



Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
Email: eabinfo@gov.bc.ca

**DECISION NOS. 2019-WIL-003(a), 2019-WIL-004(a), 2019-WIL-005(a),
2019-WIL-006(a), 2019-WIL-007(a), 2019-WIL-008(a), 2019-WIL-009(a),
2019-WIL-014(a), 2019-WIL-015(a), 2019-WIL-016(a), 2019-WIL-017(a)
[Group File: 2019-WIL-G01]**

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

BETWEEN: Allan Tew, Jim Linnell / Charles Daily, Jim Linnell, **APPELLANTS**
Bradley Bowden, Erich Steinmaier, Eric Brebner,
Herman Nell, d.b.a. 1111414 B.C. Ltd. / Alice
William, Stewart Fraser, Kevin Newberry / Garrett
Madley, Al Madley / Garrett Madley, Nicholas
Yarish

AND: Director of Wildlife and Habitat **RESPONDENT**

AND: British Columbia Wildlife Federation **PARTICIPANT**

BEFORE: A Panel of the Environmental Appeal Board:
Brenda L. Edwards, Panel Chair

DATE: Conducted by way of written submissions
concluding on June 19, 2020

APPEARING: For the Appellants:
Allan Tew Self-represented
Jim Linnell, Charles Daily, Kevin Church, Counsel
Bradley Bowden, Stewart
Fraser, Kevin Newberry,
Garrett Madley, Al Madley
Erich Steinmaier Self-represented
Eric Brebner Self-represented
Herman Nell, d.b.a. Alice William, agent
1111414 B.C. Ltd.,
Alice M. William
Nicholas Yarish Self-represented

For the Director: Emma Thomas, Counsel

For the Participant: Gerry Paille

APPEALS

[1] The Appellants are guide outfitters operating in British Columbia. Each Appellant holds a guide outfitter licence authorizing him or her to guide persons to hunt for certain species of wildlife in the area described in the licence. Most of the Appellants also hold a guiding territory certificate granting them exclusive control over guiding privileges in specific area.

[2] Each year, guide outfitters apply to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), to renew their guide outfitter licence and request a hunting quota for specific wildlife species. A quota sets the total number of a species, or type of species, that the guide outfitter's clients may harvest within the guide's territory(ies) during the period specified in the licence.

[3] In June 2019, Jennifer Psyllakis, Director of the Ministry's Wildlife and Habitat Branch (the "Director"), advised the Appellants of their moose quotas for the licence year from April 1, 2019 to March 31, 2020, and their revised "notional allocations" of moose for the five-year period from 2017 to 2021 (the "2019 Decisions"). The Appellants appealed their quotas and allocations of moose within the Ministry's Cariboo Region, also known as Region 5, that were provided in the 2019 Decisions.

[4] The Environmental Appeal Board has the authority to hear these appeals under section 101.1 of the *Wildlife Act* (the "Act"). Section 101.1(5) of the *Act* provides as follows:

On an appeal, the appeal board may

- (a) send the matter back to the regional manager or director, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is being appealed could have made, and that the board considers appropriate in the circumstances.

[5] All but one of the Appellants requests that their 2017-2021 notional allocation and 2019/20 quota be reinstated to the amounts provided in the previous licence year. Mr. Brebner requests that his quota be increased by one moose in an allocation period. Some of the Appellants have sought alternate or additional remedies which are discussed later in this decision.

BACKGROUND

The Appellants

[6] Allan Tew ("Tew"), holds guide outfitter licence 100001641. This licence authorizes Tew to guide hunters within areas set out in guiding territory certificate ("GTC") 500913; specifically, game management zone ("GMZ") 5C, management unit ("MU") 5-12A.

[7] Jim Linnell ("Linnell") owns GTC 500948. Linnell is authorized to guide hunters within his territory (500948) and in the territory covered by GTC 500983, owned by his co-Appellant, Charles Daily ("Daily"). Specifically, Linnell is authorized to guide hunters in Region 5 (Cariboo Region), GMZ 5C, MU 5-13. GTC 500948 also includes MU 7-11 in Region 7 (Omineca-Peace Region), but there is no appeal with respect to that region. MU 7-11 is adjacent to the northern boundary of MU 5-13.

[8] Bradley Bowden ("Bowden") holds guide outfitter licence 100001261. He is authorized to guide hunters in areas set out in GTC 500938 within GMZ 5A (Quesnel Highlands) and GMZ 5B (Cariboo), specifically MU 5-02, (subunit 5-02D) and MU 5-15, (subunits MU 5-15C and 5-15D).

[9] Erich Steinmaier ("Steinmaier") is licensed to guide hunters within areas set out in GTC 500939; specifically, GMZ 5C, MU 5-13B.

[10] Eric Brebner ("Brebner") holds guide outfitter licence 100001200. This licence authorizes Brebner to guide hunters within areas covered by GTC 500490; specifically, MU 5-04B.

[11] Alice William ("William") holds guide outfitter licence 100001160. This licence authorizes William to guide hunters within areas covered by GTC 500970; specifically, MU 5-04A. GTC 500970 states that it is held by William's co-Appellant, Herman Nell ("Nell"). Williams' 2019/20 licence says that GTC 500970 is held by "1111414 B.C Ltd., (Herman Nell)".

[12] Stewart Fraser ("Fraser") holds guide outfitter licence 100001160. This licence authorizes Fraser to guide hunters within the areas set out in GTC 500934; specifically, GMZ 5C, involving portions of MU 5-12 and MU 5-13.

[13] Garrett Madley ("G. Madley") holds guide outfitter licence 100000191. He is an appellant in two appeals: the first is with Kevin Newberry ("Newberry"), and the second is with Alan Madley ("A. Madley"). The licence authorizes G. Madley to guide hunters within areas set out in GTC 500968; specifically, GMZ 5C, MU 5-12A. GTC 500968 is owned by Newberry. The licence also authorizes G. Madley to guide hunters in areas covered by GTC 500524; specifically, MU 5-13. GTC 500524 is owned by A. Madley.

[14] The Appellant, Nicholas Yarish ("Yarish") holds guide outfitter licence 100001221. He owns GTC 500981 and is authorized to guide hunters in portions of MU 5-12 and MU 5-13.

Guide Outfitter Licences, Quotas, and Allocations

[15] Quota decisions have been appealed to this Board numerous times.

[16] In its past decisions on quota appeals, the Board has reviewed, in detail, how the Province regulates hunting and guiding, explained the applicable legislation, and set out the policies and procedures that provide guidance to the Ministry's decision-makers when setting annual species' quotas under the *Act* (see, for example: *John Parker v. Deputy Regional Manager (Kootenay/Boundary Region)* (Decision No. 2017-WIL-(011(a), September 29, 2017); *Kevin Newberry v. Deputy Regional Manager (Cariboo Regional Operations Division)* (Decision No. 2017-WIL-005(a),

February 1, 2018); *Chris Condie v. Director of Wildlife* (Decision No. 2018-WIL-006(a), April 26, 2019) [*Condie*].

[17] Accordingly, I will not provide a detailed overview of all of the legislation, policies, and procedures applicable to hunting and guiding in the Province. Instead, I will briefly summarize the legislation and policies relevant to this appeal. The following sections of the *Act* apply to the 2019 Decisions.

[18] The authority to attach quotas to licences is provided in section 60 of the *Act*, which states:

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.

[19] Under section 100 of the *Act*, a director, such as the Director in this case, may do an act or a thing that a regional manager is empowered to do under section 60.

[20] "Quota" is defined in section 1 of the *Act* 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.

[21] Thus, under these sections of the *Act*, a regional manager or a director has the discretion to issue licences to guide outfitters, set quotas for the harvesting of specific species, and determine the areas within a guide outfitter's territory where harvesting may occur. These decisions are made within a policy framework based on sustainable harvest and conservation of wildlife species.

[22] In order to help guide outfitters to plan their commercial operations in advance, the Ministry provides guide outfitters with "notional allocations" which establish the maximum number of a particular wildlife species that the guide's clients may harvest over a five-year period.

[23] The five-year allocation is determined after certain information is gathered and analyzed by the Ministry. Specifically, the Ministry estimates the population of the species in a given area, and the amount of harvest that should be permitted to allow the population to be replenished through natural means (i.e., the sustainable harvest). The anticipated harvest by First Nations for ceremonial and sustenance purposes is then deducted following consultation with First Nations representatives. Only after the sustainable harvest is determined and the First Nations' harvest is deducted, is the remaining available harvest, known as the Annual Allowable Harvest ("AAH"), available to be split between resident hunters and non-resident (guided) hunters on a percentage basis.

[24] On February 6, 2015, the then Minister of Forests, Lands and Natural Resource Operations released a decision on wildlife harvest allocations that created fixed "splits" for bull moose hunts between resident and non-resident hunters. In

Region 5, resident hunters were allocated 75% of the AAH for bull moose, and guided (non-resident) hunters were allocated the remaining 25%.

[25] Once the AAH and the split are determined, the non-resident hunters' portion of the AAH is allocated to individual guide outfitters based on another set of calculations which are, in turn, guided by Ministry policies and procedures.

[26] After establishing the five-year allocation for each guide outfitter, the guide's annual quota is determined.

[27] When the Ministry decides that it is necessary to limit hunters in a certain area, limit the number of animals that may be taken, or limit the harvest to a certain class of animals, the Ministry issues a limited entry hunt ("LEH") for resident hunters through legislation. The *Limited Entry Hunting Regulation*, B.C. Reg. 134/93, sets out the specific hunting restrictions for specific game species within specific zones. It also provides the director with authority to determine the number of LEH authorizations to be issued by an annual lottery for each limited entry game species.

First Nations' Rights and Title, Memoranda of Understanding and Agreements

[28] As noted in paragraph 23, above, allowable allocations and quota are set after First Nations' needs for ceremonial and sustenance purposes are deducted from the sustainable harvest. First Nations' needs are determined based on consultation with First Nations representatives. The Crown's duty to consult with First Nations is clearly outlined in *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resources)*, [2018] B.C.J. No. 523 [*Gamlaxyeltwx*] at paragraphs 125 to 128.

[29] The Court noted, at paragraph 125 of *Gamlaxyeltxw* that the Crown's duty to consult and accommodate is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or right, the Crown is contemplating action that engages that claim or right, and there is the potential that the contemplated conduct may adversely affect an Aboriginal right or title. The extent of consultation necessary is fact-specific and ranges on a spectrum. The required consultation is proportionate to a preliminary assessment of the strength of the claim to rights or title, and the seriousness of the potential adverse effect of the Crown's decision on their rights.

[30] In the Chilcotin region, the Province is aware of claims of aboriginal rights and title (inclusive of the right to hunt moose) by the Tsilhqot'in National Government ("TNG"), the Southern Dakelh National Alliance ("SDNA"), Northern Secwepemc te Qelmuw and Esk'etemc First Nations. Further, the TNG's aboriginal title has been judicially recognized. The TNG Declared Title Area was recognized by the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257. Aboriginal title confers the right to the use, control and benefit of the land. As a result, on title lands, the TNG may proactively manage, enact laws, and decide the uses of the lands and resources.

[31] The Nenqay Deni Accord entered into between the TNG and the Province on February 11, 2016, sets out the parties' commitment to working together to manage land and resources in the Declared Title Area. This co-operation includes

providing joint recommendations to statutory decision makers. Further, the accord provides for a commitment to moose recovery in the region. On August 27, 2018, the TNG issued an Emergency Moose Protection Dechen Ts'ededilhtan (law) under which it prohibited hunting or killing cow moose, by any person in the Management Units identified in Schedule A.

[32] Further, the Province has committed to the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") as a key step in reconciliation with First Nations. That commitment is now enshrined in the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44. As part of the Province's commitment to the UNDRIP, every minister in the provincial government has been mandated to review laws and policies to ensure they align with the UNDRIP. A key principle in the Declaration is the right of indigenous peoples to early, deep, and meaningful involvement in matters that affect their peoples, communities, and territories.

[33] In addition, the Province has entered into Memoranda of Understanding ("MOUs") and agreements with various First Nations who assert aboriginal rights in the Chilcotin region regarding stewardship of resources, including moose. The Province's Conservation Officer Services entered into an MOU with the ?Esdilagh and Xenigwet'in First Nations in June and August 2018, respectively. The MOUs were intended to provide for joint stewardship of moose in the First Nations' traditional territories and recognized First Nations' imposed temporary restrictions on harvesting cow moose by members of the First Nations within the traditional territory. The MOUs also provided that the Conservation Officer Services would enforce the community's ban on moose harvest.

The 2019 Cariboo Region Recommendations

[34] In 2019, Ministry staff in the Cariboo region issued a document entitled *Cariboo Region Biological Recommendations Regarding 2019 LEH and Quota Decision* (the "2019 Cariboo Region Recommendations") that summarized the biological considerations that related to the then pending 2019 moose LEH and guide outfitter quota decisions. Those considerations included the 2019 moose population survey results, GMZ population estimates, composition estimates, and historic licensed harvest and LEH authorizations. Included in the document were recommendations from the Cariboo Region Wildlife Section, based on recent survey results and biological considerations. The 2019 Cariboo Region Recommendations noted at page 1 under the heading "Background" that "(i)t should be noted that the statutory decision maker is not bound by policy or procedure and will likely incorporate feedback from First Nations and stakeholders as well as weigh biological, social, economic, and political considerations when making decisions regarding the 2019 LEH authorizations and guide outfitter quota."

[35] The 2019 Cariboo Region Recommendations noted that the pending decision on moose LEH and quotas would occur for MUs which overlap the traditional territories of the TNG, SDNA, and the Northern Secwepemc te Qelmuw and Esk'etemc First Nations, with whom consultation was ongoing at the time of writing. Included at page 3 of the recommendation document were Figures 1, 2, and 3, identifying the traditional territories and overlaying those territories on the MUs in

the region. Figure 3 noted that the Tsilhqot'in Traditional Territory included smaller areas of declared rights and title.

[36] The 2019 Cariboo Region Recommendations made the following specific recommendations for particular MUs which I have summarized, as follows:

Management Units 5-01, 5-02B and 5-02C

- Regional Recommendation – Maintain reduced licenced harvest in **5-01, 5-02B and 5-02C** until survey results indicate that bull to cow ratios have fully recovered to minimum provincial targets.
- Implement a precautionary LEH and Quota reduction of 25% in **5-02A** based on multiple indirect sources of evidence (2019 composition survey and average “days per kill”) suggesting the moose population has decreased since the last SRB survey in 2014.

Management Units – 5-04B

- Implement a moderate reduction (10%) to account for 2018 implementation of “no moose hunting area”. (This recommendation is only identified in the Summary of Regional Biological Recommendations at page 11).

Management Units 5-12A and B

- Remove the current MVP for hunting prohibition within **5-12** due to unintended consequences and lack of alignment with wildfire impact and recovery efforts

Management Unit 5-13C

- reduce the LEH and Quota within **5-13C** by 50% considering the 2019 SRB survey results, wildfire impacts and desire to maintain bull to cow ratio above 30 bulls per 100 cows.

September Season Closures in MU 5-03, 5-04, 5-05, 5-12A, 5-13A and 5-14

- The statutory decision maker should consider whether the September season closure will continue for 2019. Relevant biological information includes:
 - moose populations in the North Chilcotin have not recovered by a substantial margin since population declines through 2012-2019;
 - bull/cow ratios in certain North Chilcotin Mus (5-13A, 5-13B & 5-14) were not meeting minimum targets in 2018, and
 - calf recruitment in MU 5-12A and 5-13A appear to be below levels required to maintain stable moose populations.
- Regions expect that reinstating the September season would be strongly opposed by Chilcotin First Nations. Both the TNG and the SDNA continue to communicate that members are not achieving harvest required to meet food social and ceremonial needs

[37] The 2019 Cariboo Region Recommendation concludes with a reiteration that the discussion and recommendations outlined in the document focus on biological considerations for the Cariboo Region moose population. The discussion and

recommendations are not intended to fully capture feedback provided by First Nations regarding the sustainability of the current licensed harvest, the effects of wildfire on moose populations, availability of moose for First Nations harvest, voluntary restrictions on First Nations harvest (MOUs), traditional knowledge on population status, or traditional management practices and population objectives. The paper noted that the complete consultation record including all First Nations feedback would be considered by the statutory decision maker prior to making a decision.

[38] The Regional Director typically integrates First Nations feedback into his recommendations to the statutory decision maker. Mr. Lirette deposed in his affidavit that in 2019, regional staff and several First Nations (including the TNG and SDNA) recognized that consensus recommendations were not achievable. Regional biologists preferred to maintain 2018 harvest levels except in areas where new survey information suggested a change was required, while First Nations groups indicated a strong preference for a total closure of licenced moose harvest in the Chilcotin. As a result, instead of a joint recommendation, the Cariboo Region and First Nations presented their preferred management option and rationale to the Director, separately.

The 2019 Decisions

[39] On December 20, 2018, the Director sent an email to all guide outfitters operating in Region 5, including the Appellants, advising that she, rather than regional managers, would determine the 2019 quotas in all regions. The Director also advised that she would not provide interim quotas for moose, as there were ongoing stewardship discussions between the Ministry and the Northern Secwepemc, SDNA, and TNG. Further, the Director said she had committed to using moose population data that was being collected in 2018/19.

[40] On June 12, 2019, the Director sent an email to all guide outfitters operating in the Cariboo Region, providing an overview of her framework for calculating their moose quotas. A table attached to that email listed each guide's moose quota for 2019/20, and their revised notional allocation of moose for 2017-2021. The Director acknowledged that there were reductions in quotas in many areas, and that resident hunter LEH opportunities were being reduced "by a like amount".

[41] Between mid-June and mid-July 2019, the Director sent letters to each guide outfitter, stating their moose quota for the 2019/20 licence year and their revised notional allocations of moose for 2017-2021. She also advised that the information was available online on their Fish and Wildlife Inventory Database (FWID) profile, and she provided a Ministry contact if they wanted specific details on how their quota was calculated.

[42] The Appellants' quotas and notional allocations of moose in the 2019 Decisions, and in the previous licence year (if known to the Board), are as follows:

Name	Previous Notional Allocation 2017-2021	2018/19 Quota	Revised Notional Allocation 2017-2021	2019/20 Quota
Tew	9	9	7	2
Linnell/Daily	12	4	5	3
Linnell	21	6	8	2
Bowden	56	17	47	14
Steinmaier	13	*	10	3
Brebner	5	*	2	2
William/Nell	6	*	3	3
Fraser	37	13	20	6
G. Madley/Newberry	26	14	14	4
G. Madley/A. Madley	5	3	1	1
Yarish	13	4	8	2

(* indicates that the guide's 2018/19 moose quota is unknown to the Board)

[43] The Appellants appealed the 2019 Decisions on the following dates:

- Tew – July 10, 2019
- Steinmaier – July 12, 2019
- William – July 16, 2019
- Bowden, Fraser, G. Madley/K. Newberry, G. Madley/A. Madley, and Linnell – August 21, 2019
- Yarish – August 8, 2019.

[44] I have summarized the Appellants' grounds for appeal as follows:

- the quota reductions were not based on conservation concerns (Yarish, Tew, Steinmaier, William);
- the decision was not science-based, the Ministry's Harvest Allocation Policy was not followed, and the decision was influenced by First Nations' concerns (Brebner);

- the Director failed to follow the Ministry's Procedure Manuals when determining the allocation and quota, and failed to issue the decision in a timely manner (Bowden, Fraser, G. Madley/Newberry, G. Madley/A. Madley, Linnell);
- the Director failed to properly consider a document from the 2019 Cariboo Region Recommendations in making her decision (Bowden, Fraser);
- the Director failed to base her allocation and quota decision on objective, scientifically defensible data, and failed to be transparent in the decision-making process (Bowden, G. Madley/Newberry, G. Madley/A. Madley, Linnell);
- the Director failed to consider local moose populations and issues within the area covered by the GTC (Bowden, Linnell); and
- the decision was made in an arbitrary manner and was discriminatory to the Appellant (G. Madley, Linnell).

Relief sought

[45] While the exact language of the requests varies, all but one of the Appellants requests that their 2017-2021 notional allocation and 2019/20 quota be increased to the amounts provided in the 2018/19 licence year. Mr. Brebner requests an increase of one moose in his five-year allocation period (i.e., an increase to three moose over five years, instead of two moose over five years).

[46] Certain Appellants have sought alternate or additional remedies, as follows:

- (a) G. Madley/A. Madley seek additional relief in the form of a "compensatory" quota for 2020 and 2021 and an authorized quota of three moose per year, until the allocation that preceded the 2019 Decision that applied to them has been achieved. Alternatively, they seek an order returning the matter to the Director with a direction to increase the allocation and quota in accordance with the Ministry's policies and procedures.
- (b) G. Madley/K. Newberry seek additional relief in the form of a "compensatory" quota for 2020 and 2021, and an authorized quota of 14 moose per year until the allocation that preceded the 2019 Decision that applied to them has been achieved. Alternatively, they seek an order returning the matter to the Director with a direction to increase the allocation and quota in accordance with the Ministry's policies and procedures.
- (c) Linnell seeks additional relief in the form of a "compensatory" quota for 2020 and 2021, and an authorized quota of six moose per year under GTC 500948 and four moose per year under GTC 500983, until the allocation that preceded the 2019 Decision that applied to him has been achieved. Alternatively, Linnell seeks an order returning the matter to the Director with a direction to increase the allocation and quota in accordance with the Ministry's policies and procedures.

- (d) Bowden seeks additional relief in the form of a “compensatory” quota for 2020 and 2021, and an authorized quota of 17 moose per year until the allocation that preceded the 2019 Decision that applied to him has been achieved. Alternatively, Bowden seeks an order returning the matter to the Director with directions to increase the allocation and quota in accordance with the Ministry’s policies and procedures.
- (e) Fraser seeks additional relief in the form of a “compensatory” quota for 2020 and 2021, and an authorized quota of 13 moose per year until the allocation that preceded the 2019 Decision that applied to him has been achieved. Alternatively, Fraser seeks an order returning the matter to the Director with a direction to increase the allocation and quota in accordance with the Ministry’s policies and procedures.
- (f) Yarish seeks alternative relief that would provide him with “an area that I can actually use or my money back for buying an area that all the tags have been taken away”.

[47] The Director asks that the appeals be dismissed.

[48] The Director submits that the 2019 Decisions were delayed so that she could consider biological data with respect to moose populations in the region and could consult with and consider information received from affected First Nations. The Appellants were notified of the reasons for the delay in issuing the 2019 Decisions. Further, the Director submits that she balanced the First Nations’ concerns and biological considerations when determining the Appellants’ allocations and quotas. She also considered events in late 2018 that affected the region including: the Minister-ordered closure of several MUs for a time; TNG and SDNA’s stated dissatisfaction with the Province’s actions to manage the harvest of moose; TNG’s Emergency Moose Protection Order banning LEH authorisations in certain parts of their traditional territory; the TNG/SDNA joint press release banning LEH within their traditional territories; and, concurrent TNG road blocks and cattleguard removal to prevent hunter access.

[49] Specifically, the Director did not find it warranted to recommend a full moratorium on hunting moose in the Cariboo Region or the North or South Chilcotin as requested by First Nations. She considered the Regional Manager’s recommended reduction in licensed moose harvest of 50% in MUs 5-13A, 5-13C (G. Madley/Newberry territory) and 5-14 to account for the impact on moose populations of wildfires that occurred in the Cariboo Region in 2017 and 2018, and further reduced the LEH to the minimum of one moose. Effectively, this reduced the Regional Manager’s recommended reduction in quota by 60-88%. She applied this reduction due to the uncertainty of the impacts on moose population of wildfires, the strong opposition to any moose harvest in the area from SDNA and TNG, the overlap between the MUs, and areas covered by MOUs between the TNG and the Conservation Officer Service banning cow and calf harvest.

[50] In MUs 5-02D (Bowden territory), 5-12A and 5-12B (G. Madley/Newberry and Tew territories, respectively), the Director reduced the Regional Manager’s recommendation for reductions in licenced moose harvest by 50% to account for the increased hunting pressure on bull moose resulting from TNG’s ban on cow and

moose harvest and SDNA's concern with potential over-harvesting in the area. MU 5-02D and MU 5-13B are subject to overlapping SDNA asserted aboriginal rights and TNG rights in the Declared Title Area.

[51] In MU 5-13B and MU 5-04B (Steinmaier, Brebner, and William territories, respectively), the Director reduced the Regional Manager's recommendation by 80%. MU 5-13B is a core area for both SDNA and TNG and, as noted above, TNG has a signed MOU banning cow and calf harvest, and SDNA has expressed concerns regarding overharvesting. The licenced moose harvest recommendation for MU 5-04B was also reduced because of overlap with TNG Declared Title Area. As previously noted, the TNG has not provided permission for any licensed harvest access and has banned moose cow and calf harvests in the area.

[52] Further, the Director considered that MU 5-13C is the territory of guide outfitters Fraser, Linnell and Daily (Fraser's territory also extends into MUs 5-12A and 5-13B). The Director considered that MU 5-13C was highly impacted by wildfires, necessitating reductions to licensed harvest to address impacts to moose populations and habitat, and to account for increased hunter success (related to loss of security cover). The Director also considered applicable moose population survey information and First Nations harvest data for the area.

[53] After the appeals were filed, the British Columbia Wildlife Federation ("BCWF") requested Participant status in the appeals. The BCWF represents resident hunters in the Province. On October 18, 2019, the Board granted the request for Participant status, but limited the BCWF's submissions to addressing the potential impacts of these appeals on the *Wildlife Harvest Allocation* policy and the interests of the BCWF's members.

[54] The BCWF submits that it has "concerns" with the 2019 Decisions and the decision-making process that led to them. Specifically, the BCWF expresses concerns with: the timing of the 2019 Decisions; the "exclusion of stakeholders in the process that was used to adjust allocation of moose hunting opportunities to licensed hunters"; the lack of "substantiated evidence" of First Nations' needs for moose for food, social and ceremonial purposes; the "disregard for recommendations from regional staff"; and, the "focus on hunting regulations and licensed harvest". However, the BCWF neither supported nor opposed the appeals.

ISSUES

[55] The main question before me is whether the Appellants' 2017-2021 notional allocations and 2019/20 quotas ought to be increased. In deciding that question, I consider the following issues to be relevant:

1. whether the timing of notifying the Appellants of the 2019 Decisions breached procedural fairness;
2. whether the quotas and/or allocations should be increased based on the evidence and the applicable Ministry policies and procedures;
3. whether the Director considered irrelevant evidence or unsubstantiated claims in determining the allocations and quotas for any of the Appellants; and

4. whether the Appellants ought to be compensated, or a mitigation strategy ought to be administered by the Director, in the future, to address reductions in the Appellants' allocations and quotas.

DISCUSSION AND ANALYSIS

1. Whether the timing of notifying the Appellants of the 2019 Decisions breached procedural fairness.

Appellants' submissions

[56] Linnell/Daily, Bowden, Fraser, G. Madley/Newberry, G. Madley/A. Madley submit that the Director did not provide the 2019 Decisions (specifically, the quota determination) in a timely manner. These Appellants maintain that the timing of the release of the 2019 Decisions did not allow them to make appropriate business decisions, as they often book hunts years in advance. Some of these Appellants also argue that the 2019 Decisions were issued too late to appeal for the 2019 hunting season.

[57] In his Notice of Appeal, Yarish submits that "no outfitter would be able to book there (sic) hunts 2 months before seasons start as that is when the quotas came out since I have owned this area."

[58] Tew, Steinmaier, Brebner and Nell/William made no submissions regarding notification of the 2019 Decisions.

Director's submissions

[59] The Director concedes that there was delay in notifying the Appellants of their 2019/20 quotas. However, the Director submits that the delay, alone, does not render the 2019 Decisions procedurally unfair. In this instance, the delay was not arbitrary. Rather, it was the "cumulative result" of the Ministry conducting stratified random block ("SRB") and composition surveys of moose populations in February and March 2019, compiling and analyzing the results of the surveys, and then consulting with affected First Nations about the results.

[60] The Director further submits that the surveys were conducted when survey conditions were "ideal", and she needed to conclude consultations with First Nations before she could determine how to best address concerns about low bull moose/cow moose ratios in certain MUs in the Region. The Director advised the Appellants of the status of her deliberations on December 20, 2018, knowing that there would be a delay in her decision-making.

[61] In sum, the Director submits that it was not procedurally unfair to the Appellants for her to rely on the best available data from subject matter experts, while keeping the Appellants apprised of the situation and notifying them of the 2019 Decisions as soon as it was appropriate.

BCWF's submissions

[62] BCWF submits that 2019 was the second year in a row where the LEH draw and the distribution of moose quota decisions were delayed beyond "an acceptable

time frame". BCWF submits that the timing of the LEH draw has been a "long-time concern" for resident hunters and is exacerbated by any delays. Hunters need to know if they have been successful in the draw in order to make arrangements for holidays, accommodations, camping spots, transportation and other planning with family and friends. BCWF notes that guide outfitters have told the Board that receiving their quota late in the year makes it difficult for them to book hunters, as guided hunts are typically booked many months in advance. BCWF also notes that previous panels of the Board have expressed the hope that, in future, late delivery of decisions will be the exception: *Giles v. British Columbia (Ministry of Environment)*, [2019] B.C.E.A. No. 5, Decision No. 2018-WIL-004(a) [*Giles*], at para. 72; and, *Condie*, at para. 90.

The Panel's findings

[63] I find that the Director's 2019 Decisions regarding the Appellants' quotas for moose were made more than two months after the licence year began on April 1, 2019. I also find that the late notification of the 2019 Decisions made it impossible for the appeals to be filed before the 2019/20 licence year commenced. The appeals were filed only a few months before the moose hunting season started in the Cariboo Region. I further find that the delay in issuing the 2019 Decisions may have negatively impacted the Appellants' guide outfitting businesses, to the extent that they rely on moose hunting. As a result of the late notification, I find that the Appellants were likely required to either book or refrain from booking hunts based on their willingness to risk having sufficient quota allocated to cover successful hunts.

[64] The Board is aware that at least some moose quotas in Region 5 were also issued later than usual in 2018: *Giles* and *Condie*. In *Giles* and *Condie*, the Board found that issuing a quota decision several months later than usual, and after the licence year has started, is not necessarily unjust or unfair. If a decision is made late in the year for purely arbitrary or capricious reasons, it may be administratively unfair to those affected by the decision. However, if the decision-making and notification process is delayed due to "pressing conservation concerns"¹, constitutional obligations including mandated consultation with Aboriginal peoples², or other unforeseen or unavoidable circumstances, the delay may be justified. In short, it will depend on the circumstances.

[65] The Appellants have the obligation of establishing, on a balance of probabilities, that the Director failed to comply with legal requirements or otherwise acted in an arbitrary or capricious manner when she belatedly notified them of her 2019 Decisions. They have failed to do so. I recognize that the Appellants would have preferred to hear the results of the decision-making process sooner, so they could make more informed business decisions regarding booking hunts for moose. That said, I find that wildfires in the region in 2017 and 2018 led to serious concerns that required the Director to assess the health of the moose population before allocating moose quotas for the 2019/20 licence year.

¹ See *Giles*, at paragraph 71.

² See *Condie*, at paragraph 52.

[66] I recognize that some of the Appellants claim that they are better able than Ministry staff to estimate the health of the moose population in their guiding territories, and if the Director had relied on the Appellants' estimates, the Director could have made her decisions sooner. Under issue 2, I have considered the methodology that is described in the Director's evidence; e.g., population estimates based on modelling, SRB surveys, composition surveys, compulsory inspection results and disclosure by First Nations. I find that the Appellants' evidence is insufficient to satisfy me that any of the Appellants' estimates are superior to the methodology relied on by the Director.

[67] I further find that the Director did not act arbitrarily or capriciously, and did not act unfairly by waiting for the results of surveys and moose population estimates, given the need to ensure that the moose population could sustain a harvest following the 2017 and 2018 wildfires in the region before making the 2019 Decisions. I find that it was prudent for the Director to seek the best available information before rendering a decision. The Director is entitled to take reasonable steps to gather necessary information, upon which to base her analysis, and I find that she did so in this case.

[68] I also find that the Province has a legal obligation to conduct early and meaningful consultation with local First Nations, given their constitutionally protected hunting rights in the area and the Province's commitment to reconciliation as affirmed in the *Declaration on the Rights of Indigenous Peoples Act*. It was incumbent on the Director to ensure that she understood these First Nations' concerns and their ceremonial and sustenance needs prior to authorizing a harvest in those First Nations' traditional territory. Further, the TNG has judicially recognized Aboriginal rights and title over the Declared Title Area including the exclusive right to decide how the land is to be used. In the case of TNG Declared Title Area, the Province must act in a way that respects that title. I find that the Director properly refrained from making her decision until the Province had met its obligations regarding consultation with First Nations. Since the consultation with First Nations needed to be informed by the survey results, it follows that the consultation properly occurred after the survey information was available, thus further delaying the decision-making process.

[69] I further find that, when in 2019 it became apparent that Ministry staff and local First Nations could not reach a consensus recommendation on a course of action to address moose conservation concerns, the Director properly waited until she had received both Ministry staff's and First Nations' recommendations before making the 2019 Decisions.

[70] As a result, I find that it was appropriate for the Director to refrain from making her decisions, and notifying the Appellants of the result, until she had the information that she needed to properly understand and address conservation concerns and safeguard the Aboriginal rights and title of the effected First Nations.

[71] This ground of appeal is dismissed.

[72] Having said all of the above, in my view, the Director ought to give serious consideration as to how the consultation and data-gathering process can be expedited to ensure more timely decision-making and notification. I accept that the

past two decision-making cycles may have been unusual in that the severe forest fires of 2017 and 2018 emphasized the need for reliable scientific data to justify moose quotas in 2019 and 2020. However, it is entirely foreseeable that there will be other environmental stressors that will require the Director to have current, reliable data when considering First Nations' needs and determining harvest allocation.

[73] If the Ministry is committed to continuing to provide a five-year notional allocation to guide outfitters for their meaningful use in planning their hunts, then that information must be provided in a timely fashion. In my view, it is incumbent on the Director to ensure that she has a process in place that is flexible enough to adjust to changing environmental or other stressors while still ensuring timely decision-making.

2. Whether the Appellants' quotas and/or allocations should be increased based on the evidence and the applicable Ministry policies and procedures.

Appellants' Submissions

Tew

[74] Tew submits that the Director did not make her determination of the 2019/20 quota based on conservation concerns and did not follow the Ministry's Harvest Allocation Policy.

General submissions of Appellants Linnell/Daily, Bowden, William, G. Madley/Newberry, A. Madley/G. Madley

[75] Linnell/Daily, Bowden, William, G. Madley/Newberry, and A. Madley/G. Madley (the "Group of Five Appellants") made general submissions on this issue. While I have reviewed all submissions, for the purpose of this decision, I will refer to submissions from the Group of Five Appellants where those submissions duplicate each other.

[76] The Group of Five Appellants submit that the Director did not properly consider the relevant policies and procedures and did not correctly calculate their 2019/20 quotas. Specifically, the Director failed to consider Policy Manual 4.7.01.07, and Procedure Manuals 4.7.01.07.1 and 4.7.01.07.3, within the Ministry's Harvest Allocation Policy and Procedure Manuals.

[77] The Group of Five Appellants further submit that the Director failed to consider the 2019 Cariboo Region Recommendations, the Ministry's Procedure Manuals regarding the need for scientifically defensible harvest management, information provided from stakeholders, and local consultation from certain First Nation members who reported seeing more moose in the area. Instead, the Director relied on unproven assumptions (a change to bull only harvesting) and conjecture (estimated First Nation harvest to meet need) to significantly lower the AAH being allocated to resident and guided hunters in the Region.

[78] In addition, the Group of Five Appellants argue that the Director failed to consider the special circumstances of each guiding territory. In this regard, each Appellant provided specific submissions which are summarized below:

Linnell/Daily

[79] Linnell/Daily maintain that the Director improperly considered Linnell/Daily's territories (northern part of GMZ 5C) as "a monoculture". The Director also relied on an aerial survey conducted in an area significantly affected by wildfires in 2017 and 2018 which were located "some distance" from their guiding territories. They submit that their territories were unaffected by the wildfires. The information from an SRB conducted in 2019 in MU 5-13C, an area that was very affected by the wildfires, should not have been extrapolated over GMZ 5C. According to the 2019 Cariboo Region Recommendations, GMZ 5C had a non-resident harvest success rate of 0.27% in 2017 (21 moose out of an estimated population of 7800 moose in GMZ 5C), and 0.20% in 2018 (16 moose out of an estimated population of 7850 moose in GMZ 5C). Also, according to the 2019 Cariboo Region Recommendations, the licensed (resident and non-resident) harvest rate in 2018 was 1.1% in GMZ 5C (90 moose out of an estimated population of 7850).

[80] Linnell/Daily submit that the Director failed to consider the special circumstances that exist in their guiding territories. In particular, there is not a significantly declining moose population in GMZ 5C, and their territories were not affected by wildfires in 2017 and 2018. They also submit that there is a ratio of 37.3 bulls to 100 cows in their territories according to information in the Cariboo Regional Recommendations, which is above the minimum target of 30 bulls to 100 cows (in Ministry Procedure Manual 4.7.01.07.3). Linnell/Daily assert that their territories are "an outlier" in Region 5, because they are more similar to Region 7 with regard to geography, climate, and moose numbers and bull to cow ratios. Linnell/Daily submit that moose easily move between their territories in MU 7-11 and those in Region 5.

[81] Linnell/Daily further submit that the Director stated on page 13 of the reasons she provided with the 2019 Decisions that "given the reductions already met and level of current licensed harvest (e.g., less than 2% in both the North and South Chilcotin) the effect of further reductions is unlikely to result in strong population responses." Linnell/Daily submit that there is no biological reason to further reduce licensed harvest, and further reduction in licensed harvest will have no effect on AAH or population management as defined in the Ministry's Procedure Manuals. They submit that they have historically harvested all their allocated moose (i.e., 105.88% during the 2013 to 2016 allocation period)³. Linnell/Daily submit that the reductions in quotas and allocations are also at odds with "stakeholder and local consultation (Ulkatcho [First Nation] members seeing more moose)", although I note that this assertion is not supported by any witnesses' names or dates.

³ Appendix F attached to Linnell/Daily's submissions is a table titled "Region 5 DRAFT 2017-21 Guide Allocations for Moose". The number associated with "Utilization" for Linnell's GTC 500948 is 105.88% during the 2013 to 2016 allocation period. No source for this table is indicated. All of the Group of Five Appellants' submissions included this table as Appendix F.

Bowden

[82] Bowden's guiding territory is located within GMZ 5A (Quesnel Highlands) and GMZ 5B (Cariboo), specifically MU 5-02, subunits 5-02D and MU 5-15, subunits MU 5-15C and 5-15D. Bowden submits his guiding territory was unaffected by the wildfires in 2017 and 2018, yet this was a "non-factor" in the Director's determination of his quota and allocation. Bowden submits that although he has historically harvested approximately 66% of his allocation for the four-year period from 2013 to 2016⁴, the Director set the allocation and quota for the Appellants and other guide outfitters based on a 100% success rate rather than any historic or average utilization percentage. He implies that this was contrary to the Game Harvest Management Procedure Manual (number 4.7.01.07), which provides for the estimation of AAH using "the historical average annual harvest of moose by licensed hunters, providing all available evidence suggests that the historic harvest has been sustainable."

[83] Bowden maintains that according to the 2019 Cariboo Region Recommendations, there is not a significant declining moose population in his territory, the bull to cow ratio is within the minimum target, and no reduction in his quota or allocation was recommended. Bowden submits that his territory has strong bull to cow ratios, high productivity, and relatively low pressure from non-guided hunters⁵. Bowden also submits that his territory is "a fairly remote area with no First Nation community in close proximity" and where few First Nations members hunt any species. It ought not to be "lumped into" a general 50% reduction (for the area).

[84] In addition, Bowden submits that at page 11 of the Director's reasons for the 2019 Decisions, she states that she "assumed where [First Nations] communities have implemented and are enforcing bans [on harvesting cow moose] there will be an increased pressure on bull moose compared to other areas with the Region". Yet, Bowden maintains that there is no empirical data to confirm either that the communities have switched to bull moose harvest or, even if that were the case, that there will be increased pressure on bull moose in Bowden's territory.

Fraser

[85] Fraser submits that the Director failed to consider that his guiding territory is in GMZ 5C (North Chilcotin), specifically MU 5-13C which includes a portion of the Itcha Ilgachuz Provincial Park (the "Itchas") where hunting is permitted.

[86] Fraser submits that "some portions of the Territory were impacted by the 2017 wildfires while other portions remain entirely untouched", and overall, his territory "was unaffected by the 2017 and 2018 wildfires". Fraser acknowledges that according to the 2019 Cariboo Region Recommendations, an SRB moose survey in MU 5-13C reported that the area was significantly impacted by the 2017 and 2018 wildfires. Fraser submits that the surveyed area is in a significantly drier climactic zone and is some distance from Fraser's territory. His territory is

⁴ In the table at Appendix F, the number associated with "Utilization" for Bowden is 65.91%.

⁵ See Appendix H, table titled "Tentative LEH authorizations June 12, 2019, Final LEH authorization June 21, 2019". No source is noted for the table.

consistently stable with respect to moose population and composition. Fraser makes the same arguments as Linnell/Daily regarding the uniqueness of GMZ 5-C.

[87] In addition, Fraser submits that he has historically harvested all his allocated moose. His submissions state that he harvested 105.88% during the allocation period from 2013 to 2016, but Appendix F attached to his submissions indicates that his “utilization” was actually 85.71% during that period. He implies that the Director erred because she determined his allocation and quota based on an assumed 100% success rate.

[88] Fraser submits that the part of his territory in the Itchas is very remote and can only be accessed by a long horse journey or by resident hunters in aircraft and then a long and difficult hike. Fraser referenced a December 30, 2019 letter from Ervin Charleyboy, who describes himself as a member of the Tsilhqot’in Nation. Fraser stated that the letter from Mr. Charleyboy was appended to his submissions, but it was not.⁶ Instead, there is appended a December 30, 2019 letter from Mr. Stewart to the former Chair of the Environmental Appeal Board in which he references that he uses horses to access remote parts of his guiding area. Fraser says the letter evidences the remoteness of the region.

G. Madley / Newberry

[89] The G. Madley/Newberry territory is also in GMZ 5C and includes a portion of the Itchas. Specifically, the territory is in MU 5-12A. G. Madley/Newberry submit that their territory was only “marginally affected by the 2017 wildfires”, and this was confirmed in the 2019 Cariboo Region Recommendations. Yet, the Director did not consider this when she determined the quota and allocation for their territory.

[90] In addition, they submit that while they historically harvested only 45% of the allocated moose in the allocation period from 2013 to 2016⁷, the Director assumed an 100% success rate in the Decision. They submit that there is not a declining moose population in this guiding territory, and according to the 2019 Cariboo Region Recommendations the bull to cow ratio is “well above” the provincial minimum target.

[91] Further, they submit that the Itchas is a very remote area, where few First Nation members hunt, and that can only be accessed by plane or horseback. In support of their submissions, they provided a letter dated December 30, 2019, from Mr. Charleyboy. Mr. Charleyboy states that he is a former Tribal Chairman of the Tsilhqot’in Nation. He states that he has seen few people go into the area, and his “people” have not hunted in the area for 20 to 30 years. He states that the Itcha Mountains are accessible by aircraft, horseback, or a road with two locked gates, and very few people have keys to the gates. He states that Mr. Newberry takes hunters into the area on horseback.

A. Madley/G. Madley

⁶ There is, however, a letter from Mr. Charleyboy appended to the Madley/Newberry submissions.

⁷ In the table at Appendix F, the actual number associated with Newberry/Madley’s “Utilization” is 43.75%.

[92] These Appellants also operate in GMZ 5C; specifically, in MU 5-13A. They submit that although their territory “was affected by the 2017 wildfires, the moose numbers have reacted unevenly since 2017 with an increase in 2018 and a decrease in 2019.” They note that according to the survey data in the 2019 Cariboo Region Recommendations, there was a short-term decrease in the moose population in their territory, but it was after a short-term increase, so this may be statistically insignificant. These Appellants maintain that the bull to cow ratio is healthy in their territory and is close to minimum target of 50 bulls to 100 cows for low density areas.

[93] These Appellants submit that they have historically harvested approximately 44%⁸ of their allocated moose, yet the Director determined their allocation and quota based on a 100% success rate.

Steinmaier

[94] Steinmaier operates in MU 5-13B. He submits that the Director’s decision regarding his quota and allocation “was not made due to conservational concerns but was purely political”. In support of his submissions, he provided a copy of “Appendix 1” that was attached to an email from the Director, which states that certain areas including MU 5-13B had a reduction in moose quota “to address FN [First Nation] shift to bull moose harvest and some overlap with an MOU in place with COS [the Ministry’s Conservation Officer Service] for bull only harvest.” He further submits that there is a lack of data on First Nations’ harvest of moose, and whether they are actually only harvesting bull moose.

Brebner

[95] Brebner operates in MU 5-04B (which is part of GMZ 5D, South Chilcotin). He states that his territory is almost entirely within the Tsilhqot’in Title Area.

[96] Brebner states “I don’t have one particular reason or item of evidence that will demonstrate or prove my allocation should be reversed or varied”. He also states that he “fully expected a reduction because of low moose numbers but not to this extent”. He submits that the decisions being made are not “science based”. He submits that neither the pine beetle salvage logging practices nor the 2017 wildfires affected his guiding territory. He maintains that there has been a “predator problem”, an issue with “feral horses”, and mismanagement by the Ministry. He expresses concern that wildlife management in his area is “strongly influenced by local First Nations governments” and there has been “little to no consultation with tenure holders” until after decisions have been made. He seeks a long-term solution and is most concerned about his “5 year allocation and not my annual quota”, recognizing that he must obtain TNG consent in order to hunt in his area.

William/Neill

[97] William/Neill operate in MU 5-04A (part of GMZ 5D, South Chilcotin). They submit that the quota reductions were not a conservation concern, and that the

⁸ Appendix F states that A. Madley/G. Madley’s actual “utilization” was 44.44% for the 2013 to 2016 allocation period.

Harvest Allocation Policy was not followed. William states that based on her observations while guiding hunters last year, moose are “accumulating again in our area which is indicative of more moose population growth”.

Yarish

[98] Yarish operates in MUs 5-12 and 5-13. He submits that the quota reductions were not a conservation concern, and that the Harvest Allocation Policy was not followed.

Director's General Submissions

[99] The Director submits that the sustainable harvest of wildlife in the Province is guided by several policies and procedures, including:

- a. the Ministry's Policy Manual Vol. 4, section 7.01.07 titled “Game Harvest Management”, and section 7.01.11 titled “Commercial Hunting Interests”;
- b. the Ministry's Procedure Manual, Vol. 4, section 7.01.01.1 titled “Allowable Harvest”, section 7.01.05.1 titled “Quota”, section 7.01.05.2 titled “Administrative Guidelines”, section 7.01.07.1 titled “Big Game Harvest Management”, section 7.01.07.3 titled “Moose Harvest Management”;
- c. the February 6, 2015 Wildlife Harvest Allocation Policy decision issued by the Minister of Forests Lands and Natural Resource Operations (the “Minister's 2015 Allocation Decision”); and
- d. “Provincial Framework for Moose Management in British Columbia”, February 2015, Ministry of Forests, Lands and Natural Resource Operations, Fish and Wildlife Branch.

[100] Where the harvest of a particular species is sustainable, priority is given to First Nations, then to BC residents, and last to non-residents through licensed guide outfitters.

[101] The Director further submits that the quota attached to a guide outfitter licence is not a guarantee of the number of a particular species that will be harvested, but rather is an opportunity to harvest up to that number of the species in a particular season. Quota decisions made under section 60(1) of the *Act* authorize the number of a species that can be lawfully harvested within the time period specified. The decision-making process behind quotas is based on an assessment of the number of animals available for a sustainable harvest over a five-year allocation period. The Ministry's policy is intended to provide guided hunters with predictable, fair shares of the allocation of Category A species (including moose) in certificated areas. Guides are informed of this “notional five-year allocation” as a planning tool for their businesses.

[102] The Director submits that population of moose is typically estimated using SRB and/or moose composition (bull to cow ratio) surveys, and ideally both. Where there is a lack of reliable or any information, the Ministry uses a conservative approach to population estimates.

[103] In an affidavit dated February 14, 2020, Daniel Lirette, Senior Wildlife Biologist with the Ministry, states that he authored the 2019 Cariboo Region Recommendations, in which he summarized and assessed the winter 2018/19 moose survey information, and outlined recommended changes to licensed moose harvests based on the survey information.

[104] The 2019 Cariboo Region Recommendations note that ten moose surveys were completed in the Cariboo Region in the winter of 2018/19, the results of which were:

- a. SRB moose surveys conducted in 2019 showed the following changes from the prior survey: a decrease of 23% in MU 5-02C (last surveyed in 2011); a 45% decrease in MU 5-13C (last surveyed in 2008); a 10% increase in MU 5-03 (last surveyed in 1997); and, minimal change in population in MU 5-14;
- b. moose composition surveys were conducted in MU 5-02A, 5-02D, 5-12A, 5-12B, and 5-15D in 2019, and the bull to cow ratios observed were generally at or above the provincial minimum target of 30 bulls per 100 cows; given the high level of movement between MU 5-02D and MU 5-15D, results for these two management units should be pooled; and
- c. an additional survey (a replicate block survey) conducted in MU 5-13A demonstrated that there were 15% fewer moose in surveyed blocks compared to the pre-fire 2017 survey.

[105] Mr. Lirette also provided an overview of the Ministry's approach to estimating moose populations and managing the moose harvest. He deposed that according to Procedure Manual 4.7.01.01.1 titled "Allowable Harvest", AAH is the number of a species that can be sustainably harvested annually by licensed hunters and still meet population management objectives. Further, section 3.1.1 of the Big Game Harvest Management Procedure Manual states that, generally, "the primary population management objective for big game populations will be to maintain post-hunt numbers for each PMU [population management unit] at or near current levels." However, it also states that the harvest may "be managed for a higher or lower population level based on the advice of ... the appropriate provincial species specialist." Section 3.2.2 of the Big Game Harvest Management Procedure Manual states that for moose, "a secondary population objective will be to maintain minimum post-hunt adult sex ratios". The Moose Harvest Management Procedure Manual states that the management objective for moose populations is to have a post-hunt above 30 bulls to 100 cows, or 50 bulls to 100 cows for low density moose populations. This is also known as the provincial minimum requirement. Mr. Lirette deposed that, if the ratio falls below the provincial minimum requirement, management measures should be employed to ensure the health of the species.

[106] Mr. Lirette further deposed that the bull moose AAH is allocated in shares between resident and non-resident hunters, in accordance with the Minister's 2015 Allocation Decision, using quotas for non-residents and the LEH for residents. The goal of both the quota system and the LEH is full utilization of the allocation of licensed harvest over the five-year allocation period. Hunting success rates are tracked by the Ministry for resident hunters, and by guide outfitters for non-resident hunters.

[107] The 2019 Cariboo Region Recommendations did not account for First Nations feedback. A discussion of the Director's consideration of First Nations' feedback and concerns is set out in the next section of this decision under Issue 3.

Director's Submissions on each Appeal

G. Madley / K. Newberry

[108] Mr. Lirette attests that the 2019 Cariboo Region Recommendations for a 50% reduction to quota within MUs 5-13A and 5-13C (i.e., G. Madley/Newberry territory) considered the results of the SRB surveys and the impacts of wildfires. According to Mr. Lirette, these areas were "heavily impacted" by wildfires in 2017 and had a bull to cow ratio that was below provincial minimum requirements.

[109] The Director submits that she did not find it necessary to recommend that the Minister put a full moose hunt moratorium (closure) throughout either the Cariboo Region or in the North or South Chilcotin. She considered the 2019 Cariboo Region Recommendations, the short-term uncertainty of the impacts of the wildfires on moose populations, the recommendations of the TNG and SDNA, and overlap of guide territories with areas covered by MOUs banning cow and calf harvest. She decided to reduce the LEH to the minimum of "1".

[110] The Director made further submissions regarding these Appellants together with Tew and Bowden. Those submissions are summarized below.

Tew, Bowden, G. Madley/Newberry

[111] The Director submits that she considered it appropriate to reduce the 2019 Cariboo Region Recommendations for licenced moose harvest for MU 5-02D (Bowden territory), MUs 5-12A (Tew and G. Madley/Newberry) and 5-12B (G. Madley/Newberry) by 50% to account for the increased pressure on bull moose given the overlap of these territories with TNG and SDNA traditional territories, and the expressed concerns of those First Nations.

Steinmaier, Brebner & William

[112] The Director submits that she reduced the 2019 Regional Recommendations for licenced moose harvest for MUs 5-13B and 5-04B (Steinmaier, Brebner and William territories) by 80% given that MU 5-13B is a core area for both the SDNA and TNG, TNG has implemented a ban on cow and calf moose harvest, and SDNA has expressed concern regarding overharvest in the area. She further considered that MU-5-04B overlaps with TNG's Declared Title Area and is an important area for TNG harvesters, TNG has not given permission for licensed harvest access in the area, and there is a ban on cow and calf harvest in the area that is being actively enforced by the Conservation Office Service.

Fraser

[113] The Director submits that, contrary to Fraser's submissions, his territory is not entirely within MU 5-13C. Rather, Fraser's territory overlaps MUs 5-12A, 5-13B and 5-13C. The largest portion of the territory is contained in MU 5-13C, and 80%

is within MUs 5-13B and 5-13C. The 2019 Cariboo Region Recommendations recommended a 50% reduction in licensed harvest in MU 5-13C based on a “statistically significant decrease” in the overall moose population estimate, and to maintain the provincial minimum requirement for the bull to cow ratio. Mr. Lirette deposed in his second affidavit⁹ that recent moose surveys were conducted in areas overlapping 80% of Mr. Fraser’s territory, and not “some distance from the Territory” as submitted by Mr. Fraser. As noted earlier in this Decision, an SRB survey of MU 5-13C in 2019 showed a 45% decrease in the density of moose per square kilometre since 2008, and a bull to cow ratio below the provincial minimum requirement. An SRB survey of MU 5-13B showed a 19% increase in moose density since 1999, and a bull to cow ratio below the provincial minimum requirement.

[114] Mr. Lirette further deposed that Mr. Fraser’s territory overlaps the middle and southern portions of MU 5-13C. MU 5-13C had a “high level” of impacts from both the 2017 and 2018 wildfires. MU 5-13 B was marginally impacted by wildfires. The high-level impacts to MU 5-13C necessitated reductions to licensed moose harvest to account for increased hunter success related to loss of security cover.

Linnell/Daily

[115] The Director notes that Mr. Linnell’s guiding territory is located in MU 5-13C. Mr. Linnell is also licensed to guide in Mr. Daily’s territory, which is located in portions of MUs 5-12A and 5-13C, with the largest portion in MU 5-13C. In his affidavit, Mr. Lirette states that MU 5-13C *was* highly impacted by the wildfires, contrary to the submissions of Linnell and Daily. The licensed moose harvest was reduced to address the wildfires’ impact on moose population and habitat, and to account for increased hunter success related to loss of security cover. The impacts of wildfires in the affected areas ranged from high severity (i.e., loss of all forest crown closure) to unburnt areas.

[116] The Director maintains that her submissions in response to Fraser and Bowden apply equally to Linnell and Daily, to the extent that these Appellants all have territories within MU 5-13C.

G. Madley/A. Madley

[117] The Director notes that Territory 500524 is in MU 5-13A (held by A. Madley and for which G. Madley is the licensed guide outfitter) and is a “neighbour” to Territory 500968 (K. Newberry/G. Madley). The Director submits that Mr. Lirette’s evidence in his first affidavit with respect to MU 5-13A applies equally to the guiding territory held by A. Madley. In his third affidavit, Mr. Lirette states that this guiding territory is completely within the 2017 Chilcotin Plateau wildfire perimeter and was “significantly affected by the 2017 wildfires” as demonstrated in a “Burn Severity” map attached to his affidavit as Exhibit “A”.

Yarish

⁹ Lirette affidavit affirmed March 23, 2020.

[118] The Director submits that Mr. Yarish has provided no evidence in support of his submissions in his Notice of Appeal.

[119] To assist the Board, the Director notes that the Yarish guiding territory is adjacent to the Newberry territory, and both territories overlap portions of MU 5-12A and 5-13A. The Director submits that the evidence in Mr. Lirette's first affidavit with respect to MU 5-12 A and MU 5-13A is applicable to the Yarish territory.

BCWF's Submissions

[120] The BCWF submits that the Director made the 2019 Decisions without open and transparent consultation with both indigenous and non-indigenous communities. Wildlife management in British Columbia is based on a shared stewardship model. BCWF recognizes the government's commitment to work collaboratively with First Nations regarding wildlife and habitat management but submits that the government should not do so to the exclusion of representatives of licensed hunters. BCWF submits that the decision-making process with respect to moose allocations in the Cariboo Region for 2019 did not follow an inclusive collaborative approach. Rather, the Director summarily discarded a collaborative approach and substituted a bilateral one.

[121] The BCWF further submits that it is a proponent of science-based wildlife management, and it recognizes surveys (composition and SRB) as appropriate tools to inform decision-making. The BCWF maintains that the concessions made to First Nations, in at least some cases, appear to go against the data collected by regional staff and are contrary to the Game Harvest Management and Moose Harvest Procedure Manuals. The BCWF expects that the Director will make her decisions based on evidence or science. In this case, the 2019 Decisions were made in the absence of the continuity of scientific knowledge or practise in the Cariboo Region. Existing policies and procedures were ignored, and new approaches were "piloted" in the absence of new policy and stakeholder participation. Regional recommendations were overruled. The Provincial Wildlife Harvest Allocation Policy provision authorizing the reduction of allocations to resident hunters and guided hunters is a tool that can be used when an immediate conservation concern, backed by science, requires it, but not as a "major component of the reconciliation efforts" and without stakeholder input.

[122] The BCWF also submits that in a report entitled, *Strategy to Help Moose Restore Moose Populations in British Columbia, 2016* (the "Gorley Report"), Al Gorley made several recommendations, including recommending improving the precision of First Nations' harvest estimates. Further, the Moose Solutions Roundtable recently convened in the Cariboo Region made three main recommendations: planning and undertaking access management; developing an approach to understanding and addressing predator impacts; and, developing a common and accessible information platform (to include indigenous and local data) to inform decisions. Despite these recommendations, there are no clear "landscape objectives" for moose habitat or populations.

[123] The BCWF asks the Board to recommend that the Director adopt an inclusive approach in the future involving both stakeholders and First Nations.

Appellants' Reply Submissions

[124] The Group of Five Appellants submit that the Director's position appears to be that she is "free to make decisions based solely on what she feels is best" and that this provides exceptional hardship for those appellants who have booked hunts based on previous allocations and quota. They repeat their concern that the Director submitted to pressure from First Nations to reduce allocation and quota for guides, relied on anecdotal data from First Nations, and more heavily weighted feedback from them than from guide outfitters. The Group of Five Appellants reiterate their concern around the lack of accurate First Nations harvest reporting and dispute that there has been a substantial shift from unselective harvest to bull bias harvest by First Nations. The Group of Five Appellants repeat their concern that the Director's decision was "political" or "societal" and was not based on biological or scientific considerations. These appellants recognize the Province's duty to consult with First Nations but assert that duty has resulted in a "policy directive or to some degree and in some areas a veto". They reiterate that the decision is unfair.

[125] Tew submits that he observed the moose population in his guiding territory in September, October and November 2019, and his observations were mostly consistent with the 2019 composition survey. While he disagrees with Mr. Lirette's calf estimates, use of those estimates would still result in a bull to cow ratio above the provincial minimum requirement. Tew submits that his observations are "land based" and may be more accurate than the aerial-based surveys conducted by the Province.

[126] Tew asks the Board to consider the difficulty, stress, and frustration the Appellants face when appealing the Director's decisions. He submits that "this is far from a fair fight".

The Panel's Findings

[127] Wildlife management in British Columbia is regulated by a complex hierarchy of legislation (including the *Wildlife Act* and regulations under that Act), policies, and procedures. Although statutory decision-makers such as the Director must act in accordance with the applicable legislation, they may look to Ministry policies and procedures for guidance¹⁰ in the lawful exercise of their discretion. The Ministry's

¹⁰ I note that the Ministry web page sets out the reasoning behind its policies and procedures as follows: "Policies and procedures are designed to *guide* statutory decision-makers when exercising their decision-making authority, and to provide staff with direction on how to proceed when carrying out specific duties related to their position functions. In general terms, policies provide high level information on the principles and direction the ministry wishes to take with respect to a particular topic or issue. They are often quite broad in their context. Procedures, on the other hand, are more detailed, and generally describe processes to *assist* decision-makers in settling on final decisions, or detailing how staff should implement those decisions" (italics added):

<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/laws-policies-standards-guidance/environmental-guidance-and-policy/wildlife-policy>

wildlife policies and procedures (including guidelines) are intended to be used as tools to assist decision-makers and staff, not as restrictions to their statutory powers or discretion. A statutory decision-maker who blindly follows policy or procedure without regard to the facts of each case and the relevant law, may be accused of fettering her discretion. For example, in *Larry Hall v. Regional Manager* (2003-WIL-031, December 9, 2003), the Board held at page 10 that "By basing his decision on a policy that was never intended to take into account Mr. Hall's personal circumstances or his intentions in seeking a permit, the Regional Manager failed to take into account valid and relevant factual considerations, and fettered his discretion under section 19 of the *Wildlife Act* and section 3(2) of the *Permit Regulation*."

[128] It is in the context of the regulatory framework described above, that I make the following findings.

[129] I find that the Appellants, as licensed guide outfitters or owners of guide outfitting territories, have the exclusive right to guide non-resident hunters within the guiding territory stipulated on their license. That said, resident hunters with LEH authorizations may also hunt in guiding territories without a guide. Similarly, Aboriginal hunters with recognized Aboriginal rights may also hunt in guiding territories without guides.

[130] I find that the quota allocated in a guide outfitter's licence affords the guide's clients the lawful *opportunity* to harvest up to a maximum number of a species, such as moose, in a licence year. It is not a guarantee that the guide's hunters *will* be successful in harvesting that number of moose or indeed any moose at all, nor is it an *entitlement* to harvest the quota in a licence year. Further, a quota may be varied on an annual basis. I find that section 60(1) of the *Wildlife Act* expressly states that a regional manager (or in this case the Director) "may vary the quota for a subsequent licence year". Also, section 60(2) provides that a quota may be reduced or taken away in subsequent years if a guide outfitter exceeds her or his quota in a licence year. However, there is no parallel provision entitling a guide outfitter to an increase or maintenance of a quota based on underutilization of the quota in a licence year.

[131] I find that the Director must determine the appropriate quota, if any, annually, based on a number of considerations that are relevant to the conservation and sustainable management of the Province's wildlife resources. A starting point for determining quotas is to estimate the population and composition for the species concerned, in this case, moose, and the area concerned, based on the best available information.

[132] Based on the evidence, I find that, in determining the quota of bull moose that attached to the Appellants' licences, the Director considered the Ministry's policies respecting commercial hunting and game harvest management as well as the Ministry's procedures respecting allowable harvest, quota, administrative guidelines, big game harvest management and moose harvest management. I accept Mr. Lirette's evidence that the Ministry's wildlife management is guided by the Minister's Policy and the Ministry's February 2015 *Provincial Framework for Moose Management in British Columbia*. Accordingly, I find that the Director was further guided in her decision-making by those policies.

[133] I am satisfied, based on the evidence, that where the harvest of a particular species is considered to be sustainable, the Ministry's policy is to give priority first to local First Nations in recognition of their Aboriginal rights and title, then to BC residents, and finally, guided non-resident hunters¹¹. I accept the Director's submissions that in arriving at the quota allocation, she and her staff was guided by Ministry policies and procedures. I also accept the Director's evidence that while she considered the 2019 Cariboo Region Recommendations, as there was no consensus between regional staff and local First Nations, she weighed the Regional Recommendations together with the First Nation's recommendations before reaching her decision.

[134] The Province's commitment to reconciliation, as embodied in the *Declaration on the Rights of Indigenous Peoples Act* requires that consultation with First Nations occur early in the process and be meaningful. Further, where as here, local First Nations have established rights and title, more is required of the Crown when contemplating action that could significantly affect those rights (*Gamlaxyeltwx*). Still further, the TNG has the right to pass laws regarding management of resources on their traditional territory and, in the case of moose, the TNG has issued a ban on moose harvesting by anyone and gave notice of that ban to the Province and to the public. Still further, the Crown has entered into MOUs with local First Nations dealing, in part, with enforcement of the ban.

[135] The constitutional and contractual obligations of the Province to First Nations supersede Ministry policy. Further, that policy provides only for the allocation of harvesting opportunities to resident hunters and guide outfitters *after* a determination has been made as to the sustainable harvest of a species and *after* First Nations' needs to harvest moose for sustenance, ceremonial and cultural purposes.

[136] I have considered the concern voiced by each of the Appellants (except for Steinmaier and Brebner) that the Director failed to follow the Ministry's Harvest Allocation Policy. I have also considered the submissions of the Group of Five Appellants that, when determining quotas, the Director failed to follow Ministry policy (i.e., Policy 4.7.01.07 (Game Harvest Management)) and procedures (i.e., Procedures 4.7.01.07.1 (Big Game Harvest Management) and 4.7.01.07.3 (Moose Harvest Management)).

[137] I find that the Director is not legally obligated to adhere to Ministry guidance documents. She has discretion to deviate from the Ministry's recommended policies, procedures, and other guidance documents where, in the exercise of her discretion, she reasonably concludes that the circumstances warrant such a departure. In the absence of a consensus recommendation from staff and First Nations, and recognizing the Crown's obligation to meaningfully consult with affected First Nations and take active steps to address First Nations' concerns about the sustainability of any moose harvest, I am satisfied that the Director was obligated to, and did, consider the best-available data on moose population and demand for moose by indigenous and non-indigenous hunters before reaching her decision. If

¹¹ See for example "Big Game Harvest Management" policy paragraph 5. See also affidavits of Mr. Lirette and the Director regarding the Province's commitments to First Nations and the UNDRIP.

the Director were obligated to follow Ministry guidance despite disagreement from First Nations, this would undercut the consultation required of the Crown.

[138] I recognize that the Appellants believe that their evidence was not given the same weight as that of First Nations. The Board's function is to independently review the evidence and to weigh it appropriately and I have done so. I have considered the evidence that the Appellants provided regarding their observations of moose population in their respective guiding areas and the impact, if any, of the wildfires on that population. To the extent that the Appellants' observations differs from those of the region staff based on surveys and other data, I prefer those of staff.

[139] Further, I am satisfied, based on the evidence before me, that the Director was cognizant of the Province's fiduciary and other legal obligations to local First Nations, and properly considered the available information about their need for moose for ceremonial and sustenance purposes. To the extent that there are frailties in the information regarding First Nations' need for moose, I find that the Director properly erred on the side of conserving the resource. I would not interfere with her analysis.

[140] I am further satisfied that the Director properly considered evidence of a move to bull-only harvest by First Nations, together with the impact of successive years of wildfires on the moose population and habitat in the Cariboo Region.

[141] In reaching my decision, I recognize that the Appellants would have preferred that they were aware of the information provided by First Nations to the Director but, in the normal decision-making process, the Director is not obligated to share information upon which she bases her decision, including culturally sensitive information about the First Nations' moose harvest needs, information received from First Nations in confidence.

[142] I am mindful that the Appellants do not have the same resources as the Director to gather data that might support their appeals. I understand that they feel constrained in their ability to dispute the Director's evidence. I must, however, decide these appeals based on the best-available evidence before me. Based on the evidence, the Appellants have not met their burden of establishing that the Director erred in preferring the data resulting from composition and SRB surveys and from First Nations' surveys and affidavit evidence from TNG hunters over the Appellants' on-the-ground estimates. Based on the evidence before me, I would have done the same.

[143] In sum, I am satisfied that the Director properly considered the relevant legislation, policies and procedures when exercising her discretion to allocate quota to the Appellants and I confirm her analysis. This ground of appeal is dismissed.

3. Whether the Director considered irrelevant evidence or unsubstantiated claims in determining the allocations and quotas for (any or all of) the Appellants

The Appellants' Submissions

[144] The Appellants submit that the Director improperly considered the unsubstantiated concerns of local First Nations when determining the Appellants' quotas in the 2019 Decisions. Several Appellants made initial submissions in their Notices of Appeal with respect to this issue, and I have summarized those submissions below.

[145] Tew submits that "(t)he decision to go further than the regional manager's direction in cuts is unfounded and only intended to satisfy First Nations demands to decrease our quota and force us out of business". Tew also states that he "has no ill will to anyone". He lives in his guiding territory and has not observed the expected increase in hunting by First Nations that was stated as a reason for reducing his quota in 2017 and 2019. Tew submits that the six affidavits from TNG hunters referred to by the Director in her submissions supports his submission that many of the old (First Nations) hunters have passed on and the younger people are not hunting for moose as much. Tew questions who is hunting the 1,080 moose "put aside for Native Harvest". Tew also submits that First Nations (hunting) and guide outfitting "should go hand in hand" and the government should be facilitating that relationship.

[146] Linnell/Daily, G. Madley/Newberry, Fraser, and G. Madley/A. Madley submit that "the (Ministry) has not received the moose harvest rate data/material promised from the Tsilhqot'in Nation under the Nenqay Deni Accord but continues to accept harvest numbers from the Tsilhqot'in Nation and other first nations as fact and attributes statistical significance to those figures despite that complete lack of data and compliance with the terms of the Accord regarding provision of data".

[147] The Group of Five Appellants submit that the Director erred in basing her decision on "social concerns" and on "assumptions and conjecture". For example, in the "Reasons for decision: Moose quota and LEH in the Cariboo Region, 2018" (the "2018 Decision"), the Director stated that, in the absence of specific location of hunter effort or success for First Nations' hunters, she "assumed an even effort throughout the territory boundaries". She also assumed a maximum First Nation harvest (despite an indication by local First Nation representatives that they are not successful in achieving their needs) and a shift toward bull only harvest (despite a lack of data to support the assertion).

[148] The Group of Five Appellants further submit that, in contrast to the 2018 quota decisions, in the 2019 Decisions the Director assumed an "uneven" effort by First Nations throughout the region. She "notionally" reduced the AAH for resident and non-resident hunters by assigning between 1,100 and an unquantified number of moose to an estimated First Nation bull-only harvest of moose. The reduction in quotas and allocations is at odds with the 2019 Cariboo Region Recommendations. The Ministry has provided no information to the Appellants on First Nation harvest despite indicating in the 2019 Decisions that she had "sworn submissions" and a "formal recommendation" from First Nations. These Appellants submit that there is

not a “scintilla of evidence” available to them that local First Nations are having difficulty achieving their needs, it takes members longer to be successful, there is a requirement for the community to have one moose per four people, there is a shift to harvest of bull moose only, or that there are concerns about areas of potential overharvest.

[149] The Group of Five Appellants also submit that the Director erred in considering the draft recommendations in the UNDRIP in the 2019 Decisions. The Director is mandated to make biologically and scientifically based decisions rather than “social” decisions. The reduction in quota and allocation is “arbitrary and indefensible” and is designed to provide “acknowledgement of First Nation concerns”, it is purely “social” in nature. Further, First Nations’ concerns are canvassed in the 2019 Cariboo Region Recommendations. Game management is not mandated to be a “social experiment” or to favour any group over facts and scientific data. The 2019 Decisions are fatally flawed in that they confabulate “potential and speculative social results into scientific considerations”.

[150] Still further with reference to Bowden’s guiding territory, counsel for the Group of Five Appellants submits that there is not a demand by “multiple First Nations”. In fact, there is *no* demand by *any* First Nation in the territory. Similarly, counsel for the Five Appellants submits that with respect to the G. Madley/Newberry guiding territory, few First Nation members hunt any species in the area. He points to the appended letter from Mr. Charleyboy. Also, with reference to A. Madley/G. Madley, counsel for the Group of Five Appellants argued that the Appellants’ allocation should not be changed based on some unquantified demand by First Nations for the moose in the territory and all the biological factors to be considered. Additionally, the Director failed to consider legitimate “social” concerns such as contributions to the local economy and enhanced conservation values in her decision.

[151] The remaining Appellants made no explicit submissions as to whether the Director improperly considered irrelevant evidence or unsubstantiated claims in determining the allocations and quotas for any or all of the Appellants. However, William submits that the TNG laws are new for the Tsilhqot’in people and “they don’t follow those said policies fully”.

The Director’s Submissions

General

[152] The Director submits that, in 2019, Cariboo Region staff and several First Nations groups (including the TNG and SDNA) recognized that consensus recommendations to the Director were not achievable given the “large separation” between preferred management options. Specifically, regional biologists preferred to maintain 2018 harvest levels except in areas where new survey information suggested a change was needed. Conversely, First Nations groups indicated a strong preference for a total closure of licensed moose harvest in the Chilcotin Region. As a result, the regional staff and First Nations separately presented their preferred management options and rationales to the Director.

[153] The Director provided an affidavit in which she described her conception of her role in balancing First Nations concerns and biological considerations when making determinations relating to quotas. She referenced the Province's commitment to the full implementation of the UNDRIP, the TNG Neqay Deni Accord, the SDNA *Hubulhsooniats'Uhoot'alh Foundation Framework Agreement*, the Moose Co-Management Agreement with the TNG, and Memoranda of Understanding with the ?Esdilagh First Nation and Xení Gwet'in First Nations Government.

[154] The Director consulted with both the TNG and SDNA prior to making the 2019 Decisions. Both the TNG and SDNA were concerned about the moose population in the area, the impacts of wildfires on moose habitat, bull moose density and distribution below provincial minimum requirements, and the ability of their community members to meet their harvest needs. At an April 30, 2019 meeting, TNG representatives presented the Director with a harvest model that estimated community needs (one moose per four community members), harvest success, and projected TNG members' moose harvest. According to the Director's affidavit, she held this information in confidence, but considered it in making her quota determinations.

[155] Further, on May 17, 2019, the TNG notified the Director that the TNG had concluded that there should not be a LEH for moose in the Chilcotin portion of Zone 5 in 2019. The TNG further advised the Director that there was a Nation-level law banning the harvest of moose cow and calves.

[156] On May 30, 2019, the Director met with SDNA representatives and discussed the Director's (draft) decision and the terms of reference for a tri-partite Ungulate Working Group under the *Hubulhsooniats'Uhoot'alh Foundation Framework Agreement* regarding collaborative decision-making. On June 18, 2019, the SDNA provided the Director with their recommendations for the 2019 moose hunting season. The Director considered the recommendations and varied her decision regarding the quota for guides operating in MUs 5-02D and 5-13B.

[157] In addition, the Director considered several affidavits from TNG members regarding community bans on harvesting cow and calf moose. She also considered their focus on bull-only moose hunting, and the Province's commitments to First Nations groups through the UNDRIP, agreements and memoranda of understanding.

[158] The Director deposed that her approach to the 2019 quota decisions was also informed by events that occurred in late 2018 including: Minister-ordered closing of several MUs for set periods; the TNG Emergency Moose Protection Order banning LEH authorisations in certain areas of their traditional territory; and a joint TNG/SDNA press release banning LEH within their traditional territories with concurrent actions by TNG to pull cattle guards and blockade certain roads to prevent hunter access.

[159] The Director submits that, in accordance with Ministry policies and procedures and the Crown's duty, the Director is required to consult with First Nations before making any determination relating to allocations and quotas. The Crown's duty is clearly outlined in *Gamlaxyeltxw*, at paras. 125 to 128. Further, the Director maintains that she consulted as required by the Province's then

commitment to the UNDRIP and various MOUs and agreements between the Province and First Nations groups. The Director submits that she also considered the TNG Declared Title Area¹² as a strong factor supporting authorization (i.e. quota) reductions given that Aboriginal title confers the right to use, control and benefit of lands and the TNG may proactively manage, enact laws, and decide use of lands and resources on title lands.

[160] The Director submits that she reduced the Appellants' quotas based on concerns articulated by First Nations in consultation, and on the confidential needs data they provided to her, to account for the likely increase in the harvest of bull moose by First Nations. She anticipated that if quotas were not reduced, an overharvest of bull moose would result. Further, the Director maintains that the Appellants' multi-year notional allocation is not a guarantee that their clients can harvest that many animals within the specified time period; the allocation may change if there is a reasonable justification to do so. Updated survey information, the impacts of wildfires or disease on moose populations, and new information from First Nations are all reasons to update guide outfitter allocations midway through the allocation period. The Director submits that the ability to update multi-year allocations is essential to proper wildlife management.

[161] Finally, the Director submits that Mr. Lirette's affidavit confirms that the calculations for the Appellants' allocation and quota were completed accurately.

G. Madley/Newberry

[162] In specific response to submissions by G. Madley/ Newberry, the Director submits that their territory is mostly situated in the Chezacut and Nazko lakes areas and is not considered to be unusually remote.

[163] Further, in his affidavit, Mr. Lirette states that, contrary to the Appellants' submissions, wildlife harvest and management is not solely based on the tenets contained in procedure manuals. The 2019 Decisions required balancing biological, social and political considerations. The Cariboo Region staff fully expected that First Nations' feedback would be integrated into quota decisions, and that the final 2019 Decisions "would not necessarily align with the biological recommendations".¹³

[164] Mr. Lirette notes that the Ministry's Cariboo Region staff and several First Nations recognized in 2019 that they would be unable to reach a consensus on what to recommend to the Director. Regional biologists indicated a preference to maintain 2018 harvest levels except in areas where survey information indicated a need for change, whereas First Nation groups indicated a strong preference for a total closure of licensed moose harvest in the Chilcotin area. As a result, instead of a joint recommendation to the Director, each party presented their preferred management option to the Director.

[165] Regarding all other Appellants' territories, the Director submits that her decision to further reduce the already reduced quota and allocations recommended

¹² The TNG Declared Title Area is described in *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257.

¹³ See First Lirette affidavit (February 14, 2020) at para. 72 rather than para. 68 as per the Director's February 18, 2020 submissions.

by staff, was made based on specific considerations relating to First Nations' concerns and the shift to bull only harvesting. Moose population modelling completed in 2018 clearly demonstrated the significant effect that the shift in harvest (from unselective to a bull bias harvest) had on the bull to cow ratio of a population¹⁴. The Director submits that this is not speculative, nor is it conjecture or an assumption; it is science-based. According to Mr. Lirette's first affidavit, the shift is evidenced by the cow moose signage project (a project by a local resident to increase awareness of the importance of cow and calf moose to the health/sustainability of moose populations), MOUs between First Nations communities and Conservation Officers Service prohibiting cow moose harvest, and anecdotal reports from meat cutters as to the substantial shift to bull moose over the last five years.

Bowden

[166] In specific response to Bowden's submissions, the Director submits that it is inaccurate that the UNDRIP policies were only in draft form when the Director made the 2019 Decisions. The *Declaration on the Rights of Indigenous Peoples Act* came into force on November 28, 2019¹⁵. Regardless, the Ministry's focus and mandate when the Director made her decisions was guided by the UNDRIP.

[167] The changes to MU 5-02D, which Bowden's territory overlaps, were primarily implemented as a result of First Nations' feedback as described in the Director's rationale for the 2019 Decisions. The Director clarified that the Ministry does not assert that First Nations' harvest has completely shifted to bull moose, but it has shifted by an impactful degree. The Director submits that Bowden's territory is overlapped by multiple First Nation's traditional territories. Given the shift by local First Nations to hunting bull moose and the significant overlap between Bowden's territory and First Nations' traditional territories, it is reasonable to conclude that bull to cow ratios would be affected in Bowden's territory.

Tew

[168] In specific response to Tew's submission, the Director submits that Tew's submission that his original quota was 10 moose is an error, and he likely meant to refer to his 2017-2021 *allocation*, which decreased from 10 in 2017 to nine in 2018. His quota was three in 2017 and 2018, but his quota was reduced to two in 2019.

[169] Further, in response to Tew's submission that his observations of the moose population in his territory ought to carry more weight than population estimates by government and First Nations, the Director submits that Tew has not indicated how many moose he observed and classified to support his assertion. During the 2019 composition survey in MU 5-12A, 212 moose were observed, of which 210 were classified. The Director considers aerial survey results to be more reliable than Tew's ground-based observations.

Brebner

¹⁴ See First Lirette affidavit at paragraph 68.

¹⁵ Among other things, it states that it "affirms the application of" the UNDRIP "to the laws of British Columbia".

[170] The Director submits that Brebner's territory has significant overlap with the TNG Declared Title area. The Director submits that all calculations for Brebner's allocation and quota are accurate. Reductions in allocation and quota were only applied to those portions of guide territories which are within the LEH zones affected by the 2019 Decisions.

[171] The Director rejects Brebner's submission that there was inadequate consultation with guides in a timely manner. As noted above, the Director notified guides in December 2018 that she was not in a position to provide interim quota for moose. On June 12, 2019, she provided a summary spreadsheet of quota by guide territory, and her final decision followed in the approved licence for each guide outfitter.

[172] As to Brebner's submissions regarding predator control, the Director submits that the Ministry's *Control of Species Policy* (2006) does not support managing native species (e.g., wolf and bear) for the purpose of enhancing ungulate populations (e.g., moose).

[173] Regarding Brebner's submission about the Ministry's alleged lack of strategies for mitigating the impacts on guide outfitters of reductions in their allocations or quotas, the Director advises that the Ministry has not applied mitigation measures such as the 'hardship rules' since 2016.

William

[174] The Director submits that it is unclear, from William's submissions, what aspect of the 2019 Decisions is problematic for William. The Director infers that the issue is First Nation's feedback and the community harvest restrictions.

Steinmaier

[175] In response to Steinmaier's submissions, the Director submits that the Nazko First Nation Traditional Territory completely overlaps Steinmaier's guiding territory. Results from individual First Nations' harvest surveys were used to inform estimates of First Nations' harvest and needs, but the survey results are kept confidential. Further, in response to Steinmaier's submissions regarding the moose population article co-authored by Mr. Lirette, the Director submits that the paper was provincial in scale and did not address the specific availability of First Nations' harvest information within individual regions or GMZs.

Fraser

[176] In response to Fraser's submissions that the decision to reduce quotas was based on "speculative social results", the Director submits that it is incumbent on the Province to engage in equitable decision-making and attempt to reach consensus with First Nations around resource management in the region. These obligations coexist with the tenets contained in the Ministry's procedure manuals. The Director repeats her assertions regarding the Province's commitments under the Nenqay Deni Accord.

[177] As to Fraser's submissions regarding the lack of reliable data from First Nations on which the Director could rely, the Director submits Mr. Lirette attested

that he gave assurances to First Nations that information they provided would be held in confidence.¹⁶ Mr. Lirette attested that, in some instances, his assurance was the only way to encourage First Nations communities to participate in the harvest survey.

Linnell/Daily

[178] As to the submissions from Linnell/Daily that duplicated the submissions from Fraser and Bowden, the Director relies on her submissions in response to those Appellants.

A. Madley/G. Madley

[179] The Director maintains that her submissions in response to G. Madley/Newberry and Bowden apply equally to the appeal of A. Madley/G. Madley, as their territories overlap.

Yarish

[180] Yarish made no specific submissions on this issue.

BCWF's Submissions

[181] The BCWF submits that it is concerned over the "lack of substantiated evidence of First Nations' food, social and ceremonial needs for moose." The basic proposition that the First Nations require more moose and a needs analysis of one moose per four individuals was used "without linking the quantity of moose allotted in any objective way to satisfying First Nations' needs or alternative approaches to do so over time." The BCWF further submits that regional continuity in application of science has been eroded by the Director's "embracing First Nations engagement and advice without adequate policy or scientific verification".

[182] The BCWF submits that it is concerned that the Director focused on broad considerations such as reconciliation and consultation. There is a need for better data related to First Nations harvest that has been recognized in the Gorley Report.

[183] In addition, the BCWF submits that the Director's 2019 Decisions failed to consider whether there were elk available for First Nations harvest that could contribute to the First Nations' needs while reducing their reliance on moose.

Director's response to BCWF

[184] The Director submits that it is inaccurate to say there is a "lack of substantiated evidence of First Nations' food, social and ceremonial needs for moose". The Cariboo Region has a long history of completing First Nations' wildlife harvest surveys. GMZ-level estimates of First Nations' harvest needs are calculated by combining the estimates for all First Nations communities that conduct traditional harvest activities within the GMZ. Where communities overlap GMZs, Ministry staff divides the community need based on the Ministry's "best understanding" of what proportion of the First Nations' community harvest occurs in

¹⁶ See Lirette Affidavit of February 14, 2020 at para. 97

each area. Specific First Nation needs are calculated on a per capita basis. For those First Nations that do not have survey information available, Ministry staff uses the per capita need calculation for “similar”¹⁷ nearby First Nations.

[185] The Director further submits that in 2016, the per capita need for moose by First Nations in the region averaged 7.5 registered First Nation members per moose. The Ministry, in collaboration with First Nations in the region, were carrying out additional wildlife surveys in February and March 2020. Species abundance is only one factor affecting First Nations’ success rate in harvesting wildlife; transportation and equipment costs, traditional bereavement practices, access, habitat condition, wildlife distribution, and weather are also contributing factors.

[186] The Director submits that government has completed or is planning multiple moose recovery initiatives that align with the Moose Solutions Roundtable’s priorities including deactivation of roads, rehabilitation projects, landscape and forest harvest planning and prescription, planting of preferred moose browsing species and forest stewardship plans that incorporate moose habitat protection.

The Appellants’ Reply Submissions

Steinmaier

[187] In reply to the Director’s submissions, Steinmaier submits that the Director’s decision regarding his quota and allocation “was purely political”, and amounted “to just push(ing) numbers around on paper from one group to another” and has “nothing to do with conservational concerns”.

The Group of Five Appellants’ reply submissions

[188] The Group of Five Appellants essentially repeat their initial submissions in their final reply. In brief, they submit that the Director seems to believe that “she is free to make decisions based solely on what she feels is best”. They repeat their submissions regarding the lack of transparency in the decision-making process. The Director has not balanced the rights of all stakeholders. These Appellants submit that the Director’s use of “confidential” needs data from First Nations is “exceptionally troubling”. They submit that labelling information as “confidential” could result in the Director using such information to justify almost any decision. They urge the Board to not consider such evidence as reliable.

[189] These Appellants further submit that it is difficult for them to discharge their onus of proof in these appeals considering the “dearth of scientific data available to the Appellants” and given that the decision-maker has based her decision on “societal issues rather than scientific ones”. It is impossible for them to provide evidence to satisfy the Board that the Director’s decision is “anything other than political”¹⁸ as there is no empirical evidence available to them.

¹⁷ A First Nation is considered “similar” where both communities are exercising their Aboriginal right to harvest wildlife in similar habitats with similar availability of alternate sustenance, such as salmon.

¹⁸ Ibid., at paragraph 39.

[190] In sum, the Group of Five Appellants submit that the Director's decisions are unfair and capricious.

The Panel's Findings

[191] I find that the Director did not err in consulting with and considering the needs and concerns of First Nations before she made the 2019 Decisions.

[192] As I have already found, and as the Board has previously recognized, when the Crown contemplates making a decision that may affect the rights of Aboriginal people, the Crown has a duty to consult with the Aboriginal people, and if appropriate, accommodate their rights (e.g., see *Chief Sharlene Gale on behalf of the Fort Nelson First Nation v. Assistant Regional Water Manager*, Decision No. 2012-WAT-013(c), September 3, 2015). As noted by the Director, the Supreme Court of British Columbia reiterated the Crown's duty to consult in *Gamlaxyeltxw*, at paras. 125-128.

[193] The Crown's obligation to consult with Aboriginal people differs from any obligation that may exist to consult other stakeholders when considering matters of resource (including wildlife) management. This is because of the special nature of Aboriginal rights. The courts have explained that when the Crown acquired title to land in British Columbia at the time of sovereignty, that title was burdened by the pre-existing legal rights of Aboriginal peoples who used and occupied the land before Europeans arrived. Aboriginal rights remain valid unless extinguished by treaty or otherwise, and section 35 of the *Constitution Act, 1982* recognized and affirmed existing Aboriginal rights (see *Gamlaxyeltxw*, at para. 115). The Crown's mandate emanating from section 35 of the *Constitution Act, 1982* is to act honorably and in a fiduciary capacity in order to respect the fact that Aboriginal peoples were never conquered; the Crown's sovereignty must be reconciled against that fact (see *Gamlaxyeltxw*, at para. 130).

[194] What constitutes "adequate" consultation with First Nations varies depending on the circumstances (see *Gamlaxyeltxw*, at para. 127). In this instance, the TNG's Aboriginal title and rights have been recognized by the courts and exist in areas that overlap with some of the Appellants' guiding territories. Other First Nations in the Cariboo Region claim Aboriginal rights to hunt in areas that also overlap with some of the Appellants' guiding territories. The Province has entered into agreements¹⁹ with local First Nations that acknowledge their rights and commit to collaborative decision-making in wildlife management.

[195] I have considered that the Province has enacted the *Declaration on the Rights of Indigenous Peoples Act*, which states that it "affirms the application of" the UNDRIP "to the laws of British Columbia. For the purpose of this decision, however, I do not find it necessary to consider the UNDRIP further.

[196] I find that the Appellants are mistaken in their view that the Director's decision-making is somehow a mere "social" or "political" exercise because she

¹⁹ See e.g. Hubulhsooninats'ihoot'alh Foundation Framework Agreement between the Province and the SDNA, dated July 22, 2018; See also, Moose Co-Management Agreement between TNG and the Province, dated September 28, 2018.

consulted with, considered, and gave weight to the views of local First Nations. I find that the Director carried out the Crown's obligations to First Nations in the region, including First Nations with recognized Aboriginal title and hunting rights. It is not a mere nicety that the Director consult extensively or *deeply*²⁰ and carefully weigh the views of Aboriginal communities. It is a legal requirement.

[197] I find that the Director acted in accordance with the Crown's fiduciary duty when she met, repeatedly, with the TNG and other local First Nations, and when she gave weight to their views in her decision-making.

[198] Under section 59(3) of the *Act*, a guiding certificate grants the holder "the exclusive control over guiding privileges in the area described in the certificate for the period stated in the certificate". A guiding certificate does not grant a legal right to harvest any particular species, or a right to a particular allocation or quota for a species. Similarly, section 51(2) of the *Act* states that 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". It does not say that a guide outfitter licence grants a "right" to those species of game described in the licence. Under section 2(3) of the *Act*, a person (other than a person exercising an Aboriginal right to hunt) only acquires a right of property in wildlife if the person "lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations".

[199] Any consultation that the Director may choose to have with the Appellants and resident hunters is grounded in the Province's commitment, as set out in policy and procedure, to consider the public's interest in harvesting moose for social and economic purposes. I have already found that the Director properly considered Ministry policies and procedures in her decision-making process. I further find that her consideration of the needs and concerns of First Nations is not an "irrelevant" consideration. It is highly relevant.

[200] Having found that the Director properly considered the needs and concerns of local First Nations, I am also mindful that the Appellants are being asked to accept a decision made, at least in part, on information which has been withheld from them. I appreciate that the Director may have committed to First Nations, during the consultation process, to keep certain information in confidence. It may be that information regarding sensitive cultural practices or needs of a particular community should be protected. That ought not to be interpreted by the Director as a reason to withhold *all* information received from First Nations regarding their concerns for the moose population and their harvest needs. In my view, it is in the public interest and would add credibility to the decision-making process, if the Director shared general, if not specific information. This may mean that the Director shares regional information and concerns, or information that is general to First Nations, collectively, rather than Nation-specific information.

[201] I find that the Director did not treat the concerns of the local indigenous population as a "veto" of the allocation of moose quota to the Appellants. If she had, the Appellants would have no quota at all, as First Nations made it clear to her that they would have preferred a moratorium on moose harvest in the Cariboo Region. I find that it was relevant for the Director to first consider conservation

²⁰ *Gamlaxyetxw*, at para. 128.

needs and, in doing so, to consider the concerns of First Nations regarding the regional moose population. She was obligated to then consider the First Nations' need for moose for sustenance and ceremonial purposes, and finally, to balance those considerations with the interest of resident hunters and the Appellants.

[202] I understand that the Appellants are frustrated with the lateness of the 2019 Decisions, the Director's receiving information "in confidence" and, ultimately, with the diminution of their quota. While more could be done by the Director to improve the transparency, timeliness, and acceptability of the decision-making process, I find that the Director's consideration and weighing of the concerns and needs of local First Nations was justified.

[203] I find that the Appellants have not discharged their onus of establishing that the quota reductions are unjustified or capricious.

[204] This ground of appeal is dismissed.

4. Whether the Appellants ought to be compensated, or a mitigation strategy ought to be administered by the Director, in future, to address reductions in the Appellants' allocations and quotas.

The Appellants' submissions

[205] All of the Appellants but for Tew and Nell/William made submissions with respect to the issue of compensation or a mitigation strategy to provide them with relief from the Director's decisions.

[206] For example, in his submissions, Steinmaier requests compensations for the decline in his moose quota and lost revenue since he bought part of his territory from the provincial government in 2004. Brebner seeks "some kind of mitigation strategy if I am further unable to access moose in the (TNG Declared) Title Area.

[207] The Group of Five Appellants ask the Board to "increase the quota of bull moose for 2019 and for the remainder of the allocation period... in compensation for the missed 2019 season given the allocation and quota numbers were not provided until June".

[208] Yarish submits that he has been "pretty much unable to use (his territory)" since he purchased it. He submits that he originally had quota to hunt three caribou and seventeen moose, and now has no quota for caribou and only two for moose. He submits that he would lose money if he were to conduct only two moose hunts per year. Further, he submits that no guide outfitter would be able to book their hunts two months before the season starts. Most of his area is not accessible by vehicle because certain areas are closed to motor vehicle access for hunting. His clientele is mostly older and unable to hike or horseback. Yarish submits that he ought to have his quota reinstated or be given his "money back" for the purchase of the area.

Director's Submissions

[209] The Director did not make any submissions that directly respond to the Appellants' requests for compensation, a compensatory quota, or a mitigation

strategy to address their alleged losses arising from the decline in their moose quota and allocation.

[210] The Director submits that, for information purposes, the Board may wish to consider that Yarish's guiding territory neighbours Newberry's guiding territory, and both territories overlap portions of MU 5-12A and 5-13A. In his (third) affidavit dated May 27, 2020, Mr. Lirette deposes that the prohibition against using motor vehicles for hunting in MU 5-12 was implemented in 2018 to manage the vulnerability of moose to hunting following the 2017 wildfires. Cariboo Region staff have proposed removing the prohibition for the 2020 hunting season, but no decision has been made. That said, Yarish may use licensed motor vehicles within the portion of his territory in MU 5-13A. The Director implies that removing the prohibition against using motor vehicles may be a mitigation strategy.

The Panel's Findings

[211] The Board's powers in an appeal under the *Act* are set out in section 101.1(5) of the *Act* and are described at the beginning of this decision. The Board has no jurisdiction under section 101.1(5) of the *Act* to order the Director to pay compensation, or to direct the Director to issue a "compensatory" quota, to a guide outfitter whose quota or allocation has been reduced.

[212] I find that Appellants' request for compensation or a mitigation strategy is outside of the Board's jurisdiction, and therefore, is dismissed.

DECISION

[213] In making this decision, I have carefully considered all the submissions and arguments made by the parties, whether or not they have been specifically referenced in this decision.

[214] For the reasons provided above, I find that the appeals ought to be dismissed, and the Director's 2019 Decisions should be confirmed.

"Brenda L. Edwards"

Brenda L. Edwards, Panel Chair
Environmental Appeal Board

August 14, 2020