



# Environmental Appeal Board

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## **DECISION NOS. EAB-WIL-21-A007(a), A008(a), A009(a), A010(a), A011(a)**

In the matter of an appeal under the *Wildlife Act*, RSBC 1996, c. 488

<b>BETWEEN:</b>	Oscar's Source for Adventure, Bear Claw Lodge Ltd. Partnership, Billy Labonte, Gordon Wadley, Dave Evans and Melissa Moure	<b>APPELLANTS</b>
<b>AND:</b>	Trevor Rhodes, Associate Director, Fish and Aquatic Habitat Branch	<b>RESPONDENT</b>
<b>BEFORE:</b>	A panel of the Environmental Appeal Board David Bird, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on February 7, 2022	
<b>APPEARING:</b>	For the Appellants: Self-represented For the Respondent: Geneva Grande-McNeill, Counsel	

### **SUMMARY DISMISSAL DECISION**

#### **INTRODUCTION**

[1] Oscar's Source for Adventure, Bear Claw Lodge Ltd. Partnership ("Bear Claw Lodge"), Billy Labonte, Gordon Wadley, Dave Evans and Melissa Moure (collectively, the "Appellants") filed five separate appeals with the Environmental Appeal Board (the "Board") in response to the 2021 – 2023 British Columbia Freshwater Fishing Regulations Synopsis<sup>1</sup> (the "Synopsis") published by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). The Synopsis summarizes the regulations that apply to freshwater fishing in British Columbia. The Synopsis in effect from April 1, 2021 to March 31, 2023 states that the steelhead fishery in the Skeena River (within the Ministry's Region 6), including tributaries, is closed from October 12 to December 31.

[2] The Appellants fish steelhead in the Skeena River area, operate fish guiding businesses in that area, or both.

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<sup>1</sup> Annually published by the Ministry of Forests, Land, Natural Resource Operations and Rural Development, publicly viewable at: <https://www2.gov.bc.ca/gov/content/sports-culture/recreation/fishing-hunting/fishing/fishing-regulations>

[3] The Appellants appeal the closure of the fishery for similar reasons, which I have summarized as follows:

- the Ministry did not provide an opportunity for the Appellants and others to have meaningful and direct input into the decision to close the steelhead fishery;
- the process for collecting data that supported the decision to close the fishery was deeply flawed and not science-based; and
- the decision was poorly communicated, resulting in significant financial impacts on local small business already struggling due to the COVID-19 global pandemic.

[4] After reviewing the notices of appeal, the Board asked the parties to provide submissions on whether the appeals were against a decision which could not be appealed to the Board under the *Wildlife Act* (the "Act"), and if so, whether the appeals should be summarily dismissed because they are not within the Board's authority. This decision addresses those matters.

## **BACKGROUND**

[5] In a letter dated November 30, 2021, I invited the Director to participate in these appeals. In addition, I noted that the regulation closing the fishery as communicated in the Synopsis may not be an appealable "decision" because the Board does not have authority to hear appeals of the making of regulations under the *Act*.

[6] I also acknowledged that three of the Appellants indicated that if the appeals could not be heard under the *Act*, then they wanted the appeals to be heard under the *Environmental Management Act* (the "EMA"). However, I noted that it was not clear how the *EMA* may apply to a change in a regulation that closed the steelhead fishery on the Skeena River.

[7] Finally, I noted in the letter that section 31(1)(a) of the *Administrative Tribunals Act* (the "ATA") and section 4 of the Board's Policy and Procedure Manual state the Board may summarily dismiss an appeal if the matter is not within the Board's authority. Section 31(2) of the *ATA* requires the Board to give the Appellants an opportunity to be heard before dismissing the appeals. Therefore, I set out a schedule for the parties to provide written submissions addressing the following issue:

Does the Board have the legal authority to hear appeals of the updated B.C. Freshwater Regulations Synopsis closing the steelhead fishery between October 12, 2021 to December 21, 2021 on the Skeena River?

[8] On December 13, 2021, one of the Appellants requested information from the Respondent about who made the decision to close the fishery and how the decision was made. All the Appellants requested, and received, an extension of time to file their written submissions so they could receive and respond to the Respondent's reply, dated January 12, 2022.

[9] The Respondent's reply indicated that regulations enacted pursuant to the federal *Fisheries Act*, R.S.C. 1985, c. F-14 provide the statutory framework which empowers a provincial decision-maker to close a fishery in a lake or stream. The

relevant regulations are the *Fishery (General) Regulation*, SOR 93-53 (the “FGR”) and the *British Columbia Sport Fishing Regulations, 1996*, SOR 96-137 (the “BCSFR”).

[10] Section 55 of the *BCSFR* establishes a “close time” for all fishing, and all catching and retaining, of all fish from any lake or stream in British Columbia. This “close time” lasts from 23:00 to 24:00 on December 31, each year. This prohibition is made separately for all species of fish.

[11] Section 6(3) of the *FGR* delegates to a provincial director the authority to issue a variation order, which varies the close time set under section 55 of the *BCSFR*. A variation order of the close time defined in section 55 of the *BCSFR* could apply to all lakes and streams in British Columbia, or to any subset of them.

[12] The Respondent provided the Appellants and the Board with a copy of a Variation Order (the “Order”) issued by Trevor Rhodes, Associate Director with the Ministry’s Fish and Aquatic Habitat Branch (the “Director”), on September 29, 2021 and effective October 1, 2021. The Order varies the close time for the steelhead sport fishery on the Skeena River and its tributaries set under section 55 of the *BCSFR*, to “October 12 to December 31”.

## **ISSUES**

[13] The main question before me is whether the Board has the jurisdiction to hear the appeals of the Order. To decide this question, I will consider the following issues:

1. Is the Order an appealable “decision” under the *Act*?
2. Does legislation other than the *Act* grant the Board jurisdiction to hear these appeals of the Order?
3. If the answer to both of those questions is “no”, should these appeals be dismissed under section 31(1)(a) of the *Administrative Tribunals Act* (the “ATA”) for lack of jurisdiction?

## **DISCUSSION AND ANALYSIS**

### *Submissions of the Appellants*

[14] The Appellants made submissions regarding the nature of the Ministry’s communication of the closure, lack of consultation by the Ministry from the Appellants’ perspectives, the lack of science supporting the closure from the Appellants’ perspectives and the significant impacts the closure has had on the Appellants and the region.

[15] In general, the Appellants submit that they have been adversely affected by the closure of the steelhead fishery, and that the Board has jurisdiction to hear their appeals. The Appellants note that the Order was issued by a director within the Ministry. Some of the Appellants refer to the *Ministry of Environment Act* and the *EMA* as authority for the Board to hear the appeals of the Order. In addition, some of the Appellants submit that decisions that flow through or under the *BCSFR* should be appealable under the *Act*.

[16] While I read these submissions in their entirety and acknowledge that these matters are important to the Appellants, I am only summarizing the submissions directly related to the preliminary issues of jurisdiction that I must decide. This is not a decision on the merits of their appeals, including whether the Order was fair or appropriate.

*Mr. Wadley*

[17] In Mr. Wadley's initial submissions, he argues that the appeals should be heard under the *EMA*. He submits that although the *EMA* appears to be industry focused, it does not exclude other considerations, and recreational fisheries in BC are an industry. He says he has found nothing that can exclude any industry from falling under the *EMA*. He also says the *EMA* provides a process for addressing environmental concerns and a requirement for consultation with affected First Nations within Area Management Plans, which is sadly lacking in the *Act*.

[18] In his January 14, 2022 submission, Mr. Wadley requests that if these appeals are not heard under the *Act*, then they ought to be heard under the *Ministry of Environment Act*.

[19] Mr. Wadley notes that the Order appears to flow from section 6 of *Ministry of Environment Act* given that regulations have been vetted by the federal *Fisheries Act* for some time. Section 6 of the *Ministry of Environment Act* states:

With the approval of the Lieutenant Governor in Council, the Minister on behalf of government may enter into agreements with the government of Canada, the government of a province or an agent of the Government of Canada or a province.

[20] Mr. Wadley submits that under section 6 of the *Ministry of Environment Act*, the Board appears to be the proper venue for these appeals. Although the Order is issued under a federal Act, this should not preclude the Ministry or any other provincial Ministry from obligations under the *Act* or the Synopsis.

*Mr. Evans and Ms. Moure (Buckley River Lodge)*

[21] Mr. Evans and Ms. Moure submit that they did not receive notice of a decision under section 101(1) or (2) of the *Act*. Therefore, they ask how they can appeal a decision which was not given? They submit that the appeal process appears to protect the Ministry rather than the environment.

*Mr. Labonte and Ms. Collingwood (Babine Norlakes Steelhead Camp)*

[22] Mr. Labonte and Ms. Collingwood submit the Board has the legal authority to hear these appeals because they result from recommendations of the Regional Manager and affected their guide licence and issued rod days.

[23] They note sections 11.2 and 11.3 of the *Angling and Scientific Collection Regulation* under this *Act*. These regulations provide the regional manager the authority to cancel, suspend or vary angler day quotas only after holding a hearing.

[24] They submit the regional manager cancelled the steelhead season effective October 12 through December 31, suspending their angling licence and rod day

quotas without notice and a hearing contrary to section 11.3 of the *Angling and Scientific Collection Regulation*.

[25] They submit that since the regional managers and biologists in the Ministry's Region 6 brought forward this closure, the appeals should be heard by the Board.

[26] They also submit that under the *EMA*, the Ministry of Environment has obligations set out under section 4. They submit that Ministry of Environment staff failed to carry out those objectives.

[27] They submit that, similar to this decision affecting their angling licences and angler day quotas, the Board has previously heard appeals of decisions affecting guide outfitters quotas (see *Ray Collingwood v. Acting Regional Manager*, Decision No. 2010-WIL-006(a), February 16, 2011).

#### *Bear Claw Lodge*

[28] Mr. Allen submits that she did not receive written notice of the closure, but was forwarded emails from the Skeena Angling Advisory Team and the Upper Skeena Angling Guides Association. She also asks how a decision can be appealed when no decision was given.

#### *Submissions of the Respondent*

[29] The Respondent submits that the Order is not within the jurisdiction of the Board. The Respondent submits that the Board, as a statutory appeal body, only has the legal authority to hear appeals and exercise authority as provided by enabling statutes. The Board has no powers except those specifically conferred to it by the legislation.

[30] The Respondent notes that under section 101(1) of the *Act*, a regional manager or a director must give written reasons for a decision that affects a licence, permit, registration of a trapline or guiding territory certificate held by a person or an application any person for any of those things.

[31] Section 101(2) of the *Act* provides that an affected person must be given notice of a decision under section 101(1) of the *Act*. Through section 101.1(1) of the *Act*, an affected person referred to in section 101(2) may appeal the decision to the Board.

[32] The Respondent submits that the Order was made by the Associate Director, and the Associate Director is a regional manager or a director as referenced by the *Act*. However, the Respondent submits that the decision "was to vary the close time for that fishery which is established under that section 55 of *BCSFR*." The Order varied the closure time to run from October 12 to December 31.

[33] The Respondent submits that the *BCSFR* was created under the authority of section 6(3) the federal *FGR* made under the *Fisheries Act*. Section 6(3) states:

Where a close time, fishing quota or limit on the size or weight of fish is fixed in respect of an area of non-tidal waters for any species of fish other than salmon under the *British Columbia Sport Fishing Regulations, 1996*, the director responsible for fisheries management in the Ministry responsible for

fisheries in the government of British Columbia may, by order, vary that close time, fishing quota or limit in respect of that area or any portion of that area.

[34] The Respondent submits the Associate Director is the delegate with the authority to vary the close time of the steelhead fishery in the Skeena River under the *BCSFR* and section 6(3) of the *FGR*. The Respondent submits that while the decision to close the fishery was made by a director within the meaning of section 101(1) of the *Act*, the Order is not an appealable “decision” under the *Act* or any other provincial statute.

[35] The Respondent submits since the Board only has the legal authority conferred to it by provincial legislation, it does not have the authority to hear an appeal of this Order.

[36] Further, the Respondent submits the British Columbia Legislature does not have the authority to delegate to the Board the power to hear appeals of decisions to make regulations under the *FGR* unless that delegation is granted by the *Fisheries Act*. The Respondent submits there is no delegation under the *Fisheries Act* granting the British Columbia Legislature the power to confer to the Board the authority to hear appeals of this Order.

[37] For these reasons, the Respondent submits the Board has no jurisdiction to hear these appeals, and the appeals should be dismissed under section 31(a) of the *ATA*.

#### *Final Reply of the Appellants*

[38] Only Mr. Wadley provided a final submission in reply to the Respondent’s argument.

[39] Mr. Wadley disagrees with the Respondent’s submission that the Board cannot hear an appeal of the Order. Mr. Wadley submits that the definitions in the *BCSFR* state that “management unit” or M.U. means an area designated as a management unit under regulation pursuant to the *BC Wildlife Act*. A Region, as in Region 6, is also pursuant to the *Act* or in accordance with the *Act*.

[40] Therefore, Mr. Wadley argues that decisions that flow under the *BCSFR* should be appealable under the *Act*. Mr. Wadley further submits that the decision-making process was contrary to the requirements under section 4(2) of the *Ministry of Environment Act*.

[41] Mr. Wadley submits that it is not surprising that the Appellants have struggled to know what their appeal rights are, and he notes that the Appellants did not appeal whether the designate had the power to vary the Order under the *Fisheries Act*. He states, “We appealed the ‘decision’ as it falls under the *BCSFR* pursuant to the *BC Wildlife Act*, and further unduly impacted businesses, licence holders from all ilk’s in contravention of the [*Ministry of Environment Act*] *Act*.”

#### The Panel’s Findings

1. Is the Order an appealable “decision” under the *Act*?

#### *Principles of Statutory Interpretation*

[42] The Respondent disclosed to the parties, and the Board, that the steelhead fishery was closed through the Order of the Associate Director, who the Respondent acknowledges is a director under the *Act*. However, while the Order was issued by a director as described under section 101(1) of the *Act*, the question before me is whether the Order is a decision that may be appealed to the Board.

[43] Reaching a decision on the question of jurisdiction requires me to apply the principles of statutory interpretation. In *Vincent Smoluk v. Assistant Water Manager* (Decision No. 2019-WSA-001(a), May 20, 2020), at paragraph 42, the modern approach to statutory interpretation was stated as follows:

My role in interpreting the [*Water Sustainability Act*] is to read it in its entire context, and to consider the relevant portions in their ordinary and grammatical sense, harmoniously with the objects and schemes of the [*the Water Sustainability Act*] and the intention of the Legislature in passing it. Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, requires that I read the [*Water Sustainability Act*] in a liberal and remedial manner.

[44] I agree with and adopt the approach set out in paragraph [42] of *Smoluk* which reflects the Court's approach used in *Rizzo & Rizzo Shoes Ltd. Re* [1998] 1 SCR 27, at para. 21:

... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

#### *Interpretation of the Act*

[45] Under section 101(1) of the *Act*, a regional manager or director must give written reasons for a decision that affects a licence, permit, registration of a trapline or guiding territory certificate held by a person or an application by any person for any of those things. Section 101(2) states that notice of a decision under 101(1) must be given to the affected person.

[46] Section 101.1(1) of the *Act* provides that "the affected person referred to in section 101(2) may appeal the decision to" the Board. When section 101.1(1) is read together with sections 101(1) and (2), it indicates that "the decision" that may be appealed to the Board is a decision of a regional manager or a director that affects a licence, permit, registration of a trapline or guiding territory certificate held by a person or an application by any person for any of those things.

[47] It is not disputed that the Order was made by a regional manager or a director. I find it is also not disputed that the Order affected the licences or permits of the Appellants.

[48] However, those things alone do not make the Order a decision that can be appealed to the Board under the *Act*. Although the word "decision" is not defined in the *Act*, I find that the word "decision" in section 101 of the *Act* refers to decisions

that result from the exercise of the powers given to regional managers and directors in the *Act* and its regulations. I was not referred to, nor could I find on review, a provision of the *Act* or its regulations which contemplated or authorized the issuance of the Order by the Respondent.

[49] One of the Appellants referred to section 11.2 of the *Angling and Scientific Collection Regulation* (a regulation under the *Act*), which provides that a regional manager may cancel, suspend or vary angler day quota held by a person if the person fails to use substantially all of the person's angler day quota without reasonable excuse, or contravenes the *Act* or the regulation. However, I find that the Order is not a decision made under section 11.2 of the *Angling and Scientific Collection Regulation*. Although the Order may affect the angler day quotas of angling guides on the Skeena River (if they hold angler days during the closed period for steelhead on that River), the Order is not a decision to cancel, suspend or vary any person's angler day quota for failure to use their quota or for contravening the *Act* or its regulations. It is a decision to close the steelhead fishery, in general, on the Skeena River for a specified period.

[50] I find that the provincial Legislature would have no authority to give the Board, a provincial tribunal, the power to hear appeals of decisions made under the federal *Fisheries Act* or its regulations unless there was a valid delegation of such power to the province or the Board under a federal statute. There is no evidence of such a delegation in this case.

[51] I find that the Order is not a decision made under the *Act*. As a result, it is not within the Board's legal authority under the *Act* to hear the appeals of the Order.

[52] I find that reading sections 101 and 101.1 of the *Act* in their full context and plain and grammatical meaning supports the conclusion that the Associate Director's delegated authority to vary the close of the steelhead fishery is not a "decision" contemplated under section 101 of the *Act*.

[53] I am not persuaded by the Appellants' submissions that, because the Regional Manager and a biologist in Region 6 may have provided advice or recommendations to the Associate Director, an obligation is created to provide written reasons or notice under section 101(1), (1.1) or (2) of the *Act*.

[54] Even if a Regional Manager and biologist provided advice or recommendations to the Associate Director in support of closing the fishery, this does not make the Order an appealable "decision". This is because Order was not made under the *Act*.

[55] For these reasons, I conclude that the Order which closed the steelhead fishery between October 12 and December 31 is not an appealable "decision" within the meaning of sections 101.1(1) of the *Act*.

2. Does legislation other than the *Act* give the Board jurisdiction to hear the appeals of the Order?

[56] Several of the Appellants argue that certain sections of the *EMA* and the *Ministry of Environment Act* provide the Board with the authority to hear these appeals. I am not persuaded by these arguments.



[57] First, the purposes and powers under the *EMA* are different and distinct from those of the *Act*. The *Act* provides the Board to hear appeals of certain decisions made by a regional manager or a director that relate to wildlife. The *EMA* provides the Board the authority to hear certain decisions related to various environmental management issues including waste disposal and management, contaminated site remediation, mineral exploration, clean air provisions, greenhouse gas reduction, and pollution management.

[58] The Board's general authority to hear appeals and its general powers to decide appeals are addressed in Division 1 of Part 8 (sections 93 to 98) of the *EMA*. Within Part 8, Division 1, section 93 contemplates that the Board may hear appeals of decisions made under other Acts, if other Acts expressly say so. In that regard, section 93(1) of the *EMA* empowers the Board "to hear appeals that under the provisions of any enactment are to be heard by the" Board. Similarly, section 93(2) states:

In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

[59] Consistent with section 93 of the *EMA*, section 101.1(3) of the *Act* expressly says that Division 1 in Part 8 of the *EMA* applies to appeals under the *Act*, as discussed below under Issue 3. In contrast, nowhere in the *Fisheries Act*, the *FGR*, or the *BCSFR* does it say that any sections of the *EMA* apply to decisions made under that federal legislation. Nowhere in that federal legislation does it say that the Board may hear appeals of decisions under that federal legislation or its regulations.

[60] Since the Order is a decision made under that federal legislation, and not under the *EMA* or the *Act*, the appeal provisions in the *EMA* do not apply to the Order. The Order was issued under section 6(3) of the *FGR* under the federal *Fisheries Act*. For the same reasons given above, there is no delegation conferring authority to hear appeals of the exercise of this power to make regulations to the provincial Legislature and in turn to the Board through the *EMA*.

[61] Finally, one Appellant argues that the *Ministry of Environment Act* grants authority for the Board to hear these appeals. Generally, the *Ministry of Environment Act* creates the Ministry of Environment. Section 4 outlines the functions and purpose of that ministry, and section 6 sets out that the minister can enter into agreements with the government of Canada, or other provinces, on behalf of the provincial government. These are the sections the Appellant suggests give the Board the authority to hear these appeals.

[62] However, as identified above, the Order was issued under the *FGR* under the federal *Fisheries Act*. While section 6 of the *Ministry of Environment Act* grants the minister the authority to reach agreements with the government of Canada, the evidence does not support a conclusion that any such agreement was made with respect to the Board hearing appeals of decisions made under the federal *Fisheries Act* or its regulations. As I have discussed above, the Board only has jurisdiction when the decision is made under the *Act* or some delegation of authority has been conferred to the province and Board by the federal statutes and regulations.

[63] The Board has no powers except for those specifically delegated and granted by the Legislature and provided in the enabling statutes. For these reasons, I find the Board has no jurisdiction to hear the Appellants' appeals of the Order.

3. Should these appeals be dismissed under section 31(1)(a) of the *ATA* for lack of jurisdiction?

[64] Section 93.1(1) of the *EMA* sets out provisions of the *ATA* that apply to the Board, which include section 31 under Part 4 of the *ATA*. Section 93.1(1) of the *EMA* applies to this appeal because section 101.1(3) of the *Act* states:

Subject to this Act, Division 1 of Part 8 of the [*EMA*] applies to an appeal under this Act.

[65] Section 31(1)(a) of the *ATA* provides that if an appeal<sup>2</sup> is not within the jurisdiction of a tribunal, the tribunal may dismiss all or part of the appeal.

[66] Section 31(2) of the *ATA* requires that the tribunal must give appellants the opportunity to make written submissions or otherwise be heard in response to whether the application and/or appeal is within the tribunal's jurisdiction.

[67] Accordingly, the Board provided the parties to these appeals with the opportunity to make written submissions before deciding whether to dismiss these appeals for lack of jurisdiction.

[68] Since I have found that the Board lacks the legal authority to hear appeals of the Order varying the closure of the steelhead fishery in the Skeena River, it follows that the appeals must be dismissed under section 31(1)(a) of the *ATA* for lack of jurisdiction.

## **DECISION**

[69] For the reasons provided above, I find that the Board has no jurisdiction to hear these appeals.

[70] Therefore, I summarily dismiss the appeals under section 31(1)(a) of the *ATA*.

"David Bird"

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David Bird, Panel Chair  
Environmental Appeal Board

March 31, 2022

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<sup>2</sup> Section 31(1) of the *ATA* refers to the summary dismissal of an "application", and section 1 of the *ATA* defines "application" as including an appeal.