Environmental Appeal Board

Citation: *Cassidy Caron v. A/Director of Fish & Wildlife*, 2024 BCEAB 28

Decision No.: EAB-WIL-22-A012(a)

Decision Date: 2024-08-08

Method of Hearing: Conducted by way of written submissions concluding on March 22, 2023

Decision Type: Final Decision

Panel: Shannon Bentley, Panel Chair

Appealed Under: *Wildlife Act*, RSBC 1996, c. 488

Between:

Cassidy Caron

Appellant

And:

Logan Wenham, Ministry of Forests

Respondent

And:

BC Wildlife Federation

Participant

Appearing on Behalf of the Parties:

For the Appellant: Cassidy Caron

For the Respondent: Matthew Fingas, Counsel

For the Participant: Gerry Paille, Representative

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Introduction

[1] Cassidy Caron (the “Appellant”) operates Compass Mountain Outfitters Ltd., through which she provides guided hunting in the Peace Region (“Region 7B”) and operates five registered camps in the South and East Red Deer River area, most reachable only by horse. These camps are specifically operated for moose hunting and are located in remote areas. The Appellant’s authorized guide territory is 750006, located in Wildlife Management Units (“WMU”) 7-19, 7-20, 7-21.

[2] The Appellant appeals the decision of Logan Wenham, Acting Director of Fish and Wildlife with the Ministry of Forest (the “Director”), to amend her moose Guide Outfitter Licence 100003060 (the “Decision”). This decision, according to the Appellant, changed hunting rights in her WMUs from General Open Season to Limited Entry Hunting (“LEH”), applied a 90/10 split between resident hunters and guide outfitters, and reduced its annual moose quota to five moose across all WMUs.

[3] The Appellant brought this appeal before the Environmental Appeal Board (the “Board”) “to increase the moose quota in territory 750006 and lobby for an open season in the southern portion of WMU 7-19 where there is no road access.”

[4] The Appellant filed its appeal on July 19, 2022, on the following grounds:

1. Late notice of the amended licence Decision;
2. Failure to base moose count on current data;
3. Failure to retain remote areas of Region 7B as General Open Season;
4. Basing quota numbers on resident harvest data rather than historical Guide Declarations or moose population data; and,
5. Misapplication of the Resident/Outfitter allocation spilt.

[5] The BC Wildlife Federation (the “BCWF”) is a conservation organization that advocates for anglers, hunters, outdoor recreationalists, firearm owners, and recreational shooters. It has a membership of 43,000 and aims to protect, enhance, and promote the wise use of the environment for the benefit of present and future generations. The BCWF applied to the Board to participate in this appeal because it has interest in quota appeals and it has been involved in the development of Provincial allocation policy and procedures. The BCWF indicates that any changes in quota allocations for a guide outfitter will impact resident hunters they represent.

[6] The Board exercised its discretion to grant participant status to the BCWF under section 94(1)(a) of the *Environmental Management Act,* SBC 2003, c. 53, section 101.1 of the

Wildlife Act, RSBC 1996 c. 488 (the "*Act*"), and section 5 of the Board's Practice and Procedure Manual.

[7] On November 30, 2022, the Board granted the BCWF participant status in this appeal as it established a specific interest or involvement in the subject matter of these appeals and is in a position to make a valuable contribution or bring a valuable perspective to the appeal. The BCWF was permitted to make a written submission and to provide evidence limited to the Provincial allocation policy and procedures and to the potential impacts of guide outfitter quotas on resident hunters.

[8] The appeal was conducted by way of written submissions. Section 101.1 of the *Act* authorizes the Board to conduct this appeal by way of a new hearing and, upon the conclusion of this hearing, the Board is authorized to do one of three things:

> 101.1(5) On 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.

Background

[9] For the purposes of the *Act*, the province is divided into nine regions, which are then divided into 225 WMUs. Within Region 7B, the Appellant's guide territory licence is within WMUs 7-19, 7-20, and 7-21.

[10] When guiding licences are issued, two pieces of information are provided for the licence holders, with respect to the number of animals that can be harvested under that licence: a notional allocation of species they can hunt over a five-year period and the actual quota number for that year.

[11] The notional allocation is the maximum number of the specific wildlife they can harvest over a set five-year period. This allocation amount is an estimate and can change over the five-year period as a result of wildlife population estimates, changes in harvest rates, or when the annual quota is fully harvested.

[12] The quota number is the total number of game species or type of game species the clients of a guide outfitter may harvest in the guide's area in a specific year. The Ministry of Forests (the "Ministry") regional manager or director sets the quota.

[13] The legislative scheme that manages and regulates moose hunting in the province is set out in the *Act* and its associated regulations. This legislative scheme seeks to accomplish several objectives, including to provide for the effective management of wildlife in British Columbia and to recognize the value of sustainable hunting in British Columbia. This is evidenced by the fact the *Act* expressly permits hunting, albeit with

constraints and limitations. The associated regulations provide greater detail on specific aspects of the *Act.* In order to implement the *Act* and regulations, the Ministry creates policies and procedures as guidance for staff members.

[14] Within the Ministry, Conrad Thiessen is the Senior Wildlife Biologist (the "Biologist") who is responsible for making calculations on hunting quotas and annual allowable harvests and recommending hunting quotas to Kaitlyn Schumann, the Acting Manager of Data and Licensing (the "Manager"). The Manager then reviews these recommendations and, in turn, makes her own recommendations to the Director.

[15] In making the Decision, the Director accepted both the Biologist's initial calculations and the Manager's recommendations without amendment. The interim notional allocation and quotas for moose were provided to all outfitters, including to the Appellant, on May 31, 2022.

[16] The Appellant emailed the Ministry on June 1, 2022, with concerns that the reduced quota was unacceptable—moving from a General Open Season to a quota of five moose just 90 days before the Appellant's first clients arrive. The Appellant noted that, after two hunting seasons being lost to COVID travel restriction, she had never seen a higher moose density and requested the current moose counts and biology reports that support this reduction. She noted: "not only do we completely lose our best 2 weeks of hunting (October 1-15), 5 tags when there is over 50 resident LEH in zone 7-19, and 120 in 7-20 plus 4 days of resident GOS [General Open Season] seems unbelievably unfair." She further stated that the Decision "will probably result in bankruptcy of our business and possibly the loss of our houses we mortgaged to buy the area."

[17] The Appellant followed-up with the Director by email on June 17, 2022, to say that the Appellant had 23 existing moose hunting clients, with a business plan to take 20-30 moose clients per season. The "7-19 region is as remote as any region in the northern Rockies and accessible only by horse" and, partly because of this remoteness, the Appellant stated it is not used by resident hunters. "Furthermore, 7-19 has benefited greatly from the caribou wolf cull program and the moose as well as the other ungulates are flourishing. Having guided in NWT, Yukon, AB and BC for moose in my career I have not seen densities as impressive as 7-19 currently…Please consider assigning the 62 moose quota to all the outfitters in the region to delve up amongst ourselves."

[18] The Director discussed the Appellant's email with staff and spoke with her on June 24, 2022, about her concerns.

[19] Under the *Act*, regional managers and directors are empowered to vary quotas in subsequent years after a licence is issued. In the Decision before me, the Director exercised his power to vary the Appellant's quota.

[20] Eventually, on July 19, 2022, the Director issued a final amended licence to the Appellant for the licence year ending March 31, 2023. The Director's email explained that he had spoken with the Biologist and reviewed the Appellant's licence in the context of the

game management zone (the "GMZ") that the licence is within, as well as the Appellant's broader guiding territory certificate (the "GTC"). Based on that review the Director was able to remove the WMU-specific elements from the Appellant's territory, as described in the table:

GTC	Tentative notional allocation (by WMU)	Tentative quota (by WMU)	Final notional allocation (combined WMUs)	Final quota (combined WMUs)
750006 (7BOG106)	WMU 7-19: 4 WMU 7-20: 7 WMU 7-21: 0	WMU 7-19: 3 WMU 7-20: 2 WMU 7-21: 0	11	5

The 2022 Changes to the Hunting Regime

[21] In 2022, the Government of British Columbia implemented a series of changes to moose harvest management in Region 7B that the Respondent submits better meets the needs associated with hunting rights of Treaty 8 First Nations. In summary, the 2022 changes include the following:

1. Establishing regulations to close the General Open Season;
2. Instituting a licenced hunting system with LEH authorizations for resident hunters and assigned quotas for guide outfitter licence holders;
3. Establishing an interim Annual Allowable Harvest (the "AAH"); and,
4. Establishing a management objective to reduce the AAH for moose by 50%.

[22] The Respondent submits that these changes were in response to the British Columbia Supreme Court's decision in *Yahey v. British Columbia*, 2021 BCSC 1287 ("*Yahey*"), in which, the Respondent says:

> the Court found that the Province had infringed the Blueberry River First Nation's ability to meaningfully exercise their treaty rights to hunt, trap and fish in a manner consistent with their way of life within Region 7b. In particular, the Court examined the declining status of moose populations in the area and noted that the ability to successfully hunt within the territory was a key component of the right.

[23] The BCWF opposed these changes as they believed they would unreasonably eliminate moose and caribou hunting opportunities for resident hunters, and that these changes were contrary to both science-based management and express provincial policy. The BCWF submitted a letter they wrote to the (then) Minister of Forests, Katrine Conroy, on March 24, 2022, which noted the amendments to the existing regime were a departure from science-based management. This letter included the statement:

> In 2020, the Ministry's *Together for Wildlife* strategy promised to implement evidence-based decisions that are supported by research and monitoring. The Province's science-based approach has been guided by wildlife inventory in accordance with the Provincial Framework for Moose Management in B.C., which sets out certain harvest policies. Any departure from this approach would be unreasonable and inappropriate.

Parties Submissions – Overview

Appellant's Submissions

[24] First, the Appellant submits that the Province's 2022 changes to the industry, without reasonable notice, is extremely prejudicial to it. The Appellant explains how short notice of decision changes impact her business:

> My company currently has 23 clients booked for moose hunts for the 2022 hunting season. These hunts were booked as far back as 3 years ago, to ensure certain dates and accommodate non-resident hunters travel and work schedules. These hunts were booked in advance on the understanding that region 7 had a general open moose hunting season, with no indication the government intended on moving away from that. On July 19, 2022 I received official notice of these drastic changes to moose allocation no less that 5 weeks before my first clients are due to arrive. These customers have been planning their trips for years, flights booked, trips paid in full. The timelines of this decision are unacceptable, and if they are not reversed, numerous outfitters will be devastatingly impacted financially, myself included, but the local economies of Northern British Columbia will feel the financial burden as well as fewer hunters will mean less tourism dollars coming into the local economies via hotels, flights, restaurants, royalties, licensing fees, etc.
>
> This has created an absolutely impossible situation in which to conduct my business. My outfitting licence, camp leases, and park use permits have all been paid in advance of this decision. It's my understanding that in purchasing these permits, and paying those fees, I was entering into a

> contract with the government that will allow me to conduct my business as was allowed at the time of the payment.

[25] Second, the Appellant submits the AAH and quota decision is arbitrary and not based on scientific game management. The Appellant elaborates that:

> There has not been a moose count in region 7-19 for 15 years. These allocation numbers are partially based on ancient data that does not even come close to accurately summarizing 7-19 moose populations. 7-19 ungulates have benefitted greatly from the 4-year predator control program aimed at helping the caribou herd.

[26] Third, the Appellant submits that portions of Region 7B should have been included in the designated remote areas of the Northern Rockies which were excluded from LEH. Specifically, the "southern portions of region 7-19, roughly 70% of the zone, is as remote as any of the excluded areas. It is mountainous, with no roads, accessible for moose hunting by horse only." The Appellant asserts that the remote parts of 7-19 should remain designated as General Open Season.

[27] Fourth, the Appellant submits that basing the AAH and outfitter quota numbers on previous harvest data is biased against areas that have a low harvest rate because they are remote and hard to hunt. The Appellant asserts:

> Lower yearly resident harvest compared to other zones in 7B arguably does not reflect lower moose numbers. It simply reflects the reality that the area is difficult to access by most hunters, meaning the total harvest of moose in the area is only lower because of lack of access. The past 20 years of guide declarations for this territory should have been a factor in determining outfitter quota as this territory has consistently produced more outfitted moose than ANY neighboring territories.

[28] Fifth, the Appellant submits that shifting the resident/outfitter spilt from 70/30 to 90/10 is not only unfair but that it also does not account for the additional four days of open season that resident hunters are permitted. The Appellant says that even if the 90/10 split is applied to the lower quota amount, the result does not make sense. The Appellant argues "we are the sole outfitter in 7-19 and share the other 2 zones with other territories, it's hard to comprehend how 5 total moose represent 10%" when the resident tags issued are 42 tags in Zone 7-19, 175 tags in Zone 7-20, and 147 tags in Zone 7-21.

[29] The Appellant submitted photos taken from four trail cameras placed within a 15 km radius along a creek drainage in its guide territory. The photos "captured over 30 bulls, 12 of them confirmed legal on the SOFT-10 system in a 2-week period."

[30] In closing, the Appellant submits that the appeal should be granted for the following reasons:

1. Basing AAH and outfitter quota on previous harvest data is biased against areas that have a low harvest rate because they are remote and hard to hunt;

2. Declining moose populations in specific WMUs of Region 7B were a deciding factor in decreasing hunter harvest by 50%. However, no moose count has been conducted in WMU 7-19 for 14 years and she received one of the lowest quotas in the region; and,
3. WMU 7-19 South and East of the Red Deer River should remain on open season as it has extremely low road density and meets the criteria of other zones left on General Open Season.

Participant's Submissions

[31] The BCWF submits that the allocation decisions are inconsistent with the *Provincial Framework for Moose Management in British Columbia* ("*Management Framework")* which provides the basis for how moose are managed in BC. Under this *Management Framework*, a regional manager relies on scientific data evidence of wildlife population from staff, consultants, and local and traditional knowledge to determine if a moose population in a particular WMU can withstand hunting, and if so, how many moose and which type of moose could be hunted. The BCWF argues that moose allocations were not done through science-based management and not based on evidence of moose abundance or on policy and procedures but were based on the Province's negotiated reduction of moose harvest and hunter numbers by 50% that followed the court decision in *Yahey.*

Respondent's Submissions

[32] The Respondent argues there is no compelling reason to interfere with the Decision and seeks an order dismissing the appeal on the following grounds:

1. The quota Decision was made in the Respondent's discretion, fairly, and on the basis of the information before him, taking into account the objectives of the Government of British Columbia after the *Yahey* decision, current Ministry policy, including current management objectives for moose, First Nations considerations, and fair and consistent treatment of licenced hunters;
2. The Appellant has offered no compelling reason for the Board to interfere with the Respondent's quota Decision; and,
3. The more general concerns the parties raise regarding changes to hunting regulation are outside the scope of this appeal.

[33] The Respondent submits that the Appellant has not provided any supporting evidence to substantiate her claims and has not proven her case on a balance of probabilities. The Respondent asserts that the "Decision was made in accordance with sound harvest management practices, as well as the principles of natural justice and

procedural fairness" and provides a book of documents, a book of authorities and affidavits from the Ministry Biologist and Director to support that assertion.

Issues

[34] The Appellant raises numerous areas of concern in this appeal. However, only those matters that fall within the power and jurisdiction of the Board under the *Act* may be addressed in these reasons. The Board does not have the authority to determine issues, or provide remedies, outside of its legislated authority. Consequently, these reasons are focused on those issues for which the Board retains the ability to determine.

[35] Distilled from all the submissions, the following issues will be addressed in these reasons:

1. Should the appeal be dismissed for lack of evidence?
2. Does the timing of the Appellant's guide outfitter licence amendment provide a ground to overturn the Decision?
3. Did the Director base the changes to the Appellant's guide outfitter licence on scientific considerations?

Should the Appeal be Dismissed for Lack of Evidence?

[36] The Board's Practice and Procedure Manual states, as a general rule, the burden or responsibility for proving a fact is on the person who asserts it, and it is to be proved on a "balance of probabilities." The burden of proof can fall on either the Appellant only or on both the Appellant and the Respondent – depending on the facts of the specific appeal and the nature of the arguments being advanced.

[37] For an appellant to succeed in their appeal, they must first raise an issue within the Board's jurisdiction. They must then provide sufficient relevant evidence before the Board to support their arguments. An appellant's evidence must prove their position on a balance of probabilities—meaning that their position, or view of the facts, is more likely to have happened than not. If an appellant is unable to do this, then the appeal must be dismissed, as they have failed to prove their case.

[38] There is no requirement that a respondent to an appeal prove every aspect of the decision under appeal. Rather, respondents have the onus to provide evidence responding to the specific arguments and evidence the appellant raises in the appeal. To put it another way, the scope of a respondent's obligation to provide evidence before the Board is limited to the particular issues raised on appeal. An appeal does not open the entirety of a reviewable decision for scrutiny—it is narrowly focused on the issues argued

by an appellant.[1] These issues, as well as their scope, vary between appeals, as each appeal raises distinct grounds of appeal.

[39] Participants are authorized to provide evidence in an appeal before the Board. If a participant provides evidence, that evidence becomes a part of the hearing record. Participants have no burden of proof to meet, as their participation is for the benefit of the Board to aid it in understanding the issues under appeal.

[40] In this appeal the Respondent argues the Appellant has not led any supporting evidence, has not proven her case on a balance of probabilities, and has not offered any compelling reason for the Board to interfere with the Respondent's quota decision. As such, the Respondent asserts, the appeal should be dismissed.

[41] I do not agree with the assertion the Appellant has not led any evidence. The Appellant has provided photographic evidence to support her claim. In addition, she has used the Respondent's evidence in making some of her arguments. As this appeal is a new hearing, I must consider the whole of the evidentiary record before me—a record provided by not just the Appellant, but the Respondent and the Participant as well. I do not find that this appeal should be dismissed outright on the basis of a lack of evidence. The evidence presented before me will, instead, be examined in their proper context to assist me in determining if the Appellant has met her burden of proof.

Does the timing of the Appellant's guide outfitter licence amendment provide a ground to overturn the Decision?

Parties Submissions

[42] The Appellant submits that broad changes to the rules and regulations surrounding hunting authorizations were made by the government in 2022. The Appellant argues these changes were made without providing her with sufficient notice, and as these significant changes were made so close to the commencement of her business season, they were extremely prejudicial to her company and her livelihood—a business already negatively impacted by border closures due to Covid.

[43] The Appellant submits she was notified of these changes on July 11, 2022—five weeks before her first clients were due to arrive. She received the final quota decision on July 19, 2022. Her clients had booked with her company up to three years earlier and she had 23 moose hunting clients. The Appellant submits her company business plan involves guiding 20-30 moose clients per season. In advance of the season, the Appellant had purchased park use permits, camp leases, and an outfitting licence as part of her business

[1] *Unifor Local 2301 v. Rio Tinto Alcan Inc.,* 2017 BCCA 300, at paragraph 40.

planning and as she is legally required to do, in order to guide hunts within her assigned area.

[44] The Respondent submits the quota decision was provided to the Appellant during a time of ongoing and extensive consultations with First Nations. Given the full contextual circumstances, the Respondent argues the resulting quota adjustments were communicated in a timely manner.

[45] The Respondent also submits the Appellant has failed to provide any compelling reason to interfere with the Decision on the basis of the amount of notice she received.

[46] This issue was not within the BCWF's permitted scope of participation.

Board Findings

[47] The parties provided evidence showing the:

1. interim notional allocations and quotas for moose were sent to the Appellant on May 31, 2022;
2. Director's Decision to amend the Appellant's quota was communicated to the Appellant on July 11, 2022; and,
3. final amended licence was issued on July 19, 2022.

[48] The Appellant filed her appeal of the Decision with the Board the same day it was received. I find that the appeal was filed on the cusp of the opening of the hunting season, which effectively made it impossible for its concerns to be fully resolved through any Board-related process before the season commenced.

[49] The *Act* and Regulations do not prescribe deadlines for notification of quota decisions. Prior Board panels have grappled with whether late notification of quota decisions are administratively unfair to the Appellant.

[50] The Board in *Allan Tew v. Director of Wildlife and Habitat*, 2020 BCEAB 16, ("*Tew*") reviewed previous Board decisions on this issue and found that:

> [64] … 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"[2], constitutional obligations including mandated consultation

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[2] See *Brent Giles v. Director of Wildlife*, 2019 BCEAB 9 (CanLII), at paragraph 71.

with Aboriginal peoples,[3]or other unforeseen or unavoidable circumstances, the delay may be justified. In short, it will depend on the circumstances.

[51] While I am not bound to follow prior Board decisions, I find the reasoning in *Tew* to be persuasive, and I adopt it here. Also, both the parties assert that the context within which the Decision was made is relevant and important to consider. I agree.

[52] The Appellant submits she was not only impacted by a late notice of a quota reduction but was additionally impacted by the Ministry's sweeping 2022 regulatory changes—changes that fundamentally overhauled the regulatory scheme and directly and negatively impacted the Appellant's guide hunting business. Other contextual circumstances the Appellant faced included:

1. The impact Federally-imposed border closures (due to COVID-19) and the COVID-19 restrictions on a guiding business that relies on non-resident clients. The guiding business could not operate for two seasons so suffered economic loss;
2. The multiple regulatory changes to the moose guide hunting industry that: switched the guide hunting for moose from General Open Season to Limited Entry Hunting; closed some areas to moose hunting altogether; applied a new resident/guide hunter split; and reduced the quota amount; and,
3. The simultaneous implementation of these new industry regulations on the Appellant at the commencement of its hunting season.

[53] The contextual element the Respondent submits he faced was government's ongoing and extensive consultations with First Nations. In 2022 the Government of British Columbia was implementing a series of changes to moose harvest management in Region 7B. The Respondent submits that these changes were in response to the 2021 British Columbia Supreme Court decision in *Yahey*.

[54] The Respondent submitted into evidence two letters documenting agreements between the Province and First Nations and a consultation summary (the "Letter Agreements"). The Letter Agreements are between the Province and, in one instance, the Doig River First Nation, and in the other, the Saulteau First Nations.

[55] The Letter Agreements are both dated January 18, 2023, which is after the quota decision was made, and appended to both is a redacted document titled: BC & Six Treaty 8 First Nations Consensus Document (the "Consensus Document"). The Consensus Document (dated March 22, 2022) includes hunting regulatory changes and specifies that the parties will develop joint recommendations for the 2022 hunting season, following public and stakeholder consultations.

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[3] See *Chris Condie v. Director of Wildlife*, 2019 BCEAB 7 (CanLll), at paragraph 52.

[56] The Letter Agreements were concluded shortly after the Decision was made and the Consensus Document was dated about a year earlier. These documents, taken together, serve as evidence that negotiations must have been occurring prior to the Decision being made.

[57] This evidence supports the Respondent's claim of negotiations with First Nations occurring around the time of the AAH and quota determinations. Also, I find that the Province's legal obligations to consult with First Nations are long-standing and are built into the legislative scheme.

[58] After reviewing the legislated moose management processes, I see that it anticipates five-year allocations could change in the future—that is why "notional" allocations are included in the scheme. As such, it is realistic for the Appellant to have expected its May 2022 notional allocations could change. Here the Appellant's notional allocation did change as did her resulting quota. The Director responded to the Appellant's request to reconsider his decision, and he did change it. The Respondent's evidence of ongoing First Nations consultations is helpful in understanding the timing of their notification to the Appellant of her final quota.

[59] Also, the Director did communicate with the Appellant when she asked him to reconsider his Decision, which he did adjust in her favour. In fact, the Director noted that after he combined the Appellants WMUs , the Appellant's notion allocation was 5 of 11 animals which is 45%. This is higher than the 30% notional allocation the Administrative Guideline Procedure normally permits. The Director stated this was to "ensure a more equitable quota calculation across all guiding territories with the new GTC/GMZ calculation and ease the transition … following the Minister's regulation changes from General Open Season to Limited Entry Hunting and quota."

[60] Given the legislative scheme contemplates notional allocations and that the resulting quota decision can change, coupled with the lack of any time requirements for notifying hunters of allocation and quota decisions, I find that for the Appellant to receive her final quota decision close to her guiding season opening does not provide a basis for me to overturn the Decision.

Did the Director base the changes to the Appellant's guide outfitter licence on scientific considerations?

Appellant's Submissions

[61] The Appellant argues the changes to her licence and quota are not based on scientific game management and cannot have been since there has not been a moose count in [WMU] 7-19 for fifteen years. The Appellant argues the allocation numbers are partially based on "ancient data" that does not accurately summarize current moose populations, and partly based on Big Game Harvest Statistics ("Big Game Stats"). It claims

that Big Game Stats, which are the self-reported data that hunters (both residents and guides) are required to submit after each season, are not accurate in gauging population numbers, and it is biased against areas that have low harvest rates. The Appellant argues the low number of reported harvests in these areas is because these areas are difficult to access and they are remote, so fewer hunters go there—it does not reflect lower moose populations.

[62] Since a recent moose count has not been done, the Appellant submits a better approach should have been used—one that considered the past 20 years of guide declarations for this territory. The Appellant argues for this approach because the number of moose killed by the guide outfitters in this territory has consistently produced more "outfitted moose" than any neighboring territories. The Appellant also argues these populations have benefited greatly from the four-year predator control program aimed at helping the caribou herd: the populations of caribou and moose increase when their predators are controlled. This result, the Appellant argues, would not be reflected in the outdated moose count.

[63] In support of her position that moose populations are greater than were asserted by the Province, the Appellant submitted several trail camera photos taken in the winter of 2021 from cameras placed in a 15 km radius along the same creek drainage. One photo shows four legal moose (with six bull moose captured in the frame). The Appellant notes the "4 cameras in a very small portion of our guide territory captured over 30 bulls, 12 of them confirmed legal on the SOFT-10 system in a 2-week period" and that this is more moose seen than in past years.

Participant's Submissions

[64] The BCWF alleges the 2022 moose allocations in Region 7B were not based on evidence of moose abundance, nor were they consistent with the *Management Framework* which is a science-based management model. Rather, it alleges that because of the *Yahey* decision, and "a negotiated reduction of moose harvest and hunter numbers by 50%, moose were allocated based on politics, and not on moose abundance evidence nor by following policy and procedures."

[65] It also points to 2009 when the most recent moose inventory work for WMU 7-19 occurred. The BCWF agrees with the Appellant that a current inventory is needed, particularly since predator control is occurring there which positively impacts moose and caribou populations.

[66] In sum, the BCWF agrees with the Appellant that the moose allocations were based on non-scientific considerations – considerations that are not contemplated by government policies and procedures, including the *Management Framework*.

Respondent's Submissions

[67] The Respondent submits that despite having broad discretion to set quotas, that discretion is exercised in a context informed by other factors. Those factors include the AAH that has been recommended using the best information available on First Nation harvest needs, on the existence of any resident hunter opportunities, and on current management objectives for the species.

[68] Specifically, the Respondent submits that the AAH was calculated with the objective of a 50% reduction, so a recent moose inventory was not factored into the decision-making process since government obligations towards First Nations in Region 7B took priority.

[69] The Respondent disagrees with the Appellant and the BCWF that the AAH and quota calculations were based on "ancient data"—"ancient data" meaning the provincial 2009 moose inventory for Region 7B. Instead, the Respondent argues that the AAH calculations were based on reported Big Game Stats gathered between 2016 and 2020, and on the 50% reduction made in response to the *Yahey* decision.

[70] When addressing the decision over the designation of an WMU as either Limited Entry Hunting or General Open Season, the Respondent submits that these decisions are made by Ministerial Order and are therefore outside the Director's authority to address under the *Act.*

[71] The Respondent submitted the affidavits of two Ministry employees involved in the calculations and determinations under appeal, the Biologist and the Director, to explain the steps they followed.

[72] The Biologist was involved in making the moose quota decision under appeal. He prepared the initial calculations for the five-year notional AAH for Region 7B for the period between 2022 and 2026, and the preliminary 2022 moose calculations for Region 7B.

[73] The Biologist reports he was directed to make moose calculations based on previous moose harvest data because in 2022 the Province "established regulations to close open seasons, establish an interim AAH and limit moose hunting to [LEH] seasons with assigned quotas to Guide Outfitter Licence holders." He stated that moose quota calculations for 2022-2026 in Region 7B were premised on a 50% reduction in moose harvest following consultations with Treaty 7 and Treaty 8 First Nations.

[74] The Biologist stated that he looked at the Big Game Stats which includes a randomly selected survey of moose hunting licences and estimated moose kills from 1976-2020 reported annually by resident and guide hunters. Using these Big Game Stats, he then outlined his moose quota calculation methodology - he specifically calculated:

1. Average number of Resident hunters in each WMU for 2016-2020;
2. Average number of Resident hunter's moose kills in each WMU for 2016-2020;

3. Average number of Non-Resident hunters in each WMU for 2015-2019; and,
4. Average number of Non-Resident hunter's moose kills in each WMU for 2015-2019.

[75] From these numbers he totaled the Resident and Non-Resident moose kills to get a total average moose kill in each WMU. He then reduced that total average moose kill number by 50% to reach the preliminary 2022 AAH for each WMU.

[76] The Director reports being provided with the Biologist's draft AAH calculations and preliminary moose quota calculations. The Director reviewed and accepted the Biologist's AAH recommendation.

Board Findings

[77] The main purposes of the *Act*, as distilled by the British Columbia Supreme Court in *Fleming v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2023 BCSC 296, include "preservation and conservation of wildlife habitat, the enhanced production of wildlife as well as the regulation of the consumptive use of wildlife" and to comprehensively "regulate hunting by imposing rules and restrictions respecting who can hunt, the types of wildlife that can be hunted, when and by what methods."

[78] The Respondent submitted into evidence sixteen provincial policies and procedures that provide guidance to the Ministry on how to implement aspects of the *Act* and regulations. While the Respondent did not highlight a particular policy or procedure in argument, I have reviewed them all and I will discuss aspects of that evidence relevant to this issue.

[79] The *Game Harvest Management Policy* (enacted March 1, 2010) was written to "guide the development of defensible, scientifically sound harvest management procedures for wildlife species that are hunted and/or trapped as game." The document states that the policy of the Ministry includes:

1. Harvest opportunities will be well regulated commensurate with conservation and the high importance of the wildlife resource to British Columbians;
2. Harvest management strategies and regulations will be developed and reviewed in an objective, scientifically defensible, and transparent manner and in doing so will strive to maintain broad public support for hunting; and,
3. Where harvest is sustainable, the first priority for harvest will be First Nations use, the second priority will be resident use, and the third priority will be non-resident use. Attempts will be made to accommodate all levels of use.

[80] In 2015, five years after the above policy was enacted, the *Management Framework* was enacted. It states that the Provincial goal for moose management is to "ensure moose

are maintained as integral components of natural ecosystems throughout their range, and maintain sustainable moose populations that meet the needs of First Nations, licenced hunters and the guiding industry in B.C." It goes on to direct that:

> Management objectives need to be developed at the regional level to address different values and expectations from First Nations, resident hunters and non-resident hunters. While these objectives must reflect First Nation and stakeholder expectations, science must be used to ensure that use of moose is sustainable, and to indicate the consequences of various management options… To ensure stakeholders are aware of the consequences of various management options, and to identify trade-offs between competing objectives, a structured decision making approach should be considered prior to developing regional action plans and/or making major regulatory changes.

[81] It is clear to me, after reviewing the evidence, there is a distinct sequencing of decision points in moose management that is grounded in the conservation of the species. The first step in that sequencing is the determination of whether the moose population is robust enough to tolerate any hunting.

[82] The Respondent asserts that AAH calculations are undertaken to confirm the number of an animal class that may be removed in a year by licenced hunters. The Biologist's evidence is that AAH was derived from Big Game Stats and premised on a 50% reduction from the previous 5-year period.

[83] Both the Appellant and the BCWF allege that the Decision is not based on scientific game management, as it should be. Specifically, the Appellant asserts that moose population estimates are inaccurate and biased. Inaccurate, because there hasn't been a moose count in WMU 7-19 for fifteen years. They argue that the allocation numbers are partially based on "ancient data" that does not accurately summarize moose populations. Biased, because the Big Game Stats the Ministry relied upon (i.e. population estimates based on previous harvest data) is "biased against areas that have a low harvest rate because they are remote and hard to hunt."

[84] The Appellant submitted photos to support her claim of greater moose populations than reflected in the Ministry data.

[85] The BCWF agrees with the Appellant that the lack of current scientific evidence presents a fundamental challenge to the Respondent that prevents them from making scientific estimates of the moose population, as contemplated in the policy and procedures.

[86] The parties agree that calculations must be made to determine if the current moose population can tolerate any hunting. They do not agree on what data should be used to make that calculation. The Respondent does not dispute that a moose population survey has not been conducted since 2009. Rather, the Respondent used the Big Game

Stats data from about 2015 to 2020 to make its calculations and then factored in the 50% reduction. While a more recent moose population survey would be helpful, it simply is not available. The Appellant argues her trail photos show groupings of moose, and that this is evidence of an increase of moose populations across the WMU. While I accept those photos into evidence and agree they show groupings of moose, I cannot accept them as proof on an increase in moose populations. Even were I to accept these photos as proof of an increase in moose populations in the area where the photographs were taken, I cannot extrapolate an increase in a specifically situated population or grouping of moose to apply across the WMU without more evidence, and potentially expert evidence, to support that proposition.

[87] The Respondent asserted the presence of another indicator that the moose populations had declined in this and other WMUs: expert evidence from the *Yahey* decision. The Respondent relied on some evidentiary findings in the *Yahey* decision as evidence in this appeal. I cannot accept the evidentiary findings described in the *Yahey* decision in this appeal because the evidence on which those findings were based has not been entered into evidence in this appeal. It would be procedurally unfair for me to accept such extrinsic evidence, let alone only the portions of the evidence as they are described in a written decision. In order to have this evidence before me in a manner which allowed me to consider it, the Respondent would have needed to provide the expert evidence on moose populations directly in this hearing for the parties and the Board to consider, allowing for it to be tested through questioning and cross-examination. However, no expert evidence of moose populations was submitted by the Respondent.

[88] The Biologist utilized the Big Game Stats data to help inform the calculations on the relevant moose populations. While this may not be the best scientific data potentially available to determine a base population, it is data, and I do not fault him for using it. While there may always be more data that can be gathered to inform a decision, it does not follow that more data must be gathered to be able to make a decision. From the evidence before me, the Big Game Stats data appears to be the best available evidence the Biologist had while making the calculations on moose populations. I find this was sufficient evidence for the purpose to which the Biologist put it. Consequently, and in part answer to this issue, I find that scientific data was used to calculate the changes to the Appellant's licence.

[89] However, the Respondent also argued that AAH calculations were premised on a 50% reduction as part of broad regulatory changes. My analysis of the issue must now consider whether the 50% reduction directive itself should have been based on scientific considerations, as the Appellant asserts, and if so, whether it was.

[90] Both the Appellant and the BCWF argue the licence decision was not based on science. The BCWF asserts that this 50% reduction is a political decision, and not a scientific decision as is contemplated under the *Management Framework*.

[91] The Respondent asserts that the Appellant's general concerns regarding changes to hunting regulations are beyond the scope of this appeal. The Respondent asserts it was within their discretion to make the quota decision, which was fair and took into account "Ministry policy and legitimate government moose harvest objectives in Region 7b which prioritized the government's obligation to ensure First Nation's have the ability to meaningfully exercise their treaty rights to hunt, trap, and fish in a manner consistent with their way of life within Region 7b."

[92] The Respondent submits the 50% reduction was within the Director's discretion to include in the AAH and quota calculations and was an appropriate consideration.

[93] In my review of the Respondent's submissions, I find the 50% reduction is characterized in three different ways—all similarly stemming from an objective or obligation towards First Nations. Before I evaluate these characterizations, it is important for me to emphasize that the *Constitution Act*[4] recognizes and protects First Nations treaties and Aboriginal rights and title in British Columbia and the Province has legal obligations to First Nations. None of these established rights can be questioned in this appeal, and indeed, no party sought to question them.

[94] The Respondent is not arguing that the 50% reduction is a science-based calculation decision. Rather, the Respondent characterizes the reduction as a:

1. *management objective* – in response to *Yahey*;
2. *government objective* – factored into the sequential AAH decision making steps after population/conservation considerations and before First Nations' subsistence and ceremonial needs: "after any conservation issues, government objectives, and First Nations' needs are considered, the remaining animals (AAH) are then allocated to resident hunters and non-resident (guided) hunters, by geographic area, and in accordance with allocation percentages set out in Ministry policy;" and,
3. *contractual obligation* - with First Nations.

[95] The first step is to understand the nature of the 50% reduction. The Respondent most frequently characterized the 50% reduction as a management objective that was required to meet the Province's legal obligations flowing from the *Yahey* decision. The Respondent provided portions of the *Yahey* decision as evidence but did not provide further evidence to explain this linkage. In my review of the portions of the *Yahey* decision

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[4] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11.

provided, I did note the court directed the government of British Columbia to reduce moose hunting within the province.

[96] The second characterization used by the Respondent is that the 50% reduction is a government objective which is a discrete step in the AAH calculation process. The Respondent asserts that "after any conservation issues, **government objectives**, and First Nations' needs are considered, the remaining animals (AAH) are then allocated to resident hunters and non-resident (guided) hunters, by geographic area, and in accordance with allocation percentages set out in Ministry policy" (emphasis added).

[97] As discussed earlier, there is a sequencing of steps in the decision-making process that is grounded in the government's policies and procedures, which are longstanding and well understood. The Board in *Darren DeLuca v. Deputy Regional Manager, Recreational Fisheries and Wildlife Programs*, 2016 BCEAB 16 (CanLII), described the sequencing in the following way:

> [12] A guide's five-year allocation is determined after certain information is gathered by the Ministry, and analyses are performed. Specifically, the Ministry determines the elk population and the amount of harvest that should be permitted to allow the elk population to be replenished through natural means (the sustainable harvest). The anticipated harvest by First Nations for ceremonial and sustenance purposes is then deducted. The remaining available harvest, known as the Allowable Annual Harvest ("AAH"), is then split between resident hunters and non-resident (guided) hunters on a percentage basis.

[98] To me, these steps indicate what data is considered and in what order when calculating AAH. These are sequenced scientific data points. I find it difficult to accept, without more evidence or explanation, that a new step was intentionally inserted into this long-accepted sequence of steps taken to calculate the AAH. That is not to say the Ministry does not have government objectives or that it is not able to add a new step to this process. It is simply that I find it incongruous with the existing process for a new "government objective" step to be inserted in the calculation. I find the evidence does not support the assertion that this long-standing process has been altered in the manner suggested by the Respondent. I was not directed to any Ministerial policies or procedures which support the existence of this altered process.

[99] Finally, the Respondent asserts the 2022 regulatory changes (including the 50% reduction) form a part of the negotiated agreement between the Government of BC and First Nations.

[100] The Consensus Document, entered into evidence by the Respondent, contains a section titled "2022-2024 Wildlife Regulation Change," which lays out the details of the 2022 regulatory changes as recommendations, alongside other regulatory steps for licensed moose hunting. The Consensus Document appears to be the source of the 2022 regulatory changes to moose hunting, including the 50% reduction.

[101] Of the various characterizations used by the Respondent to describe the 50% reduction, I find that the wording of the Consensus Document most persuasive. Based on that document, I find the 2022 regulatory changes, and the 50% reduction specifically, are part of a negotiated agreement between the Government of BC and First Nations.

[102] The Respondent submits, and I accept, that the negotiated agreement for the moose harvest in Region 7B was set by the Government of BC and that the Director had the discretion to accept it or to not accept it. The Respondent submits that the Director considered the "management objectives in light of the Province's legal obligations to allow First Nations to meaningfully exercise their treaty rights to hunt, trap, and fish in a manner consistent with their way of life." The Director adds that they "decided to honor the result of that negotiated process" the government and First Nations had engaged in.

[103] I find the *Management Framework* presupposes a scientific basis from which the calculations pertaining to the AAH are made. However, the *Management Framework,* and other non-binding government policies and procedures, are not the only considerations guiding decision-makers. Indeed, this negotiated management objective is an allocation consideration outside of the science-based calculations. I find insufficient reason, based on the evidence and submissions presented, not to accept this consideration as a factor worthy of considering when determining allocation and quota allotments for moose.

[104] Ultimately, the burden is on the Appellant to prove, on a balance of probabilities, that I should arrive at a conclusion different than that reached in the Decision. I find that while the Appellant provided some relevant evidence that she believes indicates that the moose populations may be more robust than the data used by the Ministry showed them to be, this was not sufficient evidence to prove that point, nor to prove its other arguments concerning the Decision. In addition, the 50% reduction objective was based on a negotiated agreement between the Government of BC and First Nations, and the Appellant did not provide sufficient relevant evidence to prove her argument that licence decisions may not consider such agreements and must be based solely on scientific considerations.

DECISION

[105] As discussed above, it is the Appellant who, by filing this appeal, is the party with the onus to prove their case and on a balance of probabilities. While the Appellant provided some evidence to support her position, she has not met this burden of proof and I therefore dismiss her appeal.

[106] In reaching my decision, I have read and considered all the submissions of the parties even if not specifically referenced in my findings.

”Shannon Bentley”

Shannon Bentley, Panel Chair
Environmental Appeal Board