

BREAKING CASE LAW

**Ontario (Energy
Board) v. Ontario
Power Generation
Inc., 2015 SCC 44**

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This Issue

Supreme Court
clarifies tribunal
participation in
appeals

***Ontario (Energy Board) v Ontario Power Generation Inc.* 2015 SCC 44**

On September 25, 2015, the Supreme Court of Canada released two decisions relating to utility regulation: *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44, and *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45.

Aside from making findings on the merits of the appeals, in the *Ontario (Energy Board) v Ontario Power Generation Inc.* case (OEB v OPG), the Court also took the opportunity to clarify the role of the decision-making tribunal in appeals.

The facts in OEB v OPG were these: OPG applied for its utility rates to be based in part on OPG's labour compensation costs relating to nuclear operations (some \$145 million). The OEB declined to approve these particular costs when setting the rate. The Supreme Court upheld the OEB's decision.

One of the issues at play (paras 40-72) was the propriety of the OEB's participation in the appeal, which OPG argued was too aggressive. The Supreme Court discussed *Ontario Children's Lawyer* (2005 ONCA), *Quadrini* (2010 FCA), and *Leon's Furniture* (2011 ABCA) and clarified that a court has discretion to frame a tribunal's participation.

As to tribunal standing, factors for a court in framing the tribunal's participation include whether there is another opposing party and whether the tribunal adjudicates individual conflicts. A court must determine the tribunal's participation by balancing the need for tribunal impartiality against the court's need to be fully informed in its adjudication. In this case, the OEB was the only respondent on initial appeal and the OEB played a regulatory role in rate-setting. For those reasons, it was not improper for the OEB to have standing.

As for what the tribunal can argue on appeal, a tribunal may interpret its decision or make arguments implicit in the original decision. A tribunal may also explain its policies and practices; respond to arguments raised by counterparty; and highlight what is apparent on the face of the record. A tribunal will exceed its limits if it used judicial review to amend or supplement its reasons on grounds it did not rely on in the original decision ("bootstrapping"). Finally, the Court urged tribunals to be "cognizant of the tone" they adopt on review.