



## ENVIRONMENT IN THE COURTROOM

Edited by Allan E. Ingelson

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## Proving the Right to Be Heard: Evidentiary Barriers to Standing in Environmental Matters

ADAM DRIEDZIC

### Introduction

“Standing” is the legal status necessary to receive a hearing from a court or an administrative board or tribunal (a “tribunal”). In 2014 the Environmental Law Centre in Edmonton completed a major review of standing in environmental matters from which this chapter is derived.<sup>1</sup>

Evidence is rarely treated as its own topic with respect to standing. Most courts, legislatures, academic commentators, and law reform institutes have been more focused on the legal tests for standing. Yet, facts are very important to individual determinations of standing under these tests. The core issue in environmental matters is that the traditional approach to standing was developed by the common law courts in the context of the adversarial litigation system. Many tests for standing require evidence of personal interests and harm to those interests, whereas in environmental matters the interests are often collectively held and the harm to those interests is indirect. There are uncertainties about what must be proven, who should bear the burden of proof, what the standard of proof should be, and whether standing should be determined as a preliminary matter separate from the merits of the substantive claims. These issues can be acute at environmental tribunals, where the proceedings are not litigation and the rules of evidence need not apply.

Case law on standing at environmental tribunals is sparse, but evidentiary issues are central and trends are emerging. Courts in multiple provinces are following the tests articulated by legislatures for standing at administrative hearings, but are intervening against tribunals that create unnecessary

evidentiary and procedural barriers. They are also beginning to articulate concerns with fairness, access to justice, and with upholding the mandates of tribunals. This suggests that a cohesive jurisprudence on standing at tribunals may be within reach.

## **The Evidentiary Issues**

The evidentiary issues in standing are similar at courts and tribunals despite the different mandates of these institutions. These issues are not really about the sufficiency of facts upon which to base environmental decisions. They are about rules and practices that make it hard to show sufficient facts to trigger hearings. These issues can be understood as: what must be proven; who should bear the “burden of proof”; what the appropriate “standard of proof” should be; and whether standing should be determined as a preliminary matter.

### **WHAT MUST BE PROVEN?**

What must be proven to establish standing is dependent on how the legal tests for standing are articulated. Many tests are notoriously vague and provide minimal guidance to decision makers. These tests require that persons be “directly affected,” “adversely affected,” “aggrieved,” or suffer a particular “prejudice.”<sup>2</sup> The leading academic commentary has called these tests a “semantic wasteland,” a criticism that has been noted by the Federal Court and Federal Court of Appeal.<sup>3</sup>

An additional problem in public law matters is that the legal tests for standing favour private property and economic interests. They may even imply a need to show possible causation of harm to those interests. Requirements for harm to personal interests create disproportionate barriers to standing in environmental matters because the interests at stake are often collectively held and the impacts on those interests are often indirect.

### **THE BURDEN OF PROOF**

The burden of proving standing is on the person seeking standing. This appears uncontentious but it is not. Law reform commissions in multiple jurisdictions have proposed tests that resemble a presumption of standing in public law matters.<sup>4</sup> This presumption would be rebuttable by specific arguments against standing, such as the need to conserve judicial resources. Likewise, the Manitoba Public Interest Law Centre once proposed that environmental reviews should allow all persons to make their submissions subject to requirements for relevance and tribunal authority to take efficiency measures.<sup>5</sup> The

University of Victoria Environmental Law Centre has expressed concern with the tribunal process of placing the burden of proving standing on persons harmed by pollution rather than requiring persons seeking to pollute to show that they will not cause harm.<sup>6</sup> Some tribunals already offer a rebuttable presumption of standing, for example to landowners within a set distance from proposed industrial projects.<sup>7</sup>

All of these examples of presumptive standing would put focus on the substantive issues instead of the interests of the parties. They could reduce disputes about standing and ensure that reasons for denying standing are based on real circumstances rather than hypothetical ones.

### THE STANDARD OF PROOF

The standard of proof for determining standing is often lower than the “balance of probabilities” standard that must be met to prove civil claims. The appropriate standard is sometimes stated as a *prima facie* case. This low standard of proof emphasizes the distinction between standing and the merits of substantive claims, and is warranted where standing is determined as a preliminary matter.

### PRELIMINARY DETERMINATIONS OF STANDING

Standing may be determined as a preliminary matter, but need not be. The tension is between the efficiency of preliminary determinations and the risk of dismissing meritorious claims without the full evidence available.<sup>8</sup> To resolve this tension, multiple law reform reports recommend determining standing as a preliminary matter, using relaxed tests for standing.<sup>9</sup>

### Standing in the Courts

Common law tests for standing and determinations of standing under those tests frequently merge questions of law, fact, and judicial policy. The two key tests in public law matters are the English “public nuisance rule” and the Canadian development of “public interest standing.” The “public nuisance rule” provides that the appropriate plaintiff to enforce public rights is either the Attorney General or someone with the Attorney General’s consent.<sup>10</sup> Private citizens who lack consent can only enforce public rights if their own private rights have also been harmed or if they have suffered harm that is different from that suffered by the general public. This rule is constantly criticized as ineffective for environmental matters, but it persists.<sup>11</sup> “Public interest standing” is a late 20th-century Canadian development that diverges from the

historic public nuisance rule in limited circumstances. This discretionary form of standing is granted to uphold the role of the courts in scrutinizing legality. To date, it has been made available to challenge the constitutionality of legislation and the legality of administrative action. The test considers whether there is a “serious issue” suitable for judicial determination, whether the plaintiff is “directly affected” or demonstrates a “genuine interest,” and whether the proposed litigation provides a reasonable and effective means for the issue to be heard by the courts.<sup>12</sup>

The largest evidentiary barrier to common law standing is what must be proven to pass the public nuisance rule. The courts are inconsistent on whether the harm suffered by private citizens must be different from the general public “in kind” or “in degree.”<sup>13</sup> It is possible that the required factual circumstances could be more extreme than those required to initiate private litigation.

If the issues are ones for which public interest standing is available then the courts have eliminated the evidentiary barriers. The Supreme Court of Canada (SCC) has not provided much help in this endeavour. SCC cases on public interest standing are all non-environmental matters and most feature directly affected plaintiffs, so the SCC has provided minimal guidance on what amounts to a “genuine interest.” Consequently, some early environmental cases in the lower courts diverged on what must be proven. The British Columbia Supreme Court (BCSC) required some difference from the general public.<sup>14</sup> In contrast, the Alberta Court of Queen’s Bench (ABQB) held that the interest could be shared by thousands of others.<sup>15</sup> Eventually the lower courts established objective indicators of “genuine interest” in environmental matters that are fairly consistent across jurisdictions. The most important indicators are the purpose of environmental organizations and their record of involvement in the issues or subject matter.<sup>16</sup> The records of members, directors, or affiliates of organizations can be probative as well.<sup>17</sup> Prior participation or activities related to the dispute can help establish an interest, but their absence does not hurt.<sup>18</sup> The BC courts have weighted geographic proximity to environmental impacts, but only in cases where this has assisted persons seeking standing.<sup>19</sup> The Federal Court has found geographic proximity to be fairly irrelevant due to the interconnectedness and complexity of modern society.<sup>20</sup> The Federal Court’s approach somewhat resembles the manner in which interveners are screened, where the court looks for “experience” or “expertise” to help resolve the issues.<sup>21</sup>

In non-environmental matters, the SCC has denied public interest standing multiple times because of the existence of other possible means for the issue

to be litigated.<sup>22</sup> This jurisprudence was criticized for reliance on hypothetical circumstances, theoretical fears, and latent ideology over reality.<sup>23</sup> In 2012, the SCC deliberately lowered this barrier by considering the practical reality of equivalent litigation occurring and the appropriateness of public interest plaintiffs.<sup>24</sup> This development has been lauded by advocates in non-environmental disciplines.<sup>25</sup> However, it may have minimal effect on environmental matters. Standing in environmental matters is rarely ever denied due to other means for issues to be litigated, because often no one is more directly affected or able to litigate than the public interest organization.

The “burden of proof” on the plaintiff remains uncontested in the jurisprudence despite the above commentary to the effect that this practice is questionable. The “standard of proof” is rarely articulated, but it is fairly low. Usually the plaintiff must simply show some facts to establish their “genuine interest.” In contrast, their opponents must prove on a “balance of probabilities” that there is no arguable case. For example, the Federal Court of Appeal has held that standing should only be used to discourage meddlers and not to pre-emptively determine that litigation has no cause of action.<sup>26</sup> This indicates a difference between standing in public law matters and attempts to bring private law claims against government, as in the latter case the threshold issue may be the existence of a cause of action.

The courts may determine standing as a preliminary matter if the issues, evidence, and arguments available provide a sufficient understanding of the interest being asserted.<sup>27</sup> Commitment to this practice varies by jurisdiction. The Federal Court consistently makes preliminary determinations, and if standing is granted then it ceases to be an issue. Some cases from Alberta and British Columbia note that it may be necessary to determine standing through hearings on the full evidence and merits of substantive claims.<sup>28</sup> Overall, the largest barrier to standing in environmental litigation is not evidentiary but rather the limited legal issues for which public interest standing is available.

## **Standing at Tribunals**

Standing at tribunals has received less attention than standing in the courts, but this is changing. The analysis must begin with an understanding that tribunals are not courts. Tribunal hearings may resemble litigation due to evidence and argument from the parties, but this resemblance is superficial.<sup>29</sup> Courts must establish the facts of past events to decide legal disputes between the parties in a yes–no manner. Tribunal hearings rarely involve legal disputes between the parties, and even if so there are further public interests at stake.

Tribunal decisions must look to the future, which favours a range of reasonable outcomes.

Another key difference is that tribunals have no inherent jurisdiction to hear issues or grant standing. Tribunal authority to determine standing must come through ordinary legislation. There are countless legislated models, ranging from completely open standing to the exclusion of everyone except for categorized rights holders. The implication of legislated mandates is that tribunal determinations of standing have sometimes been treated as questions of “law and fact” on the basis that the relevant policy is that of the legislature.<sup>30</sup> Whether tribunals can grant common law public interest standing is a separate issue tackled elsewhere by the Environmental Law Centre and others.<sup>31</sup>

The evidentiary issues common to courts and tribunals can be aggravated by tribunal procedure. Persons seeking standing may be inexperienced and may face tight deadlines on which to file written statements or forms. Even if the parties submit sworn affidavits there may be no hearing on standing, pre-hearing conferences, or opportunities to challenge contrary evidence. Determinations of standing may be issued through letters to the parties or through decision documents that rely on the paper submissions.

There are few cases on standing at environmental tribunals, but evidentiary issues are often central to these cases. Most of the following examples from Alberta, British Columbia, and Ontario concern air emissions. This affirms the challenge created by collective interests and indirect impacts.

## REGULATORY BOARDS IN ALBERTA

Several striking examples of high evidentiary barriers come from regulatory boards in Alberta. Standing at these tribunals is provided to persons who may be “directly and adversely affected” by proposed energy and utility projects. Determinations of standing to intervene in the regulatory decision are made as a preliminary matter through letters to the persons seeking standing. The Alberta Court of Appeal (ABCA) treats determinations of standing by these tribunals as a question of “law and fact,” requiring a legally recognizable interest and evidence that it may be affected.<sup>32</sup> The tribunals show preference for property and economic interests. Historically the ABCA has upheld denials of standing to more indirect interests.<sup>33</sup> The court only requires a *prima facie* case of adverse effects.<sup>34</sup> However, it can find that this low standard is not met, even in cases featuring geographically proximate property and economic interests.<sup>35</sup>

Since 2009 the ABCA has shown propensity to intervene where the tribunals create evidentiary barriers beyond those required by legislation. Three

key cases concern the same group of landowners exposed to health risks from proposed sour gas wells. The tribunal in question is a recently defunct Energy Resources Conservation Board. In *Kelly v. Alberta (Kelly #1)*, the ABCA overturned a denial of standing and ordered the tribunal to grant standing and hold a hearing.<sup>36</sup> The tribunal had produced a model of airborne gas which indicated that the landowners resided in a zone where there was a risk of life-threatening and possibly irreversible health effects in the event of a gas release. This geographic proximity created a right to be consulted by the proponent company under a standardized regulatory directive issued by the tribunal. The ABCA held that a person with this right to be consulted qualified as directly and adversely affected for the purpose of standing. The court rejected the tribunal's interpretation of the standing test as requiring that a person show that they may be affected to a greater or different degree than the general public.

After *Kelly #1*, the tribunal changed its airborne gas model in a manner that excluded the landowners from this zone of high risk, claiming a technical error in the prior model. In *Kelly v. Alberta (Kelly #2)*, the landowners resided within a lower risk zone where persons would be advised to evacuate or take shelter in the event of a gas release.<sup>37</sup> The tribunal denied standing due to inadequate evidence supporting a claim that the landowners' existing medical conditions would be aggravated by the gas. It also stated that risk of evacuation was not an "adverse" effect because evacuation is a benefit. The ABCA rejected the tribunal's findings on both points, holding that the right to intervene was designed for persons with "legitimate concerns" to have input into decisions "that will have a recognizable impact on their rights."<sup>38</sup>

The ABCA continued to overturn the tribunal in a third case concerning intervener costs.<sup>39</sup> After being ordered to grant standing in *Kelly #1*, the tribunal held a hearing, but it denied intervener costs under a semantically narrower test that required a directly and adversely affected interest in "land." The ABCA found that the landowners were eligible for costs despite this different test. Again it emphasized the role of hearings in the regulatory process. Most notably it articulated a view of regulatory proceedings as not purely win-lose or adversarial in the manner of litigation.

The *Kelly* cases are significant in several regards. Foremost, they concern a regulatory board making original decisions in the public interest. This context is even less like litigation as compared to quasi-judicial appeals tribunals. Concerning what must be proven, the court definitely focused on individual



interests, but it rejected requirements to be differently affected from the general public. The court never questioned that the interveners must prove their standing, but it might have sensed a moving goalpost. In *Kelly #1*, the tribunal created requirements beyond the legislation while ignoring participation rights in its own regulations. Following the case, it shifted its own hypothetical model rather than acknowledging real impacts on people. In *Kelly #2*, the tribunal's requirements practically resembled "toxic tort" litigation where plaintiffs must prove that specific pollution causes their individual health problems. This can be impossible to prove in a full trial with tested expert evidence, let alone through a preliminary determination on paper submissions. The standard of proof implied by the tribunal was higher than the legislated requirement that one "may" be affected, so the court properly focused on the existence of a risk of harm.

#### APPEALS TRIBUNALS IN ALBERTA

In multiple cases since the mid-1990s, the Alberta courts have considered whether community activists pass a "directly affected" test for standing at appeals tribunals. Two foundational cases concern a now-defunct public health tribunal.<sup>40</sup> In both cases the ABCA upheld denials of standing by the tribunal, finding that the test required personal rather than communal interests. This authority was followed by the ABQB in *Kostuch v. Alberta* to uphold a denial of standing by the current Alberta Environmental Appeals Board.<sup>41</sup> The court held that there must be a causal connection between these personal interests and the matter under appeal. In the subsequent case of *Court v. Alberta* it overturned a denial of standing by this tribunal, holding that the effects on personal interests need not be different in kind from any other Albertan or user of the area.<sup>42</sup> The court held that standard of proof only requires a *prima facie* case that interests may be affected, not that they be affected. It found that the tribunal imposed an unreasonable test and evidentiary requirements that were inconsistent with the participatory role envisaged by the legislation. It also held that standing should be determined as a preliminary matter. The case centred on an area landowner concerned with emissions from a cement plant. The tribunal had determined standing with the merits of the substantive issues at the end of the proceedings. The effect of this practice was to dismiss the appeal for no standing, even though by that point in proceedings the tribunal had recognized concerns with the decision being appealed. In a 2013 case, the ABQB found that the tribunal had no jurisdiction to grant common law public

interest standing.<sup>43</sup> Multiple environmental organizations and individuals sought to appeal the legality of a decision to the tribunal, which it could have heard but for lack of standing.

The Alberta appeals tribunal cases suggest that the courts and tribunals are struggling to articulate what must be proved to pass the “directly affected” test. The cases also illustrate how these tests make it hard for tribunals to follow the accepted practices of low standards of proof and preliminary determinations. They further suggest that evidentiary barriers to standing can exceed those to the substantive claims. If the substantive issue is with the legality of a decision but one must be “directly affected,” then more facts may be required to prove standing than to settle the substantive issues.

### THE BRITISH COLUMBIA ENVIRONMENTAL APPEAL BOARD

Some of the most recent and principled judicial statements on standing at tribunals concern the requirements to be “aggrieved” for standing at the British Columbian Environmental Appeals Board. In the 2014 case of *Gagne v. Sharpe*, the BCSC overturned a denial of standing to six individuals, a local environmental organization, and a regional environmental organization who were all seeking to challenge an emissions permit for a metal smelter.<sup>44</sup> Reasons for the decision included breach of fairness, an overly high standard of proof, and an unnecessary requirement that members of incorporated groups be individually aggrieved.

The tribunal in question granted standing to two local residents but denied standing to the individuals and organizations based in the broader geographic region. Standing was determined as a preliminary matter on written submissions. The appellants requested a pre-hearing conference and particulars on the issues concerning standing, but the tribunal denied these requests. After the written submissions were filed, the tribunal requested extra material from the permit holder in relation to determining standing. The appellants were not notified of this event or provided an opportunity to respond. The tribunal’s procedural manual stated that the tribunal could obtain information not tendered by the parties, but before considering such information it must give all parties notice and opportunities to respond. The manual also stated that persons involved in the process could expect these procedures to be followed.

While this was not clear from the decision, the information that was provided after the written submission deadline was the permit holder’s environmental report. This material was known to the appellants and likely in

their possession, but it was not yet filed into evidence and might have been challenged by the appellants if there was a hearing.

The BCSC found that there was a strong duty of fairness owed to persons seeking standing, that the tribunal breached its own procedural rules, and that there was a legitimate expectation that these rules be followed. It also found that the tribunal imposed the standard of proof of a “balance of probabilities.” This standard was too rigorous for a preliminary determination because definitive proof of harm was unnecessary and tribunals should not consider the substantive merits at this stage. The court justified a low standard of proof based on risk that meritorious arguments could be foreclosed, the short timelines, the unavailability of expert evidence, the lack of a pre-hearing, and the lack of identified specific concerns with standing. It further held that incorporated environmental organizations may qualify for standing as persons without having to show that their members would have standing.

*Gagne* is significant for articulating common law principles and judicial policy concerns with “access to justice” in a review of standing under a legislated test. In that regard it goes beyond looking at standing as question of law, fact, and policy of the legislature.

Unfortunately *Gagne* does not settle what must be proven. The court believed that the requirement to be “aggrieved” was broad enough to include environmental organizations that lacked specific property and economic interests, but it admitted that they may face challenges. It also provided an *obiter dictum* opinion that public interest standing was not available at this tribunal. The case further illustrates how the ability of tribunals to forego the formal rules of evidence can occasionally be a barrier to standing.

## THE ONTARIO ENVIRONMENTAL REVIEW TRIBUNAL

The Ontario Environmental Review Tribunal provides an important contrast between standing and the substantive issues. Provincial legislation in the form of an *Environmental Bill of Rights* provides rights to third parties to appeal specific decisions to the tribunal.<sup>45</sup> The legislation creates a two-step process where “any person” with an interest in the decision has standing, but they must then pass a test for leave to appeal to the tribunal on the substantive issues.<sup>46</sup> The interest requirement is sufficiently relaxed to provide standing to environmental groups, but the requirements for leave to appeal are stringent. The tribunal must refuse leave to appeal unless there is good reason to believe that a decision was unreasonable and that it could result in significant environmental harm.<sup>47</sup> Early tribunal decisions differed on the standard of proof for

establishing this harm, but the tribunal has settled on only requiring a *prima facie* case.<sup>48</sup>

In *Dawber v. Ontario*, the Ontario Divisional Court upheld the tribunal's decision to grant standing and leave to appeal to groups and individuals opposed to a waste incineration permit.<sup>49</sup> The interests required for standing were met by persons who filed written submissions on the permit decision and persons who resided sufficiently close to the site, even though some lived on an island several kilometres away. Despite this relaxed approach, not all persons showed sufficient evidence to establish an interest. The court held that the test for leave to appeal was stringent and created a presumption against leave. It noted that the requirements for an unreasonable decision and significant environmental harm must both be met or leave must be denied. However, it found that this barrier was "not insurmountable." Evidence of the reasonableness of the decision and the likelihood of environmental harm included environmental policies that legislation required the decision maker to consider. The questions of reasonableness and likely harm were not limited to whether the permit complied with regulations. Mere regulatory compliance did not establish that environmental harm would not occur, the decision maker had power to make permits more stringent than the regulations, and the tribunal could look to other environmental policies. The court also held that the standard of proof for preliminary determinations of standing and leave to appeal was lower than a balance of probabilities.

The Canadian Environmental Law Association stated that *Dawber v. Ontario* should clarify the grounds for appeal that the tribunal may favour, but it questioned the extent to which the legislation has facilitated access to justice or impacted environmental decisions.<sup>50</sup> The number of third party appeals will remain minimal without legislative change, because the need to show evidence of unreasonableness and potential harm will result in most applications being dismissed. Records of the tribunal and the provincial Environment Commissioner affirm that third party appeals are very infrequent.<sup>51</sup>

The evidentiary requirements for leave to appeal practically combine the need to establish multiple substantive claims in litigation and regulatory proceedings. Finding that a decision is unreasonable would typically be the finding of a substantive judicial review hearing. Finding the chance of significant environmental harm would typically be the finding of an environmental assessment review. It is quite striking that both are needed simply to get a hearing under environmental rights legislation.

## TRENDS IN THE TRIBUNAL CASES

The above cases illustrate several trends. One is that there is no cohesive jurisprudence or leading authority on standing at tribunals, as each court is narrowly focused on the legislation and tribunal in question. Many cases may have limited application to those regimes. Nonetheless the similarities are apparent.

The litigation always concerns vague tests, many of which are interpreted more restrictively than is necessarily required from the face of the legislation. Often the tribunals struggle to articulate the interests and impacts that must be proven to pass these tests. The articulated requirements and findings of fact might really depend on a tribunal's latent receptivity to holding hearings.

The practice of placing the burden of proof on the person seeking standing is not challenged, which suggests that use of an adversarial litigation model is being taken for granted. All of the above tribunals and even some courts have struggled to maintain low standards of proof even if they theoretically favour this practice. Standing is very hard to settle as a preliminary matter using informal approaches to evidence because the tests promote a conflation of standing with the merits of the substantive claims.

On one hand the courts are finding that the legislature can dictate the test for standing at tribunals. On the other hand they are articulating concerns with fairness, access to justice, and the mandate of tribunals. In response the courts are proving willing to intervene in unnecessary evidentiary and procedural barriers created by the tribunals. They are also willing to uphold tribunal decisions to grant standing and to hear appeals even if the tests are stringent.

## Conclusion

Standing remains a contentious issue in environmental matters. Many of the evidentiary issues transcend the difference between courts and administrative tribunals, but the institutional responses have been very different. Where the courts find issues for which public interest standing is available, they have reduced the evidentiary barriers to standing by using objective indicators of genuine interest and a policy-driven approach to assessing the appropriate means to hear the issues.

In contrast, evidentiary issues are widespread at environmental tribunals that use models of standing borrowed from the adversarial litigation system. Litigation is increasing and the trend is towards judicial intervention into evidentiary barriers created by tribunals. The real need is for legislative reform to

provide standing tests that fit tribunal mandates, but there are opportunities to challenge and improve tribunal practice through the courts. If advocates and adjudicators are attuned to these trends, then a principled and cohesive jurisprudence on standing at tribunals is increasingly possible.

## NOTES

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- 13 Ontario Commission, *supra* note 4 at 15.
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- 16 *Sierra Club of Canada v Canada (Minister of Finance)*, [1999] 2 FC 211 at para 52 [*Sierra Club*]; *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2007 FC 955 at paras 179–80 [*MiningWatch*]; *Chetwynd Environmental*

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  - 33 *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297.
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- 49 *Dawber v Ontario (Director, Ministry of the Environment)* (2008), 36 CELR (3d) 191 (Ont Div Ct), upholding *Dawber v Ontario (Ministry of the Environment)*, [2007] OERTD No 25, 28 CELR (3d) 281 [Dawber Tribunal Decision].
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