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

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Canada Labour Code
Part II
Occupational Health and Safety

Michael Chapman
applicant

and

Canada Customs and Revenue Agency
respondent

Decision No.: 03-019
October 31, 2003

This inquiry involved an appeal brought under subsection 129.(7) of the Canada Labour Code (hereto referred to as the Code or Part II) of a decision of a health and safety officer that a danger did not exist for an employee who had refused to work. A hearing was held in Toronto, Ontario on May 8 and 21, 2003.

Appearances:

Applicant:

Mr. Michael Chapman, Customs Officer, Canada Customs and Revenue Agency (CCRA).
Mr. Tom Hamilton, Regional Representative, Public Service Alliance of Canada (PSAC).
Ms. Claudine Salama, Regional Representative, PSAC
Mr. Richard Neil Smith, Customs Officer, CCRA.

Respondent:

Ms. Kathryn Hucal, Counsel, Department of Justice/CCRA.
Ms. Christine Mohr, Counsel, Department of Justice/CCRA.
Ms. Maria Pacheco, Operations Coordinator, CCRA.
Dr. Jeffrey Chernin, Occupational Health Medical Officer, Workplace Health and Public Safety Programme, Health Canada

Mr. Robert Gass, Health and Safety Officer, Human Resources Development Canada (HRDC).

[1] On March 16, 2003, Mr. Michael Chapman, a Canada Customs and Revenue Agency (CCRA) Customs Officer, employed at Pearson International Airport (PIA), refused to work. He complained that his employer, the CCRA, had not provided him with personal protective equipment and information to protect his health and safety from unknown pathogens that may be present in the work place. Mr. Chapman was referring to Severe Acute Respiratory Syndrome or SARS.

[2] Ms. Pacheco, Mr. Chapman's supervisor, investigated into his refusal to work and disagreed that a danger existed. Health and safety officer Robert Gass was notified of Mr. Chapman's continued refusal to work and Officer Gass arrived at PIA at approximately 19:00 hours to investigate into Mr. Chapman's continued refusal to work.

[3] Mr. Chapman provided health and safety officer Gass with the following statement regarding his refusal to work. He held that the information that CCRA provided to him was vague and attempted to minimize the hazard.

> *I am refusing to work in the customs primary/secondary/point/info area because I have not been given the proper tools or information to carry out my duties in a safe and healthy manner. I have little or no protection against unknown pathogens in the work environment and further I feel that I have not been supplied with the necessary information to ascertain that my workplace is safe. I have not been instructed as to the proper protocols to ensure my health and safety is protected. Moreover, I feel my employer has transmitted suspect and vague information in an attempt to minimize the hazards faced by myself and other employees.*

[4] On March 18, 2003, health and safety officer Gass decided that at danger did not exist for Mr. Chapman and informed parties of his decision in writing.

[5] Mr. Chapman appealed officer Gass's decision to an appeals officer pursuant to subsection 129.(7) of the Code. An oral hearing was held in Toronto on May 7 and 21, 2003 to inquire into the circumstances of the decision by health and safety officer Gass that a danger did not exist for Mr. Chapman.

[6] Health and safety officer Gass submitted a copy of his investigation report prior to the hearing and testified at the hearing. I retain the following from his report and testimony.

[7] Officer Gass decided that a danger did not exist for Mr. Chapman based on the following facts that he gathered during his investigation.

- Health Canada advised CCRA that it was likely that only persons having close personal contact with passengers suffering from the SARS could be infected (e.g. Family members and health care professionals etc.).
- There was only one direct flight entering Toronto airport daily (Cathay Pacific) from South East Asia. The other flight from Hong Kong entered Canada via Vancouver.
- At the time of his investigation, no airline air crew, ground crew, or other airport employee had contracted SARS.
- Health Canada was putting measures in place for the quarantine of passengers identified as possibly being infected, that would divert the passenger before reaching Customs.
- SARS information provided by Dr. Jeffery Marc Chernin on March 17, 2003 satisfied him that a danger did not exist for Mr. Chapman.

[8] In response to cross examination questions, health and safety officer Gass confirmed that he had relied on the World Health Organization (WHO) definition of "close contact" which was:

> "*…having cared for, lived with, or having had direct contact with respiratory secretions and body fluids of a person with SARS.*"

[9] Officer Gass confirmed that he had not conducted an inspection of the work place during his investigation as he was already familiar with the facilities occupied by CCRA at PIA. He further confirmed that he had not reviewed the job description for Customs Officers prior to his decision as he was familiar with it, including their job responsibilities relative to the Primary and Secondary Units. This included knowing that Custom Officers are responsible for checking for contraband, illegal substances, and imported goods exceeding legal import limits, and for doing this, they are empowered to conduct strip searches and to arrest and detain suspects under the Criminal Code of Canada.

[10] He recalled that he may have asked CCRA about the training it provided to its Customs Officers regarding communicable diseases, but confirmed that he had not inquired about specific training regarding SARS.

[11] Mr. Chapman submitted written reasons for his appeal prior to the hearing and testified at the hearing. I retain the following from his documents and testimony.

[12] On March 15, 2003, at approximately 8:40 p.m., he received an electronic computer message from Mr. James Vosper. Mr. Vosper's communication referred to an electronic computer message entitled *"Awareness of Asian Pneumonia."* that he had received from Mr. Norman Sheridan. According to Mr. Sheridan's communication, he had just spoken to Mr. Brian Jones, Director, Import Processes, and Mr. Jones told him that two Canadian travellers, who had returned to Canada from Hong Kong on February 23, 2003 and who had been processed through Customs at PIA, had subsequently contracted a version of Asian pneumonia and died. According to the communication, Dr. Ron St. John of Health Canada had advised Mr. Jones that the symptoms of the disease included high fever, aches, coughing, shortness of breath and difficulty breathing, and that the incubation period was thought to be two weeks. Dr. St. John further advised that Health Canada had no immediate plans for enhancing monitoring or establishing quarantine protocols as the Department did not regard risk related to the disease to be elevated. However, Health Canada would continue to assess risk.

[13] Ms. Pacheco also received a copy of Mr. Sheridan's electronic communication, entitled *"Awareness of Asian Pneumonia"* and subsequently asked Mr. Chapman to telephone drug stores to obtain medical grade respirator masks. However, none of the companies contacted had proper respirators. She also asked Mr. Chapman go to Terminal #1 and pickup up boxes of protective gloves and bottles of hand disinfectant for distributing in Terminal #3.

[14] Following his shift on March 15, 2003, Mr. Chapman went home and conducted a computer search to find out what information existed on the Internet regarding this illness. He found an emergency travel advisory that WHO had issued on March 15, 2003. The advisory, entitled, *"Severe Acute Respiratory Syndrome (SARS),"* stated that WHO had received reports during the past week of more than 150 new suspected cases of SARS, an atypical pneumonia for which cause had not been determined. The advisory described SARS as a world wide threat and outlined the symptoms associated with the illness. The advisory did not recommend that people restrict travel to any destination, but recommended that all travellers, including airline crews, be aware of the main symptoms and signs of SARS which included:

- high fever; **and**,

- one or more respiratory symptoms including cough, shortness of breath, difficulty breathing: **and**, either,
- close contact with a person who has been diagnosed with SARS; **or**,
- recent history of travel to areas reporting SARS cases.

[15] Mr. Chapman noted that the WHO travel advisory defined "close contact" as meaning: *"anyone who having cared for, lived with, or having had direct contact with respiratory secretions and body fluids of a person with SARS."* He further noted that the advisory recommended that SARS patients be isolated with barrier nursing techniques and treated as clinically indicated until more was known about the illness.

[16] That evening, Mr. Chapman also found on the Internet an article on SARS issued by the Centers for Disease Control and Prevention (CDC). The CDC document recommended that, until the etiology and route of transmission were known, in addition to standard precautions, infection control measures for inpatients should include:

- Airborne precautions (including an isolation room with negative pressure relative to the surrounding area and use of N-95 respirator for persons entering the room)
- Contact precautions (including use of gown and gloves for contact with the patient or their environment.
- Standard precautions including careful attention to hand hygiene.

[17] Mr. Chapman testified that he interpreted from the internet articles that SARS was a serious pathogen.

[18] A short while after his refusal to work, Mr. Chapman received and read Health Canada's advisory on SARS that had been prepared for CCRA on March 15, 2003. According to the Health Canada advisory, the cause of SARS was unknown but Health Canada opined that the infection would only be spread in circumstances where there was contact within one metre of an infected individual. The advisory noted that the risk of contracting SARS from arriving passengers was not known, but held that is was expected to be low for casual contacts such as airport employees. Health Canada recommended frequent hand washing with soap and water for at least 20 to 30 seconds, and maintaining, where possible, a distance greater than 1 metre from passengers until more was known.

[19] Mr. Chapman was not reassured by the Health Canada advisory because it only recommended that employees maintain a distance of 1 metre "where possible." He held that almost every aspect of work conducted by Customs Officers brought them within closer proximity to passengers than the 1 metre of separation recommended. Since the advisory did not order CCRA to modify its operations to ensure a separation distance of one metre, he felt that the advisory did not properly address his job responsibilities. He added that the advisory tended to minimize the hazard despite the unknowns, and this was contrary to the normal approach at CCRA which was to treat unknown hazards as constituting high risk. According to Mr. Chapman, the CCRA training on biological hazards instructed Officers to remove themselves from the hazard.

[20] With regard to his job responsibilities on the day of his refusal to work, Mr. Chapman testified that he had been posted to the Primary Unit. He explained that Customs Officers in the Primary Unit also act as an Immigration Officers and as such, are responsible for determining the admissibility of passengers to Canada. He stated that passengers often approach the Customs Officers at a distance less than 1 metre to submit documents and to provide personal information discreetly. He added that passengers can often be seen to have documents in their mouth as they organize their papers. Mr. Chapman explained that passengers are immediately referred to the Secondary Unit if an Officer has any suspicions, and so the average time of contact per passenger in the Primary Unit varies between approximately 30 seconds to two minutes.

[21] Mr. Chapman testified that Customs Officers are frequently reassigned posts during a shift and that he could end by working in the Secondary Unit or in the Point or Rover Post.

[22] According to Mr. Chapman, Customs Officers in the Secondary Unit examine baggage closely and this can include handling soiled clothing and articles of passengers. If circumstances warrant, passengers can be subjected to a strip search. During strip searches, a Custom Officer would typically handle the passengers clothing and might be required to conduct a body search. If necessary, defecated material may have to be examined for contraband. Mr. Chapman insisted that Custom Officers in the Secondary Unit work closer than I metre from passengers for periods of time exceeding 20 minutes and are potentially exposed to a passenger's body fluids.

[23] Rovers and Point Officers, on the other hand, patrol the baggage carousel area and confront suspicious behaviour or circumstances. Their contact with passengers can be closer than one metre, but like officers staffing the Primary Unit, the duration of their contact varies from 30 seconds to two minutes.

[24] Mr. Chapman added that a Customs Officer could also be called upon at anytime to go to an airplane that has just landed and has reported having a medical emergency on board. He testified that the Custom Officer is responsible for clearing the ill person before they are transported to hospital. He conceded that such passengers could alternately be quarantined in a separate room at the airport, but noted that the nurse in charge did not have a key for the quarantine room at PIA.

[25] On March 16, 2003, Mr. Chapman reported to work, and verified that CCRA had not obtained medical grade respiratory masks for his shift. He went to Ms. Pacheco's office and refused to work stating that he was not provided with personal protective equipment (mask) and that the information provided by CCRA had not assessed the risk related to SARS. He added at the hearing that the Health Canada advisories should have recommended more frequent washing with antibacterial soap and that officers in the Primary Unit be permitted to leave their post and go to the employee wash room when they felt it necessary to wash their hands. He held that the latter was necessary because Health Canada had advised that hand wipes were only a stop-gap measure until hands could be washed thoroughly with antibacterial soap and water after having dealt with a passenger suspected of having symptoms.

[26] Mr. Chapman testified that he had participated in the CCRA information session presented by Dr. Chernin at PIA the afternoon of March 17, 2003. He stated that he was not reassured by the session because he felt that Dr. Chernin was minimizing the risk despite the fact that little was known about SARS. He recalled that Dr. Chernin had told participants that a screening process for the airlines was being established by Health Canada, but in the meantime, Customs Officers were expected to identify and isolate passengers travelling with this condition.

[27] Ms. Pacheco, Operations Coordinator, PIA, Terminal 3, testified. I retain the following from her testimony.

[28] Ms. Pacheco testified regarding the Greater Toronto Airports Authority (GTAA) Operations Directorate Emergency Planning Division document entitled," L.B. Pearson International Airport – Local Response Plan for Infectious and Dangerous Diseases, dated June 2001. She stated that the Plan was in force at the time of Mr. Chapman's refusal to work and that it dictated that a quarantine officer be available to the airport to deal with medical emergencies. She held that, with the protocol, it would be unnecessary for a Customs Officer to meet an airplane and deal with a contagious passenger. Under cross examination, she conceded that there was no formal quarantine room at PIA at the time of Mr. Chapman's refusal to work, but maintained that a room was available for this purpose. She further conceded that she could not recall any incident where a quarantine officer handled a sick passenger pursuant to the Plan in the 13 years she had worked there. She also verified that the GTAA document was not distributed to Customs Officer or included in their training.

[29] Ms. Pacheco opined that Customs Officers in the Primary area are shielded from passenger coughs and sneezes by their computers. She estimated that the counter behind which Customs Officers stand is approximately two feet wide, and confirmed that Customs Officers can direct passengers to step back so as to maintain one metre of physical separation. She further estimated that the typical duration of contact with each passenger in the Primary Unit varies between 30 seconds to two minutes. She opined that this timeframe also applies to Rover and Point Customs Officers and, if Rover or Point Officers have any suspicions, the passenger is immediately referred to the Secondary Unit.

[30] She confirmed that passengers in the Secondary Unit area may have their luggage searched and may be subjected to a body search. She estimated that body searches typically take from five minutes to two hours or more to perform.

[31] Ms. Pacheco testified that when she was made aware of the SARS notice, she ensured that Customs Officers were provided with medical grade gloves and disinfectant solution for disinfecting their hands. She confirmed that Customs Officers were also instructed to require passengers to maintain the 1 metre distance of separation. She added that Customs Officers can instruct ill passengers to wait at the back of the hall until a medical person attends.

[32] Dr. Chernin M.D., M.P.H., F.A.C.P.M., Occupational Health Medical Officer, Workplace Health and Public Safety (WPHPS) Directorate, Health Canada (Toronto Office) testified as an expert witness in public health. I retain the following regarding his testimony.

[33] Dr. Chernin testified that he had previously worked with the GTAA Emergency Planning Division until April 2002. During that time, the Laboratory Centre for Disease Control (LCDC) of Health Canada, Ottawa, was responsible for providing the GTAA with advice when a passenger was identified by a pilot or aircrew as having or suspected of having an infectious disease. The LCDC had an agreement with the WPHPS for Dr. Chernin to act for the LCDC when the GTAA reported a problem. Depending on the seriousness of the situation, Dr. Chernin could recommend that the passenger be released and processed through Customs and Immigration, or that the aircraft and/or individual be quarantined. He confirmed that he was consulted on many occasions.

[34] The situation changed in April 2002 when the LCDC was replaced by the Centre for Emergency Preparedness and Response (CEPR). With this change, the WPHPS was taken out of the process and, instead of contacting Dr. Chernin, the GTAA now contacts the CEPR in Ottawa. The on-duty CEPR doctor in Ottawa can, in turn, request a designated nurse employed in Toronto to go to the airport and to assess the medical emergency. Based on the nurse's clinical assessment, the on-duty CEPR doctor decides whether quarantine is required or not.

[35] Dr. Chernin testified that he first heard of atypical pneumonia in South-East Asia in October of 2002. On March 14, 2003, he was in Los Angeles and learned from a newspaper article that there were 2 cases of SARS in Canada. He returned to Canada on March 16, 2003.

[36] The next morning, March 17, 2003, Dr. Chernin called Ms. Alice Brant, the nurse on-call for CEPR and requested her to go to PIA to reply to Immigration and CCRA employer and employee questions, which she did.

[37] During this time, he reviewed the information on SARS maintained on the Internet by the Centre for Disease Control (CDC), the World Health Organization (WHO) and Health Canada.

[38] Dr. Chernin also participated in a Health Canada national telephone conference which reviewed all of the known issues relative to SARS. During this teleconference call, Dr. St. John reviewed Health Canada's March 16, 2003, advisory which, among other things, confirmed the following:

> *In addition, officials at Pearson & Vancouver International Airports have been contacted to activate protocols to track potentially infected passengers. Health Canada staff have been sent to those airports to assist in the management of these passengers.*

[39] According to Dr. Chernin, Dr. St. John also confirmed that airlines had been advised to have their crews watch out for passengers with symptoms.

[40] He then met with CCRA employers and employees to provide them with the most up-to-date information regarding SARS and to respond to their questions. According to Dr. Chernin, the session started at 3 p.m. and lasted for more than two hours.

[41] Dr. Chernin testified that he told participants, which included health and safety officer Gass, that SARS was thought to be a respiratory virus. He explained that the fact that SARS was initially referred to as an atypical "pneumonia" indicated to him that SARS was likely a respiratory illness. He told session participants that viral infections are commonly spread via the gastro-intestinal tract, the exchange of fluids, and the exposure to respiratory secretions. In this case, SARS was thought to be spread through respiratory droplets transferred from lung to lung when the infectious persons coughs sneezes, or through contact with an objected that an infectious person had placed in their mouth. He stated that it was further believed that SARS could survive on an inanimate object for up to 3 hours and could be spread if a person touched and infected surface and then placed their hands in their mouth or eyes. This, he confirmed, was why the Health Canada March 16, 2003 advisory to CRRA recommended that CCRA staff maintain a minimum distance of 1 metre from passengers and thoroughly wash their hands for 20 to 30 seconds on a regular basis. He added that alcohol based products were an acceptable alternative to soap and water.

[42] He further explained at the hearing that there was no diagnostic test for SARS because SARS, by definition, was a syndrome. That is, for a diagnosis of SARS, there must be fever and clinical symptoms, plus evidence of close contact with person diagnosed with SARS and/or recent travel to South East Asia. He further confirmed that, while the incubation period was unknown at the time of Mr. Chapman's refusal to work, a passenger would have to be experiencing SARS symptoms to be infectious. In this regard, he referred to the WHO definition of SARS which stated that SARS was suspected where:

> *...a person presented after February 1, 2003, with a history of: a high fever exceeding 38 ^{O}C and one or more symptoms including cough, shortness of breath, difficulty breathing, and having had "close contact" with a person who had been diagnosed with SARS, and/or had recently travelled to areas reporting cases of SARS.*

Dr. Chernin further advised participants at the March 17, 2003 information session that to be at risk for contracting SARS required repeated close contact with a SARS symptomatic person for a minimum of 20 minutes of close contact. That is, there had to be both close contact for 20 or more minutes, and repeated close contact. He reiterated that the WHO definition of "close contact" was consistent with family members sharing a residence, and/or a health worker taking care of a SARS patient, and not with the work of Customs Officers.

[43] Dr. Chernin opined there was no danger for Customs Officers in the Primary Unit, Secondary Unit or Point position at PIA because protocols were in place on March 17, 2003 to deal with any passenger exhibiting SARS or SARS like symptoms. These protocols instructed Customs Officers to:

- maintain a distance of 1 metre from passengers in the Primary Unit;
- send any passenger exhibiting symptoms to quarantine and not to process them further; and,
- wash their hands frequently and thoroughly for 20 to 30 seconds.

[44] In addition to these protocols:

- the longstanding GTAA protocol was in place at PIA to deal with ill passengers;
- international passengers were being informed of SARS and advised to advise airline flight crews if they were suffering any symptoms;
- flight crews were observing passengers for symptoms; and,
- Dr. St. Johns had assigned quarantine teams consisting of a doctor and nurse to evaluate and deal with ill passengers at PIA and Vancouver airport.

[45] Dr. Chernin recalled that, during the evening of March 17, 2003, the GTAA was advised that a passenger on board an incoming flight was suffering SARS like symptoms. He observed that the protocols were fully activated and that the passenger was placed into isolation by CCRA. He stated that CEPR was advised of the medical emergency and arranged for their nurse to meet the airplane and complete a clinical evaluation of the passenger. He said that the nurse communicated her evaluation to Dr. St. John at CEPR who assessed the information and subsequently released the passenger. Dr. Chernin concluded that the protocols in place worked.

[46] Under cross-examination, Dr. Chernin conceded that he did not observe any evidence of protocols in place when he returned to Canada by air from the United States of America on March 16, 2003. He attributed this, possibly, to the fact that there was no-one on the airplane with SARS like symptoms.

[47] He further conceded that he could not say with certainty when exactly Customs Officers were instructed to refer ill passengers to quarantine and not process them. However, he referred to the fourth paragraph of the March 16, 2003 Health Canada advisory and opined that Customs Officer could have inferred from that paragraph that they were to refer symptomatic passengers to quarantine and not to process them. Paragraph four read;

> *In addition, officials at Pearson and Vancouver International Airports have been contracted to activate protocols to track potentially infected passengers. Health Canada staff have been sent to those airports to assist in the management of these passengers.*

[48] Dr. Chernin also conceded that, while unlikely, it was technically possible for someone with SARS to be infectious before showing SARS symptoms, or for SARS symptoms to be masked by prescription medications. However, he doubted that either of these scenarios would arise and opined that medication could not mask shortness of breath or difficulty breathing symptoms. However, he agreed that it was possible that a Customs Officers in the Secondary Unit would be at greater risk if the Officer subjected an infectious passenger to a lengthy body search.

[49] Mr. Hamilton submitted that health and safety officer Gass's finding that a danger did not exist for Mr. Chapman should be rescinded and replaced with a finding of danger. He held that health and safety officer Gass's investigation was flawed, and he relied on incomplete information.

[50] Mr. Hamilton argued that health and safety officer Gass's investigation was flawed because Officer Gass did not consider the full job responsibilities of Customs Officers, and because he had not inspected the work place. Mr. Hamilton held that, if he had, he would have seen that Customs Officers are exposed to respiratory and body secretions work because their work often places them less than one metre from passengers, because passengers cough and sneeze in the direction of Customs Officers, and because passengers often put their documents in their mouth. He further argued that, had health and safety officer Gass inspected the Secondary Unit, he would have seen that Customs Officers work in close proximity to passengers for periods of times exceeding 20 minutes and that exposes them to respiratory and other body secretions.

[51] Mr. Hamilton maintained that health and safety officer Gass's decision was factually flawed because Health Canada measures to divert ill passengers to quarantine before they reached customs were not in place at the time he investigated Mr. Chapman's refusal to work and, in fact, the practice at the time was that Customs Officers attended medical emergencies on board airplanes to clear ill passengers.

[52] He further held that Dr. Chernin's testimony established that SARS symptoms could be masked such that Customs Officers could be exposed before anyone was aware that a passenger was SARS contagious.

[53] With regard to the Code and previous Appeal Officer decisions, Mr. Hamilton argued that the revised definition of "danger" in the Code is prospective and that Appeals officer Cadieux confirmed this in his Welbourne decision (Welbourne v. Canadian Pacific Railway Co., [2001] C.L.C.A.O.D. No. 9, Decision No. 01-008.) He reiterated that Mr. Chapman was assigned to the Primary Unit and could have been reassigned to the Secondary Unit or as Point Officer or Rover.

[54] Ms. Hucal submitted that a danger did not exist for Mr. Chapman at the time health and safety officer Gass investigated his refusal to work and that his decision should be confirmed.

[55] She held that Mr. Chapman had the most up-to-date information known about SARS. She noted that Mr. Chapman had read the March 15, 2003, WHO advisory on the Internet which listed the symptoms of SARS and opined that communication of the disease was associated with "close contact" which the advisory defined.

[56] In addition to this Mr. Chapman had read Mr. Sheridan's March 14, 2003, E-mail entitled, "Awareness of Asian Pneumonia", and, Health Canada's advisory to CCRA on March 15, 2002, entitled, "Workplace Health and Public Safety Programme (WHPSP) dated March 15, 2003 had been communicated to Customs Officers including Mr. Chapman. In the documentation, Dr. Ron St. John opined that there was no evidence of an elevated risk or need for enhanced monitoring or quarantine.

[57] Ms. Hucal noted that the subsequent Health Canada advisory to CCRA only recommended that Customs Officers wash their hands frequently and maintain a distance greater than 1 metre.

[58] She added that, during his information session on March 17, 2001, Dr. Chernin told Customs Officers that the protocol put in place by CCRA was adequate because Customs Officers were to maintain a distance greater than 1 metre with an infectious passenger and to refer any passenger they suspected to be ill to quarantine.

[59] In terms of the measures taken by CCRA to mitigate the hazard posed by SARS, she noted that Ms. Pacheco had distributed protective gloves and disinfectant to Customs Officers. She referred to the GTAA medical emergency protocol in place at PIA at the time of Mr. Chapman's refusal to work which arranged for airport medical officers to meet airplanes at the gate. According to the protocol, a passenger with a medical emergency would be isolated and assessed. If a contagious disease was suspected, airport medical personnel were instructed to contact Health Canada who would advise regarding quarantine.

[60] She reiterated that, in his information session, Dr. Chernin informed participants, who included Mr. Chapman, that Health Canada was initiating a quarantine protocol whereby passengers on international flights would be advised of SARS and asked to indicate any symptoms to flight attendants. Health Canada was also organizing teams to respond to any medical emergency identified.

[61] Ms. Hucal referred to a decision of the Federal Court in the case of Fletcher v. Canada (Treasury Board), [2002] F.C.J. No. 1541, whereby the Court described the role of the right to refuse mechanism in the Code as follows:

> *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 a short-term will-being of an employee which is at stake, not a hypothetical or speculative one.*
>
> *The mechanism is an emergency measure. It is a tool placed in the hands of an 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.*

[62] She also referred to the Welbourne decision wherein Appeals Officer Cadieux wrote:

> *Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.*
>
> *In reality, however, the injury or illness can only occur upon actual exposure to the hazard, condition or activity.*

[63] Finally, she referred to the decision of appeals officer Serge Cadieux in the case of Parks Canada Agency and Doug Martin and PSAC, [2002] C.L.C.A.O.D. No.8, Decision No. 02-009 (Parks Canada decision), and my decision in the case of Canada (Correctional Service) and Schellenberg, [2002] C.L.C.A.O.D. No.6, Decision No. 02-005 relative to the criteria for determining that a danger exists under the Code. The combined quotation in Ms. Hucal's brief read as follows:

> *...the facts established at the time show that:*
>
> *(a) A hazard or condition will come into being;*
>
> *(b) An employee will be exposed to the hazard or condition when it comes into being;*
>
> *(c) There is a reasonable expectation that:*
>
> *i. the hazard or condition will cause injury or illness to the employee exposed thereto; and*
>
> *ii. the injury or illness will occur immediately upon exposure to the hazard or condition.*

[64] In connection with these criteria, Ms. Hucal held that there was no evidence in this case to show that a hazard was present or would come into being. She pointed out that there was no evidence that a passenger suffering from SARS was aboard a flight landing or expected to land at PIA such that Mr. Chapman would be exposed SARS. Further, she pointed out that there was no evidence that the Greater Toronto Airports Authority (GTAA) Operations Directorate Emergency Planning Division document, "L.B. Pearson International Airport – Local Response Plan for Infectious and Dangerous, dated June 2001 was insufficient to identify and isolate passengers who may be ill.

[65] With regard to the second point in the criteria, whether or not an employee would be exposed should a hazard or condition come into being, Ms. Hucal held that there was no evidence that Mr. Chapman would be exposed if a SARS infectious passenger arrived at Customs at PIA. She maintained that Customs officials are able to conduct their duties while maintaining a safe distance of one metre from passengers, and that Customs Officers were provided with all of the information available to health officials at the time concerning the likelihood of infection from casual contact with an infected individual. She added that there were no reported cases of the disease being contracted by Customs officials or air crew anywhere in the world…

[66] Finally, she maintained that it was not reasonable to expect that the hazard or condition would cause injury or illness to the employee exposed because protocols were in place to ensure that ill passengers would be immediately segregated and assessed by the airport nurse on duty. She added that, even if a SARS infectious passenger did enter the Customs area undetected by the air crew, the chance of infection through the casual contact associated with the work of Customs Officer was remote.

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[67] The issue to be decided in this case is whether or not a danger as defined in Part II existed for Mr. Chapman at the time of the investigation by health and safety officer Gass.

[68] "Danger" is defined in subsection 122.(1) of the Code as:

> *"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 chronic illness, in disease or in damage to the reproductive system."*

[69] The Federal Court has recently reiterated in the case of Fletcher v. Canada (Treasury Board), [2002] F.C.J. No. 1541 that the right to refuse mechanism in the Code is an emergency measure that provides an ad hoc opportunity to employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation.

[70] In the Welbourne Case, Appeals Officer Cadieux wrote in paragraph [18] that danger can be prospective to the extent that the potential hazard, condition or future activity is capable of coming into being or action and is reasonably expected to cause injury or illness before the hazard or condition is corrected or activity altered. He qualified in paragraph [19] that, since the existing or potential hazard or condition, or current or future activity must be one that can reasonably be expected to cause injury or illness to a person exposed thereto before the hazard, condition can be corrected or activity altered, the concept of reasonable expectation excludes hypothetical or speculative situations. He added in paragraph [20], that 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. His exact words were:

> *[18] Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer's investigation but can also be potential or future. The New Shorter Oxford Dictionary, 1993 Edition, defines "potential" to mean "possible as opposed to actual; capable of coming into being or action; latent." Black's Law Dictionary, Seventh Edition, defines "potential" to mean "capable of coming into being; possible." The expression "future activity" is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the Code, the danger can also be prospective to the extent that the hazard, 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 can be corrected or the activity altered. [My underline.]*
>
> *[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. [My underline.]*
>
> *[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. [My underline.]*

[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.)

[71] In the Canada (Correctional Service) and Schellenberg decision, I wrote the following in paragraphs [41] and [42] regarding the interpretation and application of the definition of danger relative to an existing or potential hazard or condition:

> *[41] For deciding if a danger exists, the health and safety officer must consider all aspects of the definition of danger and, on completion of his or her investigation, decide if the facts in the case support a finding of danger under the Code. This determination must be done on a factual basis and the facts must be persuasive since the right to refuse and danger provisions under the Code are considered to be exceptional measures. For a health and safety officer to find that a danger under the Code exists at the time of his or her investigation in respect of a potential hazard or condition, as in this case, the facts in the case must be persuasive that:*
>
> - *a hazard or condition will come into being;*
> - *an employee will be exposed to the hazard or condition when it comes into being;*
> - *there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and*
> - *the injury or illness will occur immediately upon exposure to the hazard or condition.*
>
> *[42] It follows that, where a hazard or condition actually exists at the time of the health and safety officer's investigation, the facts in the case must only be persuasive that:*
>
> - *an employee will be exposed to the hazard or condition;*
> - *there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and*
> - *the injury or illness will occur immediately upon exposure to the hazard or condition.*

[72] I further clarified in paragraph [40] in the case of Canada (Correctional Service) and Schellenberg, the determination of danger by a health and safety officer is made at the time of his investigation and not at the time of the employee's refusal to work. Paragraph [40] reads:

> *[40] According to subsection 129.(1) of the Code, when a health and safety officer is notified that an employee is continuing to refuse to work, the health and safety officer is required to investigate or cause another officer to investigate the refusal to work without delay. On completion of the investigation, the investigating officer is required, pursuant to subsection 129.(4), to decide whether or not a danger under the Code exists. If the officer decides that a danger exists, then the officer is required by subsection 129.(6) to issue a direction pursuant to subsection 145.(2) requiring the employer to, amongst other things, take measures to correct the hazard or condition or alter the activity, or to protect any person from the danger. The officer is also required to issue a direction to the employee(s) in question to cease the work in question until the employer complies with the officer's direction under 145(2)(a). If the officer decides that a danger does not exist, then according to subsection 129.(7), the employee is not entitled under section 128 to continue to refuse to work. The officer is clearly deciding whether or not a danger under the Code exists at the time of his or her investigation and, relative to subsection 145.(2.1), whether or not the employee(s) may work in a place or do the work in question.*

[73] Appeals Officer Cadieux wrote the following in his Parks Canada decision regarding the interpretation and application of the definition of danger relative to a current or future activity:

> *[139] The Code allows for a future activity to be taken into consideration in order to declare that "danger" as defined in the Code exists. However, this is not an open-ended expression. 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[2];*
> - *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.*

[74] While Appeals Officer Cadieux referred only to current or future activities in the Parks Canada decision and I referred only to existing or potential hazards or conditions in the Canada (Correctional Service) and Schellenberg decision, it is my current view that the interpretation and application of the definition of danger applies similarly in respect of a potential hazard or condition or a future activity such that the criteria indicated in both decisions could essentially be merged. However, before any thought of merging the criteria, it is necessary to consider the words of the Honourable Madam Justice Tremblay-Lamer in the Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada Decision, Citation: 2003 FC 1158, Docket T-950-02.

[75] In paragraph [57], the Honourable Madam Justice Tremblay-Lamer agreed with Appeals Officer Cadieux that, in the absence of specific evidence indicating "when" the grievous bodily harm or death could reasonably occur to a park warden performing law enforcement activity, one must find that a danger did not exist because the situation was hypothetical or speculative. Paragraph [57] of her decision reads:

> *[57] I agree with the appeals officer that in the absence of specific evidence indicating when grievous bodily harm or death could reasonably be expected to occur to a park warden performing law enforcement activity, a safety officer would have to conclude on the absence of danger since he would be faced strictly with a hypothetical or speculative situation. [My underline.]*

[76] However, she pointed out in paragraph [58], that, by definition, it is not necessary that there be a reasonable expectation that the injury or illness will occur immediately upon exposure to the activity for a finding of "danger". She wrote:

> *[58] However, the new definition also clearly states that a hazard, condition or activity could constitute a danger "whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity". As such, contrary to what was indicated by the appeals officer, I am of the view that it is not necessary that there be a reasonable expectation that the injury or illness will occur immediately upon exposure to the activity in order to constitute danger within the meaning in the Code.*

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[2] This first condition is redundant in cases where the health and safety officer has established that the activity is taking place at the time of his investigation.

[77] Notwithstanding this however, the Honourable Madam Justice Tremblay-Lamer confirmed in paragraph [59] of her decision that the new definition still requires an impending element because the injury or illness must occur before the hazard, condition can be corrected or activity altered. Her exact words were

> *[59] Nevertheless, in my opinion, the new definition still requires an impending element because the injury or illness has to occur, "before the hazard, condition can be corrected or activity altered".*

[78] What I interpret from her words is that it is not necessary for a finding of danger that the facts in the case establish that the injury or illness following an exposure to a hazard, condition of activity will likely occur immediately. However the facts must indicate when, or the specific circumstances under which, grievous bodily harm or death is reasonably expected (likely) to occur, such that it is reasonable for the health and safety officer to expect that the injury or illness will occur before the hazard or condition can be corrected or future activity altered. Otherwise, one is dealing with a hypothetical or speculative situation.

[79] While I did not write with the clarity of the Honourable Madam Justice Tremblay-Lamer, this is essentially the position I took in the R. Abood, J. Chan, C. Ouellette, D. Rai and B. Singh and Air Canada Decision, Decision No. 03-002, January 9, 2003. In that decision, I wrote the following in Paragraphs [37] and [38]:

> [37] *Ms. Elias argued that the history of terrorism in Israel and the terrorist attacks on the United States of America on September 11, 2001 made the potential risk of being exposed to and injured by acts of terrorism of sufficient certainty for the Air Canada flight crew employees who refused to work that it constituted a danger for them. But, I would make the following analogy in respect of her logic in this regard. In Canada, it seems that a week rarely goes by without a news item on the radio or television, or in the press, concerning a motor vehicle accident attended by injury or death. One might reasonably conclude from this that, if you accept to drive in a motor vehicle on our highways, you expose yourself to a risk of being involved in an automobile accident and of being injured or killed therein. However, I doubt that anyone would reasonably conclude that the simple act of driving in a motor vehicle on a Canadian highway constitutes a danger under the Code for the driver or passengers. However, if, for example, the vehicle in which a person was riding or was about to ride had been fabricated with a component subsequently determined by professionals to be defective and to catastrophically fail causing a loss of control of the vehicle at the approximate reading indicated on the odometer of the vehicle, then the situation would have to be reassessed. That reassessment would have to consider the reliability of the evidence concerning the attendant risk amplifiers.*
>
> [38] *No conclusion is drawn in the above hypothetical example regarding the existence or not of danger. It is offered only to illustrate that, for a finding of danger, the evidence in respect of a hazard, condition of activity must be sufficient to elevate the risk of occurrence and of injury or illness to a person exposed thereto from a speculative possibility to a reasonable expectation. In respect of both instances of refusals to work in this case, the evidence did not confirm the existence of attendant risk factors or risk amplifiers sufficient to establish that it was reasonable to expect that the Air Canada employees who refused to work would be exposed to an act of terrorism in Israel that could reasonably be expected to cause injury or illness to the employees had they carried out their assigned tasks. [Underlined for emphasis.]*

[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:

- *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.*

[81] It follows, in the case of an existing hazard or condition or current activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that

- *an employee will likely be exposed to the hazard, condition or activity;*
- *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.*

[82] In the instant case, the hazard was not an existing hazard in that there was no evidence that a SARS infectious passenger was present at Customs at PIA at the time of Mr. Chapman's refusal to work. Thus, to find that a danger existed for Mr. Chapman, I must first be persuaded by the facts that a SARS infectious passenger would likely arrive at Customs at PIA during his shift and that Mr. Chapman would likely be exposed to the passenger. If I find in the affirmative, I must then be persuaded by the facts in the case that it was reasonable to expect that Mr. Chapman would have been injured or made ill by his exposure to a SARS, infectious passenger and that the injury or illness would occur before the hazard was corrected.

[83] Relative to the first criteria, whether or not it was likely that the potential hazard or condition or future activity in question would present itself for Mr. Chapman, I was not persuaded by the facts that a SARS infectious passenger would likely arrive at Customs at PIA during his shift. The fact that the WHO advisory dated March 15, 2002, stated there had been more than 150 new suspected cases of SARS had occurred in Canada, China, Indonesia, Philippines, Singapore, Thailand and Viet Nam; the fact that direct and indirect flights were arriving at PIA daily from South East Asia at PIA; and the fact that two passengers previously cleared through Customs at PIA had died from SARS suggested that it was certainly within the realm of "possibility" that a SARS infectious passenger could have arrived at Customs at PIA and expose Mr. Chapman to SARS. However, there were no facts to establish that a SARS infectious passenger was actually aboard a flight destined for PIA that would arrive at Customs during Mr. Chapman's shift or was about to board such a flight. I conclude, therefore, that Mr. Chapman's fear that he would be exposed to a SARS infectious passenger was hypothetical and not based on fact.

[84] While the appeal fails on this point, I believe it would be useful to continue with the analysis.

[85] With regard to the second criteria, whether it was likely Mr. Chapman would be exposed to the hazard, condition or activity when it presented itself, the evidence was somewhat more compelling in favour of Mr. Chapman. For example, I was not convinced that the long standing GTAA protocol ensured that potentially infected passengers would be detected and intercepted by flight personnel on flights arriving from SARS affected countries and diverted to quarantine before proceeding to Customs. While it existed, I was not convinced that it included monitoring in flight passengers for SARS or SARS like symptoms and taking steps to ensure that the passenger was diverted to quarantine and not to Customs. There was also some question regarding the availability of a quarantine room at PIA.

[86] Moreover, I was not convinced that the measures indicated in Health Canada's March 16, 2003 Advisory titled, "Severe Acute Respiratory Syndrome", whereby fight crews would monitor passengers for SARS or SARS-like symptoms and divert such passengers to quarantine before they proceeded to Customs, were in place at the time of Mr. Chapman's refusal to work on March 16, 2003.

[87] On the subject of postings, Mr. Chapman testified that he was assigned to the Primary Unit when he refused to work. However, his uncontested testimony was that Customs Officers were frequently reassigned during shifts such that they could occupy any post during a shift.

[88] However compelling, though, I was not convinced by these facts that Mr. Chapman would likely be exposed had a SARS infectious passenger arrived at Customs at PIA. Other officers were working on the shift when Mr. Chapman refused to work, and there was no evidence Mr. Chapman was required to deal with every passenger. Thus, it was somewhat speculative that Mr. Chapman would be exposed had a SARS infectious passenger arrived at Customs at PIA.

[89] With regard to the third criteria, whether or not it was likely that exposure to the hazard, condition or activity would cause serious injury or illness to the employee exposed thereto, I had Mr. Chapman's testimony that it was impossible for Customs Officers to maintain a distance of 1 metre from passengers at all times because passengers routinely approach Customs Officers closer than one metre to pass their documents to the Officer or lean towards Customs Officers to achieve some privacy when providing personal information. Mr. Chapman testified further that Point Officers, Rovers and Customs Officers in the Secondary Unit also work in closer proximity to passengers than I metre

[90] However, Dr. Chernin testified that the risk of infection from SARS required repeated incidents of "close contact" for a minimum of 20 minutes. He opined that this was highly unlikely to occur in the Primary Unit since passengers were not held in the Primary Unit for more than two minutes before being processed, or referred to the Secondary Unit for closer scrutiny. Therefore, there was insufficient exposure time for Mr. Chapman to contract SARS in the Primary Unit at PIA.

[91] With regard to Mr. Chapman's concern that he could come into close contact with respiratory secretions from SARS infected passengers because passengers often place documents in their mouth, I recall Ms. Pacheco's evidence that Custom Officers were provided with gloves and with antiseptic solutions and instructed to wash their hands frequently and thoroughly. I also have Mr. Chapman's testimony that he always wore gloves.

[92] In the case of the Secondary Unit, Dr. Chernin conceded that a Customs Officer could be infected by SARS there only if the Officer failed to detect symptoms and remained in close contact with a SARS infectious passenger for more than 20 minutes while conducting a thorough body search which could include being exposed to body fluids and secretions, especially if the Customs Officers was involved in obtaining a fecal sample and examining the sample. He opined, however, that this would not occur because it would only take a short time for Customs Officers to recognize that a passenger before them was suffering SARS or SARS like symptoms, and because CCRA had instructed Customs Officers to immediately refer passengers with symptoms to quarantine rather than to continue processing the passenger.

[93] With regard to his ability to recognize SARS symptoms, I note that Mr. Chapman had visited the Internet sites maintained by WHO, CCA and Health Canada prior to his refusal to work to learn about SARS. Having so informed himself, I conclude that he was familiar with the symptoms of SARS and the WHO definition of "close contact." Moreover, Mr. Chapman testified that a Customs Officer in the Primary Unit acts for Immigration Canada and in that capacity is responsible for screening passengers for illness. As a minimum, this implies a degree of training knowledge and experience relative to detecting disease symptoms. Mr. Hamilton held that passengers could inadvertently mask SARS symptoms with medications. However, Dr. Chernin countered that it would be unlikely that shortness of breath or difficulty in breathing could be masked. I am therefore persuaded that Mr. Chapman was capable of detecting SARS or SARS like symptoms.

[94] On the question of whether or not CCRA had instructed its Customs Officers to refer symptomatic passengers to immediately quarantine and not continue screening the person, I am satisfied that Dr. Chernin made this clear to Customs Officers when he addressed CCRA staff and management on March 17, 2003. But, there was no corroborating evidence that Mr. Chapman was instructed on this prior to his refusal to work on March 16, 2003. To the contrary, Mr. Chapman's actual testimony was that CCRA had not directed him to enforce the one metre distance recommendation of Health Canada or to refer symptomatic passengers to quarantine rather than process them through Customs.

[95] However, as I clarified in paragraph [40] in the case of Canada (Correctional Service) and Schellenberg, the determination of danger by a health and safety officer is made at the time of his investigation and not at the time of the employee's refusal to work. As in this case, the investigation by the health and safety officer may take several days to complete. Nonetheless, subsection 129.(4) stipulates that the decision, as to whether or not a danger "exists" (present tense), is made on completion of the investigation. It would, however, be inconsistent with section 122.1, the purpose clause of the Code, to interpret this to mean that a health and safety officer could not decide that a danger exists based on the facts gathered to that point, even if his or her investigation was not completed. Subsection 129.(4) and section 122.1 read as follows:

> *129.(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.*
>
> *122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.*

[96] When Mr. Chapman refused to work, events were unfolding rapidly as Health Canada moved to assess "SARS" in order to advise Federal Departments as to the protective measures necessary to protect federal employees and to establish protocols to facilitate identification and treatment of SARS infected passengers coming into Canada. For example, on March 15, 2003, Health Canada issued an advisory to CCRA recommending as precautionary measures that CCRA employees engage in frequent hand washing with soap and water for 20 to 30 seconds, and to maintain, where possible, a distance greater than 1 metre from passengers. On March 16, 2003, Health Canada issued a SARS advisory that confirmed that officials at Pearson and Vancouver International Airports had been contacted to activate protocols to track potentially infected passengers and that Health Canada had dispatched staff to those airports to assist in the management of these passengers. In addition, the advisory indicated that Health Canada was working towards distributing Health Alert Notices to international passengers arriving in or returning directly from Hong Kong. The cards would advise passengers on SARS and how to recognize SARS symptoms. In the meantime, airlines were contacted to provide the warning during flights, to advise airport authorities of any passengers reporting symptoms and to be on the lookout for passengers exhibiting symptoms. On March 17, 2003, Dr. Chernin met with CCRA management and employees and advised them fully on SARS.

[97] Based on this, I am satisfied that CCRA had instructed its Customs Officers, including Mr. Chapman, to discontinue screening of any passenger showing symptoms of illness and to refer symptomatic passengers immediately to quarantine by the time that health and safety officer Gass had informed parties on March 18, 2003 of his decision that a danger did not exist for Mr. Chapman. Therefore, at the time of health and safety officer Gass's decision that a danger did not exist, it was unlikely that Mr. Chapman would be injured or made ill by exposure to SARS should a SARS infectious passenger arrive at Customs at PIA.

[98] For all of these reasons, I confirm the decision of health and safety officer Gass on March 18, 2003, that a danger did not exist for Mr. Chapman.

_____

Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 03-019

Appellant: Michael Chapman

Respondent: Canada Customs and Revenue Agency

Provisions:

***Canada Labour Code*:** 122(1), 128, 129.

Keywords: Severe Acute Respiratory Syndrome, SARS, danger, close contact, strip search, protective gloves, medical grade respirator, quarantine, protocols, respiratory secretions, body fluids, hand wash

Summary:

On March 16, 2003, a Canada Customs and Revenue Agency (CCRA) Customs Officer, employed at Pearson International Airport (PIA), refused to work. He complained that his employer, the CCRA, had not provided him with personal protective equipment (PPE) and information to protect his health and safety from unknown pathogens that may be present in the work place. Mr. Chapman was referring to Severe Acute Respiratory Syndrome or SARS.

The Health and Safety Officer who investigated the Custom officer's refusal to work decided that a danger did not exist for the employee. He decided that a danger did not exist because the work of the Customs Officer did not entail close contact with passengers, there was only one direct flight daily from South East Asia, Health Canada was putting measures in place to quarantine ill passengers that would divert them before they reached Customs. He noted that no-airline crew member, ground crew member, or other airport employee had contracted SARS.

The Appeals Officer confirmed the decision of the health and safety officer that a danger did not exist for the employee at the time of his investigation