



Environmental Appeal Board

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DECISION NO. 2018-WIL-006(a)

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

BETWEEN:	Chris Condie	APPELLANT
AND:	Director of Wildlife	RESPONDENT
AND:	British Columbia Wildlife Federation	PARTICIPANT
BEFORE:	A Panel of the Environmental Appeal Board: Linda Michaluk, Panel Chair	
DATE:	Conducted by way of written submissions concluding on February 20, 2019	
APPEARING:	For the Appellant: Self represented For the Respondent: Meghan Butler, Counsel For the Participant: Gerry Paille	

APPEAL

[1] The Appellant, Chris Condie, is a licensed guide outfitter holding Guide Outfitter Licence 100001000 (the "Licence"). The Licence authorizes the Appellant to guide persons to hunt game within the areas set out in Guiding Territory Certificate ("GTC") 500940. The Appellant holds GTC 500940 with Frank McFadden. GTC 500940 spans areas of the Cariboo Region (Region 5) and the Thompson Region (Region 3), but falls primarily within Management Unit ("MU") 5-01, which is within Game Management Zone ("GMZ") 5B in the Cariboo Region. This appeal concerns only the portion of GTC 500940 that is within the Cariboo Region.

[2] In a decision dated September 4, 2018, the Respondent, Jennifer Psyllakis, the Director, Fish and Wildlife Branch, Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), revised the Appellant's 2017-2021 notional allocation, and issued the Appellant's quota for the 2018/19 licence year, for harvesting bull moose in the portions of his guiding territory that are within the Cariboo Region (the "Decision"). The revised 2017-2021 notional allocation is 10 bull moose, and the 2018/19 quota is three bull moose.

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

(5) 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 appealed could have made, and that the board considers appropriate in the circumstances.

[4] The Appellant requests that his 2017-2021 notional allocation and 2018/19 quota be reinstated to the previous amounts of 16 and five bull moose, respectively. In the alternative, he requests that the matter be sent back to the Respondent with directions to reconsider the 2018/19 quota.

[5] The Respondent asks that the appeal be dismissed.

[6] On January 16, 2018, the Board granted the BC Wildlife Federation ("BCWF") Participant status in this appeal. The BCWF represents resident hunters in the Province. The Board limited the BCWF's submissions to addressing the potential impacts of this appeal on the Provincial Wildlife Harvest Allocation Policy and the interests of the members of the BCWF. The BCWF supports the Respondent's position and asks that the appeal be dismissed.

BACKGROUND

Guide Outfitter Licences and Quotas

[7] Every year, guide outfitters apply to the Ministry to renew their guide outfitter licences and to request a hunting quota for specific animal species. The Ministry's quota decisions have been appealed to this Board numerous times.

[8] 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: *Findlay v. Deputy Regional Manager, Recreational Fisheries and Wildlife Program (Thompson/Okanagan Region)*, (Decision No. 2013-WIL-033(a), April 24, 2014; *Robert J. Cutts v. Deputy Regional Manager*, (Decision No. 2013-WIL-024(a), July 17, 2014); *John Parker v. Deputy Regional Manager (Kootenay/Boundary Region)*, (Decision No. 2017-WIL-(011(a), September 29, 2017), and *Newberry v. Deputy Regional Manager (Cariboo Regional Operations Division)*, (Decision No. 2017-WIL-005(a), February 1, 2018)).

[9] The Panel, therefore, will not provide a detailed review of all of the legislation, policies and procedures applicable to hunting and guiding in the Province. Instead, the Panel has briefly summarized the legislation and policies relevant to this appeal. The following sections of the *Act* apply to the Decision made by the Respondent.

[10] 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.

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

[12] "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.

[13] A regional manager has discretion under the *Act* to grant licences to guide outfitters, to set quotas for the harvesting of specific species, and to determine the areas within a guide outfitter's territory within which that harvesting may occur. These decisions are made within a framework based on sustainable harvest and conservation of wildlife species.

[14] In order to allow guide outfitters to plan their commercial operations in advance, allocations for each guide outfitter are set out in five-year blocks. The allocation establishes the maximum number of animals the guide's clients may harvest over that period, while quotas establish the number of animals that a guide's clients may actually harvest in a given year. Quotas attach to a guide's licence and apply during the licence year, or part of it.

[15] The five-year allocation is determined after certain information is gathered and analyzed by the Ministry. Specifically, the Ministry determines the animal population, 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. The remaining available harvest, known as the Annual Allowable Harvest ("AAH"), is then split between resident hunters and non-resident (guided) hunters on a percentage basis.

[16] Prior to 2015, Ministry policy allowed the percentage of the AAH split between the resident and non-resident hunter groups to be adjusted during the five-year allocation period to account for either the over- or under-harvest by the hunter groups, among other things. However, for certain species, including bull moose, this changed on February 6, 2015, when the then Minister of Forests, Lands and Natural Resource Operations released a revised decision on wildlife harvest allocations that created fixed "splits" for bull moose hunts between resident and non-resident hunters (the "Minister's Policy"). In Region 5, resident hunters were allocated 75% of the AAH for bull moose, and guided (non-resident) hunters were allocated the remaining 25%.

[17] 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 guided by Ministry policies and procedures.

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

[19] When the Ministry decides that it is necessary to limit hunters in a certain area, to limit the number of animals that may be taken, or to 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 (section 8).

The Appeal

[20] In December 2016, the Appellant was notified that, in the Cariboo Region, his 2017-2021 allocation was 16 moose, and his 2017/18 quota was five moose.

[21] In the September 4, 2018 Decision, the Appellant's allocation and 2018/19 quota in the Cariboo Region were reduced to 10 and three moose, respectively.

[22] On September 19, 2018, the Appellant appealed the Decision on the following grounds:

1. by failing to notify the Appellant of his 2018 quota until September 21, 2018, the Respondent effectively denied the Appellant the right to meaningful due process as generally facilitated by the appeal process and thereby breached the fiduciary duty owed the Appellant; and
2. the Respondent's decision incorporates an incorrect calculation of quota.

[23] The Appellant requests that his 2017-2021 notional allocation and 2018/19 quota of moose be reinstated to their previous amounts; in the alternative, he asks that the matter be sent back to the Respondent with directions to reconsider the 2018/19 quota.

[24] In support of his appeal, the Appellant filed a written submission which included 10 exhibits, as well as various emails and two reports: Cariboo Region 2018 Composition Surveys Report, August 2018, prepared by Carla Grimson of the Ministry (the "Grimson 2 Report"); and, Thompson Moose Composition Surveys Winter 2013, March 2013, prepared by Francis Iredale and Chris Proctor for the Ministry.

[25] The Respondent maintains that Director's revision to the Appellant's notional allocation of moose over the remaining four years of the five-year allocation period is not a statutory decision capable of appeal under the *Act*, and further, that the Director reasonably exercised her discretion under the *Act* in issuing the moose quota for the 2018/19 licence year. The Respondent submits that the Decision duly considered all material facts including current composition surveys of the bull/cow

ratio, is procedurally fair and consistent with Ministry policies and procedures, does not contain any appealable error in judgement or in law, and that the Appellant has not identified any alternative approach that would meet the Ministry's prime conservation objectives in policy and law. The Respondent requests that the appeal be dismissed.

[26] In support of her written submissions on the appeal, the Respondent filed a number of documents and two affidavits:

- an affidavit sworn on February 12, 2019, by the Respondent, Jennifer Psyllakis (the "Psyllakis affidavit"); and
- an affidavit sworn on February 12, 2019, by Daniel Lirette, Senior Wildlife Biologist, Fish and Wildlife Section, Cariboo Region of the Ministry (the "Lirette affidavit").

[27] The BCWF submits that the Respondent relied on the best science available when estimating the bull to cow moose ratio in MU 5-01, and correctly applied the allowable harvest rate, the resident/non-resident allocation split, and the Administrative Guidelines provisions. The BCWF recognizes that reducing allocations to both resident hunters and guided hunters is a tool that can be used to help when there is an immediate conservation concern backed by science.

ISSUES

[28] The main question before the Panel is whether the Appellant's 2017-2021 notional allocation of 10 moose and 2018/19 quota of three moose should be increased to 16 and five moose, respectively. In deciding that question, the Panel has considered the following issues:

1. Whether the Respondent complied with the *Act* and any other applicable legal requirements in notifying the Appellant of the Decision.
2. Whether the Respondent properly considered and applied the relevant Ministry policies and procedures, and correctly calculated the 2018/19 quota.

[29] The Respondent raised a further issue, by arguing that allocations are not appealable decisions under the *Act*. However, the Panel notes the Board has previously considered that issue, and concluded that allocations are appealable decisions under the *Act*: *Kevin Newberry v. Deputy Regional Manager* (Decision No. 2017-WIL-005(1), February 1, 2018), at paras. 89 - 93. Consequently, the Panel need not discuss that issue any further.

DISCUSSION AND ANALYSIS

1. Whether the Respondent complied with the *Act* and any other applicable legal requirements in notifying the Appellant of the Decision.

Appellant's Submissions

[30] The Appellant submits that the duty to act fairly is a keystone of any civilized society, and the Ministry has recognized this by way of their many policies

acknowledging the necessity of informing licensees of significant decisions in a timely way. The Appellant further submits that he was not properly notified of his quota until September 21, whereas in previous years, he usually received notice by registered mail in January or February, and by March at the latest. The Appellant contends that by failing to inform him of his quota until September 21, the Respondent did not meet its fiduciary duty, because his right to meaningful due process as facilitated by the appeal process was not practicable.

[31] Regarding the timing of the Decision and the concept of fairness, the Appellant notes that section 101(1) of the *Act* provides:

- 101** (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects
- (a) a license, permit, registration of a trapline or guiding territory held by a person, or
 - (b) an application by a person for anything referred to in paragraph (a).
- (1.1) The regional manager must give written reasons for a decision made under section 61(1.1) (a) or (b).
- (2) Notice of a decision referred to in subsection (1) or (1.1) must be given to the affected person.
- (3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, the notice is conclusively deemed to be served on the person to whom it is addressed on ...

[32] The Appellant argues that delivery of an important quota decision via "random" email, which may or may not be delivered to a spam folder or an incorrect or unused email address, is unacceptable and contrary to section 101 of the *Act*.

[33] In reply to the Respondent's argument that the government owes no fiduciary duty to the Appellant, the Appellant contends that *Chingee v British Columbia*, 2017 BCCA 250 [*Chingee*], which is discussed below, is not a complete and final authority on the Crown's fiduciary duty. The Appellant argues that, in *Chingee*, the court did not dismiss the concept that the Crown had a fiduciary duty in certain circumstances, but in that case held that "the pleadings are generic and insufficiently precise". The Appellant refers to paras. 61, 64, and 66-67 of *Chingee* in support of his argument.

Respondent's Submissions

[34] The Respondent concedes that there was a delay in notifying all Region 5 guide outfitters, including the Appellant, of the 2018/19 quotas. The Respondent contends, however, that the delay was not arbitrary; it was the cumulative result of the timing of moose population surveys and the lengthy consultation with affected First Nations.

[35] The Respondent submits that all Region 5 guide outfitters, including the Appellant, were sent an email on December 19, 2017, advising that quota decisions

would now be made by the Director. The email also set out other actions being undertaken, and included tentative 2018 quota numbers. On April 11, 2018, when it was clear that there would be further delay, all Region 5 guide outfitters were advised by email of the status of the Respondent's deliberations and options under consideration.

[36] In terms of why the quota decision was not available until June 2018, the Respondent provided affidavit evidence that she was directly involved in the Ministry's negotiations with the Tsilhqot'in National Government ("TNG") respecting Region 5. Consultation with TNG respecting the 2018/19 quota decisions for Region 5 began shortly after the close of moose hunting season in November 2017, and concluded in about June 2018.

[37] The Respondent attests that the Ministry made a commitment to the TNG that there would not be any decisions on moose quotas for 2018/19 in Region 5 without the full benefit of the moose composition surveys completed in February and March 2018, which in itself had the effect of delaying the quota decisions.

[38] According to the affidavit evidence of Mr. Lirette, while the Respondent was involved with the TNG consultation, consultation was also underway at the regional level with the Northern Secwepemc te Qelmucw ("NStQ") First Nation, which has asserted claims over lands that fall within MU 5-01. After discussion regarding the 2018 moose survey results and options for recovery, the consistent feedback received from the NStQ representatives was to implement a 50% reduction in the licensed bull moose harvest in several areas including MU 5-01 for two to three years, with monitoring, to track recovery. The NStQ consultation concluded in May 2018.

[39] Regarding the results of the moose population surveys conducted in February and March 2018, Mr. Lirette attests that he had access to the draft analysis in June 2018, and used this information as the basis for his quota recommendations to the Respondent, who then made the final quota decisions.

[40] On June 14, 2018, after consultation with First Nations concluded, the Appellant and all other Region 5 guide outfitters were notified via email of their 2018/19 quotas in their respective territories. The Appellant's revised notional 2017-2021 allocation and 2018/19 quota in the June 14, 2018 email were the same as those provided in the Decision issued in September 2018.

[41] The Respondent contends that as the only guide outfitter licence holder in GTC 500940, the Appellant had *de facto* notice of his quota on June 14, 2018. The Respondent submits that section 101 of the *Act* requires the Director to give written reasons for a decision that affects a GTC or licence, and to deliver those written reasons to the affected person; the June 14, 2018 email met those statutory requirements.

[42] The Respondent further submits that it is clear the Appellant received the June 14, 2018 email given email correspondence on June 25, 2018, concerning his request for information that had been provided to Respondent regarding the MU 5-01 moose populations.

[43] Regarding the September 4, 2018 Decision letter, the Respondent submits that while the Appellant may have retrieved his registered letter copy of the Decision on September 21, 2018, an electronic copy of the Decision was delivered to the Appellant on September 4, 2018.

[44] The Respondent argues that the Director owes no fiduciary duty to the Appellant, or to any person who holds a licence, permit, registration of a trapline or guiding territory certificate when statutory decisions are made respecting any of these things. The Respondent does not accept that the an acknowledgement of the importance of notifying guides of their annual quotas as early as practicable creates a fiduciary duty, where the BC Court of Appeal has found none to exist in the overarching scheme of the *Act*: *Chingee*.

BCWF's Submissions

[45] The BCWF submits that the requirement for current population data, collaboration with First Nations, and engagement with stakeholders were seemingly the cause of a delay on the decisions for both guided hunter quotas and the final number of resident hunter LEH authorizations. The number of LEH authorizations for the zones in question appeared in the 2018/2019 synopsis that was released in April 2018 as "To Be Determined", which created uncertainty for resident hunters.

[46] The BCWF submits that the June 14, 2018 email to the Cariboo Region Wildlife Advisory Committee, which includes guide outfitters, the BCWF, and other stakeholders, made it clear that the zone where the Appellant operates was going to be impacted by 50% for both guided hunters and resident LEH opportunities.

[47] The BCWF submits that the timing of decisions around guided hunter quotas impacts an outfitter's ability to market hunts, but resident hunters are also impacted by the timing of such decisions, as holidays need to be booked with employers (in the case of shared or group hunts for multiple people) and trip arrangements have to be made in advance.

Panel's Findings

[48] The Panel finds that the 2018/19 moose quota decisions were made and released significantly later than usual, and the reasons for this were twofold: First Nations consultations; and, the timing of the moose population surveys.

[49] The evidence shows government-to-government and regional First Nations consultations were ongoing between November 2017 and June 2018. The moose surveys were undertaken in February and March 2018, draft analysis was available in June 2018, and the reports were finalized and published in August 2018. Mr. Lirette had access to, and used, draft analysis of the data in June 2018 as the basis for his quota recommendations to the Respondent. The Respondent accepted the recommendations, and notified the Appellant by email of his revised 2017-2021 notional allocation and 2018/19 quota decisions on June 14, 2018.

[50] In assessing the timeline, the Panel finds that the Respondent needed to abide by the Ministry's commitment not to assign quotas without the moose survey information. The Panel also finds that although the Appellant's guide outfitter territory may not fall within the TNG territory *per se*, it was captured within the

consultation framework. Further, the Panel finds that those waiting for quota decisions were kept informed as the process proceeded. Everyone involved, including the Appellant, was aware that the quotas were going to be assigned significantly later than usual, and knew the reasons why.

[51] In terms of notification, the evidence is clear that while the Appellant may not have retrieved his registered letter copy of the Decision until late in September 2018, the Appellant received the June 14, 2018 email which set out the same information regarding his revised 2017-2021 notional allocation and 2018/19 quota. Section 101 of the *Act* requires that written reasons for decisions such as this must be given to the affected person, but giving notice by registered mail is not mandatory. Section 101(3) states that notice “may” be by registered mail; it does not state that notice “must” be by registered mail. The Panel finds that written reasons were provided to the Appellant via email as early as June 2018, in compliance with section 101 of the *Act*.

[52] The Panel also finds that this was an incredibly late notification for these kinds of decisions. This does not mean, however, that the timing of the Decision resulted in administrative unfairness. The Panel finds that the reasons for the lateness were not arbitrary, frivolous, or capricious. The lateness was due to the requirement for First Nations consultation, which is a legal duty of the Crown, and the need to obtain scientific information about the moose population to ensure wildlife conservation, which is a fundamental objective of the *Act*.

[53] The Panel finds that the lateness of the Decision did not result in administrative or procedural unfairness. The Panel would hope, however, that in future years, the lateness of this Decision will prove to be an exception.

[54] Regarding whether the Crown owes a fiduciary duty to the Appellant, the Panel notes that both the Respondent and the Appellant rely on *Chingee* in support of their submissions. *Chingee* involved a claim by the holder of a GTC and trapline under the *Act* that the Province had a fiduciary duty to consult with him and accommodate his statutory interests before authorizing logging in the area covered by his GTC and trapline. The Court of Appeal concluded in *Chingee* that the pleadings did not disclose a claim in fiduciary duty which had any reasonable possibility of success. The Panel notes, in particular, paragraphs 65 and 68 of *Chingee*:

65. The tenures grounding the plaintiff’s claim are statutory. They are not Aboriginal interests or rights. There is nothing in the statutory scheme capable of supporting the proposition that the province had a fiduciary duty to protect the interests of the holder of a trapline or a guiding certificate. Inherent in the scheme is the need to weigh and balance potentially conflicting interests in the public interest....

...

68. In my view, given the complex policy interests, priorities, and considerations in play when the ministry, as required by legislation, administers and allocates rights and interests in the province’s forestry and wildlife resources, it is not tenable to hold that the province owes certain statutory tenure holders a fiduciary duty – a duty requiring the

province to put those tenure holders' interests above all others,
including holders of other statutory licences (e.g., TSLs) and, generally,
society as a whole (the public interest).

[underlining added]

[55] The Panel concludes that the Court of Appeal's unanimous decision was unequivocal in finding that the Province does not owe a fiduciary duty to "certain statutory tenure holders" including holders of GTCs. The Appellant falls within the group referenced by the Court of Appeal. The Panel finds, therefore, that the Respondent, as a statutory decision-maker under the *Act*, owed no fiduciary duty to the Appellant as the holder of a GTC.

2. Whether the Respondent properly considered and applied the relevant Ministry policies and procedures, and correctly calculated the 2018/19 quota.

Appellant's Submissions

[56] The Appellant submits that the Decision incorporates an incorrect calculation of quota, the AAH was miscalculated in the Appellant's guide outfitter territory, and the Decision relies on questionable science that doesn't meet a minimum standard generally considered acceptable for wildlife population survey results.

[57] In particular, the Appellant submits that when providing the Respondent with recommendations to inform her Decision, the Regional Manager applied inconsistent methodology by conflating GMZs with MUs to determine a revised allocation and quota.

[58] The Appellant submits that it is standard practice for the Regional Manager to determine the moose available to each guide outfitter by applying a consistent formula as follows:

- the Regional Manager assumes the AAH is equally distributed across the moose habitat within a GMZ;
- the percentage of suitable moose habitat a guide outfitter territory contains in relationship to the total available in the GMZ is determined;
- the percentage is multiplied by the AAH, with the resulting number being subject to a 75/25 resident/non-resident split; and
- the non-resident share is multiplied by five to determine the five-year allocation.

[59] For the Appellant, the application of this approach previously resulted in a 2017-2021 allocation of 16 moose.

[60] The Appellant submits that in determining quota for 2018/19, the situation was varied. Specifically, he submits:

The Regional Manager states in his email of Dec. 7 (appx A exh 7) "the Director made the decision to reduce moose quota in LEH zones 5-01, 2-02B and 5-02C by 50% for 2018". This is incorrect. What the

Director determined is stated clearly in her letter of Sept. 4 (appx A exh 3) "I have determined the following: Hunt zones with below target bull-to-cow ratios will have their licensed bull moose harvest reduced by 50%. These zones are: 5-01, 5-02B, 5-02C". In effect a reduction of the AAH for those MUs. Though the AAH and a quota are related and one may inform the other they are most definitely separate things and the distinction is critical to understand. And to accurately apply.

[61] The Appellant contends that when the Regional Manager acted on the Director's decision to reduce bull moose harvest, he took an action that was based on an MU-specific directive, but applied it to a GMZ-informed quota. The Appellant supplied several hypothetical examples as to why this approach, in his view, is incorrect, and consequently does not meet the "test of creating certainty" as intended by Ministry policies.

[62] Regarding the science used to inform the Decision, the Appellant submits that the decision to reduce bull moose harvest levels was based on preliminary results from composition and stratified random block ("SRB") surveys that showed reduced bull/cow ratios. The Appellant further submits that the surveys were accepted as a determining factor by the Director, although some results had an inherent margin error of plus or minus 50%. Further, the Appellant submits that the composition survey for MU 5-01 (as documented in the Grimson 2 Report) was conducted on March 5 (2018), "which is far outside the parameters of what science considers an acceptable time frame to conduct these types of surveys". The Appellant notes that the calf/cow ratios were down dramatically from a 2015 SRB survey, and he questions whether the observers mistakenly classified "a bunch of bulls as cows".

Respondent's Submissions

[63] The Respondent submits that 2018 was the first year in which quota decisions for all regions were made by the Director, as opposed to each Regional Manager, to support a consistent application of quota decisions across all Regions. While the Director was responsible for making the decisions, the preparation of calculations leading to the Decision was undertaken by regional staff as in previous years. In the matter at hand, the calculations were performed and recommendations made by Mr. Lirette, R.P.Bio, who was also the author of the 2016 Cariboo Region Moose Allocation Information Package: Evaluation of Alternative Harvest Options.

[64] The Lirette affidavit contains the following points regarding the Ministry's methodologies for estimating moose populations:

- reliable and scientifically-sound population estimates are imperative when calculating the AAH, particularly when populations are noted to be in decline;
- the primary spatial scale for estimating moose populations are GMZs which are comprised of a number of MUs;
- MUs or sub-zones of MUs are the spatial scale at which SRB moose surveys are completed;

- SRBs, while an effective population estimate on their own, are complimented with aerial compositional surveys (observed number of males, females and juveniles), and hunter surveys which additionally inform reliable population modelling and estimates for calculating the AAH and informing harvest management decisions.

[65] Mr. Lirette's affidavit states that he has conducted more than 12 SRB and composition surveys, and has classified more than 2,500 moose. Mr. Lirette attests that he was the lead biologist on the 2018 moose composition survey in MU 5-01, and that on March 5, 2018, when the survey was conducted, conditions were considered "good". Further, he states that one of the objectives of the survey was to estimate calf recruitment. According to page 49 of a Ministry document titled "Aerial-based Inventory Methods for Selected Ungulates: Bison, Mountain Goat, Mountain Sheep, Moose, Elk, Deer and Caribou", March 2002 (the "RISC Standards"), February and March is generally the best period to estimate moose population size and calf recruitment.

[66] Mr. Lirette states that his quota recommendations for the 2018 hunting season were informed by three survey reports: 100 Mile House Moose Density Estimate, Winter 2015-2016, September 2016, prepared by Becky Cadsand, a Wildlife Biologist with the Ministry (the "Cadsan Report"); Horsefly River (MU 5-02B) Winter Moose Survey 2018, August 2018, prepared by Carla Grimson of the Ministry (the "Grimson 1 Report"); and, the Grimson 2 Report. The Cadsan Report and the Grimson 1 Report are both SRB surveys, while the Grimson 2 report is a composition survey.

[67] Mr. Lirette further states that although the 2018 information was only available to him in draft form when he made his quota recommendations, the results of the draft analysis did not change when the reports were finalized over the summer months. The Lirette affidavit states:

36. In 2018, the moose population for GMZ 5B was unchanged from 2016 at 6,645. However, the bull/cow ratio for all three management units surveyed fell well below the provincial minimum target: in MU 5-01, the ratio was 18 bulls per 100 cows, and in MU 5-02B, the ratio was 20 bulls per 100 cows, and in MU 5-02C, the ratio was 15 bulls per 100 cows. In other words, results of the 2018 moose surveys indicated widespread issues with bull/cow ratios in the Cariboo Region.

37. *MOOSEPOP* and *Aerial Survey* are software programs the Ministry uses to analyze data from SRB moose surveys. When attempting to estimate moose abundance and density using SRB surveys, wildlife biologists need to correct for sightability bias because it is well documented in literature that not all moose within a survey area are detected by observers during a fly-over survey. All SRB surveys completed in the Cariboo Region apply a "Sightability Correction Factor" ("SCF") calculated using a sightability model developed in BC called *Aerial Survey* (RBOD Tab 38). By applying the SCF using *Aerial Survey*, the Ministry's wildlife biologists correct for sightability bias, and calculate "corrected" moose abundance and density estimates.

38. Because *Aerial Survey* has only recently begun to be used to analyze survey results in the Cariboo Region, and *MOOSEPOP* has been used since 1994, the Ministry uses the *MOOSEPOP* bull/cow ratio estimates to track changes over time, to test for significant changes, and to inform management decisions. *MOOSEPOP* estimates do not apply a SCF. It is not expected that the use of "sightability uncorrected" *MOOSEPOP* bull/cow ratio estimates introduces bias respecting moose classification. Available literature suggests there is no significant difference in *sightability* between male and female moose (see e.g. page 6, RBOD Tab 40, and page 47, RBOD Tab 38); therefore, a SCF does not need to be applied to the observed ratios from a composition survey for that data to be valid, and usefully applied to harvest management decisions.
39. Composition surveys, on the other hand, do not attempt to estimate moose abundance. Rather, composition surveys are used to monitor both bull/cow and calf/cow ratios.
- ...
41. I am aware that the appellant relies on a composition survey report completed in March 2013 for the Thompson Region (Region 3), prepared by wildlife biologists Francis Iredale and Chris Procter ("Region 3 Report"), who applied a SCF to the observed number of bulls. ... I understand the appellant to be suggesting that by not applying a SCF to the 2018 composition survey data in Region 5, the results are somehow less reliable.
42. In my experience, different regions within British Columbia can have slightly differing inventory procedures based on historic methods and efforts to maintain survey consistency over time. I have reviewed the Region 3 Report, and point out that in every MU in which "corrected" bull/cow ratios were reported, the corrected estimate was either **the same as or lower** than the observed ratio (although only be a small percentage). ...
43. Therefore, my understanding is the Region 3 Report results are consistent with available literature that suggests, for composition surveys, there is minimal or insignificant difference between "sightability corrected" bull/cow ratios and observed bull/cow ratios ...
45. Applicable directly to MU 5-01, I also draw attention to the 2016 MU 5-01 SRB survey report in which Becky Cadsand tested for differences in vegetation cover estimates between cows with calves, cows without calves, and bulls located during the SRB survey. The analysis found no significant difference, indicating that the sightability of moose (as measured by vegetative cover) did not differ based on sex or presence of calf

[bold in original]

[68] The Lirette affidavit states that in addition to the 2018 moose survey results indicating that bull/cow ratios were below the provincial target of 30 bulls to 100 cows, the average resident "hunter days per kill" have been increasing in MU 5-01 from approximately 25 days per kill in 2007-2010 to approximately 70 days per kill in 2016 and 2017. Mr. Lirette notes that in MU 5-03 where the observed bull/cow ratio was 36 bulls/cow, the average hunter days per kill for the 2016 and 2017 was approximately 16, which he states supports the Ministry's conclusion that there was an issue with the number of bulls in MU 5-01.

[69] Mr. Lirette attests that in considering what recommendations to make to the Director regarding 2018/19 quota, he reviewed historical management decisions from the Cariboo Region, and learned that the Region had recovered previously from low bull/cow ratios through reductions in the licensed moose harvest. The Lirette affidavit states:

63. The Cariboo Region has previously recovered bull/cow ratios that were below provincial minimum targets by reducing licenced bull harvest in affected Zones. For example, in 1995, the bull/cow ratio in MU 5-13A was 15 bulls per 100 cows. Licenced harvest was reduced by approximately 50% and the ratio recovered to 29 bulls per 100 cows within three years. Also, in 1996, the bull/cow ratio in MU 5-02A was 19 bulls per 100 cows. Licenced harvest was decreased by approximately 50% and the ratio recovered to 40 bulls per 100 cows within two years.
64. Based on all information I reviewed, including the 2018 moose survey results, the LEH Hunter Survey data, First Nations feedback, stakeholder feedback, and historical precedents for bull/cow ratio recovery, it was my professional opinion that a significant reduction in the licenced harvest was required to expeditiously recover the bull/cow ratios in MUs 5-01, 5-02B and 5-02C to the provincial minimum target. I was cognizant of the impact this reduction would have on affected guides; however, in my opinion, the seriousness of the low bull/cow ratios necessitated a substantial reduction in licenced bull moose harvest in those management units to ensure a future sustainable harvest.

[70] The Lirette affidavit also states that the AAH was not updated for 2018. Only the moose harvest allocations for the balance of the allocation period (i.e., 2018-2021) were updated. He advises that the AAH will most likely be updated in 2021 for the 2021-2025 allocation period. Mr. Lirette states that the 2017 AAH for bull moose in GMZ 5B was 400 bull moose. In 2017, this resulted in a five-year allocation (2017-2021) of 16 bull moose, and a 2017/18 quota of five, for the Appellant.

[71] Mr. Lirette's affidavit states that the need to substantially reduce the licensed harvest within GMZ 5B resulted in a recommendation to apply a reduction factor to the remaining years of the 2017-2021 allocation (i.e., 2018-2021), so as not to penalize guides for acting within their allocations from the previous years, and thus lessen the impact of the decision. The affidavit further states that reducing the LEH authorizations within this GMZ by 50% would result in maintaining the allocation

ratios between resident and non-resident hunters, consistent with the Ministry's allocation split, and yielding a fair decision.

[72] In terms of how this recommendation impacted the Appellant's guiding territory, the Lirette affidavit refers to a spreadsheet setting out the calculations for the notional allocation, which includes the following figures:

- 2017-2021 allocation = 16
- 2017 quota with low moose quota principal¹ applied = 5
- percentage of 2017-21 allocation attributed to GMZ 5B = 100%
- GMZ 5B 2017-21 allocation attributed to MUs 5-01, 5-02B, 5-02C = 16
- adjusted allocation attributed to MUs 5-01, 5-02B, 5-02C [- 50%] = 8
- revised weighted 2017-21 allocation² (rounded) = 10
- percent change from 2017-21 allocation = -37.5%
- 2017 harvest from guide declaration = 3
- remaining revised 2017-21 allocation (after harvest) = 7
- 2018 quota with low moose principal applied = 3
- percent change from 2017 quota = -40%

[73] Regarding the hypothetical calculations presented in Appellant's submissions, Mr. Lirette concludes that the Appellant inappropriately applied the allocation split.

[74] Mr. Lirette attests that he discussed his recommendation with the Head of Fish and Wildlife for Region 5, Dave Reedman, who had previously acted as Regional Manager for quota decisions. Mr. Reedman reviewed the calculations, and he and Mr. Lirette presented the recommendations to the Director.

[75] The Respondent's affidavit states that she reviewed and was satisfied with Mr. Lirette's recommendation and rationale regarding the Appellant's quota reduction:

26. I considered that I had the option to either recalculate the AAH for the entire Region 5 based on this data and other data available, or to take an alternative action that was consistent with meeting the overriding policy considerations, such as sustainable harvest of moose as a game species (*Game Harvest Management* policy, RBOD Tab 26); and providing resident and non-resident hunters with fair shares of the allocations of bull moose (*Commercial Hunting Interests* policy, RBOD Tab 27).

27. I consulted with Daniel Lirette about remedial actions; he indicated that he was aware of instances in the mid-1990s where low bull/cow

¹ allocation multiplied by the low moose quota principal of 30%: (16 x .3)

² 1/5 of the former 2017-2121 allocation added to 4/5 of the adjusted allocation: (1/5 x 16) + (4/5 x 8) = 3.2 + 6.4 = 9.6 = 10

ratios in Region 5 were recovered in a short number of years through significantly reduced licenced harvests.

28. Having considered (a) the *Administrative Guidelines* in their appropriate place in the regulatory scheme; (b) the overriding policy objectives, and the resources required to calculate the AAH for the entire Region 5 (because AAH is not calculated on a management unit basis); and (c) Daniel Lirette's proposed short-term solution tailored to the specific management units of concern; as well as weighing the significant date inflection against the time and resources required to recalculate the AAH, I exercised my discretion to not recalculate the AAH. Rather, I chose to curtail resident LEH authorizations and non-resident quotas for the 2018/19 licence year, and indicate reduced LEH authorizations and quotas would be likely for the next few years, or until new survey data shows the bull/cow compositions have recovered.

[76] The Respondent's affidavit further states that she considered the potential impact of the decision on the Appellant's interests, reviewed his past harvest records, and was satisfied that the flexibility provided by the administrative guidelines was the way to mitigate the potential impact on his business interests while maintaining the Ministry's objective to conserve and manage sustainable moose populations.

[77] The Respondent decided to accept Mr. Lirette's recommendation, and based her Decision upon it.

BCWF's Submissions

[78] The BCWF submits that the 50% reduction in allocation for both resident hunters and guided hunters within MUs 5-01, 5-02B and 5-02C in GMZ 5B resulted from a conservation concern. The BCWF maintains that the Director made her decision correctly and in accordance with provincial policy and procedure.

[79] The BCWF further submits that reinstating the Appellant's quota as requested, without adjusting the AAH for GMZ 5B, would have a cascading effect on all quotas and resident allocations, and ignore the conservation concerns in MUs 5-01, 5-02B and 5-02C.

Panel's Findings

[80] The Panel notes that one of the primary purposes of the *Act* is the conservation of wildlife in BC, and that hunting regulations address the consumptive use of wildlife in a sustainable manner. The Panel also notes that the Appellant has not challenged the way that his 2017-2021 five-year allocation was determined. The Appellant challenges how his allocation changed for the 2018-2021 period, and how that change impacted his quota.

[81] Based on Mr. Lirette's affidavit evidence, the Panel finds that his recommendations pertaining to the Appellant's quota were based on concerns about moose conservation and population sustainability, and drew on his knowledge of Ministry policies and procedures, as well as on the Region's past practices for

conserving moose populations when the bull/cow ratio became too low. Mr. Lirette's analysis of the moose populations indicated to him that prompt action was necessary to facilitate the expeditious recovery of the bull/cow ratios in the Appellant's guide territory, and the Director accepted his recommendation.

[82] The Appellant contends that the methodology and reports relied upon by Mr. Lirette, and subsequently the Director, underestimate the bull/cow ratio in his guide territory. In particular, the Appellant asserts that the Respondent's population estimates were flawed in that the SRB surveys (Cadsand Report and Grimson 1 Report) include data from both high and low value habitat, whereas the composition survey (Grimson 2 Report) focused on high value habitat and did not include any bulls in the low value habitat. In that regard, the Panel notes that the Grimson 2 Report states:

Methods

... A map with identified high value habitat areas was used as a guide for areas to focus the survey on. Additional areas identified as suitable moose habitat were surveyed opportunistically. ...

[83] Based on this statement in the Grimson 2 Report, the Panel finds that although the focus of the composition survey in the Grimson 2 Report was indeed high value habitat areas, other areas were also included. The Panel finds, therefore, that it is inappropriate to conclude, as the Appellant has done, that the composition survey did not account for any bulls in the low value habitat areas.

[84] Regarding the Appellant's contention that differences in the results of the MU 5-02B bull/cow ratios in the composition and SRB surveys point to problems with data accuracy, the Panel finds that the two survey types are different in nature, and that a combination of the data from the surveys were used to develop the recommendations presented to the Director. Further, in all cases, the results of all surveys showed that the bull/cow ratios were significantly below the provincial minimum target of 30 bulls to 100 cows.

[85] The Panel finds that the methodology applied by Mr. Lirette in developing the recommendations forwarded to the Director is sound from a scientific standpoint, and in terms of addressing concerns about the sustainability of moose populations in MUs with low bull/cow ratios.

[86] The Panel finds that the information regarding moose populations showed that action needed to be taken, because maintaining hunting opportunities at their earlier higher level, in light of the moose population, could well have conflicted with the "expeditious recovery" of the bull/cow ratios. The Respondent's evidence shows that she exercised her discretion to not recalculate the AAH, and chose to curtail resident LEH authorizations and non-resident quotas for the 2018/19 licence year in specific MUs, including MU 5-01 in which the Appellant's guide territory is located.

[87] The Appellant cites several Ministry policy and procedure documents to support his contention that the Respondent acted inappropriately in revising his quota without recalculating the AAH. The Panel finds that the *Act* sets out the kinds of decisions that Ministry officials are empowered to make, whereas policies and

procedures are in place to assist decision-makers in exercising their statutory powers. While decision-makers must act within the confines of the *Act*, they must exercise their discretion appropriately and without blindly adhering to policy and procedure which would result in a fettering of their discretion.

[88] In the matter at hand, the Director is empowered to make decisions regarding licensed hunting opportunities (i.e., guide outfitter quotas and allocations) in a way that meets the conservation and sustainable harvest objectives of the *Act*. Based on the evidence, the Panel finds that the Director considered the regulatory and policy framework, as well as moose population sustainability and management issues that were identified by Ministry staff. As a result of the identified moose population concerns, the Director chose to exercise her discretion and, in effect, apply a conservation adjustment that impacted all licensed harvest of bull moose for guide outfitters and residents in particular MUs within Region 5 without recalculating the AAH. For the Appellant, this resulted in a 40% reduction to his 2018/19 moose quota. The Panel notes that, in fact, given the recommendation was actually premised on a 50% reduction of moose harvest opportunities, the Director could have reduced the Appellant's 2018/19 quota (and those of other guides in the affected MUs) by 50% instead of 40%.

[89] The Panel concludes that the Director exercised her discretion fairly, in accordance with the objectives of the *Act*, and after considering the relevant Ministry policies and procedures.

Conclusion

[90] The Panel acknowledges that the Decision for the 2018/19 moose hunting season was made significantly later than in past years. However, the Panel has found that there were valid reasons for the lateness of the Decision, and the delay did not result in administrative or procedural unfairness to the Appellant. The Panel would hope, however, that in future years, the lateness of this Decision will prove to be an exception.

[91] Based on the evidence, the Panel finds that there were pressing conservation concerns regarding the sustainability of moose populations in certain MUs, that required immediate action. The Director exercised her discretion appropriately by implementing a 50% reduction in allocation for both resident hunters and guide outfitters (including the Appellant) in those MUs for the 2018/19 licence year, as this approach had proven effective in the past for addressing such concerns.

[92] The Appellant has provided no evidence that the Director acted in an arbitrary or unfair manner, or did not act in accordance with the law or the Ministry's policies and procedures.

DECISION

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

[94] For the reasons stated above, the Panel finds that the Respondent's Decision should be confirmed.

[95] The appeal is dismissed.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

April 26, 2019