

# Labour, Employment and Human Rights Law Bulletin

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Fasken Martineau DuMoulin LLP

## WCB Exposure Expands

Norm Trerise, Vancouver

On September 16<sup>th</sup>, 2009, the British Columbia Court of Appeal ruled on an occupational safety and health issue which will have significant ramifications for many businesses in British Columbia, notably franchisors and organizations utilizing contractors to provide services or carry out industrial projects.

In *Petro-Canada and Workers' Compensation Board of British Columbia*, the British Columbia Court of Appeal upheld the Workers' Compensation Board (hereinafter referred to as "WorkSafe BC") in its interpretation of the obligations of an employer under the *Workers' Compensation Act*, (hereinafter referred to as "the *Act*") s.115 as applying to a franchisor respecting the safety of the franchisee's employees at a service station.

The underlying facts concerned a 2005 robbery of a Petro-Canada service station where the perpetrator gained access behind the counter by kicking down a small swinging door that was the only barrier to entry and held a worker at knife point. The workers at the station were not employed by Petro-Canada but were employed by a franchise holder. Petro-Canada had no workers at or near the service station where the robbery

occurred. WorkSafe BC determined that, contrary to the Regulations, no action had been taken to improve the layout and design of the sales register counter to prevent such violent incidents. WorkSafe BC issued orders against Petro-Canada.

Petro-Canada sought a review of the orders but the Review Board held that Petro-Canada was indeed obligated to ensure the safety of workers under s.115 of the *Act*. On judicial review, the Chambers Judge found that the Review Officer had erred and quashed the Review Officer's decision, remitted the review back to the Review Division with instructions to interpret the term employer in accordance with his judgment. He had determined that it was unreasonable for WorkSafe BC to conclude that Petro-Canada was an employer under s.115 of the *Act*.

The Court of Appeal determined that Petro-Canada was an employer for the purposes of s.115 of the *Act* **and** that the real issue was whether Petro-Canada's work was being carried out at the service station and whether, "in the context of the case, Petro-Canada's degree of control over the workplace permitted a finding that it had failed to ensure the safety of workers."

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The Appeal Court held that the Review Officer had sufficiently considered Petro-Canada's control over the work place to demonstrate that Petro-Canada failed to take appropriate steps within its means to ensure workers' safety. The Review Officer had concluded that because Petro-Canada owns the premises, owns the products sold, chooses, dictates, supplies and prices the products, requires exclusivity on the part of the licensee, requires the licensee to hold all monies in trust until it receives them, pays the licensee a commission and labels the licensee as its agent for the purposes of sales transactions; that in operating the service stations, the licensee and its employees are in an overall sense carrying out the work of Petro-Canada. The Court of Appeal was unwilling to say that the Review Officer's reasons for that determination were unreasonable.

Based on this decision, significant responsibilities exist for franchisors that retain substantial control and for businesses that have contractors carry out work on their behalf whether it be construction work, logging services, mining operations or other work. The "owner" of the property on which the work is being carried out or the "owner" of the project will likely be targeted by WorkSafe BC with employer responsibilities under the Act as well as their owner and prime contractor responsibilities if, in their view, insufficient steps have been taken to ensure the safety of workers .

For more information on the subject of this bulletin, please contact the author or your lawyer:

**Norm Treise**

604 631 3122

[ntreise@fasken.com](mailto:ntreise@fasken.com)

## For More Information About Our Labour Employment & Human Rights Law Practice Group

### Vancouver

Kevin O'Neill  
604.631.3147  
[koneill@fasken.com](mailto:koneill@fasken.com)

Gary Catherwood  
604 631 3119  
[gcatherwood@fasken.com](mailto:gcatherwood@fasken.com)

Trish Janzen  
604.631.3144  
[pjanzen@fasken.com](mailto:pjanzen@fasken.com)

### Calgary

Katie Clayton  
403.261.5376  
[kclayton@fasken.com](mailto:kclayton@fasken.com)

### Toronto

Brian O'Byrne  
416.868.3347  
[bobyrne@fasken.com](mailto:bobyrne@fasken.com)

Ralph Nero  
416.868.3356  
[rnero@fasken.com](mailto:rnero@fasken.com)

Peggy A. McCallum  
416.865.4372  
[pmccallum@fasken.com](mailto:pmccallum@fasken.com)

### Montréal

Dominique Monet  
514.397.7425  
[dmonet@fasken.com](mailto:dmonet@fasken.com)

Louise Béchamp  
514.397.7573  
[lbechamp@fasken.com](mailto:lbechamp@fasken.com)

Benoit Turmel  
514.397.7596  
[bturmel@fasken.com](mailto:bturmel@fasken.com)

### Quebec City:

Jasmin Marcotte  
418.640.2040  
[jmarcotte@fasken.com](mailto:jmarcotte@fasken.com)

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### Vancouver

604 631 3131  
[vancouver@fasken.com](mailto:vancouver@fasken.com)

### Montréal

514 397 7400  
[montreal@fasken.com](mailto:montreal@fasken.com)

### Johannesburg

27 11 685 0800  
[johannesburg@fasken.com](mailto:johannesburg@fasken.com)

### Calgary

403 261 5350  
[calgary@fasken.com](mailto:calgary@fasken.com)

### Québec City

418 640 2000  
[quebec@fasken.com](mailto:quebec@fasken.com)

### Toronto

416 366 8381  
[toronto@fasken.com](mailto:toronto@fasken.com)

### London, U.K.

44 207 917 8500  
[london@fasken.co.com](mailto:london@fasken.co.com)

### Ottawa

613 236 3882  
[ottawa@fasken.com](mailto:ottawa@fasken.com)

### Paris

33 1 44 94 96 98  
[paris@fasken.com](mailto:paris@fasken.com)