



Environmental Appeal Board

Fourth Floor, 747 Fort Street, Victoria BC V8W 3E9

Tel: (250) 387-3464

www.bceab.ca

Fax: (250) 356-9923

Email: info@bceab.ca

DECISION NO. EAB-WIL-22-A008(a)

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

BETWEEN: Daniel Norton **APPELLANT**

AND: Acting Director of Wildlife, Ministry of Forests **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
David Bird, Vice Chair

DATE: Conducted by way of written submissions
concluding on November 14, 2022

APPEARING: For the Appellant: Krista Sittler, Representative
For the Respondent: Sonja Sun, Counsel

PRELIMINARY DECISION ON THE METHOD OF HEARING

[1] Daniel Norton [the "Appellant"] appeals a June 7, 2022 decision of Logan Wenham, Acting Director of Fish and Wildlife with the Ministry of Forests [the "Director"] amending the quotas listed in the Appellant's guide outfitter licence 100003649, which is in effect from April 1, 2022 to March 31, 2027 [the "Amended Licence"].

[2] The Amended Licence limits hunters guided by the Appellant in the Omineca Region (Region 7a) to harvesting 3 adult mountain goats and 10 bull moose, cumulatively. Additionally, the Amended Licence sets out special provisions for the harvest of adult mountain goats.

[3] The Appellant specifically disputes the impact of changes to the boundaries of his guiding area that result from a regulatory change. The Appellant asserts that he was not consulted or given the opportunity to address this change prior to the change of his guiding area, which leaves him with less area where he can hunt mountain goat. He says his quota allocation should be increased to 5 mountain goats for the 2022-2023 season, or a total of 15 mountain goats for the 5-year allocation period.

[4] The Appellant's notice of appeal indicates he does not dispute the allocation of bull moose in his licence.

BACKGROUND

[5] The Environmental Appeal Board (the "Board") received the Appellant's notice of appeal on July 6, 2022. On August 3, 2022, the Board wrote the parties

indicating that the appeal could be heard fairly and efficiently by written submissions. If the parties objected to the proposed method of hearing, they were to provide the Board with written reasons for their objection by August 19, 2022. The Appellant replied by letter on August 19, 2022, arguing that oral evidence is needed to properly present his case and that he wanted the opportunity to cross examine the Director. The Director indicated he had no objection to the Board hearing the appeal in writing.

[6] The Board held a pre-hearing conference with the parties to discuss the Appellant's objection to the Board's proposed method of hearing. During this pre-hearing conference, the Appellant was given a deadline to provide a written submission on why the appeal should not be heard in writing. Subsequently, the Director was given the opportunity to make a written submission in response, and the Appellant was given the opportunity to provide a final reply thereafter.

ISSUE

What is the appropriate method of hearing for this appeal?

DISCUSSION AND ANALYSIS

[7] In the Board's decision *James (Jim) Munroe v Deputy Regional Manager, Recreational Fisheries & Wildlife Program and Keyohwhudachun (Chief) Petra A'Huille*, EAB-WIL-21-A012(a), dated July 21, 2022 ["*Munroe*"], the following guidelines were considered in deciding the appropriate method of hearing:

[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"), 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.

[8] These paragraphs in *Munroe* are relevant considerations to my analysis in this case on a similar question. Although not binding on me, the paragraphs quoted above provide a consistent analytical framework for determining the method of appeal in the case before me.

Appellant's Submissions

[9] The Appellant submits that oral evidence and cross-examination are necessary in order to properly present his arguments, and highlight for the Board how the Director came to the decision to issue the Amended Licence. In addition, the Appellant submits that the high likelihood of conflicting evidence that will be presented to the Board is also a reason for the appeal to be heard by way of an oral hearing.

[10] The Appellant submits that a one-day oral hearing would be sufficient for the Board to hear the appeal.

Director's Submissions

[11] The Director submits that the appeal can be heard fairly and efficiently through written submissions, with the possible exception of an oral hearing component to cross-examine any expert witnesses.

[12] The Director identified that in the Board's decision *Peace River Coal Inc. v. Director, Environmental Management Act*, Decision No. EAB-EMA-21-A008(a), dated June 10, 2022 ["*Peace River Coal*"] the Board referenced its prior decision *Donald Pharland v Director, Environmental Management Act*, Decision No. 2007-EMA-014(a), ["*Pharland*"] which outlined the relevant factors that should be applied when deciding on the method of hearing. Specifically, the relevant factors are:

- the parties require an oral hearing to fully and fairly present their cases;
- the Board requires an oral hearing to make a fair and informed decision on the appeal; and
- the public can view the proceedings that impact it, in a fair and accessible manner.

[13] The Director submits that the criteria outlined in the Board's Practice and Procedure Manual (the "Manual") also do not suggest an oral hearing is required to hear this appeal. The Director submits that his credibility is not a significant factor. The Director submits that there may be credibility issues with expert evidence but this is not known at this time and may be effectively addressed through a limited oral hearing focused on cross-examination of experts.

[14] The Director submits that cross-examination is not required because it is unlikely to elicit any further evidence that would be determinative of the issues.

[15] Finally, the Director submits that appeals of this nature are common and generally not complex. The Director submits that the Board's decision on appeal should be based on "animal population data, biological and conservation considerations, and guided by the Province's policies and procedures", which the

Director believes are all factors that can be readily addressed by both parties in writing.

[16] The Director also relies on additional factors from the Manual which include: where credibility is not a significant factor, where the material facts are undisputed (including where the questions to be resolved are purely legal), and where the appeal is neither novel nor complex. However, the Manual does stress that an oral hearing is not necessarily required where those criteria are not met. For example, not all novel and/or complex appeals require an oral hearing to be heard fairly and efficiently.

[17] The Director submits that his decision on the original quota and the offer to increase the quota are "well documented and articulated in writing". The Director submits that decisions on quotas and the rationale behind these decisions are "heavily driven by underlying calculations and data" which can be presented sufficiently and clearly through written evidence and do not require oral explanation.

[18] The Director submits that the Appellant has argued an oral hearing is required because the Appellant cannot prepare an effective written argument due to the start of the hunting season. However, the Director submits that, given the passage of time, this is no longer a barrier. The Director submits that, although the Appellant indicates he may rely on an expert opinion, this does not necessarily indicate that an oral hearing is required as experts can, and often do, provide their opinions in writing.

[19] The Director submits the Appellant has not provided a compelling explanation why his case cannot be presented through a written hearing. The Director notes that, historically, the Board has heard quota appeals through written hearings. The Director submits that quota appeals are "relatively straightforward and simple to explain in writing".

[20] In consideration of whether this appeal requires an oral hearing for the accessibility of issue to the public, the Director submits the issue in this appeal does not have a great impact on the public. The issue involves one guide outfitter's licence conditions and changes to this individual licence will not have much effect on the general public.

[21] The Director submits that the Board, on its own initiative or by application of a party, may include an oral component to the written hearing for cross-examination of experts if necessary.

Appellant's Final Reply

[22] The Appellant's position is there are issues of conflicting evidence and issues of credibility which necessitate that the Board hear the appeal by way of oral hearing. The Appellant notes that in *Munroe*, issues of credibility and issues of conflicting evidence were factors identified as being determinative of the method of hearing.

[23] The Appellant submits that the issue on appeal results from the Director's exercise of discretion and his decision "is purely based on professional judgement

and discretionary interpretation of the information that was provided to him, including relevant policies, procedures and management plans.”.

[24] The Appellant submits that a briefing note relied on by the Director is “highly subjective, biased, and lent itself towards a decision that was already made in an attempt to cover their tracks on a mistake that was made over 20 years previously.”. The Appellant submits this is an example of conflicting facts and evidence which warrant an oral hearing.

[25] The Appellant submits that the lack of public impact is not a relevant factor in deciding the method of appeal. The Appellant submits the Board’s decision will have “real, meaningful and lasting impacts on [the Appellant].”.

[26] The Appellant submits that the only means of ensuring that the Director’s credibility is not an issue is to make him available to answer relevant questions regarding the information relied on in making the appealed decision.

[27] The Appellant submits that an oral hearing is required to fairly and efficiently hear this appeal.

Panel’s Findings

[28] To begin, I note that the Board has the jurisdiction to hold a hearing in writing, virtually or in person, or any combination of those formats¹. The issue I am deciding in this application is whether, in the circumstances of this appeal, the Board should require an oral hearing be held.

[29] I also note that when considering how to hear an appeal, the Board is motivated by several, and at times competing, interests. The Board is mandated to complete appeals efficiently, without undue delay or unnecessary expenditure of resources while fairly balancing the factors outlined in the Manual and in *Pharland*.

[30] The Manual and *Pharland* provide general factors which would not suggest the need for an oral hearing. I am not persuaded by the Appellant’s submissions that the circumstances of this particular appeal require an oral hearing to fairly and efficiently decide the appeal. I find that the Board can fairly decide this appeal through written submissions and documentary evidence, including any expert reports.

[31] I am not persuaded there is complex conflicting evidence or issues of credibility that cannot be effectively presented and reviewed by written submissions. I note that the issue under appeal is not complex or novel and the Board has decided many appeals with similar issues by written submissions.

[32] I am also not persuaded by the Appellant’s argument that cross examination of the Director is required to fairly hear the appeal. Each party has the burden of proving their positions and arguments and it has been identified by both parties that the Director’s decision relied on underlying data and interpretation of the law,

¹ See sections 11(1) and 36 of the *ATA*, made applicable to the Board by section 93.1(1)(d) of the *Wildlife Act*.

policies, and procedures. These are, in my view, precisely the type of appeals most suited to the written submission process.

[33] The use of discretion is commonly applied by decision-makers when applying and interpreting legislation based on the information before them. This is what the legislator intended. The Appellant has not distinguished how the circumstances of this decision, and how the Director interpreted the legislation and information before him, warrants an oral hearing.

[34] At this stage it is also not clear whether there will be expert evidence presented on appeal or why that expert evidence cannot be received in the form of a report. Regardless, not all expert evidence requires cross-examination and the Board's Manual provides that if a party seeks to cross-examine a witness on the evidence they provide in the written submissions of another party, that party may submit an application pursuant to Board Rule 16 to allow for cross-examination of witnesses².

[35] The Board's Manual also provides that the panel deciding an appeal by written submission may determine that further information is required to make an informed decision and provides a process for how all parties [and participants or interveners if applicable] are provided the opportunity to respond to new information³.

[36] I note the fact that the Board has heard many appeals addressing decisions regarding quota allocations for guide outfitters by written submissions. I do not find that the subject matter is novel or complex such that there is issues of conflicting evidence which may be better heard by an oral hearing. A written submission process provides the parties with time to consider evidence or arguments and time to respond thoughtfully and fully. Oral hearing proceedings can be procedurally complex and rule driven and take significantly more time and cost to coordinate and schedule.

[37] I am not persuaded that there is significant public interest in this specific appeal which would favour an oral hearing proceeding. The Board can hear and render a decision on this appeal in a timelier fashion by a written submission process and public access to the outcome will be available when the Board publishes its decision on its website. The Appellant concedes there is very little public impact as a result of a decision on this appeal and only argued that this should not be a factor to deny an oral hearing, despite the Rules stating the contrary intention. Therefore, I do not consider the public to be sufficiently impacted by the issue in this appeal to warrant an oral hearing.

[38] I note the following comments made by the Board in *Peace River Coal* in paragraphs [53], [54] and [55]:

[53] The desire of any prospective, undefined members of the public to fairly and accessibly view the appeal can be met by members of the public

² See "Application to cross-examine" section starting at page 32 of the Board's Manual.

³ See "Additional information requested by the Board" section starting at page 31 of the Board's Manual.

reviewing the decision when it is released and, if they so choose, request appeal records, including by submitting requests for records through the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165. I have considered these factors independently and in sum in reaching this conclusion.

[54] In reaching this conclusion, I note that this matter remains at a preliminary stage. Notwithstanding this preliminary decision, at a later stage in the proceeding the Panel assigned to hear this appeal on the merits may consider whether fairness requires all or part of the proceedings to be conducted orally. In that respect, Peace River remains free to raise any specific concerns about the sufficiency or quality of the evidence presented by the Director. The Director is on notice that Peace River wishes to pose questions of the Director and various staff members subordinate to the Director. Peace River may apply to the Board for an order compelling the Director or her staff to provide evidence, should the Director's evidence not sufficiently address any relevant points Peace River wishes to address.

[55] Peace River may also apply to the Board for cross-examination on the contents of any affidavits, after reviewing them, in the normal course of this appeal. Such a request will need to describe the subject matters to be addressed in the cross-examination and establish why cross-examination would be required or of assistance to the Board in deciding the appeal.

[39] I have referenced these paragraphs from *Peace River Coal* because the approaches outlined are relevant and available to the parties in this appeal as submissions and evidence are exchanged.

[40] Based on the submissions of both parties, and considering the merits and circumstances of this specific appeal, I am satisfied that the Board can fairly and efficiently hear this appeal by written submissions. However, as outlined in the excerpt from the *Peace River Coal* decision, the Appellant is at liberty to apply to cross examine the Director at a later stage of this appeal process if he can establish that it is appropriate to do so at that time.

DECISION

[41] For the reasons provided, I find that the appeal will proceed by way of written submissions. The parties to this appeal remain able to make application for individual oral testimony or cross-examination to occur.

"David Bird"

David Bird, Vice Chair
Environmental Appeal Board

December 08, 2022