Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

275 rue Slater Street, Ottawa, Ontario, K1P 5H9 – Fax : (613) 953-3326

Canada Labour Code
Part II
Occupational Health and Safety

Charmion Cole and Lynn Coleman
applicant

and

Air Canada
respondent

Decision No.: 06-004
February 28, 2006

This case was heard by appeals officer Douglas Malanka in Toronto, Ontario, on July 28 and September 6, 2005.

Appearances

For the Applicant
Charmion Cole, Ticket Agent, Air Canada
Lynn Coleman, Ticket Agent, Air Canada

For the Respondent
Rhonda R. Shirreff, Counsel
Dr. Edward Bekeris, Senior Director, Occupational Health Services, Air Canada
Kevin Brady, Manager, Passenger Services Operations, Toronto, Air Canada

Health and Safety Officer
Gerry McCabe, HRDC Labour Program, Toronto, Ontario

[1] This case involves the review by Appeals Officer Douglas Malanka of the appeals made by C. Cole and L. Coleman, Tickets Agents with Air Canada, pursuant to subsection 129(7) of the *Canada Labour Code, Part II*, (the *Code*). Subsection 129(7) permits an employee to appeal the decision of a health and safety officer that a danger does not exist for the employee.

[2] On March 21, 2003, C. Cole and L. Coleman, Air Canada Tickets Agents employed at Pearson International Airport in Toronto, Ontario, refused to work for fear of contracting Severe Acute Respiratory Syndrome (SARS) from passengers with whom they came in

contact at the airport. At the time of their refusals to work, the employees were responsible for providing passengers with information and direction while boarding or connecting to flights, and for checking passenger documents such as tickets, boarding passes, and passports.

[3] Following the employer's investigation of their refusals to work, the two employees continued to refuse to work and a health and safety officer was contacted.

[4] Health and Safety Officer (HSO) G. McCabe arrived the same day and investigated into the refusals to work. I retain the following from the documents he provided prior to the hearing and from his testimony at the hearing.

[5] L. Coleman had earlier refused to work on March 19, 2003, fearing that she was at risk of contracting SARS because her duties required her to be in close contact with passengers who had recently arrived from Hong Kong. She maintained that the close contact arose from the fact that many passengers arrive with their documents in their mouth because their hands are loaded with their baggage. She stated that she was also susceptible to the spray when passenger coughed and sneezed. Air Canada resolved that refusal to work by providing L. Coleman with protective gloves and allowing her to wear a face mask or respirator.

[6] On March 21, 2003, Air Canada informed employees of its new policy entitled "Severe Acute Respiratory Syndrome (SARS)". This was done verbally and in writing via Air Canada's internal publication called, "Aéro**NET**". I retain the following from the Aéro**NET** publication regarding Air Canada's SARS policy:

- the World Health Organization (WHO) issued an emergency travel advisory regarding SARS, an atypical pneumonia for which the cause was unknown;

- the WHO advised that there were no recommendations regarding travel restrictions or specific measures to be taken;

- according to the WHO, the main symptoms of SARS are:

  - high fever above 38.0 degrees Celsius and,
  - one or more respiratory symptoms including cough, shortness of breath, difficulty breathing, and
  - "close contact" with a person who has been diagnosed with SARS and/or recent history of travel to areas reporting cases of SARS. (WHO defined "close contact" to mean having cared for, having lived with, or having had direct contact with respiratory secretions and body fluids of a person with SARS);

- the airlines do not consider their employees at risk since the definition of close contact referred to by the WHO and Health Canada does not apply to any of its employees; and

- since airline employees are not exposed to close contact with passengers, personal protective equipment is not necessary.

[7] The evidence of Air Canada was that the policy relied generally on the findings of the WHO and specifically on the Health Canada advisory document entitled, "Health Canada – Warnings, Advisories - Update #5, Severe Acute Respiratory Syndrome". I retain the following from Health Canada's Update # 5:

- it is Health Canada's position that Government of Canada workers are not considered to be at high risk of infection because of the limited contact with and proximity to the individuals. Therefore, Health Canada advises that the use of masks is not necessary.

- Health Canada has asked officials at Pearson and Vancouver International Airports to carefully monitor passengers arriving from Hong Kong and Singapore to see if anyone has flu-like symptoms;

- Health Canada has sent staff to Pearson and Vancouver International Airports to assist in the screening of passengers arriving from Hong Kong and Singapore to see if anyone has flu-like symptoms. These symptoms include a high fever over 38.0 degrees Celsius and one or more of the following respiratory symptoms: cough, shortness of breath or difficulty breathing;

- Health professionals from Health Canada's Workplace Health and Public Safety Programme were on site at Pearson and Vancouver International Airports to provide advice for federal employees.

[8] At 07:35, Marshall Port, Manager, Air Canada, advised L. Coleman that she was no longer permitted to wear protective gloves and a face mask while on duty to protect against contracting the SARS pursuant to Air Canada's Aéro**NET** policy on SARS.

[9] After reading the Aéro**NET** publication, L. Coleman reiterated that she was exposed in her work to bodily fluids from passengers who carry their documents in their mouth and from passengers who sneeze and cough in her presence and she refused to work. For the same reason, she refused to be reassigned to another location at the airport.

[10] When similarly advised that she could no longer wear protective gloves and a face mask, C. Cole refused to work for the same reason stated by L. Coleman. However, HSO McCabe noted C. Cole had additional concerns related to previous events which were as follows:

- on March 18, 2003, C. Cole was working at the International Check-In Desk in Terminal One and saw an unaccompanied minor exhibiting flu-like symptoms who had arrived on a flight from Vancouver. The minor made a connection and continued on her journey to Grand Cayman. Management was not able to explain to her how this had occurred without intervention;

- the incident prompted C. Cole to request disinfectant soap to wash her hands after dealing with a passenger displaying flu-like symptoms. Despite Air Canada's policy that employees are to wash their hands after dealing with such passengers, Air Canada had not yet provided the soap at the time of her refusal to work on March 21, 2003; and

- on March 18, 2003, a representative from the Canadian Auto Workers (CAW) union met with C. Cole and told her that Jeff Bennie of the CAW had told her that employees had the right to use precautions to protect their health and safety from SARS.

[11] During HSO McCabe's investigations of the refusals to work, K. Brady advised him that Dr. Bekeris had confirmed Health Canada's view that personal protective equipment was unnecessary for Air Canada employees. He added that Air Canada's position was that the wearing of gloves and masks is not part of uniform policy and would not be allowed.

[12] In connection with his investigation at the work place, HSO McCabe consulted with his Technical Advisor, Kerry Piccolotto, and HRSDC Labour Program's regional and national headquarters. He also consulted with Dr. Paul Varughese, Head, Surveillance of Vaccine Preventable Diseases, Division of Immunization, Bureau of Infectious Diseases, Centre for Infectious Disease Prevention and Control, Population and Public Health Branch, Health Canada and S. Courage, RN, BScN, Coordinator, National Office of Health Emergency Response Teams, Office of Public Health Security, Centre for Emergency Preparedness and Response, Population and Public Health Branch, Health Canada. Both Health Canada officials were at the airport as quarantine officers.

[13] HSO McCabe decided that a danger did not exist for either C. Cole or L. Coleman based on the expert advice he received for the following reasons:

- SARS is a condition affecting individuals who develop a fever, a cough, and difficultly breathing, and who have recently traveled to Asia or have been in close contact with someone who has SARS;

- Canadians that had contracted SARS and had not recently traveled to Asia, all had household contact with a person infected with SARS, or had provided care to a person infected with SARS;

- it was unlikely that the work performed by L. Coleman and C. Cole would bring them in "close contact" with a person infected with SARS in the circumstances specified by the WHO;

- personal protective equipment was not necessary to protect the health and safety of either C. Cole or L. Coleman from wet documents pursed in the mouths of passengers or from coughs and sneezes from passenger within one metre. This was based on the medical expertise he obtained from the Health Canada website and directly from Health Canada officials at Pearson International Airport during the course of his investigation who had knowledge of the work that ticket agents had to perform; and

- Dr. Bekeris had agreed with Health Canada that personal protective equipment such as gloves and face masks were not necessary for government workers and airline employees.

[14] HSO McCabe confirmed that he was also influenced in his finding that a danger did not exist for L. Coleman or C. Cole by the following:

- Health Canada health professionals were at Pearson International Airport to provide information or assist ill passengers;

- there was on-board screening of ill passengers by flight crews during flight; and

- telephone conference calls were being held daily to brief government departments such as HRSDC, CCRA, CIC and the RCMP on SARS.

[15] In testimony, HSO McCabe stated that he considered the job descriptions for L. Coleman and C. Cole in his decision, but conceded that he was not expert enough on SARS to consider specific tasks in the job description.

[16] L. Coleman testified at the hearing and I retained the following statements.

[17] She stated that she has more than 32 years of service with Air Canada at Pearson International Airport. As a ticket agent, she is required to check-in passengers and board and disembark passengers. In connection with boarding passengers, she stated most passengers present themselves at the gate with tickets and boarding passes in their mouth or in contact with other parts of their bodies other than their hands. As a result, she is regularly required to handle documents that are damp with saliva, respiratory fluids or sometimes bodily fluids such as sweat. This occurs with less frequency when checking-in or unloading passengers.

[18] According to her testimony, L. Coleman stated that she is not able to stop work when she comes in contact with wet or damp tickets or other documents to wash her hands. This is because ticket agents have time standards for checking-in, boarding and deplaning passengers that make it impossible. If a flight is delayed, Air Canada pays a penalty to the airport authority.

[19] L. Coleman testified that she is within one metre distance of passengers for a couple of minutes if they do not require special assistance. However, when dealing with passengers who have special needs it can take ten to twenty minutes. She conceded that there may be up to four other agents and so she is not alone to deal with every Air Canada passenger that is in the process of checking-in, boarding or disembarking.

[20] L. Coleman also testified that she had no medical training and, even with her experience, could not differentiate the symptoms of SARS listed by the WHO and Health Canada as opposed to someone suffering from a severe allergy, cardio problems or the common cold or flu. The situation was exacerbated because she had no way of knowing where

passengers had been, there were no translators for questioning passengers who could not communicate with her in English and the information cards that Health Canada was distributing to passengers regarding SARS symptoms were only in English and French, whereas the passengers often only spoke Chinese. Moreover, no passenger had ever admitted to her that they were sick. She conceded, however, that she was required by Air Canada to refer any passengers of questionable health to a manager or a quarantine officer for further assessment. She stated that, in her thirty-two years of experience, she had never stopped a passenger from flying due to flu-like symptoms.

[21] Finally, L. Coleman testified that, until the Aéro**NET** policy on SARS, there had not been any consultation with employees, or employee briefing by Air Canada, regarding SARS. Prior to the Aéro**NET**, Air Canada did not consider SARS a risk for its employees. Moreover, even with the Aéro**NET** policy on SARS, there was no information regarding the method of transmission of SARS, the amount of contagion necessary to become infected, the viability of the virus outside of the body or on inanimate objects and whether or not someone could be infectious without symptoms.

[22] C. Cole also testified at the hearing and I retain the following regarding her testimony.

[23] At the time of her refusal to work, C. Cole was a member of the International Ticket Team and was employed as a "point agent." In this capacity, she was required to meet all passengers getting off international flights to check their boarding pass and ensure that only authorized luggage was placed on the running luggage belt. She testified that this brought her into close contact with passenger sneezing and coughing.

[24] In connection with ensuring that only permitted passenger luggage went on to the running luggage belt, C. Cole testified that it was impossible for her to leave her post to go and frequently wash her hands as recommended by Air Canada. She explained that her area was unsecured and, if she left to wash her hands, anyone could place luggage on the running belt. She conceded that she could leave the area if management was able to get a replacement but that staffing at Air Canada negated this as a practical option.

[25] With regard to boarding passes, C. Cole testified that passengers regularly held documents in their mouths or other body locations not including their hands while handling their luggage and so she regularly had to handle boarding passes that were damp from saliva, respiratory fluids or other bodily fluids. Because passengers often did not speak English or French, she often had to get the permission of passengers by pointing to go into their pockets and hand bags for accessing the boarding passes. During these occasions, she had to handle tissues and other personal items in the pockets and purses of passengers.

[26] C. Cole echoed the position of L. Coleman that Air Canada had not provided employees with information about SARS or presented any information sessions or briefings on SARS prior to the day of her refusals to work.

[27] C. Cole stated that subsequent SARS information was based on information from the WHO, the Center of Disease Control and Health Canada and from newspaper articles. She said that she remained dubious about what Air Canada was communicating to its employees because Air Canada had not reviewed the information they were receiving by looking at the specific employee tasks. She noted, for example, that Health Canada had recommended that face masks were unnecessary in respect of SARS but were silent regarding the use of protective gloves.

[28] In her testimony, C. Cole also echoed the position of L. Coleman that she had no medical training and was unable to determine whether the symptoms displayed by a passenger were SARS symptoms or symptoms of some other disease or condition. She stated that she has never denied travel to a passenger exhibiting flu-like symptoms.

[29] C. Cole testified that on March 28, 2003, following her refusal to work, she felt ill at work and noted that she had a fever and a cough. She went to an Air Canada nurse with the symptoms and advised her that she had been recently receiving therapy at a hospital where patients suffering from SARS were treated. The nurse had her immediately don a face mask to protect others and told her she should go home. When she informed her manager of the nurse's recommendation, she was advised that she would be docked pay if she left. She remained at work for the rest of her shift and continued to wear the face mask and gloves despite Air Canada's policy to the contrary.

[30] K. Brady testified at the hearing and I retain the following.

[31] He confirmed that, as manager of passenger operations, he was familiar with the work of all ticket agents including L. Coleman and C. Cole. He said that ninety percent of all ticket agents work in close proximity to passengers and he made no distinction in this regard to the work performed by L. Coleman and C. Cole.

[32] K. Brady clarified that "close proximity", which he said was estimated to be anything within six feet, did not constitute the term "close contact" referred to by the WHO or Health Canada. This was because the "close proximity" experienced by ticket agents did not involve caring for a person suffering from SARS or being a family member in a home where someone had SARS.

[33] With regard to wet boarding passes and documents, K. Brady said he had no reason to disagree with L. Coleman and C. Cole that passengers carry their boarding passes and other documents in their mouth when their hands are being used to carry luggage. However, he held that the ticket agents could refuse to handle a boarding pass that was in a passenger's mouth and, assuming the passenger could speak English, instruct the passenger to present the documents so that the agent could inspect them.

[34] K. Brady testified that Air Canada leads (or supervisors) communicated Air Canada's corporate policy regarding SARS to the employees. He added that leads remained current regarding SARS by monitoring Air Canada's Aéro**NET**, the internet and on-going advisories of Health Canada, the WHO, the Centre of Disease Control (CDC) and other

organizations having information regarding SARS. They communicated the updates to employees at briefing meetings prior to each shift and posted the information in locations known to employees.

[35] While, K. Brady held that Aéro**NET** constituted Air Canada's company wide corporate policy regarding SARS, he was unable to comment on a CAW document on SARS which was dated April 3, 2003 and appeared to be signed by the co-chairs of the Vancouver Airport Passenger Services health and safety committee. The CAW document, which was circulated to C. Cole and L. Coleman:

- acknowledged that Health Canada, the WHO and the CDC were the experts in the field of SARS and represent the most reliable sources of information;

- confirmed that hand washing was the most important measure in preventing the spread of infection; and

- noted Health Canada's position that the wearing of face masks is not necessary for employee protection and so Air Canada was not required to provide them to employees.

[36] However, the CAW advisory confirmed that rubber gloves and wipes were available for use by employees, and that employees were entitled to wear the masks if they provided their own.

[37] With regard to the testimony of L. Coleman and C. Cole that their job responsibilities did not permit them to go and wash their hands after handling damp documents, K. Brady commented that Air Canada operating procedures permitted employees to call their lead for a replacement. However, he could not reply to their claims that, in practice, one could not rely on obtaining relief because of understaffing by Air Canada. K. Brady held that a ticket agent could shut down their unit and abandon it if there was a serious health and safety issue. However, he agreed that such action would adversely affect Air Canada's flight schedule(s) and costs.

[38] Dr. Bekeris testified at the hearing as a medical expert as opposed to an expert on infectious diseases. I retain the following from his testimony.

[39] In March of 2003, Air Canada was obtaining its information regarding SARS from Health Canada, the CDC, the WHO, the Greater Toronto Area (GTA), Provincial Health/Medical Authorities and his office who was reviewing medical/scientific papers on SARS. Dr. Bekeris also participated in numerous conference calls including forums involving all air transport companies chaired by the GTA and the Canadian Accident Transport Agency. He noted that one of the main areas of discussion was the transmissibility of SARS and the risk to air transport employees and employee groups relative to contracting SARS from passengers. He also noted that information was being updated on a daily basis.

[40] Based on the information available in March, 2003, Dr. Bekeris stated that SARS was emerging in clusters connected with health care workers in a hospital setting and with family members giving home care to someone in the residence suffering from SARS. Thus, the main risk was to health care workers taking care of someone with SARS. It was generally thought that the risk to the general public, including employees working at airports was low.

[41] During this time, Dr. Bekeris stated that Air Canada was communicating the following information to its employees:

- updates regarding SARS;
- symptoms related to SARS;
- meaning of "close contact";
- instruction that ill passengers were to be referred to supervisors or quarantine officers; and
- confirmation that protective gloves and respirators were unnecessary.

[42] Dr. Bekeris opined that a lay person with no medical training could easily recognize the symptoms of SARS. He stated that a person with high fever would look toxic and would have one or more respiratory symptoms which include coughing, shortness of breath and trouble breathing. He observed that most lay people could agree if someone looked that sick. He testified that it would be difficult to mask SARS symptoms with medication.

[43] Dr. Bekeris confirmed that a person was only contagious relative to SARS if exhibiting the symptoms of SARS and that the consensus of infectious disease experts was that SARS was spread by contact with saliva, respiratory fluids and bodily fluids. He stated that he was not aware of anyone contracting SARS from an inanimate object, but had concerns with passenger ticket agents handling boarding passes and other documents that were wet with respiratory and other bodily fluids. He stated that passenger ticket agents should decline to accept such passenger documents.

[44] Dr. Bekeris stated that wearing protective gloves would not add any additional protection from the SARS virus unless the skin on the person's hand was broken. In fact, wearing gloves could add to risk if the person did not change or wash the gloves frequently so as to avoid ingesting or otherwise absorbing the virus on the gloves into their body. Dr. Bekeris added that if an employee is provided gloves or other personal protective equipment (PPE) devices they must be instructed and trained on how to safely remove the PPE and dispose of it to avoid contamination from the PPE itself. This also applied to the use of face masks or respirators. Dr. Bekeris could not confirm if the training was provided to any employees because the use of personal protective equipment falls under the domain of occupational safety in Air Canada which is not his area of responsibility. He stated that he just deals with health issues.

[45] Dr. Bekeris further maintained that protective gloves are primary worn by health care workers who must deal with gross contamination of blood and bodily fluids. He stated that passenger ticket agents at Air Canada should immediately refer ill passengers to medically qualified staff and not deal further with the passenger.

[46] In response to the applicants, Dr. Bekeris advised that passenger ticket agents should wash their hands (or gloves) as soon as possible after handling something that has been contaminated by saliva or respiratory fluids to reduce the opportunity for ingestion or absorption of the virus via their mouth, eyes or wounds. For hand washing, Dr. Bekeris recommended the use of soap and water or a commercial waterless hand lotion.

[47] Dr. Bekeris was unable to confirm whether or not Air Canada had consulted with its policy health and safety committee or work place health and safety committees in the development, implementation and monitoring of its SARS corporate policy.

[48] In summation, L. Coleman and C. Cole argued that in March, 2003, information regarding SARS was scant and ever changing. Notwithstanding the WHO's definition of "close contact" they maintained that the requirement for them to handle boarding passes and other documents carried by passengers in their mouths brought them in close contact with passenger saliva and respiratory fluids. They further held that they worked within one meter of passengers when verifying passenger documents and providing information which lasted typically from a few seconds up to twenty minutes. It was then that there was opportunity for exposure to SARS.

[49] L. Coleman and C. Cole further maintained that they had no medical training to differentiate between the flu-like symptoms consistent with SARS as opposed to ordinary flu-like symptoms.

[50] Finally, L. Coleman and C. Cole argued that Pearson International Airport received flights from countries reporting SARS cases and so there was a potential for contracting SARS in the circumstances in which they worked.

[51] In her summation, Ms. Shirreff cited the following decisions for interpreting and applying the definition of danger for determining whether a danger existed or not for L. Coleman or C. Cole. The decisions were:

- *Canada (Attorney General) v. Fletcher (C.A.)* [2002 F.C.A.424 (Desjardins, Decary and Noel JJ.A.), November 5, 2002

- *Welbourne v. Canadian Pacific Railway* (Mar 22, 2001) Decision No. 01-008 (Cadieux);

- *Chapman and Canada (Customs and Revenue Agency)*, [2003] C.L.C.A.O.D. No. 17, Decision No. 03-019, Appeals Officer Douglas Malanka; and

- *Verville v. Canada (Correctionnal Services)* [2004] F.C.J. No. 940, 2004 FC 767, Docket T-1207-02.

[52] With regard to the *Fletcher supra* decision, Ms. Shirreff referred me to paragraphs 18 and 19 which she maintained establishes that the right to refuse mechanism in the *Code* is an emergency measure and an *ad hoc* opportunity to avoid injury or illness. Paragraphs 18 and 19 read:

> [18] The mechanism is an ad hoc opportunity given employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation. It is the short-term well-being of an employee which is at stake, not a hypothetical or speculative one.
>
> [19] The mechanism is an emergency measure. It is a tool placed in the hands of the employee when faced with a condition that could reasonably be expected to cause injury or illness to him before the hazard or condition can be corrected. See Scott C. Montani (1994), 95 di 157, at page.

[53] Ms. Shirreff held that the *Welbourne supra* decision establishes that a danger can be prospective, but that the term reasonably expected in the definition of danger in section 122.1 of the *Code* excludes a hypothetical or speculative risk. She referred me to paragraphs 19 and 20 which read:

> [19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.
>
> [20] The expression "before the hazard or condition can be corrected" has been interpreted to mean that injury or illness is likely to occur right there and then i.e. immediately[1]. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or future activity, thus appearing to remove from the previous concept of danger the requisite that injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity altered. With this knowledge in hand, one cannot wait for an accident to happen, thus the need to act quickly and immediately in such situations.

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[1] *Brailsford v. Worldways Canada Ltd. (1992), 87 di 98 (Can. L.R.B.)*
Bell Canada v. Labour Canada (1984), 56 di 150 (Can. L.R.B.)

[54] Ms. Shirreff held that the standard of review for a finding of danger appears in paragraph 80 of the *Chapman supra* decision. Paragraph 80 reads as follows:

> [80] Taking all of this into account, and with reference to the aforementioned criteria, it is my opinion that, for a finding of danger in respect of a potential hazard or condition or future activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that:
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> - the potential hazard or condition or future activity in question will likely present itself;
> - an employee will likely be exposed to the hazard, condition or activity when it presents itself;
> - the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and,
> - the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.

[55] Ms. Shirreff further observed that the above noted criteria is referred to in paragraph 33 of the *Verville supra* decision. Paragraph 33 reads:

> [33] In his decision, the appeal officer states that he relies on his decision in *Parks Canada Agency, supra*, where he found that:
> "In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, on the basis of the facts gathered during his investigation that:
>
> - the future activity in question **will** take place [See Note 2 below];
> - an employee **will** be exposed to the activity when it occurs; and
> - there is a reasonable expectation that:
> - the activity **will cause** injury or illness to the employee exposed thereto; and,
> - the injury or illness will occur **immediately** upon exposure to the activity.

[56] With regard to the first criteria, Ms. Shirreff stated that neither L. Coleman nor C. Cole submitted any evidence to establish that it was likely that a passenger exhibiting SARS symptoms would arrive at the airport during their work shift. She noted, in this regard, that in-flight crews were monitoring international passengers on route for SARS symptoms and had instructions to refer such passengers to medical officers at the airport.

[57] In connection with the second criteria, Ms. Shirreff maintained that there was no evidence beyond a mere possibility that a passenger exhibiting SARS symptoms would present themselves before L. Coleman or C. Cole. She pointed to the evidence that neither L. Coleman nor C. Cole were required to meet with every Air Canada international passenger as there were other ticket agents on duty, and that they could avoid contact with any passenger exhibiting SARS symptoms by referring them to supervisors. She reiterated

that in-flight crews were monitoring international passengers on route for SARS symptoms and had instructions to refer such passengers to medical officers at the airport.

[58] Even if the first two criteria were met, Ms. Shirreff held that there was no danger for L. Coleman or C. Cole because they were never in "close contact", as defined by the WHO and Health Canada with the passengers. Both the WHO and Health Canada confirmed that close contact was the type of contact that was consistent with a health care worker in a hospital or home care situation. Moreover, she pointed out that the opinion of the WHO and Health Canada was that a person was not contagious unless they were symptomatic. Lastly, she reiterated that employees, including L. Coleman and C. Cole, were advised to refer any passenger exhibiting SARS symptoms to their supervisor.

[59] Ms. Shirreff then referred specifically to the following evidence of Dr. Bekeris, and HSO McCabe and the documents from the expert agencies which included the CDC, the WHO and Health Canada:

- gloves protect the hands against exposure to the SARS virus where there are open cuts or wounds. Otherwise, the skin is as impermeable as the glove material. What is important is that the hands are washed regularly and thoroughly. This may not be done if the person is wearing gloves giving the sense of false protection;

- gloves are normally used where gross contamination exists;

- gloves and respirators (face masks) may pose a real risk of contamination if they are not removed and disposed of properly; and

- simple contact with saliva or respiratory fluids from a passenger will not result in infection unless the passenger is symptomatic with SARS.

[60] Finally, Ms. Shirreff argued that HSO McCabe's finding that the risk of exposure to SARS did not pose a danger to L. Coleman or C. Cole was consistent with the decision of other health and safety officers in other situations where an air transport employee refused to work because of the fear of contracting SARS. Those cases included:

- *Chapman supra*;

- Ponzi and Air Canada Tango Operations, [2005] C.L.C.A.O.D. No. 24, Decision No. 05-025;

- Crawford and Air Canada, , [2004] C.L.C.A.O.D. No. 10, Decision No. 00-009; and

- Aerogard Co. and International Assn. of Machinists and Aerospace Workers, [2004] C.L.C.A.O.D. No. 51, Decision No. 04-0248.

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[61] The issue in this case is whether or not HSO McCabe erred when he decided that a danger of contracting SARS in connection with their work as Ticket Agents at Pearson International Airport did not exist for L. Coleman or C. Cole.

[62] For deciding the matter, I must consider the interpretation and application of the applicable provisions in the *Code*, the facts in the case and the relevant jurisprudence.

[63] In September of 2000, the definition of "danger" was redefined at subsection 122(1) of the *Code* as follows:

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.	"danger" Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

[64] The first decision of an Appeal Officers regarding the interpretation and application of the new definition of danger was issued by Appeals Officer Serge Cadieux in the *Welbourne v. Canadian Pacific Railway* (Mar 22, 2001) Decision No. 01-008. The relevant excerpts highlighted by Ms. Shirreff have already been cited in this decision and will not be repeated here. That stated, however, I would make the following observations with regard to paragraphs 17, 18 and 19 of the Welbourne decision.

[65] In paragraph 17 of the *Welbourne* (*supra*) decision, Appeals Officer Serge Cadieux explained that the previous definition of danger[2] was believed to be too restrictive to protect the health and safety of employees. He stated that the new definition broadened the concept of danger and allowed for potential hazards or conditions or future activities to be taken into account. He opined that this better reflected the purpose clause in section 122.1 of the *Code*.

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[2] *Code* was amended in September of 2000. Prior to this amendment, the definition of danger read:
"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.

[66] Following his review of the dictionary definition for the terms "potential" and "future activity", Appeals Officer Cadieux concluded in paragraphs 18 and 19 that "danger" can be prospective to the extent that the hazard or condition or activity is "capable" of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition could be corrected or the activity altered.

[67] Recently, two decisions have emanated from the Federal Court that represented a significant searching and testing of the interpretation and application of the revised definition of danger. These decisions include the decision of:

- Justice Tremblay -Lamer in the case of Douglas Martin and Public Service Alliance of Canada and the Attorney General of Canada, Citation: 2003 FC 1158, Docket T-950-02, 2003/10/06, and

- Justice Gautier in the case of Juan Verville and Correctional Service Canada, Citation: 2004 FC 767, Docket T-1207-02, 2004/05/26.

[68] In her decision, Justice Tremblay-Lamer confirmed the *Parks Canada supra* decision which included reference to the Welbourne *supra* decision. She did not comment on the standard of review described in each decision, except to clarify that the *Code* does not specify that the injury or illness must occur immediately for a finding of danger. However, she wrote that the new definition of danger still requires an impending element because the injury or illness has to occur before the hazard or condition can be corrected or future activity altered.

[69] Justice Gauthier's decision followed and considered the decision of Justice Tremblay-Lamer. Justice Gauthier wrote in paragraph 36 of her decision that:

> [36] …Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[70] Taking the above noted *Code* provisions and the findings of Justices Tremblay -Lamer and Gauthier, it is my opinion that a danger exists where the employer has failed, to the extent reasonably practicable, to:

- eliminate a hazard, condition, or activity;

- control a hazard, condition or activity within safe limits; or

- ensure employees are personally protected from the hazard, condition or activity;

and one determines that:

- the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto **before the hazard, condition or activity can be corrected or altered**; and

- the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability. [My underline.]

[71] As pointed out by Justice Tremblay-Lamer, the new definition of danger still requires an impending element because the injury or illness has to occur before the hazard or condition can be corrected or future activity altered.

[72] In this case, it would have been unreasonable to expect Air Canada to eliminate the risks related to contracting SARS as SARS was not under Air Canada's control.

[73] According to Dr. Bekeris' evidence, Air Canada principally addressed the risk of its employees contracting SARS via their policy directive on SARS. The policy directive relied on the information Air Canada had received directly and indirectly from expert agencies which included Health Canada, the Centre of Disease Control, the WHO, the Greater Toronto Authority, Provincial Health/Medical Authorities. In particular, Air Canada relied on the definition of "close contact" provided by Health Canada and other expert agencies which Air Canada held defined "close contact" as the type of contact consistent with a health care worker caring for a SARS patient in a hospital or a family member caring for a SARS patient in a home setting. Dr. Bekeris further pointed out that measures were in place at airports and on-board aircraft to inform passengers and employees regarding SARS and SARS symptoms to identify and segregate passengers displaying flu-like symptoms and to encourage passengers suffering flu-like symptoms to self identify themselves to officials. With these measures, Air Canada held that it was unlikely that a ticket agent would ever be in close contact with a passenger with SARS.

[74] While it was laudable that Air Canada sought the advice of the expert agencies in the development of its SARS policy, Air Canada did not provide any evidence in this review, that it consulted with its employees on the advice in the development, implementation and monitoring of the SARS policy. In this regard, I refer Air Canada to paragraph 125.1(f) of the *Code* that requires employers to investigate and assess in consultation with its work place health and safety committee hazardous substances to which its employees may be exposed. What is specifically required is prescribed in Part X (Hazardous Substances) of the *Canada Occupational Health and Safety Regulations* (COHSR). In connection with this, I would also encourage Air Canada to review Part XIX (Hazard Prevention Program) of the COHSR that was proclaimed on November 28, 2005.

[75] Air Canada also had an obligation under section 134.1 (Policy Health and Safety Committees) and 135 (Work place Health and Safety Committees) of the *Code* to essentially consult with its Policy Health and Safety Committees and its Work Place Health and Safety Committees respectively regarding the development, implementation and monitoring of its health and safety policies and programs. Such programs include

employee education and the provision of PPE. In its work, the committees are to have full access to employer reports, studies and tests relating to the health and safety of employees in the work place.

[76] In this regard, Dr. Bekeris was unable to confirm whether or not Air Canada had consulted with its policy health and safety committee or work place health and safety committees in the development, implementation and monitoring of its SARS corporate policy. The totality of the evidence in this case suggested to me that the involvement of the policy and work place health and safety committees was not significant.

[77] It is clear from the evidence that Air Canada's SARS policy did not address the following work place concerns that C. Cole and L. Coleman raised in connection with their refusals to work:

- despite the fact that ticket agents had complained in the past regarding "wet" documents from passengers, Air Canada had not addressed this concern in the past, and did not include measures in its SARS policy to deal with the matter. Dr. Bekeris confirmed in evidence that he had health concerns with such a practice but was unable to confirm that Air Canada had taken any prevention measures;

- Ticket Agents C. Cole and L. Coleman's work involved contacting passengers within a metre or less throughout their shifts and their contact with any passenger could last for up to twenty minutes or more;

- L. Coleman could not leave her post to wash her hands following exposure to saliva, respiratory or bodily fluids on passenger document because she would have to abandon the luggage belt in her area which was open to the public and had to be secured by her constant presence. While K. Brady's testimony was that she could call for a replacement, he agreed that minimal staffing levels in the section might not enable a timely response for this eventuality. The reality that ticket agents were routinely handling "wet" documents was neither acknowledged or addressed by Air Canada SARS prevention measures;

- similarly, C. Cole could not leave her post to wash her hands following exposure to saliva, respiratory or bodily fluids on passenger documents because this could delay the boarding and ultimate departure of a flight. K. Brady confirmed that Air Canada could be subjected to a financial penalty by the airport authority if a flight was delayed and was unable to confirm that C. Cole could not be subjected to discipline if her actions caused the flight delay. This tended to confirm C. Cole's expectation that she would be disciplined if she were to close a station to go and wash her hands;

- despite the testimony of Dr. Bekeris that SARS symptoms could not be missed by a lay person, there was no evidence that employees were instructed relative to distinguishing between SARS flu-like symptoms from more common flu-like symptoms. In connection with this, Dr. Bekeris was unable to confirm whether or not it was possible to mask early symptoms of SARS with medications although he thought it unlikely. In addition, ticket agents found in the past that passengers tended not to self report illness unless there was a medical emergency and few passengers were ever prohibited from travel by Air Canada due to illness;

- Air Canada did not arrange for translators to assist ticket agents verifying documents of passengers who were not able to communicate in English or French or provide ticket agents with advice on how to handle such situations in their SARS policy. Where this arose, ticket agents had to go through passenger wallets, purses or other luggage to retrieve their documents. This further exposed C. Cole and L. Coleman to other personal items that may have been potentially wetted by saliva and respiratory fluids.

- the notice form used on-board aircraft and in airports to inform passengers of the need to report flu-like symptoms to an airport or airline official were only printed in English and French despite the fact that the SARS had originated from China.

- Dr. Bekeris stated employees who wear protective gloves or respiratory protection must be instructed and trained on how to safely remove the PPE and dispose of it to avoid contamination from the PPE itself. Dr. Bekeris could not confirm if the training had been provided to any employees despite the fact that employees had been provided with gloves and were initially permitted to wear masks to avoid potential exposure to SARS. Dr. Bekeris' explanation for this was that the use of personal protective equipment was an occupational safety issue and this was not his area of responsibility as he only dealt with health issues at Air Canada. This appears to confirm that such a division of occupational health and safety responsibility can adversely impact on health and safety;

- C. Cole's supervisor appeared to be uninformed regarding the necessity to segregate persons who reported flu-like symptoms and who may have come into contact with SARS. In this regard, I refer to the evidence that C. Cole felt ill one day and reported to the Air Canada nurse. She told the nurse that she had a high fever and was coughing, and that she had been undergoing outpatient physiotherapy at a hospital were SARS patients were treated. The Air Canada nurse instructed her to immediately don a respirator mask, to go home and to consult with her

family physician. When she informed her supervisor of this, the supervisor told her that she would not be paid salary if she left with the result that C. Cole remained at her post and completed her shift; and

- a CAW letter that appeared to be signed by the Vancouver International Airport local health and safety committee and was still in circulation following Air Canada's AéroNET communication on SARS. The letter confirmed that Air Canada would not provide the masks or gloves because it had decided that SARS did not pose a risk for airport employees but stated that employees were within their right to wear masks and gloves. This letter did not appear to have been addressed by Air Canada to confirm that the advice was no longer appropriate.

[78] In my opinion, the above circumstances cited by C. Cole and L. Coleman give considerable weight to the argument that SARS could reasonably be expected that to cause injury or illness to C. Cole or L. Coleman in the circumstances that existed in connection with their work. However, the evidence of Dr. Bekeris was that the best information available in March, 2003 was that SARS was emerging in clusters connected with health care workers in a hospital setting and with family members giving home care to a family member suffering from SARS. As C. Cole and L. Coleman did not provide any evidence in this review to dispute this conclusion, I must find that it was not reasonable to expect that SARS could cause injury or illness to either employee.

[79] While not argued by Air Canada at the hearing, I can accept that situations may arise in the work place where there is insufficient time to fully consult with employees and the employer must react rapidly and unilaterally to ensure that the health and safety of employees is initially protected. However, this case aptly demonstrates that adopting expert advice in a work place policy without subsequent consultation exposes employees to risk and uncertainty. Air Canada had a duty under the *Code* to address the concerns of C. Cole and L. Coleman and it did not, even at the time of this review.

[80] That being the case, I am of the opinion that Air Canada is in contravention of paragraph 125.1(f) of the *Canada Labour Code* and Part 10.4 of the *Canada Occupational Health and Safety Regulations*. I am also of the opinion that Air Canada is in contravention of sections 134 and 135 of the *Code*. As I am authorized by subsection 145.1(2) of the *Code* with the discretion to direct the employer concerned to terminate any contravention that is occurring or has occurred, I refer Air Canada to the attached direction which instructs Air Canada to terminate the contraventions by March 31, 2006.

[81] In her submission, Ms. Shirreff pointed out that the testimony of L. Coleman and C. Cole confirmed that they were routinely obliged to handle documents that are wet from respiratory fluids, saliva and other bodily fluids. She postulated that any danger posed by this was, therefore, a normal danger connected with the work of the employees. As such, she held that L. Coleman or C. Cole could not refuse to work on that basis. While I did not find that a danger existed, I feel it is necessary to address Ms. Shirreff's contention.

[82] Justice Gauthier addressed the concept of danger normal to the work in paragraph 55 of her *Verville supra* decision. She stated in paragraph 55 of her decision that a danger normal to the work includes a risk that is an essential characteristic of the work but logically excludes a risk which depends on the method used to perform the job or activity. Justice Gauthier wrote in paragraph 55 of her decision that:

> [55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?

[83] In this case, Ms. Shirreff did not submit any evidence to establish that the level of risk associated with contact with documents wet with saliva, respiratory fluids or other bodily fluids existed as an essential characteristic of the work that could not be eliminated, controlled or protected against despite Air Canada's best efforts. Rather, the risks reviewed in this case related to methodology. Therefore, Ms. Shirreff's argument that any danger associated with the complaint of L. Coleman or C. Cole was a normal danger to their work was not applicable.

[84] For the aforementioned reasons, I hereby confirm the decision of health and safety officer G. McCabe that a danger did not exist for either C. Cole or L. Coleman.

[85] Finally, I rely on health and safety officer G. McCabe, or any other health and safety officer to ensure that Air Canada has complied with the direction and to take whatever measures the health and safety officer deems appropriate.

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Douglas Malanka
Appeals Officer

In the Matter of t*he Canada Labour Code,* Part II, Occupational Health and Safety

Direction to the Employer Under Paragraphs 145(1)(*b*)

On July 28, 2005 and September 6, 2005, the undersigned Appeals Officer conducted an inquiry pursuant to section 146.1 of the *Canada Labour Code*, Part II (the *Code*), into the circumstances of the decision of absence of danger by health and safety officer G. McCabe on the refusals to work by C. Cole and L. Coleman, employees of Air Canada at Terminal Two at Pearson International Airport in Toronto, Ontario, being an employer subject to the *Canada Labour Code*, Part II.

The undersigned Appeals Officer is of the opinion that Air Canada is in contravention of paragraph 125.1(*f*) and section 134 and 135 of the *Canada Labour Code* and section 10.4 of the *Canada Occupational Health and Safety Regulations*. Specifically, Air Canada failed to consult with its policy and work place health and safety committees regarding the assessment, development, implementation and monitoring of its occupational health and safety policies and programs in respect of a hazardous substance.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Code*, to take measures by March 31, 2006 to terminate the contravention.

Issued at Ottawa, February 28, 2006.

Douglas Malanka
Appeals Officer
Certificate #. QC 3533

To: Air Canada
P.O. Box 6002,
Toronto AMF, Ontario
L5P 1B4

Summary of Appeals Officer's Decision

Decision No.: 06-004

Applicant:

Key Words:

Respondent:

Provisions: *Code*
COHSRs

Summary: