Forest Appeals Commission

Citation: *Canadian National Railway Company v. Government of British Columbia*, 2026 BCFAC 4

Appeal No.: FAC-WFA-25-A003

Decision Date: 2026-06-17

Method of Hearing: Conducted by way of written submissions concluding on December 5, 2025

Decision Type: Preliminary Decision

Panel: James Carwana, Panel Chair

Appealed Under: *Wildfire Act*, SBC 2004, c. 31

Between:

Canadian National Railway Company

Appellant

And:

Government of British Columbia

Respondent

And:

Forest Practices Board

Third Party

Appearing on Behalf of the Parties:

For the Appellant:	Patrick Williams
	Nico Rullmann
For the Respondent:	Shaun Ramdin
	Tyna Mason
For the Third Party:	Nathan Murray

DECISION ON PRELIMINARY APPLICATION FOR APPEAL ON THE RECORD

INTRODUCTION

[1] The Appellant (or "CN Rail") has filed an appeal in respect of an order made by Laurence Bowdige, Deputy Director, BC Wildfire Service, on August 7, 2025 (the "Order"). The Order followed an Opportunity to Be Heard hearing held on July 18, 2025 (the "OTBH"). In the Order, Mr. Bowdige (the "Deputy Director") considered allegations against the Appellant in respect of sections 26, 27, 6(1) and 25 of the *Wildfire Act*, SBC 2004, c. 31 (the "*Act*"), and section 9(b) of the *Wildfire Regulation*, B.C. Reg. 38/2005.

[2] Regarding sections 26 and 27 of the *Act*, the Deputy Director concluded that, "although CN Rail contravened section 9(b) of the *Wildfire Regulation*, they have established a defence of due diligence for that contravention." The Deputy Director further determined CN Rail had not contravened section 6(1) of the *Act*.

[3] Regarding s. 25 of the *Act*, the Deputy Director concluded the Appellant caused the wildfire at issue and made the Order under section 25(2) of the *Act* that CN Rail pay $435,371.76 to the government for its costs of fire control and for the value of damage to Crown resources, comprised of the following amounts:

- $59,640.19 for damaged or destroyed mature Crown timber.
- $27,150.00 for damaged or destroyed forest land resources and grass land resources.
- $348,581.57 in government fire control costs for the control of wildfire K72249.

[4] The Appellant has appealed the portion of the Deputy Director's Order relating to s. 25 and has applied for the appeal to be heard on the "record" (the "Application"), which the Appellant describes as "an appeal based solely on the information that was before Mr. Bowdige [the Deputy Director]." The Appellant has raised two issues on the appeal: one relating to statutory interpretation, and one relating to procedural unfairness. The parties agree that the statutory interpretation issue can be heard on the record but disagree concerning the procedural unfairness issue.

BACKGROUND

[5] The Order in the present case concerns a wildfire known as Wildfire 2022-K72249 (the "Fire"), which ignited on September 3, 2022, near Spences Bridge, British Columbia.

[6] Staff from the Natural Resource Officer Service ("NROS") attended the site of the Fire to assess whether a contravention of the *Act* or *Wildfire Regulation* had occurred. During their investigations, NROS staff collected field information and photographs and

obtained recorded statements from several eyewitnesses. As a result of their investigation, the NROS alleged that CN Rail had contravened section 6(1) of the *Act* and section 9 of the *Wildfire Regulation*. The NROS also alleged that as the Fire originated on private land owned by CN Rail, a decision-maker may issue an order against CN Rail under section 25(2) of the *Act* requiring that CN Rail pay the government its fire control costs and the dollar value of all government property damaged or destroyed as a direct or indirect result of the Fire. The NROS took the position that these costs may be recovered without a determination of a contravention.

[7] The allegations of the NROS were the subject of an OTBH hearing, as previously noted. In the current Application, the Appellant has provided the Order and its written submission at the OTBH, and identified the following paragraphs from its written submission at the OTBH in relation to its argument on this Application:

> (A) Section 25 is not an alternative — only Sections 26–27 are in issue
>
> 36. The primary issues at this hearing are whether CN contravened s. 6(1) of the Act and s. 9(b) of the Regulation. The Province seeks to impose administrative penalties and cost recovery orders under ss. 26-27 of the Act for those alleged contraventions.
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> 37. However, the Province—in a single page—also seeks a cost recovery order under s. 25 of the Act. The Province alleges that Christopher and Sarah Matthews v. Government of British Columbia, 2024 BCFAC 3 permits it to proceed simultaneously under ss. 25 and 26-27.
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> 38. Not so. Matthews confirms the Province can issue a violation ticket and proceed under s. 25 simultaneously. But even Matthews presents ss. 25 and 26-27 as alternatives: the appellants wanted the Province to proceed under ss. 26-27 whereas the Province wanted to proceed under s. 25, which the Commission approved.
>
> 39. Here, the Province clearly intends to proceed under ss. 26-27. It cannot leave s. 25 as an ambiguous back up option. Section 25 is a different cost recovery path with different requirements than ss. 26-27. The Province has picked ss. 26-27 and this hearing should proceed on that basis alone.

[8] In the Order, the Deputy Director addressed the question of whether he was able to consider allegations under both section 25 and sections 26–27 of the *Act*. The Deputy Director examined the notice which had been given to the Appellant and was satisfied that notice had "been given to CN Rail that an order under section 25 of the Wildfire Act may be considered in these circumstances." The Deputy Director further stated:

> At the OTBH, Mr. Williams [counsel for CN Rail] suggested that he would have expected more materials relevant to a section 25 cost recovery path than was presented in the NROS Investigation Report but did not indicate

> what additional materials he would have expected to see. I note that a large portion of the materials in the NROS Investigation Report pertained to the contraventions that the NROs investigated, however in addition to the contravention details, the NROS Investigation Report contained:
>
> - A Wildfire Origin and Cause Report describing the process the FOC Investigator followed to investigate the origin and cause of the wildfire and his conclusion that railway operations was the most probable cause of wildfire K72249.
> - A legal description of the private land on which wildfire K72249 ignited.
> - Maps and aerial photographs on which the wildfire perimeter and the fire origin location were plotted.
> - Information that CN Rail owns the private land on which wildfire K72249 ignited.
> - Evidence and information supporting the NROS allegation that a CN Rail train caused wildfire K72249.
> - A summary and detailed description of the government fire control costs.
> - A Damage Report describing the process the NROS used to identify the value of the damage to Crown resources.
>
> There is no statutory bar that prevents me from proceeding to consider both section 25 and sections 26-27. I am satisfied that CN Rail had notice that I may make orders under section 25, was provided with information to support the assertion of a case under section 25, and had the opportunity to provide evidence and submissions related to section 25 and did so.

[9] As previously noted, the Deputy Director went on to make the Order, requiring that the Appellant pay a cost recovery amount of $435,371.76 under section 25 of the *Act*.

[10] The Appellant filed its Notice of Appeal on September 8, 2025. In its Notice of Appeal, the Appellant alleges the Deputy Director erred by considering and issuing a cost recovery order under s.25(2) of the *Act* as the cost recovery order was improperly considered in the alternative to the other alleged contraventions of the *Act*. Further, the Appellant alleges the process leading to the s.25(2) order was procedurally unfair as CN Rail did not receive adequate notice or opportunity to be heard on the s.25 allegations as required under s.24.1 of the *Act*.

[11] The Appellant made the present Application on October 10, 2025. Submissions were received from the Respondent and the Third Party, as well as a reply submission from the Appellant, with submissions completing on December 5, 2025.

ISSUES

[12] The issues raised in this preliminary Application involve whether this appeal should be determined on the "record." The Commission's Practice and Procedure Manual (the "Manual") at page 25 describes an appeal on the record as "an appeal based solely on the information that was before the decision-maker below," and in a previous case the Board has described such an appeal as one "without the parties having any chance to submit new evidence."[1] As previously noted, the Appellant has referred to what it is seeking as an appeal based solely on the information that was before the Deputy Director, which I will refer to as an appeal based solely on the "OTBH record."

[13] With that in mind, I find the issues in this appeal are, more particularly:

a. Should the statutory interpretation issue be heard on the OTBH record?

b. Should the procedural fairness issue be heard on the OTBH record?

DISCUSSION AND ANALYSIS

Summary of the Appellant's Position

[14] The Appellant characterizes the two questions on appeal as:

i) Can the Province proceed with a single opportunity to be heard under s. 24.1(a) and (b) of the Wildfire Act seeking orders in respect of both s. 25(2) and ss. 26-27(1)?

ii) If so, was it procedurally unfair for the Province to seek—and for the decision maker to make—a cost recovery order under s. 25(2) of the Wildfire Act here?

[15] In terms of the answers to these questions, the Appellant says:

i) the answer to the first question is "no"—the options in s. 24.1 are mutually exclusive; and

ii) the answer to the second question is "yes," given the barebones s. 25(2) claim here.

[16] The Appellant says the existing record from the OTBH hearing is sufficient to answer these questions. The first is a pure question of statutory interpretation and the second is a question of procedural fairness that turns on what happened leading up to, and at, the OTBH. Thus, the Appellants argue that no further facts need to be considered or determined.

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[1] *West Fraser Mills Ltd. et al v Government of British Columbia*, 2024 BCFAC 10 (CanLII) ("*West Fraser*"), at paragraph 3.

[17] With respect to the legal basis for the Application, the Appellant says the Commission has broad discretion to determine the conduct of appeals under the provisions of the *Administrative Tribunals Act*, SBC 2004, c. 45 which are incorporated via s. 40.1 of the *Act*. The Appellant notes that Part 8.0 of the Commission's Practice and Procedure Manual provides that the Commission has discretion to conduct the appeal "on the record"—i.e., based solely on the information that was before the decision-maker below.

[18] The Appellant relies on *West Fraser,* where the Commission recently decided the hearing of those appeals would be on the OTBH record. The Appellant says the panel in *West Fraser* held that whether appeals are held on the OTBH record is determined on a case-by-case basis. In making the determination, the "true question" is whether a hearing on the record is procedurally unfair in the circumstances of each case and the relevant factors to consider are: fairness, natural justice, quasi-judicial economy, and the public interest in seeing justice done.

[19] The Appellant submits the panel in *West Fraser* held that, on an application for an appeal on the record, the OTBH record is to be examined by the Commission to determine if it is sufficiently robust to allow the Commission to answer the issues on appeal. According to the Appellant, the issues raised on appeal which are to be considered are those put forward by an appellant, and unless an appellant has raised issues that expand the scope of the appeal beyond the OTBH, it is fair to rely on the OTBH record. The Appellant further says the OTBH and an appeal to the Commission are separate administrative processes each of which must independently guarantee procedural fairness, and the Respondent cannot rely on the Commission to cure a procedurally unfair OTBH.

[20] Applying the principles from *West Fraser* to the present case, the Appellant says it is both procedurally fair and an efficient approach for the present appeal to be heard on the OTBH record. The Appellant says the first question raised on appeal, involving statutory interpretation, is a pure question of law requiring no evidence to resolve. In terms of the second question raised on appeal, the Appellant says that question deals with whether the OTBH—including the record it proceeded on—was procedurally fair, and the only record relevant to answering this question is the OTBH record.

[21] With respect to the fairness factor from *West Fraser*, the Appellant argues there is no unfairness to the Respondent in the proposed approach since the Province had the opportunity to provide evidence at the OTBH. The Appellant says to allow the Respondent to supplement or backfill the record at this stage would pre-emptively deny CN Rail the basis of its own appeal. Similarly, the Appellant argues there is no unfairness to the Third Party since it has just as much ability as any other party to make submissions regarding the adequacy of the OTBH procedures and the sufficiency of the record to maintain the Order.

[22] With respect to the factor of quasi-judicial economy, the Appellant argues a hearing on the OTBH record is more efficient than a new hearing, which would be both lengthier and more expensive and would distract from the issues on appeal.

[23] On the public interest factor, the Appellant says the public interest in seeing justice done would not be served by the Commission exceeding its jurisdiction or allowing its processes to be dictated by unfairness in the administrative proceedings below. The Appellant argues the Commission should adhere to its intended, legislated function as an independent appeal body established to hear appeals from other decision-makers and the Respondent should not be allowed to circumvent its obligation to provide notice and an opportunity to be heard by reworking its case and evidence on appeal.

[24] In conclusion, the Appellant argues that the adequacy of the OTBH record and fairness of the OTBH procedure are the very issues on appeal, so the OTBH record is entirely sufficient to decide the appeal and other evidence is "neither necessary nor appropriate."

Summary of the Respondent's position

[25] With respect to the issue relating to statutory interpretation—Issue 1 raised by the Appellant—the Respondent agrees the Commission can determine that issue on the record and no additional evidence is needed.

[26] With respect to Issue 2, the Respondent says the question of procedural unfairness cannot be assessed on the current Application, nor can it be determined whether the Commission may require further evidence to decide that issue.

[27] The Respondent says that, after receiving the Application, the Respondent sought clarity regarding the grounds of appeal from the Appellant. In particular, the Respondent sought clarity about whether the procedural fairness allegations were limited to what occurred at the OTBH hearing. In response to this request, the Appellant referred to the wording of its Application and stated that the question of procedural fairness "turns on what happened **leading up to** and at the hearing below" (emphasis in the Respondent's submission).

[28] The Respondent points out that the Appellant has not limited its allegations of procedural unfairness to the OTBH itself, but rather has included matters relating to "what happened leading up to" the OTBH. Thus, in terms of the issues on appeal, the Respondent says the procedural fairness issue goes beyond the OTBH and, as such, evidence beyond the OTBH ought to be permitted.

[29] Regarding the sufficiency of the record, the Respondent goes on to say that the Application does not state with any particularity, or at all, what the procedural unfairness allegations are regarding either what happened leading up to the OTBH or what happened at the OTBH hearing. The Respondent argues that, in the absence of the underpinning allegations, the sufficiency of the OTBH record to determine the alleged

procedural unfairness cannot be determined. The Respondent says that although it may be possible, after obtaining further particulars, that Issue 2 can be properly adjudicated on the OTBH record as CN Rail claims, the sufficiency of the OTBH record for determining Issue 2 regarding procedural unfairness cannot be adequately assessed based on the information provided to date.

[30] The Respondent argues it should be able to lead properly responsive evidence to the procedural unfairness allegation, given the Commission can cure any procedural defects, should they have occurred. The Respondent notes that, while the Appellant argues "the Province cannot rely on the Commission to cure a procedurally unfair OTBH," the Commission has routinely noted that "procedural defects or irregularities below can be cured by a full and fair hearing of the matter before the Commission." In that regard, the Respondent relies on the decisions of the Commission in *Frank Schlichting v. Government of British Columbia*, 2015 BCFAC 1 (CanLII), ("*Schlichting*"), at paragraph 25, and *Rudy and Cecilia Harfman v. Government of British Columbia,* 2001 BCFAC 1 (CanLII) ("*Harfman*"), at page 9, as well as paragraph 59 of *West Fraser* where the panel noted that a later process may be curative of any defects that arise below.

[31] With respect to the current appeal, the Respondent says "the order sought in the Application makes little procedural sense since to the extent procedural unfairness is determinable on the OTBH record as [the Appellant] claims, then [the Appellant] can simply advance that case and the relief sought in the Application is unnecessary or superfluous."

Summary of the Third Party's Position

[32] As previously mentioned, the use of the record to deal with the statutory interpretation issue is not in dispute and the Third Party agrees that additional evidence is not required for the Commission to adjudicate Issue 1.

[33] Regarding Issue 2 involving procedural unfairness, the Third Party says it is not in a good position to know if the Commission requires, or would benefit from, additional evidence related to Issue 2 as it did not participate in the OTBH, is not familiar with the record established during that process, and does not know if additional relevant evidence exists through witnesses or documents.

[34] In any event, the Third Party says the Commission should not only consider the possibility of additional evidence related to determining whether there was a breach of procedural fairness, but should also consider whether any defects in the OTBH process that amount to a breach of the Appellant's procedural fairness rights can be cured in this appeal to the Commission. The Third Party notes that, while the Appellant argues the Respondent cannot rely on the Commission to cure a procedurally unfair OTBH, the Commission is not precluded from curing a procedural defect. The Third Party points to previous decisions of the Commission where it has held that "procedural defects or irregularities below can be cured by a full and fair hearing of the matter before the

Commission." The Third Party further notes the Commission in *West Fraser* also stated that such a later process may be curative of any procedural defects that arose below.

Summary of Appellant's Reply Submissions

[35] The Appellant notes that all the parties agree that Issue 1 involving statutory interpretation issue can proceed on the existing record. Accordingly, the Appellant says it only remains to be determined if the following question can be decided solely on the record: "whether it was procedurally unfair for the Province to seek—and for the DDM [Deputy Director] to make—a cost recovery order under s. 25(2) of the Wildfire Act, given the degree of notice provided to CN [Rail] in advance of the OTBH ("Issue 2")."

[36] The Appellant disagrees with the Respondent's position that Issue 2 is unclear, and maintains the phrasing is clear from its Notice of Appeal and the Application. The Appellant says the OTBH was procedurally unfair because the Appellant did not receive adequate notice of the s. 25(2) allegations. The Appellant says that, by covering letter dated January 14, 2025 (the "Covering Letter"), it was provided with notice of the OTBH and the Investigation Report. According to the Appellant, neither the Covering Letter nor the Investigation Report contained particulars of what the NROS' theory is or was under s. 25(2), but instead the Appellant asserts those documents only sought to justify proceeding with s. 25 in the alternative, or in addition to ss. 26-27.

[37] The Appellant says it has set out the evidence it intends to rely on in the adjudication of the procedural fairness issue, being: the Covering Letter, the Investigation Report, the Appellant's written submissions at the OTBH, and the Deputy Director's written reasons. The Appellant argues this constitutes the relevant record. In response to the Respondent's suggestion on this Application that there may be further evidence "responsive to allegations of procedural unfairness that is not in the OTBH record," the Appellant says that if the Respondent has more evidence, it should say so directly—not speculate.

[38] The Appellant notes that both the Respondent and Third Party submit the Commission can cure any procedural unfairness at the OTBH by way of the appeal process. However, the Appellant argues the Commission's conclusion in *West Fraser* is fatal to that submission. The Appellant says the sentence from *West Fraser* relied on by the other parties, indicating that an appeal before the Commission "may be curative of any defects that arise," is taken out of context and cannot be read as they suggest. The Appellant asserts the *Schlichting* and *Harfman* cases cited by the other parties, as supporting the Commission's power to cure procedural unfairness, are irrelevant here, and are based on the circumstances of those cases.

[39] The Appellant argues the Respondent did not provide sufficient notice of the case to be met at the OTBH, and the burden at the OTBH was on the Respondent to prove its case. The Appellant says any shortcomings with the notice and evidence at the OTBH should have been addressed then. The Appellant says the availability of a *de novo* hearing

procedure cannot be transformed into an opportunity for the Respondent to re-hear its case, and the Respondent should not be granted a re-hearing and opportunity to backfill its case with new evidence.

PANEL'S FINDINGS

[40] In analyzing the issues before me, I will examine the following matters:

i) What are the factors to consider in deciding whether an appeal should be conducted on the record?

ii) Can the Commission cure a procedural unfairness in the process leading to the original decision by way of the appeal process? and

iii) Should the appeal be conducted on the OTBH record?

i) What are the factors to consider in deciding whether an appeal should be conducted on the record?

[41] I begin by noting that in *West Fraser* the panel held that it is the Commission which will decide whether to convene a new hearing or an appeal on the record (or a hybrid process). I agree with the panel in *West Fraser* that the choice of process is for the Commission to decide, and not for any particular party.

[42] As noted at page 24 of the Commission's Manual, "a hearing, written or oral, is generally conducted as a 'new hearing,' which means "the Commission may hear new evidence and argument that was not before the previous decision-maker." However, at page 25, the Manual also provides that the Commission "has the discretion to conduct the appeal as an 'appeal on the record,'" and "if a party wants the appeal to be conducted on the record, rather than as a new hearing, an application must be made to the Commission." In my view, this means that if a party considers an appeal ought to be heard on the record, that party must apply to the Commission to demonstrate why this should occur.

[43] Turning to the factors for the Commission to consider in determining whether an appeal should be limited to the record, the panel in *West Fraser* held such factors included the following:

- examination of the issues under appeal,
- whether the record is sufficiently robust to allow the Commission to answer the issues under appeal,
- fairness,
- natural justice,

- quasi-judicial economy, and
- the public interest in seeing justice done.

[44] In dealing with the factors involved with the sufficiency of the record and the issues on appeal, the panel in *West Fraser* stated, at paragraph 62:

> ...when assessing the sufficiency of the record, the Commission should consider what exists on the record and the issues under appeal. The Commission should consider whether the record is sufficient to address those issues, or whether the parties may be able to provide further evidence to allow the Commission to better address those issues. The choice of appeal process may also involve the input of the parties, and may also weigh notions of proportionality and efficiency. It must engage in these considerations with reference to relevance as established by the issues raised by the appellant, and possibly clarified or reframed by the appellant or the Commission, in any given appeal.

[45] I accept and adopt this reasoning from *West Fraser*. From this, I find the Commission should, among other things:

- consider what exists on the record;
- analyze whether what exists on the record is sufficient to address the issues under appeal;
- consider whether the parties may be able to provide further evidence to allow the Commission to better address those issues;
- take into account that the choice of appeal process may involve the input of the parties; and
- consider that the choice of appeal process may also involve notions of proportionality and efficiency.

[46] When considering if an appeal is to be conducted on the record, I note that such an appeal would be by way of a written hearing, with no additional evidence admitted. Thus, I further find that the factors set out at page 23 of the Manual regarding whether to hold an oral or written hearing may also be relevant in determining whether the appeal is to be on the record:

> ...the Commission will give careful consideration to balancing the process to be followed with the nature and complexity of the appeal, any views expressed by the parties, the likelihood that there will be conflicting evidence and/or credibility issues that will need to be assessed, the number of parties involved in the appeal, whether there are any language or literacy barriers to a particular type of hearing, and the potential for community interest in the appeal.

[47] I find the Commission will need to balance the various factors I have mentioned in order to determine whether to conduct an appeal on the record, and in each case the balancing process will turn on its own particular circumstances. In my view, the most important factors will generally be: i) the breadth of the issues on appeal; ii) the sufficiency of the record to deal with those issues; iii) whether the parties may be able to provide further evidence to allow the Commission to better address those issues; and iv) fairness. With respect to fairness, I agree with the panel in *West Fraser* at paragraph 51 that "the Commission must ensure that the method of hearing it selects offers procedural fairness to the parties to the appeal, including the Respondent."

ii) Can the Commission cure a procedural unfairness in the process leading to the original decision by way of the appeal process?

[48] A significant point of disagreement between the parties is whether the Commission can cure a procedural unfairness that occurred in the process below by way of the appeal process. As previously noted, in response to the submissions of the Respondent and Third Party to that effect, the Appellant says the Commission's conclusion in *West Fraser* is fatal to that position. I disagree with the Appellant, however, and in my view, the panel in *West Fraser* did **not** hold that the Commission cannot cure procedural unfairness at an opportunity to be heard by way of the appeal process. I find this for the following reasons.

[49] First, it is clear the panel in *West Fraser* says an appeal before the Commission "may be curative of any defects that arise" at an opportunity to be heard. While the panel stated that the Respondent should not act in an unfair manner at an opportunity to be heard in reliance that the Commission will later do so, that does not mean the Commission's process cannot cure defects in the procedure which led to the decision.

[50] Second, as the Respondent and Third Party point out, previous Commission decisions, including *Schlichting* and *Harfman*, have held that the Commission's process can be curative of any procedural defects which occurred at an opportunity to be heard. In my view, the panel in *West Fraser* was not attempting to depart from such case law without a thorough analysis of such case law and an explanation as to why the panel was departing from the reasoning as set out in those cases.

[51] Third, the courts have also held that a subsequent process can be curative of defects in the process below. For example, in *British Columbia (Attorney General) v. 992704 Ontario Limited,* 2023 BCCA 346 (CanLII), the British Columbia Court of Appeal held at paragraph 68 that it is well-established that breaches of procedural fairness by an original administrative tribunal will generally be cured by a full and fair hearing *de novo* before an appellate body. Again, I find that the panel in *West Fraser* was not attempting to depart from the jurisprudence in this area of administrative law.

[52] From the foregoing, I find that the Commission can cure a procedural unfairness that occurred in the process below. Having said that, whether to hold an appeal on the

record will still depend on the particular circumstances, including the specific issues involved with the appeal, whether the parties may be able to provide further evidence to allow the Commission to better address those issues, and whether it would be fair to do so. I repeat the panel's statement in *West Fraser* at paragraph 51, which I agree with, that "the Commission must ensure that the method of hearing it selects offers procedural fairness to the parties to the appeal, including the Respondent."

iii) Should the appeal be conducted on the OTBH record?

Issue 1 - Statutory Interpretation

[53] As previously noted, with respect to the issue relating to statutory interpretation—Issue 1 raised by the Appellant—all the parties agree the Commission can determine that issue on the record without additional evidence. I agree and find that Issue 1 involves a strictly legal question that does not require additional evidence. I therefore find that the statutory interpretation question can be heard on the OTBH record.

Issue 2 – Alleged Procedural Unfairness

[54] In dealing with this issue, I will consider the factors previously mentioned, and in particular:

i) the issue under appeal;

ii) the sufficiency of the record;

iii) whether the parties may be able to provide further evidence to allow the Commission to better address the issue; and

iv) fairness.

[55] I begin with the issue under appeal. In the present case, the issue under appeal is one of alleged procedural unfairness. The material provided on the Application indicates the Appellant has acknowledged that the alleged procedural unfairness involves events leading up to the OTBH as well as what occurred at the OTBH. I agree with the Respondent that the Application does not describe the allegations of procedural unfairness with sufficient particularity regarding either what happened leading up to, or at, the OTBH. While the Appellant says that the notice received about the section 25(2) claim was inadequate, there is not sufficient information before me about why the notice was inadequate to assess whether the issue can properly be dealt with solely on the record. Similarly, while counsel for the Appellant indicated at the OTBH that he would have expected to get more materials in relation to section 25(2) (as mentioned in the quote from the Order at paragraph 8 above), there is not sufficient information as to what more counsel for the Appellant expected to get. In my view, without knowing particulars about these allegations of inadequate notice or information, it cannot be said that there is no need for further evidence. In the present circumstances, I find the lack of particulars

regarding this issue on appeal is a factor against finding the appeal should be determined on the record.

[56] Regarding the sufficiency of the record, there are two things of note. First, in the present case it is not clear what the extent of the record is regarding the procedural unfairness issue. The Manual at page 25 provides that an appeal on the record is "based solely on the information that was before the decision-maker below." The material provided on the Application indicates that the alleged procedural unfairness includes what occurred leading up to the OTBH, and it has not been adequately established that all relevant matters which occurred leading up to the OTBH were before the decision-maker below.

[57] Second, the responding parties ought to have an opportunity to indicate what they consider the record to be. As set out at page 30 of the Manual and as noted in *West Fraser*, the process of determining what constitutes the record will involve the parties. The Appellant has indicated in its reply submission that the relevant record consists of the evidence it intends to rely on, being: the Covering Letter, the Investigation Report, CN Rail's written submissions at the OTBH, and the Deputy Director's written reasons. However, the record in an appeal is not what an appellant says it intends to rely upon and I find that, without adequate particulars of the procedural unfairness allegations, the responding parties have not been provided with an adequate opportunity to assert what they consider the record to be and whether it is sufficient for the Board to address the issues under appeal.

[58] The panel in *West Fraser* indicated there should be an examination of what exists on the record, and whether what exists on the record is sufficient to address the issues under appeal, and I agree. For the reasons mentioned, I find it has not been established what the record contains or whether it is sufficient to deal with the issue of alleged procedural unfairness. In particular, I find it has not been established whether all relevant matters relating to the alleged procedural unfairness which occurred during the time frame leading up to the OTBH would have been before the Deputy Director. Thus, I find this is a factor against finding the appeal should be determined on the record.

[59] As for whether the parties may be able to provide further evidence to allow the Commission to better address the issue, counsel for the Respondent says it should be able to lead properly responsive evidence relating to the procedural fairness allegation. I agree and find counsel for the Respondent ought to be provided with the opportunity to investigate the allegations of procedural unfairness, and in particular relating to what occurred prior to the OTBH. The Appellant has put what occurred prior to the OTBH at issue and there may have been, for example, communications such as emails or discussions prior to the OTBH which are relevant to the procedural unfairness allegation. I find that such information, if it exists, could assist the Commission in addressing the issue under appeal, and that relevant evidence about the procedural unfairness allegation ought to be permitted regardless of whether it was before the Deputy Director. Thus, I find this weighs against having the appeal determined solely on the record.

[60] Fairness also militates against having the appeal determined solely on the record. For the reasons previously given, I find fairness supports allowing counsel for the parties to have the opportunity to explore what occurred prior to and at the OTBH, and to indicate whether there is any evidence they wish to provide relating to the procedural unfairness allegations. In that regard, I further find it would be unfair to prevent the Respondent from leading evidence to respond to the Appellant's allegation that the Respondent acted in a procedurally unfair manner. However, in terms of ensuring fairness, I also agree with the Appellant that if and when the Respondent has any more evidence about such matters, the Respondent should say so directly and indicate what that evidence is.

[61] With regard to the other factors, and quasi-judicial economy in particular, I wish to make it clear that my decision does not automatically require that there be an oral hearing—in other words, this decision does not preclude having this appeal heard by way of either a written hearing or a hybrid hearing. While a hearing on the record will of necessity be a written hearing, a finding that a hearing may extend beyond the record does not mean it must be an oral hearing. Furthermore, even if there is additional evidence on the procedural unfairness issue submitted in this appeal, it may nevertheless still be appropriate to have a written hearing, or hybrid hearing, if such evidence is not disputed or could, for example, be presented by way of affidavit. I make no such finding on the appropriate method of hearing, and the Commission will determine this at a later date. Thus, I do not consider that quasi-judicial economy is significantly implicated in the circumstances of this Application on the information presented to me.

[62] Before concluding, there is one other aspect of the Application I wish to address. In considering the breadth of the issues on the appeal, I have treated Issue 2 as being one alleging procedural unfairness and inadequate notice as described in the submissions. I note, however, the Appellant appears, at times, to refer to the merits of the section 25 claim with submissions indicating the Respondent should not have the "opportunity to backfill its case with new evidence." I have decided that the parties should have the opportunity to lead evidence on the procedural unfairness issue involving notice, which is the ground of appeal in question, and I make no comment about potential additional evidence on the merits of the section 25 claim, which is not before me.

Conclusion

[63] Based on the evidence before me in the Application, I have, for the preceding reasons, determined that Issue 1 may be heard on the record, but not Issue 2. The Application in the present case is made in relation to both Issue 1 and Issue 2, and the question of potentially separating them for adjudication has not been addressed. In the circumstances, I find that the appropriate order is to dismiss the Application.

[64] Having said that, my order is not intended to preclude further discussions between the parties and with the Commission about the process moving forward. In that respect, I note that counsel for the Respondent has indicated it may be possible, after obtaining

more particulars underpinning the allegations of procedural unfairness, that Issue 2 can be properly adjudicated on the OTBH record as CN Rail claims. Again, my decision is not intended to preclude the parties coming to an agreement about the process for adjudication moving forward, and the Commission making any further orders about the process in the appropriate circumstances. However, in the absence of such further order by the Commission, the appeal is to proceed as a *de novo* hearing which may be an oral, written, or hybrid hearing as further determined by the Commission.

DECISION

[65] For the reasons set out above, the Application is dismissed on the basis previously noted.

[66] In reaching my decision, I have considered all of the submissions provided by the parties, whether specifically referenced in my reasons or not.

"James Carwana"

James Carwana, Panel Chair
Forest Appeals Commission