

Date: 20061222

Docket: A-507-05

Citation: 2006 FCA 425

**CORAM: DESJARDINS J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

**MARINE RESEARCH INC./RECHERCHES MARINES INC.,
an entity duly incorporated under the laws of the province of New Brunswick,**

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Ottawa, Ontario, on November 15, 2006.

Judgment delivered at Ottawa, Ontario, on December 22, 2006.

REASONS FOR JUDGMENT:

DESJARDINS J.A.

CONCURRED IN BY:

**NADON J.A.
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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] The appellant is appealing a decision by the Federal Court (Mr. Justice Pinard), 2005 FC 1287, dismissing its application for judicial review of the refusal by Minister of Fisheries and Oceans (the Minister) to grant it a licence to fish for scientific purposes under section 52 of the *Fishery (General) Regulations*, SOR/93-53 (the Regulations) adopted under the *Fisheries Act*, R.S.C. 1985, c. F-14 (the Act).

A. THE FISHING LICENCE

[2] On August 12, 2004, the appellant, a profit-making corporation financed by private investors, applied to the regional office of the Department of Fisheries and Oceans (the Department) for a licence to fish for scientific purposes.

[3] The project involved gathering the data necessary to produce and market fishing maps indicating the distribution of different biological and commercial categories of snow crab in the southwestern Gulf of the Saint-Lawrence. These high-definition maps, resembling navigation maps, were meant primarily for professional fishermen. The appellant intended, however, to make them available to all Canadians.

[4] In order to gather the necessary data, the appellant planned to spend at least 45 days out at sea between September and December. It intended to use various types of fishing gear and make use of confidential sampling procedures that it described as a [TRANSLATION] “sampling optimized by stratification in accordance with geostatistic principles and optimized to limit costs”. No crab would be landed, but samples of non-commercial species would eventually be gathered for scientific purposes. It was imperative that the research activities begin before the end of September 2004, failing which the project could not be completed, since it was too dangerous and difficult to effect this kind of outing in the winter.

[5] Given the unique nature of the application, the Department demanded additional information from the appellant, in accordance with the power conferred to the Minister under

section 8 of the Regulations. The Department asked the appellant to provide it with a copy of the sampling procedures, a list of the station locations for each type of gear used as well as the coordinates of the geographical region of the project. It also asked it to consult with stakeholders in the fishing industry – namely fisher groups and the First Nations members who fished in the contemplated areas – and to send their comments and reactions regarding the project to the Department. A policy in the process of being drafted provided that the Department could require that a person seeking a fishing licence be bound to consult stakeholders in the fishing industry. Until that time, the Department had customarily carried out such consultations itself.

[6] The Department informed the appellant that the licence would be subject to a condition to the effect that it would be required to send the Department the data gathered so that it could analyze it later.

[7] On September 23, 2004, the appellant sent the Department a detailed letter from its expert, Dr. Gérard Y. Conan. However, the appellant refused to divulge certain information that it had been asked to provide. On October 7, 2004, the Department advised the appellant of its decision not to issue a fishing licence. It said that it was unable to complete its evaluation of the application without the information requested.

[8] In a subsequent letter dated November 3, 2004, the Department stated that it was prepared to meet with the appellant in order to discuss and clarify the information and respective positions.

[9] The appellant addressed the Federal Court of Canada. Mr. Justice Pinard dismissed the application for judicial review.

B. THE RELEVANT STATUTORY PROVISIONS

[10] The relevant provisions of the Act are the following:

Fishery Leases and Licences

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

Regulations

43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

(a) for the proper management and control of the sea-coast and inland fisheries;

(b) respecting the conservation and protection of fish;

(c) respecting the catching, loading, landing, handling, transporting, possession and

Baux, permis et licences de pêche

7. (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discretion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries – ou en permettre l'octroi –, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

Règlements

43. Le gouverneur en conseil peut prendre des règlements d'application de la présente loi, notamment :

a) concernant la gestion et la surveillance judicieuses des pêches en eaux côtières et internes;

b) concernant la conservation et la protection du poisson;

c) concernant la prise, le chargement, le débarquement, la manutention, le transport, la

disposal of fish;	possession et l'écoulement du poisson;
(d) respecting the operation of fishing vessels;	d) concernant l'exploitation des bateaux de pêche;
(e) respecting the use of fishing gear and equipment;	e) concernant l'utilisation des engins et équipements de pêche;
(e.1) respecting the marking, identification and tracking of fishing vessels;	e.1) concernant le marquage, l'identification et l'observation des bateaux de pêche;
(e.2) respecting the designation of persons as observers, their duties and their carriage on board fishing vessels;	e.2) concernant la désignation des observateurs, leurs fonctions et leur présence à bord des bateaux de pêche;
(f) respecting the issue, suspension and cancellation of licences and leases;	f) concernant la délivrance, la suspension et la révocation des licences, permis et baux;
(g) <u>respecting the terms and conditions under which a licence and lease may be issued;</u>	g) <u>concernant les conditions attachées aux licences, permis et baux;</u>
(g.1) respecting any records, books of account or other documents to be kept under this Act and the manner and form in which and the period for which they shall be kept;	g.1) concernant les registres, documents comptables et autres documents dont la tenue est prévue par la présente loi ainsi que la façon de les tenir, leur forme et la période pendant laquelle ils doivent être conservés;
(g.2) respecting the manner in which records, books of account or other documents shall be produced and information shall be provided under this Act;	g.2) concernant la façon dont les registres, documents comptables et autres documents doivent être présentés et les renseignements fournis sous le régime de la présente loi;
(h) respecting the obstruction and pollution of any waters	h) concernant l'obstruction et la pollution des eaux où vivent des

frequented by fish;	poissons;
(i) respecting the conservation and protection of spawning grounds;	i) concernant la conservation et la protection des frayères;
(j) respecting the export of fish or any part thereof from Canada;	j) concernant l'exportation de poisson;
(k) respecting the taking or carrying of fish or any part thereof from one province to any other province;	k) concernant la prise ou le transport interprovincial de poisson;
<u>(l) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those powers and duties; and</u>	<u>l) prescrivant les pouvoirs et fonctions des personnes chargées de l'application de la présente loi, ainsi que l'exercice de ces pouvoirs et fonctions;</u>
(m) where a close time, fishing quota or limit on the size or weight of fish has been fixed in respect of an area under the regulations, authorizing persons referred to in paragraph (l) to vary the close time, fishing quota or limit in respect of that area or any portion of that area.	m) habilitant les personnes visées à l'alinéa l) à modifier les périodes de fermeture, les contingents ou les limites de taille ou de poids du poisson fixés par règlement pour une zone ou à les modifier pour un secteur de zone.
[Emphasis added.]	[Je souligne.]

[11] The following provisions of the Regulations are also relevant:

Application for Documents	Demandes de documents
8. (1) The Minister may require an applicant for a document to submit	8. (1) Le ministre peut exiger de la personne qui demande un document de fournir :
(a) <u>such information in addition to that included in the</u>	a) <u>des renseignements qui peuvent être raisonnablement</u>

application as may reasonably be regarded as relevant; and

considérés comme pertinents, outre ceux contenus dans la demande;

(b) a statutory declaration verifying the information given in the application or verifying the information submitted under paragraph (a).

b) une déclaration solennelle attestant l'exactitude du contenu de la demande ou des renseignements fournis conformément à l'alinéa a).

(2) An application from a corporation for a document shall be signed by an officer of the corporation.

(2) Toute demande de documents formulée par une société doit être signée par un dirigeant de celle-ci.

Conditions of Licences

Conditions des permis

22. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:

22. (1) Pour une gestion et une surveillance judicieuses des pêches et pour la conservation et la protection du poisson, le ministre peut indiquer sur un permis toute condition compatible avec le présent règlement et avec les règlements énumérés au paragraphe 3(4), notamment une ou plusieurs des conditions concernant ce qui suit :

...

[...]

(c) the waters in which fishing is permitted to be carried out;

c) les eaux dans lesquelles la pêche peut être pratiquée;

...

[...]

(h) the type, size and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is permitted to be used;

h) le type et la quantité d'engins et d'équipements de pêche qui peuvent être utilisés et leur grosseur ainsi que la manière dont ils doivent être utilisés;

(i) the specific location at which

i) l'endroit précis où les engins

fishing gear is permitted to be set;	de pêche peuvent être mouillés;
(j) the distance to be maintained between fishing gear;	j) la distance à garder entre les engins de pêche;
...	[...]
(t) the time within which findings and data obtained as a result of fishing for an experimental or scientific purpose are to be forwarded to the Minister;	t) le délai accordé pour faire parvenir au ministre les résultats et les données obtenus à la suite de la pêche effectuée à des fins expérimentales ou scientifiques;
...	[...]
Licence	Permis
51. No person shall fish for experimental, scientific, educational or public display purposes unless authorized to do so under a licence.	51. Il est interdit de pêcher à des fins expérimentales, scientifiques, éducatives ou pour exposition au public à moins d'y être autorisé par un permis.
52. Notwithstanding any provisions of any of the Regulations listed in subsection 3(4), <u>the Minister may issue a licence if fishing for experimental, scientific, educational or public display purposes would be in keeping with the proper management and control of fisheries.</u>	52. Malgré les dispositions des règlements énumérés au paragraphe 3(4), <u>le ministre peut délivrer un permis si la pêche à des fins expérimentales, scientifiques, éducatives ou pour exposition au public est en accord avec la gestion et la surveillance judicieuses des pêches.</u>
[Emphasis added.]	[Je souligne.]

[12] It is worthwhile to add section 34 of the *Fisheries Act*, R.S.C. 1970, c. F-14, the precursor of what is now section 43 of the Act, and subsections 29(4) and (5), 39(5) and (6), 46(2) and 59(1) of

the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, adopted pursuant to the *Fisheries Act*, R.S.C. 1970, c. F-14. I will refer to these provisions in the analysis of the decision of the Court of Appeal for Ontario in *Re Peralta et al. and The Queen in Right of Ontario et al.; Peralta et al. v. Warner et al.* (1985), 49 O.R. (2d) 705 (*Peralta*), affirmed by the Supreme Court of Canada in [1988] 2 S.C.R. 1045.

[13] Section 34 of the *Fisheries Act*, R.S.C.1970, c. F-14, reads as follows:

Regulations

34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

(a) for the proper management and control of the seacoast and inland fisheries;

(b) respecting the conservation and protection of fish;

(c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

(d) respecting the operation of fishing vessels;

(e) respecting the use of fishing gear and equipment;

Règlements

34. Le gouverneur en conseil peut édicter des règlements concernant la réalisation des objets de la présente loi et l'application de ses dispositions et, en particulier, peut, sans restreindre la généralité de ce qui précède, édicter des règlements

a) concernant la gestion et la surveillance judicieuse des pêches côtières et des pêches de l'intérieur;

b) concernant la conservation et la protection du poisson;

c) concernant la prise, le chargement, le débarquement et l'écoulement du poisson;

d) concernant l'exploitation des bateaux de pêche;

e) concernant l'utilisation des appareils et accessoires de pêche;

(f) respecting the issue, suspension and cancellation of licences and leases;

f) concernant la délivrance, la suspension et l'annulation des permis et baux;

(g) prescribing the terms and conditions under which a licence or lease is to be issued;

g) concernant les modalités et conditions auxquelles un permis ou un bail doit être délivré;

(h) respecting and obstruction and pollution of any waters frequented by fish;

h) concernant l'obstruction et la pollution des eaux que fréquente le poisson;

(i) respecting the conservation and protection of spawning grounds;

i) concernant la conservation et la protection des frayères;

(j) respecting the export of fish or any part thereof from Canada;

j) concernant l'exportation, hors du Canada, du poisson ou de toute partie de poisson;

(k) respecting the taking or carrying of fish or any part thereof from one province of Canada to any other province;

k) concernant la prise ou le transport du poisson ou de toute partie de poisson d'une province du Canada à une autre province;

(l) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those duties and powers; and

l) prescrivant les pouvoirs et les fonctions des personnes engagées ou employées à l'administration ou l'application de la présente loi et concernant l'exercice de ces pouvoirs et fonctions; et

(m) authorizing a person engaged or employed in the administration or enforcement of this Act to vary any close time or fishing quota that has been fixed by the regulations. 1960-61, c. 23, s. 5.

m) autorisant une personne engagée ou employée à l'administration ou l'application de la présente loi à modifier une période de temps prohibé ou la quantité maximum de poisson qu'il est permis de prendre, que les règlements ont fixées. 1960-61, c. 23, art. 5.

[14] The *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, read in part as follows:

**Licences Other than Angling
Licences**

...

29. (4) The Minister may, in any commercial fishing licence, designate

(a) the waters and the species, size and quantity of fish for which the licence is valid;

(b) the means of taking the fish for which the licence is valid;

(c) the use for which any fish may be taken;

(d) the number of nets and the size of the mesh thereof and any other fishing devices that may be used;

(e) the dimensions of nets or other fishing devices and the materials that may be used in the construction thereof;

(f) the period of time during which fishing operations may be conducted; and

(g) the person or persons who may conduct fishing operations under the licence.

**Permis autres que les permis
de pêche à la ligne**

[...]

29. (4) Dans tout permis de pêche commerciale, le Ministre peut désigner

a) les eaux ainsi que les espèces, la taille et la quantité de poisson pour lesquelles le permis est valide ;

b) les moyens de capture du poisson pour lesquels le permis est valide ;

c) les fins pour lesquelles le poisson peut être pris ;

d) le nombre de filets ainsi que les dimensions de leur maille et tout autre engin de pêche qui peuvent être utilisés ;

e) les dimensions des filets et d'autres engins de pêche, ainsi que les matériaux utilisés dans leur fabrication ;

f) la période pendant laquelle il est permis de se livrer à des opérations de pêche ; et

g) la ou les personnes qui peuvent se livrer à des opérations de pêche à la faveur du permis.

...

(5) The Minister may in any licence impose such terms and conditions as he deems proper and that are not inconsistent with these Regulations.

Special Conditions of Gill Net Licences

39. (1) This section applies only to commercial fishing in Lake Nipigon.

...

(5) No holder of a commercial fishing licence that authorizes the use of not more than 12,000 yards of gill net shall take more than 25 tons of yellow pickerel, sturgeon, lake trout and whitefish in the aggregate.

(6) No holder of a commercial fishing licence that authorizes the use of more than 24,000 yards of gill net shall take more than 50 tons of yellow pickerel, sturgeon, lake trout and whitefish in the aggregate.

Conditions of Trawl Net Licences

46. (2) Notwithstanding the terms and conditions of any

[...]

(5) Le Ministre peut poser, dans un permis, les termes et conditions qu'il juge à propos et qui ne sont pas incompatibles avec les dispositions du présent règlement.

Conditions spéciales applicables aux permis de pêche au filet maillant

39. (1) Le présent article ne s'applique qu'à la pêche commerciale dans le lac Nipigon.

[...]

(5) Il est interdit au titulaire d'un permis de pêche commerciale, à qui ce permis confère le droit d'utiliser au plus 12 000 verges de filet maillant, de prendre, dans l'ensemble, plus de 25 tonnes de doré jaune, d'esturgeon, de truite grise et de poisson blanc.

(6) Il est interdit au titulaire d'un permis de pêche commerciale, à qui ce permis confère le droit d'utiliser plus de 24 000 verges de filet maillant, de prendre dans l'ensemble, plus de 50 tonnes de doré jaune, d'esturgeon, de truite grise et de poisson blanc.

Conditions applicables aux permis de pêche au chalut

46. (2) Nonobstant les termes et conditions du permis de

commercial fishing licence that authorizes the use of a trawl net, the holder of such a licence, while trawling for smelt in Lake Erie,

(a) shall not take more than 20 tons of fish during a period of 7 days ending on a Saturday; and

(b) may take and retain, in addition to smelt, any other commercial fish, except that the aggregate quantity of any blue pickerel, perch, sauger, sturgeon, white bass or yellow pickerel taken in 1 day shall not exceed 10 per cent of the total weight of the catch taken on that day.

Underweight or Undersized Fish Taken by Means Other than Angling

59. (1) Subject to subsection (2) and notwithstanding anything else contained in these Regulations, where a person takes fish by means other than angling, he may retain a quantity of any underweight or undersized fish of any species not exceeding 10 per cent of the total weight of that species taken at that time.

pêche commerciale autorisant l'usage d'un chalut, le titulaire d'un tel permis, en pêchant l'éperlan au chalut dans le lac Érié,

a) ne doit pas prendre plus de 20 tonnes de poisson durant une période de 7 jours se terminant un samedi; et

b) peut prendre et garder, en plus de l'éperlan, tout autre poisson marchand, sauf que, dans l'ensemble, la quantité de doré bleu, perche, doré noir, esturgeon, bar blanc ou doré jaune prise au cours d'une même journée ne doit pas dépasser 10 pour cent du poids total de la prise de cette journée-là.

Poissons pêchés autrement qu'à la ligne et dont la taille ou le poids est inférieur, respectivement, à la taille ou au poids réglementaire

59. (1) Sous réserve du paragraphe (2) et nonobstant toute disposition du présent règlement, lorsqu'une personne pêche du poisson autrement qu'à la ligne, elle peut retenir une quantité de toute espèce de poissons dont la taille ou le poids est inférieur, respectivement, à la taille ou au poids réglementaire, mais cette quantité ne doit pas dépasser 10 pour cent du poids total de l'espèce prise au moment.

C. ISSUES RAISED IN THIS APPEAL

[15] The appellant raised three issues:

- 1- The invalidity of sections 8 and 22 of the Regulations;
- 2- The appropriate standard of review; and
- 3- The errors by the first judge.

1. The invalidity of sections 8 and 22 of the Regulations

[16] The appellant has raised, for the first time in this litigation, an issue that was not debated at trial. This is the invalidity of sections 8 and 22 of the Regulations. There is therefore no need to consider the standard of review.

(a) Appellant's submissions

[17] The appellant submitted that Regulations ought not to confer discretionary power. They should rather establish standards.

[18] The appellant argued that by empowering the Governor in Council to adopt regulations, Parliament wanted to give the Governor in Council some latitude without enabling him to bypass the obligation to incorporate his rule of conduct in the regulations.

[19] The appellant stated that the Supreme Court of Canada strongly opposes the practice of not exercising a regulatory power by transforming it to an administrative discretion.

[20] In this case, the appellant said, sections 8 and 22 of the Regulations do not establish any standard. The Act, at section 43, delegates to the Governor in Council the power to make regulations respecting the management and control of fisheries, the conservation of fish and the issue of licences. The Regulations, however, at section 22, give carte blanche to the Minister to impose any condition that he deems desirable or relevant so long as the purpose of that condition is the proper management and control of fisheries. The appellant argued that this type of delegation is invalid, referring to the following supporting authorities: Patrice Garant, *Droit administratif*, 5th ed., Cowansville, Quebec, Yvon Blais, 2004 at page 341; *Brant Dairy Co. v. Ontario (Milk Commission)*, [1973] S.C.R. 131; *Dynamex Canada Inc. v. Canadian Union of Postal Workers*, [1999] 3 F.C. 349 (C.A.); *Canadian Institute of Public Real Estate Companies v. Toronto (City of)*, [1979] 2 S.C.R. 2; *Butler Metal Products Company Limited v. Employment and Immigration Commission of Canada and Attorney General of Canada*, [1983] 1 F.C. 790 (C.A.); *Swan v. Canada*, [1990] 2 F.C. 409 (F.C.T.D.).

[21] The appellant argued that the decision of the Court of Appeal for Ontario in *Re Peralta et al. and The Queen in Right of Ontario et al.; Peralta et al. v. Warner et al.* (1985), 49 O.R. (2d) 705 (*Peralta*), affirmed by the Supreme Court of Canada in [1988] 2 S.C.R. 1045, is different from this case because in *Peralta*, the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, adopted under the authority of the *Fisheries Act* (federal) in the version that was then in force (R.S.C. 1970, c. F-14), and section 34 of that statute (which corresponds to section 43 of the Act), had divided Ontario waters into special areas and had set global quotas according to the species of fish found in those

waters for commercial fishing purposes. Therefore the Court of Appeal for Ontario, and then the Supreme Court of Canada, had no difficulty, it said, in finding that there had been a valid administrative delegation to Ontario's Minister (provincial) of Natural Resources to set, in each case, specific quantitative limits on issuing fishing licences. The appellant adds that in this case, there was no general policy established by the Governor in Council, so that the delegation by the Governor in Council to the Minister (federal) of Fisheries and Oceans was not normative and constituted an invalid legislative delegation.

(b) Analysis

[22] It is useful from the outset to point out the fundamental distinction that should be made between an administrative act and a legislative act. In *Peralta*, the Court of Appeal for Ontario, which, bear in mind, was affirmed by the Supreme Court of Canada at pages 728-729, referred to an excerpt from S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed., 1980, which explains the difference between an administrative act and a legislative act as follows:

A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[Emphasis added.]

[23] The Court of Appeal for Ontario then added at page 729:

This passage was quoted by Dickson J. speaking for the Supreme Court of Canada in *Re British Columbia Development Corp. et al. and Friedmann et al.* (1984), 14 D.L.R. (4th) 129, [1985] 1 W.W.R. 193, 55 N.R. 298 sub nom. British Columbia

Development Corp. v. Ombudsman, and he went on to say (p. 148 D.L.R., p. 312 N.R.):

I find support for this view in the judgment of the Ontario Court of Appeal in *Re Ombudsman of Ontario and Health Disciplines Board of Ontario et al.*, *supra*. The issue in that case concerned the extent of the Ontario Ombudsman's jurisdiction. The word under consideration was "administrative". Morden J.A. said, at p. 608:

“ . . . it is reasonable to interpret 'administrative' as describing those functions of Government which are not performed by the Legislative Assembly and the Courts. Broadly speaking, it describes that part of Government which administers the law and governmental policy.”

In accord are *Booth v. Dillon* (No. 3), [1977] V.R. 143 (S.C.) at p. 144; *Glenister v. Dillon*, [1976] V.R. 550 (S.C.) at p. 558.

As I said earlier, it cannot have been the intention of Parliament that the Governor in Council would have the obligation to issue individual licences with individual quotas to thousands of commercial fishermen, with regard to the different areas of the large lakes being fished, having set out in part at least the maximum total quotas for the individual species and set out generally the waters from which they might be taken.

Dickson J. also quoted (p. 147 D.L.R., p. 312 N.R.) from 1 Hals., 4th ed., p. 7, para. 4, under the title "Administrative Law" as follows:

“The functions of government are classified as legislative; executive or administrative; judicial; and ministerial ... executive and administrative acts entail the formulation or application of general policy in relation to particular situations or cases, or the making or execution of individual discretionary decisions ...”

[Emphasis added.]

[24] As such, there is no difference that would exclude the application of *Peralta* in this case.

[25] The issue in *Peralta* was the validity of a delegation of power under section 34 of the *Fisheries Act* (federal) (similar to the current section 43 of the Act) and subsections 29(4) and (5) of the *Ontario Fishery Regulations* (similar to section 22 of the Regulations at issue) to Ontario's

Minister (provincial) of Natural Resources pursuant to the *Ontario Fishery Regulations* (federal regulations).

[26] According to the Court of Appeal for Ontario, the decision by Ontario's Minister of Natural Resources to set individual quotas stemmed from the application of a general policy determined pursuant to section 34 of the *Fisheries Act* and under subsections 39(5) and (6), 46(2) and 59(1) (these provisions were reproduced above) and Schedule VIII of the *Ontario Fishery Regulations*.

The Court of Appeal for Ontario stated at page 723:

Mr. Scott forcefully argued that by virtue of s. 29(4) of the *Ontario Fishery Regulations*, the Governor in Council had effectively abdicated to the Minister all its powers which it and it alone could exercise. However, when one examines the regulations it is clear that this not so. For example, they detail the general conditions applicable to commercial fishing and to gill-nets (ss. 30 to 43, 46, 57 to 59). They divide the waters of Ontario areas and they establish global quotas for commercial fishing of particular species from those waters (ss. 39(5) and (6), 46(2), 59(1)). Commercial fish are defined in the definition section, and their minimum sizes are set out in Sch. VIII of the *Ontario Fishery Regulations*. The effect of the regulations was to set general policy and in setting the individual quotas within those policy guide-lines, the Minister was acting in a fashion consistent with the regulations.

[27] The Court of Appeal for Ontario stated at page 727:

The Minister was only empowered to act within the scheme established generally by the *Ontario Fishery Regulations*. I cannot accept that the Minister was delegated what the Governor in Council alone was empowered to do and that the regulations merely repeated what Parliament had given to the Governor in Council. As I have already said, I have concluded that the Governor in Council was empowered by the wording of s. 34 to subdelegate as it did.

[28] Then at page 729, it held:

The action of the Minister in fixing the individual quotas for commercial fishermen for particular waters "was the application of general policy in relation to particular situations or cases" in the province. That action was, accordingly, administrative

and did not fall within the ban on interdelegation of legislative power: see also *Desrosiers v. Thinel*, [1962] S.C.R. 515 at pp. 517-8, 519.

[29] Therefore, the Minister's power to set, in each case, limits on the amount of fish caught did not arise from a subdelegation of a legislative power, but rather of an administrative power.

[30] It is true that in this case, the factual situation is different. The Minister's refusal is founded on section 8 of the Regulations, given that the appellant did not provide enough information, while in *Peralta*, the Minister (provincial) had issued a licence with limits on the amount of fish that could be contemplated by the licence. The Court of Appeal for Ontario was able to refer to the relevant provisions of the *Ontario Fishery Regulations*, which could be likened, overall, to the fishing quota in Ontario waters.

[31] As such, the Regulations in this case, even if they do not relate to any licence condition, since no licence was issued, nonetheless state a significant number of rules of conduct that could be described as general policy. Also, sections 27, addressing the identification of fishing gear, 30, on the obstruction of mesh, 31, on chafing gear, and 34, on the dumping and wasting of fish, are all examples of general rules of conduct that could apply in this case. To that, we must add the *Atlantic Fishery Regulations, 1985*, SOR/86-21, applicable pursuant to paragraph 3(4)(a) of the Regulations. The *Atlantic Fishery Regulations, 1985*, include specific provisions on crab fishing which, in the event of conflict, prevail over the more general provisions of the Regulations.

[32] As for the rest, section 22 of the Regulations at issue is of the same nature as subsections 29(4) and (5) of the *Ontario Fishery Regulations* which were declared valid in *Peralta* as an administrative delegation. Section 22 of the Regulations establishes a non-exhaustive list of subjects serving as points of reference for the Minister in establishing conditions when issuing fishing licences. This administrative delegation is supported not only by paragraphs 43(a), (b) and (g), but also paragraph 43(l) of the Act. In my opinion, the validity of sections 8 and 22 of Regulations at issue is governed by the decision of the Court of Appeal for Ontario in *Peralta*, which was affirmed by the Supreme Court of Canada. In this case, it was not a delegation attributing pure discretionary powers, which Professor Patrice Garant describes as being invalid (*op. cit.*, page 341) (See also Donald J.H. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, Toronto, Canvasback Publishing, 1998-, vol. 2, paragraphs 13:2000 and 13:2500).

[33] Finally, I note that section 22 of the Regulations employs the word “respecting” (« concernant »), the meaning of which was discussed in the following terms by the Court of Appeal for Ontario at page 717:

The use of the word “respecting” allows for a delegation of the administration of the regulations.

2. The appropriate standard of review

[34] I must now determine the appropriate standard of review.

[35] In *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31,

our Court explains at paragraphs 13-14:

In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paragraph 43, the Supreme Court dealt with the role of a Court of Appeal reviewing a decision of a subordinate court which itself was conducting a judicial review of a decision of an administrative tribunal. The Supreme Court found that “the normal rules of appellate review of lower courts as articulated in *Housen*, . . . apply”. The *Housen* approach (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235) provides that on a question of law the appellate court reviews the subordinate court decision on a standard of correctness (paragraph 8). On all other issues, the standard of review is palpable and overriding error (paragraphs 10, 19 and 28).

However, in more recent cases, the Supreme Court has adopted the view that the appellate court steps into the shoes of the subordinate court in reviewing a tribunal’s decision. See for example *Zenner v. Prince Edward Island College of Optometrists*, [2005] 3 S.C.R. 645, at paragraphs 29-45, per Major J. See also *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.* (2002), 312 A.R. 40 (C.A.), at paragraphs 25-26, per Berger J.A. The appellate court determines the correct standard of review and then decides whether the standard of review was applied correctly: see *Zenner*, at paragraphs 29-30. In practical terms, this means that the appellate court itself reviews the tribunal decision on the correct standard of review.

[Emphasis added.]

[36] It follows that the Court of Appeal must put itself in the position of the reviewing court. It must decide the appropriate standard of review and must determine whether the trial judge erred in applying this standard to the facts of the case.

[37] Our Court, in *Tucker v. Canada (Minister of Fisheries and Oceans)*, 2001 FCA 384, affirming [2000] F.C.J. No. 1868, stated that the standard of review for a decision by the Minister made under section 7 of the Act is that of patent unreasonableness.

[38] The appellant argued that in *Tucker* the parties had agreed to apply this standard. In this case, it said, as the issue of a licence is a matter within the Minister's discretionary power, the standard of reasonableness *simpliciter* should be applied instead, as it was in the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[39] It is true that in *Tucker*, the parties agreed on the appropriate standard of review. The agreement of the parties was not however determinative in setting that standard. Even if the first judge, Mr. Justice Rothstein (sitting *ex officio*), agreed with the parties' position, his reasoning was nevertheless developed in accordance with accepted legal requirements.

[40] Ultimately, the distinction between patent unreasonableness and unreasonableness *simpliciter* is difficult to assess. Most importantly, we must remember that judicial deference is broader in the first case and less broad in the second.

3. The errors by the first judge

(a) The need to consult

[41] The appellant argued that the first judge erred in finding that the Minister had not acted reasonably in requiring that the appellant consult all of the stakeholders in the fishing industry who could be affected by the application.

[42] In order to do so, the first judge relied on evidence establishing that it was customary at the Department to consult interveners likely to be affected. Charles Gaudet, Acting Director, did, in fact, explain in his affidavit (d.a., vol. 1, p. 111) that snow crab is fished commercially by several fishers in the southwestern Gulf of the Saint-Lawrence and that before making a decision that could have a negative impact, it was customary for the Department to consult the interveners potentially affected by the decision.

[43] The obligation to consult imposed on the appellant was not in the context of a condition indicated on the licence in accordance with the terms of section 22 of the Regulations. It was a consultation preliminary to the Minister's decision whether or not to issue a licence under section 7 of the Act.

[44] Section 7, which confers a very broad discretion to the Minister, authorized him to refuse a licence if the requested consultation was not held. The finding of the first judge is therefore not patently unreasonable.

(b) Sampling procedures

[45] The first judge defined (paragraph 19 of his reasons) sampling procedures as they relate to documents containing information pertaining to the methodology and details of the research activity, like the number of stations, type of trawl net, length of each line, crab parts measured on board the vessel and so on. He found that obtaining these procedures was relevant in particular in

that reviewing them enabled the Minister to determine whether all steps have been taken to minimize the impact on the species and their habitat.

[46] The appellant submits that sampling procedures would have no impact, except on the quality and reliability of the results obtained. In its opinion, the quality of marine maps that the appellant would have produced for commercial purposes had nothing to do with the mandates to conserve and protect stock and proper fishery management. By requiring the disclosure of these procedures, it says, not only was the Department exceeding its mandate, but, by the very act, the Department was trying to appropriate intellectual property belonging to the appellant. Further, the appellant argued, to determine as he did, the first judge relied on evidence that lacked credibility, i.e. on the statements made by Charles Gaudet in his affidavit (d.a., vol. 1, p. 111), when he recognized, on cross-examination, that it was the responsibility of the scientific group in his Department, and not his, to assess the impact of the project on the species and their habitat (d.a., vol. 2, p. 363).

[47] I am unable to make the determination proposed by the appellant that the information requested was not relevant and that this finding by the first judge is patently unreasonable. The Minister has the discretion to determine the relevance of information that he requests, information to be assessed by his delegates, and nothing in the record supports a finding that it was patently unreasonable to act in that way. The first judge therefore did not err in the manner alleged by the appellant.

(c) The fishing gear, the geographic location and the Department's requests regarding the data gathered

[48] Finally, there is nothing in the findings of the first judge regarding the Department's request for information regarding the use of the fishing gear and the geographic locations of the stations that would support my finding that the first judge erred in such a way that we must intervene. The same applies to his determination that it was not unreasonable to require that the information gathered by the appellant be sent to the Department.

D. CONCLUSION

[49] I would dismiss the appeal with costs.

“Alice Desjardins”

J.A.

“I concur.
M. Nadon J.A.”

“I concur.
J.D. Denis Pelletier J.A.”

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-507-05

(Appeal from an order of the Honourable Mr. Justice Yvon Pinard dated September 29, 2005, in docket T-1963-04.)

STYLE OF CAUSE: MARINE RESEARCH
INC./RECHERCHES MARINES
INC., entity duly incorporated
under the laws of the province of
New Brunswick v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 15, 2006

REASONS FOR JUDGMENT: DESJARDINS J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

DATE OF REASONS: December 22, 2006

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