

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150109**

**Docket: A-82-14**

**Citation: 2015 FCA 5**

**CORAM: DAWSON J.A.  
WEBB J.A.  
NEAR J.A.**

**BETWEEN:**

**GARTH H. DRABINSKY**

**Appellant**

**and**

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

**Respondents**

Heard at Toronto, Ontario, on December 11, 2014.

Judgment delivered at Ottawa, Ontario, on January 9, 2015.

**REASONS FOR JUDGMENT BY:**

**NEAR J.A.**

**CONCURRED IN BY:**

**DAWSON J.A.  
WEBB J.A.**

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**REASONS FOR JUDGMENT**

**NEAR J.A.**

I. Introduction

[1] Garth H. Drabinsky appeals from the January 8, 2014 decision of the Federal Court (2014 FC 21), in which the Federal Court judge dismissed his application for judicial review. In the Federal Court Mr. Drabinsky challenged the following “decisions” in the process that led to the termination of his appointment as a member of the Order of Canada:

1. The decision of the Advisory Council of the Order of Canada (the “Advisory Council”) to require that the applicant, Mr. Drabinsky, submit by no later than August 7, 2012 all materials for review by the Advisory Council in its consideration as to whether to recommend that Mr. Drabinsky’s appointment as an Officer of the Order of Canada be terminated;
2. The decision of the Advisory Council to disregard or to reject Mr. Drabinsky’s request for an extension of the August 7, 2012 deadline so that he could access persons, information, and materials which he was unable to obtain before August 7, 2012 or while he remained in custody at Beaver Creek Institution;
3. The decision of the Advisory Council to recommend to the Governor General of Canada that he issue an Ordinance terminating Mr. Drabinsky’s appointment as an Officer of the Order of Canada, as set out in a letter dated January 17, 2013 and communicated to Mr. Drabinsky through his lawyers on February 1, 2013; and
4. The decision of the Governor General to issue the Ordinance on the basis of the recommendation described in paragraph 3, above.

[2] For the reasons set out below, I would dismiss the appeal.

## II. Facts and Judicial History

[3] The facts of this case were aptly summarized by the Federal Court judge:

[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.

[4] In dismissing the application for judicial review the Judge found that the decisions of the Advisory Council and the Governor General could not be reviewed for their substance because "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" (at para. 18). This flows from the fact that no Canadian citizen can claim a "right" to an honour (citing *Black v. Canada (Prime Minister)*, 54 O.R. (3d) 215 at para. 60, [2001] OJ No. 1853 (QL)).

[5] The Federal Court judge did accept, however, that the Advisory Council's decision could be challenged on the procedural question of whether the process leading to the termination of the appointment met the affected person's legitimate expectations (at para. 21). He did so based on the Federal Court's reasoning in *Black v. Advisory Council for the Order of Canada*, 2012 FC 1234 at para. 63, 2012 F.C.J. No. 1309 (QL).

III. Issues

[6] The issues before this Court are:

1. Are decisions of the Advisory Council to recommend termination of an appointment to the Order of Canada justiciable?
2. Did the procedure followed by the Advisory Council fail to meet any legitimate expectations held by Mr. Drabinsky?

IV. Analysis

[7] In my view, there is no need for this Court to opine on the issues of justiciability and whether legitimate expectations can be created where no common law duty of fairness arises. Assuming without deciding that the decision to terminate Mr. Drabinsky's order is justiciable and that the doctrine of legitimate expectations has application, there is no basis to find that the process followed by the Advisory Council failed to meet the appellant's legitimate expectations.

[8] The law is well-settled that only clear, unambiguous, and unqualified representations as to procedure can give rise to a legitimate expectation (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 94, 98, 99. See also *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 68, [2011] 2 S.C.R. 504).

[9] Before us Mr. Drabinsky argued that he had a legitimate expectation to a fair process and that the Advisory Council would ascertain all of the relevant facts. This did not happen, he argues, in the following respects.

[10] First, he was given an inadequate extension of time to respond to the Advisory Council. This meant it had an inadequate record on which to base its recommendation.

[11] Second, the Advisory Council did not communicate findings to support its recommendation to the Governor General.

[12] Finally, he was not immediately advised of the decision of the Governor General.

[13] I reject the notions that Mr. Drabinsky had any legitimate expectation that he would receive an indefinite extension, and that the Advisory Council would make findings of the sort Mr. Drabinsky desired. I reach these conclusions for the following reasons.

[14] First, the *Policy and Procedure for Termination of Appointment to the Order of Canada* relied upon by Mr. Drabinsky does not contain a clear, unambiguous and unqualified representation that any requested extension will be granted. At best, the Policy authorizes the Secretary General of the Order to grant an extension of time to respond. Similarly, the Secretary General's statement in his letter of June 7, 2012 to Mr. Drabinsky that he could make representations "supported by the documentation you deem appropriate, by July 7, 2012" could not give rise to a legitimate expectation of an indefinite extension.

[15] Second, the Advisory Council put before the Governor General the entire record that was before it and advised that “[a]fter reviewing all the facts in the matter, notably the material provided” the Advisory Council is recommending that Mr. Drabinsky’s appointment be terminated. In other words, the Advisory Council found the record before it supported termination. Nothing in the Policy creates a legitimate expectation that the Advisory Council will give detailed reasons as Mr. Drabinsky seeks.

[16] Finally, even if Mr. Drabinsky had a legitimate expectation that he would receive immediate notice of the Governor General’s decision, any failure to do so is of no legal consequence. Mr. Drabinsky commenced his application for judicial review on a timely basis when notified of the decision.

[17] As the Federal Court judge found, the process leading to the termination of the appellant’s appointment was consistent with the Policy. The appellant was granted an extension of time to make submissions, and he made substantial written submissions within the extended timeframe granted to him. These materials were considered, and formed the basis of the Advisory Council’s recommendation to the Governor General. The Governor General made his decision based upon the recommendation from the Advisory Council.

[18] While the appellant would have preferred greater procedural entitlements, given the limited nature of the entitlements afforded to him under the doctrine of legitimate expectations, I see no basis upon which this Court should intervene.

V. Conclusion

[19] I would dismiss the appeal. The respondent has ten (10) days to make submissions in writing as to costs. Mr. Drabinsky shall then have ten (10) days to respond. The parties' submissions may be in letter form and shall not exceed two (2) pages in length.

"David G. Near"

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J.A.

"I agree.

Eleanor R. Dawson J.A."

"I agree.

Wyman W. Webb J.A."



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE O'REILLY DATED  
JANUARY 8, 2014, DOCKET NUMBER T-363-13**

**DOCKET:** A-82-14

**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:** DECEMBER 11, 2014

**REASONS FOR JUDGMENT BY:** NEAR J.A.

**CONCURRED IN BY:** DAWSON J.A.  
WEBB J.A.

**DATED:** JANUARY 9, 2015

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