Environmental Appeal Board

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DECISION NO. EAB-WIL-21-A012(a)

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

BETWEEN:	James (Jim) Munroe	**APPELLANT**
AND:	Deputy Regional Manager, Recreational Fisheries & Wildlife Program	**RESPONDENT**
AND:	Keyohwhudachun (Chief) Petra A'Huille	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Michael Tourigny, Panel Chair	
DATE:	Conducted by way of written submissions concluding on May 31, 2022.	
APPEARING:	For the Appellant: Courtenay Jacklin, Counsel Christopher Devlin, Counsel	
	For the Respondent: Sonja Sun, Counsel	

Method of Hearing Preliminary Decision

[1] This preliminary decision pertains to an appeal under the *Wildlife Act*, RSBC 1996, c. 488 (the "*Act*"). The appeal is from a November 2, 2021 decision (the "Decision") of Leslie McKinley, Deputy Regional Manager, Recreational Fisheries & Wildlife Programs, Omineca Region.

[2] The Decision denied an application submitted by the Appellant, in his role as executor of the estate of the late Chief Sally Sam A'Huille ("Chief Sally"). The Appellant applied for registration of the transfer of Chief Sally's estate interest in trapline TR0725T008 (the "trapline interest") to her daughter, the Third Party.[1] The Third Party had been named as a beneficiary under Chief Sally's will.

[3] During pre-hearing conferences held before the Environmental Appeal Board (the "Board") in this appeal, disagreements between the parties were identified relating to how this appeal should be conducted.

[4] The Appellant prefers an oral hearing, while the Respondent prefers a written one. The Appellant also asked that the Board waive or modify its rules so that the Appellant will not be required to deliver any expert report or notice of expert

[1] A "trapline" is defined in the *Act* to mean an area for which registration is granted to one or more licensed trappers for the trapping of fur bearing animals.

testimony until after the Respondent's written submissions or statement of points have been provided to the Appellant and Third Party. The Respondent counters that the Board's normal rules should apply.

[5] The Board requested written submissions from the parties on these procedural disputes. The last of those submissions was provided to the Board on May 31, 2022. The Board received submissions form the Appellant and the Respondent. The Third Party provided no submissions.

[6] This decision addresses the disputes about the form of the appeal hearing and the deadline for filing of expert reports.

Background

[7] Section 42(1) of the *Act* states that an authorized decision maker may grant registration of a trapline on Crown land to a person who is, or to a group of persons each of whom is, 19 years of age or older and a citizen or permanent resident of Canada.

[8] As noted above, the Appellant made his application for registration of the transfer of the trapline interest to the Third Party under section 42(1) of the *Act* as executor of the estate of the late Chief Sally.

[9] At the time of her passing on August 20, 2020, Chief Sally was a registered holder of trapline TR0725T008, together with her nephew, Richard Prince. Mr. Prince does not agree to the transfer of Chief Sally's interest in the trapline to the Appellant and has not co-signed the transfer application submitted by the Appellant.

[10] Chief Sally was hereditary chief of the Maiyoo Keyoh, an Indigenous group of peoples whose ancestral lands include the area associated with trapline TR0725T008. The Maiyoo Keyoh provided notice of their Aboriginal title to their ancestral territory to British Columbia in 2002.

[11] With the passing of Chief Sally, the Third Party is now hereditary chief of the Maiyoo Keych.

Decision Under Appeal

[12] In the Decision it was held, among other things, that once a holder of a trapline registration dies, the registration ends. A trapline registration is not property that survives death, and it does not form part of the estate of the deceased holder. While the Regional Manager has discretion to consider the intentions of the deceased trapline holder as evidenced by a will, it is the Reginal Manager who has the discretion to decide, pursuant to section 42(1) of the *Act*, whether or not to grant a registration on that trapline to a new applicant.

[13] In denying the Appellant's application, the Respondent concluded that, because the Appellant had not come to an agreement with the remaining living registered trapline holder to transfer part of the trapline, it would not be appropriate to approve the transfer. Further, without agreement with the current registered holder, the issue of proper furbearer management on this trapline with

multiple parties would be of concern. It is for these reasons together that the Respondent denied the transfer application.

Notice of Appeal

[14] On November 30, 2021, the Appellant filed his Notice of Appeal setting out comprehensive grounds for appeal. I have summarized those grounds for appeal as follows:

a. The Decision maker fettered her discretion under section 42(1) of the *Act* by treating a Ministry procedure that requires all registered holders of a trapline to agree to a transfer as a mandatory requirement.

b. The Decision was unreasonable for a number of reasons.

c. The concerns expressed in the Decision about sustainable management were unreasonable. In addressing the issue of proper furbearer management on the trapline by both the Third Party and Richard Prince, regardless of whether they are recognized as registered holders in the provincial trapline registration system, the Appellant says that they both have constitutionally protected rights to trap in the trapline area under section 35 of *The Constitution Act, 1982,* Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11, s. 35 ("*Section 35*").[2]

d. Other options to ensure sustainable furbearer management are available to the Ministry, such as section 61(1) of the *Act* that provides regional managers with broad discretion to conduct hearings to determine whether a person should continue to enjoy the privileges afforded to them by having a trapline registration.

e. It was unreasonable for the Decision to require the Appellant as an executor to come to an agreement with Richard Prince as a pre-requisite to the Regional Manager's approval of the application.

f. The Decision failed to consider section 42(3) of the *Act* which provides that registration of a trapline in the name of more than one person creates a tenancy in common. The Decision was accordingly unreasonable as it was inconsistent with the clear intention of section 42(3) of the *Act.*

g. The Decision was also unreasonable in finding that trapline registration is not property that survives death and does not form part of the estate of the deceased holder. In arguing that a registered interest in a trapline is "property" that can be passed by testamentary will, the Appellant references the legislative history of section 42(3) of the *Act,* and in particular, the 1989 amendments to the provincial trapline registration system.

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[2] Section 35(1) of *The Constitution Act* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."] Therefore, their ability to meaningfully exercise these rights depends on the continued sustainable management of furbearers, making the expressed concerns unreasonable.

h. The Decision was inconsistent with the principles of natural justice and procedural fairness. In support, the Notice of Appeal submits that the Decision-maker was aware of and failed to properly take into account the Third Party's Aboriginal rights and title claims in relation to the trapline interest arising on her mother's passing, when making the Decision. Also, the Third Party was not given a reasonable opportunity to address the Decision-maker's concerns before the Decision was made.

ISSUES

[15] The issues identified from the parties' written submissions that will be addressed in this decision are:

1. What is the appropriate form of hearing for the conduct of this appeal?
2. Should the Board waive or modify its rules so that the Appellant will not be required to deliver any expert report or notice of expert testimony to be tendered by it in the appeal until after the Respondent's written submissions or statement of points have been provided to the Appellant and Third Party?

Discussion and Analysis

1. What is the appropriate form of hearing for the conduct of this appeal?

[16] The Board's appeal process is governed by the legislative requirements set out in the *Environmental Management Act*, SBC 2003, c. 53, (the "*EMA*"), the *Environmental Appeal Board Procedure Regulation* (the "*Regulation*"), certain sections of the *Administrative Tribunals Act*, SBC 2004, c. 45 (the "*ATA*")[3], as well as by the common law principles of procedural fairness and natural justice.

[17] Section 11 of the *ATA* allows the Board to establish rules respecting practice and procedure to facilitate the just and timely resolution of matters before it. The Board has established its rules pursuant to this authority (the "*Rules*").

[18] The Board has also developed a Practice and Procedure Manual (the *"Manual"*) containing information about the Board itself, the legislated procedures that the Board is required to follow, the *Rules*, and the policies the Board has adopted to fill in the procedural gaps left by the legislation and the *Rules.*

[19] *Rule* 17 [Scheduling a hearing], provides that the Board will decide whether an appeal hearing will be conducted by way of an in-person (oral) hearing, written submissions (a written hearing), telephone or videoconferencing, or a combination thereof. The authority for *Rule* 17 derives from section 36 of the *ATA*, which provides that the Board may hold any combination of written, electronic and oral hearings.

Appellant's Submissions

[20] In support of his application for an oral hearing under *Rule* 17-1, the Appellant makes four arguments. First, the Appellant does not know the degree to

[3] Section 93.1 of the *EMA* indicates which portions of the *ATA* apply to the Board.

which the Respondent will challenge or contradict the evidence and submissions made in the Notice of Appeal[4] including issues of credibility.

[21] Second, the Notice of Appeal raises issues of Indigenous laws and *Section 35*. Oral history contains the Indigenous understanding of the past, often referring to distant historical events for which little or no documentary evidence exist. Oral history testimony is a practical necessity for Indigenous claimants and is an important medium for communicating Indigenous knowledge.

[22] Third, the Third Party has limited command of English. As a child, her first language was Dakelh. Although she has a junior high school education, the Third Party does not understand complex or legal English and would benefit from an oral hearing.

[23] Fourth, if the Respondent challenges or contradicts the evidence and submissions made in the Notice of Appeal respecting the Indigenous laws, the United Nations Declaration on the Rights of Indigenous People[5] ("UNDRIP"), the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 (the "*Declaration Act*"), and rights protected under *Section 35*, the Appellant will need to provide the Board with oral history evidence in a manner consistent with the Indigenous laws themselves, namely through oral testimony and stories.

Respondent's Submissions

[24] In her written reply on the method of hearing, the Respondent says that an oral hearing is unnecessary. In the Respondent's view, it is not clear from the Notice of Appeal what issues of Indigenous law, Indigenous legal traditions, or rights under UNDRIP, the *Declaration Act*, and section 35 of the *Constitution Act, 1982*. The majority of the grounds for appeal and arguments involve legal interpretation, which can be dealt with more efficiently, in terms of time and costs, by written submissions. However, if the Appellant wishes to present oral history evidence as part of his appeal, the Respondent will not object to an oral hearing on that basis.

Panel's Findings

[25] As set out on pages 23 and 24 in the *Manual,* when considering the type of hearing to be held, the Board "… will give careful consideration to balancing the process to be followed with the nature and complexity of the appeal, any views expressed by the parties, the likelihood that there will be conflicting evidence and/or credibility issues that will need to be assessed, the number of parties involved in the appeal, whether there are any language or literacy barriers to a particular type of hearing, and the potential for community interest in the appeal. If there are issues of credibility, complex issues that require oral evidence or other

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[4] The Appellant uses the phrase "Notice of Application" throughout his submissions. I understand this to be an inadvertent misdescription of his "Notice of Appeal" and I have accordingly edited the term to read "Notice of Appeal" from this point forward in this decision.

[5] UNGA Res 61/295 (13 Sep 2007) (adopted by 144 votes in favour, 4 against; 11 abstentions.

circumstances that warrant having the parties, participants and the panel to be in the same room, the Board will schedule an oral hearing."

[26] While I agree with the Respondent that the legal interpretation issues raised in the Notice of Appeal could fairly and effectively be dealt with by way of written hearing, I find it important to note that the decision whether to register the transfer of the trapline interest under section 42(1) of the *Act* is a matter of discretion. The exercise of that discretion requires a consideration of the relevant evidence in order to find the facts upon which its' exercise could be based.

[27] The Appellant's submissions make it clear that the Third Party would benefit as a witness from being able to give her testimony in person, as opposed to in writing. Likewise, the Panel hearing the appeal would benefit from receiving the best available evidence upon which to base its findings of fact and in its consideration of the application of section 42(1) of the *Act* on the facts as found.

[28] I am satisfied that the "oral history" evidence that the Appellant intends to lead through the Third Party will likely need to be tested by cross-examination by the Respondent or questions from the Panel. Likewise, the Panel's consideration of the relevance or weight to be given to such evidence in this appeal will involve a degree of complexity. These circumstances call for an oral hearing.

[29] Further, the Respondent has submitted she does not object to an oral hearing if the Appellant wishes to present oral history evidence as part of his appeal.

[30] Having carefully considered the submissions of the parties and the relevant factors referred to above from the *Manual*, I direct, as a matter of procedural fairness, that the appeal hearing be conducted by way of an in-person oral hearing.

2. Should the Board waive or modify its *Rules* so that the Appellant will not be required to deliver any expert report or notice of expert testimony to be tendered by it in the appeal until after the Respondent's written submissions or statement of points have been provided to the Appellant and Third Party?

[31] As directed under Issue 1 above, this appeal is to be heard by way of an in-person oral hearing. Accordingly, *Rule* 19 [Oral hearings] that addresses pre-hearing submissions and document disclosure applies.

[32] *Rule* 19 requires that appellants deliver their Statements of Points and documents to each party and the Board at least 30 calendar days before the hearing commences. The Respondent and any other party must deliver their Statements of Points and documents to each party and the Board at least 15 calendar days before the hearing commences.

[33] *Rule* 19 provides that a Statement of Points is to contain:

a. a summary of his or her case to be presented at the hearing,

b. a list of witnesses to be called by that party (if any),

c. the legal authorities that will be relied upon at the hearing (if any); and

d. a copy of the documents that he or she will be referring to, or relying upon, at the hearing.

[34] *Rule* 25 [Expert evidence] governs the introduction of expert evidence in an appeal to the Board. *Rule* 25 provides that "unless the Board directs otherwise", a party must deliver a written statement or report by an expert (or notice of expert testimony without a report) at least 84 calendar days before the scheduled oral hearing date, to the Board and the other parties. *Rule* 25 provides further that unless the Board directs otherwise, an expert's reply report (or notice of an expert's reply without a report) is to be delivered at least 42 calendar days before the scheduled oral hearing date, to the Board and the other parties.

[35] *Rule* 2 [Applying the rules] requires all participants in an appeal to comply with the *Rules* unless the Board orders or directs otherwise under section 11(3) of the *ATA.*

[36] Section 11(3) of the *ATA* authorizes the Board to waive or modify one or more of its *Rules* in "exceptional circumstances".

Appellant's Submissions

[37] The Appellant confirms in his submissions that he is not seeking to change the *Rule* 19 order of exchange of Statement of Points by the parties. The Appellant will still make his submissions first, followed by the Respondent's response. However, the Appellant requests that the Respondent be required to provide its Statement of Points 112 days in advance of the scheduled hearing. The Appellant submits that this would provide the Appellant with 28 days to review the Respondent's Statement of Points and, if necessary, provide the Respondent with the 84 days' notice set out in *Rule* 25 if the Appellant intends to rely on expert evidence. This would allow the Appellant to know what the Respondent intends to argue before he has to decide whether expert evidence is required in reply.

[38] While it is not expressly stated in the Appellant's submissions, I understand that he proposes to provide his Statement of Points to the Respondent 15 days before the Respondent is called upon to respond (to be consistent with *Rule* 19), which is 127 days before the scheduled hearing.

[39] As alternative relief, the Appellant requests leave to apply for an extension of time and an adjournment of the hearing if, after receiving the Respondent's Statement of Points, the Appellant needs to provide expert evidence in reply to the Respondent's submissions.

[40] The Appellant's key submissions on his application (including his reply submissions) concerning the delivery of expert evidence are as follows.

[41] Unlike in court proceedings, the Respondent is not required to tell the Appellant in advance the position it will argue before the hearing itself. The Appellant will not know how the Respondent will respond to the appeal until the Appellant receives the Respondent's written Statement of Points 15 days before the hearing. Until the Appellant knows how the Respondent will respond to his submissions, the Appellant cannot know whether his submissions on Indigenous legal traditions and *Section 35* rights will be contested. If those submissions are not contested or contradicted, then the Appellant will likely not require expert evidence

in reply. But if they are, then the Appellant may need to lead such reply evidence. Under the *Rules*, however, the Appellant is required to deliver any expert report or provide notice of expert testimony 84 days before the hearing commences. The Appellant says this would be procedurally unfair and highly prejudicial to the Appellant's appeal.

[42] The Appellant has filed a detailed Notice of Appeal. The Respondent has a full picture of the facts the Appellant intends to rely on and his grounds for appeal. Conversely, the Appellant has little to no information about what the Respondent intends to argue or any evidence the Respondent intends to adduce in response. Whether the hearing proceeds orally (pursuant to Rule 19) or by way of written submissions, the Board's rules of procedure do not allow the Appellant to know the Respondent's case until just before the hearing. Essentially, this process is "appeal by ambush".

[43] The central issue in this appeal is one of statutory interpretation. However, this appeal also involves issues respecting the application of Indigenous law, and *Section 35* rights which are germane to the statutory interpretation question. Should the Respondent adduce contradictory evidence or submissions in response to the Appellant's submissions on those issues in his Notice of Appeal, it may be necessary for the Appellant to adduce expert evidence in reply.

[44] The *Rules*' failure to require the Respondent to articulate its position on the appeal until after the Appellant submits his Statement of Points or written submissions is unfair and inadequate in the circumstances of this appeal. The Appellant cannot be expected to know whether expert evidence is required before he knows what submissions the Respondent intends to make. At this point, the Appellant does not have sufficient information to instruct an expert. If the Appellant were to instruct an expert, he would have to provide broad instructions to cover every imaginable response by the Respondent, which adds unnecessary complexity and unfair expense to the appeal process.

[45] If the Appellant does not provide expert evidence at this time and finds out only after his Statement of Points or written submissions have been submitted prior to the hearing that the Province intends to adduce contrary evidence on issues respecting the application of Indigenous law and section 35 rights, the Appellant would have to ask for an adjournment of the hearing in order to prepare reply evidence and argument on whatever specific points the Respondent makes. Anything less would be highly prejudicial and procedurally unfair.

[46] This is not an attempt to split the Appellant's case so that the Appellant can assess the strength of the Respondent's response before deciding whether to put forward his best case. Rather, the Appellant is asking the Board to build safeguards into a process that was not designed to assess issues of Aboriginal rights or the relevance of Indigenous law to decisions made under colonial statutory regimes.

[47] It is inaccurate to say that the Appellant only wants to adduce expert evidence if he feels it necessary based on the Respondent's response. The Appellant is prepared to submit expert evidence on contested Aboriginal rights or Indigenous law issues to ensure that the Board can make an informed decision on the appeal. However, in the Decision, the written reasons of the Respondent were underinclusive with respect to the Aboriginal rights at issue in the application. While

the Appellant has identified those Aboriginal rights in his Notice of Appeal, he has yet to hear from the Respondent about whether the Respondent will take issue with his assertions of Aboriginal rights. If the Respondent is content to only adduce evidence and make submissions on the statutory interpretation issue, and accept the evidence of the Appellant respecting the Indigenous laws that relate to this appeal, then the Respondent should simply state that to be the case. The Respondent has not done so and that is unfair.

[48] Under section 8.1 of the *Interpretation Act,* RSBC 1996, c. 238 (the "*IA*"), the *ATA* must be construed (i) "as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act*, *1982*", and (ii) as being consistent with the *Declaration Act*. With this in mind, the need to recognize and take precautions to accommodate issues of Aboriginal rights and Indigenous law certainly constitute "exceptional circumstances", of the kind anticipated in section 11(3) of the *ATA*.

[49] The Notice of Appeal raises issues with respect to Aboriginal rights and Indigenous law. As stated in the Notice of Appeal, the Maiyoo Keyoh's ancestral lands are reflected today by trapline TR0725T008. Chief Sally left her interest in the trapline to the Third Party pursuant to both colonial law and the Indigenous legal order of the Stuart Lake Carrier people. The decision has significant implications with respect to, *inter alia*, the Third Party's ability to fulfil her obligations as Keyohwhudachun. The decision and the appeal (including issues of procedure) have broader implications with respect to Crown commitments to reconciliation, the implementation of UNDRIP (which includes making space for Indigenous legal orders), and the impact of the new provincial *Directives on Civil Litigation involving Indigenous Peoples.*

[50] The Appellant intends to lead evidence on Indigenous law and Aboriginal rights. While the Respondent's current position appears to be that such evidence is irrelevant, the Respondent has not confirmed that this is indeed its position. If the Respondent intends to put at issue the Appellant's evidence on Indigenous law and Aboriginal rights and to lead contradictory evidence in response, it is essential that the Appellant know this position now in order to have opportunity to provide expert evidence on the Aboriginal rights and Indigenous law evidence the Respondent intends to challenge.

[51] Admissions of fact would help the Appellant understand which facts the Respondent will accept or reject. However, admissions of fact do not require the Respondent to identify evidence it will contest or positions it will take on the issues raised in the appeal. This information is crucial to the proper instruction of experts and will help the Appellant ensure that his limited resources are expended efficiently and responsively to the issues in question.

[52] The Respondent cannot insist that the Appellant adduce comprehensive evidence in a vacuum, unaware of the contested issues on the appeal, and yet rely on the underinclusive Decision for its position on the appeal. The Respondent must respond to the Appellant's case as stated in the Notice of Appeal so that all parties, and the Board, know what the issues will be at the hearing.

Respondent's Submissions

[53] The Respondent's key submissions in response to the Appellant's application concerning the delivery of expert evidence are as follows.

[54] While the Board has the discretion to change the delivery dates, and on the face of it, the Appellant is applying for a change of delivery dates, the request in substance fundamentally alters and upends the entire appeal procedure of the Board. The Appellant is arguing that the process dictated by the Board's *Rules* is unfair and amounts to "appeal by ambush" because he must decide whether to utilize experts in support of his appeal prior to receiving the Respondent's written submissions or Statement of Points.

[55] The Respondent submits that the normal procedure of the Board, which applies to all hearings, is neither unfair nor prejudicial to the Appellant. Rather, it serves multiple important goals and purposes such as efficiency and finality, and is appropriate in an administrative context where the appellant is appealing a known decision. The onus is on the Appellant to prove his case. He must anticipate whether the Respondent might contest his grounds of appeal, and how. It is the Appellant's responsibility to decide how best to present his case up front. The Appellant can, like all other appellants before the Board, decide whether to adduce expert evidence as part of his case in the first instance. Not wanting to do so is not the same as being unable to. The Appellant's responsibility to adduce his evidence and prove his case exists regardless of whether the Respondent adduces contrary evidence in response.

[56] In contrast, the change to the normal procedure requested by the Appellant amounts to an improper reversal of onus. Instead of putting his best case before the Board in the first instance as intended by the Board's *Rules*, the Appellant wants to be able to split his case to allow him to assess the strength of the Respondent's response before deciding whether it is worth putting forth his best case and providing relevant evidence. By only wanting to adduce expert evidence if he feels it necessary based on the Respondent's response, the Appellant wishes to tailor his case to the response even though he has the burden of proof. This is unfair and prejudicial to the Respondent as it puts the onus on the Respondent to put forward a case (which the Respondent has in essence already done through her original Decision) for the Appellant to respond to. It also means that the Respondent might not have a fair opportunity to respond to all of the Appellant's evidence.

[57] There are many negative consequences to such a reversal of onus. If one party can respond and adduce fresh evidence after a round of submissions or Statement of Points, then the other party should also be given a further chance to do so. This either results in a repetitive and inefficient process, or unfairness to one side. The parties are also likely to need to amend their initial statement of points or written submissions to address any expert evidence provided thereafter, decreasing the efficiency of the process and increasing the time and cost of hearing the appeal. All of this also changes the delicate balance of a process designed to try to provide an appropriate and fair playing field. In the Respondent's view, the usual procedure has better implications for cost, complexity and time, and fairness to all parties.

[58] Under section 11(3) of the *ATA*, the Board may waive or modify its *Rules* only in exceptional circumstances. Such a fundamental departure as requested by the Appellant is not just a simple date or schedule change, but constitutes a waiver/modification of the *Rules* and should not be made without significant and compelling reasons. The Appellant has not demonstrated such a reason unique to his case, and this appeal is not in any way singularly prejudiced by the usual hearing process.

[59] The Appellant states that the appeal also "…involves issues respecting the application of Indigenous law, and section 35 rights which are germane to the statutory interpretation question." However, the Respondent submits that the Notice of Appeal fails to identify the *Section 35* rights or the Indigenous laws that are allegedly in issue. Nor does it outline any allegation that the decision infringes *Section 35* rights or that the Respondent failed to consider or rejected an Aboriginal right. If the Appellant considers these to be material issues, his request to have the Respondent submit argument in the first instance is again prejudicial to the Respondent, who cannot credibly address issues that are not articulated or described. The Respondent reiterates that the onus is on the Appellant to prove his case.

[60] The Respondent's Decision focused on fur bearer management, and it made no determinations with respect to or affecting *Section 35* rights and did not dispute Indigenous laws. The Respondent does not intend to lead any expert evidence on Indigenous laws or *Section 35* rights on the basis of the current Notice of Appeal. In any case, the Respondent submits that the usual Board procedure does not negatively affect any appellant, including this Appellant's ability to address Indigenous law or *Section 35* rights.

[61] Furthermore, the Board's practices and procedures provide tools to discover the basis for the Respondent's likely response. The Appellant already has the benefit of some of these tools, but has also not exhausted his options in this regard. The Appellant has requested and been provided with documentary disclosure, which should help inform his decision of whether to utilize expert evidence. The Appellant may also seek admissions of facts from the Respondent, which might further assist with deciding whether he ought to utilize experts in support of his appeal. The Appellant has not done this, but the Respondent would respond to such a request. Additionally, it remains open to the Appellant to request more time to deliver an expert report without reversing the due date order with the Statement of Points or written submissions (either through scheduling a longer period to the oral hearing or written submissions, or shortening the 84 days). The Appellant's complaint that the Board's process is unfair and prejudicial is analytically narrow and inappropriately subjective.

[62] For these reasons, the Respondent submits that the usual hearing process for Board appeals is fair and suitable for this one; reversing the process gives the Appellant an unfair advantage, prejudices the Respondent, and has many other negative consequences. The Board should not alter the process and waive/modify its *Rules* to allow the Appellant to adduce new expert evidence after the Respondent's Statement of Points or written submissions because there is no exceptional circumstance here which would justify such a departure.

Panel's Findings

[63] The Board's powers in deciding the appeal are set out in section 101.1(5) of the *Act.* It provides:

> (5) On an appeal, the appeal board may
>
> (a) send the matter back to the regional manager or director, with directions,
>
> (b) confirm, reverse or vary the decision being appealed, or
>
> (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[64] In the Notice of Appeal, the Appellant seeks, as primary relief, an order reversing the Decision and confirming registration of the transfer of the trapline interest from Chief Sally to the Third Party.

[65] Section 101.1(4) of the *Act* states that the Board may conduct the appeal by way of a new hearing. There is no dispute that this appeal will be conducted as a new hearing. This means that, in addition to reviewing the Decision, the Panel of the Board hearing this appeal may hear new evidence that was not considered by the Respondent, and will make findings of fact, rulings on questions of law and its ultimate decision on relief based solely on the evidence and argument put before it on the appeal. That Panel may exercise any discretion that it has without regard to the evidence presented to, or the conclusions reached by, the Respondent.

[66] Under the *Regulation, Rule* 5 [Starting an appeal], and the *Manual,* appeals to the Board are started by filing a Notice of Appeal in writing wherein an appellant is obliged to describe what is wrong with the decision being appealed and why it should be changed, together with the remedy sought. The authority for this derives from section 22(2) of the *ATA.*

[67] As stated on pages 33 and 56 of the *Manual*, the general evidentiary rule in appeals before the Board is that the burden of proving a fact is on the party who asserts it. In this case, that means the Appellant carries the burden of proving the allegations advanced by him in support of the relief sought in his Notice of Appeal.

[68] For instance, in paragraph 60 of the Notice of Appeal, the Appellant asserts in part:

> Despite having knowledge of [Chief] Sally's will and despite the Ministry's awareness of the keyoh system and the Maiyoo Keyoh's Aboriginal rights and title claims, the Decision Maker failed to appreciate the significance of the Decision for Petra [Third Party] and her family.

[69] The burden is on the Appellant to prove the Aboriginal rights and title claims of the Third Party and her family that the Appellant says are relevant to a proper interpretation section 42(1) of the *Act.*

[70] The Appellant's submissions concede that the central issue in this appeal is one of statutory interpretation. However, the Appellant submits that this appeal also involves issues respecting the application of Indigenous law, and *Section 35* rights, which are germane to the statutory interpretation question. If that is so, the

burden lies with the Appellant to prove the relevant facts underlying this assertion. Responsibility for determining what evidence will be provided to the Panel to prove the relevant facts lies with the party asserting the facts, and on this point, that is the Appellant.

[71] In requesting that the Respondent be required to deliver her Statement of Points before the Appellant is called upon to decide whether or not to lead expert opinion evidence, the Appellant characterizes the expert evidence being contemplated by him as "reply evidence" as being in response to the Respondent's Statement of Points. I find that it is inaccurate to characterize the expert evidence being contemplated by the Appellant as "reply evidence". Rather, such opinion evidence would be evidence tendered by the Appellant in support of his appeal, if he determines that such evidence is required by him to prove his case.

[72] After receiving the requisite 84-day notice of such evidence from the Appellant, it would then be up to the Respondent to determine whether or not to lead expert reply evidence, in which case she would be bound by the applicable 42-day notice requirements for any reply expert evidence.

[73] The converse, of course, is also true. If the Respondent intended to lead expert evidence as part of her case, she also would be required to provide the requisite 84-day notice of such evidence to the Appellant, who would then have the option of providing reply expert evidence within the applicable 42-day notice requirement.

[74] Both the *Rules* enacted under section 11 of the *ATA,* as well as the common law principles of procedural fairness and natural justice applicable to practice and procedure before the Board, are intended to apply equally to all parties that come before it on an appeal. That includes not only the Appellant and Third Party, but also the Respondent. The objective is to facilitate the just and timely resolution of matters before the Board.

[75] Having timely disclosure of expert evidence by the parties before their exchange of their Statement of Points 30 and 15 days before the hearing, respectively, is consistent with the objective of the *Rules*, being the just and timely resolution of the appeal on its merits.

[76] I find the Appellant's submission that he cannot properly instruct an expert on the scope of the opinion sought, until he knows the Respondent's position, to lack merit. The Appellant knows what his fact evidence will be and also should know what Aboriginal rights he will submit are relevant in this appeal. Based on the Notice of Appeal as filed, those particulars have not been put forward. Therefore, suggesting that the Appellant's decision on providing expert evidence should await the Respondent's Statement of Points responding to the Notice of Appeal makes little practical sense.

[77] As submitted by the Respondent, if the Appellant considers certain Aboriginal rights to be material to his appeal, his request to have the Respondent submit argument in the first instance is prejudicial to the Respondent, who cannot properly address issues that are not articulated or described in the Notice of Appeal.

[78] Rather than waiting to see what is in the Respondent's Statement of Points, the Appellant may seek admissions of facts from the Respondent as a way of

discerning whatever facts can be agreed to in his case. This might assist with deciding whether he ought to utilize experts in support of his appeal, or how broad of an opinion he may seek from an expert. The Appellant agrees in his submissions that admissions of fact would help the Appellant understand which facts the Respondent will accept or reject.

[79] Contrary to the Appellant's submissions, the Board's normal practice and procedure is neither unfair nor "appeal by ambush". The *Rules,* which apply to all hearings before the Board, are neither unfair nor prejudicial to an appellant. Rather, they serve multiple important goals and purposes such as efficiency and finality. The *Rules* calling for the disclosure of expert evidence before the exchange of Statements of Points are appropriate in an administrative context where the appellant is appealing a known decision. The Appellant can, like all other appellants before the Board, decide whether to adduce expert evidence as part of his case in the first instance. Not wanting to do so is not the same as being unable to. The Appellant's responsibility under the *Rules* to adduce his evidence and prove his case exists regardless of whether the Respondent adduces contrary evidence in response.

[80] The question remains as to whether the Appellant has established that "exceptional circumstances" exist in this case, as required under section 11(3) of the *ATA,* to allow the Board to waive or modify its *Rules* as sought by the Appellant.

[81] The Appellant submits that section 11(3) of the *ATA* is to be construed as upholding and not abrogating or derogating from the Aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by *Section 35*, and (ii) as being consistent with the *Declaration Act* by reason of the application of section 8.1 of the *IA*. On its face, this proposition is not contentious.

[82] However, the Appellant goes on to submit, "With this in mind, the need to recognize and take precautions to accommodate issues of Aboriginal rights and Indigenous law certainly constitute 'exceptional circumstances'. I find that the Appellant has identified no right covered by section 8.1 of the *IA* that would be abrogated or derogated from if I find that "exceptional circumstances" have not been established on this application.

[83] I do not find that the Appellant's stated intention to lead evidence on Indigenous law and Aboriginal rights, in itself, constitutes "exceptional circumstances" as contemplated by section 11(3) of the *ATA* that would warrant modifying the *Rules* as sought by the Appellant. Further, the Appellant has not demonstrated any "exceptional circumstances" unique to his case, that would singularly prejudice the Appellant by following the normal pre-hearing process set out in *Rules* 19 and 25.

[84] The Appellant's request in substance alters and upends the entire appeal procedure of the Board. The modification of the *Rules* sought by the Appellant is unfair and prejudicial to the Respondent, as it puts the onus on the Respondent to put forward a case (which the Respondent has in essence already done through her Decision) for the Appellant to respond to. It also means that the Respondent might not have a fair opportunity to respond to all of the Appellant's evidence. If one party can respond and adduce fresh evidence after a round of Statement of Points, then the other party should also be given a further chance to do so. I agree with

the Respondent that granting the Appellant's application would result either in an inefficient and repetitive appeal process, or unfairness to one side.

[85] On balance, I find that the Appellant has failed to establish the existence of "exceptional circumstances" as contemplated by section 11(3) of the *ATA* in this case that would justify modifying the *Rules* as sought by the Appellant. In any event, I decline to do so.

[86] The Appellant's application to waive or modify *Rule* 19 and/or *Rule* 25 is denied. I also find it inappropriate to comment on any possible future applications by either party.

Decision

[87] For the reasons provided above, I direct that the hearing of the appeal be conducted by way of in-person oral hearing, and that *Rules* 19 and 25 will apply to this appeal. The Appellant's application is granted with respect to the request for an oral hearing of the appeal, and is denied with respect to the request to modify the procedures for the prehearing disclosure of expert evidence and the delivery of Statement of Points under *Rules* 25 and 19.

[88] In reaching this conclusion, I have considered all information and submissions provided by the parties in this appeal, even if not specifically referenced in this decision.

"Mike Tourigny"

Michael Tourigny, Panel Chair
Environmental Appeal Board

July 21, 2022