Administrative Justice and the Rule of Law:

A Primer and a Prescription for the Future[1]

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It is sometimes said that "it is better to beg for forgiveness than to ask for permission." When Toronto homeowners Shih Drum Tseng and Yang Feng Tseng built a two-story addition on their home without a building permit and in violation of code, that is exactly what they did. When the City told the Tsengs the addition was unlawful and had to be torn down, they appealed to the Ontario Municipal Board (OMB)—and won.[4] The OMB found that the "reduction in sunlight and increase in shadowing … is acceptable"[5] and that "[t]he addition adds to the living space and is an appropriate extension of the existing residential unit."[6] The OMB therefore allowed the illegal addition to stand by granting a minor variance from the by-laws under section 45 of the *Planning Act*, which allows the OMB to "authorize such minor variance… as in its opinion desirable for the appropriate development or use of the land."[7]

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[1] Prepared for the Ontario Landowners Association (OLA) Annual Public Meeting, October 21, 2017. This paper may not be copied, cited or distributed without the permission of the authors. Part of the analysis in this paper has been adapted from a forthcoming paper by the authors titled "The Rule of Law and the Public Interest: The Regulatory Sword of Damocles."

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[4] See *Re Pauline Tseng,* Ontario Municipal Board File No. PL120925, decision dated July 18, 2013.

[5] *Re Pauline Tseng* at paragraph 158.

[6] *Ibid* at paragraph 169.

[7] *Ibid.*

What does this case tell us about the respective roles of the OMB[8] and the City when it comes to planning rules? Shortly after the Tseng decision, then-city councillor (now MP) Adam Vaughan was quoted in the *Toronto Star* as saying that the OMB has "opened up the door to illegal construction" and observed, "[w]hat is to stop a condo developer from building 40 stories when they're approved for 30, and just asking for approval later?"[9] Mr. Vaughan also added that the city wouldn't be appealing the decision due to the time and money that had already been spent on the case.

Whether you agree with the outcome in the Tseng OMB case or not, the ability of the OMB (and other similar administrative tribunals) to exercise broad discretion in cases such as these should be cause for concern. This is especially true in an administrative justice system that increasingly touches all aspects of Canadian life. Lawyer Ron Ellis recently estimated that the number of rights-related decisions by administrative tribunals is over one million per year in Ontario alone.[10] No doubt that number will continue to rise as Parliament and the provincial legislatures continue to expand the powers of administrative agencies and tribunals in the name of expediency and efficiency. More troubling, still, these tribunals often have the final say in the cases they hear, as appeals from such decisions rarely succeed.[11]

[8] Note that in May 2017, the Ontario government introduced Bill 139 which, if passed, would re-name the OMB the Local Planning Appeal Tribunal and, among other things, amend the planning approval and appeal process. See Bill 139 available online at: <http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b139_e.pdf>.
[9] See, "After seven years in court, family has illegally built home addition approved by OMB," *Toronto Star,* Sept. 6, 2013.
[10] Ron Ellis, *Unjust by Design,* UBC Press, 2013.
[11] For example, you might be able to appeal a decision of an administrative tribunal to a Court. However, Courts usually "defer" to the decision of the administrative body, even if they would have decided the case differently had they been the ones making the decision in the first place. As a result, administrative decisions are rarely overturned.

In this little paper we argue that in many cases, the breathtakingly broad exercise of discretion by administrative agencies is inconsistent with the rule of law, a foundational principle of the Canadian constitution and legal system. The rule of law requires that all laws be framed in sufficiently clear terms to give fair notice to citizens of conduct that could result in punishment or a penalty. It also means that administrative decision makers must make their decisions according to an intelligible and justifiable legal standard. Why should the right of a landowner to construct a building on his or her own property depend on the decision of a government appointee as to whether the building is "desirable for the appropriate development or use of the land"? While the Tseng OMB decision is one example, the problem is, unfortunately, widespread.[12]

What is our prescription for the current state of affairs? While courts have found that all legislative enactments should meet a minimum threshold of precision, the Supreme Court of Canada has recently held that the rule of law can itself provide a basis for striking down a legislative enactment.[13] If that nascent authority is the start of a new trend, courts will have a powerful new weapon to use in the review and restriction of broad indiscriminate administrative law powers.

[12] To give you one example from our area of speciality, securities law, section 127 of the *Securities Act* allows the Ontario Securities Commission to impose sanctions on financial market participants when, in the Commission's view, it is "in the public interest" to do so. What the "public interest" means is left almost entirely to the Commission on a case-by-case basis. Thus, in many cases, the Commission has imposed sanctions on individuals who have acted lawfully but who, in the Commission's view, have acted contrary to the "public interest". We argue that the Commission's ability to do this is entirely inconsistent with the rule of law.

[13] See *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59, where a majority of the Supreme Court struck down a law that purported to impose hearing fees on litigants in the province of British Columbia. The majority found that the hearing fees limited access to the courts, and was therefore a violation of the constitutional principle of the rule of law.

I. The Administrative Law System

Ron Ellis has described the Canadian administrative justice system as "the system to which Canadians are required to turn for the enforcement or vindication of their rights in a broad range of everyday matters." [14] This was not always the case. Until the second half of the twentieth century, it was primarily the courts that would adjudicate everyday disputes through interpreting laws passed by Parliament and the legislatures. But as laws and regulations continued to become more complex, the executive branch developed regulatory "frameworks" to govern particular areas of activity. To administer these government-made rules, various administrative agencies were created. Many of these agencies included "tribunals," which are quasi-judicial bodies made up of people appointed by the government to decide issues arising under these new regulatory schemes.

The result was, in the words of the Chief Justice of the Supreme Court of Canada, "a dramatic shift in who did society's judging."[15] Areas of the law formerly under the purview of the common law courts now fell under the jurisdiction of an increasing number of administrative boards and tribunals. The Chief Justice put it this way:

> "Virtually all the important areas of endeavour and social concern, from labour to human rights, from workers' compensation to mental health—areas once under the jurisdiction of the common law courts—have been, to coin a term, 'administerized'. Vast swaths of the rule of law are dealt with by commissions and tribunals."[16]

[14] Ron Ellis, *Unjust By Design: Canada's Administrative Justice System,* UBC Press, 2013, p. 2.
[15] Remarks of the Rt. Hon. Beverley McLachlin, Chief Justice of Canada, at the 6th Annual Conference of the Council of Canadian Administrative Tribunals. Toronto, Ontario, May 27, 2013.
[16] Ibid.

There is little doubt that this shift towards an "administrative" system of adjudication has produced some benefits. Tribunals provide greater flexibility and efficiency than the courts. They are also often far cheaper than traditional court litigation. But there are also significant concerns arising from this trend. First, decision makers on administrative boards and tribunals have very limited security of tenure. For example, appointees to the OMB typically receive three-year renewable terms, with the decision on renewal being made by the provincial cabinet. Second, courts have taken an extremely deferential approach to the review of administrative decisions. A decision will generally be overturned only if it is determined to be "unreasonable."[17] This means that administrative tribunals usually have the final say in cases they hear. For these reasons, decisions of these agencies—and the laws under which they exercise their authority—deserve careful scrutiny, particularly with regard to constitutional principles that are so central to our society, such as rule of law.

II. Defining the Rule of Law Principle

The rule of law is a key constitutional and legal value in Canada.[18] Its critical importance for our purposes is how the rule of law can be used as a weapon against arbitrary government laws and actions. Prior to 1982, the rule of law was not explicitly recognized in the Canadian Constitution. It was, however, implicitly recognized in the preamble to the *Constitution Act, 1867,* which states that Canada is to have a "Constitution similar in Principle to that of the United Kingdom."[19] When the Canadian Constitution was brought home from England in 1982,

[17] See, for instance, *Dunsmuir v. New Brunswick (Board of Management),* 2008 SCC 9.
[18] See Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada", 55 U.T.L.J. 715 (2005) [Hogg and Zwibel].
[19] The Supreme Court in *Manitoba Language Reference* found that the preamble to the 1867 Act implicitly included reference to the rule of law.

the rule of law gained explicit recognition in the preamble to the *Canadian Charter of Rights and Freedoms,* which states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law."

Despite its significance in Canada, as one might expect with lawyers, there are different opinions among academics about precisely what the rule of law means. Professor Peter Hogg summarized some of the various viewpoints this way:

> "Many authors have tried to define the rule of law and to explain its significance, or lack thereof. Their views spread across a wide spectrum. At one pole are those who, like Jennings, argue that the rule of law is lawyers' rhetoric that means nothing. At the other end of the spectrum are those who argue that the rule of law means almost everything. T.R.S. Allan, for example, claims that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law. Luc Tremblay asserts that the rule of law includes the liberal principle, the democratic principle, the constitutional principle, and the federal principle."[20]

One point of agreement, however, is that the rule of law requires that individuals be protected from arbitrary government action. E.C.S. Wade summarized this common understanding of the concept of the rule of law in the introduction to A.V. Dicey's *Introduction to the Study of Law and the Constitution:*

> "The rule of law presupposes the absence of arbitrary government power and so gives the assurance that the individual can ascertain with reasonable certainty what legal powers are available to government if there is a proposal to affect his private rights. A person who takes the trouble to consult his lawyer ought to be able to ascertain the legal consequences of his own acts and the powers of others to interfere with those acts."[21]

One of the best examples of the Supreme Court of Canada invoking the rule of law in the context of "arbitrary government power" is the judgment of Mr. Justice Ivan Rand in *Roncarelli*

[20] Hogg and Zwibel, *supra.*
[21] A. V. Dicey, *Introduction to the Study of Law and the Constitution,* 10th Ed (London: Macmillan, 1965) at p. 40.

v. Duplessis.[22] In that case, Quebec Premier Maurice Duplessis had cancelled Frank Roncarelli's liquor license because he had posted bail for Jehovah's Witnesses who had been arrested by the government for distributing literature in breach of municipal by-laws. The Supreme Court found that Premier Duplessis' cancellation of Mr. Roncarelli's liquor license amounted to a "gross abuse of legal power expressly intended to punish [Mr. Roncarelli] for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province."[23] Mr. Justice Rand found that the actions taken by the Premier were inconsistent with the principle of the rule of law, and reinstated Mr. Roncarelli's liquor license.

The rule of law means that people should have reasonable certainty, in advance, regarding the rules and standards by which their conduct will be judged. This requires a legal system comprised of clearly-enunciated rules that are sufficiently certain and apply equally to all, including the State. Let us then turn to the potential use of rule of law arguments against government legislation.

III. The Rule of Law as an Implied Limit on Legislative Power

Some of the post-*Charter* cases could be interpreted to suggest that the rule of law can impose limits on legislative powers. One such case is the *Manitoba Language Reference.* There, the Supreme Court characterized the rule of law as "one of the basic principles of nation building" and an essential part of the Canadian legal order. It also found that the Supreme

[22] *Roncarelli v. Duplessis,* [1959] SCR 121 [*Roncarelli*].
[23] *Roncarelli* at para 44.

Court has "denied the assertion of any power which would offend against the basic principles of the Constitution." [24]

The Court's reference to *any* "assertion of power" being subject to the "basic principles of the constitution," including the rule of law, would appear to include "legislative power." Might it be possible, then, that a law that offends the rule of law could be struck down? According to Professor Peter Hogg, the answer is "no." Hogg has characterized the rule of law as a Constitutional *value* rather than a Constitutional *provision.* He explains the difference this way:

> "This understanding of the rule of law does not give it any direct legal effect. It is not like a provision of a written constitution, the breach of which will lead to invalidity. Nor is it a rule of positive law directly mandating behaviour. It is a constitutional value, an ideal that influences how our laws are made and administered but has no direct force of its own" [emphasis added].[25]

We are not quite so sure. While Professor Hogg's approach is consistent with the view of several of the Supreme Court decisions since the *Manitoba Language Reference,*[26] there is a new argument to be made based on a recent case, as explored in the next section of this paper.

IV. The Rule of Law as a Basis for Invalidating Legislation

A 2014 decision of the Supreme Court of Canada, *Trial Lawyers,*[27] may be a signal that the door is opening to challenge legislative enactments on rule of law grounds. In that case the Supreme Court considered a challenge to the constitutionality of provisions enacted under a British Columbia law that required parties to pay a fee to appear before a court. Chief Justice

[24] *Reference Re Manitoba Language Rights,* [1992] 1 SCR 212 at paras 67-68 [*Manitoba Language Reference*].
[25] Hogg and Zwibel, *supra.*
[26] See, for instance, *Babcock v. Canada (Attorney General),* 2002 SCC 57; *British Columbia v. Imperial Tobacco,* 2005 SCC 49.
[27] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59 [*Trial Lawyers*].

McLachlin, writing for the majority of the Court, found the imposition of this fee to be unconstitutional and declared the law invalid. Significantly, the majority found that the province's jurisdiction was subject not only to the written text of the *Constitution Act, 1867,* but also "the assumptions that underlie the text." With a view to these underlying principles, including the rule of law, the majority found that the *Constitution Act, 1867* "does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction."[28]

In *Trial Lawyers,* the Court found that access to the courts is a core element of the rule of law. Therefore, charging a fee to appear in court (and thereby preventing some people from accessing the courts) was a violation of the rule of law. If the rule of law also requires that laws be written in sufficiently clear terms, as we have explored in this paper, it follows that a law that fails to meet this standard could also be invalidated.

V. The Rule of Law and the OLA

In *Roncarelli,* the Supreme Court established that there is no such thing as "unfettered" discretion. In our view, however, many decisions of administrative agencies have begun to tread close to the line. The result has been an increasing intrusion into the rights of Canadians in all aspects of everyday life. In the Tseng OMB case, the OMB allowed the home addition to stand. Whether or not you agree with that outcome, the fact that the decision is left in the hands of a government-appointed board, deciding whether the building is "desirable or

[28] *Ibid* at para 43.

appropriate," is highly troubling. What citizens need is the certainty that would come from a disciplined and clear approach to the exercise of administrative law powers.

In this expanding "administrative state," we should not take for granted that the rule of law will be upheld. In his seminal book, *The Rule of Law,* Lord Bingham of England argues that the stature of the rule of law principle has eroded over time, and that "it is tempting to throw up one's hands and accept that the rule of law is too uncertain and subjective an expression to be meaningful."[29] Lord Bingham explains the significance of the rule of law, characterizing it as "the difference between Good and Bad government" and "an ideal worth striving for, in the interests of good government and peace, at home and in the world at large."[30] Lord Bingham's attempt to re-affirm the importance of the rule of law, in an era where he may have seen judges, lawyers and legislators increasingly undermine it in favour of expediency, results, or politics, is well worth repeating in this country.

What does the future hold? It is too soon to tell if the *Trial Lawyers* decision is the beginning of a real change. We can only hope that over the course of the next decade, the rule of law will become both a sword and a shield against a government that seems all to willing to expand its powers in unfathomable ways.

[29] Bingham, Tom. *The Rule of Law.* Penguin Books, 2010, at 6.
[30] *The Rule of Law* at 174.