



# Environmental Appeal Board

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## DECISION NO. 2013-WIL-033(a)

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

<b>BETWEEN:</b>	Neil T. Findlay	<b>APPELLANT</b>
<b>AND:</b>	Deputy Regional Manager, Recreational Fisheries and Wildlife Program (Thompson/Okanagan Region)	<b>RESPONDENT</b>
<b>AND:</b>	British Columbia Wildlife Federation	<b>PARTICIPANT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on August 19, 2013	
<b>APPEARING:</b>	For the Appellant: Neil T. Findlay For the Respondent: Joseph G. McBride, Counsel For the Participant: Wilf Pfleiderer	

## APPEAL

[1] The Appellant, Neil T. Findlay, is a licensed guide outfitter who operates in the Thompson/Okanagan Region (Region 3) of British Columbia. The guiding territories covered by his guide outfitter licence and certificate include the following three management units ("MU"): MU 3-12B, MU 3-20 and MU 3-26.

[2] 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 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 bull moose. In the past, the Appellant has obtained licences with a quota for bull moose in his guiding territories.

[3] In a decision dated January 21, 2013, Mike Burwash, Deputy Regional Manager, Thompson/Okanagan Region (the "Regional Manager"), advised the Appellant of his bull moose quotas for the 2013-2014 licence year. He also advised the Appellant of his 2012-2016 allocations (target harvest) in relation to bull moose.

[4] For the three MUs combined, the Appellant was given a total quota of eight bull moose and a total five-year allocation of 16 bull moose. The Appellant appealed this decision to the Board.

[5] 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.

[6] The Appellant seeks an order from the Board increasing his quota and allocation for bull moose in accordance with the Ministry's harvest allocation policies and procedures. In the alternative, he asks the Board to send the matter back to the Regional Manager with directions to properly follow the Ministry's harvest allocation policies and procedures, and to increase his allocation and quota for bull moose accordingly.

[7] 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.

## BACKGROUND

### Guide outfitters - general

[8] Guide outfitting has a long history in the Province. According to a document submitted by the Appellant,<sup>1</sup> local hunters started guiding services in or around the late 1800s in order to meet the demand for quality big game hunts. 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. Although a guide's clients are typically non-residents, residents may also hire a guide outfitter. [A 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.]

[9] 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

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<sup>1</sup> *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.

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

[10] 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).

[11] 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
- (a) is a resident, or
  - (b) is accompanied by
    - (i) a guide licensed under this Act, ...

[Emphasis added]

[12] 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]

[13] 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.

...

[14] 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.

[15] 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 the resident hunters and the guided hunters. Guided hunters are typically non-residents, and are generally referred to as "non-resident hunters" in this decision.

[16] 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**

[17] 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.

[18] 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.

[19] 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.

[20] 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

[21] 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."<sup>2</sup> 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.

[22] 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-

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<sup>2</sup> December 10, 2012, Ministry "Backgrounder" on harvest allocation.

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."<sup>3</sup> 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.

[23] 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.<sup>4</sup>

[24] 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.

[25] 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**

[26] 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.

[27] Wildlife harvest opportunities are managed according to four priorities.<sup>5</sup> The first priority is conservation. If the viability of a population is at risk, the Ministry will reduce or suspend harvest opportunities.

[28] 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.

[29] To implement the allocation to residents, the government creates an "opportunity" for harvest. For higher value species, it is typically created by a

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<sup>3</sup> Ibid, page 1.

<sup>4</sup> 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.

<sup>5</sup> Ministry Backgrounder, supra note 2.

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.

[30] 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.

[31] 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.

[32] 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**

[33] 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 current 2012-2016 allocation period is the first time that the harvests for all applicable species, in every region, have been set in the context of the new policies and procedures; i.e., "full implementation".

### **The Decision**

[34] In a decision dated January 21, 2013, the Regional Manager issued the Appellant's licence along with the following allocations and quotas for bull moose in his three MUs:

#### MU 3-12B

Allocation for 2012-2016 = 2 animals

Quota for 2013 licence year = 2 animals

#### MU 3-20

Allocation for 2012-2016 = 12 animals <sup>6</sup>

Quota for 2013 licence year = 4 animals

MU 3-26

Allocation for 2012-2016 = 2 animals

Quota for 2013 licence year = 2 animals

[35] The Regional Manager states:

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 [five year] allocation period. The benefit to you of having a higher than sustainable quota in any given year is flexibility around when you harvest animals.

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 [five-year] allocation will not be exceeded. You should keep that in mind when choosing how many animals to harvest this year.

[36] The Appellant's quota and five-year 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 3.

### **The Appeal**

[37] In a Notice of Appeal dated February 27, 2013, the Appellant appealed the above-noted decision. The Appellant's grounds for appeal are summarized as follows. 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;
- failed to follow and apply the policies and procedures to correctly determine the Appellant's allocation for bull moose; and
- failed to follow and apply the policies and procedures to correctly determine the Appellant's quota for bull moose.

[38] In particular, the Appellant submits that a fundamental flaw in the Regional Manager's decision, and a key issue in the appeal, is that the quota and five-year

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<sup>6</sup> The Regional Manager notes that "only a portion of your 2012 harvests were counted towards your 5 year allocation, such that you have an allocation of 10 animals remaining for the 2013-2016 period."



allocation for bull moose were calculated on a guide territory level, rather than on a regional level, contrary to the Ministry's policies and procedures. This resulted in far fewer moose being available for harvest by guided (non-resident) hunters.

[39] 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 five-year 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.

[40] In support of his case, the Appellant provided detailed submissions and 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.

[41] 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 was given a total 2013 quota of 8 moose for his three territories, even though his annual allocation is 3.2 animals (five-year allocation of  $16 \div 5 \text{ years} = 3.2$  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.

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

[43] 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.

[44] 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**

[45] This appeal raises the following issues:

1. Should the Appellant's annual quota and five-year allocation be determined on a "guide territory level" or a "regional level"?
2. Did the Regional Manager calculate the five-year allocation and quota for the Appellant in accordance with the Ministry's policies and procedures? Should the five-year allocation and quota be changed?

## **DEFINITION OF TERMS AND PHRASES**

[46] 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.

[47] Despite that 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. As noted by the Appellant, “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]

[48] To avoid perpetuating this confusion, the Panel will use the phrase “five-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. Should the Appellant's annual quota and five-year allocation be determined on a "guide territory level" or a "regional level"?

#### *Appellant's submissions*

[49] 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. Specifically, the process requires the Director, or a regional manager, to determine the AAH for the region, and then determine the allocation between resident hunters and guide outfitters in the region. Once that occurs, a regional manager assigns quota based upon the guide outfitters' allocation for the region.

[50] 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]

[51] 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.

[52] The Appellant also submits that the guide territory approach implies a degree of scientific precision on a micro level that "simply does not exist." He states:

Wildlife roam freely within a region and the government does not have the resources, time or ability to accurately determine wildlife populations (AAH and Allocation) within each and every guide territory within a region.

As a result, the government has chosen to manage wildlife on a regional level for both guide outfitters and resident hunters [per policy]. The Regional Manager cannot arbitrarily apply and follow some aspects of the ... Policy Manuals and Procedure Manuals when it comes to one user group, but not the other. (paras. 47-48)

[53] In 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]

[54] The Appellant argues that the Regional Manager's error in the calculation of the AAH and the resident/non-resident allocation, in turn, resulted in incorrect (and lower) quotas because quotas are derived from the allocation. When a quota is assigned on the basis of a guide's territory, which is what occurred in this case, the guide gets a smaller share of the AAH. This is because the number of animals in a guide outfitter's territory is generally smaller than the number of animals in an entire region. As a result, a guide outfitter's percentage of animals for harvest is also much smaller. The Appellant submits that the impact of this error is evident from a document attached to the Ellis Affidavit. Based on that document, if the allocation of the AAH was based upon the regional numbers, the Appellant submits that there would be 35 more moose included in the guide outfitters' share of the allocation.

[55] 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*

[56] 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.

[57] 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.

[58] 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]

[59] 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"). The Regional Manager provided a copy of that report and the government's response.

[60] In the Trumpy Report, Mr. Trumpy notes 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)

[61] 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 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".

[62] 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.

[63] 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.

[64] 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.

[65] The Regional Manager submits that the method he used to determine the Appellant's quota and five-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.

[66] 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*

[67] 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.

[68] 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]

[69] 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.

[70] 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*

[71] The Appellant submits that the Regional Manager is the person ultimately responsible for making decisions on quota, and for communicating those decisions to guide outfitters. He submits that the Regional Manager "cannot avoid a review of his decision by saying that others [the Director] were involved in the decision and therefore he is not responsible for the decision."

[72] The Appellant also clarifies that he is not asking for a redistribution of the AAH between resident hunters and guide outfitters, nor is he asking for a redistribution of quota among guide outfitters. Rather, he is asking the Regional Manager to issue quota in accordance with the guide outfitters' "fair share" of the regional allocation.

***The Panel's Findings***

[73] The new processes and procedures used to determine the resident and non-resident hunter allocation are based upon the government's many years of experience managing wildlife in the Province. It is clear that these policies and processes reflect the government'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 2011 Trumpy Report.

[74] The Harvest Allocation procedure is used to determine the ultimate resident and non-resident split or share of the AAH. As noted by the Appellant, this is defined in the policies and procedures as "the allocation". 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 3, for the 2012-2016 period, was 90% to residents and 10% to guided hunters.

[75] However, when read together with the other policies and procedures, it is apparent that these words "in the region" do not tell the entire story. The other policies and procedures indicate that, for guide outfitters, quota decisions are based on the species in his or her territory, which is different from the method that the

government uses to determine the numbers for resident hunters. The Panel finds that this difference is intentional.

[76] 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.

[77] 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.

[78] 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."

[79] 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]

[80] In *Hoessl*, the Board accepted that the government 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.

[81] The Panel accepts that, contrary to the Appellant’s assertion that the Regional Manager erred in basing the guide’s quota and five-year allocation on a guide territory basis, as opposed to a regional basis, the policies and procedures direct that this occur. 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.

[82] Even if there were, in the Panel's view, 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]

[83] 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.

[84] 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 government's policy is to determine guide outfitters' quotas, and the individual five-year allocations, 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 government in this regard.

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

**2. Did the Regional Manager calculate the five-year allocation and quota for the Appellant in accordance with the Ministry's policies and procedures? Should the five-year allocation and quota be changed?**

*Appellant's submissions*

[86] The Appellant submits that the quotas issued for the 2012/13 harvest year will not allow guided hunters to harvest their share of the AAH allocation. He submits that the Regional Manager issued quotas for the 2012/13 harvest year that are equal to the allocations. In essence, this treats quota as a *guaranteed* harvest of an animal, rather than an *opportunity* to harvest an animal. 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.

[87] The Appellant further submits 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.

[88] In particular, the Appellant submits that the reduction in bull moose quota and allocation is inconsistent with sections 2, 3(c) and 4 of the Commercial Hunting Interests policy because it:

- does not provide guided hunters with "predictable, fair shares" of the allocations of bull moose in his guide outfitter territory;

- does not support the viability of the guide outfitting industry through a regulatory framework that “maximizes guided hunters’ success, enjoyment, and participation”; and
- does not remove “unnecessary barriers to achievement of allocation prior to reducing allocation”.

[89] The Appellant submits that the government made a commitment to ensure that each user group would be able to harvest its fair share of the allocation. While the Regional Manager has followed through on this commitment with respect to resident hunters (e.g., by issuing L.E.H. authorizations that far exceed the resident hunters share of the allocation), he has failed to issue sufficient quota to guide outfitters to allow them to achieve their share of the allocation for the last three years. This leads to issues of under-harvest, as referenced in the Under-Harvest of Allocated Share policy (01.13), which states as follows:

It is the policy of the Ministry:

That the allocation to a hunter group is not to be altered because of under-harvest by that hunter group at the regional level if the cause of under-harvest is redundant or unnecessarily restrictive regulations or licence conditions.

The harvest of category A species by each hunter group will be monitored and recorded annually by regional staff.

If either hunter group under-harvests a category A species regionally for three consecutive years, the regional manager will provide a report to the director that reviews the regulations and licence conditions relating to the particular species. If determined to be redundant or unnecessarily restrictive with respect to conservation and other management objectives, these regulations, licence conditions, or both should be changed to facilitate optimal utilization.

[Emphasis added]

[90] Contrary to this policy, the Appellant submits that the Regional Manager did not file the required report to the Director, nor has the Director considered changes to facilitate optimal utilization before reducing the allocations and quotas in the Appellant’s region. Therefore, neither the Regional Manager, nor the Director, properly and reasonably exercised their discretion to ensure that guide outfitters receive sufficient quota to allow guided hunters to achieve their share of the allocation. Further, the Regional Manager compounded this problem by significantly reducing the quotas for guide outfitters in his region.

[91] The Appellant submits that the current failure of the Regional Manager to reasonably and properly exercise his discretion to issue sufficient quotas to the Appellant, and the other guides in his region, will be compounded in subsequent years because “at Step 3 of the process for determining Allocation, the Director assesses the degree to which each hunter group is likely to use their allocated shares of the harvest and then adjusts Allocation accordingly” (per Harvest Allocation procedure 01.03.1). The Appellant submits that this results in a



"negative feedback loop". He explains that lower and lower quotas for guides in subsequent harvest years due to under-utilization (described above) "is directly caused by the failure of the Regional Manager to issue sufficient quota to allow guided hunters to achieve their Allocation." With the L.E.H. authorizations issued to residents in excess of their respective share of the allocation, the Appellant submits that the respective share of the allocation becomes more and more unbalanced, contrary to the Harvest Allocation policy (01.03) which states, in part:

It is the policy of the Ministry:

That, when a regional manager has determined that a big game species, population, or animal class within the region that he or she manages is a category A species, the harvest is allocated in order to prevent or reduce causes for conflict between hunter groups. When allocating category A species:

...

(b) changes of allocation share between resident hunters and guided hunters are gradual, reflect relative importance and utilization, and will only occur after unnecessary barriers to achievement of harvest have been addressed.

[Emphasis added]

[92] The Appellant submits that giving the guides higher quotas so they can achieve their share of the allocation will not impact conservation or the resident hunter's share of the AAH. He submits that conservation is already taken into consideration before the AAH is derived and, in contrast to the resident hunters, guide outfitters only receive a small portion of the AAH for a given animal. Therefore, the Appellant submits that residents can have a much greater impact on conservation generally.

[93] In addition, 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.

[94] For all of the above reasons, the Appellant submits that the reduction in his quotas constitutes an unreasonable and improper exercise of discretion.

#### *Regional Manager's submissions*

[95] The Regional Manager's submissions are set out in two parts: the first part addresses how a regional manager's discretion to assign a quota fits within the larger allocation scheme; the second part describes his decision-making process in this case.

##### *1. Decisions on quota within the larger allocation scheme*

[96] 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 #1).

[97] 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 or she must make a decision.

[98] 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.

[99] The Regional Manager acknowledges that guides in the Thompson/Okanagan 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.

[100] 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.

[101] 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.

[102] 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. He explained that, if an individual guide's harvest in year one (2012-2013) was greater than 1/5 of the new five-year allocation, the first year would not count against the allocation available for the remainder of the allocation period (2013-2016). For example, if a guide's new allocation is 10 moose over five years, a maximum of two moose should count against the remaining allocation. If the guide harvested three moose in 2012, only two of these animals would count against the remaining allocation.

[103] Finally, the Director advised that the allocation splits between resident and guided (non-resident) hunters, as determined through the Harvest Allocation procedure, would not be recalculated until the 2022-2023 licence year to allow planning, and to facilitate more expeditious allocation information to guides and residents in 2017.

## 2. The Regional Manager's decision-making process in this case

[104] The Regional Manager described his specific approach to calculating the 2012-2016 bull moose allocations and the 2013-14 bull moose quotas for the guide outfitters in the Thompson/Okanagan Region as follows.

**Step 1:** Calculate the 2012-16 allocation under full implementation of the harvest allocation policy.

- a. Determine the **2013 population estimate** for moose within each guide outfitter territory. These estimates are based on inventory data, abundance of suitable moose habitat, anecdotal information, hunter success rates, etc.
- b. Apply a **harvest rate** for moose in each guide outfitter territory. These are typically based on provincial harvest procedures and align with the harvest rates used to determine Annual Allowable Harvest for resident hunters. The harvest rate for [the guide outfitters in this region] is 6% of the total moose population [Note that in the Kootenays a harvest rate of 15% is generally used, but that is 15% is of bull moose, compared to 6% of all moose].
- c. Calculate the **Annual Allowable Harvest (AAH)** for each territory. This is the harvest rate multiplied by the population estimate.
- d. Determine the **guide share** within each territory. This was set by headquarters staff using the allocation calculator.
- e. 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 territory.

- f. 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”.<sup>7</sup> 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 guide outfitter territory, using guide declaration and compulsory inspection data.
- b. Determine the number of **years** that the territory 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 to determine whether guides are “substantially impacted”, in order to exclude changes attributable to a decline in AAH.

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<sup>7</sup> The Director's letter actually uses the words “substantively impacted” not “substantially impacted”.

- 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**. This represents the 2012-16 allocation as stated in quota letters. If there was no hardship consideration, then this is simply the 2012-16 allocation under full implementation. Hardship consideration did not apply to the appellant.

**Step 3:** Determine the 2013 quota based on 2012-16 allocation.

- a. Determine the **2012 harvest** from guide declaration data and regional Compulsory Inspection data.
- b. Calculate **1/5th of 2012-16 allocation**. This is simply the 2012-16 allocation considering hardship divided by 5.
- c. Determine the **corrected 2012 harvest**. According to the Director’s December 14, 2012 letter sent to guide outfitters, the portion of a guide’s 2012 harvest that was greater than 1/5th of the new 2012-16 allocation should not count against the allocation available for 2013-16. For example, if a guide’s new allocation is 10 moose over 5 years, a maximum of 2 moose ( $10 \div 5$ ) should count against the remaining allocation. If the guide harvested 3 moose in 2012, only 2 of these animals would count against the remaining allocation. Therefore, the minimum of either the 2012 harvest or 1/5th of the 2012-16 allocation was generally used for the corrected 2012 moose harvest (a correction did not apply to the appellant).
- d. Determine **remaining allocation** for 2013-16. This is the 2012-16 allocation considering hardship, minus the corrected 2012 harvest.
- e. Calculate the **2013 quota**.

2013 moose quotas were calculated using a 30% administrative guideline: moose quota was provisionally calculated as 30% of the 5-year allocation. That figure was then adjusted in accordance with the Ministry’s response to the Trumpy report: guides allocated 3 or fewer moose over 5 years received their full allocation in 2013; guides allocation 4 or 5 moose received a quota of 3 in 2013 (less any moose harvested in 2012).

**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 the QVP in the Thompson Okanagan 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 5-year allocation.

[Emphasis in original]

[105] Applying the actual numbers used by the Regional Manager (in the four steps above) to determine the Appellant's five-year allocation and 2013-14 quota, the results are shown as follows [Emphasis in original]:

Moose quota – Thompson/Okanagan Region (2013-2014 season)

1. The government estimates that there are the following numbers of moose in the following MUs:
  - 3-12 = 100
  - 3-20 = 400
  - 3-26 = 300
2. The government estimates that there are the following numbers of moose in portions of the licensed area in the following MUs:
  - 3-12 = 70
  - 3-20 = 400
  - 3-26 = 60
3. Using a harvest rate of 6% (of all moose shown in #1, above), the AAH in the MUs are as follows:
  - 3-12 = 6 bull moose
  - 3-20 = 24 bull moose
  - 3-26 = 18 bull moose
4. The Appellant's share (10%) of the AAH in the portions of the licenced area in the following MUs is as follows:
  - 3-12 = 70% of 10% of 6 = 0.42 bull moose
  - 3-20 = 100% of 10% of 24 = 2.4 bull moose
  - 3-26 = 20% of 10% of 18 = 0.36 bull moose

[total 3.2]

5. The 2012-16 allocation (5 times the annual figure) under full implementation is the following in the portions of the licenced area in the following MUs:

$$3-12 = 5 \times 0.42 = 2.10 \text{ bull moose}$$

$$3-20 = 5 \times 2.4 = 12.00 \text{ bull moose}$$

$$3-26 = 5 \times 0.36 = 1.80 \text{ bull moose}$$

6. The guide's 2007-11 harvest not attributable to a drop in the AAH from the last allocation period is lower than these tentative allocations in all cases, so the 30% hardship rule does not apply.

7. **The 2012-16 allocation is as follows in the portions of the licenced area in the following MUs:**

**3-12 – 2.1 bull moose**

**3-20 – 12 bull moose**

**3-26 – 1.8 bull moose**

8. Applying an administrative guideline of 30% to the 2012-16 allocations, and setting a minimum quota of 2 yields the following rounded figures:

$$3-12 - 2 \text{ bull moose}$$

$$3-20 - 4 \text{ bull moose}$$

$$3-26 - 2 \text{ bull moose}$$

9. **Quota on the 2013-14 licence was set at as follows:**

**3-12 – 2 bull moose**

**3-20 – 4 bull moose**

**3-26 – 2 bull moose**

10. The guide harvested 4 moose in MU 3-20 in 2012. This was 1.6 more than 1/5 of his 2012-16 allocation (2.4 moose) so the corrected 2012 harvest is 2.4. The 2012-16 allocation of 12 minus the corrected 2012 harvest of 2.4 leaves an allocation for the remaining 4 years of 9.6 bull moose.

[Emphasis in original]

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

- Residents cannot hunt during L.E.H. season unless they have an L.E.H. or hire a guide.
- 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.

- Guides are rarely 100% successful. As a result, a guide can usually book more hunters than the guide has quota. It is no longer an offence to exceed quota, but the Regional Manager expects that guides will, nevertheless, act prudently and realistically manage their bookings and hunts, with the goal of all guides harvesting their five-year allocation by the end of the five years. The Regional Manager quotes from an explanation provided in an email sent by the regional manager of the Kootenay Region to all guides in that region on April 30, 2013, which states in part:

The intention, as I understand it, is to provide some flexibility to help guide outfitters achieve full harvest allocations (based on their projected success for the year). ....

For example, if your success rate on sheep is 50%, and you have a quota of 1 sheep, it is reasonable for you to book 2 hunters in an attempt to harvest your 1 sheep. If, by chance, you have a successful season and both hunters harvest a sheep, this would not be an offence, or an issue (especially if you can demonstrate that your booking was in line with your historical harvest success rate). The excess harvest would then come out of allocations that would have been assigned to following years, had the overharvest in the current year not happened.

... if a guide exceeds his/her quota (without good rationale) or continues to exceed quota over a number of years, other penalties could still be applied, including suspension or cancellation of the guide's licence.

- The Commercial Hunting Interests policy does not directly affect the Regional Manager's discretion when issuing quota. The government, not the Regional Manager, effectively set the guide's share of the harvest.

[107] In all of the circumstances, the Regional Manager submits that the method that he used to determine the Appellant's quotas and five-year allocations has been considered by the Board in previous appeals in other regions, has been accepted by the Board in those appeals (see for example, *Hoessl* and *Fitch*), and has been applied to the decision under appeal.

[108] The Regional Manager submits that he properly exercised his discretion and considered all relevant information in relation to the Appellant's quotas and allocations. He submits that his decision should be confirmed.

#### *BCWF's submissions*

[109] In specific response to this appeal, the BCWF makes the following points:

- Moose is an important food source for resident hunters – a "meat and potato" species for them.
- Conservation must be accepted as the first priority.
- Parts of the North Thompson (Bonaparte and the Nehalliston Plateau) are experiencing declines in moose population, as indicated by the harvest



information and anecdotal evidence. It is also supported by the inventory work conducted in Region 5 (the Cariboo/Chilcotin). This would cause a reduction in the AAH for both hunter groups due to population declines as a result of the new policies and procedures.

- The period of 2007-2011 was an implementation phase to allow all stakeholders to prepare for implementation of the allocation policy in 2012. In 2012, the Ministry provided limits on reductions to guide outfitters' quotas to avoid undue hardship.
- The Harvest Allocation policies and procedures are to be fully implemented in the 2013-2014 licence year. The Director's December 14, 2012 letter set out how to assess "substantive impact" and how mitigation may be carried out by Ministry staff. The BCWF points out that mitigation is not to be applied where a conservation concerns exist for a species.
- 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 groups for full implementation of the new policy in 2012.
- It is important to segregate economic impacts from the actual impacts from the Harvest Allocation policies and procedures. 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.
- The Administrative Guidelines procedure was in place in 2007 and contains the provisions required by the L.E.H. to allow for the needs of that community.

[110] The BCWF submits resident hunters are dependent on the Ministry for their hunting opportunity through the L.E.H. It submits that resident hunters face greater uncertainty than guides in terms of hunting opportunities, as L.E.H. authorizations are provided by lottery. The BCWF states:

It is not until after the Limited Entry Hunting authorizations are drawn are residents aware of the actual authorizations drawn per hunt which occurs in July generally. While the guide outfitter has already received their Quota letter in March. This results in residents having at least 3 months less to plan their hunt. ....

Simply put, the guide outfitters have direct control over their harvest opportunities while resident hunters are directly reliant on regional staff.

[111] The BCWF asks the Panel to observe the following comments by the Board in *Rich Peterson v. Director of Resource Management, Region 7B (Peace)*, Decision No. 2012-WIL-007(a), August 3, 2012:

The appropriate forum for raising concerns with general administrative, management or with policy decisions is by communicating with the appropriate government body, minister and working with representing organizations and the government.

*Appellant's reply to the Regional Manager's submissions*

[112] In response to the Regional Manager, the Appellant submits that he did not personally agree to the new Ministry policies and procedures and neither did the Guide Outfitters Association of British Columbia. While there was consultation with the Association and other wildlife users, the decision to revise the policies and procedure was made solely by government.

[113] Although the Regional Manager relies upon *Hoessl*, the Appellant submits that his appeal is distinguishable. The Board in *Hoessl* decided different issues to the ones raised in this appeal.

[114] Regarding removal of the offence, the Appellant submits that, in reality, the five-year allocation is still a "hard cap". If a guide exceeds his or her quota in one year, it will be deducted from his quota in subsequent years. Further, although the Administrative Guidelines provide each guide with some flexibility, the ability for a guide outfitter to "borrow quota against future quota" is not an answer to the issues on this appeal. First, "future quota" are only an "expected" number. It may be changed in the allocation period. In addition, this argument does not address the very issue of whether the Regional Manager issued sufficient quota opportunity to allow guide outfitters to achieve their allocations, let alone correctly calculated their allocations.

[115] The Appellant further submits that increasing quota by the use of success factors, or other tools, is "absolutely necessary to allow guide outfitters to harvest their fair share of the regional Allocation."

[116] Although the Regional Manager suggests that guide outfitters mitigate their losses by overbooking hunts, this could result in a guide filling his or her quota in the early hunts and having to cancel later hunts. The Appellant submits that, "Cancelling any over-booked hunts because quota has been filled is not workable for a guide outfitter's business".

[117] The Regional Manager raises concerns with overharvest, infringement of First Nation's rights and unfairness to other guides as a consequence of changing the subject quota decisions. The Appellant submits that conservation concerns and First Nations harvest are not issues for him because they are both addressed at the "front end" of the process – they are taken into consideration under the government's policy before the allocation is determined for guide outfitters and resident hunters.

*Appellant's reply to the BCWF's submissions*

[118] In response to the BCWF, the Appellant submits that:

*Hunting opportunity*

- Whereas resident hunters are issued L.E.H. authorizations in numbers that far exceed the resident hunters' allocation of the AAH, guide outfitters in the Thompson/Okanagan Region are not issued any quota opportunity that exceeds their share of their "incorrectly calculated" lower allocation (based on the Appellant's argument that the quota should be based on regional numbers). The result is that resident hunters have far more opportunity to harvest their allocation.
- Infrastructure limits the number of clients that a guide can take at one time; therefore, they typically schedule clients throughout the hunting seasons. Resident hunters do not face that limitation and, in theory, they may all go out on the first day of hunting season and harvest their allocation.
- Under the current regime, both user groups are equally dependent on the government when it comes to calculation of allocation and harvest opportunity (i.e., quota for guides, and L.E.H. authorization and general open seasons for resident hunters).
- Whereas the BCWF suggests that guides have suffered a loss of quota but "have not lost any potential harvest opportunities just because the quota is less", the Appellant submits that the fact is that quota is "opportunity" to harvest an animal; therefore, a reduction in quota is a reduction in opportunity to harvest an animal.

*Population declines*

- The BCWF make unsubstantiated claims about population declines.

*Economic factors*

- The Appellant has not argued that economic conditions and the rising Canadian dollar should be taken into account. Therefore, the BCWF submissions are not relevant.
- The only economic consideration at issue in the appeal is the loss of quota resulting from the Regional Manager's failure to correctly interpret and apply (or apply at all) the policies and procedures. However, the Appellant has addressed the significance of the direct financial loss that has occurred as a result of the decision.
- Although the BCWF submits that economic viability cannot be part of the consideration when allocating wildlife harvest, economic considerations do come into play when determining allocation of the AAH. As set out in the Commercial Hunting Interests policy, the economic viability of the guide outfitting industry should be a key consideration for the Regional Manager when issuing quota. One of the issues in this appeal is the failure of the Regional Manager to give proper consideration to this policy when determining the Appellant's quota.

- The Trumpy Report also addressed economic loss to the industry from the reduction in quota opportunity as being \$6 million dollars per year. That report was commissioned by the government.

*Hunter Priority and Allocation of the AAH*

- Resident "priority" under the policy refers to the fact that resident hunters receive a greater share of the AAH; the government itself acknowledges that priority does not mean that all resident hunters' needs must be met before the guide outfitters receive their share of the AAH. There is no indication that resident hunters have not received a greater portion of the AAH as compared with guide outfitters.

***The Panel's Findings***

*i) Economic factors (Commercial Hunting Interests policy)*

[119] The Appellant submits that the Ministry's stated policy is to support the viability of the guide outfitting industry, and 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 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.

[120] 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 five-year allocations treat quota as a guaranteed harvest of an animal, rather than an opportunity to harvest an animal.

[121] However, the Panel notes that the Appellant's quotas for the 2013-14 licence year are not equal to his five-year allocations in the MUs; they were greater than 1/5th of the allocation because the Regional Manager applied the 30% administrative guideline.

[122] In addition, although the Appellant is correct that the five-year allocation appears to be a "hard cap", the Regional Manager is also correct that guided hunters are rarely 100% successful. Therefore, although the Panel agrees that booking additional hunters is not a ideal solution, it does allow a guide to book sufficient clients over the years to ensure that he or she achieves the five-year allocation.

[123] 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.

[124] 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.

[125] 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."

[126] However, Mr. Trumpy also notes that the challenges faced by the industry at this time extend beyond the new policies and procedures to include:

- a. Slow US and European economies and Canadian dollar appreciation.
- b. Rising fuel prices.
- c. Quality of product.
- d. Improving access for resident hunters particularly where aggressive pine beetle harvesting and active gas exploration occurs, increasing numbers of resident hunters and the increasing sophistication of resident hunters.
- e. Increasing competition from other parts of the world. (page 19)

[127] 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.

[128] 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 government'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. 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.

[129] 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 quotas and five-year allocations 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.

[130] The evidence is that the Ministry established these new policies and procedures, in part, to prevent the 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 subject of discussions between the guide, or the guide outfitting community, and the Ministry. The Panel finds that changing a quota and/or five-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.

*ii) Under-harvest*

[131] The Appellant also submits that, by failing to increase the quota, the Regional Manager's decision may violate the Ministry's policy against under-harvest. He also states that, contrary to the Under-Harvest of Allocated Share policy, the Regional Manager did not file the required report to the Director, nor has the Director considered changes to facilitate optimal utilization before reducing the five-year allocations and quotas in the Appellant's region.

[132] The Panel notes that the Under-Harvest of Allocated Share policy is directed at the harvest allocation procedure which determines the resident/non-resident split or share of the harvest, as opposed to the quota and five-year allocation of a specific guide.

[133] Regarding the failure to file a Director's report, this report is only required if there is an under-harvest of category A species "regionally for three consecutive years". There is insufficient evidence before the Panel to determine whether a report should have been filed. If a report should have been filed, there is no clear

evidence before the Panel to determine whether a report has, or has not, been filed, nor is there evidence regarding the implications of such a failure on the validity of the decision currently under appeal.

*iii) Failure to follow policies and procedures to determine the quotas and five-year allocations*

[134] The Appellant also argues 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 five-year allocations and quotas for bull moose.

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

[136] 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.

[137] 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.

[138] The Regional Manager's detailed decision-making process was described above. He considered the data obtained on the moose population in the three MUs, the estimate of moose within the guide's territory within the MUs, and then applied a harvest rate to determine the Appellant's share of the AAH in his portions of the MUs. In his calculations, it is clear that the Regional Manager also applied the 90/10 split as established by the Director.

[139] In addition, the Regional Manager considered whether the hardship rule applied to the Appellant, and found that it did not. He applied an administrative guideline of 30%, which resulted in the quota under appeal. Although the Regional Manager considered applying the quota variance principle, he determined that moose have a high resident hunter demand and that, based on Ministry policy, he should not apply this principle if it impacts resident hunter priority.

[140] Having reviewed the 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.

[141] Interestingly, on many occasions the Appellant refers to the Regional Manager's failure to apply the policies and procedures. In his view, the policies and procedures should have been applied to increase the quota. However, for the most part, the Panel disagrees with the Appellant's interpretation of these policies. Except for the Quota procedure, most of the other policies and procedures are in the nature of establishing Ministry goals or objectives, and/or are directed at the process of establishing the allocation split between resident and non-resident hunters. These decisions are not made by regional managers. In addition, the policies and procedures do not support a five year cumulative quota that exceeds the guide outfitter allocation (10% in the region).

[142] The Panel finds that the Regional Manager's role, rightly or wrongly, is limited. Further, the Panel finds that an increase in bull moose quotas in this case will not solve all of the Appellant's problems with the policies and procedures, such as under-harvest ("negative feedback loop"), commercial hunting interests (guide's "fair share"), and meeting the allocation share for guided hunters. These policies and procedures remain in place until the Ministry decides to change them. Moreover, they were apparently created to reduce the variation in a regional manager's treatment of different guides in different regions. 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.

[143] 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. In particular, although the Appellant argues that success factors are "absolutely necessary to allow guide outfitters to harvest their fair share of the regional Allocation", it is clear that the government intentionally eliminated the use of success factors from the Regional Manager's decision-making process. This type of consideration now appears to be encapsulated by Step 3 of the Harvest Allocation procedure, but on a regional basis.

[144] Where regional managers have discretion, the Panel has considered the evidence before it and the parties' submissions.

[145] The Panel notes that the Appellant did not challenge the population data, or any of the numbers applied by the Regional Manager to arrive at the Appellant's quotas and five-year allocations. Instead, the Appellant focused on the Regional Manager's interpretation and application of the policies and procedures.

[146] After a careful review of the Regional Manager's decision-making process and his application of the policies and procedures, the Panel cannot find any clear error



in the calculations or any improper consideration that warrants a change in the Appellant's quotas and five-year allocations. 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.

[147] 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.

[148] Without any clear error in the data or the method of calculation, or any finding of an improper consideration or legal error, the Panel is not prepared to adjust the Appellant's quota and allocation as requested.

[149] Based on the evidence and submissions before the Panel, the Panel finds that the Regional Manager calculated the Appellant's five-year allocations and quotas for bull moose in accordance with the Ministry's policies and procedures and that there is no basis to change the Appellant's quotas and five-year allocations.

## **DECISION**

[150] 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.

[151] For the reasons stated above, the Panel finds that the January 21, 2013 decision should be upheld.

[152] The appeal is dismissed.

"Alan Andison"

Alan Andison, Panel Chair  
Environmental Appeal Board

April 24, 2014

## **RECOMMENDATION**

[153] 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.