DATE: April 18, 2005
DOCKET: C41313

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., GOUDGE AND BLAIR JJ.A.

B E T W E E N :

CHILDREN'S LAWYER FOR ONTARIO **Applicant (Appellant)**	**Leslie M. McIntosh and Elaine Atkinson for the appellant**
- and -	
DAVID GOODIS, Senior Adjudicator, Information and Privacy Commissioner and JANE DOE, Requester **Respondents**	**Freya Kristjanson and Christopher D. Bredt for the respondent** **Mary M. Thomson and Christine Lonsdale, *amicus curiae***

Heard: December 6 and 7, 2004

On appeal from the judgment of the Divisional Court (Justice John G.J. O'Driscoll, Justice G. Dennis Lane and Justice Lawrence C. Kozak) dated August 14, 2003, reported at (2003), 66 O.R. (3d) 692.

GOUDGE J.A.:

[1] In the proceedings resulting in this appeal, the Children's Lawyer for Ontario sought judicial review of the decision of the Information and Privacy Commissioner who ordered the Children's Lawyer to disclose certain documents in her possession. Disclosure had been requested under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*") by a requester who has been given the pseudonym of Jane Doe in these proceedings.

[2] The Divisional Court dismissed the application for judicial review. In the course of doing so, it dismissed the Children's Lawyer's request to refuse or limit the standing of the Commissioner. The Children's Lawyer now appeals, challenging the role that the Commissioner was permitted to play in the Divisional Court. We must therefore grapple with the vexing question of the scope of standing to be accorded by the court to an administrative tribunal whose decision is attacked by way of judicial review.

[3] For the reasons that follow, I agree with the conclusion of the Divisional Court and would therefore dismiss the appeal.

BACKGROUND

[4] When Jane Doe was a child, the Children's Lawyer acted for her in three different legal proceedings. The Children's Lawyer represented her in a child protection case and acted as her litigation guardian in two motor vehicle accident cases.

[5] Upon reaching majority and apparently dissatisfied with her representation, Jane Doe requested a copy of her "complete files". The Children's Lawyer, whose office operates as a branch of the Ministry of the Attorney General, treated this as a request for information under *FIPPA* rather than as a request from a client for her file. However reasonable it might be to analyze the interests at stake in this framework, this was not raised as an issue before us, and I will say nothing more about it.

[6] The Children's Lawyer responded to the request by deciding that some 2,800 pages of records had to be disclosed, but that she had the right to deny access to 933 pages. She based this decision on s. 13 and s. 19 of *FIPPA*.

[7] Section 13 creates an exemption from disclosure for records that reveal the advice and recommendations of a public servant. Section 19 is more important for these proceedings. It has two branches and provides that the head of the government agency may refuse to disclose a record either if it is subject to solicitor-client privilege or if it was prepared by or for Crown counsel to assist in giving legal advice or in contemplation of or for use in litigation. Section 19 reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[8] As *FIPPA* permits, the requester appealed the decision to deny access to 933 pages to the Commissioner. Except for a handful of these pages, the Commissioner allowed the appeal and ordered disclosure of these pages. The Commissioner found that s. 13 did not apply because the records were prepared by the Children's Lawyer for the purpose of representing the requester in legal proceedings rather than for the benefit of the government or the public at large. The first branch of s. 19 did not apply because solicitor-client privilege could not be asserted by the Children's Lawyer against a party she represented in litigation. The Commissioner found that the second branch of s. 19 did not apply because it does not protect the Children's Lawyer from a request from an individual she has represented.

[9] The Children's Lawyer subsequently applied under *FIPPA* to have the Commissioner reconsider her decision. The result was that although the Commissioner permitted several additional documents to be withheld, she confirmed the essence of her prior decision.

[10] The Children's Lawyer then applied for judicial review of the decision and the reconsideration on the grounds that the Commissioner erred in finding that neither s. 13 nor the second branch of s. 19 entitled the Children's Lawyer to withhold these records. She no longer asserted that she could deny disclosure based on the first branch of s. 19.

[11] The Commissioner opposed the application for judicial review. In her factum, the Commissioner put the argument that the second branch of s. 19 was not available to the Children's Lawyer because the Children's Lawyer was not acting as Crown counsel when she represented the requester in the various pieces of litigation. This reason was not expressly set out in the Commissioner's original decision.

[12] The Children's Lawyer responded to the Commissioner's factum by moving for an order that the Commissioner be denied standing, or at least be prohibited from arguing that her decision was correct on a basis that was not given in her original decision. The Children's Lawyer filed an affidavit saying that in her exchanges with the Commissioner prior to the decision, the Commissioner had not raised the "Crown counsel" issue and that, had she done so, the Children's Lawyer would have provided evidence and submissions on the question.

[13] The requester did not respond to the judicial review application or to the preliminary motion and has played no part in the court proceedings. Because of the Children's Lawyer's objection to the Commissioner's standing, and the absence of the requester, the Divisional Court appointed *amicus curiae* to assist the court by making those submissions it deemed appropriate on all issues. Through the facilities of the Advocates' Society, Ms. Thomson and Ms. Lonsdale filled that role there and again in this court with great skill. That they have acted *pro bono* throughout reflects the best traditions of the bar.

[14] The Divisional Court dismissed the preliminary motion, finding that s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 gives the Commissioner the right to be a party to the judicial review application and that the court ought not exercise its discretion to limit the Commissioner's participation because the court would thereby deny itself legitimate and helpful submissions.

[15] The court then dismissed the application for judicial review in its entirety. The court found that the Commissioner was correct in denying the protection of the second branch of s. 19 of *FIPPA* because in representing the requester in litigation the Children's Lawyer could not be considered to be Crown counsel when it represented the requester. The court also found that, while this issue may not have been front and centre before the Commissioner, it was raised in the record and was open to be argued by both the Commissioner and the *amicus* on judicial review. Finally, the court found that the Commissioner's decision that s. 13 of *FIPPA* did not permit the Children's Lawyer to withhold disclosure of these records was not unreasonable.

[16] In this court, the Children's Lawyer did not pursue the s. 13 argument but focused on the role that the Commissioner was permitted to play in the judicial review application. The Children's Lawyer raised two issues on this appeal:

(a) Whether the Divisional Court erred in affording standing to the Commissioner, and

(b) Whether the Divisional Court erred in permitting the Commissioner to raise the issue of whether lawyers employed or retained by the Children's Lawyer are "Crown

> counsel" for the purposes of s. 19 of *FIPPA* and then proceeding to decide the case on that basis.

[17] The Children's Lawyer did not ask this court to decide the merits of the judicial review application or even to determine the Crown counsel issue but rather sought an order remitting the latter question back to the Commissioner for determination. The focus of argument in this court was almost entirely on the law applicable to determining the scope of standing of an administrative tribunal in a judicial review application.

ANALYSIS

[18] The last half-century has seen an explosion in the number and variety of administrative tribunals that are part of the broader justice system. One consequence has been the increasingly sophisticated law governing the courts' supervision of tribunals. However an aspect of that law that has lacked consistency concerns the extent of an administrative tribunal's role in an application for judicial review of its decision. The eminent administrative law scholar Professor David Mullan has described it as "a domain fraught with uncertainty". See David J. Mullan, *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) at 457.

[19] Despite this uncertainty, a brief review of several cases that highlight the jurisprudential history of the issue is useful in clarifying the fundamental values at play.

[20] The starting point is *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684. The decision under scrutiny was that of the Public Utilities Board for Alberta. Although the attack was commenced by way of statutory appeal, the principles enumerated by the Supreme Court have been applied without distinction to judicial review.

[21] Writing for the court, Estey J. made it clear that, although the governing legislation would be determinative if it defined the role of the tribunal, if it did not do so, the tribunal could not go beyond explaining the record and making representations supporting its jurisdiction to make the order in question. He relied squarely on the importance of maintaining tribunal impartiality. He put it this way at 709:

> This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

[22] Ten years after this decision, the Supreme Court again addressed the issue in *CAIMAW Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983. In that case, judicial review was sought of a British Columbia Labour Relations Board decision. LaForest J., writing for himself and Dickson C.J.C., accepted as beyond question a tribunal's standing to explain the record before the court and to advance its view of the appropriate standard of review. He also approved the tribunal's standing to explain why its decision was a reasonable approach to adopt and could not be said to be patently unreasonable. To this extent, the Board was free to argue the merits of its approach although not to the point of defending the decision as correct. The scope of the Board's standing was thus expanded considerably beyond the strict question of jurisdiction. L'Heureux-Dubé J., who was the only other member of the court to address the issue, essentially agreed with this approach.

[23] LaForest J. was clearly moved to these conclusions by the importance of having a fully informed adjudication of the issues before the court. At 1016, he placed at the centre of his reasoning a passage from Taggart J.A. in *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 at 153 that he adopted without reservation. It makes the point graphically:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

[24] Since *Paccar*, the fundamental values of maintaining tribunal impartiality and facilitating a fully informed adjudication have been employed in a number of cases – separately or together – to underpin decisions on this issue. Some have followed *Northwestern Utilities*. Some have followed *Paccar*. In other cases, the courts have simply given full standing as a matter of course to tribunals to defend their decisions without even broaching, let alone discussing, the limits of their standing. In a thoughtful article on the subject, Laverne Jacobs and Thomas Kuttner cite as two examples of this method *Quebec (Commission des affaires sociales) v. Daigle*, [1992] 1 S.C.R. 952 and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221. See Laverne A. Jacobs and Thomas S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing before the Courts" (2002) 8 Can. Bar. Rev. 616.

[25] Against this rather clouded jurisprudential backdrop, I think the analysis of the scope of standing to be accorded to the Commissioner in this case must begin with the relevant legislation. Section 9(2) of the *Judicial Review Procedure Act* reads:

> For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

[26] The ordinary meaning of this provision gives the administrative tribunal the right to be a party to the proceeding if it chooses to do so. It leaves to the tribunal rather than the court the decision of whether to become a party to the application for judicial review.

[27] However, once a party, the scope of a tribunal's standing is a subject not addressed by the legislation. Although the legislature could have pre-empted the debate by spelling out precise limits to a tribunal's participation, it has chosen not to do so. The legislation's silence necessarily leaves this issue to the court's discretion, as part of its task of ensuring that its procedures serve the interests of justice. Where the issue arises, the court must exercise this discretion to determine the scope of standing to be accorded to a tribunal that is a party to a judicial review proceeding.

[28] This approach to s. 9(2) was well described by the Divisional Court in *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America Local 2-69 et al.* (1985), 51 O.R. (2d) 481. In that case, judicial review was sought of a decision of the Ontario Labour Relations Board on the basis that the draft decision by the hearing panel was presented to the full Board for discussion of policy, thereby violating the principle of natural justice.

[29] The applicant objected to counsel for the Board making submissions about its own procedure. However, the Divisional Court unanimously rejected this argument. It found that s. 9(2) entitled the Board to be a party to the proceedings and it then exercised its discretion to permit Board counsel full latitude to answer the submissions of the applicant.

[30] When the case was appealed to the Court of Appeal for Ontario and then to the Supreme Court of Canada, Board counsel was again permitted to argue fully. In neither court was the scope of standing raised, let alone commented upon.

[31] In the decision under appeal here, the Divisional Court adopted the approach used in *Consolidated Bathurst, supra*. It held that the scope of standing accorded to the Commissioner is best left to judicial discretion. In exercising that discretion to permit the Commissioner to respond fully to the applicant, the court appeared to be most moved by the desire to avoid denying itself legitimate, helpful submissions. On this basis, the Children's Lawyer's motion to deny or limit the Commissioner's standing was dismissed.

[32] In this court, all parties took similar positions, at least at the broadest level of generality. They all argued that the court should approach the scope of standing issue contextually and should avoid the formalism of fixed rules that turn on whether the question before the court is one of jurisdiction, natural justice, or the applicable standard of review. They all urged the same "pragmatic and functional" label for this approach but disagreed on the considerations that should inform the court's decision.

[33] As I have said, s. 9(2) of the *Judicial Review Procedure Act* entitles the administrative tribunal to be a party to the proceedings but leaves to the court's discretion the scope of its standing. Given the wide variety of administrative tribunals and types of decisions that are today subjected to judicial review, I agree that the court should exercise this discretion paying attention to the context presented in the particular application. However, I think it is both unnecessary and confusing to use the "pragmatic and functional" label. This phrase has developed a strong association with the quite different task of determining the proper standard of review and with the well-known factors embodied in that approach, which will not automatically be useful in determining the scope of standing.

[34] However, I agree with the parties that a context-specific solution to the scope of tribunal standing is preferable to precise *a priori* rules that depend either on the grounds being pursued in the application or on the applicable standard of review. For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America Local 1368 v. Bransen Construction Ltd. et al.* (2002), 249 N.B.R. (2d) 93 at para. 32.

[35] Nor do I think cases like *Northwestern* and *Paccar, supra*, dictate the use of precise rules of this sort. Particularly in light of the recent evolution of administrative law away from formalism and towards the more flexible practical approach exemplified by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, I think these cases are best viewed as sources of the fundamental considerations that should inform the court's discretion in the context of a particular case. Resolving the scope of standing on this basis rather than by means of a set of fixed rules is likely to produce the most effective interplay between the array of different administrative decision makers and the courts.

[36] If this is so, what are the important considerations that should guide the court in the exercise of its discretion? In my view, the two most important considerations are those reflected in the two seminal cases on this issue: *Paccar* and *Northwestern Utilities, supra*.

[37] In *Paccar*, LaForest J. articulated the importance of having a fully informed adjudication of the issues before the court. Because of its specialized expertise, or for want of an alternative knowledgeable advocate, submissions from the tribunal may be essential to achieve this objective. In these circumstances, a broader standing adds value to the court proceedings. Because sound decision making is most likely to come from a fully informed court, this consideration will frequently be of most importance. Professor Mullan put it this way at Mullan, *supra*, at 459:

> Under a discretionary approach, the principal question should probably be whether the participation of the tribunal is needed to enable a proper defence or justification of the decision under attack. If that decision will almost certainly be presented

> adequately by the losing party at first instance or by some other party or intervenor such as the attorney general, there may be no need for tribunal representation irrespective of the ground of judicial review or appeal. On the other hand, where no one is appearing to defend the tribunal's decision, where the matter in issue involves factors or considerations peculiarly within the decision maker's knowledge or expertise, or where the tribunal wishes to provide dimensions or explanations that are not necessarily going to be put by a party respondent, then there should clearly be room for that kind of representation to be allowed within the discretion of the reviewing or appellate court. Indeed, in at least some instances, a true commitment to deference and restraint in intervention would seem to necessitate it.

[38] In *Northwestern Utilities, supra*, Estey J. articulated the other significant consideration, namely the importance of maintaining tribunal impartiality. This obviously matters to the parties to the decision, particularly if the application results in the matter being referred back to the tribunal. More broadly however, in future cases before the tribunal where similar interests arise, or where the tribunal serves a defined and specialized community, there may be a risk that full-fledged participation by a tribunal as an adversary in a judicial review proceeding will undermine future confidence in its objectivity.

[39] This risk may be enhanced where the tribunal's role is not to evaluate the interests of an applicant against a legislative standard but is to resolve private disputes between two litigants where the perception of favouring one side over the other may be felt more acutely.

[40] I also agree with Jacobs and Kuttner, *supra*, that the nature of the issue under review may affect the apprehension of partiality arising from the unconstrained participation of the tribunal before the court. For example, if the question is whether the tribunal has treated a particular litigant fairly, impartiality may suggest a more limited standing than if the allegation is that the structure of the tribunal itself compromises natural justice.

[41] Although these two considerations are primary and will have to be weighed and balanced in almost every case where the scope of a tribunal's standing is in issue, there will undoubtedly be other considerations that will be relevant in particular cases.

[42] In this case the Children's Lawyer raises such a consideration. She says that the tribunal's standing should not extend to defending its decision on a ground that it did not rely on in the decision under review. The argument is that this "bootstrapping" undermines the integrity of the tribunal's decision-making process. It is akin to the impartiality concern in that a tribunal seeking to justify its decision in court on an entirely different basis than that offered in its reasons may well cause those adversely affected to feel unfairly dealt with. However, it goes beyond impartiality. The importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to support its decision. Where a tribunal takes such a course, this will become an important consideration in determining the extent of the tribunal's standing.

[43] Ultimately, if the legislation does not clearly articulate the tribunal's role, the scope of standing accorded to a tribunal whose decision is under review must be a matter for the court's discretion. The court must have regard in each case, to the importance of a fully informed adjudication of the issues before it and to the importance of maintaining tribunal impartiality. The nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to knowledgeably respond to the attack on the tribunal's decision, may all be relevant in assessing the seriousness of the impartiality concern and the need for full argument.

[44] The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of fully informed adjudication may well be the governing consideration.

[45] In addition to fully informed adjudication and tribunal impartiality, there may be other considerations that arise in particular cases, as the appellant argues here. In the end however, the court must balance the various considerations in determining the scope of standing that best serves the interests of justice.

[46] It remains to apply these considerations to this case to assess whether the Divisional Court erred in exercising its discretion to dismiss the appellant's attempt to deny or limit the standing of the Commissioner in these judicial review proceedings.

[47] Several aspects of this case clearly demonstrate the importance of full tribunal participation in the judicial review to ensure a fully informed adjudication of the issues.

[48] From the beginning, the requester has played no part in the proceedings. As the Divisional Court noted, it would be left with only one party, the Children's Lawyer, if the tribunal were denied standing. There would be nobody charged with defending the decision under review, a problem not solved by the appointment of the *amicus*, whose appointment was for the purpose of making the submissions it deemed appropriate. Traditionally, an *amicus* does not act on behalf of any party nor is it meant to defend the position of the tribunal.

[49] As well, the specialized nature of the statutory scheme administered by the Commissioner has long been recognized by this court. See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.) at 472-73. The issues raised in the judicial review require the court to understand two specific provisions in that scheme (s. 13 relating to the advice of a public servant and s. 19 relating to Crown litigation privilege). With full standing, the Commissioner's expert familiarity with the statute provides an important assurance of a fully informed adjudication. This is not a role that an *amicus* could be expected to fill.

[50] On the other hand, both the nature of the tribunal here and the nature of the issues suggest that the impartiality consideration is not a significant brake on full standing for the Commissioner.

[51] Under *FIPPA*, the Commissioner sits on the appeal from a decision of the head of a government institution about whether the legislation requires disclosure of records to the public at the behest of a requester. On appeal, the head is not defending his or her private interest, or that of the institution, but his or her decision interpreting the legislation and applying it to the circumstances. Nor is the requester seeking private access but access for the public. *FIPPA* provides that the process used by the Commissioner to decide the appeal is inquisitorial not simply adversarial. All of this shifts the nature of the tribunal somewhat away from a court-like model and mutes the impartiality concern.

[52] Similarly the issues raised by this judicial review application are fundamentally ones of statutory interpretation. Although they arise in a particular factual context, they are not applicable only to the Children's Lawyer and the requester. If the Commissioner were to address the court on these issues, its ability to act impartially in future cases, even ones involving this government head and this requester, would not be adversely affected any more than its original decision on the same issues could be said to carry that consequence.

[53] The final consideration in this case is the importance of preserving the integrity of the administrative tribunal's decision making. The appellant argues that this is undermined if the Commissioner is given standing to defend her decision in court on an entirely different basis than that offered in her reasons for decision. There is no doubt that this is a valid consideration. The only question is whether in this case it warrants curtailing the scope of the Commissioner's standing.

[54] In my view it does not. There is no doubt that the Commissioner's original decision that the second branch of s. 19 of *FIPPA* did not provide the Children's Lawyer with a basis to refuse to disclosure rested on her conclusion that this provision offered the Children's Lawyer no protection from the individual she represents. It did not rest on an express finding that the Children's Lawyer was not "Crown counsel" in the circumstances. In the Divisional Court that is the argument the Commissioner sought to put in defence of its decision.

[55] Clearly an administrative tribunal must strive to provide fully reasoned decisions. However I do not think the absence of the "Crown counsel" argument in the decision should prevent the Commissioner from advancing it to the court on judicial review. It is not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it. If the Children's Lawyer was the legal representative of the requester in the proceedings for which records are sought (the reason relied upon by the Commissioner in her original decision) it could not have been Crown counsel in those proceedings.

[56] Moreover, the Children's Lawyer was required by this section of *FIPPA* to positively establish that it was Crown counsel in order to take advantage of the protection offered by the second branch of s. 19. It appears that the Children's Lawyer did not seek to do so before the Commissioner either by evidence or argument. The result was that the decision under review was simply silent on the question.

[57] Finally, if the Commissioner's standing were to preclude her from making this argument there would be no guarantee that the Divisional Court would hear it from anyone else with a resulting risk to a fully informed adjudication.

[58] It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis.

[59] In summary, I conclude that allowing the Commissioner full standing in the judicial review proceedings assures a fully informed adjudication of the issues without significantly compromising her impartiality or undermining the integrity of her decision-making process. The Divisional Court did not err in exercising its discretion to refuse the appellant's attempt to preclude or limit the Commissioner's standing.

[60] Before leaving this appeal, I would add a word about procedure. Where a party to a judicial review application seeks to limit the standing of the administrative tribunal, it should do as the appellant did here. It should serve a notice of motion saying why, so that the issue can be properly joined. Although this may require additional factums and perhaps additional material, it ought not normally require a separate preliminary hearing. Submissions on this issue can be made at the hearing on the merits of the application. If the decision on the scope of standing is reserved, the written and oral submissions of the tribunal on the merits that go beyond the scope of standing ultimately permitted will, of course, be disregarded. With this approach, the scope of standing issue ought not to unduly complicate judicial review proceedings.

[61] Finally, I think it important that if an administrative tribunal seeks to make submissions on a judicial review of its decision, it pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary.

[62] I hasten to add that before us all counsel were exemplary. We are grateful for their able submissions.

[63] The appeal is dismissed. No party sought costs, and none are ordered.

"S. T. Goudge J.A."
"I agree R. R. McMurtry C.J.O."
"I agree R. A. Blair J.A."

RELEASED: April 18, 2005