



Rocky Mountain Ecosystem Coalition v. Canada (National Energy Board), 1999 CanLII 8615 (F.C.)

Date: 1999-08-03
Docket: T-8-99
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Date: 19990803

Docket: T-8-99

IN THE MATTER OF an Application pursuant to Section 22 of the *National Energy Board Act*,
R.S.C. 1985, c. N-7, as amended

AND IN THE MATTER OF a Declaration of the National Energy Board relating to an application
by Alliance Pipeline Ltd., dated July 3, 1997, for a certificate of public connivance and necessity made
pursuant to Parts III and IV of the *National Energy Board Act* in respect of the construction and
operation of a proposed natural gas pipeline system from northeastern British Columbia and
northwestern Alberta to Chicago, Illinois

BETWEEN:

T-8-99

ROCKY MOUNTAIN ECOSYSTEM COALITION,

Applicant

- and -

**THE NATIONAL ENERGY BOARD and THE ATTORNEY
GENERAL OF CANADA, REPRESENTING THE MINISTER
OF AGRICULTURE, THE MINISTER OF FISHERIES AND
OCEANS, THE MINISTER OF NATURAL RESOURCES
and THE MINISTER OF THE ENVIRONMENT and
ALLIANCE PIPELINE LTD.,**

Respondents

AND BETWEEN:

T-9-99

ROCKY MOUNTAIN ECOSYSTEM COALITION,

Applicant

- and -

THE NATIONAL ENERGY BOARD and THE ATTORNEY

GENERAL OF CANADA, REPRESENTING THE MINISTER

OF AGRICULTURE, THE MINISTER OF FISHERIES AND

OCEANS, THE MINISTER OF NATURAL RESOURCES

and THE MINISTER OF THE ENVIRONMENT and

ALLIANCE PIPELINE LTD.

Respondents

REASONS FOR ORDER

JOHN A. HARGRAVE,

PROTHONOTARY

[1] These reasons arise out of motions to strike out two applications for judicial review filed by the Rocky Mountain Ecosystem Coalition ("Rocky Mountain") in respect of the Alliance Pipeline System Project (the "Project").

[2] The first application ("T-8-99") seeks an order to set aside or quash the decision of the National Energy Board (also referred to as the "NEB") rendered on November 26, 1998 in respect of the Project. The second application ("T-9-99") seeks relief in the nature of *mandamus* compelling the Department of Fisheries and Oceans ("DFO") and the Prairie Farm Rehabilitation Administration ("PFRA") to conduct a panel review of the Project so as to fulfill their alleged duties as responsible authorities as defined in the section 11(1) of the *Canadian Environmental Assessment Act* (the "*CEA Act*"). To paraphrase, a responsible authority, as defined, includes a federal authority charged with issuing an approval or permit to allow a project to proceed. Here the NEB was certainly a responsible authority: it was charged with issuing a certificate to authorize the construction of a natural gas pipeline to be built by Alliance Pipeline Ltd. ("Alliance"). There may be more than one responsible authority and then such responsible authorities work together as set out in section 12 of the *CEA Act*. However there is also another role for government bodies, such as, in this instance, DFO and PFRA and that is participation under section 12(3) of the *CEA Act*, by which such federal bodies make available specialist or expert evidence to the responsible authority, that is, in this instance, to the NEB. The point is that DFO and PFRA are not necessarily responsible authorities, but rather may be a federal authorities with information useful to the NEB, all as envisioned by section 12(3) of the *CEA Act*.

[3] The grounds for the first application of Rocky Mountain are that the NEB made use of information provided by DFO and PFRA which entities, according to Rocky Mountain, did not participate in the public hearing in respect of the Project. Among the alternatives, Rocky Mountain says that the NEB restricted the participation of DFO and PFRA to the role of advisers instead of imposing upon them the duties of responsible authorities. The grounds alleged in the second application are that DFO and PFRA did not fulfill their duties and functions as responsible authorities as set out in sections 11 and 12 of the *CEA Act*, particularly section 12(3) and (4) which, according to Rocky Mountain, impose a duty on DFO and PFRA to provide any relevant and important information to the review

panel conducting an environmental assessment of a project. In addition, Rocky Mountain says that DFO and PFRA, as responsible authorities, should have been involved as such in holding the pipeline hearing. Here one might observe that even if DFO and PFRA are in some way responsible authorities within the *CEA Act*, they and the NEB, by section 12(1) of the *Act*, have the discretion to determine how they will perform their functions.

[4] The Respondent Attorney General of Canada ("AGC") representing various federal ministers brings a motion to strike out both of Rocky Mountain's applications. The AGC's grounds in respect of the first application, T-8-99, are: (1) that the Trial Division of the Federal Court has no jurisdiction to entertain this matter; (2) that by virtue of section 18.5 of the *Federal Court Act* and section 22 of the *National Energy Board Act* ("*NEB Act*"), the Applicant, Rocky Mountain, is employing an improper procedure for reviewing the decision of the NEB and; (3) in the alternative, if the decision of the NEB is reviewable at all, only the Federal Court of Appeal has the jurisdiction to hear the application.

[5] The AGC submits in respect of the second application, T-9-99: (1) that this Court has no jurisdiction to hear Rocky Mountain's application since it does not seek to review a decision of a federal board, commission or other tribunal as defined in the *Federal Court Act*; and (2) that the relief sought by Rocky Mountain is in the nature of *mandamus* to compel a public authority to make a particular decision, but that this Court cannot provide such relief in reviewing discretionary decision of the public authority, such relief not being available at law. I have decided this motion on the second issue, the availability of *mandamus*.

[6] Rocky Mountain brings mirror image motions for affirmations that both applications are properly commenced in the Trial Division. Should this Court decide to accept the jurisdiction to hear the applications, Rocky Mountain also seeks advice and directions as to the dates and time lines for steps to be taken in these proceedings.

[7] Rocky Mountain's motions are moot, for I have decided that the first application is outside the jurisdiction of the Trial Division, but might be salvaged by a further motion, to a judge, to have the first application sent to the Court of Appeal under Rule 49 and that the second application, seeking *mandamus*, a remedy which the Court cannot give in this instance, is struck out without an alternative. I now consider all of this in more detail, beginning with some relevant facts.

BACKGROUND

[8] The factual circumstances are not, for the most part, in great dispute. On July 3, 1997, Alliance made an application to the National Energy Board for: (1) a certificate of public convenience and necessity authorizing construction of a pipeline system to transfer natural gas from its sources in Northern British Columbia and Northern Alberta ultimately to Chicago, Illinois, U.S.A.; and (2) related toll and tariff authorizations.

[9] The extent of the Project is substantial: just the Canadian portion of the Project encompasses construction of approximately 1565 km of main pipelines, 770 km of lateral pipelines (the latter reaching north of Fort St. John, B.C.) and related facilities. The Canadian portion of the main line extends from a location near Gordondale in Northwestern Alberta to a point near Elmore, Saskatchewan where it joins the American portion of the system. The pipeline crosses over 500 streams and rivers. The entire pipeline system is estimated to cost \$3.7 billion with the Canadian portion being allotted \$2 billion. The system is scheduled to be in service by the second half of the year 2000, and once completed, it will be capable of delivering 37.5 million cubic metres of natural gas per day.

[10] Given the large scale of the Project and its possible impact on the environment, the NEB's approval of the Project became subject to comprehensive study and active consultation with "interested parties" pursuant to the *CEA Act*. As a consequence, the NEB issued Hearing Order GH-3-97 on 3 September, 1997 directing a public hearing in order to obtain the evidence and views of interested persons on the Alliance's application and to provide a forum for public participation.

[11] The public hearing commenced on 6 January, 1998 and went on for 77 days primarily at the NEB's offices in Calgary. There was also occasion for some regional hearings to facilitate the participation of the persons living in the areas directly affected by the Project. Rocky Mountain, a non-profit organization with a mandate to preserve environmental integrity, registered as an interested party. It actively participated, conducting cross-examinations and making submissions to the NEB panel.

[12] During the course of the hearing, Rocky Mountain became aware of a new drilling method proposed by Alliance to run the pipeline beneath streams and rivers. The environmental impact of running pipeline beneath streams was unknown. Rocky Mountain became concerned about its effect on the fish habitat. Rocky Mountain says that DFO had on-going discussions with Alliance about the drilling method, but that the discussions were conducted outside the formal hearing process. It further says that the substance of the discussions was neither presented at the hearing nor made available to other participants.

[13] Rocky Mountain says the exchange of information between DFO and Alliance, outside the hearing process, effectively precluded the NEB panel from obtaining relevant and important information for the purpose of making a decision. Rocky Mountain requested the NEB to require Alliance to produce witnesses with knowledge of the discussions with DFO, but its request was denied on the basis that Rocky Mountain should have asked DFO and PFRA to make available the specific witnesses for the hearing first, and only when that request was denied, would they have been entitled to come before the panel for issuance of subpoenas. Not having done so, the NEB advised that it was in no position to intervene (AGC's record Vol.II, p.516).

[14] To the contrary, Rocky Mountain says it exchanged much correspondence with DFO and PFRA in respect of the drilling method. Rocky Mountain went on to make a motion to the NEB panel for an adjournment of the hearing pending receipt of information from DFO, but its motion was denied. It is interesting to note the position of NEB in their ruling dated 23 January 1998 (part of the Exhibit D, AGC's Record Vol.II p.20):

Under the NEB Act, the Board has a discretion as to the amount of information necessary for it to set an application down for a hearing. The information generally required is set out in the Board's *Guidelines for Filing Requirements* ("Guidelines").

* * *

On more than one occasion the Board has pointed out to parties that the purpose of those Guidelines is to ensure that the Board has sufficient information for it to hold a proceeding. This does not mean it has sufficient information to make a determination that the proposed project is in the public convenience and necessity.

Similarly, the question to be dealt with in relation to this motion is not whether the Board has sufficient information to determine if the environmental effects of the proposal are likely to be significant or insignificant. In fact, if the Board required that there be sufficient information on the record to make that clear determination, it would mean that the Board would, in essence, foreclose the option of being able to find that it is uncertain whether or not the project is likely to cause significant adverse environmental effects. Rather the question is whether the information filed by Alliance is sufficient to permit an environmental assessment process to be undertaken. The information filed is then examined, questioned and tested by way of written and oral questions and the evidence of the other parties.

The Applicant in an environmental assessment process always faces the possibility that the ultimate outcome, after a consideration of the evidence, is that it is found likely or uncertain that the environmental effects will be significant.

In this instance the Board is of the view that there is sufficient information on the record to permit the environmental impact assessment under the CEA Act to proceed . . . Therefore the motion of RMEC for an adjournment is dismissed.

[1] The NEB's Comprehensive Study Report was released for comment. DFO, in response to a request from NEB for comments indicated in a letter dated 25 September 1998 that it was still awaiting some additional information regarding the new drilling method under Wapiti River, one of the numerous streams and rivers affected by the Project, and that it was not satisfied with the comprehensiveness of the report.

[2] Notwithstanding DFO's comment, the NEB released the Comprehensive Study Report on 2 October 1998, submitting it to the Minister of Environment for approval. The Minister concluded that the Project was not likely to have significant environmental effects. The approval of Governor in Council was granted on 3 December 1998. Alliance obtained its certificate of Public Convenience and Necessity. The Project commenced in February of 1999. Construction is in progress in both the United States and in Canada.

ISSUES

[3] The gist of the AGC's argument on its motions is that Rocky Mountain's application is bereft of any possibility of success and thus must fail. The grounds of the AGC's motion to strike out the first application can be summarized as questioning whether the Trial Division of the Federal Court has any jurisdiction to hear the application. As to the second application the AGC submits that *mandamus* cannot be granted and thus the proceeding should be struck out.

[4] Rocky Mountain, for its part, argues that their applications, especially the second proceeding, are properly commenced in the Trial Division since Rocky Mountain does not necessarily request the Court to review the decision of NEB, but rather ask the Court to review the collateral action or inaction by which DFO and PFRA are said to be in breach of their duty as responsible authorities. Rocky Mountain also requests the direction of this Court in the management of these proceedings. Since the success of Rocky Mountain's motion seeking direction depends on the outcome of the AGC's motion, I will deal with the AGC's motion first.

ANALYSIS

I. Preliminary Issue: Motion to Strike Out an Application for Judicial Review

[5] The Court has always been reluctant to strike out an originating application. Rule 221 (formerly Rule 419), which deals with striking out, applies to actions. There are various reasons for this usual stance against striking out an application. For example, in contrast to an action, the merit of the application is decided on affidavit evidence and documentation in a summary way. Thus, the Court may be a little less concerned with preserving the resources of the Court. In a judicial review setting, the role of the Court is in part an expediter leading the parties to the hearing stages as quickly as possible. This usually makes a motion to strike unnecessary. This, when combined with the general reluctance of the Courts to strike out any proceeding or an interlocutory motion, leads to the proposition that originating applications will generally not be struck.

[6] There are, however, exceptions whereby a motion to strike out an application may be granted. Counsel for the Respondent AGC refers to the decision of the Federal Court of Appeal in *David Bull Laboratories v. Pharmacia Inc.*, 1994 CanLII 3529 (F.C.A.), [1995] 1 F.C. 588, where it was suggested that the Court may strike out any application which is "so clearly improper as to be bereft of any possibility of success." (p.600). The decision of the same Court in *Moldeveanu v. Canada (MCI)* (1999), 235 N.R. 192, elaborates on the principle in *David Bull* as including a situation in which an "affidavit at its face could not support the proceeding at issue," (page 194) at which point the application is bereft of any possibility of success. The Court of Appeal then specifically notes that "We express no opinion as to the effect of new Rule 221 (which has replaced old Rule 419) on the principle set out above" (*loc. cit.*). Also pertinent, jurisdiction being at issue, is *Cyanamid Agricultural De Puerto Rico Inc. v. Canada*, (1984), 74 C.P.R. 133, involving an application under section 41 of the *Patent Act*. There the respondent, by an interlocutory motion, sought to strike out Cyanamid's application. In leading to a dismissal for Cyanamid's application for want of jurisdiction, Mr. Justice Mahoney said:

"... the Rules of Court make no provision for a respondent to move for summary dismissal of an application for a want of jurisdiction as is provided to a defendant in an action by Rule 419. I agree that, ordinarily, a respondent ought to make his entire reply to an application when it is returnable and I should be prepared to discourage questionable interlocutory proceedings by imaginative awards of costs; however, where the motion itself is apt to be time consuming and where there is, as here, a clear question of jurisdiction which may determine the entire matter, common sense dictates, and Rule 5 permits, that the court deal with the preliminary objection in advance.

(Page 135)

If at this point jurisdiction is found wanting, striking out the applications will save the time, money and resources of all concerned. With these principles in mind, I will now deal with each application in turn

II. Application for Judicial Review in respect of the Decision of NEB (T-8-99)

Jurisdiction of Trial Division

[7] Rocky Mountain acknowledged, at the commencement of the hearing of this motion, that their first

application may fail for want of jurisdiction. Nevertheless, rather than merely strike out the application with no or minimal comment, I shall set out my reasoning for striking out this application.

[8] By virtue of subsection 18.1(1) of the *Federal Court Act*, the Trial Division of the Federal Court is empowered to hear an application for judicial review seeking extraordinary remedies against a federal board, commission or other tribunal as defined in the section 2 of the Act.

[9] The power of the Trial Division contemplated in the section 18 of the *Federal Court Act* is specifically subject to section 28. By section 28 the jurisdiction to hear judicial review applications against specified federal boards, commissions or other tribunals lies only with the Federal Court of Appeal. Section 28(3) expressly provides that the Trial Division is deprived of jurisdiction in respect of judicial review against federal boards and tribunals over which the Federal Court of Appeal entertains jurisdiction. Section 28 reads in part:

28. (1) Judicial Review - The Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

. . .
(f) the National Energy Board established by the *National Energy Board Act*;
. . .

(3) Trial Division Deprived of jurisdiction - Where the Court of Appeal has jurisdiction to hear and determine any matter, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter.

[10] The NEB is clearly a named federal board, commission or tribunal within section 28(1)(f). Therefore, should there be a judicial review application of any of its decisions, it must be in the Federal Court of Appeal. This Court has no jurisdiction to hear the application T-8-99 insofar as the Applicant, Rocky Mountain, seeks an order to set aside or quash the decision of the NEB. Application T-8-99 is bereft of any chance of success.

[11] There is another vantage point for looking at this issue, suggested in the NEB's submission and also by the style of cause, which refers to section 22 of the *National Energy Board Act*. Section 22 provides a right of appeal from a decision of the Board to the Federal Court of Appeal "on a question of law or jurisdiction," after leave to appeal has been obtained from that Court. An intended appellant must file a leave application within 30 days from the decision, otherwise the decision becomes final and conclusive. (Section 23(1) of the *Act*). Section 18.5 of the *Federal Court Act* is a further limit on Rocky Mountain's ability to succeed in a judicial review proceeding before the Federal Court Trial Division since it prohibits judicial review of any decision of a federal board insofar as a right to appeal exists in any other statutes. Rocky Mountain failed to exhaust this available avenue. In the event that Rocky Mountain was not truly a party to the proceedings, before the NEB and thus not entitled to an appeal, the Federal Court of Appeal still has the jurisdiction and is the proper court to hear Rocky Mountain's case by way of judicial review: see *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.*, an unreported 22 February 1999 decision of the Federal Court of Appeal in file A-676-98.

[12] At this point I should draw the attention of Rocky Mountain to Rule 49 of the *Federal Court Rules, 1998*. Rule 49 allows a judge to transfer any proceeding brought in the wrong division of the Court to the proper division. Should the Applicant wish to attempt to remedy the jurisdictional problem, it might bring a motion to a judge seeking an order for transfer of the present proceedings to the Federal Court of Appeal.

III. Application for Judicial Review seeking *Mandamus* against DFO and PFRA (T-9-99)

[13] The second application by Rocky Mountain seeks *mandamus* directing DFO and PFRA to openly engage in a panel review of the Project. Rocky Mountain submits that no relief is sought from the decision of NEB and, therefore, the application does not fall under the jurisdiction of the Federal Court of Appeal, but is properly brought in the Trial Division. I do not need to decide this point. Rather, the availability of *mandamus* is determinative.

The Nature of Mandamus

[14] *Mandamus* is a prerogative remedy which may be granted when a person who is delegated with a public duty is in the breach of that duty. It is, for example, exercised by Canadian courts in an application for judicial

review against the Ministers of the Crown in respect of failure to fulfill their ministerial duty. *Mandamus* "compels the performance of a public legal duty" and therefore it is usually directed against the public official.¹ Given its coercive and discretionary nature, the circumstances in which the remedy may be granted is now very much circumscribed.

[15] There is a line of authority establishing the requisites for *mandamus*. In the decision of the Ontario Court of Appeal in *Karavos v. Toronto and Gillies*, [1948] 3 D.L.R. 294 at 297, Mr. Justice of Appeal Laidlaw set out the fundamental criteria for *mandamus*:

[*Mandamus*] is appropriate to overcome the inaction or misconduct of persons charged with the performance of duties of a public nature.

...

Before the remedy can be given, the applicant for it must show

(1) "a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced"...

(2) "The duty whose performance it is sought to coerce by *mandamus* must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform"...

(3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers"

...

(4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy...

(emphasis added)

Brown and Evans on Judicial Review (Carswell, Toronto, 1998) refer to *Karavos* as the leading decision (page 1-33) comment upon these four specific requirements:

Where these conditions have been met, *mandamus* can issue regardless of the classification of the duty as judicial, administrative or legislative in nature.

(Page 1 - 34)

I am aware of the eight part test for *mandamus* set out by the Federal Court of Appeal in *Apotex Inc. v. Canada* 1993 CanLII 3004 (F.C.A.), [1994] 1 F.C. 742 at 766, affirmed without comment 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100. In *Apotex Inc.* the Court of Appeal refers to *Karavos*. I have not followed the fuller analysis set out in *Apotex* for the essential elements are found in *Karavos*. However, in all probability Rocky Mountain would fare less well under the *Apotex* analysis.

[16] The test for *mandamus* is difficult to meet for the requirements are cumulative and must be strictly met. Once all of the conditions are met, however, *mandamus* will be granted in an eclectic range of situations: see Brown and Evans (*loc. cit.*) I now consider Rocky Mountain's claim to *mandamus* in the light of the four criteria enunciated in *Karavos*.

A Clear Legal Right and a Duty Due

[17] There is a tendency to intermix the first two requirements, a legal right in an applicant for *mandamus*, in effect the person's standing and the concomitant duty due, on the premise that they both go to the same issue: see for example *Distribution Canada Inc. v. M.N.R.* *reflex*, [1991] 1 F.C. 716 at 724, a decision of Mr. Justice Strayer, as he then was, upheld 1993 CanLII 2923 (F.C.A.), [1993] 2 F.C. 26. Thus, the test for these requirements is a two-pronged test: a right must be both legal and clear or specific and matched by a duty. Unless there is a statutory provision imposing and defining the duty which is sought to be enforced, *mandamus* is not appropriate: the court is neither empowered to compel ministers to perform an action which may be contrary to law nor can it grant performance of an action which is not clearly defined.

[18] In the present case, Rocky Mountain looks to derive its legal right or, conversely, the duty of DFO and of PFRA mainly from two statutes, *CEA Act* and *NEB Act*. Of particular importance are sections 5, 11 and 12 of *CEA Act* which provide in part:

5. (1) An environmental assessment of a project is required before a federal authority exercise one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority...

(d) under a provision prescribed to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part...

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

(2) A responsible authority shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(a) or 37(1)(a).

12. (1) Where there are two or more responsible authorities in relation to a project, they shall together determine the manner in which to perform their duties and functions under this Act and the regulations...

(3) Every federal authority that is in possession of specialist or expert information or knowledge with respect to a project shall, on request, make available that information or knowledge to the responsible authority or to a mediator or review panel.

(4) Where a screening or comprehensive study of a project is to be conducted and a jurisdiction has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part thereof, the responsible authority may cooperate with that jurisdiction respecting the environmental assessment of the project.

[19] The effect of these provisions is that an environmental assessment of the project is required before a federal permit or licence is granted. An environmental assessment should be conducted in a timely manner, "as early as is practicable" and federal authorities "shall" cooperate with the jurisdiction in which the environmental assessment is conducted. In addition, the federal authorities in possession of expert information "shall" on request disclose the information to the responsible authority or review panel conducting the assessment.

[20] Rocky Mountain submits that, by virtue of the above sections of the *CEA Act*, DFO and PFRA have a duty to disclose any relevant information that they have to the NEB panel. I disagree. The sections only stipulate that the environmental assessment be conducted in a timely fashion and either that federal authorities make available expert information when requested (section 12(3)) or that, if there is more than one responsible authority capable of holding a hearing, they together determine how they will perform their duties and functions (section 12(1)). The parties say that DFO and PFRA identified themselves as responsible authorities for the assessment of the Project and that they exchanged a substantial amount of correspondence with the NEB in respect of the Project, albeit some of the correspondence was not produced at the hearing.

[21] The contention of Rocky Mountain is not that DFO and PFRA did not cooperate. Rather the supposedly relevant information they possessed, regarding a certain drilling technique, was not submitted to the NEB panel.

[22] The legislation does not stipulate any specific manner in which responsible authorities or federal authorities are to cooperate. Nowhere in the *Act* does it provide that DFO and PFRA, either as responsible authorities or as federal authorities in possession of specialist or expert information, must cooperate in holding hearings in a specific way or provide to the review panel any specific information unless requested to do so. To allow such remedy, in the absence of a legal right and a due duty, would be outside the scope of *mandamus*. Thus the Applicant's argument must fail in this respect.

[23] The outcome might have been very different had the NEB requested information from DFO and PFRA. The wording of the section 12 indicates that DFO and PFRA owe a duty to the NEB to make expert information

available. However, the NEB did not request the information. The NEB in its ruling indicates to Rocky Mountain that it is in the NEB's discretion to conduct a hearing as long as there is sufficient material and information to proceed with it. The NEB specifically expressed that it does not require every piece of relevant information to be submitted before a hearing can proceed. If Rocky Mountain has any difficulties with this view it should take up the issue by way of review of the NEB decision and not by way of a proceeding seeking *mandamus* against DFO and PFRA.

A Ministerial Non-Discretionary Decision

[24] "The presence of a discretion to act or not, or to act in one of a number of ways, will preclude the issue of *mandamus* since there will be no specific duty to act in a particular way." *Brown and Evans*, *supra*, at page 1-39. *Mandamus* cannot issue where the complaint involves the manner in which a minister performs his or her duties. This is especially so if the statute vests a discretion in the minister with respect to performance of those duties. In other words, the decision of the ministers must be purely "ministerial" and not "administrative," the difference there being the discretionary capacity. The AGC referred the Court to *Distribution Canada Inc. v. M.N.R.*, (*supra*). The Federal Court of Appeal in *Distribution Canada* decided that the word "shall", as used in the *Customs Tariff*, was indicative of the Minister's discretion and, as long as the Minister was not in dereliction of his general duty to impose tariff, *mandamus* could not issue to compel the minister to decide on a particular manner of imposing a tariff. The same reasoning is applicable here. In the event that DFO and PFRA are federal authorities with expert information, the *CEA Act* leaves open how the information is to be provided to the NEB. Alternately, if the NEB, DFO and PFRA are all responsible authorities, each capable of setting up a commission to review the Project, the *CEA Act* by its wording leaves open the manner in which responsible authorities are to cooperate in the assessment of a project: they cannot be forced by *mandamus* to decide this in any particular way. All of this is purely discretionary. Rocky Mountain is essentially asking for an order compelling DFO and PFRA, despite their discretion, to act or to cooperate in a very particular manner.

[25] To further emphasize the point, I would note the decision of the Saskatchewan Court of Appeal in *R. v. Nicol* reflex, (1965), 52 W.W.R. 434. In *Nicol* the Chief Justice, writing for the Court, considered whether a labour board constituted to investigate dismissal of a union worker should have, by writ of *mandamus*, compelled the employer to produce certain privileged documents at the hearing. The Court rejected the applicant's contention on the basis that a provision in *The Trade Union Act* and related Regulations gave the Board discretion to "accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not," and that the refusal to produce the privileged documents did not constitute a violation of fundamental natural justice in that case. (p. 438) As applied here, DFO and PFRA had a certain degree of discretion as to how they might, as responsible authorities, cooperate in the hearing procedure. Section 12 of the *CEA Act* also allows similar discretion to DFO and to PFRA as federal authorities with specialist information, in that they need only produce information in their possession upon request. The question of how they cooperate in relation to the general assessment hearing process was clearly in their discretion. *Mandamus* will not issue in such an instance.

Demand and Refusal

[26] *Mandamus* is appropriate only when there was a "proper" demand and when that demand was refused. For example, if the applicant fails to comply with all the conditions necessary for performance of a duty or if it demands a performance of otherwise appropriate duty through incorrect procedure, *mandamus* will not be granted.

[27] In the present case, there was a demand and refusal. The Applicant made a request for a production of the witness panel and certain documents either through the NEB hearing or in its application for judicial review, thus satisfying the fourth element.

Conclusion as to the Issuance of Mandamus

[28] Rocky Mountain has clearly and absolutely failed to establish three of the four necessary elements by which to obtain *mandamus*. *Mandamus* cannot issue in this instance. The second proceeding seeking relief against DFO and PFRA, in the nature of *mandamus*, is bereft of any possibility of success. It is struck out.

CONCLUSION

[29] Rocky Mountain also requested the production of various documents in the possession of NEB. Given that neither of the applications will proceed in this Court, the request for production of documents is not relevant in this Court, but might be should Rocky Mountain succeed in bringing its issues, with respect to NEB, before the Federal Court of Appeal.

[30] The first application of Rocky Mountain is beyond the jurisdiction of the Federal Court Trial Division, it clearly falling within the jurisdiction of the Federal Court of Appeal. The application is struck out, subject to Rocky Mountain, within the next 30 days, bringing an application before a judge of the Trial Division in order to see if the proceeding might be transferred to the Federal Court of Appeal. Such a transfer to the Federal Court of Appeal is necessary even where several authorities are attacked, but only one matter comes within section 28 of the *Federal Court Act* and the mandate of the Federal Court of Appeal: see for example *Alberta Wilderness Association et al. v. Express Pipelines Ltd.* (1997), 201 N.R. 336 and particularly at page 340-341.

[31] The second application is struck out because Rocky Mountain can not satisfy all of the necessary pre-requisites in order to obtain *mandamus*.

(Sgd.) "John A. Hargrave"

Prothonotary

August 3, 1999

Vancouver, British Columbia

[32]

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-8-99, T-9-99

STYLE OF CAUSE: ROCKY MOUNTAIN ECOSYSTEM COALITION

v.

THE NATIONAL ENERGY BOARD and THE ATTORNEY GENERAL OF CANADA, REPRESENTING THE MINISTER OF AGRICULTURE, THE MINISTER OF FISHERIES AND OCEANS, THE MINISTER OF NATURAL RESOURCES and THE MINISTER OF THE ENVIRONMENT and ALLIANCE PIPELINE LTD.

PLACE OF HEARING: Vancouver

DATE OF HEARING: July 5, 1999

REASONS FOR ORDER OF MR. JOHN A. HARGRAVE, PROTHONOTARY

DATED: August 3, 1999

APPEARANCES:

Mr. Clint Docker for the Applicant

Mr. Kirk Lambrecht for the Respondent Attorney General of Canada

Mr. Richard Neufeld for the Respondent Alliance Pipeline Ltd.

Ms. Judith Hanebury for the Respondent National Energy Board

SOLICITORS OF RECORD:

Docker & Company

Calgary, AB for the Applicant

Mr. Morris Rosenberg

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Fraser Milner

Calgary, AB for the Respondent Alliance Pipeline Ltd.

National Energy Board

Legal Services Unit

Calgary, AB for the Respondent National Energy Board

¹ Brown and Evans, Judicial Review of Administrative Action in Canada (Canvasback Publishing: Toronto, 1998) at 1-32("Brown and Evans")