

Federal Court



Cour fédérale

**Date: 20140108**

**Docket: T-363-13**

**Citation: 2014 FC 21**

**Ottawa, Ontario, January 8, 2014**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**GARTH H. DRABINSKY**

**Applicant**

**and**

**THE ADVISORY COUNCIL OF THE ORDER OF  
CANADA AND THE ATTORNEY GENERAL OF  
CANADA**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Mr Garth H Drabinsky is a well-known impresario and producer. In 1995, the Governor General awarded Mr Drabinsky the Order of Canada based on his contribution to the entertainment industry.

[2] In 2009, Mr Drabinsky was convicted on two counts of fraud in respect of the management of his company, Livent. The Ontario Superior Court of Justice sentenced him to 7 years of

imprisonment. On appeal, the Ontario Court of Appeal upheld the convictions but reduced the sentence to 5 years: *R v. Drabinsky*, 2011 ONCA 582.

[3] In June 2012, while Mr Drabinsky was still in custody, the Secretary General to the Governor General wrote to inform him that the Advisory Council of the Order of Canada planned to consider whether his appointment to the Order should be terminated. The Secretary General told Mr Drabinsky that he could make written submissions to the Council and set a deadline of July 7, 2012.

[4] Counsel for Mr Drabinsky replied to the Secretary General's letter and requested an extension of time to make submissions. In particular, counsel requested an extension until January 2013 when Mr Drabinsky expected to be released on day parole, and would therefore be in a better position to assemble the materials that he wished to provide to the Council.

[5] The Secretary General replied to counsel's letter and stated that the Council had agreed to give Mr Drabinsky a one-month extension until August 7, 2012.

[6] Mr Drabinsky made extensive representations to the Council on August 3, 2012 – 17 pages of written submissions and voluminous supporting documentation, including a copy of his autobiography, entitled "Closer to the Sun". However, he also stated that he reserved the right to add substantially to those submissions following his release. The Secretary General acknowledged receipt of Mr Drabinsky's materials, but said nothing about allowing further submissions.

[7] The Council met in November 2012 and decided to recommend to the Governor General that Mr Drabinsky's appointment be rescinded. The Governor General accepted the Council's recommendation and signed an Ordinance to that effect. The Secretary General informed Mr Drabinsky of the Governor General's decision, which was later published in the Canada Gazette.

[8] Mr Drabinsky argues that the Council unfairly refused him an opportunity to make further written submissions and failed to comply with the procedures it was bound to follow before terminating his appointment.

[9] Mr Drabinsky purports to challenge a series of decisions – the Council's setting of the August 7, 2012 deadline; the Council's apparent refusal of an extension of time to January 2013; the Council's recommendation to terminate his appointment; and the Governor General's acceptance of that recommendation, as reflected in the Ordinance. Looking at the circumstances as a whole, it appears to me that Mr Drabinsky is actually challenging the decision of the Governor General to revoke his appointment to the Order of Canada, and is citing steps, which he regards as unfair, along the route to that decision. Accordingly, in his view, I should overturn the Governor General's decision because it was the product of an unfair process.

[10] The respondents argue that neither the Council's nor the Governor General's decisions are amenable to judicial review and, even if they were, Mr Drabinsky has failed to show that he was treated unfairly.

[11] I can find no basis for allowing this application. While I accept Mr Drabinsky's contention that judicial review is available to a person in his circumstances, albeit on limited grounds, I find that the Secretary General, the Council, and the Governor General treated Mr Drabinsky fairly and, in particular, respected the procedures that he would have legitimately expected to be followed. I must, therefore, dismiss this application for judicial review.

[12] The following issues arise:

1. Can the Court review the decision to revoke Mr Drabinsky's appointment to the Order of Canada?
  
2. If so, did the process that led to the termination of Mr Drabinsky's appointment, meet his legitimate expectations about the procedure to be followed?

## II. The Legal Framework

[13] The *Constitution of the Order of Canada* (s 7(1) – see Annex for all provisions cited) provides that the Council is made up of:

- The Chief Justice of Canada, who chairs the Council;
  
- The Clerk of the Privy Council;
  
- The Deputy Minister of the Department of Canadian Heritage;
  
- The Chairperson of the Canada Council;
  
- The President of the Royal Society of Canada;

- The Chairperson of the Board of Directors of the Association of Universities and Colleges of Canada; and
- Not more than five other members appointed by the Governor General on the recommendation of the Council.

[14] A person's membership in the Order of Canada can be terminated if the Governor General issues an Ordinance to that effect (s 25(c)).

[15] The *Policy and Procedure for Termination of Appointment to the Order of Canada* sets out the process by which a person's membership in the Order can be terminated. In essence, after considering the evidence, ascertaining the relevant facts, and being guided by the principle of fairness, the Council may recommend termination. The relevant provisions of the Policy (ss 2 to 5) include the following steps:

- The Council must consider termination if the person has been convicted of a criminal offence;
- The Secretary General must notify the affected person that his or her appointment is under consideration;
- The notice must advise the person that he or she may, within the time period set out in the notice, make representations to the Council; if the person does not reply within the applicable time frame, the process will continue to unfold;
- The Secretary General will forward the person's representations to the Council;

- The Council will duly consider the representations and prepare a report setting out its findings and recommendations;
- After receiving the Council's report, the Governor General can either advise the person, through the Secretary General, that he or she remains in the Order in good standing, or issue an Ordinance terminating the person's appointment; and
- Notice of termination will be published in the Canada Gazette.

III. Issue One – Can the Court review the decision to revoke Mr Drabinsky's appointment?

[16] The respondents argue that the Governor General's decision is not amenable to judicial review because his power emanates from the Crown Prerogative.

[17] Clearly, the courts have limited powers to review decisions based on the Crown Prerogative. However, in my view, a decision terminating an appointment to the Order of Canada can be challenged in court, but only on narrow grounds.

[18] Generally speaking, decisions based on the Crown Prerogative can be judicially reviewed solely where a person's rights or legitimate expectations have been affected (*Black v Canada (Prime Minister)*, [2001] OJ No 1853, at para 51) [*Black (1)*]. It follows that, since no Canadian citizen can claim a "right" to an honour (*Black( 1)*, at para 60), a decision to grant, or not to confer, or even to withdraw an honorary appointment does not affect a person's rights, and cannot be challenged in court.

[19] Therefore, the Governor General's decision cannot be contested on the ground that it affects Mr Drabinsky's rights. By contrast, the doctrine of legitimate expectations relates to procedural fairness, not substantive rights (*Baker v Canada (Minister of Citizenship and Immigration)* (1999), 174 DLR (4<sup>th</sup>) 193 (SCC), at 212-214). Accordingly, the sole basis on which the Governor General's decision can be reviewed is procedural [*Black (1)*]. The question is whether the process leading to the termination of the appointment met the affected person's legitimate expectations.

[20] In a case dealing with potential termination of an appointment to the Order of Canada, Justice Yves de Montigny recognized that the procedure set out in the Policy created a legitimate expectation that could give rise to a court challenge: *Black v Advisory Council for the Order of Canada*, 2012 FC 1234, at para 63 [*Black (2)*]. There, Mr Black challenged a decision of the Council denying him an opportunity to make oral submissions. Justice de Montigny held that the Council's decision could only be challenged on the procedural question of whether Mr Black's legitimate expectations had been met. In the end, he found that the Council was not obliged to afford Mr Black an oral hearing. The Federal Court of Appeal agreed that an oral hearing was not required, but expressed no opinion on the question of whether the decision was actually amenable to judicial review, or on the doctrine of legitimate expectations: 2013 FCA 267, at para 7. In other words, it appears that the Court assumed without deciding that the Council's decision was amenable to judicial review.

[21] The issue in *Black (2)* differs from the issue that Mr Drabinsky is raising here. As discussed above, I do not interpret Mr Drabinsky's application as challenging a particular procedural decision made along the way toward the ultimate decision of the Governor General. Rather, he argues that

the overall process followed by the Council leading to that decision was unfair because it failed to correspond with his legitimate expectations about the procedure to be followed.

[22] In my view, a person who feels aggrieved by a decision of the Governor General terminating his or her appointment to the Order of Canada can challenge that decision on procedural grounds based on the doctrine of legitimate expectations. I believe this approach would be consistent with *Black (1)*. There, the Ontario Court of Appeal observed that a decision of the Prime Minister to oppose the awarding of an appointment to a Canadian citizen by a foreign government could be reviewed on grounds that legitimate expectations about the procedure to be followed had not been met. (*Black (1)*, at para 61).

[23] Similarly, I have no doubt that the Ordinance terminating Mr Drabinsky's Order of Canada can be challenged by way of judicial review on the basis that his legitimate expectations about the process that would be followed en route to that decision were not met.

[24] The respondents also argue that this issue is now moot since any procedural irregularities took place before the Ordinance was issued. Once the Ordinance was signed, they say, none of the steps leading to that decision can now be challenged. In my view, given my interpretation of Mr Drabinsky's application for judicial review (*ie*, that it challenges the Governor General's decision), and my conclusion that the Ordinance is open to review on procedural grounds, Mr Drabinsky's application cannot be moot. Clearly, there remains a live controversy between the parties.



IV. Issue Two – Did the process that led to the termination of Mr Drabinsky’s appointment, meet his legitimate expectations about the procedure to be followed?

[25] Mr Drabinsky argues that the process that resulted in the Governor General’s decision to terminate his appointment to the Order of Canada did not correspond with the procedures that have been set out in the applicable Policy. In particular, Mr Drabinsky argues that the Council can make a recommendation to the Governor General to terminate a person’s appointment only after ascertaining “the relevant facts” (s 2). According to Mr. Drabinsky, the Council was required to balance his criminal convictions against all factors favouring retention of his appointment. Since he had a limited opportunity to make it aware of all those positive factors, the Council was not in a position to ascertain the relevant facts.

[26] In my view, the conduct of the Council and the Governor General respected the steps set out in the applicable process – identifying the applicable deadline, extending the deadline, receiving written submissions, Council’s consideration of those submissions, its report to the Governor General, the Governor General’s consideration of that report, the Governor General’s signing of the Ordinance, the communication of the decision to Mr Drabinsky, and the publishing of the decision in the Canada Gazette.

[27] While Mr Drabinsky complains that he was unfairly denied a chance to present supporting documentation, I note that in his letter of August 3, 2012, Mr Drabinsky did not explicitly request a further extension of time to make additional submissions. Rather, he said he reserved the right to do so, even though there was no apparent legal basis on which he could have asserted such a right.

[28] In fact, after receiving the acknowledgement of the Secretary General dated August 23, 2012, Mr Drabinsky said nothing more to the Council about his parole status or his capacity to make further submissions, even though that was the basis of his suggestion that he would be able to make fuller representations at a later date. In fact, he did not follow up in any way to the Secretary General's letter of acknowledgement, which did not grant him any additional opportunity to make further submissions.

[29] On these facts, I can find no basis for a legitimate expectation that the Council would grant Mr Drabinsky a further extension of time to make submissions beyond those he provided in August 2012.

[30] Mr Drabinsky also argues that he was entitled to receive immediate notice of the Governor General's acceptance of the Council's recommendation, and to make submissions during the period of time between that approval and the issuance of the Ordinance. I see no basis for any legitimate expectation that he would be afforded an opportunity to make additional representations at that stage. He was given a reasonable amount of time to make submissions to the Council. His only legitimate expectation was that those submissions would be reviewed by the Council and taken into account in its recommendation to the Governor General. And they were.

[31] Mr Drabinsky maintains that the Council had an obligation to consider all relevant evidence and, because he could have supplied further documentation, the Council failed to discharge its duty. However, the question of relevance had to be determined by the Council, not by Mr Drabinsky.

While he may have felt he had more evidence to supply, the Council obviously believed it had all the relevant evidence it needed in order to make a recommendation to the Governor General.

[32] It must be remembered that once Mr Drabinsky had been convicted of a crime the Council had no choice but to consider whether his appointment should be terminated. It had no alternative. The Policy distinguishes between criminal convictions and other grounds for termination. In respect of the former, the Council acts solely on the basis of the conviction, which suggests that there may be a limited range of other evidence that would be relevant to its deliberations. Where the Council considers termination on other grounds (*eg* whether the person's conduct constitutes a significant departure from generally-recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order), it must obviously weigh numerous factors. The range of relevant evidence would likely be wider there than in respect of criminal convictions.

[33] In sum, I cannot conclude that the process leading to the decision to terminate Mr Drabinsky's appointment failed to meet his legitimate expectations about the process that would be followed along the way.

#### V. Conclusion and Disposition

[34] The decision to terminate Mr Drabinsky's appointment is amenable to judicial review based on his legitimate expectations about the procedure that would be followed. However, in my view, the Council and the Governor General respected the applicable procedures, and provided Mr Drabinsky a fair chance to make submissions opposing the termination of his Order of Canada. Therefore, there is no basis on which to overturn the Governor General's decision.

[35] I must, therefore, dismiss this application for judicial review, with costs. The parties agree that costs should be fixed in the amount of \$5,000.00.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is dismissed, with costs payable by the applicant.
2. Costs are fixed in the amount of \$5,000.00.

“James W. O’Reilly”

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Judge

## Annex

**Policy and Procedure for Termination of Appointment to the Order Of Canada**

2. Termination of a person's appointment to the Order of Canada shall be on the recommendation of the Advisory Council made to the Governor General. The recommendation of the Advisory Council shall be based on evidence and guided by the principle of fairness and shall only be made after the Council has ascertained the relevant facts relating to the case under consideration.

3. The Advisory Council shall consider the termination of a person's appointment to the Order of Canada if

(a) the person has been convicted of a criminal offence; or

(b) the conduct of the person

(i) constitutes a significant departure from generally-recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order, or detracts from the original grounds upon which the appointment was based; or

(ii) has been subject to official sanction, such as a fine or a reprimand, by an adjudicating body, professional association or other organization.

4. Termination of an appointment to the Order of Canada is the sole sanction for a person appointed to the Order.

## Procedure

5. The termination procedure will proceed in the following stages:

**Politique et procédure de révocation d'une nomination à l'Ordre du Canada**

2. Le gouverneur général ne procède à la révocation que sur la recommandation du Conseil consultatif, celle-ci étant fondée sur des éléments de preuve, après vérification des faits en cause et compte tenu du principe de l'équité.

3. Le Conseil consultatif envisage la révocation dans l'un ou l'autre des cas suivants :

a) la personne fait l'objet d'une condamnation au criminel;

b) la conduite de la personne, selon le cas :

(i) constitue un écart de conduite grave et est considérée comme une atteinte à la réputation, à l'intégrité ou à la valeur de l'Ordre ou ternit les motifs de la nomination de la personne à l'Ordre;

(ii) a fait l'objet d'une sanction officielle, telle une amende ou un blâme par un organe d'arbitrage, une association professionnelle ou toute autre organisation.

4. La révocation de la nomination d'une personne à l'Ordre du Canada est la seule sanction que cette personne encourt.

## Procédure

5. La révocation de la nomination d'une personne à l'Ordre du Canada s'effectue selon les étapes suivantes :

Stage 1 - A request to consider the termination of an appointment to the Order of Canada may be made by any person in writing to the Deputy Secretary, The Chancellery. After review, if the grounds for termination are considered to be insufficient or spurious, the Deputy Secretary, after consultation with the Secretary General of the Order, will send a reply to the person who made the request to that effect.

The Deputy Secretary may initiate a request for termination on his/her own accord.

Stage 2 - If the Deputy Secretary determines that there may be reasonable grounds for termination of the appointment, the request will be forwarded by the Secretary General to the Advisory Council for its consideration.

Stage 3 - The Advisory Council will consider the request and if, in its opinion, there are insufficient grounds to proceed further, the Secretary General will send a reply to the person who made the request to that effect.

Stage 4 - If the Advisory Council determines that there may be reasonable grounds for termination of the appointment, the request will be subject to the remainder of the termination process.

Stage 5 - The Secretary General, on behalf of the Advisory Council, will send, by registered mail, a written notice advising the person, on the basis of the allegations of fact set out in the notice that termination of his or her appointment to the Order is under consideration. The notice will advise the person that, within the time prescribed in the notice, he or she may

- (a) resign from the Order (see stage 6); or
- (b) make representations respecting the matter under consideration or any allegation of fact set out in the notice.

Étape 1 - La demande d'examen de la révocation peut être présentée par quiconque par écrit au sous-secrétaire, la Chancellerie. Après examen, si les motifs de révocation sont jugés insuffisants ou fallacieux, le sous-secrétaire, la Chancellerie, après consultation du secrétaire général de l'Ordre, envoie une réponse en ce sens à l'auteur de la demande.

Le sous-secrétaire peut présenter une demande de révocation de sa propre initiative.

Étape 2 - Si le sous-secrétaire conclut qu'il peut y avoir des motifs de révocation soutenable, le secrétaire général soumet la demande à l'examen du Conseil consultatif.

Étape 3 - Le Conseil consultatif examine la demande et si les motifs lui paraissent insuffisants pour poursuivre la procédure de révocation, le secrétaire général envoie une réponse en ce sens à l'auteur de la demande.

Étape 4 - Si, au contraire, le Conseil consultatif conclut qu'il peut y avoir des motifs de révocation soutenable, la procédure se poursuit.

Étape 5 - Le secrétaire général, au nom du Conseil consultatif, adresse par courrier recommandé un avis écrit à l'intéressé l'informant de la révocation envisagée et des faits allégués à l'appui et l'avisant qu'il peut, dans le délai fixé dans l'avis:

- a) démissionner de l'Ordre (voir étape 6);
- b) présenter ses observations au sujet de la révocation ou de tout fait allégué dans l'avis.

The notice will also indicate that the termination process will continue, even if the person omits to reply within the prescribed time.

Stage 6 - If the person chooses to resign from the Order, the person will notify the Secretary General in writing of that fact within the time prescribed in the notice. After the acceptance of the person's resignation by the Governor General pursuant to paragraph 25(b) of the Constitution of the Order of Canada, the person's name will be struck from any list held by the Chancellery and, pursuant to subsection 23(2) of the Constitution of the Order of Canada, the person must return the person's insignia to the Secretary General of the Order.

Stage 7 - If the person elects to make representations respecting the matter under consideration or any allegation of fact set out in the notice, the person or his or her representative may, within the time prescribed in the notice or as otherwise authorized by the Secretary General, make representations in writing or as the Secretary General may authorize.

Stage 8 - If, within the time prescribed in the notice or authorized by the Secretary General, the person fails to reply to the notice, the Secretary General will request the Advisory Council to review the case in accordance with the procedures provided for in stage 9.

Stage 9 - If the person has made representations, the Secretary General will send all relevant documentation to the Advisory Council for its consideration. After due consideration, the Advisory Council will prepare for the Governor General a report that contains its findings and recommendation with respect to whether or not to terminate the person's appointment to the Order.

L'avis précise également que la procédure de révocation se poursuivra même si l'intéressé omet de se manifester dans le délai fixé.

Étape 6 - Si l'intéressé choisit de démissionner de l'Ordre, il en informe le secrétaire général par écrit, dans le délai fixé dans l'avis. Après que le gouverneur général a accepté la démission conformément à l'alinéa 25b) de la Constitution de l'Ordre du Canada, le nom de l'intéressé est alors rayé des listes conservées par la Chancellerie et, en vertu du paragraphe 23(2) de la Constitution de l'Ordre du Canada, l'intéressé doit remettre son insigne au secrétaire général.

Étape 7 - Si l'intéressé choisit de présenter des observations, lui-même ou son représentant peut, avant l'expiration du délai fixé dans l'avis ou de tout autre délai autorisé par le secrétaire général, les transmettre par écrit ou sous toute autre forme autorisée par le secrétaire général.

Étape 8 - Si l'intéressé omet de se manifester dans le délai fixé dans l'avis ou autorisé par le secrétaire général, ce dernier demande au Conseil consultatif d'examiner le cas de la façon prévue à l'étape 9.

Étape 9 - Si l'intéressé a présenté des observations, le secrétaire général remet tous les documents pertinents au Conseil consultatif. Après un examen en bonne et due forme, le Conseil consultatif fournit au gouverneur général un rapport exposant ses conclusions et sa recommandation quant à la révocation de l'intéressé.



Stage 10 - On receiving the report referred to in stage 9, the Governor General, in accordance with the recommendation of the report, will

- (a) request the Secretary General to either advise the person in question that he or she remains in the Order in good standing; or
- (b) pursuant to paragraph 25(c) of the Constitution of the Order of Canada, make an Ordinance terminating the person's appointment to the Order.

Stage 11 - Notice of the termination of the person's appointment to the Order of Canada shall be published in the Canada Gazette.

### *Constitution of the Order of Canada*

#### COUNCIL

7. (1) The Advisory Council for the Order shall consist of the following members:

- (a) the Chief Justice of Canada, who shall act as Chairperson of the Council;
- (b) the Clerk of the Privy Council;
- (c) the Deputy Minister of the Department of Canadian Heritage;
- (d) the Chairperson of the Canada Council;
- (e) the President of the Royal Society of Canada;
- (f) the Chairperson of the Board of Directors of the Association of Universities and Colleges of Canada; and
- (g) not more than five additional members appointed pursuant to subsection (2).

Étape 10 - Sur réception du rapport du Conseil consultatif mentionné à l'étape 9, le gouverneur général, selon la recommandation que contient le rapport :

- a) soit demande au secrétaire général d'informer l'intéressé qu'il continue d'appartenir à l'Ordre;
- b) soit prend une ordonnance de révocation de la nomination de l'intéressé à l'Ordre en vertu de l'alinéa 25c) de la Constitution de l'Ordre du Canada.

Étape 11 - Les avis de révocation des nominations à l'Ordre du Canada sont publiés dans la Gazette du Canada.

### *Constitution de l'Ordre du Canada*

#### CONSEIL

7. (1) Le Conseil consultatif de l'Ordre se compose :

- a) du juge en chef du Canada, qui agit comme président du Conseil;
- b) du greffier du Conseil privé;
- c) du sous-ministre du ministère du Patrimoine canadien;
- d) du président du Conseil des Arts du Canada;
- e) du président de la Société royale du Canada;
- f) du président du conseil d'administration de l'Association des universités et collèges du Canada;
- g) d'au plus cinq autres membres nommés en vertu du paragraphe (2).

Termination of Membership in the Order

**25.** A person's membership in the Order ceases when

[...]

(c) The Governor General makes an Ordinance terminating the person's appointment to the Order.

Fin de l'appartenance à l'Ordre

**25.** Une personne cesse d'appartenir à l'Ordre dans les cas suivants :

...

c) le gouverneur général prend une ordonnance de révocation de sa nomination à l'Ordre.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-363-13

**STYLE OF CAUSE:** GARTH H. DRABINSKY v THE ADVISORY COUNCIL  
OF THE ORDER OF CANADA AND THE ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 24, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** JANUARY 8, 2014

**APPEARANCES:**

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