# Environmental Appeal Board

**Citation:** *Raymond Majerus et al. v. Director of Fish & Wildlife,* 2023 BCEAB 16

**Decision No.:** EAB-WIL-22-A007(a), EAB-WIL-22-A010(a), EAB-WIL-22-A014(a), and EAB-WIL-22-A017(a)

**Decision Date:** 2023-05-31

**Method of Hearing:** Conducted by way of written submissions concluding on April 3, 2023

**Decision Type:** Method of Hearing

**Panel:** Michael Tourigny, Panel Chair

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

**Between:**

Raymond Majerus, Fraser MacDonald, Carl Gunster and Michael Schneider

**Appellant(s)**

**And:**

Director of Fish & Wildlife, Ministry of Forests

**Respondent**

**Appearing on Behalf of the Parties:**

| | |
|---|---|
| For the Appellants: | Self-represented |
| For the Respondent: | Geneva Grande-McNeil, Counsel<br>Micah Weintraub, Counsel |

# METHOD OF HEARING

## INTRODUCTION

[1] This preliminary decision pertains to a group appeal under the *Wildlife Act*, RSBC 1996, c. 488 (the "*Act*"). The four appeals grouped together by the Board for hearing are all from decisions made under the *Act* (the "Decisions") by Logan Wenham, Acting Director, Fish & Wildlife Branch, Ministry of Forests (the "Delegated Decision Maker" or "DDM"). The Decisions are dated June 7, June 30, and July 7, 2023.

[2] The Decisions issued Amended Guide Outfitters Licences to each of the Appellants subject to licensee specific annual bull moose quotas covering the Omineca Region for the Licence year ending March 31, 2023 (the "Quota Decisions").

[3] In their Notices of Appeal to the Environmental Appeal Board (the "Board"), each Appellant challenges the allocation and annual bull moose quota granted to them under the Quota Decisions as being unreasonable and not backed by science. The Appellants each assert that their annual bull moose quota was reduced from prior levels even though the relevant bull moose population had not decreased. By way of remedy, each Appellant asks that the Quota Decisions be reversed and that their prior allocation and bull moose quota be reinstated to them.

[4] Based on its initial review of the Appellants' Notices of Appeal, the Board indicated to the parties that it believed the appeals could fairly and most efficiently be heard by way of written submissions and documentary evidence. In response, the Appellants objected to the method of hearing proposed by the Board, seeking an in-person oral hearing instead. The Respondent advocated for a written hearing.

[5] The Board requested written submissions from the parties on the appropriate method of hearing of this group appeal. The last of those submissions was provided to the Board by the Appellants in reply on April 3, 2023.

[6] This decision determines the method of the group 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" to mean, in part:

> (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] The Appellants right to appeal to the Board in relation to the Quota Decisions is set out in section 101.1 of the *Act.* 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.

## ISSUE

[11] What is the appropriate method of hearing for the conduct of this group appeal?

## DISCUSSION AND ANALYSIS

[12] 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.

[13] 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").

[14] 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.

[15] 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.

[16] 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.*

[17] 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.

## Appellants' Submissions

[18] The Appellants have applied for a direction under Rule 17 that the appeal be conducted orally and in-person.

[19] The Appellants are all self-represented in this group appeal. Each Appellant has made written submissions on this application.

[20] The appellant Raymond Majerus ("Mr. Majerus") submits that the Quota Decisions have been extremely impactful on the livelihoods of the Appellants that should not be taken lightly. He submits that the opportunity to meet in person and to explain their points of view and to provide any requisite clarification on any questions the Respondent may have will provide a more informative decision.

[21] In support of his objection to a written hearing, the appellant Fraser MacDonald ("Mr. MacDonald") relies on the Board's method of hearing decision in *James (Jim) Munroe v Deputy Regional Manager,* 2022 BCEAB 24 [Decision No. EAB-WIL-21-A012(a)] ("*Munroe*") where, at paragraph 25 the Board discussed the guidance provided by the *Manual* at pages 23 and 24 which states that 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. [Emphasis added by Appellant]

[22] Mr. MacDonald submits that his appeal is complex and requires oral evidence for him to properly present his arguments to the Board. He anticipates there will be an extensive amount of conflicting evidence, not just calculations. He anticipates introducing several types of evidence which are best presented in person, including oral expert testimony and explanations of "visual results and media". Mr. MacDonald indicated that during the appeal hearing, he will seek to cross-examine the DDM relating to the Quota Decisions. These appeals are important as they have large and lasting impacts on his

guide outfitters business. Forty-five percent of his livelihood has been taken away by the Quota Decisions. It is not fair to force his appeal through a prescriptive written approach because it is more convenient for the Board or the government lawyers.

[23] The appellant Leif Gunster ("Mr. Gunster") seeks an oral hearing on the basis he believes an oral hearing will most effectively allow the introduction of the large volume of information that needs to be presented on the appeal to reach an "understanding". The reduction in moose quota has had a significant and negative impact on his livelihood, which he anticipates will continue into the foreseeable future. Accordingly, it is important to him that he be able to convey his position and that he fully understands the position of the Respondent. He believes this objective will be best achieved through an oral hearing.

[24] The appellant Michael Schneider ("Mr. Schneider") submits there is no way for him to appeal in writing. English is his second language and only an oral face to face process is going to provide him with a fair hearing.

## Respondent's Submissions

[25] The Respondent submits that this group 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.

[26] The Respondent relies on the Board decisions in *Peace River Coal Inc. v. Director, Environmental Management Act*, 2022 BCEAB 17 [EAB-EMA-21-A008(a)] ("*Peace River*"), and *Donald Pharand v. Director*, *Environmental Management Act,* 2007 BCEAB 22 [Decision No. 2007-EMA-014(a)] ("*Pharand*"), which identified the three predominant factors that the Board will consider in deciding whether to convene an oral hearing. In *Peace River*, the Board also discussed the further guidance provided in the *Manual*:

> [38] As Peace River noted, *Pharand* identifies three predominant factors the Board will consider in deciding whether to convene an oral hearing in any particular appeal. They 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.
>
> [39] The Manual provides further guidance, listing circumstances that would not generally suggest the need for an oral hearing, based on those criteria: 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. This is

> not a closed list; there will be other circumstances where an oral hearing is not required. Additionally, the list does not imply that an oral hearing will be indicated where those criteria not met. For example, although a case that is neither novel nor complex may be appropriately decided through written submissions, this does not mean that an oral hearing is necessary in any case that is novel, complex, or both.
>
> (under-lining added by Respondent)

[27] The Respondent references guidance from the *Manual* at pages 23-24:

> 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.
>
> (under-lining added by Respondent)

[28] Similarly, the Respondent references guidance from the *Manual* at page 29:

> 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.
>
> (under-lining added by Respondent)

[29] The Respondent submits that Mr. MacDonald advances no explanation as to why the appeal is complex or how its complexity cannot be addressed in writing. Mr. MacDonald also fails to explain why "visual results and media" evidence cannot be presented and explained in writing. If the DDM provides evidence by way of affidavit, then Mr. MacDonald can, at that time, apply to the panel of the Board hearing the appeal (the "Panel") to cross-examine the DDM. Likewise, if expert testimony is led by Mr. MacDonald and/or the Respondent, their cross-examination can be accommodated within a written hearing process.

[30] In response to Mr. Majerus' and Mr. Gunster's submissions, the Respondent submits the focus of these appellants' submissions is on the impact of the Quota Decision on their livelihoods. Potential impact to business is not a factor which would typically support one method of hearing over another, including in the factors addressed in the *Manual*.

[31] In response to these appellants' submissions that a large amount of information will be presented by all parties at the appeal hearing and that they can best convey their position in an oral hearing, the Respondent submits that the volume of evidence is not typically a factor that prefers one method of hearing over another. Similarly, a mere assertion that one's position can best be articulated in an oral hearing does not actually explain why that is the case.

[32] In response to Mr. Schneider's submissions about his difficulty with written English, the Respondent submits the fact that English is Mr. Schneider's second language does not equate to a language or literacy barrier calling for an oral hearing. Mr. Schneider does not describe the barriers to communication he faces, which makes it difficult to evaluate his assertion that a written hearing would be "impossible" for him.

[33] To the contrary, Mr. Schneider's letter to the Board and his company website (http://www.huntdriftwood.com/Guide-Outfitters.htm) state that he has been operating a family business in Canada since he moved here in 1987. Mr. Schneider seems fully capable of expressing himself in writing in English.

[34] In conclusion, the Respondent submits that on the basis of the Notices of Appeal and the Appellants' submissions, none of the factors from the *Manual*, as discussed in *Peace River*, support the need for an oral hearing of these appeals. The Appellants have not articulated a sufficient reason that would require this matter to be heard by way of an oral hearing. As such, the Respondent respectfully requests that the Board conduct the hearing of this matter in writing, subject to any future application by the parties to apply to cross-examine affiants.

## Appellants' Reply Submissions

[35] Only Mr. MacDonald provided a reply submission. In addressing the Respondent's submission that he had not properly explained how the appeal is complex or why its complexity cannot be addressed in writing, Mr. MacDonald says the complexity of his appeal is what would be dealt with in the actual hearing itself, not now. Mr. MacDonald submits that to present his case fairly and completely requires an oral appeal setting where he can thoroughly present materials, expert witnesses and cross-examine the Respondent.

[36] Based on his experience as a wildlife biologist in the Omineca Region for more than 15 years and as a participant in previous oral appeals, Mr. MacDonald believes an oral hearing is required for this appeal to be properly and fairly presented to the Board. Only an oral appeal will enable the Board to understand how the decision made can be so drastically different from what the science shows. He concludes by stating that due process calls for an oral hearing. Statutory decision makers under the *Act* should not be able to avoid answering questions about their decisions that impact the public by having all wildlife appeals conducted in writing.

## Panel's Findings

[37] I agree that *Peace River* and *Pharand* identify the three predominant factors that the Board will consider in deciding whether to convene an oral hearing of an appeal before it. This decision, therefore, is structured around a consideration of these three factors, which 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.

[38] I have also found the guidance from the *Manual* referred to in *Munroe, Peace River* and *Pharand,* quoted in the submissions of both Mr. MacDonald and the Respondent, to be of assistance in my consideration of this application.

[39] In accordance with section 101.1 of the *Act* and Board practice, this appeal will be conducted as a new hearing, whether it is conducted by way of an oral hearing under Rule 19 or as a written hearing under Rule 20. This means that, in addition to reviewing the evidence and decision of the DDM, the Panel may hear new evidence and argument that was not before the DDM, as well as make findings of fact on the evidence presented to it and decide questions of law. The Panel may exercise any discretion that it has without regard to the evidence presented to, or the conclusions reached by, the DDM. Simply put, the decision of the DDM does not constrain or limit the decision of the Panel.

[40] In exercising its jurisdiction under section 101.1 of the *Act,* the Panel will consider the Quota Decision in the context of section 60 of the *Act.* The imposition of a quota under section 60 of the *Act* is a matter of discretion. The exercise of that discretion requires consideration of the relevant underlying evidence in order to find the material facts upon which its exercise could reasonably be based. Accordingly, a major focus of this application involves a consideration of how that relevant underlying evidence can best and most fairly be introduced by the parties and weighed by the Panel.

[41] Mr. MacDonald anticipates introducing several types of evidence which he says are best presented in person, including oral expert testimony and explanation of "visual results and media". Mr. Majerus and Mr. Gunster both submit that a large volume of information needs to be presented on the appeal to reach an understanding of the issues to be decided. All three submit that this evidence can best be introduced by them in an oral hearing. I find that this position is not one that is supported by the Rules.

[42] I will first address the matter of documentary evidence.

[43] Rule 1 defines a "document" to include, among other things, a letter, email, photograph, chart, report, plan, sound recording, videotape, or other thing upon which information is communicated or recorded.

[44] If the appeal is to be conducted as an oral hearing, then Rule 19 will apply. Rule 19 (1)(b) requires all parties prior to an oral hearing to provide the other parties and the Board with a copy of the documents they will be referring to, or relying upon, at the hearing.

[45] If the appeal is to be conducted as a written hearing, then Rule 20 will apply. Rule 20 (2) also requires that all parties provide, prior to a written hearing, the other parties and the Board with a copy of the documents they will be referring to, or relying upon, at the hearing.

[46] Whether the appeal is conducted orally or in writing, pre-hearing document disclosure is called for by the Rules. The determination of the relevance or weight to be given to any such documents by the Panel will be made on the same basis whether the hearing is conducted orally or in writing.

[47] I find that any documentary evidence that the Appellants might tender as part of their cases can be fully and fairly introduced by them as part of their cases whether the hearing is conducted in writing or orally. The introduction of a large volume of documentary evidence does not require an oral hearing either for the Appellants to fully and fairly present their cases or for the Panel to make a fair and informed decision on the appeal.

[48] I will next address the matter of fact witness evidence.

[49] If the Appellants intend to lead evidence through the testimony of fact witnesses, as opposed to expert witnesses, the this can be done either by in-person testimony or by affidavit during an oral hearing, or by affidavit in a written hearing.

[50] While the Appellants all express a preference for such evidence to be given in an oral in-person hearing, none of the Appellants other than Mr. Schneider, (whose submission I will address below), suggest there is any impediment to their ability to set this evidence down in writing in the form of a witness statement or affidavit.

[51] Setting submissions down in writing can achieve the effect of focusing the evidence and arguments presented. Likewise, having the evidence in written form in advance of the hearing would be of benefit to the Panel when considering the merits of these appeals.

[52] Evidence that is introduced in the form of an affidavit, either in an oral hearing or in a written hearing, can be made subject to in-person cross-examination if so ordered by the Panel. Accordingly, if the Respondent relies on an affidavit from the DDM as part of its case, Mr. MacDonald or the other Appellants have the right under the Rules to seek his in-person cross-examination regardless of the method of hearing.

[53] Rule 19 (3) and (4) state that if a party intends to produce affidavit evidence at the oral hearing, the party must provide the affidavit evidence with the Statement of Points, and if the other party wishes to cross-examine the affiant on the contents of the affidavit, that party must apply to the Board within a reasonable time after receiving the affidavit.

[54] Rule 20 (4) provides that a party to a written hearing can apply to the Board to cross-examine an affiant on the content of an affidavit or to have a portion of the written hearing conducted orally. Accordingly, if cross-examination is required to facilitate a fair contextualization and informed consideration of such evidence on the appeal, it can be obtained under Rule 20 if the appeal hearing is conducted in writing.

[55] I find, based on the submissions before me, that an oral hearing is not required so that fact witness evidence can be fully and fairly introduced by the Appellants to and weighed by the Panel to reach a fair and informed decision on the appeal.

[56] Additionally, Mr. MacDonald argues his appeal is complex and that he plans on leading expert evidence. He submits these factors call for an oral hearing.

[57] As contemplated by the *Manual,* an oral hearing is not necessary in every case that is novel, complex, or both. While the likelihood of expert evidence being led suggests a degree of complexity in this appeal, the likely topic of such opinion evidence is well within the subject matter expertise of the Board, given the issues under appeal. These issues have been dealt with in previous appeals before the Board. The Appellants have not submitted that their appeals are novel.

[58] 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.

[59] Based on the submissions before me, I find that an oral hearing is not required so that expert witness evidence can be fully and fairly introduced by the Appellants to and weighed by the Panel to reach a fair and informed decision on the appeal.

[60] Guidance from the *Manual* suggests that when considering the type of hearing to be held, the Board will give careful consideration to whether there are any language or literacy barriers to a particular type of hearing.

[61] Mr. Schneider submits there is "no way" for him to appeal in writing because English is his second language. However, Mr. Schneider does not particularize the barriers to written communication he faces, which makes it difficult to evaluate his assertion.

[62] Contrary to his assertion that there is "no way" for him to appeal in writing, the Respondent points to Mr. Schneider's letter submission to the Board on this application and to his company website (http://www.huntdriftwood.com/Guide-Outfitters.htm), both of which state that he has been operating his family guide-outfitting business in Canada since he moved here in 1987. I agree with the Respondent that Mr. Schneider seems capable of expressing himself in writing in English.

[63] If Mr. Schneider requires additional time to prepare his written submission to accommodate the fact that English is his second language, Rule 21 could be relied upon by

him in that regard. This approach, if necessary, could accommodate any concerns he has in relation to his ability to fully and fairly present his case in writing or the Board's ability to make a fair and informed decision based on his written submissions.

[64] Accordingly, I find that in the factual circumstances of this case the Appellant's ability to fully and fairly present his case and the Board's ability to make a fair and informed decision can be met in a written hearing format. The evidence presented pertaining to the Appellant's concerns about his written English skills do not call for an oral hearing in this appeal.

[65] I also point out that even if an oral hearing was directed, Rule 19(1) requires that all parties, prior to the oral hearing, provide the other parties and the Board with a written Statement of Points including a summary of their case to be presented at the hearing. Under either method of hearing, Mr. Schneider would be called upon to make written submissions.

[66] The *Manual* states that the views expressed by the parties are relevant when considering the type of hearing to be held. It is clear from the Appellants' Notices of Appeal and submissions on this application that the Quota Decisions have had a significant negative impact on their guide-outfitter businesses and their preference is for an in-person oral hearing. I do not doubt the negative impact of the Quota Decisions on the Appellants businesses. However, I cannot find that such negative impact gives their stated preference for an oral hearing any greater weight than would otherwise be given to a party's preference in this or any other appeal. The preference of the Respondent is for a written hearing. I have weighed these preferences equally in this application.

[67] Having carefully considered the submissions of the parties and the relevant factors referred to above from *Peace River, Pharand* and the *Manual*, I find that an oral hearing is not required in the circumstances of this case and that a written hearing under Rule 20 would allow the Appellants to fully and fairly present their cases and would also best allow the Panel to make a fair and informed decision.

## DECISION

[68] For the reasons provided above, I direct that the hearing of this group appeal be conducted by way of written hearing, and that Rule 20 will apply.

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.

"Michael Tourigny"

Michael Tourigny, Panel Chair
Environmental Appeal Board