Federal Court  Cour fédérale

Date: 20150424

Docket: T-2586-14

Citation: 2015 FC 531

Montréal, Quebec, April 24, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ROTOR MAXX SUPPORT LTD.

Applicant

and

MINISTER OF TRANSPORT

Respondent

JUDGMENT AND REASONS

Overview

[1] The Applicant requested an injunction to silence the issuance of an "Alert" that the Minister of Transport concluded was necessary as a safety measure for the security of the flying public.

[2] On any scale, grave risk to human life should weigh much higher than any commercial interests.

[3] An injunction, therefore, will not be issued to safeguard commercial interests, as there is no more (a) serious issue, (b) balance of convenience, and (c) irreparable harm than the loss of human life.

[4] All of the above factors for the issuance of an injunction favour the Respondent, the Minister of Transport, in respect of security reasons for the public rather than the commercial interests of the Applicant.

[5] Significant parts of certain aircraft may be faulty due to questionable certification that could lead to "catastrophic" consequences as per detailed copious affidavits, exchanges and technical evidence on file.

[6] In plain language, a public safety interest is implicated. Therefore, an Alert is to be issued, not to hide that which the Minister of Transport would want to ensure be made known as per the Minister's statutory mandate for the safety of the flying public.

Background

[7] This is a matter which stems from the fact that the Minister of Transport [the Minister] intends to advise the aviation industry by issuing a Civil Aviation Safety Alert [CASA] to address the risk from helicopter engine and drive train parts that the Applicant, according to the

Minister, "improperly certified". As per the Minister, the parts are already in use around the world, the "failure of which could lead to a catastrophic failure". This is the view of Transport Canada in respect to its mandate by which to "protect the public interest by ensuring effective safety oversight of the Aviation industry".

[8] The Applicant at the outset of proceedings on this matter had requested a confidentiality order to ensure that its commercial interests would not be jeopardized by the outcome of such an "Alert".

[9] An interim confidentiality order was granted at the outset for the issues to be canvassed and set out in writing for the Applicant and Respondent to have a chance for further explanation by documentation to that effect.

[10] The Applicant wants the confidentiality order to be further maintained to ensure that its commercial interests are not jeopardized. The Applicant would like more time. It has proposed to Transport Canada its own corrective measures which (due to time factor delays, questionable part authenticity and certification documentation, and missing and insufficient records) were not accepted.

[11] A "commercial interest" must be analyzed in view of a general or "public" interest, in respect of security. Any "important commercial interest" would have to outweigh the public security need to know, in such a case.

[12] When such a confidentiality order is requested, the Court must weigh the risk to "commercial interests of a company" in relation to the deleterious effects of such an order on important public security interests, in regard to public safety, and, in this case aviation safety.

[13] If such a confidentiality order was maintained, detailed evidence, motion records, submissions and written decisions would be hidden from public scrutiny. (Reference is made to the Supreme Court decision in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, 2002 CarswellNat 822 at para 53).

[14] Such a confidentiality order, also indirectly, does what the Applicant would want to do directly; that is to ensure the evidence is not in the public purview; the Minister would thereby, be, in effect, stopped from issuing an Alert on this matter.

[15] In addition, the Applicant has requested an interlocutory injunction to prevent the Minister from issuing an "Alert" on the matter.

[16] Any interlocutory injunction is "a rare exceptional remedy". The conjunctive tripartite test for an injunction must be met for the issuance of such an injunction, in addition to demonstrating its urgency.

[17] The background, in respect to issuing an "Alert", arises from the following factors:

a) the issuance of the CASA relates to the findings of a Civil Aviation Safety Inspection from early 2013;

b) Since July 2014, the possibility of an Alert was made known to the Applicant;

c) The Applicant had a draft of the proposed CASA as of November 2014;

d) The Applicant was informed of the contents of the Alert three weeks prior to March 17, 2015, when it was to be issued;

e) The Applicant served a motion record, requesting interim relief, a week before the March 17, 2015 Alert was to be issued.

[18] An application for judicial review has been filed with the Court by the Applicant in regard to a November 24, 2014 letter from Transport Canada concerning maintenance policy manual changes.

[19] The interlocutory injunction request is to stop the Minister from issuing an Alert in regard to the potential existence of parts, not properly certified as having met the approved type design.

Analysis

[20] In respect to the tripartite RJR MacDonald test, the Court does not find a serious issue to be tried exists, that would put into question the reasonableness of such an Alert.

[21] When a party requests that a public oversight entity be made to silence itself, or be prevented from exercising statutory authority, the balance of convenience becomes such that the public interest suffers; and, the scales are thereby tipped in the public's favour; thus, the balance of convenience, in fact, favours the Minister as the impugned Alert was to be undertaken as per a

security of the public responsibility within her statutory authority (*RJR MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 at paras 76 and 77).

[22] An important public interest has been recognized by the Federal Court of Appeal in respect of Transport Canada enforcing the *Aeronautics Act* and its Regulations for the purposes of public safety (*Swanson Estate v R.*, [1991] FCA No 452 at para 27).

[23] In addition, it has been clearly stated that the Minister carries "a heavy responsibility towards the public to ensure that aircraft and air carrier operations are conducted safely" (*Sierra Fox Inc. v Canada (Minister of Transport)*, 2007 FC 129 at para 6).

[24] The Court recognized that the mandate of the Act is to ensure air travel is as safe as it can be, as per the state of the art "a stakeholder's economic interests must give way to the broader public interest" (*Gill v Canada (Minister of Transport)*, 2014 BCSC 582).

[25] It is important to specify that the Applicant, itself, described its certifying parts process in 2012, as "very arbitrary" and in a "state of flux" without a written process and during a growth period in which the quality assurance manager was, as stated, overwhelmed; and, this led to an atmosphere of "trepidation".

[26] Reference is made to the affidavit of Mathew MacWilliam, paragraph 33 exhibit 6; and to the affidavit of Michael Godsell, exhibits 6-9; Respondent's Records at pages 56, 57-58 and 76-77; these references to affidavit documents and exchanges below demonstrate examples of

pertinent evidence that required evaluation records are not included to verify parts conform to type design and that information transmitted by vendors of parts raised questions in regard to the authenticity of the parts, themselves. [In addition, specific reference is made to potential peril to the flying public as discussed in the following documents: the supplemental affidavit of Michael Godsell, paragraph 49, exhibit 49 with respect to whether or not a part is necessarily airworthy; and, furthermore, reference is made to criticality in respect of airworthiness; for an understanding of related issues in regard to missing and insufficient records and documentation, reference is made also to the supplemental affidavit of Michael Godsell, paragraphs 8-10 of exhibit 12; and, the supplemental record of the Respondent, at pages 71 and 172-185, 227-250, 300-304; also, transcripts from the cross-examination of Michael Godsell, page 27, lines 9-12; and all of the Respondent's supplemental motion record is significant, in that regard, and, in addition, specifically, pages 348 and 349 which clearly demonstrates a problem with the recertification process by the Applicant, dated April 16, 2015.]

[27] Section 571.13 of the *Canadian Aviation Regulations* specifies that a part may not be installed on an aircraft unless it conforms to the type design.

[28] The Alert by CASA is to give notice to the industry of residual risk from engine and drive train parts which have not been properly certified. These parts are being used around the globe (that includes an aircraft that is used by the President of the United States).

[29] If parts do not conform, they may fail, all of which can lead itself to the ultimate failure of protecting the interests of the public by undue risk due to a lack of a notice when it was duly to be issued.

[30] Plans submitted by the Applicant were not found to be adequate to justify the risk which would ensue.

[31] It is significant to specify, that the Applicant admitted that it decided not to comply with a request for a listing of the undocumented parts which it had certified due to "expense". (The Applicant also admitted that its record keeping "was not up to snuff" for the period of June 2011-November 2012.)

[32] The irreparable harm to the public aviation safety outweighs any commercial interest of the Applicant. (Reference is made to the detailed affidavits, cited above – demonstrating a catastrophic outcome which could ensue). What is primordial is what are the parts, as "authenticated", implicated; and, furthermore, what purposes do they serve; to whom were they sold and on which aircraft have they been installed.

Conclusion

[33] After continuous reading of the copious detailed multiple binders of affidavits, exchanges and technical evidence during the past nine days and subsequent to a two-day session of hearings with the parties, the Court, therefore, due to all of the above, dismisses the motion for an

interlocutory injunction with costs to the Respondent; and, discontinues the interim confidentiality order (injunction).

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's motion for an interlocutory injunction be dismissed with costs; and in addition, that the interim confidentiality order (injunction) that has been in place until today, Friday, April 24, 2015, be discontinued as of the issuance of this judgment.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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