

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Federal Court Upholds Minister's Intent to Issue Civil Aviation Safety Alert

On April 24, 2015, the Federal Court of Canada released a decision relating to the ability of an aircraft parts overhaul and repair facility to prevent the release by of a Civil Aviation Safety Alert (the "Alert") by the Minister of Transport.

The issue arose from a concern by the Minister that certain helicopter and drive train parts were improperly certified by the Rotor Maxx Support Ltd. ("Rotor Maxx"). According to the Minister, the parts are already in use around the world, and their failure could lead to catastrophic consequences.

By way of background, the Court noted that:

- certain adverse findings about the parts in question were made in a civil aviation inspection undertaken in early 2013;
- the possibility of the issuance of the Alert were made known to Rotor Maxx in early July 2014;
- Rotor Maxx was provided with a draft form of the Alert in November 2014;
- Rotor Maxx was aware of the specific content of the Alert three weeks prior to the intended issue date, being March 17, 2015; and
- Rotor Maxx did not serve motion materials in an attempt to prevent the issuance of the Alert until one week before it was to be released.¹

Rotor Maxx had proposed its own corrective measures to Transport Canada, but they were not accepted due to "time factor delays, questionable part authen-

ticity and certification documentation, and missing and insufficient records".

Rotor Maxx initially sought two forms of relief:

- a) anonymity in the proceedings in order to protect its commercial interests; and
- b) an injunction preventing the Minister from issuing the Alert.

Initially, anonymity was granted on an interim basis in order to allow the parties to provide written materials further fleshing out the dispute.

At the outset of its analysis, the Court noted that on an application of this sort, it must weigh the "commercial interests of a company" against the "deleterious effects of such an order on important public security interests".

As is the custom when deciding an application for injunctive relief, the Court turned to the Supreme Court of Canada's decision in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311, where that court established a tri-partite test (the "RJR Test") for granting an injunction, as follows:

1. Is there a serious issue to be tried?;
2. Will the applicant (i.e. Rotor Maxx) suffer irreparable harm if the injunction is not granted?; and
3. Which party will suffer the greater harm from granting or refusing the remedy (i.e. the issuance of the Alert) pending a decision on the merits? (This is often referred to as the "balance of convenience").

First Branch: Serious issue to be tried

The Court did not demonstrate any rigour in the ruling on this aspect of the test. It simply made a declaratory statement that "the Court does not find a serious issue to be tried exists, that would put into question the reasonableness of such an Alert". [emphasis in original].

Second Branch: Irreparable Harm

The second branch of the *RJR* Test was also sparsely reasoned. The Court made another declaratory statement that "public aviation safety outweighs any commercial interest of [Rotor Maxx]".

Third Branch: Balance of Convenience

The Court began its analysis of the "balance of convenience" branch of the *RJR* Test by stating:

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.

[emphasis in original]

This statement is rather curious, as it
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Civil Aviation Safety Alert (cont'd)

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suggests that the balance of convenience will always favour a public authority exercising its powers. In our view, this principle would not likely hold up on review, although we acknowledge that there would be a very strong presumption in favour of a public authority in a situation such as this one. Nevertheless, we believe that the respondent should have the ability to rebut this presumption, a possibility seemingly not contemplated by the Court's ruling, as set out above.

In any event, in considering this branch of the *RJR* Test, the Court also cited a number of decisions² standing for the trite proposition that the Minister of Transport's public interest function has been widely recognized by the Courts.

Also, in assessing the third branch of the *RJR* Test, the Court noted that Rotor Maxx described its own certification process in 2012 as "very arbitrary" and "in a state of flux". In reviewing the affidavits filed on the application for the injunction, the Court held that there was evidence in the record that:

- the documentation with respect to the parts in issue called into question their authenticity as well as whether they conform to type design; and
- there may have been concerns with the recertification process respecting the parts in issue.

The Court also noted that Rotor Maxx "admitted that it decided not to comply with a request for a listing of the undocumented parts which it had certified due

to 'expense'" and that its record keeping was "not up to snuff".

In considering all of the branches of the *RJR* Test, the Court decided to dismiss the application for an injunction, with costs, and also to discontinue the interim confidentiality order.

While the Court's endorsement was not as detailed as it may have been, the message is clear: those seeking to prevent the Minister from issuing a Civil Aviation Safety Alert face a very high bar indeed.

Rotor Maxx Support Ltd. v. Minister of Transport,
2015 FC 531

Footnotes:

1. The Court did not, however, that Rotor Maxx has filed an application for judicial review regarding a November 24, 2014 letter from Transport Canada concerning maintenance policy manual changes.
2. *Swanson Estate v. R.* [1991] FCA 452; *Sierra Fox Inc. v. Canada (Minister of Transport)*, 2007 FC 129; and *Gill v. Minister of Transport*, 2014 BCSC 582.

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