Environmental Appeal Board
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DECISION NO. EAB-WIL-22-G004(a)

In the matter of an appeal under the *Wildlife Act*, R.S.B.C. 1996, c. 488

BETWEEN:	Bradley Bowden Darren Linnell Eldon McMann Allan Tew Stewart Fraser	**APPELLANTS**
AND:	Director of Fish and Wildlife, Ministry of Forests	**RESPONDENT**
AND:	Kluskoil Adventures Ltd. Itcha Mountain Outfitters Ltd. BC Wildlife Federation	**PARTICIPANTS**
BEFORE:	A Panel of the Environmental Appeal Board Diana Valiela, Panel Chair	
DATE:	Conducted by way of written submissions concluding on December 23, 2022.	
APPEARING:	For the Appellant: Kevin Church, Counsel	
	For the Respondent: Amanda Macdonald, Counsel	

PRELIMINARY DECISION ON METHOD OF HEARING

[1] This preliminary decision is to determine whether this appeal will be conducted through written submissions, an oral hearing (whether in-person or via electronic means), or a hybrid of the two.

BACKGROUND

[2] The Appellants are all guide outfitters in British Columbia's Region 5 (Cariboo Region) and are all represented by the same counsel in a grouped appeal. The Respondent is Acting Director of Fish and Wildlife, Ministry of Forests. The Appellants each appeal a July 7, 2022 decision of the Respondent, made under the *Wildlife Act,* RSBC 1996 c. 488, (the "*Wildlife Act*") and its regulations to issue 5-year allocation numbers and single year quota numbers for bull moose to the Appellants. In the 'Reasons for Appeal' section of the Notices of Appeal filed with the Environmental Appeal Board (the "Board"), the Appellants' state that their desired outcome is "a return to the moose allocation and quota from previous years and an allocation and quota commensurate with the abundance of moose."

[3] Pre-hearing conferences held before the Board in this appeal identified disagreements between the parties relating to how this appeal should be conducted. The Appellants argue for an oral hearing, while the Respondent favours a written one. The Board requested written submissions from the parties on the mode of hearing. The Board received one submission from the five grouped Appellants and one from the Respondent.

ISSUES

[4] The issue in this preliminary decision is whether the appeal will be conducted by way of written submissions, an oral hearing (whether in-person or held via electronic means), or a hybrid of the two.

POSITIONS OF THE PARTIES

The Appellant's Position

[5] The Appellants submit that they were denied procedural fairness as required by *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, in that they never had the opportunity to address the decision-maker[1], at least in any formalized manner, through either written or oral means. The Appellants submit that in this appeal the Board is not considering an individual decision based on prior submissions from the appellant, but rather a case where the Appellant has not been afforded the right to be heard at all until the appeal stage. They argue this has deprived them of the right to be heard and to address the decision-maker.

[6] The Appellants also submit that the Respondent's decision is one that may decide whether the Appellants can remain open for business and able to support themselves and their communities. The Appellants add that the Respondent should not be able to make potentially life-altering decisions affecting the Appellants and never have to justify those decisions or face the persons who will be affected by those decisions.

[7] The Appellants argue that most of the Appellants do not know who the Respondent is, other than someone in Victoria who makes decisions that have potentially dire consequences for them, and that they know less about the Board and its workings. They conclude that the legitimacy of the process would be greatly enhanced through an oral hearing of this matter.

[8] The Appellants submit that the decision by the Respondent was late and therefore had a significant and negative effect on the operations of the Appellants. Some Appellants were forced to cancel hunts or postpone hunts to alternate years.

[9] The Appellants say that the cost of an oral hearing will be substantially less for Guide Outfitters on a per capita basis than having counsel prepare written submissions. The Appellants submit that the Appellants who reside in remote areas (some of which are several hours from their chosen counsel or any legal resource)

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[1] In the case before me, the decision-maker who made the decision that is now under appeal was the Acting Director of Fish and Wildlife, Ministry of Forests. For consistency and clarity, I will refer to the Acting Director as the Respondent throughout this decision.

will have to make several trips to town to provide information and have Affidavits commissioned rather than attending on one occasion for an oral hearing. The Appellants submit that the base cost for preparing written submissions and rebuttal is also significantly higher than in an oral hearing. The Appellants submit that they recognize the overall cost to the "system" may be higher but the persons whom the decision already adversely affects should not bear unduly the burden of the cost of this hearing.

The Respondent's Position

[10] The Respondent cites the guidelines considered by the Board in *James (Jim) Munroe v. Deputy Regional Manager, Recreational Fisheries & Wildlife Program and Keyohwhudachun (Chief) Petra A'Huille*, EAB-WIL-21-A012(a) for determining the appropriate method of hearing and cites the following paragraphs from that decision:

> [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.
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> [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*").
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> [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.*
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> [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*.*

[11] The Respondent further cites the Board's decisions in *Peace River Coal Inc. v. Director, Environmental Management Act*, EAB-EMA-21-A008(a) ("*Peace River Coal*"), and *Donald Pharland v. Director, Environmental Management Act*, 2007-EMA-014(a) ("*Pharland*") as identifying three predominant factors the Board will consider in deciding whether to convene an oral hearing in any particular appeal. These factors are:

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

[12] The Respondent argues that the parties do not require a full oral hearing to present their cases fully and fairly because the Respondent's decision rationale is well documented and articulated in writing and the Appellants have been provided a full decision record. The Respondent cites previous Board decisions concluding that an appellant's claim that they were denied procedural fairness is met by the fact that the Board's appeal process is a hearing *de novo* and therefore any procedural defects in the original decision can be cured with the appeal.

[13] The Respondent accepts that the quota decisions have significant importance to those affected and can impact their business operations. However, the Respondent submits that this does not necessarily warrant an oral hearing. The Respondent submits a written hearing will allow the Appellants to have the opportunity to submit full and complete written documentation, thus fulfilling procedural fairness requirements.

[14] The Respondent submits it cannot comment on the costs to the Applicants for a written or an oral hearing but that for the Respondent, it is more costly to have an in-person oral hearing as compared to a written hearing and that since this is a group appeal for five appellants, this will take more time and cost to coordinate and schedule compared to a lone appeal.

[15] The Respondent further submits that as set out in *Peace River Coal*, if the hearing proceeds by written submissions, the parties can apply to the Board for cross-examination of the contents of any affidavits once the affidavits have been filed with the Board and reviewed by the parties.

[16] With respect to the factor of a "Fair and Informed Decision", the Respondent argues that the Board can obtain sufficiently clear submissions and evidence through a written process.

[17] Regarding the factor of whether the public can view proceedings that impact it in a fair and accessible manner, the Respondent submits that the quota attached to each guide outfitter's licence has no broader impact on the public, so that there is no requirement for public access to an oral hearing. Further, the Respondent submits that in *Peace River Coal* the Board stated that there are ways in which written hearings can provide the required level of public transparency, including review of the decision when released and requesting appeal records.

[18] The Respondent argues that criteria in the *Manual* suggest that an oral hearing is not required: there is no issue of credibility or reliability of the Respondent and, since the parties indicated they do not intend to file expert reports in this appeal, oral cross-examination of experts is not a factor. The Respondent adds that should this change, the parties can apply to cross-examine any experts on their expert reports.

[19] The Respondent submits that the material facts are not in dispute, but what is in dispute is the Respondent's interpretation and application of law, policy, and science to reach the decision that was made. The Respondent argues that this can be efficiently set out in writing.

[20] The Respondent submits that the issues set out in the Notices of Appeal are not complex since the remedy requested by the Appellants is that their quota should be varied. The Respondent states that the factors that are considered in determining quota include animal population data and biological and conservation considerations, which are guided by the Province's policies and procedures. The Respondent adds that though these issues may be technical in nature, they are not so complex that they cannot be addressed by both parties in writing. The Respondent submits that in *Peace River Coal*[2] the Board found that even if an appeal raises complex issues, it does not necessarily warrant an oral hearing; in that appeal the subject matter was not considered to be novel because prior similar cases would provide insight into how the Board would consider the matter.

[21] The Respondent argues that the subject matter of this appeal is not novel because there have been several appeals to the Board regarding guide outfitter quota over the past several years, including a Group Appeal involving four of the five Appellants in this appeal[3]. The Respondent argues that many of these quota appeals have been heard by written submissions and that this approach can again be taken in this appeal.

[22] The Respondent submits that even if the Appellant can demonstrate that they meet some of the factors set out above, the Board stated in *Peace River Coal*[4] that this is not a closed list, and the list does not imply that an oral hearing will be indicated where those criteria are not met.

[23] The Respondent 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 as they are typically more time and cost effective. The Respondent adds that even if the Board decides at this point to proceed with a written hearing, the Board can require cross-examination on a written affidavit if it later becomes apparent that it is necessary for evidence to be presented at an oral hearing to allow for cross-examination of witnesses. Parties to the appeal may similarly apply to the Board to require this cross-examination, if they later determine it is necessary.

[24] In response to specific points made by the Appellants, the Respondent submits that matters such as the quota allocation process and decision-making process are not relevant to this preliminary application and are more appropriately addressed in submissions in the hearing.

The Appellant's Reply

[25] Regarding the factors to consider listed in *Peace River Coal* for determining whether an oral hearing will be required, the Appellants submit that two of the

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[2] At paragraphs 42 and 43.

[3] *Tew v. British Columbia (Ministry of Environment),* 2019-WIL-G01.

[4] At paragraph 39.

three enumerated factors support an oral hearing, as follows: it is not the position of the Appellants that the facts are undisputed (nor is the methodology to obtain those "facts"); and, the public may not be that interested in Victoria or the Lower Mainland, but the public may be interested in this process in the Interior. The Appellants submit that this interest is borne out by the request of the BC Wildlife Federation to have intervenor status.

[26] The Appellants submit that the Respondent's statement that any procedural defects can be cured with the appeal is a specious argument, since the effect of an exceptionally late transmission of a decision by the decision-maker cannot be "cured" by this appeal. The Appellants submit that what can be cured is the ability of the Appellants to hear the rationale for the late dissemination of allocation and quota of the decision-maker in person and weigh that rationale against the factual matrix presented by the decision-maker in real time. The Appellants add that it is akin to the fundamental right of the public to meet and question the person who essentially has the fate of the business of each of the Appellants in their hand. The Appellants submit that an oral hearing also meets the criteria of taking the process back to the people and not be ensconced in a process that is opaque to the participants.

[27] Regarding the Respondent's statement that the parties can engage in oral cross-examination of witnesses if the written process is inadequate, the Appellants submit that this could be overcome by engaging in the oral process to begin with. In the alternative, the Appellants submit that the Respondent will not object to an application for oral cross-examination, if necessary, given this submission.

[28] The Appellants submit that the Respondent seems to imply that since previous similar appeals have been by written submissions that that is the proper form in all instances. The Appellants conclude this implies the decision-making process has to a certain degree already been determined. The Appellants add that that perception could be overcome, and their faith restored in the process, by an oral hearing in these circumstances.

[29] Regarding the Respondent's consideration of the cost and resources for all parties as a factor in favour of a written hearing, the Appellants submit the costs to them will be significantly higher with a written hearing than an oral hearing. The Appellant adds that in the Respondent's submissions, the cost to Appellants seems to take a back seat to the costs for the Respondent and to convene the Board.

The Panel's Findings

[30] Under s. 93.1(1)(d) of the *Environmental Management Act,* S.B.C. 2003, c.53[5], and sections 11(1) and s. 36 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, the Board has the jurisdiction to control its own processes, make rules respecting practice and procedure, and to hold any combination of written, electronic and oral hearings in an application or an interim or preliminary matter. Under these powers, the Board has established the *Environmental Appeal Board Rules* (the "*Rules*"). Section 17(1) of the *Rules* states that the Board will decide

[5] Made applicable by s. 101.1(3) of the *Wildlife Act*

whether a hearing will be conducted orally, by way of written submissions, by telephone or videoconferencing, or a combination of the above.

[31] In addition to the legislation and the *Rules*, the Board's *Practice and Procedure Manual* (the "*Manual*") and previous Board decisions, although not binding on me, provide some guidance on factors to consider in similar circumstances.

[32] At pages 23-24, the *Manual* states:

> 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.
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> 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.

[33] In what follows I consider the factors identified in the *Manual* that are relevant to this preliminary decision.

The Nature and Complexity of the Appeal

[34] The nature of this appeal is a group appeal of five decisions issued to the Appellants assigning five-year allocation numbers and single year quota numbers for bull moose. The organizational, procedural, and legal issues that arise in and through the appeal process influence the Board's decision on the best method of hearing for a particular appeal. There is no 'bright line' that separates a complex appeal from a non-complex appeal. Instead, the circumstances of each appeal must be considered on their own, albeit within the context of the Board's organization and the nature of appeals previously held.

[35] In the present case, no party has given notice that they propose to tender expert evidence, which would indicate some added complexity. Based on the evidence before me, the present case involves a dispute based on the interpretation and application of known facts to the law, which indicates the matter is of lesser complexity.

[36] I find that the complexity of this appeal does not justify the need for an oral hearing, as the rationales for the quota decisions are based on data and policies contained in each decision record, and can be addressed in writing by the Appellants based on their specific circumstances. The Appellants will have an opportunity to review and respond to the Respondent's presented animal population data and the biological and conservation considerations the Respondent used in making the decision. Further, this appeal does not raise novel legal issues that differentiate it from previous Board decisions on appeals of allocation and quota numbers under the *Wildlife Act*. For example, *Tew v. British Columbia (Ministry of Environment)*, 2019-WIL-G01 ("*Tew*") was held in writing and included the issues

raised here, dealt with additional issues such as aboriginal consultation, and involved 11 grouped appeals.

The Likelihood that there will be Conflicting Evidence and/or Credibility Issues that will need to be Addressed

[37] The Appellants submit that an oral hearing will allow them to hear the decision maker in person and assess the rationale offered against the facts, while the Respondent argues that the facts are not in dispute and that if the hearings proceed by written submissions, the Board can direct or the parties can apply to the Board for cross-examination on the contents of any affidavits if it becomes appropriate to do so. The Appellants submit they want to hear the rationale for the late dissemination of allocation and quota of the decision-maker in person, but do not indicate why this information could not be obtained in writing. No other indications of conflicting evidence or credibility were identified. Additionally, the likelihood that there will be conflicting evidence or credibility issues that have not been identified, or that arise later, must be assessed within the context of the Board's *Rules* and procedures. Notably, these Rules anticipate and make provision for a situation where a change in circumstances would require cross-examination of a witness on their affidavit evidence. I find this factor does not justify an oral hearing in this case.

The Number of Parties Involved in the Appeal

[38] As previously noted, this is a grouped appeal consisting of five separate Appellants.

[39] In *Norton v. British Columbia (Ministry of Forests*), EAB-WIL-22-A008(a) ("*Norton*"), the Board received submissions for holding that appeal in writing or as an oral hearing. In para. 36 of that preliminary decision, the Board concluded that "[o]ral hearing proceedings can be procedurally complex and rule driven and take significantly more time and cost to coordinate and schedule." It should be noted that in *Norton* there was only one Appellant, as opposed to five in the present appeal. The procedural complexities of an in person-hearing involving five parties would require multiple hearing days and increased costs and delays for all parties. I find that the fact that there are five appellants in this appeal is a factor indicating that an in-person hearing would be more costly than a written hearing. While the cost to the parties is not a determinative factor in assessing if a hearing should be conducted orally or through written submissions, it is a relevant one. For each case before it, the Board must consider what the potential impact of requiring the parties to attend an oral hearing may be. The requirement of an oral hearing increases the costs to all parties and may, in some instances, act as a barrier for individuals in having their appeals heard due to the costs borne through participating in an oral appeal process. It is therefore important that the Board consider what benefits may be gained through an oral hearing that would not be present through a written process. As noted above, *Tew* was held in writing and dealt with 11 grouped appeals.

[40] I find that the potential benefits of an oral hearing, as compared to a written hearing, have not been demonstrated in this case. The Appellants submit that an oral in-person hearing would allow them to hear the rationale for the late dissemination of the allocation and quota decision of the decision-maker in person,

and to be able to weigh this against the factual matrix presented by the decision-maker in real time. I find that in a written proceeding the Appellants would be able to review the Respondent's decision records and respond in writing, presenting their factual submissions, subject to applications for cross-examination on written affidavits or other orders of the Board panel hearing the appeal on the merits. I find that there is no greater benefit to the Appellants in receiving the information and rationale that they seek orally in-person rather than in writing. While there are differences between these methods of receiving the information, proceeding with a written hearing will not deny the Appellants any opportunity to test or challenge the information presented to them in the course of the hearing. I find that this factor does not indicate an oral hearing is required or preferable in this case.

The Potential for Community Interest in the Appeal

[41] It is important in this appeal for participants to be given a fair process, and that process must be understandable and accessible to other members of our society. However, this principle does not restrict this fair process to a single method of procedure; a fair and transparent process may be accomplished in more than one way. This is demonstrated through the *Rules* and procedures that the Board has established; they contemplate a variety of methods of hearing, including both written and oral hearings.

[42] The Appellants submit that public interest is demonstrated by the request of the BC Wildlife Federation to have intervenor status. I agree. However, this example also demonstrates that this process is open to interested and potentially affected community members, as evidenced by the fact that three parties have been granted participant status in this appeal. I find that the broad availability of the appeal decision, when released, and the opportunity to request appeal records are both appropriate measures to allow for the engagement of the community in this appeal, and to have the community informed of both the issues under appeal and the disposition of the appeal after a hearing on the merits of the case.

[43] The parties in this preliminary appeal make arguments based on the three predominant factors the Board is said to consider in *Peace River Coal* and *Pharland* in deciding whether to convene an oral hearing in any particular appeal. These factors are as follows:

- 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.

Full and Fair Presentation of Cases

[44] As discussed above, there are many methods of hearing an appeal that permit a full and fair presentation of a case. This can be accomplished through either an oral hearing, a written hearing, or a hybrid of the two. Regarding the Respondent's statement that the parties can engage in oral cross-examination of witnesses if the written process is inadequate, the Appellants submit that this could be overcome by engaging in the oral process to begin with. In the alternative, the

Appellants submit that the Respondent will not object to an application for oral cross-examination, if necessary, given this submission.

[45] There have been no admissions made before the Board in this appeal. The acceptance that there is a potential remedy or procedure that is responsive to a possible future situation does not mean that the party accepting the presence of the remedy also consents to having that remedy applied. This is especially true in cases, such as this one, where the remedy remains only a possibility and there is no factual background to assess whether it is likely to arise or to be granted. If any party believes that cross-examination of a witness on their affidavit evidence is necessary, they remain able to make such an application to the Board. On receiving such an application, the Board will, at that time, consider the application in the context of the evidence, the Board's *Rules*, and the applicable legal tests.

[46] The Appellants submit that an in-person hearing will allow them to dispute the facts and the methodology used by the Respondent. Evidence has not been presented to me that demonstrates that it is not possible to dispute facts and methodology through written proceedings in this case. I find that in this appeal the parties' opportunity for a full and fair presentation of cases is not limited by a written hearing combined with the option of applying to the Board for cross-examination on the contents of any affidavits or the ability of the Board to issue an order to produce evidence if such measures become appropriate.

[47] Further, in a hearing on the merits arising from a decision under the *Wildlife Act*, the remedies available to the Board include making any decision that the person whose decision is being appealed could have made, and that the Board considers appropriate in the circumstances[6]. This places a panel of the Board in substantially the same position as the Acting Director was when the decision was made. As a result, the panel of the Board owes no deference to the original decision-maker and can make a wide range of decisions, based on the evidence presented before it. Therefore, the present appeal will provide the Appellants the right to be heard by the decision-maker, in this case the panel of the Board assigned to hear this appeal on the merits.

Fair and Informed Decision

[48] The Appellants submit that the Board requires an oral hearing to make a fair and informed decision on the appeal, while the Respondent argues that the Board can obtain sufficiently clear submissions and evidence through a written process. I find that the Appellants have not demonstrated that proceeding by a written hearing would be unfair, or result in a lack of information for the panel hearing this appeal on the merits. Further, The Rules and the underlying legislation allow the Board to convene written hearings, which it has effectively held in various cases cited above. The method of hearing of an appeal, either written or oral, does not

[6] Section 101.1(4) of the *Wildlife Act* provides that the Board may conduct an appeal by way of a new hearing and s. 101.1(5) states that on an appeal, the 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.

affect the Board's powers or jurisdiction to seek further information from any party if it deems it necessary.

Fair and Accessible Means for Viewing by Impacted Public

[49] It should be noted that several parties with specific interest in or information regarding these matters have been given participant status in this appeal, each limited to providing a written submission in the appeal. The presence of participants demonstrates that there is the ability for interested parties to not only observe, but to participate in this process and its outcome.

[50] I find that considering the potential level of general public interest in this specific appeal, a written hearing will provide the public with an opportunity to review the decision when released. I find that, in the circumstances of this appeal, reviewing the decision when released allows the public a fair and accessible means to view the outcome, including arguments made by representatives in the course of the hearing. Further, as suggested in *Peace River Coal* (at para. 53) members of the public may request appeal records, including by requesting records under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165.

DECISION

[51] For the reasons provided above, the appeal will proceed by way of written submissions, subject to any later approved applications for individual oral testimony or cross-examination by a party, or orders of the Panel assigned to hear this appeal on the merits.

[52] I considered all the information and arguments provided by both parties, whether or not specifically referenced in this decision.

"Diana Valiela"

Diana Valiela, Panel Chair
Environmental Appeal Board

February 17, 2023