Environmental Appeal Board

Citation: *Marc Hubbard v. Director of Fish and Wildlife*, 2023 BCEAB 6

Decision No. EAB-WIL-22-A004(a)

Decision Date: 2023-03-14

Method of Hearing: Conducted by way of written submissions concluding on January 8, 2023

Decision Type: Method of Hearing Decision

Panel: Mike Tourigny, Panel Chair

Appealed Under: *Wildlife Act,* R.S.B.C. 1996, c. 488

Between:

Marc Hubbard

Appellant

And:

Director of Fish and Wildlife, Ministry of Forests

Respondent

Appearing on behalf of the parties:

For the Appellant: Self-represented

For the Respondent: Geneva Grande-McNeill

METHOD OF HEARING DECISION

INTRODUCTION

[1] This preliminary decision pertains to an appeal under the Wildlife Act, RSBC 1996, c. 488 (the "Act"). The appeal is from a May 26, 2022, decision under the Act (the "Decision") of Logan Wenham, Acting Director, Fish & Wildlife Branch of the Ministry of Forests, Fish and Wildlife (the "DDM").

[2] The Decision was to issue an Amended Guide Outfitters Licence #1000002380 (the "Licence") to the Appellant for the period April 1, 2022, until March 31, 2025, subject to an Annual Quota Attachment for the Licence year April 1, 2022, to March 31, 2023 (the "Quota").

[3] In his Notice of Appeal to the Environmental Appeal Board (the "Board"), the Appellant challenges the Quota allocated to him under the Licence as being unfair.

[4] Based on its initial review of the Appellant's Notice of Appeal, the Board indicated to the parties that it believed the appeal could fairly and most efficiently be heard by way of written submissions and documentary evidence. The Board asked the parties to indicate whether there was any objection to this proposed method of hearing. In response, the Appellant objected to the method of hearing proposed by the Board, seeking an in-person oral hearing instead, while the Respondent indicated no objection to proceeding with a written hearing.

[5] During subsequent pre-hearing conferences held before the Board in this appeal, the Board requested written submissions from the parties on their preferred mode of hearing of this appeal. The Appellant submits an in-person oral hearing is called for while the Respondent submits a written hearing is more appropriate. The last of those submissions was provided to the Board by the Appellant in reply on January 8, 2023.

[6] This decision addresses the dispute about the form of the appeal hearing.

BACKGROUND

[7] Under section 51(1) of the Act, an authorized decision maker may issue a guide outfitters licence to a person if that person meets specified qualifications. Section 51(2) states that a guide outfitter licence authorizes the holder to guide persons to hunt only for those species of game and only in the area described in the licence.

[8] Under section 60 of the Act, the authorized decision maker issuing a guide outfitters licence under section 51(1) may attach a quota as a condition of the licence and may vary the quota for a subsequent licence year.

[9] The Act defines "quota" in part to mean:

(a) the total number of a game species, or

(b) the total number of a type of game species

specified by the regional manager that the clients or a class of client of a guide outfitter may kill in the guide outfitter's guiding area, or part of it, during a licence year, or part of it.

[10] At the time of making the Decision, the Respondent sent the Appellant a letter dated May 26, 2022, ("Notice of Quota"), that, among other things, addressed the Quota attached to the Licence in part, as follows:

> Your quota for any licence year is informed by different factors, including the current notional allocation calculation for the allocation period and any animals harvested in previous licence years during this allocation period. An allocation is a notional harvest of a species over a period of years that normally informs annual setting of quota. A notional allocation calculation may change over the course of an allocation period as a result of a number of factors such as changes in population estimates or changes in
> harvest rates.
>
> This notional allocation is not your 2022/23 quota. It is provided only to assist in your planning through the 5-year allocation cycle. The quota and current 5-year notional allocation for each certificate associated
> to your licence are included in the appendix for your ease of reference (Appendix 3). The appendix also includes any regional-specific information that would have informed final quota decisions (Appendix 2).
> For more information about how the allocation process works, please visit https://www2.gov.bc.ca/gov/content/sports-culture/recreation/fishing-hunting/hunting/wildlife-harvestallocation.
>
> You should also be aware that yearly quota numbers are calculated by applying an administrative guideline percentage to five-year notional allocation numbers. The administrative guideline percentage
> does not typically represent an even divide of the notional allocation numbers over the five-year planning period.
>
> ... If you would like to see the specific details of how your quotas for this licence year were calculated, please contact the relevant representative for the region in question. Contact information for all regions is
> included below (Appendix 1).

[11] The Notice of Quota also set out the Appellant's right to appeal to the Board in relation to the Decision under section 101.1 of the Act which specifies that the Board may conduct the appeal by way of a new hearing.

[12] Section 101.1 of the Act further specifies that on an appeal the Board may send the matter back to the decision maker, with directions; confirm, reverse or vary the Decision; or make any decision that the decision maker could have made, and that the Board considers appropriate in the circumstances.

[13] As a matter of Board practice, an appeal hearing under the Act, whether written or oral, is generally conducted as a new hearing. This means that, in addition to reviewing the evidence and decision of the decision-maker below, the Board may hear new evidence and argument that was not before the previous decision-maker, make findings of fact on the evidence presented to it, and decide questions of law. The Board may exercise any discretion that it has without regard to the evidence presented to, or the conclusions reached by, the decision-maker below.

ISSUES

[14] The preliminary issue identified from the parties' written submissions that will be addressed in this decision is: what is the appropriate form of hearing for the conduct of this appeal?

DISCUSSION AND ANALYSIS

[15] 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")1, as well as by the common law principles of procedural fairness and natural justice.

[16] 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").

[17] 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 relevant legislation and the Rules.

[18] 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.

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

[19] 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.

[20] Accordingly, Rule 19 [Oral hearings] will apply if I direct that this appeal be conducted as an oral hearing and Rule 20 [Written hearings] will apply if I direct that this appeal be conducted in writing.

Appellant's Submissions

[21] The Appellant is self-represented in this appeal.

[22] The Appellant submits that the appeal should be conducted as an in-person oral hearing as he believes he can represent himself much better in person than dealing with the appeal entirely in writing.

[23] The Appellant describes himself as being very challenged with using a computer and has a very difficult time writing letters. He describes himself as being "illiterate". He left school in grade 10 having failed spelling and English. He started as a hunting guide when he was 19 years old and has guided ever since for a total of 47 years.

[24] The Appellant has been assisted by his wife in editing his submissions so far in this appeal to correct spelling and grammar. Unfortunately, his wife is seriously ill and her availability to edit his written materials is limited due to her frequent hospitalizations and poor state of health.

[25] The Appellant states he intends to lead evidence from one to three witnesses. He says his ability to put this evidence before the Board would be compromised if they do not testify in person.

[26] The Appellant states he also wants the opportunity to cross-examine the Respondent's witnesses, particularly its wildlife biologists.

[27] The Appellant has advised the Board that he intends to lead expert evidence but due to the lack of rationale for the Decision, he is having difficulty identifying the relevant expert evidence to present.

Respondent's Submissions

[28] The Respondent submits that this appeal should proceed by way of written submissions, except for a potential oral component limited to any cross-examination of affiants necessary for a full and fair hearing.

[29] The Respondent relies on the Board decisions in Peace River Coal Inc. v. Director, Environmental Management Act, Decision No. EAB-EMA-21-A008(a) ("Peace River"), and Donald Pharland v. Director, Environmental Management Act, 2007-EMA-014(a) ("Pharland"), for the proposition that the three predominant factors that the Board will consider when deciding whether to convene an oral hearing are whether:

- 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 proceedings that impact it, in a fair and accessible manner

[30] The Respondent notes that both Peace River and Pharland acknowledge the further guidance provided in the Manual. In particular, that the Manual identifies factors that indicate an oral hearing is not generally needed as including:

- 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.

[31] The Respondent submits that the parties do not require a full oral hearing to present their cases fully and fairly because:

(a) The rationale for the Decision is well documented and articulated in writing.

(b) The Respondent's written submissions are supported by an affidavit from the DDM in relation to written electronic communications with the Appellant in May and June 2022 in relation to the Licence and Quota. Based on that affidavit and documents attached to it, the Respondent submits that the Appellant can adequately set forth his case in writing as evidenced by his timely and clearly written and reasoned communications with the Respondent.

(c) Most quota decisions and rationales, including in this case, are heavily driven by underlying calculations and data. These calculations and data lend themselves well to being presented sufficiently and clearly in writing such that it does not require further oral explanation.

(d) The Respondent submits that the issues raised by the Appellant with the DDM in relation to the Decision referenced in the DDM's affidavit raise technical and policy questions that are better addressed in writing, where specific policies, figures and research can be quoted by both sides with clarity and consistency.

[32] The Respondent submits that the Board can make a fair and informed decision on the appeal based on written submissions on the basis that the type of submissions and evidence necessary to review quota decisions is relatively straightforward and simple to explain in writing. There is not often a large amount of nuance. In this case, the decision and the policy and technical issues raised by the Appellant are all grounded in documentary evidence. Thus, the Board can obtain sufficiently clear submissions and evidence through a written process to make a fair and informed decision.

[33] The Respondent submits that the sheep quota attached to one guide outfitter licence has no broader impact on the public, and thus that there is no requirement for public access to an oral hearing.

[34] The Respondent submits that the factors mentioned in the Manual calling for an oral hearing are not present in this appeal. There is no issue of credibility. The Appellant does not suffer from a literacy barrier. The material facts are not in dispute, and the appeal is neither novel nor complex. What is in dispute on this appeal is the DDM's interpretation and application of policy and science to reach the Decision. These are issues likely to be addressed by expert opinion, which must be based on the underlying facts, which are not in dispute.

[35] The Respondent further submits that the limited resources of the Board, as well as a consideration of the costs and resources for all parties should be factors that favour a written hearing, which is typically more time and cost-effective than an oral hearing. There is also recourse available to the parties even if the Board decides at this point to proceed with a written hearing. The panel can require, or a party can apply for, cross-examination of an affiant on a written affidavit, or evidence to be presented at an oral hearing to allow for cross-examination of witnesses, if it becomes apparent at a later stage of the appeal that it is necessary.

Appellant's Reply Submissions

[36] The Appellant has provided lengthy written submissions in reply to those of the Respondent, which I have considered in full but summarize for purposes of this decision as follows.

[37] The Appellant does not accept the findings of the Respondent's local field office biologists concerning the relevant animal populations and wants more documentation and an opportunity to question these biologists in person and under oath.

[38] Contrary to the Respondent' characterization, the Appellant submits the issues are both novel and complex and that underlying facts are in dispute. His right to cross-examine the local biologists should be given to him as a matter of procedural fairness. The Appellant says the decisions and actions of the local biologists relating to the count of the relevant sheep population indicate a bias against him that he wishes to address by way of cross-examination in an oral hearing.

[39] The Appellant references the communications from the Respondent's biologists exhibited to the DDM's affidavit and submits that he has many questions about assertions in those communications which he wants an opportunity to test by cross-examination.

[40] The Appellant re-emphasizes the difficulty he has in presenting his case solely in writing and submits it would be unfair to him if he was to be denied an oral hearing just to potentially save the Respondent time and money.

Panel's Findings

[41] I agree with the Respondent that Peace River and Pharland identify the three predominant factors to be considered by the Board when deciding to convene an oral hearing of an appeal before it, being:

- 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 proceedings that impact it, in a fair and accessible manner

[42] While, in general, public access to the hearing of appeals before the Board is an important aspect of the administrative appeal process, I agree with the Respondent that the Quota attached to the Appellant's Licence likely has no broader impact on the public calling for public access to an oral hearing in this case. On balance, I consider this factor to be neutral in my determination of the mode of hearing this appeal.

[43] On the facts in this case, my primary concern is whether the Appellant has established that he requires an oral hearing to fully and fairly present his case, and just as importantly, whether an oral hearing is required so that the Board can make a fair and informed decision on the appeal.

[44] I have found the guidance from the Manual of assistance in my consideration of this application.

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

[46] Conversely, and as set out at page 29 in the Manual, "Written hearings are normally scheduled in cases where there are no language or literacy barriers for a party or participant, where credibility of the parties or witnesses is not a significant factor in the appeal, there is no dispute about material facts, the issues to be decided have been dealt with in previous appeals, or there are purely legal questions to be decided."

[47] While I agree with the Respondent that the evidence on this application does not support the Appellant's characterization of himself as in fact being "illiterate", I find that the Appellant has established that his ability to fully and fairly present his case in a written

hearing, as opposed to an oral hearing, could be compromised. This finding is based upon factors including the challenges he has described in his ability to express himself in writing absent assistance from his wife, whom the Appellant states cannot be relied upon to assist him due to her health. The fact that the Appellant is self-represented and submits that he would be better able to lead evidence from his anticipated witnesses orally, rather than in writing, is another factor I have taken into account in considering how the Appellant could most effectively and fairly present his case.

[48] In order to consider the nature and complexity of the issues that might be relevant to the merits of this appeal informing the appropriate mode of hearing, I have looked to documents and submissions of the parties, and in particular, the Notice of Quota.

[49] I do not read the Notice of Quota as a clear articulation of the rationale for the Decision. It reads more like a standard form letter sent to all licensees to whom a quota is assigned, rather than a specific rationale for the particular Quota in question on this appeal. In fact, it specifically states: "If you would like to see the specific details of how your quotas for this licence year were calculated, please contact the relevant representative for the region in question."

[50] On the documentation put before me on this application, I cannot agree with the Respondent's submission in support of a written hearing that the rationale for the Decision is well documented and articulated in writing.

[51] The Notice of Quota does state that the "notional allocation" calculation that underlies a particular quota allocation is influenced by "changes in population estimates." I read this as confirmation that facts relating to the relevant animal populations are material facts to be considered in the determination of any quota, including the Quota in issue here.

[52] The Appellant's submissions challenge the evidence of the Respondent's local field office biologists in this regard. Contrary to the Respondent's submissions, I find that underlying material facts do appear to be disputed by the Appellant. Being guided by the Manual, I find the fact that the underlying material facts are in dispute, weighs in favour of an oral hearing in this case.

[53] While I agree with the Respondent that policy and technical issues that are grounded in documentary evidence could fairly and effectively be dealt with by way of written hearing when the underlying material facts are not in dispute, I find it important to note that both the issuance of the Licence under 51(1) of the Act and the imposition of the Quota under section 60 of the Act are matters of discretion. The exercise of that discretion requires a consideration of the relevant underlying evidence in order to find the material facts upon which its' exercise could be based.

[54] The Panel would benefit from receiving the best available evidence upon which to base its findings of fact and in its consideration of the exercise of discretion under sections 51(1) and 60 of the Act on the facts as found.

[55] The submissions of both parties reference the likely need for expert evidence in this appeal. While the Appellant submits that due to the lack of rationale given for the Decision, he is having difficulty identifying the relevant expert evidence to present, the Respondent submits that the interpretation and application of policy and science by the DDM in reaching the Decision are issues likely to be addressed by expert opinion, which must be based on the underlying facts. I find that the likely need for expert evidence suggests a degree of complexity involved in this appeal.

[56] If expert evidence is led in this appeal, then Rule 25 will apply to the introduction of that evidence. Rule 25 expressly provides that a party can give notice requiring the other party's expert to attend the hearing for cross-examination. This right exists whether the hearing is conducted orally or in writing. While both the parties and the Panel could benefit from the opportunity to question any such experts as part of a hearing, this benefit can be achieved under the Rules governing either an oral or written hearing.

[57] The Appellant's submissions make it clear that he believes he would benefit from this appeal being heard as an oral hearing with an opportunity for him to cross-examine the Respondent's local field office biologists on their sheep population evidence. Conversely, the Respondent is correct in stating that a written hearing under Rule 20 could accommodate a potential oral component including the cross-examination of affiants if found necessary by the panel of the Board (the "Panel") hearing this appeal. However, Rule 19 also contemplates the possibility of evidence being introduced by way of affidavit with a right of cross-examination in an oral hearing. If the Respondent concludes it would be expedient and cost-effective to produce affidavit fact evidence in support of its case, it is at liberty to do so under either mode of hearing.

[58] I am satisfied that the underlying fact evidence from the local field office biologists concerning the relevant animal populations has been put in issue by the Appellant's submissions on this application such that cross-examination by him of those witnesses, or questions of those witnesses from the Panel, may be called for in order to establish the necessary underlying facts upon which the DDM relied in making the Decision. 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.

[59] Having carefully considered the submissions of the parties and the relevant factors referred to above from Peace River, Pharland and the Manual, I find that an oral hearing would both best accommodate the Appellant's ability to fully and fairly present his case and would also allow the Panel to make a fair and informed decision on the appeal. In result, I direct, as a matter of procedural fairness, that the appeal hearing be conducted by way of an oral hearing rather than a written hearing.

DECISION

[60] For the reasons provided above, I direct that the hearing of the appeal be conducted by way of oral hearing, and that Rule 19 will apply to this appeal.

[61] 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"

Mike Tourigny, Panel Chair
Environmental Appeal Board