



Environmental Appeal Board

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DECISION NO. 2013-WIL-029(a)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	Darren James Linnell	APPELLANT
AND:	Regional Manager, Recreational Fisheries and Wildlife Program (Cariboo Region)	RESPONDENT
AND:	British Columbia Wildlife Federation	PARTICIPANT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
DATE:	Conducted by way of written submissions concluding on August 19, 2013	
APPEARING:	For the Appellant: Kevin Church, Counsel For the Respondent: Joseph G. McBride, Counsel For the Participant: Wilf Pfleiderer	

APPEAL

[1] The Appellant, Darren James (Jim) Linnell, is a licensed guide outfitter who operates in the Cariboo Region (Region 5) of British Columbia. He operates Batnuni Lake Guides and Outfitters.

[2] Region 5 is divided into 16 management units ("MUs"). These MUs are amalgamated into five game management zones ("GMZ").¹

[3] There are 53 guide territories within Region 5. The Appellant's guiding territory relevant to this case is located within MU 5-13, which is within GMZ 5C near Nazko BC.

[4] Each year, guide outfitters apply to the regional manager of the Recreational Fisheries and Wildlife Program, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), to renew their guide outfitter licence and request a hunting quota for specific animal species. A quota sets the total number of a

¹ A GMZ is a geographic area that combines several MUs which share similar ecological characteristics and hunter harvest patterns. GMZs are used as the underlying areas for assessments of moose populations in the Cariboo Region. (Cariboo Region Moose Allocation PowerPoint presentation, 2012)

particular species, or type of species, that may be harvested by the guide outfitter's clients within the guide's territory(ies) during the period specified in the licence. The species at issue in this case is moose. In the past, the Appellant has obtained licences with a quota for bull moose in his guiding territory.

[5] In a letter dated January 16, 2013,² Mike Ramsay, Regional Manager, Cariboo Region (the "Regional Manager"), advised the Appellant of his bull moose quota for the 2013-2014 licence year. He also advised the Appellant of his five-year allocation (target harvest) in relation to bull moose. The Appellant was given a quota of five animals for 2013-2014 and an allocation of 20 animals for the five year period of 2012-2016. However, since only four years were remaining in this allocation period, the letter focused on the Appellant's remaining four-year allocation (2013-2016), which he calculated as 16 animals. The Appellant appealed this decision to the Board on the main ground that it is a significant reduction from previous quotas and allocations.

[6] The Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*. Section 101.1(5) of the *Wildlife Act* provides that the Board may:

- a) send the matter back to the person who made the decision being appealed, 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.

[7] In his submissions, the Appellant asks the Board to reverse the Regional Manager's decision and order that his bull moose allocation for the 2012-2016 period be increased to 39 bull moose (his 2007-2011 allocation), with a 2013-2014 quota of 22. In the alternative, he asks the Board to order that:

- (a) his 2012-2016 bull moose allocation be increased to 27 bull moose in keeping with the maximum of 30% reduction of allocation designed to avoid a "substantive impact", or
- (b) that his 2012-2016 bull moose allocation be increased to 21, to reflect the allocation that he should receive on a "regional" basis, and

that his quota be varied to 30% of his allocation, as determined by the Board.

[8] In the further alternative, the Appellant asks the Board to refer this matter back to the Regional Manager with directions to properly determine the Appellant's allocation and quota in accordance with the Ministry's harvest allocation policies and procedures, including the Commercial Hunting Interests policy, and to increase his allocation and quota for bull moose accordingly.

² The letter is incorrectly dated "2012".

[9] This appeal is one of 28 appeals filed by guide outfitters in three different regions against their 2013-2014 quota and five-year allocations. The appeals were all conducted by way of written submissions, and are the subject of separate decisions. However, the Panel notes that the issues and arguments in each of the appeals have many similarities. For each of the appeals, some of the submissions from the parties are identical. In those appeals where there are similarities, the Panel has adopted some of the findings and language that has been used by this Panel in the reasons given in those other appeals. For example, see *Findlay v. Deputy Regional Manager, Recreational Fisheries and Wildlife Program (Thompson/Okanagan Region)*, (Decision No. 2013-WIL-033(a), April 24, 2014). In spite of any similarities, each appeal is and has been adjudicated on its own merits.

BACKGROUND

Guide outfitters - general

[10] Guide outfitting has a long history in the Province. Local hunters started guiding services in or around the late 1800s in order to meet the demand for quality big game hunts.³ Guiding licences were first issued in 1913 and guiding territories were established in the 1940s. In 1961, legislation provided guides with exclusive rights to guide hunters that live outside of BC (non-resident hunters) within his or her guiding territory.

[11] Although a guide's clients are typically non-residents, residents may also hire a guide outfitter. [A guided resident hunter's harvest does not count against the guide's quota if the resident holds a limited entry hunting authorization for the species harvested, or if it is during a general open season: Quota procedure.]

[12] According to a December 10, 2012 Information Bulletin by the Ministry, there are approximately 245 licensed guide outfitters in the Province, employing over 2,000 people, and providing services to roughly 5,000 non-residents hunting in the Province each year. There is no dispute that this industry is a source of revenue for the government and for rural communities. In addition, for many guide outfitters the guide outfitting business is their primary source of income.

The legislative context: guide outfitting in BC

[13] According to section 2(1) of the *Wildlife Act*, ownership of all wildlife in the Province is vested in the government. As the owner of wildlife, the government is responsible for the management and protection of the Province's wildlife resource (*Ministry of Environment Act*, R.S.B.C. 1996, c. 299).

[14] Under section 47 of the *Wildlife Act*, it is illegal for a non-resident of BC to hunt big game in the Province without a licensed guide outfitter. Section 47 states:

47 A person commits an offence if the person hunts big game unless he or she

³ *Backgrounder; Guide Outfitting in British Columbia*, by the Guide Outfitters Association of British Columbia (undated), Exhibit A to the Affidavit of Scott Ellis, sworn on June 25, 2013.

- (a) is a resident, or
- (b) is accompanied by
 - (i) a guide licensed under this Act, ...

[Emphasis added]

[15] Guide outfitter licences are issued by regional managers under section 51 of the *Wildlife Act*, as follows:

51 (1) A regional manager

- (a) may issue a guide outfitter licence to a person if all of the following apply:
 - (i) the person is a citizen of Canada or a permanent resident of Canada;
 - (ii) the person has public liability insurance prescribed by regulation;
 - (iii) the person has other qualifications prescribed by regulation, and
- (b) ...

- (2) A guide outfitter licence authorizes the holder to guide persons to hunt only for those species of game and in the area described in the licence.

...

[Emphasis added]

[16] According to section 60 of the *Wildlife Act*, regional managers may attach a quota as a condition of the licence. Section 60 states:

Quotas

- 60** (1) If a regional manager issues a guide outfitter licence, the regional manager may attach a quota as a condition of the licence and may vary the quota for a subsequent licence year.

...

[17] Under section 1, "quota" is defined as:

- (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, but does not include an angler day quota.

[18] Regional managers exercise their discretion to attach a quota within a "sustainable use" framework. The framework is established by, and described in,

various Ministry documents, including wildlife management objectives and Ministry policies. The latter will be described in some detail later in this decision. However, for the purposes of this background, the sustainable use framework takes into account the population estimates for a particular species and the hunter groups that seek an opportunity to hunt that species in the Province. The hunter groups referred to most often in this appeal are resident hunters and guided hunters. Guided hunters are typically non-residents and are generally referred to as “non-resident hunters” in this decision.

[19] The way that the Ministry splits or allocates the harvest between these two groups has been the subject of controversy over the years, and has recently changed.

The division (split) of hunting opportunities between guide outfitters (non-resident hunters) and resident hunters

[20] In BC, the management of hunting is based, in large part, on the size and health of a species’ population. For species with healthy populations in a particular area there are “general open seasons”. With a general open season, there may be annual limits on the number of animals that a hunter may kill, but there is no limit on the number of hunters that can hunt, or the number of clients that a guide can take hunting.

[21] For other species, there are insufficient animals to allow a general open season. This may be due to low productivity (mountain goats, grizzly bears), high demand (moose) or because a class of animal is critical to the productivity of a herd (female elk). For these species, deciding how many animals can be harvested by resident and non-resident hunters, without jeopardizing population sustainability, requires a careful consideration of different factors. The factors to be considered, and the way that the resident/non-resident split is determined, is established by Ministry policies and procedures. Once the split is determined, the number of these animals that will be available to resident hunters is generally set out in legislation; the number of animals available to non-resident hunters is set out in a guide outfitter’s quota. Ministry policies and procedures describe the relevant objectives, considerations and procedures to be used by regional managers when issuing quotas to guide outfitters.

[22] Prior to 2007, the Ministry’s policies and procedures gave regional managers significant discretion to make quota and allocation decisions based on the factors and information that he or she considered relevant and significant. While this resulted in decisions that, some may argue, best reflected the local situation, it also resulted in the inconsistent application of principles across the Province, and inconsistent results. This was a source of concern and frustration for guides and resident hunters alike.

[23] In 2007, after years of consultations with various stakeholders, including the Guide Outfitters Association of British Columbia (representing the interests of guide outfitters), and the BC Wildlife Federation (representing the interests of resident hunters) (the “BCWF”), the Ministry adopted a new “harvest allocation policy”. This new policy is, in fact, a collection or “suite” of policies and procedures. The policies

and procedures were approved by the Ministry's Director of Fish and Wildlife (the "Director") and the Assistant Deputy Minister. The main policies and procedures relevant to this appeal are as follows:

Wildlife Policies

Volume 4, section 7

- 01.03 - Harvest Allocation
- 01.07 - Game Harvest Management
- 01.10 – Resident Hunter Priority
- 01.11 - Commercial Hunting Interests
- 01.13 – Under-Harvest of Allocated Shares

Wildlife Procedures

Volume 4, section 7

- 01.03.1 - Harvest Allocation
- 01.05.1 - Quota
- 01.05.2 - Administrative Guidelines

[24] One of the stated objectives of these policies and procedures is to "guide provincial decision makers in determining the split [the percentage of the big game species that will be allocated to each group] between ... residents and non-residents."⁴ The Regional Manager explains the split as follows in his submission to the Board:

24. ... The government has planned that the harvest outside guiding areas will go fully to residents and that the harvest within guiding areas will be split in shares set by the government.

[25] The new harvest allocation policies and procedures are clear that resident hunters will have "priority" in the harvest of big game species. However, the Ministry also states that, while resident hunters have higher priority than non-resident hunters, "this does not imply that resident demand must be fully satisfied before non-residents can be granted harvest opportunities. Instead, it means that the share that goes to residents is considerably greater than the share that goes to non-residents."⁵ For instance, under the Harvest Allocation procedure, category A species (i.e., big game species for which guided hunters' harvest is limited by quota in any portion of a region), the Director is to begin with an initial split of 75/25; that is, 75% of the allowable harvest of the species to resident hunters, and 25% to guided hunters, in each region. Under the Harvest Allocation procedure, the Director may alter this initial 75/25 split in the region according to the relative importance of that species to each hunter group in the region, among other things.

⁴ December 10, 2012, Ministry "Backgrounder" on harvest allocation.

⁵ Ibid, page 1.

[26] One of the goals of the new policies and procedures is to provide a consistent method of determining allocations that is transparent, practical, and measurable. The new policies and procedures attempt to standardize the allocation procedures by taking out regional variations, such as the use of success factors.⁶

[27] The allocation or split between resident and non-resident hunters applies for five-year periods (allocation periods), after which they are to be recalculated based on the previous five years of data.

[28] Once the Director sets the resident/non-resident hunter split for each region, regional managers apply that ratio when determining a guide's quota.

Setting quota

[29] Some of the Ministry's policies and procedures also address the calculation of annual quotas and the application of administrative guidelines by regional managers. Quota decisions involve different considerations than those outlined in determining the resident/non-resident split or share of the harvest. The quota decision-making process is based upon an assessment of the number of animals available for a sustainable harvest over an allocation period.

[30] Wildlife harvest opportunities are managed according to four priorities.⁷ The first priority is conservation. If the viability of a population is at risk, the Ministry will reduce or suspend harvest opportunities.

[31] If the government determines that there are animals available for a sustainable harvest over an allocation period, there is first a deduction to satisfy First Nations' needs (the second priority). The remainder is allocated to the third and fourth priorities (resident and non-resident hunters) according to the split determined by the Director.

[32] To implement the allocation to residents, the government creates an "opportunity" for harvest. For higher value species, it is typically created by a Limited Entry Hunt ("L.E.H."). A L.E.H. is created under section 16 of the *Wildlife Act* and allows the minister, by regulation, to "limit hunting for a species of wildlife in an area of British Columbia". It may also be created through the regulation-making powers given to the Lieutenant Governor in Council under section 108 of the *Act*. In general, a L.E.H. is created in an area when the government determines that it is necessary to limit the number of hunters, limit the number of animals that may be taken, or limit the harvest to a certain "class" of animals. It can be created anywhere in the Province. When species and maps for a L.E.H. are created by regulation, the Ministry accepts applications for this hunt by BC residents. L.E.H. authorizations are currently issued under section 16 of the *Wildlife Act* by means of a lottery.

⁶ Some regional managers provided higher allocations to guides based on how successful the guide was historically, or on how successful the guides were in a region. It was used to account for the less than 100% harvest success rate of all guided hunters within a region, and was intended to allow guides to achieve their allocated harvest.

⁷ Ministry Backgrounder, *supra* note 4.

[33] After subtracting the estimated number of animals that will be killed pursuant to L.E.H.s, the remainder are assigned to guides by the issuance of quota, based on further policies and procedures.

[34] As part of the quota assignment, regional managers also advise the guides of their five-year harvest allocation (target harvest) that is the maximum number of animals each guide's clients may take over that period.

[35] A guide's quota may be subject to an administrative guideline. Administrative guidelines allow a guide outfitter to exceed the annual quota by a set number, but that number then counts against the total five-year allocation. The guidelines reflect the Ministry's recognition that the clients of guides rarely have a 100% harvest success rate. They provide guide outfitters with some flexibility in the number of animals harvested in a year, and are intended to be used by the guides for harvest planning purposes.

Implementation of the new policies and procedures

[36] When the Ministry adopted the new policies and procedures, it understood that many guide outfitters' quotas and five-year allocations would be negatively impacted. To minimize the impact, the government adopted a transitional approach. In the 2007-2011 allocation period, the policies and procedures were implemented in a "piecemeal" fashion. The 2012-2016 allocation period was the first time that the harvests for all applicable species, in every region, were set in the context of the new policies and procedures; i.e., "full implementation".

The Decision

[37] In a letter dated January 16, 2013, the Regional Manager advised the Appellant of his remaining four-year allocation and his annual quota for moose. The Regional Manager states, in part, as follows:

I am writing to you to advise you of your quota for the licence year 2013/14 and your allocation for the 2013-2016 allocation period.

Your Moose allocation for the 4 remaining years of the 5 year 2012-2016 allocation is 16 animals. This represents your target harvest for Moose for the 2013-2016 allocation period.

Your current allocation is different from your 2007-2011 allocation due to changes of annual allowable harvest (-35% in GMZ's 5C and 5D of the Chilcotin), and implementation of the Harvest Allocation Policy.

Ministry policy direction is to limit any decrease in a guide's allocation which would result solely from fully implementing the Harvest Allocation Policy to 30%.

Your Moose quota for this licence year is 5 animals.

I derived your quota for this year by applying an administrative guideline. That quota reflects a permissible harvest rate that will very likely be unsustainable over the allocation period. The benefit to you

of having a higher than sustainable quota in any given year is flexibility around when you harvest animals.

An allocation is a target total harvest of a species over a period of years that normally informs annual setting of quota. An allocation may change over the course of an allocation period, e.g. because of changes in population estimates or permissible harvest rates.

My goal is for you to come as close as possible to taking your entire allocation. That goal will be achieved by the annual setting of quota, keeping in mind your harvest to date in the allocation period. Note that if you fully harvest the quota set here, I may need to set your quota lower for later years in the allocation period, so that the [2013-2016] allocation will not be exceeded. You should keep that in mind when choosing how many animals to harvest this year.

...

If you would like to see the specific details of how I calculated your quotas for this licence year, please contact myself

[Bold in original]

[38] The Appellant's quota and 2013-2016 allocation were based upon a calculation of the number of moose in the Appellant's guide outfitter territory – not on the number of moose available in Region 5.

The Appeal

[39] In a Notice of Appeal dated February 22, 2013, the Appellant appealed the above-noted decision. He states that the Regional Manager's decision to reduce his moose quota is based upon a reduction of moose in GMZ 5C which is in error. He states that the moose population in his territory has remained stable.

[40] In his written submissions, the Appellant expanded upon his grounds for appeal. The grounds that he addressed in his written submissions are summarized as follows:

- The Regional Manager's January 16, 2013 letter setting out the Appellant's 2013-2014 quota and his multi-year allocation does not comply with sections 2.2 and 2.3 of the Ministry's Quota procedure (1.05.1).
- The Regional Manager's decision is not based on "scientifically defensible inventory data". The reduction of the AAH due to alleged declining moose populations in GMZ 5C is unwarranted.
- The Regional Manager failed to follow and apply the harvest allocation policies and procedures of the Ministry, including the Harvest Allocation policy and procedure, the Quota policy and procedure, the Commercial Hunting Interests policy, and the Administrative Guidelines procedure;

- The Regional Manager failed to follow and apply the policies and procedures to correctly determine the Appellant's guided non-resident hunters' allocation for bull moose in his territory;
- The Regional Manager failed to correctly determine the Appellant's quota for bull moose; and
- The Regional Manager failed to properly and reasonably exercise his discretion to ensure that guided hunters are able to harvest their share of the allocation of the annual allowable harvest.

[41] The Appellant submits that a flaw in the Regional Manager's decision is that the quota and five-year allocation for moose were calculated on a guide territory level, rather than on a regional level, contrary to the Ministry's policies and procedures. The Appellant submits that calculating these on a guide territory level is inconsistent with the Ministry's management of species on regional levels and results in far fewer moose being available for harvest by guided (non-resident) hunters. He further argues that if the Ministry wants quota and allocations to be calculated on a guide territory basis, then the animals should be managed on a guide territory level, taking into consideration the local population and the specific ecological components of the guide's territory.

[42] The Appellant also submits that, in its policies and procedures, the Ministry committed to supporting the viability of the guide outfitting industry and to providing guide outfitters with a predictable, fair share of the allocation of species in their guide territory areas. He states that the determination of his allocation and quota has not been made in accordance with these commitments and principles, and that the decision, as it stands, will cause significant financial and economic hardship to his guide outfitting business now, and in the future.

[43] In support of his case, the Appellant provided detailed submissions and relied upon an affidavit sworn by Stewart Fraser on July 15, 2013, which attaches 17 documents as exhibits. He also refers to an affidavit sworn on June 25, 2013 by Scott Ellis, Executive Director of the Guide Outfitters Association of British Columbia (the "Ellis Affidavit"). Sixteen documents are attached as exhibits to the Ellis Affidavit.

[44] In response, the Regional Manager submits generally that:

- The Director, not the Regional Manager, sets the shares or split as between guided hunters and residents. The harvest share is already set when the Regional Manager determines quota.
- The Regional Manager determined the quota based on the number of animals within the guiding area, determined by the relative size of the guiding area, in accordance with the government's policy.
- The Appellant's 2013-14 quota was five bull moose, even though on a purely mathematical calculation it would be four animals per year (remaining four year allocation of $16 \div 4 \text{ years} = 4 \text{ per year}$).

- The Commercial Hunting Interests policy does not directly affect the Regional Manager's discretion in this context. As stated above, the Regional Manager does not set the guide outfitters' share of the harvest.
- Although a reduction in quota can have an economic impact on a guide, fairness to all harvesters, and protection of the wildlife resource, is paramount.
- If the Board increases the Appellant's allocation as requested, the allocation to other guides must go down. The other affected guides have not been joined to this appeal. It would be unfair for the Board to order increased quota to the Appellant without hearing from those whose allocations would be correspondingly reduced.
- Increasing quota risks overharvest, infringement of aboriginal hunting rights, and unfairness to guides who have not appealed.
- The Board should defer to the Regional Manager's judgment in this case as he actively administers the *Wildlife Act* on a daily basis, and makes all of the decisions on setting guide outfitter quotas. In other words, he has the best information and understanding of the particular facts and the repercussions of allocation and quota decisions in the region.

[45] For these reasons, the Regional Manager submits that his decision should be upheld.

[46] The BCWF represents the interests of resident hunters in BC. It applied for participant status in this appeal on the grounds that the appeal could directly impact resident hunters by altering wildlife allocations, and by potentially reducing resident hunting opportunities. In addition, the BCWF submits that the appeal will directly impact the new harvest allocation policies.

[47] On May 3, 2013, the Board granted the BCWF limited participant status in this appeal. The BCWF was granted the opportunity to make a brief submission limited to addressing the potential impact of this appeal on the 2007 policies and procedures, and the resident hunters' share of the harvest in this region.

ISSUES

[48] The Panel has determined that the main issues to be decided by this appeal are as follows:

1. Whether the Regional Manager's January 16, 2013 letter complies with the Ministry's Quota procedure.
2. Whether the Appellant's annual quota and five-year allocation should be determined on a "guide territory level" or a "regional level".
3. Whether the Appellant's 2013-2016 allocation and 2013-2014 quota should be increased due to errors made by the Regional Manager.
4. In all of the circumstances, should the Appellant's 2013-2014 quota and 2013-2016 allocation be changed?

DEFINITION OF TERMS AND PHRASES

[49] In order to understand the submissions and the Panel's findings on the issues, some of the frequently referenced terms and phrases should be defined. The following definitions are found in the Ministry's policies and procedures:

"annual allowable harvest" ("AAH") - means the optimum number of animals that can be harvested annually by hunters from a herd or population which will be replenished through the population's natural reproduction to meet management objectives.

"allocation" – means the division of the annual allowable harvest remaining after the legal rights of First Nations have been recognized and provided for, between resident hunters and guided hunters. [Note: This is sometimes referred to as the resident's and non-resident's "share" of the AAH. A five-step process set out in the Harvest Allocation procedure is used to calculate the resident/non-resident allocation (share) of the AAH.]

"allocation period" - means the 5-year period to which an allocation share applies.

"category A species" - means big game species, population, or class for which guided hunters' harvest is limited by quota in any portion of a region [moose are a category A species].

"certificated area" – means an area of the province where a guide outfitter certificate has been issued.

"uncertificated area" - means an area of the province where no guide outfitter certificate has been issued.

[50] Despite the definition of "allocation" above, it appears that this word is used in the Regional Manager's decision letter, and some of the submissions, to mean something different. "Allocation" is defined in the policies and procedures as the division (split) of the AAH (after First Nations' rights are accounted for) between resident and guided hunters. In this context, allocation is the split or share as determined by the Director under the Harvest Allocation procedure. However, many of the Regional Manager's submissions address the guide outfitter's "five-year allocation" – or target harvest – as set out in his decision letter. The use of the word allocation in this context means something different than "allocation" as it is used in the Ministry's policies and procedures. When the Regional Manager sets out the "five-year allocation" (or the four-year allocation as the case may be) in his decision letter, it appears that he is really setting out a five-year quota – or cumulative quota. Support for this is found in subsections 2(a)-(c) of the Administrative Guideline procedure which states, in part, as follows:

1. The regional manager should attach an administrative guideline to all quotas that are not equal to a whole number each year. The regional manager may attach an administrative guideline to whole number quotas.
2. The regional manager should apply an administrative guideline to the quota of a guide outfitter as follows:

- a) The annual quota will apply for five years;
- b) Up to 30% of the cumulative five year quota (obtained by multiplying the annual quota by 5) may be harvested in any one year;
- c) Notwithstanding 2 b), no more than 5 times the annual quota may be harvested in the five year period.

NOTE: The annual quota is not to be rounded before being multiplied by 5 to obtain the cumulative 5 year quota.

[Emphasis added]

[51] To avoid perpetuating this confusion, the Panel will use the phrase five or four-year allocation when referring to the guide's cumulative quota, and the words "split" or "share", when referring to the resident/guided hunter allocation as determined by the Director.

DISCUSSION AND ANALYSIS

1. Whether the Regional Manager's January 16, 2013 letter complies with the Ministry's Quota procedure.

[52] The Appellant states that the Regional Manager's January 16th letter "purported to be the final and official notice of his 2012-2016 allocation and his 2013 quota". He submits that this January 16th letter does not comply with sections 2.2 and 2.3 of the Quota procedure which states as follows:

2.2 The regional manager should provide final approval of quotas in a timely manner and in accordance with regulation setting policy and procedure.

2.3 The regional manager should enter approved quotas onto the guide outfitter's licence as a condition of the licence.

[Emphasis added]

[53] In the circumstances, the Appellant submits that the appropriate remedy is for the Board to declare the notice a nullity, and for the Appellant's previous 2007-2011 allocation and quota to be restored until the nullity is rectified.

[54] The Regional Manager did not make any submissions on this issue.

The Panel's Findings

[55] The Regional Manager's authority to issue quota is found in section 60(1) of the *Wildlife Act*, which is repeated for convenience as follows:

Quotas

60(1) If a regional manager issues a guide outfitter licence, the regional manager may attach a quota as a condition of the licence and may vary the quota for a subsequent licence year. [Emphasis added]

[56] From the Board's past experience with quota appeals, it observes that regional managers often provide these letters in advance of a licence (or licence renewal) in order to give the guides more notice of their quotas and five-year allocations; the licence then follows at a later date. As this is in advance of the licence, the Panel finds that it is "timely", consistent with section 2.2 of the procedure.

[57] In addition, there is no suggestion in the evidence that the Appellant did not receive a licence for 2013-2014. Nor is there any suggestion that the quota attached to his licence differs from the quota shown in the January 16th letter. In the Panel's view, this letter does not conflict with the Quota procedure and there is no reason to declare it a nullity. Further, this letter constitutes "notice of a decision", and is properly appealable under section 101.1 of the *Wildlife Act*.

[58] Finally, the Panel notes that, even if the January 16th letter rendered the quota and the 2013-2016 allocation a nullity, this would not result in the restoration of the Appellant's previous quota and allocation, nor would this be an appropriate remedy. As a quota is attached as a condition to the licence, and the licence is only valid for one year, declaring the current quota a nullity would mean that the Appellant has no quota for the 2013-2014 season. In addition, to grant the Appellant's remedy on the basis of historical levels alone would be irresponsible. Such decisions need to take into consideration current population information: the "blind" application of previous quota and allocation decisions could jeopardize conservation efforts and impact wildlife management objectives.

[59] For the reasons above, this ground for appeal fails.

2. Whether the Appellant's annual quota and five-year allocation should be determined on a "guide territory level" or a "regional level".

Appellant's submissions

The Appellant submits that the Regional Manager erred by calculating the quota on the basis of his guide territory. He submits that the new policies and procedures make it clear that the government chose to manage the AAH and the resident/non-resident allocation at a regional level. The Appellant states that setting the allocation on a guide territory level is inconsistent with the Ministry's management of species on regional levels, and results in a significantly lower share of the AAH being available to non-resident hunters in his guide outfitter territory.

[60] The Appellant submits that the guide outfitter's entitlement to a share of the regional allocation is evident from the Ministry's Harvest Allocation procedure (01.03.1). This procedure uses a five-step process to arrive at "the allocation" – the resident and non-resident share of the AAH - which applies for the five-year allocation period. This lengthy, detailed procedure states as follows [underlining added]:

Procedure:

The director should determine the allocation shares for each category A species based on the process outlined in Appendix A.

The regional manager should apply the allocation shares determined by the director as outlined in Appendix B.

APPENDIX A: PROCEDURE FOR MAKING ALLOCATION DECISIONS

The regional manager of each region should maintain a complete list of category A species in their region and forward this list to the director as changes are made.

The director may use the "allocation calculator" to assist in determining allocation shares for each category A species. The allocation calculator automatically performs the steps outlined below upon insertion of the necessary data.

STEP 1 – APPLY INITIAL ALLOCATION

The director should assign an initial allocation of 75% of the allowable harvest to resident hunters and 25% to guided hunters for each category A species in each region.

STEP 2 – ALTER INITIAL ALLOCATION ACCORDING TO RELATIVE IMPORTANCE

For each category A species in each region, the director should then alter the initial 75/25 allocation according to the relative importance of that category A species to each hunter group.

2A) DETERMINE RELATIVE IMPORTANCE TO RESIDENT HUNTERS

- 1) For each category A species in each region:
 - a. Determine the number of applicants, defined as the average annual number of hunters who apply to the limited entry hunting (L.E.H.) draw using the most recent five year period.
 - b. Determine the number of authorizations, defined as the average annual number of L.E.H. authorizations issued using the most recent five year period.
 - c. Determine the number of licenced hunters, defined as the average annual number of successful L.E.H. applicants who purchase species licenses using the most recent five year period.
 - d. Determine the actual participation rate, defined as the number of licenced hunters divided by the number of authorizations.
 - e. Determine the potential number of hunters, defined as the actual participation rate multiplied by the number of applicants.
- 2) Determine the total potential number of hunters, defined as the sum of all the individual potential number of hunters for each category A species in each region.

- 3) Calculate a relative importance value for each category A species in each region by dividing each hunt's potential number of hunters by the total potential number of hunters.
- 4) List all of the relative importance values for all category A species and region combinations in ascending order.
- 5) Categorize the values in the list generated in 4) based on the percentile to which they belong, ...

2B) DETERMINE RELATIVE IMPORTANCE TO GUIDE OUTFITTERS

- 1) For each category A species in each region:
 - a. Determine the number of guided hunters, defined as the average annual number of guided hunters using the most recent five year period based on Guide Declaration information.
 - b. Determine the average hunt price, defined as the average price that a guided hunter pays to a guide outfitter for the sole purpose of hunting a particular category A species at a given time and location.
 - c. Determine the individual hunt values, defined as the number of guided hunters multiplied by the average hunt price.
- 2) Determine the total guided hunt value, defined as the sum of all the individual hunt values for all species and regions.
- 3) Calculate a relative importance value for each category A species in each region by dividing each individual hunt value by the total guided hunt value.
- 4) List all of the relative importance values for all category A species and region combinations in ascending order.
- 5) Categorize the values in the list generated in 4) based on the percentile to which they belong, as follows: ...

2C) ALTERNATIVE MEASURES OF RELATIVE IMPORTANCE

If a category A species is not managed by a L.E.H. season in a region, the director should disregard Steps 2A) 1) and substitute the number of hunters hunting that species in that region for the potential number of hunters in 1) in the formulas in 2) and 3).

2D) COMPARE RELATIVE IMPORTANCE AND ALTER INITIAL ALLOCATION

The director will then directly compare the relative importance categories for each category A species in each region between hunter groups.

The director should alter the initial 75/25 allocation according to the matrix below. ...

STEP 3 – ALTER ALLOCATION ACCORDING TO DEGREE OF UTILIZATION

After determining the relative importance of each category A species to each hunter group and altering the allocation accordingly, the director should

consider the degree to which each hunter group is likely to use their allocated shares of the harvest according to the following procedure:

3A) DETERMINE DEGREE OF UTILIZATION

For each category A species in each region, divide (i) the average annual number of those animals harvested by resident hunters by (ii) the average annual number of those animals allocated to resident hunters, using data from the most recent five year period. Repeat for guided hunters.

3B) ALTERNATIVE MEASURE

If a species has not previously been allocated, or insufficient data have prevented a precise assessment of the average degree of utilization as required by Step 3A), it should be assumed that on average resident hunters were allocated a 75% share in a region and guided hunters were allocated a 25% share.

3C) RANK

The director should rank the average regional degree of utilization for each category A species according to the following: ...

3D) ALTER ALLOCATION BASED ON COMPARISON OF UTILIZATION

The director should then compare the degree of utilization of each hunter group for the species in question and alter the allocated shares determined in Step 2D), according to the matrix below. ...

STEP 4 – MINIMUM SHARES

4A) RESIDENT HUNTER MINIMUM SHARE

If, for any reason, the above steps (1-3) lead to an allocation share in which resident hunters are allocated less than a specified minimum share, the director shall increase the resident hunters' share of the AAH to that specified minimum share and decrease the guided hunters' share accordingly. The minimum shares for resident hunters are as follows:

⇒60% for allocated sheep, goat, and grizzly bear hunts;

⇒98% for allocated antlerless hunts; and

⇒70% for all other category A species.

4B) COMMERCIAL HUNTER MINIMUM SHARE

If, for any reason, the above steps (1-3) lead to an allocation share in which guided hunters are allocated less than a specified minimum share, the director shall increase the guided hunters' share of the AAH to that specified minimum share and decrease the resident hunters' share accordingly. The minimum shares for guided hunters are as follows:

⇒20% for allocated sheep and goat hunts; and

⇒10% for all other category A species.

STEP 5 – DETERMINE THE ALLOCATION

Informed by Steps 1 through 4, the director should determine the allocation shares for each category A species. This allocation share shall be effective until the director determines a new allocation share at the beginning of a new allocation period.

APPENDIX B: PROCEDURE FOR APPLYING ALLOCATION DECISIONS

Unless otherwise specified by the director, the regional manager should apply the allocation share specified by the director to each M.U. with an allocated hunt.

[Bold in original, underlining added]

[61] The Appellant notes that, whereas the guide outfitters' allocation was incorrectly determined on a guide territory level contrary to this procedure, the resident hunters' allocation was correctly determined on a regional level in accordance with the procedure.

[62] In further support of his position, the Appellant refers to and relies upon the following sections of the Quota procedure (1.05.1):

Procedure:**1. Calculation of quotas**

1.1 Allocations of harvest opportunities to guided hunters by means of a quota should be based on the calculation of an annual allowable harvest (AAH), and be consistent with the Ministry ... policy and procedure concerning harvest allocations.

1.2 Quotas should be calculated by the regional section head, in accordance with the allocation share determined by the director.

...

[Appellant's underlining]

[63] Based upon this procedure, the Appellant submits that it is clear that the allocation must be determined on a regional level. In Region 5, the allocation is 77% to residents and 23% to non-residents. The Appellant submits that the Regional Manager did not provide the Appellant with the required 23% of the allocation because "of the 23% of the AAH that was to be allocated to guides in Region 5, only 18% is actually allocated to guides when the effect of vacant or unallocated guide territories is factored into the equation." The Appellant estimates that this policy has resulted in a lost opportunity to harvest approximately four to five moose over his remaining allocation period (i.e., if 18% = 16 (his current allocation), then 23% would = 20.4 moose).

[64] The Appellant submits that the Regional Manager's decision to calculate the allocation for resident hunters on a regional level, but calculate the allocation for non-resident hunters on a guide territory level, is a "clear breach" of the process for determining allocation as set out in this procedure manual. As a result, he has

received a significantly lower allocation than what is mandated under the policies and procedures.

[65] For all of these reasons, the Appellant submits that the Regional Manager erred by failing to calculate, consider or apply the resident/non-resident allocation on a regional level, resulting in lower quotas. It also resulted in insufficient quota opportunity to allow guide outfitters to achieve their incorrectly calculated lower allocation of the AAH.

Regional Manager's submissions

[66] The Regional Manager agrees that, if the guided (non-resident) hunters' share of the allocation is calculated on a region-wide basis, rather than on a guiding territory basis (i.e., the area described in the guide outfitter's licence), this can make a significant difference to a guide's respective share of the animals and the ultimate quota issued to a guide outfitter. However, the Regional Manager explains that the government has, in fact, decided to treat resident hunters and guided hunters differently.

[67] First, the Regional Manager submits that, in accordance with the Harvest Allocation procedure described above, the decision regarding the allocation split – the resident and non-resident hunters' respective share of the AAH – is set by the Director, and it is determined on a regional basis. In many cases, the new allocation policy resulted in a reduction in the allocation to guides. However, the Regional Manager submits that this is because the new policy allocates a greater share of the animals to residents than was formerly the case, and he has no authority to change that.

[68] Second, the Resident Hunter Priority policy (01.10) reinforces the government's intention to treat resident hunters differently. Most important to this issue, the policy now allocates the entire AAH in an uncertificated area (an area that is not part of a guide territory) to resident hunters. Section 8 of this policy originally stated, "the resident hunters' priority in the harvest of big game species will be addressed by ... ensuring the resident hunters have exclusive access to uncertificated areas of the province for hunting." [Emphasis added]

[69] The Regional Manager notes that this policy was considered by Chris Trumpy in his March 31, 2011 "Harvest Allocation Policy Review" – an assessment of the effects of the 2007 harvest allocation policies and procedures on the operation and viability of the guide outfitting industry (the "Trumpy Report").

[70] In the Trumpy Report, Mr. Trumpy states that, prior to 2003, regional managers adopted various tools to manage the relative splits and allocations between resident and guided (non-resident) hunters, particularly at the level of the individual guide outfitter territory. One of those tools was the "allocation of vacant land share to guides." He explains that:

In most regions there are areas which are not occupied by guides. Previous guide allocations included a pro rata share of these areas as if they were guide territories. This had the effect of increasing guide allocations above what their territory alone would justify. (page 10)

[71] Mr. Trumpy made 11 recommendations in his report. His recommendations were based upon four objectives, one of which was the government's commitment to resident priority. Although the Resident Hunter Priority policy stated that resident hunters would have *exclusive access* to uncertificated areas, Mr. Trumpy's recommendation 5 was that "all of the *allocation* in areas where there are no guide territories should be allocated to resident hunters" [Emphasis added]. He acknowledged that this would cause some hardship to guides in regions with large portions of unallocated territory because guides had previously received a share of animals on unallocated lands. However, he states that, given the exclusive right that guides enjoy in their territories (e.g., exclusive control over guiding privileges in the area), the policy rationale for guides receiving a portion of this vacant land allocation "is unclear".

[72] The Ministry responded to Mr. Trumpy's recommendations on December 5, 2011. In relation to recommendation 5, the Ministry advised that it would allocate all of the AAH to residents in areas without guiding territories, effective the 2012-2016 allocation period.

[73] The Regional Manager submits that, if the animals in uncertificated areas were then included in the calculation of the guide's five-year allocation and quota, the clear intention of the government's policy on this matter would be undermined: resident hunters would not get the entire AAH for uncertificated land.

[74] The Regional Manager also argues that, if he set the target harvest as if the Appellant had a share of the areas outside of his guiding territories, an overharvest might occur.

[75] The Regional Manager submits that the method he used to determine the Appellant's quota and multi-year allocation under the policies and procedures is similar to the method used by regional managers to make similar decisions in the Cariboo and Skeena Regions. Some of the quota and allocation decisions made by regional managers in those regions were appealed to the Board in 2009 and 2010. The Regional Manager submits that the Board considered those methods and accepted them in *Hoessl et al. v. Regional Wildlife Manager*, (Decision Nos. 2009-WIL-003(a) to 017(a), 019(a) and 020(a), August 3, 2010) [*Hoessl*], and in *Fitch et al v. Acting Regional Manager*, (Decision Nos. 2010-WIL-003(a), 004(a), 007(a), 012(a) and 015(a), February 16, 2011) [*Fitch*]. The *Hoessl* decision related to quotas issued in the Cariboo Region. *Fitch* related to quotas issued in the Skeena Region.

[76] In summary, the Regional Manager submits that the new policies and procedures are clear that harvest outside of a guide's territory is 100% reserved for residents. He submits that the policy to calculate the population on a guide territory basis is "inherently reasonable", as the guides have no right to guide outside of those areas. The Regional Manager submits that the Appellant is essentially saying that he doesn't like the government's policy of giving priority (a greater share of the harvest) to residents, and wants a share of the animals that are not within his guide territory areas. The Regional Manager submits that the Panel should accept that government's policy on this matter. Further, he submits that the substance of the policy is beyond the scope of the appeal.

BCWF's submissions

[77] The BCWF submits that resident hunters have priority in the harvest of big game species under the Resident Hunter Priority policy and under the Harvest Allocation policies and procedures. It notes that the harvest share allocation percentage is applied at the guide outfitter territory level to reflect the species populations that reside within that territory. It submits that allocation from vacant areas cannot be allocated to guide outfitters and that this is clear from the Resident Hunter Priority policy.

[78] In addition, although the Appellant highlighted the first two provisions of the Quota procedure, the BCWF focuses on section 1.4 which states:

1.4 Quotas should be calculated to reflect guided hunters' share of the harvestable portion of the population within each guide outfitter's territory, if available. [Emphasis added]

[79] The BCWF also argues that no other industry benefits from a resource outside of the boundaries of its tenure; therefore, the guide outfitters should not be issued quota based on the animals outside of their territory.

[80] In summary, the BCWF submits that guide outfitters are allocated their animals on a guide territory basis under the new policy. It also argues that any change to this policy will have a direct impact to over 98,000 resident hunters in the Province.

Appellant's reply

[81] The Appellant submits that the decision to allocate the non-resident hunters' share based solely on areas occupied by a guide outfitter is inconsistent with the general management paradigm of the Ministry to manage on a regional or GMZ level. He states:

If allocation to guide outfitters is to occur on a guide outfitter territory level, then management of the resource should occur on a guide territory level. The MFLNRO [the Ministry] doesn't have the capacity to manage on a guide territory level and as many guide territories abut either vacant territories or areas where no guide territory exists, it is an error to allocate the guide outfitter's share only within established guide outfitter territories. The resource being managed is not static and given the migration patterns of the species concerned, both seasonally and for forage, a decision based on human and artificially created boundaries is unsupportable and not within the four corners of the Environment Procedure Manual on Harvest Allocation.

[82] The Appellant also submits that the Regional Manager's distinction between himself and "the government" for the purposes of decision-making is "at best a misconstruction of the role of the Regional Manager who is the 'government' at least for guide outfitters."

[83] The Appellant also states that the Regional Manager has not given an adequate explanation or submission to justify his position. He has not said why

species are managed regionally but quotas are issued on the basis of a guide's territory when the ecological components of the territory are not considered before setting the AAH and issuing the quota. He also submits that the Regional Manager failed to address the Appellant's claim that only 18% of the AAH, not 23%, was allocated to guides when the effect of vacant or unallocated guide territories is factored into the equation.

The Panel's Findings

[84] The new processes and procedures used to determine the resident and non-resident hunter allocation are based upon the Ministry's many years of experience managing wildlife in the Province. It is clear that these policies and processes reflect the Ministry's attempt to strike a precarious balance between conservation, First Nations' rights and, ultimately, the interests of resident hunters and guided (non-resident) hunters to category A animals. The new policies and procedures are the product of many years of consultations with various interested and/or affected groups, including the groups representing guide outfitters and resident hunters. The current policies and procedures also incorporate many of the recommendations made in the Trumpy Report.

[85] The Harvest Allocation procedure is used to determine the ultimate resident and non-resident split or share of the AAH. Some of the steps in the Harvest Allocation procedure require a significant amount of data/information to be inserted in an attempt to assess the relative importance and/or value of the hunt to resident and guided hunter groups, while also confirming and ensuring resident priority to hunt the species in question. The procedure also attempts to determine the degree to which each group is likely to use (utilize) the allocated shares. The Panel finds that these assessments are performed on a regional level. The language used in the Harvest Allocation procedure focuses on the species "in each region". The Panel also finds that this allocation split or share is determined by the Director, not the Regional Manager. In the present case, the Director determined that the allocation split for moose in Region 5, for the 2012-2016 period, was 77% to residents and 23% to non-residents.

[86] The Appellant argues that the distinction between the Regional Manager and the Director is some type of "misconstruction" of the Regional Manager's role and that, from the guide outfitters' perspective, the Regional Manager *is* the "government".

[87] It is true that the Regional Manager has the ultimate statutory discretion to attach a quota to a guide's licence. However, it is not unusual for broad decision-making authority to be guided by policies. Nor is it unusual for a decision-maker to rely upon information and assessments made by others in order to arrive at his or her decision. The Panel finds that, particularly in the case of regulating an entire wildlife population, it is not unreasonable for a regional manager to rely upon the decisions and assessments made by others when making the ultimate decision on quota. While guide outfitters may see regional managers as the "face" of government, it is also true that, being the face of government does not mean that a regional manager is legally responsible for every decision and/or assessment that precedes his or her decision. The Panel finds that the Regional Manager reasonably

relied upon the Ministry's policies and procedures with respect to the allocation split, and reasonably relied upon the Director's decision on the split (77/23) prior to deciding the Appellant's multi-year allocation and annual quota.

[88] When the Harvest Allocation procedure is read together with the other policies and procedures, it is apparent that, for guide outfitters, quota decisions are based on the species in his or her territory, not the species in the region. The method for deciding quotas for guided hunters is, therefore, different from the method used to determine the numbers for resident hunters. The Panel finds that this difference is intentional.

[89] First, section 8 of the Ministry's "Policy Statement" in the Resident Hunter Priority policy (01.10), makes it clear that resident hunters have exclusive access to the areas outside of the guide outfitter territories. Further, the Ministry's response to the Trumpy Report makes it clear that resident hunters are entitled to the entire allocation in those areas.

[90] Second, the Quota procedure for guided hunting (01.05.1 of the Ministry's Procedure Manual) states in full:

Procedure:

1. Calculation of quotas

- 1.1 Allocations of harvest opportunities to guided hunters by means of a quota should be based on the calculation of an annual allowable harvest (AAH), and be consistent with the Ministry ... policy and procedure concerning harvest allocations.
- 1.2 Quotas should be calculated by the regional section head, in accordance with the allocation share determined by the director.
- 1.3 Quotas recommended by the regional section head should not exceed the guided hunters' portion of the total allocated harvest for the big game population.
- 1.4 Quotas should be calculated to reflect guided hunters' share of the harvestable portion of the population within each guide outfitter's territory, if available.
- 1.5 If a limited entry hunt (L.E.H.) has been instituted;
 - (a) the harvest by any guided resident hunter with a L.E.H. authorization should not be included in the quota;
 - (b) a resident hunter without a L.E.H. authorization may purchase the services of a guide outfitter, and the harvest should be included in that guide outfitter's quota.

1.6 If no L.E.H. has been instituted, the harvest by resident hunters (guided or unguided) should not be included in the quota.

1.7 The harvest by any guided non-resident is included in the quota.

[91] The Panel finds that the Ministry's objectives in relation to this matter are clear from section 1.4. The guide outfitter quota is intended to "reflect guided hunters' share of the harvestable portion of the population within each guide outfitter's territory."

[92] According to the Trumpy Report, all of these new policies and procedures are the product of consultation, study, and are intended to remedy a certain "mischief" or undesirable situation. Mr. Trumpy states at page 10 of his report:

The new model takes away a significant amount of discretion from the regional manager to avoid special deals for any of the user groups. It took over three years of intense discussions to arrive at the allocation model which is scheduled for full implementation beginning in 2012. Representatives of both the BCWF and the GOABC [Guide Outfitters Association of British Columbia] report that they did not get what they wanted out of the process.

Prior to 2003, various regional managers adopted different tools to manage the relative splits and allocations, particularly at the level of the individual guide outfitter territory. Most of these will disappear upon full implementation of the policy. The tools used included:

- (i) Allocation of vacant land share to guides – In most regions there are areas which are not occupied by guides. Previous guide allocations included a pro rata share of these areas as if there were guide territories. This had the effect of increasing guide allocations above what their territory alone would justify. Under the new policy all animals attributable to vacant land are allocated to resident hunters.
- (ii) Remote access factor – Some areas are easily accessible by road and heavily used by resident hunters, while others are remote and very difficult to access even with equipment like all-terrain vehicles. In some regions this was recognized and a higher share of animals in remote guide territories was provided to guides operating in those areas. This was usually offset by relatively lower allocations to guides in areas where there was better access for resident hunters. This tool disappears under the new policy as allocations are set at the regional level, and for guides, are applied at the guide territory level with no consideration of accessibility.

[Emphasis added]

[93] In *Hoessl*, the Board accepted that the Ministry intended to change the way that uncertificated areas were dealt with. It states at paragraph 72, in part:

... Another change in the policy is that harvestable moose in vacant areas are allocated to resident hunters and not guide

outfitters. Guide outfitters are not able to take non-resident hunters into vacant areas, but the vacant areas previously were figured into their quota/allocation numbers.

[94] The Panel accepts that, contrary to the Appellant's assertion that the Regional Manager erred in basing the guide's quota and multi-year allocation on a guide territory basis, as opposed to a regional basis, the policies and procedures direct that this occur. Further, there is no error in the percentage of the allocation. The clear intent of the Resident Hunter Priority policy was to exclude uncertificated areas from quota decisions. The guided hunters' allocated share of 23% is, therefore, only applied to the guide's territory. As will be seen from the Regional Manager's evidence in the next issue, that is what occurred in this case.

[95] The Panel further accepts that there is no compelling reason for a guide's allocation to be based upon animals that are not in his or her territory, and that this could result in overharvest. Regarding the Appellant's argument that the moose population should be managed according to the "specifics" of his guide outfitter territory, this will be further considered under the next issue.

[96] Finally, even if there were compelling reasons to change the policy, the Panel notes the BC Supreme Court's findings in a 1989 judicial review of a Board decision on an elk quota appeal. In *Olson v. British Columbia (Ministry of Environment Wildlife Branch, Director)*, [1989] B.C.J. No. 1579 [*Olson*], the Court characterized the Board's decision as a decision to "pool" all of the elk quotas in the region, and divide them "on an equitable basis among all Guide Outfitters licensed to guide in Region 1, including those with exclusive guiding areas where no huntable population of elk exists." The Court considered the Wildlife Branch's policies and the Board's decision, and found as follows:

In its decision the Board sought to revamp the administrative policy regarding elk quota established by those charged with that responsibility under the Act. The practical effect of its decision would be to change the policy of exclusivity of guiding areas which is fundamental to the policy of the Branch for the management of wildlife in British Columbia. It fashioned a remedy to attempt to ensure equality of hunting opportunities for guide outfitters. While the Act provides for equality of opportunity in bidding on guiding areas, equality of hunting opportunities for Guide Outfitters is not its primary focus. Read in its entirety, the Act focuses on the effective management of wildlife as a resource for the residents of British Columbia. The Legislature has given to the officers of the Wildlife Branch the task of making the difficult decisions between conflicting interests that wildlife management requires. It has given to the Environmental Appeal Board the task of ensuring that those officers make those decisions fairly, not the power to alter the general policies of the Branch. [Emphasis added]

[97] Although the Board's powers on an appeal are broader now than they were in 1989, the views and concerns expressed by the Court remain relevant to the present appeal. The Panel finds that the Resident Hunter Priority policy and the Quota procedure reflect the Ministry's management of conflicting interests and its

decisions on how to manage the wildlife resource. The Ministry's decision to determine a guide outfitters quota on a guide territory basis is a clear policy choice, and there are implications that may flow from interfering with that policy choice.

[98] The management of wildlife in the Province has evolved into a complex system of policies and procedures in order to address many competing interests, including the interest of protecting the public resource. The Panel finds that the Ministry's policy is to determine guide outfitters' multi-year allocations and annual quotas on a guide territory basis. This is different from the policy to determine the resident/non-resident share at a regional level. Further, there is no authority, nor is there any legitimate reason to, "revamp" or alter the general policies and procedures of the Ministry in this regard.

[99] For all of these reasons, the Panel finds that the Appellant's annual quota and 2013-2016 allocation should be determined on guide territory level in accordance with the relevant Ministry policies and procedures.

3. Whether the Appellant's 2013-2016 allocation and 2013-2014 quota should be increased due to errors made by the Regional Manager.

[100] The Appellant alleges that numerous errors underlie the bull moose quota and multi-year allocation under appeal. To understand his arguments, it is helpful to first set out the Regional Manager's decision-making process.

[101] In his submissions on the appeal, the Regional Manager states that the method he used to arrive at the quotas and multi-year allocations for guide outfitters in Region 5 was as follows:

Step 1: Calculate the 2012-2016 allocation under full implementation of the harvest allocation policy.

- a. Determine the 2013 population estimate for each of 4 game management zones: GMZ A, B, C, D. These estimates are based on inventory data, anecdotal information, hunter success rates, etc.
- b. Determine expected First Nations Harvest and deduct from population to determine number of moose available for harvest by residents and non-residents (the annual allowable harvest – AAH).
- c. Determine the number of bulls available for harvest by modeling the population to identify sustainable harvest.
- d. Calculate the **Annual Allowable Harvest** (AAH) for each GMZ.
....
- e. Determine what proportion of moose habitat in what GMZ the guiding area covers compared to the whole GMZ. This yields a figure that can be used to derive the AAH in the guiding area. Calculate the AAH in the guiding area.

- f. Determine the **guide share** within each guiding area. This was set by headquarters staff using the allocation calculator. For cariboo moose it was 23%.
- g. Calculate the **annual guide AAH**, which is the portion of the AAH within the guide territory that should be available to the guide to harvest each year over the 5-year allocation period. This is calculated by multiplying the guide share by the AAH in the guiding area.
- h. Calculate the **2012-16 allocation under full implementation** of the harvest allocation policy. This is the annual guide AAH multiplied by 5 to derive the 5-year allocation.

Step 2: Adjust the 2012-16 allocation to ensure guides are not “substantially impacted”.⁸ In accordance with the December 14, 2012 letter sent to guide outfitters from the director of wildlife, guides are “substantially impacted” if their 2012-16 allocation is more than 30% down from their 2007-11 harvest. However, this 30% decrease must exclude any changes in allocation not attributable to the allocation policy (e.g., changes in population size or harvest rate, and hence changes in AAH).

- a. Determine the guide’s **2007-11 harvest** in each guiding area, using guide declaration and compulsory inspection data.
- b. Determine the number of **years** that the guiding area was active in the 2007-11 allocation period. If a territory was inactive for one or more years, the number of active years was reduced accordingly.
- c. Calculate the corrected **2007-11 harvest for 5 years** by dividing the number of years by the 2007-11 harvest, and multiplying by 5.
- d. Determine the **2007 AAH in territories**, which is the AAH within the territory from the last allocation period.
- e. Calculate the **change in allocation between 2007 and 2012**. This is the 2012 AAH minus the 2007 AAH, divided by the 2007 AAH, to determine percent change.
- f. Determine the **component of harvest not attributable to a drop in AAH**. If the AAH increased between 2007 and 2012, the 2007-11 harvest was used. If the AAH declined between 2007 and 2012, the 2007-11 harvest was decreased by this amount. For example, if the 2007-11 harvest was 10, and the AAH between 2007 and 2012 declined by 50%, the component of harvest not attributable to a drop in AAH would be 5 (50% of 10). This is the 2007-11 harvest that must be compared to the 2012-16 allocation

⁸ The policy outlining this consideration (Director’s letter dated December 14, 2012) uses the words “substantively impacted”, not “substantially impacted”.

to determine whether guides are “substantially impacted”, in order to exclude changes attributable to a decline in AAH.

- g. Calculate the **30% hardship** impact by multiplying the corrected 2007-11 harvest (i.e., the component of harvest not attributable to a drop in AAH) by 70%. This represents the minimum allocation that should be assigned to each guide outfitter to ensure they are not “substantially impacted”.
- h. Determine whether the **30% hardship should be considered** when setting each guide outfitter allocation for 2012-16. If the 30% hardship impact was greater than the allocation under full implementation, the Regional Manager considered increasing the 2012-16 allocation to ensure guides were not “substantially impacted”.
- i. Establish the **2012-16 allocation considering hardship**. If there was no hardship consideration, then this is simply the 2012-16 allocation under full implementation. Since there are only 4 years left, 4/5 of this number was used to establish a 4 year allocation for 2013-16.

Step 3: Determine the 2013 quota based on 2013-16 allocation.

2013 moose quotas were calculated using a 30% administrative guideline: moose quota was provisionally calculated as 30% of the 4 year allocation. That figure was then adjusted in accordance with the Ministry’s response to the Trumphy report: guides allocated 3 or fewer moose over 4 years received their full allocation in 2013; guides allocation 4 or 5 moose received a quota of 3 in 2013.

Step 4: Consider other tools to reduce the impact of the allocation policy on guide outfitters.

- a. The Regional Manager considered applying the **Quota Variance Principle** (QVP). This principle allows for variance from established quota procedures to meet exceptional conditions (e.g., guiding in remote or inaccessible areas), and must not impact resident hunter priority. Moose have high resident hunter demand and were generally not considered for QVP in the Cariboo Region.
- b. In future years, the flexible quota system will also be considered when calculating quotas. This allows an increase in quotas later in the allocation period to allow guides to more fully harvest their multi-year allocation.

[Emphasis in original]

[102] As stated above, within step 1 the AAH is calculated for each GMZ. The Regional Manager provided an undated document describing how the 2012-2016 AAH for moose in Region 5 was determined. For the populations west of the Fraser River (GMZs 5C and 5D), the author states:

Over the past two years surveys completed in MU's 5-12 (North Chilcotin) and MU's 5-04 (South Chilcotin) have both indicated significant declines in the moose population in the Chilcotin. Survey results indicate lower populations over both GMZ's with significant decreases in cow and calf numbers. Predators and unregulated hunting facilitated through access and clear-cuts appear to be responsible for the current declines and low moose densities. Population trend modeling reveals that if no management action is taken to increase calf recruitment and cow moose survival rates, moose populations will decline another 40-45% in the Chilcotin over the next 5 years.

Bull to cow ratios are meeting objectives in both GMZ's. While the harvest of bulls is not a factor in the decline of the moose population, it is necessary to reduce the bull harvest by resident and guided hunters in order to facilitate the possibility of First Nations shifting from non-selective to bull only harvest. Guide outfitters and residents will suffer a substantial loss in opportunity even though precautionary LEH bull seasons in the Cariboo have ensured their harvest was not one of the factors influencing the decline.

Based on population modelling results, the AAH will be reduced for resident and guided hunters by 35%. This adjustment is in response to 2 recent moose surveys (MU's 5-14 and 5-04), and the evaluation of the independent experts review, into the analysis of the population structure and vulnerabilities for 2014.

An independent expert has been tasked with reviewing the current status of the population within GMZ's 5C and 5D. The AAH may be further adjusted in 2014, pending the results of that evaluation. (tab 4, page 1)

[103] Applying the four step process to the Appellant's area, the Regional Manager calculated the Appellant's allocation and quota as follows:

Moose

The [Appellant's] area is in GMZ 5C only.

The population in GMZ 5C declined significantly since the previous allocation period. First Nations harvest is a first priority and accounts for over half of the harvest. That means that reduction in harvest opportunity is felt fully by resident and non-resident hunters, essentially magnifying the effect of population decline. This is the main cause of reductions in moose allocations and quotas for guides in this zone since previous allocation periods.

The area comprises 5.0% of the moose habitat in GMZ 5C. The AAH for GMZ 5C is 343. $5.0\% \text{ of } 343 = 17.19$ moose annually to split between residents and non-residents in the area.

Applying the target guide share of 23% of 17.19 yields 3.95 moose annually for non-residents.

The 2012-16 allocation (5 times the annual figure) under full implementation in the licenced area is $5 \times 3.95 = 19.77$ bull moose, rounded to 20.

The guide's 2007-11 harvest not attributable to a drop in the AAH from the last allocation period was 23.83. 70% of that is less than 20, so the 30% hardship rule does not apply.

4/5 of that tentative 5 year allocation of 20 yields a rounded 4 year tentative allocation of 16.

The 2013-16 allocation in the licenced area is 16 bull moose.

Applying an administrative guideline of 30% to the 2013-16 allocation of 16 yields a rounded figure of 5.

Quota on the 2013-14 licence was set at 5 bull moose.

[Emphasis in original]

Appellant's submissions

[104] The Appellant submits that the Board should increase his bull moose allocation for the 2012-2016 period to 85, and his 2013-2014 quota to 24. He submits that these numbers are warranted for the following reasons:

- The Regional Manager did not base his decision on "scientifically defensible inventory data";
- The Appellant's territory is more similar to Region 7A, to the north of his territory;
- The reduced numbers to residents and non-residents are not due to population decline; rather, the reduction is due to a "social experiment" - an attempt to "shift" First Nations' harvest towards a bull moose only harvest to reduce the killing of moose cows and calves;
- Conservation of moose will not be impacted by an increase to his quota and multi-year allocation because
 - the population has not declined in his territory, as alleged, and the bull-to-cow ratio is good,
 - resident hunters are more likely to impact conservation efforts because of the number of L.E.H. authorizations that are issued, and
 - conservation is already taken into consideration before the AAH is set.
- An increase to his quota and 2013-2016 allocation will not impact resident hunter priority;
- The 2013-2016 allocation exceed the 30% hardship rule;

- The increase is what he needs to achieve his share of the non-resident allocation; and
- The current quota and 2013-2016 allocation are inconsistent with the Ministry's Commercial Hunting Interests policy and other Ministerial pronouncements.

[105] For all of the above reasons, the Appellant submits that the reduction in his quota and multi-year allocation constitutes an unreasonable and improper exercise of discretion.

[106] The Panel has consolidated these arguments and addressed them under the headings (a) to (e), below.

a) The accuracy and relevance of the population estimates to his territory

i) Inaccurate population estimates

[107] The Appellant argues that determining an appropriate harvest, and dividing up the animals to meet the four priorities of conservation, First Nations' needs and resident and non-resident hunting, depends upon having access to accurate data. To have accurate data, one first needs a scientifically defensible "inventory" of a species.

[108] The Appellant submits that regional managers and field workers within the Ministry do not currently have the resources required to accurately inventory species. Regional managers and Ministry staff often rely upon "soft" and outdated information when they set the conservation numbers and the AAH. He submits that this information comes from infrequent helicopter inventories, or anecdotal information from Ministry employees who are infrequently in the field.

[109] In contrast, the Appellant agrees with, and relies upon, the observations of Mr. Fraser, as set out in Mr. Fraser's July 15, 2013 affidavit. Mr. Fraser has over 35 years of experience as a guide in the area and his territory is also within MU 5-13. Mr. Fraser observed that moose in the area have adapted to the more open spaces and sightlines created by the mountain pine beetle infestation and the associated logging. Mr. Fraser also observed that, since the mountain pine beetle swept through the region, the moose have changed their feeding and resting times. They generally remain hidden in tall second growth forest more often than they did prior to the mountain pine beetle infestation. In his view, and the Appellant agrees, this behavior makes them more difficult to see and, therefore, more difficult to inventory.

ii) Moose data not relevant to his territory

[110] The Appellant states that he has a guide territory with a high density of moose. Ministry documents show his territory within MU 5-13 as being 1558.9 square kilometers ("km²"), with a suitable moose habitat area of 1501 km², and an estimated moose density of 0.425. The Ministry document also estimates that there are 663.1 moose within his territory. The Appellant notes that there are only two other territories with a higher moose density in Region 5, and both are within "sub-Region 5-C". The Appellant states that his moose quota and multi-year

allocations have been much higher in the past. For the three-year period of 2009-2011, he received 22 bull moose. Prior to 2009, his five-year allocation was 39 bull moose. Now his 2013-2016 is only 16 bull moose and his annual quota is 5 bull moose.

[111] According to the Regional Manager's submissions, the Appellant's quota and multi-year allocation were reduced due to an "alleged reduction" of moose population in GMZ 5C. The Appellant submits that the population has not declined as alleged; therefore, the reduction of the AAH due to declining moose populations is unwarranted.

[112] The Appellant also submits that, despite setting the allocation regionally, regional managers are encouraged to manage species by MU. What has occurred in his guide territory is that it is "managed" for the larger region and GMZ, rather than according to the specifics of his guide territory. In particular, the Regional Manager's decision is based on an estimate of moose derived from an ecosystem that is more related to the central Cariboo plateau than the bio-climatic area of his guide outfitter territory. The Appellant submits that his territory is more similar to Region 7A. This is supported by the statements made by Mr. Fraser in his appeal and in his affidavit. Mr. Fraser's guide territory abuts MU 7-11 to the north, and he states that MU 7-12 is directly north of the Appellant's territory. The Appellant's territory abuts Mr. Fraser's territory. Both the Appellant and Mr. Fraser state that moose in Region 7A are currently perceived to be in higher numbers and density than what is perceived in Region 5.

[113] Even if the Ministry is correct that moose numbers appear to be down in GMZ 5C, the Appellant submits that his quota reduction is excessive. The Appellant relies upon a copy of a PowerPoint presentation attached to Mr. Fraser's affidavit. That presentation was apparently given by the Regional Manager in the summer of 2012 to guide outfitters in Region 5. It is titled "Cariboo Region Moose Allocation". According to that document, the moose population has declined in GMZ 5C by over 30% since 2008, however, the Appellant points out that the AAH dropped by 50%. In addition, the Appellant notes that the Ministry's 2012 survey for part of MU 5-12 shows an increased bull-to-cow ratio of 66/100, which is above the provincial minimum target of 30/100.

[114] In the event that there are losses to the moose population in GMZ 5C, the Appellant submits that there is "strong evidence" that the harvest of bull moose by guide outfitters and residents is not the cause of any decline in Region 5 moose numbers. On that basis, there is no scientific or biological reason to reduce his quota and allocation from previous years.

iii) Social experiment

[115] The Appellant further suggests that the reduction to his quota is "suspect" because it is based upon the Ministry's attempt to modify the behavior of First Nations – to have them harvest only bull moose. The Appellant submits that it is questionable whether this attempted change in hunting behavior will have the desired result of increasing the moose population in his GMZ. He states, "It is glaringly apparent that guide outfitters, and to a lesser extent resident hunters, are

bearing the brunt of a social experiment not a reduction in AAH based on science or defensible data."

Conclusion

[116] Given that the Regional Manager's decision is based on old, "soft" data, is not based on scientifically defensible inventories or biological data, and is based upon data which does not reflect the specific characteristics of his own territory, the Appellant submits that the decision is "arbitrary", and is an unreasonable exercise of discretion. He submits that his harvest of bull moose within his territory is sustainable at his previous levels and that his former allocation and quota should be implemented.

Regional Manager's submissions

[117] The Regional Manager submits that he relied upon the population numbers determined by the government, using the best available science. If the government devoted more resources to determining populations, the Regional Manager admits that the numbers would be even more accurate; however, in this case, the Regional Manager only has those estimates that have been provided by government staff that are in charge of determining the numbers. He then states, "To set quotas based on population numbers different than those determined by the government's experts would be unwise and imprudent."

The Panel's Findings

[118] The Ministry's PowerPoint presentation explains how the AAH is determined, and explains the moose population estimate model. To determine the AAH, this document describes the process as follows:

1. Assemble biological data by GMZ and estimate moose population size
2. Construct moose population model
3. Use model to assess consequences to moose population health under different harvest levels
4. Use the model to estimate the AAH that best achieves management objectives
5. Discuss modelling results with First Nations, resident hunters and guide outfitters
6. Determine final AAH

[119] It describes the "Moose Population Model" as follows:

1. Model forecasts the status of each GMZ population through the allocation period.
2. Incorporates estimates of population size, bull/cow ratios, natural mortality rates, and historic harvests, as well as uncertainty of all estimates.

3. Allows us to assess the consequences of different harvest levels relative to objectives, and to examine trade-offs.
4. Used to calculate the AAH.

[120] The Ministry looked at population estimates in the GMZs. These estimates were based on "stratified random block surveys", supplemented with "composition surveys" and "historic harvest data". The survey results were extrapolated to estimate moose numbers in each GMZ. The 2012 population estimate for GMZ 5C was 8,966 (2628 bulls/4547 cows/1791 calves). This is within a total area of 32,093 km². This survey shows a decline from 13,193 in 2008 (the last population estimate), to 8,966 in 2012.

[121] The PowerPoint document also shows that, for six years (2004-2009), moose harvest in GMZ 5C has been the highest of all the zones by both residents and non-resident hunters (no numbers were provided for 2011).

[122] The Ministry compared the 2012 moose survey results with the last survey which was done in 2002, 10 years earlier. For MU 5-12B (North Chilcotin), the survey results show that the 2012 population estimate decreased by 60% from 2002, and that the estimated density of 0.23 moose/km² "is well below the regional target of 0.4 moose/km²." However, the Ministry also states that the bull/cow ratio increased from 2002 and "is well above the provincial minimum target of 30 bulls/100 cows", and the calf/cow ratio is also above the regional target.

[123] The Ministry's conclusions were:

- Survey data indicates declining moose populations across the Cariboo particularly in the Chilcotin.
- Bull to Cow ratios remain high in all GMZs suggesting declines are not due to licenced harvest (Licenced harvest is restricted to bull moose).
- Declines in number of cows and calves suggest the declines largely due to antlerless mortality.
- Potential Causes:
 - Anecdotal reports of increase in number of predators (reduced calf/cow ratio)
 - Increased access due to pine beetle salvage (increased hunter success)
 - Increase in First Nations harvest of antlerless animals
- What can we do? – Modeling suggests that even if we completely eliminate licenced harvest, moose populations will continue to decline.
 - Reduce access to areas that were formerly inaccessible
 - Work with First Nations to reduce the mortality of reproductive cows
 - Promote liberal management of predators

[124] In this document, the Ministry states that it is commissioning an independent review of the Cariboo Region's moose populations to confirm, or refute, the government's assessment of the current status of moose populations, and to identify factors limiting moose populations and make recommendations to address factors limiting moose populations.

[125] The Appellant asks the Board to almost double his 2012-2016 allocation (from 20 to 39), and to more than quadruple his quota from 5 to 22. He refers to some of his previous (historical) allocations and quotas as justification for the higher numbers. However, his previous quotas and allocations were based upon population estimates of the past, and on past policies and procedure. Therefore, this argument is not persuasive.

[126] The Panel accepts the evidence that there has been a general decline in the moose population within a number of the GMZs in Region 5. It is apparent that the moose population in this region has been the subject of concern for some time and that it is being studied and monitored by the Ministry. It is also apparent that the Ministry is trying to make sure that any decisions made with respect to hunting do not negatively impact conservation of the species. Although the Panel agrees with the Appellant that lawful hunting has not caused the apparent decline, this does not, in and of itself, justify additional quota. While the cause of a decline is relevant to an analysis of how to fix the problem, it is not a justification for ignoring the problem itself by increasing quota and allocations.

[127] The Panel finds that the Regional Manager's reliance on the population estimates is reasonable in the circumstances. Those estimates are based on the most scientifically defensible inventory data available. Further, as noted by the Appellant, the Ministry does not have the resources to "manage" animal populations by guide territory. The Panel finds that it is reasonable for the Ministry to try to manage populations by larger areas. However, what if the larger area is not representative of the guide's territory?

[128] The Appellant claims that his guide territory is more similar to the territory in Region 7, and that moose in that region are "currently perceived to be in higher numbers and density than what is perceived in Region 5." The Panel acknowledges that the moose population estimates are not based on the specifics of the Appellant's territory; rather, it is "managed" on the basis of a GMZ which is an area that is smaller than the region, but larger than the guide's territory and/or the MU. There is also no dispute that the Appellant's territory has significant moose density. The Panel notes that this density (suitable moose habitat) was, in fact, taken into consideration in the Regional Manager's decision.

[129] Although the Appellant seeks to justify a significant increase to his multi-year allocation and 2013-2014 quota on the grounds that his territory is more similar to the abutting territory in Region 7, he did not provide any evidence to support this claim. Nor did he provide the moose population estimate from Region 7A, or any other evidence that would support his contention. For instance, other than the Appellant's assertion that the ecology of his territory is more similar to Region 7A, there is no supporting evidence for this assertion: there is no mapping of his territory and the adjacent territory in Region 7, no evidence of the moose population estimate in the adjacent territory in Region 7, nor any information about

the other MUs in GMZ 5C to establish his contention that it is not similar to his territory, and therefore, the moose population estimates are not applicable. There is simply no compelling evidence to support the Appellant's contention that his territory should be treated differently than the rest of GMZ 5C.

[130] In addition, by his own admission, there has been significant beetle kill in the forests in his territory, there are more roads, and the moose are subject to animal predation. If, despite these factors, the population in the Appellant's territory is higher than other areas in the GMZ, and if it is more similar to the moose population in Region 7, or MU 7-11, this has not been established by the evidence presented in this appeal.

[131] As a further justification for a higher 2013-2016 allocation and annual quota, the Appellant also points out that the bull/ cow ratio in GMZ 5C is well above the provincial minimum target. The documents before the Panel support this contention. However, managing a resource is not limited to looking at only one factor or ratio. Although the bull/cow ratio is good, the Ministry is clearly concerned with the general decline in moose populations in various parts of Region 5 over the years, and the decline in the calf/cow ratio from the previous survey in 2002. Although the calf/cow ratio is slightly above the regional target for MU 5-12B, there is still a decline in the numbers over the past 10 years. This, in conjunction with the more serious declines of calf/cow ratios in the other MUs studied, and the population declines in the other GMZs, is clearly driving the Ministry's decision to reduce the AAH in some of the GMZs. As noted in more than one of the Ministry documents referenced by the parties, the population trend modeling suggests that even if licensed harvest is eliminated, moose populations will continue to decline. Therefore, the conclusions and suggestions for future action set out in the PowerPoint document, such as reducing access to areas that were formerly inaccessible, working with First Nations to reduce the mortality of reproductive cows, and promoting liberal management of predators, are critical to improving the numbers to ensure the health of the population, and the availability of future hunting opportunities. Thus, the Panel finds that the bull/cow ratio, although it is a good sign, cannot form the basis for an increase to the Appellant's multi-year allocation and quota.

[132] In addition, regarding the Ministry's desire to work with First Nations to shift their hunting towards bull moose, the Panel finds that this is not a "social experiment". The Panel finds that encouraging First Nations to reduce the mortality of reproductive cows simply recognizes First Nations' constitutional right to hunt, and attempts to resolve one problem without creating another. This is the role of government.

[133] Ultimately, the Panel is of the view that it is reasonable for the Regional Manager to rely upon the evidence from Ministry staff that the moose population in GMZ 5C has declined. There is no way of determining whether the decline is more or less significant in the Appellant's guiding territory, although he asserts that it is less significant. It is ultimately reasonable for the government to invoke protective measures, such as reducing the AAH and attempting to modify First Nations' hunting practices while it investigates, and attempts to mitigate, the apparent decline.

b) There will be no impact to conservation of the species or to resident priority

Appellant's submissions

[134] The Appellant submits that conservation is not an issue if he is given more animals because:

- the population has not declined as alleged and, therefore, the reduction of the AAH due to declining moose populations is unwarranted,
- resident hunters are more likely to impact conservation efforts because of the number of L.E.H. authorizations that are issued, and
- conservation is already taken into consideration before the AAH is set.

[135] The Appellant submits that giving guides a higher quota so that they can harvest their share of the allocation will not impact conservation or the resident hunters' share of the AAH. He argues that the very definition of AAH presumes that, even if the total AAH is achieved, the population will be replenished to meet management objectives.

[136] In addition, the Appellant submits that guide outfitters in Region 5 present a much lower risk to conservation, even if the Regional Manager issued quota opportunity that was higher than the guided hunters' share of the AAH. He notes that the Ministry has always been concerned with the potential over-harvest by guide outfitters, but has assumed that not all residents are successful. However, the Appellant states that, in contrast to his 5 tags for bull moose, the Ministry has issued 3.6 times more L.E.H. authorizations in his territory than what the Ministry "expects" residents to harvest. In his view, this poses a much greater risk for "localized over harvest" than increasing his quota as requested.

[137] The Appellant also notes that guides have reporting requirements which allow the Ministry to track and adjust the quotas in subsequent years, by region, to ensure that they are not harvesting more than their share of the allocation. While there is some tracking for resident hunters, the Appellant submits that it is not as onerous and, therefore, the ability of the Regional Manager to adjust the AAH or L.E.H. opportunity is not as immediate for all species.

Regional Manager's submissions

[138] The Regional Manager submits that setting a guide outfitter's quota is just one part of the government's process of allocating the harvestable population of a species among hunters. It is a step that is informed by other factors that effectively precede it and constrain it. As described earlier, the government first determines how many animals are available for a sustainable harvest over an allocation period. It then estimates how many animals First Nations will harvest during the period. The remaining animals, after considering human caused (non-hunting) mortality, are then split between resident hunters and guided hunters. The split, or share, is determined according to the formula set out in the Harvest Allocation procedure (see Issue #2).

[139] The Regional Manager submits that, through a legislative process, the number of L.E.H. authorizations to be issued to residents has been set and/or an open season has been set for a defined duration and with a projected success rate. He explains that it is only after these steps are taken that a regional manager may set quota. By this time, the Regional Manager submits that there is a "fairly fixed factual context" within which he must make a decision.

[140] The Regional Manager submits that, if the underlying presumptions and projections are accurate and a regional manager allocates a different number of animals than what has been calculated as available for guides within their territories, a regional manager risks one or both of the following outcomes:

1. A shift of the split between residents and guided hunters to a split other than set by the government policy (the Director's decision under the Harvest Allocation procedure). This would result in one user group being unhappy and the government being frustrated in its efforts to implement the split set by policy.
2. Overharvest of the population and possible infringement of aboriginal hunting rights, driving the government to reduce harvest levels for future hunts, or, in the worst case, to close hunts.

[141] The Regional Manager acknowledges that guides in the Cariboo Region have experienced lower quotas since the new policies and procedures took effect. He explains that they were lower in the 2007-2011 allocation period due to the change in the split between resident and non-resident hunters. In addition, guides were particularly "hard hit" if their historical quotas were disproportionately high compared to the size of their areas or the number of animals in their areas.

[142] For the 2012-2016 allocation period, there was a further reduction in quotas because the policies and procedures allocated 100% of the animals in uncertificated areas to residents.

[143] However, the Regional Manager notes that, in a December 14, 2012 letter, the Director outlined transitional measures to mitigate the impact of full implementation of the policies and procedures for this allocation period. For instance, if a guide is "substantively impacted", those impacts should be mitigated for the remainder of the current allocation period. The Director defined "substantively impacted" as a decrease in a guide's 2012-2016 allocation by more than 30% when compared to the guide's 2007-2011 harvest for that species, "excluding any changes in allocation not attributable to the Allocation Policy (e.g. changes to a game population AAH)". The Director states that staff "will consider capping those decreases at no more than 30% of their 2007-11 harvest", subject to considerations of conservation, underutilization of harvest opportunity, and temporary adjustments to resident hunter opportunity.

[144] The Director included an additional transitional measure because the quotas were set in year one of the allocation period, without the five-year allocations first being set.

[145] The Regional Manager states that, if the Panel increases the Appellant's 2013-2016 allocation and quota, as requested, the multi-year allocations to other

guides will go down. As the other affected guides have not been joined to this appeal, it would be unfair for the Board to order increased quota to the Appellant without hearing from those whose allocations would be correspondingly reduced.

[146] In addition, he submits that the Board should defer to his judgment in this case as he actively administers the *Wildlife Act* on a daily basis, and makes all of the decisions on setting guide outfitter quotas. In other words, he has the best information and understanding of the particular facts and the repercussions of allocation and quota decisions in the region. On the specifics of this case, the Regional Manager explains that conservation is only considered when he is "tempted" to mitigate the effect of a change in the resident/non-resident shares of the harvest. He states, "There really are no extra animals left to allocate, so every time the respondent allocates an animal above the AAH, it must be done carefully, as a calculated risk."

BCWF's submissions

[147] The BCWF makes the following points:

- Conservation must be accepted as the first priority.
- Moose populations have declined significantly in Region 5.
- Region 5 wildlife staff have approached First Nations to request that they harvest bull moose only due to conservation concerns.
- The Appellant's territory is located in a GMZ where there was a significant moose population decline (35%). An increase in bull moose harvest by First Nations will directly impact both resident and guided hunters. Moose is a "food staple" for resident hunters.
- The reduction in AAH will result in all guide outfitters and resident hunters seeing their harvest opportunity reduced due to conservation concerns.
- The BCWF submits that the Appellant's request for additional quota should be denied based on the current inventory work conducted throughout the region, and the obligations of the Regional Manager to follow the Game Harvest Management policy, the purpose of which is to develop defensible, scientifically sound harvest management procedures for wildlife species that are hunted.
- The allocation split for moose is 77/23, which is 2% higher for guides than in the 2007-2011 period. The BCWF submits that the guides' quotas will be down simply because of the new and different methods of calculating and administering quota (no more success rates or regional averaging). However, as a result of administrative guidelines, guides may not lose potential harvest opportunities just because the quota is less. They will just have to learn how to manage their quota a little closer under the new system.

Appellant's reply to the Regional Manager's submissions

[148] The Appellant submits that, although the Regional Manager provided a thorough review of some factual background, for the most part, he did not respond to the specific facts and issues raised by the Appellant.

[149] The Appellant also states that the Regional Manager's submissions supporting curial deference should be rejected on the grounds that, if the Board were to accept whatever decision the Regional Manager made and assume that it was made in good faith and as a proper exercise of discretion, no appeal would ever succeed unless the decision was made in bad faith.

[150] Regarding the Regional Manager's argument that no change should be made to the allocation and quota as it could impact other guides, the Appellant submits that it is within the purview and jurisdiction of the Board to do so, just as the Regional Manager made his quota decisions for the region without hearing from the guides, or providing them with an opportunity to comment.

Appellant's reply to the BCWF's submissions

[151] In response to the BCWF, the Appellant submits that the BCWF's submissions are unsubstantiated and, in any event, failed to comply with, and go beyond, the parameters of participation granted by the Board in its May 3, 2013 letter.

The Panel's Findings

[152] Having reviewed the Ministry's policies and procedures in detail, as well as the documents and submissions made by all parties, it is abundantly clear to the Panel that allocation of the Province's wildlife for the purpose of hunting is complicated. There is often limited supply, significant demand, and multiple competing interests. As stated above, through its policies and procedures, the Ministry has attempted to structure the decision-making to make it more mathematical in order to remove some of the variables which apparently plagued the old system.

[153] The Panel finds that the Regional Manager's role, rightly or wrongly, is limited. The number of L.E.H. authorizations that are available for the resident lottery is established through other processes. The Appellant is correct that if residents are more successful than anticipated they may impact conservation efforts more than guides will, however, this is not something that is within the Board's purview to address.

[154] In addition, although the Panel understands the Appellant's argument that a change to the quota will not impact conservation efforts due to the small number of guided hunters in comparison to resident hunters, and the fact that conservation is taken into account at the AAH stage, the Panel is not in a position, nor is it the Board's role, to change these policies and procedures or the way that a guide's quota is determined. The Appellant is not the only guide seeking a greater opportunity to kill moose in the region. This is one reason why the Ministry is in a better position to assess any impact that a change in quota and multi-year allocation may have on conservation, and the other priorities.

[155] In this case, the evidence before the Panel from the Regional Manager is that the expected First Nations' harvest of bull moose accounts for over half of the harvest in this zone, and this has "magnified the effect of the population decline generally". However, the evidence is also that attempting to increase the First Nations' harvest of bull moose is being encouraged in order to increase calf recruitment and cow moose survival rates. If this does not occur, one estimate is that "moose populations will decline another 40-45% in the Chilcotin over the next 5 years" (per undated Ministry document describing the five-year AAH for GMZs 5C and 5D).

[156] Unless there is a clear error, or sufficient evidence to justify a change in the quota or allocation without affecting the other priorities, the Panel is not in a position to properly assess the requested change, or the potential impact of the change. No such evidence was presented by the Appellant.

c) The current quota and allocation exceed the 30% hardship rule

[157] The Appellant submits that the Regional Manager should have applied the maximum reduction of 30% of the multi-year allocation and quota as required by the "substantive impact" analysis (the hardship rule) set out in correspondence from the Director. As he is usually successful in achieving his quota and allocation, his "harvest" essentially equals his quota. Therefore, the Appellant argues that the reduction to his allocation and quota is a "substantive impact" and it should be capped at 30% of his 2007-2011 allocation.

[158] The Regional Manager's explanation for making his decision was described earlier in this issue.

The Panel's Findings

[159] According to the Regional Manager's description of decision-making process, he first found out how many animals were available for harvest in the GMZ. He then determined how much moose habitat was within the Appellant's area (5%), and arrived at the number of moose in the territory that is subject to the allocation split. In his calculations, it is clear that the Regional Manager applied the 77/23 split as established by the Director.

[160] In addition, the Regional Manager considered whether the hardship rule applied to the Appellant. In his detailed explanation on how his decisions are made, the Regional Manager explains the calculation of the hardship rule as follows:

Calculate the **30% hardship** impact by multiplying the corrected 2007-11 harvest (i.e., the component of harvest not attributable to a drop in AAH) by 70%. This represents the minimum allocation that should be assigned to each guide outfitter to ensure they are not "substantially impacted".

[161] In the Appellant's case, the Regional Manager found that the corrected 2007-2011 harvest (not attributable to a drop in the AAH) was 23.83. He multiplied this

by 70% and determined that the hardship rule did not apply to the Appellant: the 2012-2016 allocation was 20, so there was not a 30% decrease in the allocation.

[162] The Regional Manager calculated the remaining four years of the five-year allocation and arrived at a rounded four-year allocation of 16 bull moose. He then applied a 30% administrative guideline to arrive at a quota of 5 bull moose for 2013-14, which is the quota under appeal.

[163] The Panel finds that the Regional Manager did not err in his calculation of the 30% hardship rule. The fact that the Appellant is a highly successful guide that normally achieves his quota is not the test for "substantive impact" established by the Director.

d) The requested increase is what the Appellant needs to achieve his share of the non-resident allocation

Appellant's submissions

[164] The Appellant submits that the quotas issued for the 2013-2014 harvest year will not allow guided hunters to harvest their share of the AAH allocation. He states that the end result is that he will not have the opportunity (i.e., the quota) to harvest his share of the allocation of the AAH if quota is not provided in keeping with his actual share of the AAH (based upon a regional allocation of 23%).

[165] The Appellant submits that the *Wildlife Act* and the Ministry's policies and procedures are intended to allow each user group to harvest their share of the allocation, and that the Regional Manager's decision is inconsistent with this clear intention. If guided hunters are to harvest their share of the AAH allocation, he submits that the quota should be higher.

[166] The Appellant also submits that, while the government has followed through with its commitment to ensure that resident hunters are able to harvest their fair share of the allocation, including by the issuance L.E.H. authorizations in numbers that "far exceed" (at least 3.6 to 1) the resident's share of the animals, the same has not occurred for guides. The Appellant argues that, unlike the situation with resident hunters, the Ministry has always equated quota as "kill" rather than an opportunity: the Ministry assumes that a guide outfitter "will either utilize his entire quota or have the capability to utilize his entire quota".

The Panel's Findings

[167] The Appellant argues that the Regional Manager failed to issue sufficient quota opportunity to allow him to harvest his share of the allocation. The Panel finds that the non-resident share of the allocation is 23%, and that it was factored into the Appellant's multi-year allocation of 16 before arriving at his quota of 5.

[168] The Panel notes that the Appellant states in his submissions that he has generally "fully achieved his quota" and that he harvests "close to 100%" of his allocation and quota. If his current quota and multi-year allocation is less than it has been in previous years, as is alleged, and his success rate is so high, the basis

for his argument on this matter is unclear. It may be that the Appellant's argument is that he will not be able to achieve 23% of a "regional" allocation of moose. As the Panel found in issue #2, according to the Ministry's Quota procedure, the 23% non-resident share is only applied to the guide territory – not to a larger area. It is not based on the region, the GMZ or "vacant" land.

[169] Accordingly, the Panel does not accept the Appellant's argument on this point.

e) The current quota and 2013-2016 allocation are inconsistent with the Ministry's Commercial Hunting Interests policy and other Ministerial pronouncements

Appellant's submissions

[170] The Appellant argues that the reduction in quota will have significant financial consequences for his guide outfitting business, contrary to section 3 of the Commercial Hunting Interests policy (01.11) which states:

It is the policy of the Ministry:

That guide outfitters' commercial interests in the harvest of big game species will be addressed by:

- (1) requiring non-resident hunters to hire a guide outfitter to hunt big game in the province, except when permits to accompany have been issued;
- (2) providing guided hunters with predictable, fair shares of the allocations of category A species in certificated areas;
- (3) supporting the viability of the guide outfitting industry by committing to:
 - a. the timely application of decision making processes regarding the transfer and disposition of guide territories;
 - b. the timely review of the status of uncertificated areas;
 - c. creating and maintaining a regulatory framework that maximizes guided hunters' success, enjoyment, and participation;
 - d. the maintenance of exclusive guided hunting rights for guide outfitters; and
- (4) removing unnecessary barriers to achievement of allocation prior to reducing allocation.

[Appellant's emphasis]

[171] In addition, the Appellant refers to an April 13, 2011 letter from the Minister which states:

Guides have indicated that full implementation of the policy, including the associated 'implementation rules', could result in the loss of millions of dollars to the industry and to the province; and that a number of guides would lose their business equity and their livelihoods. Such dramatic impacts were not intended when the

Harvest Allocation policy was originally signed in 2007. It was therefore imperative that the ministry explore these impacts prior to fully implementing the policy.

[Appellant's emphasis]

[172] Given the above-noted policy and statement, the Appellant argues that the government has clearly made a commitment to ensure that guide outfitters would be able to harvest their fair share of the allocation. He further submits that, as his allocation and quota are being impacted by Ministry policies and procedures, not legislation, pronouncements by the Minister should be given equal or almost equal weight with the policies.

[173] The Appellant states that he employs many local guides and purchases his capital assets, his supplies and inventory in the Interior of BC. He also states that moose is the main species that sustains his hunting business and he has no ability to mitigate the effects of the Harvest Allocation policies and procedures by diversifying into other species or other activities such as trail riding. He states that his area has been heavily impacted by the mountain pine beetle and the ensuing logging. With all of the clear cutting, the resulting aesthetics do not attract eco-tourism. Accordingly, without sufficient quota, his guide outfitting business, and other businesses in his territory, will cease to be economically viable. This will result in an impact to the economy of the local area, and will reduce the value of his territory. In support, he cites the Trumpy Report which confirmed that a loss of quota opportunity will significantly impact revenues for the guide outfitting industry and result in a loss in guide territory value.

[174] By failing to issue sufficient quota to the Appellant, he submits that the Regional Manager has caused, and will cause, significant financial and economic hardship now and in the future. The Appellant submits the Regional Manager's decision is contrary to sections 2 and 4 of the Commercial Hunting Interests policy because it does not remove "unnecessary barriers to achievement of allocation prior to reducing allocation", and fails to provide the Appellant with a "predictable, fair share" of the allocation of moose in his guide outfitter territory.

[175] The Appellant states that, from 2009-2011, he received 22 bull moose, and before 2009, he had a five-year allocation of 39 bull moose. He submits that his current 2013-2016 allocation and 2013-2014 quota constitutes a significant reduction, and is contrary to the above-noted policy: it has resulted in a lack of certainty and the inability to plan for the future. The uncertainty and inability to plan is highlighted by the draft allocations and quotas that are attached to the affidavit of Mr. Fraser, which show different numbers than what he ultimately received. In addition, the changes have not been gradual. The Regional Manager's failure to comply with either this policy, or the Minister's pronouncement, constitutes an unreasonable and improper exercise of discretion.

Regional Manager's submissions

[176] In response to the Appellant's economic argument, the Regional Manager states that:

- The government does not regulate how many hunters a guide may book. During a L.E.H. season, guides can take as many clients hunting as they wish as long as the guide has at least one animal quota.
- The Commercial Hunting Interests policy does not directly affect the Regional Manager's discretion when issuing quota. The government, not the Regional Manager, effectively sets the guide's share of the harvest.

[177] The Regional Manager further submits that he does not treat quota as being equal to kill, and that he issued quota in excess of $\frac{1}{4}$ of the 2013-2016 allocation by using an administrative guideline. Therefore, the Appellant does have "opportunity" that exceeds allocation. However, the Regional Manager warned that guides harvesting the entire quota may get lower quotas in later years if the current quota is unsustainable over the remainder of the allocation period. He explains how a guide can use his success rate to help determine the number of clients to book as follows:

... if the guide has a 5 year allocation of 50, a yearly quota of 15, and a success rate of 80% for that species, the guide could comfortably book 15 hunters and expect to harvest between 10 and 14 animals, average 12. This is $\frac{1}{5}$ of allocation or above, but below quota.

The guide could even book more than 15 hunters if he wanted to aim to harvest the full annual quota, but ought in fairness to warn hunters that book later in the season that he might not have quota available. And even in that case, if the guide can demonstrate an 80% success rate and books 19 hunters ($0.8 \times 19 = 15.2$ animals) the guide's exceeding the quota of 15 in that situation is not an offence and should not result in disciplinary action, but rather in only in reduced quota in subsequent years or allocation periods.

[178] In the present case, the Regional Manager notes that the Appellant seems "quite aware of his success rates, so should be able to book hunters to harvest at least $\frac{1}{4}$ of his 4 year allocation in each year." He also states that, in the present case, there are fewer animals to distribute to the guides, and the Appellant has not demonstrated that he has not received "his fair share of the share available to the guides."

[179] In all of the circumstances, the Regional Manager submits that he properly exercised his discretion.

BCWF's submissions

[180] The BCWF submits generally as follows:

- Economic viability cannot be part of the consideration when allocating wildlife harvest. "It is unacceptable to expect any type of allocation to be implemented other than that based on the wildlife populations within the tenure area of each guide outfitter. Conservation is always the first priority when allocating any species."

- Considerations relating to business hardship were already provided under the “implementation phase”, which was used to prepare both resident and non-resident hunter groups for full implementation of the new policies in 2012.
- It is important to segregate economic impacts from the actual impacts from the Harvest Allocation policies and procedures. The BCWF submits that non-policy impacts include:
 - a rising Canadian dollar (which impacts guide outfitter bookings), and
 - a general decline in the total “Non-resident Basic Licences” for hunting.

Appellant’s reply to the Regional Manager’s submissions

[181] In regard to the Regional Manager’s suggestion that guide’s book more clients than they have quota for, the Appellant submits that such business decisions are beyond the purview of the Regional Manager. In any event, booking more hunters than an outfitter has animals to harvest encourages unethical behavior and, over time, this could lead to the demise of the industry.

Appellant’s reply to the BCWF’s submissions

[182] In response to the BCWF, the Appellant submits that the BCWF’s submissions failed to comply with, and went beyond, the parameters of participation granted by the Board in its May 3, 2013 letter.

The Panel’s Findings

[183] The Appellant submits that the Ministry’s stated policy is to provide guide outfitters with a predictable, fair share of the allocation of species in their guide territory areas. He states that the determination of his 2013-2016 allocation and 2013-2014 quota has not been made in accordance with these commitments and principles, and that the decision, as it stands, will cause significant financial and economic hardship to his guide outfitting business now, and in the future.

[184] He also states that, contrary to the policy, the Regional Manager’s decision does not remove “unnecessary barriers to achievement of allocation prior to reducing allocation.” The Appellant submits that the government committed to ensuring that guide outfitters would be able to achieve their allocation, and that the quotas issued by the Regional Manager that are equal to the multi-year allocations treat quota as a guaranteed harvest of an animal, rather than an opportunity to harvest an animal.

[185] The Panel finds that the Appellant’s argument that his previous quota and multi-year allocations were higher, was based upon the population estimates at that time. The Panel also notes that the Regional Manager did not respond to, or explain, the draft allocations and quotas contained in documents attached to Mr. Fraser’s affidavit. However, they appear to use different reductions to the AAH in GMZ 5C (10% and 50%) than were ultimately accepted (35%). Although the Panel

understands that these documents make it difficult for the Appellant to plan, the documents are clearly labeled "draft", and should not be relied upon in any event.

[186] Regarding allegations that the Ministry treats quotas as being equal to the multi-year allocations, the Panel notes that the Appellant's quota for the 2013-2014 licence year is not equal to his 2013-16 allocation: his quota of 5 bull moose is greater than 1/4 of his remaining four-year allocation of 16 bull moose because the Regional Manager applied a 30% administrative guideline.

[187] As was stated at the beginning of this decision, the guide outfitting industry is a source of revenue for government and for rural communities. According to the Ministry's 2012 Information Bulletin, the 245 licensed guide outfitters employ over 2,000 people, and provide services to roughly 5,000 non-residents that hunt in the Province each year.

[188] As noted by the Appellant, the Trumpy Report concluded that the new policies and procedures would have a significant impact on the guide outfitting industry. Mr. Trumpy observed at page 6 of his report that:

There is little doubt that the implementation of the allocation policy will affect the value and viability of many guide outfitter territories. The Ministry's policy for valuing new guide territories for sale as well as industry practice is to estimate value based on the number of animals available to the guide. Since there is a reduction in the number of animals available to most guides the policy will reduce values.

[189] He also notes at page 17 that, "At an individual guide level the impact of this revenue reduction combined with the elimination of tools used by regional managers could prove catastrophic." This is because the industry is "very fragmented", with large multi-million dollar operations and many small business people who use their guide outfitter income to supplement other sources of income to survive. For those smaller operations, any reduction in income can have a "magnified impact on their ability to survive."

[190] However, Mr. Trumpy also notes that the challenges faced by the industry at this time extend beyond the new policies and procedures to such things as "slow US and European economies", the appreciation of the Canadian dollar, and improved access for resident hunters due to aggressive pine beetle harvesting.

[191] Many of Mr. Trumpy's 11 recommendations were made to increase certainty, fairness and equity for guide outfitters, and to facilitate the utilization of available animals. Most of the recommendations were adopted by the Ministry to some degree, but this did not/does not alleviate the negative economic impact for all guides.

[192] The Panel finds that supporting the economic viability of an industry is not the same as supporting the economic viability of a particular business. From a review of the Commercial Hunting Interests policy, it is apparent that the Ministry's focus is on larger concepts such as protecting the industry by requiring non-residents to hire a guide to hunt big game, as well as predictability, timeliness, maximizing hunters' success and maintaining exclusivity for guides and their

achievement of allocation. The focus of the policy is not on preventing or eliminating economic impacts to an individual guide's business. Further, many of the impacts to the guide outfitting industry appear to be a result of a shift to resident hunter priority, the removal of success factors, and a change in quota being determined at a guide territory level as opposed to a regional level. These changes were implemented by the Ministry and are found in various policies and procedures. These are not decisions or choices made by the Regional Manager, nor can they be "fixed" or "corrected" by the Regional Manager. That is simply not the way the new system is intended to work.

[193] In addition, some of the impacts are also the result of declining moose populations in the region and the corresponding conservation efforts.

[194] If the Commercial Hunting Interests policy was intended to be used by a Regional Manager to determine quota, the policy would have said that. Instead, the policy focuses on the larger policy goals of the Ministry; not the determination of quota by the Regional Manager.

[195] When reviewing the policies and procedures, it is apparent that the Ministry has attempted to strike a balance between various competing interests. Although the Appellant submits that the subject quota and remaining four-year allocation will negatively impact his business, the Panel cannot justify changing the Regional Manager's decision on the basis of economic impact alone. This impact was recognized by the Ministry when it created the new policies and procedures, and it has responded with certain mitigating policies and procedures. For instance, the Director has advised of certain measures that a Regional Manager may consider in order to reduce economic hardship to an individual guide. Such measures are the product of consideration of the wildlife management objectives. Further, they provide structure to a regional manager's discretion and apply to all regions consistent with the Ministry's goals of transparency and fair treatment.

[196] The evidence is that the Ministry established these new policies and procedures, in part, to prevent regional variations and inconsistencies in the exercise of discretion by statutory decision-makers - the perceived problems with the "old" system. The Panel is of the view that any further mitigating measures to avoid economic impact on a guide outfitter's business should be the subject of discussions between the guide, or the guide outfitting community, and the Ministry. The Panel finds that changing a quota and/or multi-year allocation in order to avoid economic consequences to a particular guide could have unintended consequences for other guides, resident hunters, and could impair the effectiveness of the new policies and procedures.

[197] The Appellant also argued that the pronouncement by the Minister in his April 13, 2011 letter stating that "such dramatic [economic] impacts were not intended", should be "given equal or almost equal weight" with the policies. The Panel notes that the Minister's "pronouncement" that such dramatic economic impacts to guides "were not intended" when the policies were signed is contained in the letter releasing the Trumpy Report. The Minister's letter states, "In order to better understand these impacts, the ministry contracted Mr. Trumpy to perform a qualitative analysis on the effects of implementing the Harvest Allocation Policy on the operation and viability of the guide outfitting industry." The Minister then

provides a brief overview of the report and asks for a formal response to the 11 recommendations and on how they may affect the interests of the various stakeholder groups. The government ultimately responded to the recommendations: it made the changes that it accepted, and explained why it rejected others. In addition, the Director advised of approved mitigation measures (e.g., substantive impact).

[198] It is apparent from the above that the Ministry did explore the economic impacts to the guide outfitters via the Trumpy Report, performed additional consultation with stakeholders on Mr. Trumpy's recommendations, and made certain adjustments in the policies and procedures in an effort to mitigate some of those impacts. The Panel finds that the Minister's 2011 letter does not constitute any Ministerial prohibition on negative economic impacts to the guide outfitting industry. Nor does it modify or inform the Ministry's policies and procedures, or the way that a regional manager is to exercise his or her discretion.

[199] The new system clearly has its flaws, a number of which were identified in the Trumpy Report, and has created economic uncertainty and hardship for many guides, including the Appellant. However, for the reasons set out in *Olson*, the Panel is not prepared to change this system of policies and procedures.

4. In all of the circumstances, should the Appellant's 2013-2014 quota and 2013-2016 allocation be changed?

[200] The Appellant argues, generally, that the Regional Manager failed to follow and apply the Harvest Allocation policy and procedure, the Quota procedure and the Administrative Guidelines procedure to determine his 2013-2016 allocation and his annual quota for bull moose.

[201] The Regional Manager emphasizes the limited extent of his discretion when it comes to setting the allocation and quota. However, he also described the factors that he considered in order to mitigate the impact of the new policies and procedures on the Appellant.

[202] It is evident from the policies and procedures that the Ministry has attempted to structure all regional managers' discretion in order to avoid regional differences in decision-making practices and results. Although the Regional Manager described the factors that he considered in order to mitigate hardship or impact, these factors are the ones that are set out in the policies and procedures, or in separate directives by senior Ministry staff.

[203] Despite this structuring of discretion, a regional manager's hands cannot be completely "tied" when it comes to exercising discretion regarding quota. Policies are not laws and there must be some flexibility when it comes time to making a decision. This is acknowledged by the Regional Manager when he states:

No regional manager can be said to have 'failed' to follow them [policies and procedures]. This misses the point about their non-binding nature. The respondent considered policies and procedures that applied to the decisions he made and largely, but not always, followed them.

[204] The Regional Manager's detailed decision-making process was described above. Where the Regional Manager has discretion, the Panel has considered the evidence before it, and the parties' submissions. The Regional Manager clearly had some "wiggle room" in the number of animals available for harvest by non-residents. This is evidenced by some of the documents relied upon by the Appellant, and is evidenced by the Regional Manager's ability to apply a 30% cap to mitigate a substantive impact. Unfortunately, the Regional Manager did not address many of the Appellant's submissions or respond to the documents attached to Mr. Fraser's affidavit, which was relied upon by the Appellant. The lack of response has made the Panel's job difficult because it is unclear whether these documents were superseded by other documents or were modified on the basis of new information. It is also unclear why different allocation dates are used in some documents than are identified in the Regional Manager's decision (e.g., 2013-2017 period, rather than 2012–2016 or 2013-2016).

[205] Nevertheless, in order to justify additional quota and multi-year allocations, the Panel will have to be satisfied that there will be no impact to conservation, to First Nations, to resident hunters or to other guide outfitters, and that there are, in fact, additional animals available. There is insufficient evidence before the Panel to meet this test.

[206] In addition, the Panel cannot find any clear error in the calculations or any improper consideration that warrants a change in the Appellant's quota and 2013-2016 allocation. The Panel also finds that the decision is not arbitrary or unlawful. Rather, it is based upon the application of the Ministry's policies and procedures which reflect an intentional shift in the way that hunting opportunities are allocated to residents and non-residents in the Province, as well as the Regional Manager's consideration of the facts as he understood them in the context of those policies and procedures. The Regional Manager exercised the discretion that he has to reduce the impact on the Appellant to the extent that is appropriate in the circumstances.

[207] As stated above, the Ministry has acknowledged that many guides will be negatively impacted by the changes. It understands that many guides will no longer receive quota at their historic levels. Despite the use of a transition period and the implementation of mitigation measures to soften the negative impacts, it is apparent that these measures do not constitute, nor are they intended to constitute, a full reversal of the impacts.

[208] Based on the evidence and submissions before the Panel, the Panel finds that the Regional Manager calculated the Appellant's 2013-2016 allocation and 2013-2014 quota for bull moose in accordance with the Ministry's policies and procedures, and there is no basis to grant the Appellant's remedy.

DECISION

[209] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

[210] For the reasons stated above, the Panel finds that the January 16, 2013 decision should be upheld.

[211] The appeal is dismissed.

"Alan Andison"

Alan Andison, Panel Chair
Environmental Appeal Board

June 25, 2014

RECOMMENDATION

[212] The Panel recommends that the Ministry, and regional managers, ensure that the word "allocation" is used consistently: that is, that the word allocation does not have a different meaning in decision letters than it does in the Ministry's Policy and Procedure Manuals.