supreme Court

In order to obtain leave to intervene in the appeal before the Supreme Court of Canada, the City must bring a motion. The Supreme Court has wide discretion in determining to whom leave may be granted but it will be necessary for the City to satisfy the Court that:

1. the City has an interest in the proceeding; and
2. the City will make submissions that are both useful and different from the submissions to be received by Sudbury or the Ministry.

If authority is given, the City anticipates preparing materials to be filed with the Court in April, 2022 detailing the City's interest in the appeal and outlining the legal arguments it seeks to advance.

In this regard, the City Solicitor has consulted, and will continue to consult, with the Deputy City Manager, Infrastructure and Development Services; Deputy City Manager, Leave to Intervene in *Sudbury v. Ontario (Ministry of Labour)*
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Corporate Services; Deputy City Manager, Community and Social Services; General Manager, Toronto Water; Chief Engineer and Executive Director, Engineering and Construction Services; General Manager, Transportation Services; General Manager, Solid Waste Management; Executive Director, Corporate Real Estate Management Division; and the General Manager, Parks, Forestry and Recreation. Staff support the City's participation in this case.

Given the City's significant interest in the outcome of the appeal, the City has a genuine interest in this case. In my view, it is important for the City to seek leave to intervene to actively participate.

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SIGNATURE

Wendy Walberg
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