CITATION: Tesla Motors Canada ULC v. Ontario (Ministry of Transportation), 2018 ONSC 5062
COURT FILE NO.: DC 497/18
DATE: 20180827

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
TESLA MOTORS CANADA ULC	)	
	)	
Applicant	)	Mark Polley, Jeffrey Haylock, and Sandy Lockhart for the Applicant
	)	
– and –	)	
	)	
ONTARIO (MINISTRY OF TRANSPORTATION)	)	
	)	
Respondent	)	Antonin Pribetic and Brent Kettles, for the Respondent
	)	
	)	
	)	**HEARD:** August 22, 2018

REASONS FOR DECISION

F.L. MYERS J.

The Issue

[1] Tesla Motors Canada ULC asks the court to intervene on an urgent basis to strike down the government's recent decision to exclude Tesla and its customers from the two month extension of government subsidies for electric car buyers who bought their cars before July 11, 2018. Tesla argues that the government unlawfully targeted it without any rational basis. It says that had the government spoken to Tesla before excluding it from the program changes, Tesla could have shown the government that the exclusion of Tesla's customers from the two month wind-down made no sense even on the grounds now advanced by the government. Tesla fears that it is being demonized for purposes that are outside the legitimate reach of the laws that govern electric car subsidies in Ontario.

Outcome

[2] For the reasons set out below, the exercises of discretion by the Minister of Transportation to create the transition program announced July 11, 2018 (as amended by the Ministry's letter to Tesla of the same date and further apparently amended in the affidavit of Vrinda Vaidyanathan sworn August 17, 2018 filed herein) under the *Electric and Hydrogen Vehicle Incentive Program* under the *Climate Change Action Plan* created pursuant to s. 7 (1) of the *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c. 7 and to fund that program under s. 118 (2) of the *Public Transportation and Highway Improvement Act* are quashed and set aside.

Urgency

[3] Tesla has applied to the court under s.6 (2) of the *Judicial Review Procedure Act*, RSO 1990, c J.1. That provision allows Tesla to bring its case before a single judge of the Superior Court of Justice rather than waiting to be heard by a three judge panel of the Divisional Court. To do so, Tesla is required to show that the matter is so urgent that it cannot wait. It has done so.

[4] The government subsidy extension expires on September 10, 2018. Tesla has hundreds of cars moving to Ontario to fill some 600 orders that were outstanding on the July 11, 2018 cutoff date. While it may well be possible to measure the harm to customers and to Tesla in dollars and cents if the government has acted illegally, the harm can be prevented altogether by a hearing now. The matter is unfolding in real time. If the government's program is unlawful, it can be struck down to avoid the creation of urgency for hundreds of families, order cancellations, litigation, and further harm to Tesla's goodwill. While everyone's rights could possibly be vindicated by damages claims in the fullness of time, lawsuits for $14,000 are uneconomical, will take too long, and will cause harm and distress that in my view would amount to a failure of justice as compared to simply resolving the matter before the September 10 cutoff.

[5] The lawyers for the Province of Ontario argued that the matter was not urgent, but frankly and quite fairly agreed that they were prepared to argue the case on its merits if need be. For the reasons set out in the preceding paragraph, need be.

Background Facts

[6] While there is a fair amount of technicality involved in the funding of the various government programs involved, I do not need to go through every last detail in order to make the issues and outcome understandable. Moreover, the need for an urgent resolution precludes a voluminous decision.

[7] The legal authority for government funding of electric vehicle subsidies is provided to the Minister of Transportation in s. 118 (2) of the *Public Transportation and Highway Improvement Act*, RSO 1990, c P.50:

> (2) On and after January 1, 1997, the Minister may, out of money appropriated therefor by the Legislature and upon such conditions as he or she considers advisable, provide grants, loans and other financial assistance to any person…for specific projects that the Minister considers to be of provincial significance.[1]

[8] For many years the province has had programs established under various environmental statutes and regulations to promote zero emission motor vehicles. Two of these programs provided subsidies to buyers of vehicles which the government listed as environmentally approved and eligible for subsidies on lists under the two programs. Subsidies could also be paid to the sellers directly if they passed on the savings to their customers. Most recently, the applicable programs were funded through "cap-and-trade" tax revenues.

[9] Since March of this year, there has been no funding available for cars priced at more than $75,000. Since then, only Tesla customers who buy its Model 3 vehicle could qualify for subsidies. Tesla points out that there are luxury brand cars that remain on the approved list that are made by other manufacturers and sell for more than its Model 3.

[10] On July 3, 2018 the government announced that it had revoked the cap-and-trade regulation and would begin the orderly wind-down of programs funded through cap-and-trade tax revenues.

[11] On July 11, 2018, the government announced that it was ending the programs to fund electric cars. However, the announcement included a two month extension for some orders that had already been placed. The government announced two conditions under which it would continue to pay subsidies through the two month transition period:

> Applications will be accepted from dealerships, car owners or prospective car owners only if one of the following conditions has been met:
>
> • Eligible vehicles that have been delivered to consumers, registered, and plated on or before July 11 will receive the incentive.

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[1] Both the Minister's entitlement to fund and the right to impose terms and conditions are addressed by the statute. Therefore, the government's argument that the issues in the case deal with the Crown's prerogative spending power is not correct. Once a statute occupies ground formerly occupied by the royal prerogative, the prerogative goes into abeyance. *Black v Chretien et al.* (2001), 52 OR (3d) 215 (CA) at para. 26. *Kuki v Ontario*, 2013 ONSC 5574, at para. 13.

- Inventory that dealers have on lots or orders made by dealerships with manufacturers on or before July 11, will also be honoured for the incentive provided that the vehicle is delivered to consumers, registered, and plated by September 10.

[12] The two terms of the transition plan aim at different things. Under the first bullet customers were protected as far as the government was willing to do so. Customers will receive subsidy payments provided they had received their cars by the July 11 cancellation date. It should be noted that the government application forms signed by all car purchasers who sought subsidies included the following terms:

> You agree that all decisions made by the Province of Ontario relating to [the program], including applicant and vehicle eligibility and the incentive amount, are final and binding and cannot be appealed.
>
> You acknowledge that…
>
> (e) the program may be changed or cancelled by the Province of Ontario at any time for the reason whatsoever, without notice…
>
> (g) funding for [the program] is subject to appropriation from the legislature and is not guaranteed for any specific applicant.

[13] There is no disagreement among the parties that governments are entitled to cancel their subsidy programs at any time. No one has a right to receive government funds. In *Skypower CL 1 LP v Ontario (Minister of Energy),* 2012 ON SC 4979, at para. 84, Justice Nordheimer (as he then was) wrote for the Divisional Court:

> The applicants assumed the same risk making their applications for the [subsidy] program, that is, that the terms of the program might change because of changing government policy. While it may sometimes seem unfair when rules are changed in the middle of a game, that is the nature of the game when one is dealing with government programs.

[14] There is no complaint in this proceeding regarding the government's right to end the subsidy to customers as it did under the first bullet above.

[15] The second term of the transition program was aimed at car dealerships. The government agreed to honour subsidy requests made before July 11 provided that the cars purchased were either already on a dealer's lot or were on order by the dealer from the manufacturer before that date. The government provided two months, to September 10, for cars to be delivered by manufacturers to dealers and then to the customers who had already ordered them by July 11.

[16] The government's announcement said that further letters would be sent to car dealers to explain the terms of the transition program. Tesla Motors Canada ULC is a registered dealer in Ontario. It is a direct or indirect wholly-owned subsidiary of the Tesla US auto manufacturer. However, although it is a duly registered Ontario dealer to whom the transition program as announced applied, it did not receive the government's letter. Rather, the government sent a customized letter just to Tesla. In this letter, the government explained that, although not stated

in its public announcement, the transition program only applied to orders for cars made by a "franchised automobile dealership" and not where vehicles "have been ordered directly from an original manufacturer by a consumer."

[17] As the government believed that all of Tesla's cars are ordered by customers online directly from the US parent manufacturer, this seemed to exclude Tesla customers from the transition program. However, the government may not have known that Ontario customers actually buy their cars from Tesla Motors Canada ULC - a registered Ontario dealership. Like the other major car manufacturers, Tesla US sells into Ontario through dealerships. That left only the word "franchised" as the term that excluded Tesla and its customers from the program. Tesla Motors Canada ULC is not a franchised business.

[18] In trying to understand why customers who bought from franchised dealerships would remain qualified for subsidies rather than those who bought from dealerships integrated into the manufacturer's business model, Tesla points to a statement made to the Ontario Legislative assembly on July 26, 2018 by the Minister of Transportation who said:

> But we also were extremely fair in the way that we ended it. On July 11, we announced that until September 10, all dealers and anyone who had purchased a vehicle or had a vehicle on order, as long it was plated and delivered by September 10, **other than Tesla**—they would receive their rebate. [Emphasis added.]

[19] The Minister said nothing about franchised dealers and simply referred to Tesla as having been excluded. On July 31, 2018, the Parliamentary Assistant to the Minister of the Environment, Conservation, and Parks explained to the Legislature the government's disagreement with certain policies of the prior government as follows:

> ... Under the current cap-and-trade program, the previous Liberal government used the funds they raised to balance their budget. I'm going to say it, Mr. Speaker, because that's what they did. We have seen that it actually has not reduced greenhouse emissions. Not only did they use it to balance their budget, they used it for programs like **Tesla subsidies**, through the greenhouse gas reduction account. [Emphasis added.]

[20] She also told the Legislature that the former Environment Minister's Chief of Staff "landed a job [sic] none other than Tesla." She said,

> So I don't know if that's unethical or a conflict of interest, but all of a sudden, in that same month as he landed that great job at Tesla, they announce a major subsidy for a program providing up to $14,000 to consumers who buy electric cars like Tesla. Where's the accountability?

[21] Once again, Tesla says, the government has singled it out for vilification. The zero emission vehicle subsidies applied to cars produced by some 17 manufacturers. Tesla complains that the government is punishing Tesla for its success in producing electric vehicles in accordance with the government's own environmental goals.

[22] In addition, the Premier of Ontario recently stating the following in an interview with a member of the press:

> ...with the folks from Tesla, the common folks here in Hamilton have a big problem, giving rebates of up to $16,000 with our hard-earned money, to millionaires buying $80,000 cars, $100,000 cars. Uh we have an issue with that, we want to protect the little person.
>
> ...
>
> Tesla can do what they want, but maybe they should think of coming here, and opening up a manufacturing facility, like the big five are. That's what I have, uh, message for Tesla. Stop trying to get rebates for your millionaire buddies, and putting it on the backs of the hardworking people of Hamilton and the rest of the hardworking people of Ontario.

[23] The evidence discloses that rebates are limited to $14,000, the maximum car price for which subsidies may be paid is $75,000; not $80,000 or $100,000, and Tesla's Model 3 is not the most expensive car receiving subsidies under the program.

[24] Tesla tried to communicate with the Ministry of Transportation several times since the announcement of the cancellation of the subsidy programs and the terms of the transition program. The government has not responded.

[25] There are approximately 600 customers in Ontario who had placed orders for Tesla Model 3 vehicles with Tesla Motors Canada ULC dealerships as at July 11, 2018. There were 34 unallocated vehicles on Tesla dealership lots at that time. While the government relies on Tesla's website to say that Tesla cannot deliver its cars in time, Tesla has adduced evidence that there are 256 vehicles currently on their way to Ontario by train and 63 more that are currently headed here by truck.

[26] Tesla says that not only are its customers injured by the government's adoption of the franchised business term of the transition program, but it is harmed as well. It has suffered 175 order cancellations since July 11, 2018. More can be expected. In addition, the targeting and vilification by the government raises a legitimate concern, it says, that its business is not welcome in Ontario and that potential customers will likely be influenced to avoid purchasing vehicles from Tesla as a result.

[27] The government's evidence was adduced through Vrinda Vaidyanathan. She is the Acting Manager of Policy and Programs in the Assistant Deputy Minister's Office, Ministry Of Transportation - Policy and Planning Division. She participated in the events leading to the adoption of the transition program although she was not a decision-maker.

[28] Ms. Vaidyanathan swears that the transition program was, "only extended to independently-owned, franchised dealerships." This is the first time that the phrase "independently-owned" has appeared in any discussion of the terms of the transition program.[2] The government argues that it is totally within its discretion to determine that it will provide brief further funding to protect small to medium-sized Ontario businesses from the risk of harm and economic loss. The government says that if dealers had cars on their lots or already on order on July 11th, the cancellation of the subsidy could leave the dealers exposed to loss at the hands of the vehicle manufacturers. That is, customers may cancel their purchases after the dealerships had already ordered and had become required to pay the manufacturers for the cars. The government extended the subsidy program to protect small to mid-sized dealerships from this potential harm.

[29] On cross-examination Ms. Vaidyanathan did not know whether any car dealerships in Ontario are very large businesses and are not small to mid-sized dealerships as defined by the Ministry. Tesla asserts that documents obtained online show that some very substantial businesses own large numbers of dealerships in Ontario. There is no admissible evidence before the court to support the truth of that submission. But it was clear that the witness was unable to point to any evidence of any consideration having been given to the actual economic design of the motor vehicle dealership industry in Ontario. Similarly, there is no evidence that Ontario dealers are more or less at risk to manufacturers than is Tesla Motors Canada ULC. With 17 different manufacturers and hundreds or thousands of dealerships operating in Ontario, one might surmise that there could be significant differences in the contractual terms applicable among dealers and manufacturers. There is no evidence before the court on the terms of payments due from dealers to manufacturers or whether refunds are available to any dealership for car orders that may be cancelled after the July 11 termination of the subsidy program.

[30] The government has not produced any contemporaneous documents supporting its decision to include only purchases from franchised dealers in the transition program. It rightly claims that the doctrine of Executive Privilege protects some cabinet level documents from disclosure. However, if it had studies or business case rationales to explain or support the economic or business basis for the exclusion of non-franchised dealerships (i.e. Tesla) from the transition, those documents would not likely be privileged. While this matter has been brought on quickly, there is a limited universe of documents that are fundamental to the decision and none has been accessed by the government or its witness for this proceeding. In fact, the government's witness confirms that she only looked at documents printed or put to her on the day that she swore her affidavit.

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[2]There was no explanation for this late addition. It seems to me however that the only explanation for the addition of the qualifier "independently-owned" to the franchise limitation is to ensure that Tesla US cannot get around the exclusion by quickly signing a franchise agreement with Tesla Motors Canada ULC. No other manufacturer operates through owned dealerships.

Analysis

(i) The Court does not Review the Wisdom of Government Policy Decisions

[31] It is common ground that the decisions in this case were taken by the cabinet. That is not unusual or objectionable. Hogg, *Constitutional Law of Canada*, 5th ed., Vol 1, page 9-11 (Toronto, Carswell, loose-leaf).

[32] The government says that its core policy decisions, including decisions to spend money, are not justiciable. That is, in our constitutional framework, some decisions are meant for the government alone. They are usually policy decisions or decisions that are highly political in nature. If those decisions are unwise or unpopular, then the citizens can vote for a new government at the next election. The court's role, by contrast, is to assess the legality or lawfulness of actions. The court has no business assessing the wisdom of core government policy decisions.

[33] In *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (Div. Ct.), 1991 CanLII 7099 (ON SC), the Divisional Court was asked to review a government decision to stop funding a municipal expressway construction project. The court held:

> 42. The evidence leads to the conclusion that the decision was one announced by the Minister after approval of the Cabinet and in substance constitutes an expression of the intention of the government not to provide any further funding for construction of the project. The government has the right to order its priorities and direct its fiscal resources towards those initiatives or programs which are most compatible with the policy conclusions guiding that particular government's action. This was simply a statement of funding policy and priorities and not the exercise of a statutory power of decision attracting judicial review.
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> 43. While it would appear that in basing its decision on environmental concerns the government is ignoring the statutory framework established to deal with environmental matters, that does not affect its jurisdiction to make the decision in question. Such a decision is not subject to judicial review. It is in substance a decision for the disbursement of public funds. It has been a constitutional principle of our parliamentary system for at least three centuries that such disbursement is within the authority of the legislature alone. The appropriation, allocation or disbursement of such funds by a court is offensive to principle.

[34] In *Hamilton-Wentworth*, the court was very careful to state, in paras. 39, 46, and elsewhere in the decision, that in exercising its authority to decline funding, the government was not exercising a statutory authority. Rather it was determining its funding priorities on a policy basis and it must be free to do that. In that case, it decided to stop funding a project and nothing more. The court found that it does not set funding priorities for government and it does not tell the government how to spend public funds.

[35] But the court went on to consider the decision of Grange J. in *Re Metropolitan General Hospital and Ontario (Minister of Health)*, 1979 CanLII 2058 (ON SC), and held:

> Like Grange J., I am forced to the conclusion that it is not for any court to oversee a Minister of the Crown in policy decisions or in the exercise of his or her discretion in the expenditure of public funds entrusted to his or her department by the legislature. As Grange J. said, "***The propriety of the payment or the withholding of payment may in some circumstances be inquired into***; the wisdom of the decision can never be the subject of judicial review. It is a political and not a judicial problem." [Emphasis added]

[36] Justice Grange dealt with a key distinction. Just as it is not for the court to tell the government that it must fund a highway or it must spend public funds on this or that project, it is very much the role of the court to inquire into the *propriety* or the lawfulness of a payment or withholding of a payment under statutory or regulatory laws.

(ii) The Court Reviews the Lawfulness of Operational Exercises of Statutory and Regulatory Discretion

[37] The cabinet decided to cancel cap-and-trade and to stop funding projects paid from cap-and-trade tax revenues. Those are policy decisions without doubt. They set high level political direction that can then be implemented by statutory or regulatory changes. Whether the decisions were good decisions or not will only be decided in the court of public opinion.

[38] The cabinet then made a second decision. It decided to continue to fund the electric car subsidy program for a brief transition period of two months. The project that they decided to fund was one established under environmental legislation relating to the promotion of clean energy and electric motor vehicles. The decision to continue to fund that particular program for two months was also a political or policy decision in my view. It too was a high level or abstract decision about policy direction that required implementation by statutory or regulatory changes.

[39] But then the cabinet or the Minister made a third decision. They actually established the terms and conditions of the electric vehicle subsidy transition. They looked at the program under the environmental regime and under the power to set terms and conditions in the *Public Transportation and Highway Improvement Act* and they designed program terms so as to include only franchised dealers and to exclude Tesla.

[40] In my view, in setting the operative terms of the transition program, the government changed its role from policy-setting at a high level of abstraction to executive program administration. Cabinet descended from its high core policy role as priority-setter into the field of discretionary decision-maker under the environmental regulatory regime and discretionary term-

setter under s. 118 (2) of the *Public Transportation and Highway Improvement Act*. It effectively told the Ministry to design a program to exclude from environmental subsidies non-franchise dealers i.e. Tesla.[3] It is the legality of that decision under the *Public Transportation and Highway Improvement Act* and the applicable environmental laws that is the subject of this application.

(iii) The Law of Judicial Review has narrowed the Class of Non-Justiciable Decisions

[41] The law of judicial review of government action has evolved. Mr. Justice Stratas discussed the current place of judicial review in our constitutional structure recently in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (CanLII), at para. 78:

> In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315. **Subject to any concerns about justiciability**, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [Emphasis added.]

[42] Subject to the issue of justiciability of the government's actions, judicial review of executive action is a fundamental pillar of our legal and constitutional structure.

[43] In *Black v Chretien*, the Court of Appeal considered the question of justiciability of Crown prerogatives such as its power to spend public funds and to set funding priorities. The Court of Appeal adopted the following words of the House of Lords from *Civil Service Unions v Minster for the Civil Service*, [1985] 1 AC 374 at p. 417:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the

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[3] Ms. Vaidyanathan learned later that Daimler-Chrysler may also sell directly to customers a few of its Mercedes Benz and Smart branded vehicles. But that was not known at the time that the decision was made.

> source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

[44] Justice Laskin, speaking for the Court of Appeal, at para. 50 of *Black*, wrote:

> The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch": Reference re Canada Assistance Plan (British Columbia), 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525 at p. 545, 58 B.C.L.R. (2d) 1.

[45] Justice Laskin adopted the test set out by the House of Lords as follows:

> ...the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter ***affects the rights or legitimate expectations of an individual***. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative. [Emphasis added.]

[46] Under this test, matters of high policy i.e. purely political matters, like a decision to sign a treaty, or to declare war, or to cancel a subsidy program, affect no one's individual rights or legitimate expectations and, as such, are not subject to judicial review. I would add that, like the decision to cancel windmill subsidies in *Skypower*, the decision to cancel the cap-and-trade program and the electric car subsidy program are such decisions. At the opposite end of the spectrum, Justice Laskin referred to more mundane executive decisions such as issuing a passport. He wrote:

> A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.

[47] I note that in *Hamilton-Wentworth*, the Divisional Court had determined that the "doctrine of legitimate expectations" was not itself a basis to make government decisions justiciable. It is apparent that *Black* has changed the law in that regard and narrowed the class of non-justiciable activities to those which do not affect the rights or reasonable expectations of a person. The doctrine of legitimate expectations, as recognized in *Black*, does not create substantive rights. That is, as noted above, no one has a right to receive government subsidies generally. But, as found by the Court of Appeal, in appropriate cases the court will review executive action taken "**for improper reasons or without affording the applicant procedural fairness**."

(iv) The Doctrine of Improper Purpose Limits Executive Statutory and Regulatory Discretion

[48] Among the grounds advanced by Tesla in its notice of application to challenge the government's decision in this case, Tesla argues that the decision to exclude it and its customers from the transition program has "no possible connection" to the conservationist purposes of the environmental laws under which electric vehicle subsidy program exists.

[49] Without a detailed analysis of the complex environmental regulatory scheme, no one disagreed that the purposes of the electric car subsidy program included: reducing greenhouse gases in response to climate change, protecting the environment, and assisting Ontarians to transition to a low-carbon economy. The purposes of the *Public Transportation and Highway Improvement Act* include the development, construction, and operation of public highways in Ontario. Tesla argues that the decision to exclude it from the transition program met none of these purposes, is without a legitimate justification, and prejudiced its interests in an unfair manner.

[50] Since at least 1959 it has been established in Canada that courts have the authority to review executive action taken for an improper purpose. In that year, the Supreme Court of Canada released its seminal decision *Roncarelli v Duplessis*, [1959] SCR 121 at p. 143. In that case, the Premier of Québec had intervened in a liquor license proceeding and directed that Mr. Roncarelli's business be denied its liquor license because he was a member of the Christian religious sect known as Jehovah's Witnesses. In finding the Premier's intervention unlawful, Mr. Justice Ivan Rand wrote at p. 142:

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, [and] that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and the irrelevant purposes of public officers acting beyond their duty, [both] would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

[51] Justice Rand explained further at p. 140:

> In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute... "Discretion" necessarily implies good faith in discharging public duties; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

[52] Justice Rand defined "good faith" in the exercise of statutory discretion in this way:

> ...carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right: it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

[53] Courts have since that time exercised the authority to ensure that executive discretion is not exercised for an improper purpose i.e. a purpose that is outside of the purposes for which the statute or regulation created the discretionary power that is purportedly exercised. For example, in *Re Doctors Hospital and Minister of Health et al.*, (1976), 12 OR (2d) 164, the Divisional Court struck down orders in council that revoked the operating authority of four hospitals under the *Public Hospitals Act*. The Minister of Health wrote letters to the hospital administrators advising that the government of the day had decided to close the hospitals to save costs as part of a "plan for greater overall cost-efficiency in the provincial health sector." It was clearly stated that the decision to close the hospitals was a funding decision in light of government funding priorities.

[54] The statutory authority of the Minister of Health to close hospitals at the time was set out in s. 4 (5) of *The Public Hospitals Act*, RSO 1970, c 378:

> Any approval given or deemed to have been given under this Act in respect of a hospital may be suspended by the Minister or revoked by the Lieutenant-Governor in Council.

[55] In that case, the court rejected the same arguments that counsel for the government has made in this case. The court held that cabinet's power to suspend or revoke hospitals' operating authority set out in *The Public Hospitals Act* was intended to deal with matters of health and hospital administration. It was not intended to be used as a means of exercising financial controls over hospitals. The court held:

> In the absence of clear words in the statute, the discretion granted to the Lieutenant-Governor in Council could only be used to pursue the policy and objects of the act, which are be determined according to the standard canons of construction and to that extent, at least, reviewable by the Courts. That we take to be the view of Mr. Justice Lacourciere expressed Multi-Malls at page 18 of his reasons, where he in turn was relying upon and to a certain extent interpreting the speech of Lord Reid in Padfield et al. v Minister of Agriculture, Fisheries & Food et al., [1968] A.C. 977. At page 1030, Lord Reid stated:
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> > [...]In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.[...]

[56] In *Multi-Malls Inc. et al. and Minister of Transportation and Communications et al.*, 1976 CANLII 623 (ON CA) the Court of Appeal applied the same principles. In that case, a Minister had refused to issue permits under the law regulating highways as a means to prevent Multi-Malls from developing a shopping centre contrary to government planning policy. The court struck down the Minister's exercise of discretion under the highway statute for this reason:

> I am of opinion that the Minister of Transportation and Communications allowed himself to be influenced by extraneous, irrelevant and collateral considerations which should not have influenced him in the exercise of his discretion to refuse the entrance permit. It seems

> clear that the purpose of the Act in general is not to ensure proper land use planning but generally to control traffic. All of its provisions deal with the procedure for the designation, acquisition, construction, maintenance and financing of roads, for determining the need for and use of, King's Highways, secondary highways, tertiary resource, industrial, county, suburban, township, city, town, village and development roads.

[57] In *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64 (CanLII) the Supreme Court of Canada affirmed the *Doctors Hospital* case but with an important gloss. At para. 28 of the reasons, Abella J. wrote:

> It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, 1978 CanLII 40 (SCC), [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, 1981 CanLII 175 (SCC), [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 1976 CanLII 739 (ON SC), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, **"it would take an egregious case to warrant such action"** (*Thorne's Hardware*, at p. 111)[4] [Emphasis added.]

(v) The Minister Exercised his Discretion for an Improper Purpose

[58] Premier Ford's interview and the speeches in the Legislature are not admissible for the purpose of proving that the transition program has a colourable or improper purpose. "Speeches and public declarations by prominent figures in the public and political life" are political and are not credible sources of statutory or regulatory intention. *Reference re Upper Churchill Water Rights Reversion Act,* [1984] 1 SCR 297, at pa. 318.

[59] It is clear nevertheless that the transition program had a distinct and unique effect on Tesla and that this was known and intended throughout. The government sent a unique letter to Tesla showing that it was treating Tesla differently than all other vehicle sellers in Ontario because it was not a franchised business – a term that the government had not announced publicly.

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[4] In *Thorne's Hardware*, Dickson J. (as he then was) dealt with the review of cabinet's orders in council. It is therefore an apt analogy for this case.

[60] As discussed above, if cabinet's goal is to protect small to mid-sized dealerships from the risk of loss if customers cancel orders and if the dealers are left with cars on their lots or on order and if they cannot sell the cars to others or return those cars to the manufacturers for refunds, then including franchised dealers and effectively excluding Tesla from the transition is no answer. Including franchised dealers is grossly over-inclusive as it catches all dealerships other than Tesla whether they are huge businesses or small. Including all franchised businesses does nothing to determine if:

a. any customer of a dealership cancelled an order;

b. if an order was cancelled, whether the dealer could sell the car anyway;

c. if an order was cancelled and the dealer could not sell the car, whether the dealer could cancel the order with the manufacturer; and

d. if an order was cancelled and the dealer could not sell the car or cancel the order, whether the dealer could return the car to the manufacturer or otherwise deal with the manufacturer to protect the dealer in some other way (such as adjusting its incentives, rebates, and the like).

That is, the discretionary decision to limit the transition to franchised dealers is not at all related to either protecting small to mid-sized dealers or to protecting dealers who may suffer losses to manufacturers. All it seems to do is to include in the transition all dealerships in Ontario who had eligible cars on their lots or on order except Tesla.[5] This conclusion is buoyed by the evolution of the program terms from the initial public announcement that included all dealers, to the letter to Tesla including only franchised dealers, to the affidavit filed herein that includes only "independently-owned" franchises. The evolution of the program terms propounded by the Minister lays bare the targeting of Tesla.

[61] I am not assessing whether the goal of protecting small to mid-sized businesses that may be at risk of losses is wise policy. Rather, I am considering the actual exercise of discretion under which the Minister has adopted a condition of the transition program to limit it to franchised dealers as a manner to carry out that policy. Whether the goal was wise or not, the means implemented by

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[5] plus a few models of cars that were accidentally swept up because they are bought directly from manufacturers. But no branded dealerships associated with those purchases, at whom the limitation is supposedly aimed are excluded or affected at all.

the exercise of statutory and regulatory discretion was arbitrary; it was unrelated to the achievement of the supposed policy goal. It was also not related to any of the conservationist purposes of the electric car subsidy program. It was not related to any purpose under the *Public Transportation and Highway Improvement Act.*[6] Therefore it cannot stand.

[62] The government chose to refrain from filing contemporaneous evidence apart from the *ex post facto* explanation provided by its witness. While there was no formal "record of proceedings" for this type of decision-making, as Justice Stratas noted in *Tsleil-Waututh* at para. 79, it is not open to the government to say, "Trust us, we got it right."

[63] Moreover, where an executive decision singles out a person or business for financial and reputational harm and is taken on certain assumed facts, basic fairness calls out for the target to be entitled to provide a response. The government's asserted rationale for limiting the transition program to franchised dealerships is laden with factual assumptions that were susceptible to being proved or disproved with evidence. Tesla was not asked to provide any facts that might have been relevant to those factual assumptions.

[64] In conclusion, the decision to exclude Tesla by limiting the transition program to only franchised dealerships is arbitrary and unrelated to the purposes of the statutory or regulatory discretion being exercised. In my view, it is egregious, as that term was used by Dickson J. above, because, not only was it made for an improper purpose, but because the Minister singled out Tesla for reprobation and harm without provided Tesla any opportunity to be heard or any fair process whatsoever.

Remedy

[65] Tesla asks that I set aside the limitation of the transition program to franchised dealers. However, doing that effectively re-shapes the transition program and requires the government to fund subsidies to Tesla's customers. I am not prepared to make such an order. The government's counsel argues that the inclusion of only franchised dealers is part and parcel and inextricably intertwined with the terms implemented to construct the transition program. I agree. If the government wants to transition out of the electric car subsidy program, the Minister must exercise his operational discretion in a lawful manner. He has yet to do so. I therefore quash and set aside the Minister's unlawful exercises of discretion to implement the transition program announced July 11, 2018 (as amended by its letter to Tesla of the same date and further amended in the

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[6] Said another way, it is not necessary to achieve the state's objective and it bears no relation to the state interest that lies behind the legislation. *Canada (Attorney General) v PHS Community Services Society*, 22011 SCC 44 at para. 77.

affidavit filed herein) under the *Electric and Hydrogen Vehicle Incentive Program* under the *Climate Change Action Plan* created pursuant to s. 7 (1) of the *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c. 7 and to fund that program under s. 118 (2) of the *Public Transportation and Highway Improvement Act*.

[66] Tesla seeks costs of approximately $185,000 on a partial indemnity basis. Its efforts to contact the Ministry were never responded to. It was forced to bring urgent court proceedings to vindicate its rights. It is entitled to reimbursement for its reasonable costs.

[67] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is "fair and reasonable" in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario),* 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, at paras 26, 37.

[68] In my view, it is fair and reasonable, and reasonably ought to have been expected by the government, that if unsuccessful in an urgent proceeding of this magnitude it will be required to reimburse Tesla for costs of $125,000 on a partial indemnity basis all-inclusive and it is so ordered.

F.L. Myers J.

Released: August 27, 2018

CITATION: Tesla Motors Canada ULC v. Ontario (Ministry of Transportation), 2018 ONSC 5062
COURT FILE NO.: DC 497/18
DATE: 20180827

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TESLA MOTORS CANADA ULC

Applicant

– and –

ONTARIO (MINISTRY OF TRANSPORTATION)

Respondent

REASONS FOR JUDGMENT

F.L. Myers J.

Released: August 27, 2018