Federal Court Cour fédérale

Date: 20121023

Docket: T-1348-12

Citation: 2012 FC 1234

Ottawa, Ontario, October 23, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

CONRAD BLACK

Applicant

and

THE ADVISORY COUNCIL FOR THE ORDER OF CANADA

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] The Applicant, Mr. Conrad Black, brought this application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, in order to challenge a decision of the Advisory Council for the Order of Canada (the "Council"), dated June 7, 2012, and confirmed July 6, 2012. The Council refused Mr. Black's request to be granted an oral hearing in advance of their determination as to whether there are reasonable grounds for the termination of his appointment to the Order of Canada (the "Order").

[2] Having carefully considered the written and oral submissions made by the Applicant and the Respondent, the Court has reached the conclusion that the application ought to be dismissed. While I am prepared to accept that the application is not premature and that the Council's decision to deny the Applicant an oral hearing is not immune from judicial review, I find that procedural fairness and natural justice do not require an oral hearing in the circumstances of this case.

FACTS

[3] The Applicant, Conrad Black, was appointed as an Officer of the Order of Canada in 1990.

[4] On July 20, 2011, Stephen Wallace, Secretary to the Governor General, wrote a letter to Mr. Black advising him that the Council had determined that there may be reasonable grounds for the termination of his appointment to the Order. This came about as a result of Mr. Black's recent re-sentencing on two convictions in the United States District Court of the Northern District of Illinois on one count of fraud and one count of obstructing justice.

[5] The grounds upon which the Council was considering whether to make a recommendation to the Governor General to terminate Mr. Black's appointment are stated in the following paragraph of Mr. Wallace's letter:

> The Policy and Procedure for Termination of Appointment to the Order of Canada requires the Advisory Council to consider termination in certain circumstances, including when the person has been convicted of a criminal offence and when the conduct of the person 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.
>
> (Affidavit of Conrad Black, Ex 1, Application Record, p 17)

[6] In that same letter, Mr. Wallace informed the Applicant that he had the option of resigning voluntarily from the Order or of making written representations by August 17, 2011. Failure to reply within the prescribed time would not halt the process.

[7] On August 17, 2011, the Applicant wrote to Stephen Wallace informing him that he would not resign voluntarily and requesting a personal hearing before the Council. The Applicant mentioned that his request was based on "both the nature and complexity of the matters under consideration and the fact that [he had] been assured of the support of numerous Officers and Companions of the Order of Canada who would also wish to make representation on [his] behalf" (Black Affidavit, Ex 3, Application Record, p 27).

[8] In that same letter, the Applicant summarized the legal proceedings that led to his convictions and explained that, if provided with an opportunity, he could demonstrate that he did nothing wrong in any sense, legal or moral. With respect to the legal proceedings in the United States, he stated:

> I would further respectfully submit that the existence of a criminal conviction in a foreign state is not the end of the matter but rather the start. In that situation, a fair and decent minded person must look at the circumstances underlying the matter to ascertain what weight if any should be given to that conviction for these purposes. If, as I feel confident I can demonstrate if provided the opportunity, there are substantial grounds to show that the conduct of the foreign prosecutors and state have not been appropriate or fair towards me then I believe that is something the Advisory Council not only should but must consider. In my case, if a fair and objective observer had regard to the entire picture, I believe that he or she would conclude that I have acted honourably and it is the foreign state that has not met that measure. It is also demonstrably true that equivalent adjudication of the facts in my case, by a Trial Court, and if necessary, an Appeal Court and the Supreme Court of Canada, would not possibly have returned any guilty verdicts.

[9] In his five page letter, Mr. Black went on to explain that he was charged in 2005 with 17 criminal offences in the United States, of which three were not proceeded with, one was abandoned, nine were rejected by jurors, and the remaining four were confirmed by the Court of Appeals for the Seventh Circuit (*United States of America v Conrad M. Black*, 530 F 3d 596 (7th Cir Ill 2008)), but unanimously vacated by the Supreme Court of the United States (*Conrad M. Black v United States*, 78 USWL 4732 (US 2010)). In the end, the Court of Appeals for the Seventh Circuit confirmed two convictions: one count of fraud and one count of obstruction of justice in relation to the Applicant removing 13 boxes of papers from his office at Hollinger in Toronto (*United States of America v Conrad M. Black*, 625 F 3d 386 (7th Cir Ill 2010)). In his letter to Mr. Wallace, Mr. Black indicated that he was considering an appeal of his convictions, on the grounds that his right to counsel as guaranteed by the Sixth Amendment has been violated.

[10] The Applicant further noted that the allegations that formed the basis of the obstruction of justice charge were brought before the Ontario Court of Justice in a contempt motion in 2005. The boxes were ordered to be returned, but the request for a finding of contempt was deferred. More than seven years have now passed since the motion was adjourned and no materials have been filed, nor has any further action been taken with respect to the contempt motion.

[11] On June 7, 2012, Stephen Wallace sent a letter to the Applicant in reply to his August 17, 2011 letter (Black Affidavit, Ex 4, Application Record, p 33). Mr. Wallace informed the Applicant that the Council would not hold an oral hearing. The letter indicated that, in considering the termination of his appointment, the Council would have regard to five reported United States decisions related to Mr. Black's United States convictions. The letter invited Mr. Black to make

additional representations in writing, supported by any documentation upon which Mr. Black wished to rely, provided they were made before July 7, 2012. The letter also advised that following receipt of these submissions, the Council would review Mr. Black's appointment and make a recommendation to the Governor General.

[12] On June 26, 2012, counsel for Mr. Black wrote to Stephen Wallace requesting that the Council reconsider his request for an oral hearing (Black Affidavit, Ex 5, p 36). The letter advised that an application for judicial review would be initiated if the Council were to refuse Mr. Black's request.

[13] On July 6, 2012, Mr. Wallace replied to counsel for Mr. Black and again denied his request for an oral hearing. Mr. Wallace wrote that the Council, as previously indicated, was prepared to consider additional written representations. In light of the passage of time, Mr. Black was invited to make those representations no later than July 23, 2012.

[14] On July 9, 2012, the Applicant initiated an application for judicial review of the Council's decision not to hold an oral hearing, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[15] On July 18, 2012, the Applicant filed a notice of motion for an interim order restraining the Council from proceeding with further deliberations or from rendering a decision pending the determination of the application for judicial review. On July 19, 2012, the Respondent filed a cross-motion for an order striking the application. Upon the parties agreeing to withdraw their motions

on the basis that the Council would not proceed to make its recommendation until the judicial review application had been heard and determined, Justice Tremblay-Lamer issued an order on July 19, 2012, which provided that the application be expedited and set down for hearing on August 24, 2012.

ISSUES

[16] This application for judicial review raises three issues, which can be framed as follows:

a) Is the application premature?

b) Is the decision of the Council to deny the Applicant an oral hearing susceptible to judicial review?

c) Did the Council breach a principle of procedural fairness?

ANALYSIS

The Order of Canada

[17] Before embarking upon an analysis of the three issues identified above, it is important to understand the legal framework governing the Order of Canada, especially with respect to the procedure governing appointments and termination of appointments. The Respondent has provided a useful description of the applicable rules and the following account is therefore largely based on the Respondent's submissions in this respect.

[18] The Order of Canada was created by Letters Patent issued by the Queen in 1967. The Order of Canada, like the Order of Merit, the Order of Military Merit and the Order of Merit of the Police

Forces, is part of the Canadian Honours system and is awarded pursuant to the Crown prerogative over honours: Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 103.

[19] The *Constitution of the Order of Canada* (“*Constitution*”), a Schedule to the Letters Patent, empowers the Governor General of Canada to appoint individuals to the Order of Canada in recognition of the highest levels of achievement and service to humanity at large, to Canada, or to their community, group or field of activity (*Constitution*, ss 9, 11, 16 and 18).

[20] The Order of Canada consists of Her Majesty in right of Canada, the Governor General of Canada, the Governor General’s spouse, the Companions, Officers and Members of the Order, and the Order’s honorary Companions, Officers and Members (*Constitution*, s 2).

[21] As suggested above, there are three ranks of membership in the Order: Companions, Officers, and Members. The Governor General may appoint an individual to any level of membership and, once appointed to the Order, the Governor General may elevate any membership with the individual’s consent (*Constitution*, ss 1 and 24).

[22] The privileges accorded to Companions, Officers and Members are symbolic. Once appointed, Companions, Officers and Members are entitled to wear insignia as prescribed by the Governor General, petition the Chief Herald of Canada to grant lawful armorial bearings, surround their shield of arms with the circle and motto of the Order and suspend therefrom the ribbon and badge of their rank, and place after their name initials signifying their rank as Companion (C.C.), Officer (O.C.) or Member (C.M.) of the Order (*Constitution*, s 21(1)).

[23] Any Canadian citizen may be appointed as a Companion, an Officer or a Member of the Order. A person who is not a Canadian citizen may be appointed as an honorary Companion, Officer or Member (*Constitution*, s 9). The total number of appointments at the rank of Companion of the Order is limited, as is the maximum number of appointments which may be made at all three ranks in a given year (*Constitution*, ss 13-15, 17 and 19).

[24] Before making an appointment to the Order of Canada, the Governor General obtains the advice of the Council. The Council is established pursuant to s 7 of the *Constitution.* The Council consists of the Chief Justice of Canada, 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 up to five additional members appointed by the Governor General.

[25] Pursuant to section 8 of the *Constitution*, the Council's role is to:

> (a) consider those nominations referred to in paragraph 5 *(c)* that the Secretary General has transmitted to it;
>
> (b) compile and submit to the Governor General a list of those nominees in the categories of Companion, Officer and Member and honorary Companion, Officer and Member who have the greatest merit; and
>
> (c) advise the Governor General on such matters as the Governor General may refer to Council.

[26] The *Constitution* provides that a person's appointment to the Order terminates upon death, upon acceptance of a person's written resignation from the Order, or upon the Governor General's

making of an Ordinance terminating the person's appointment (*Constitution*, s 25). Section 26 of the *Constitution* authorizes such Ordinances as follows:

> 26. The Governor General may make Ordinances respecting the government and insignia of the Order and the termination of a person's appointment to the Order.

[27] Pursuant to the *Policy and Procedure for Termination of Appointment to the Order of Canada* (the "Policy"), an Ordinance regarding the termination of a person's appointment to the Order shall be made on the recommendation of the Council to the Governor General (Policy, s 2). The Council shall consider the termination of a person's appointment to the Order in the following circumstances (Policy, s 3):

> 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.

[28] The Policy also provides that the Council's recommendation regarding termination of a person's appointment to the Order of Canada must be made fairly and based on evidence, and shall only be made after the Council has ascertained the relevant facts (Policy, s 2).

[29] Section 5 of the Policy outlines an eleven-stage process whereby the Council notifies an individual in writing if it is considering recommending the termination of that individual's Order of

Canada and provides the individual the opportunity to make representations, as set out at stage 7 of the Policy:

> 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.

[30] At the conclusion of this process, the Council prepares for the Governor General a report containing its findings and recommendations (Policy, s 5, 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.

[31] Upon receipt of the report, the Governor General, in accordance with the recommendation of the report, may request the Secretary General to advise the person in question that he or she remains in the Order in good standing, or to make an Ordinance pursuant to paragraph 25(c) of the *Constitution* terminating the person's appointment to the Order (Policy, stage 10). Upon termination of an appointment, an announcement is made in the Canada Gazette and a press release is issued by the Governor General's office (Policy, s 5, stage 11).

a) Is the application premature?

[32] It is trite law that interlocutory decisions of administrative bodies are generally not reviewable. This rule is longstanding and has recently been reiterated both by the Supreme Court of Canada (see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012

SCC 10, [2012] 1 SCR 364 [*Halifax (Regional Municipality)*]) and the Federal Court of Appeal (see *C.B. Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 FCR 332 [*C.B. Powell*]). In *C.B. Powell*, Justice Stratas, speaking for the Court of Appeal, articulated the rationale for this rule in the following terms (paras 30-32):

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point…
>
> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial review and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway…

[33] This rule has been consistently followed by this Court, as exemplified by the following cases where applications seeking to challenge interlocutory decisions have been routinely dismissed: *Esgenoôpetitj (Burnt Church) First Nation v Canada (Human Resources and Skills*

Development), 2010 FC 1195, [2010] FCJ no 1492 at paras 42-47; *Lundbeck Canada Inc v Canada (Minister of Health)*, 2008 FC 1379, [2008] FCJ no 1772 at paras 27-32; *Boulos v Canada (Attorney General)*, 2012 FC 292, [2012] FCJ no 320 at paras 15-25; *Garrick v Amnesty International Canada*, 2011 FC 1099, [2011] FCJ no 1609 at paras 45-55.

[34] There is no disagreement between the parties as to the existence of that rule. They diverge, however, as to whether the issue raised by the Applicant qualifies as an "exceptional circumstance" where the Court would be justified in intervening prior to a final decision being made. The Applicant contends that the Council's decision to deny him an oral hearing amounts to a breach of procedural fairness and would have an irreversible impact on his rights. He further submits that he would be left without a remedy should he wait until after the Governor General has terminated his appointment, because such an Ordinance has never been subject to judicial review and his challenge would likely be met with a mootness argument. Needless to say, the Respondent counters that none of Mr. Black's arguments meet the "exceptional circumstances" test.

[35] I agree with the Respondent that the scope of recognized exceptions to the rule against judicial review of interlocutory decisions has been drastically reduced over the last few years. In its most recent decision on the subject, the Supreme Court went so far as to overrule its earlier decision in *Bell v Ontario (Human Rights Commission)*, [1971] SCR 756, in which it held that an application for prohibition could be entertained before an administrative process has run its course where a preliminary jurisdictional issue was at stake. In *Halifax (Regional Municipality)*, the Supreme Court explicitly endorsed the restraint shown by reviewing courts in refusing to short-circuit the

decision-making role of a tribunal, referring with approval to the Federal Court of Appeal's decision in *C.B. Powell*.

[36] In light of these recent developments, the notion that an allegation of breach of procedural fairness is an exceptional circumstance that would justify a reviewing court to intervene and quash an interlocutory administrative decision is questionable. In his written submissions, the Applicant referred to a decision of this Court where such an allegation was found to be sufficient to justify intervention at the interlocutory stage: see *Fairmont Hotels v Director Corporations Canada*, 2007 FC 95, [2007] FCJ no 133 at para 10. This approach is probably no longer appropriate, as evidenced by the following excerpt from the *C.B. Powell* decision (at para 33):

> Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high… Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. <u>Concerns about procedural fairness or bias</u>, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts <u>are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted</u>… [Emphasis added.]
>
> (See also *Garrick*, above; *Boulos*, above.)

[37] The Applicant's argument with respect to the lack of an alternative remedy, however, is more compelling. His contention is premised on the notion that the Governor General will inevitably terminate his appointment without further notice to him if the Council's report provides

that his appointment ought to be terminated. While there is no doubt that a person's appointment to the Order of Canada cannot be terminated without a recommendation of the Council, pursuant to s 2 of the Policy, I am not at all convinced that the Governor General is bound by the recommendation of the Council. I acknowledge that the wording of stage 10 of the Policy, stating that "the Governor General, in accordance with the recommendation of the report, will" [emphasis added] either decide that a person remains in the Order in good standing or terminate that person's appointment, could support the opposite conclusion. The fact remains, however, that the Council's report to the Governor General contains "findings and recommendations"; the final decision remains with the Governor General. Indeed, the model Ordinance for the termination of an appointment found in the Policy states, in part:

> …
>
> Whereas, further to , the Advisory Council of the Order of Canada considered whether there were grounds to terminate the appointment of __________ to the Order of Canada;
>
> Whereas the Advisory Council, after considering all the facts in the matter, has recommended to the Governor General that the appointment of _________ to the Order of Canada be terminated;
>
> And Whereas the Governor General has seen fit to accept the Advisory Council's recommendation… [Emphasis added.]

[38] Moreover, the Applicant has not explained how a policy could displace the prerogative powers of the Governor General and fetter his discretion. Be that as it may, I am prepared to accept that the Governor General will, in most circumstances, follow the recommendation provided by the Council. I am also of the view that a recommendation from the Council would not be subject to review pursuant to section 18.1 of the *Federal Courts Act*, as it is not a decision or an order pursuant to that provision: *Jada Fishing Co v Canada*, 2002 FCA 103, [2002] FCJ 436. The question, then,

becomes whether the Applicant would be left with no remedy if the Governor General were to accept a recommendation of the Council to terminate his appointment.

[39] This question is fraught with uncertainty as an Ordinance made pursuant to paragraph 25(c) of the *Constitution* has never been the subject of an application for judicial review. On this issue, counsel for the Respondent took what appeared to be a contradictory position, arguing that neither the recommendation of the Council nor the decision of the Governor General is justiciable, yet stating that this application is premature because Mr. Black could bring an application for judicial review after the Governor General had made his decision. The Respondent cannot have it both ways.

[40] I shall say more about justiciability in the following section of these reasons. Suffice it to say, for the moment, that this question does not lend itself to a straightforward and unassailable answer. There are good reasons to believe that the Governor General's ultimate decision to terminate an appointment is not judicially reviewable, as it is a true exercise of a prerogative power. The same is probably true of the final recommendation given by the Council to the Governor General pursuant to stage 9 of the termination procedure set out in the Policy, as it can be argued that this recommendation also constitutes an exercise of the prerogative power. Even if that recommendation could be challenged on the ground that it is vitiated by a violation of the Applicant's right to natural justice and procedural fairness (a debatable proposition), the Governor General could very well act upon that recommendation before an application for judicial review could be filed, let alone be heard and decided.

[41] Counsel for the Applicant also referred the Court to the decision of Prothonotary Aalto in *Chauvin v Canada*, 2009 FC 1202, [2009] FCJ no 1496 [*Chauvin*], where it was held that the application challenging the procedure for the appointment of Dr. Morgentaler to the Order of Canada was moot once he had been appointed, since any tangible dispute about his investiture had disappeared. In that case, Mr. Chauvin, a Member of the Order, took great umbrage with the appointment of Dr. Morgentaler and challenged not the appointment of Dr. Morgentaler to the Order *per se*, but the process by which the Council submitted Dr. Morgentaler's name to the Governor General. The Court came to the conclusion that an order that the recommendation of the Council should be set aside or sent back for reconsideration would have no practical effect once the appointment by the Governor General had taken place. That decision does not seem to have been challenged and, therefore, has not been revisited either by this Court or by the Federal Court of Appeal. There is, however, no doubt in my mind that the same mootness argument could be made if ever Mr. Black were to challenge the termination of his Order on the basis that the process followed by the Council was flawed. Even if one could attempt to draw a formal distinction with *Chauvin* on the basis that Mr. Black might also challenge the Governor General's decision to terminate his appointment and not only the process leading to that decision, the fact of the matter is that the only ground that could be raised to challenge the decision of the Governor General would be the Council's alleged failure to follow the procedure prescribed by the Policy before making its recommendation to the Governor General.

[42] On the basis of the foregoing discussion, I am prepared to accept that the issue raised by the Applicant is an "exceptional circumstance" that should constitute an exception to the rule against judicial review of interlocutory decisions. There is a real possibility that the Applicant would be left

with no possible alternative remedy if he was prevented from bringing his application for judicial review of the Council's refusal to let him appear before it. While being mindful of the recent jurisprudence to the effect that the exceptional circumstances justifying the Court's intervention prior to the making of a final decision ought to be narrowly interpreted, I am of the view that the case at bar fits the exception. To the extent that the issue raised by Mr. Black is justiciable and reviewable by the Court, a question I will now turn to, he cannot be prevented from bringing his application at this early stage on the ground that it is premature. To decide otherwise would risk imposing on Mr. Black a potentially grave injustice, as he could ultimately be left with no possibility to challenge the decision of the Council.

[43] Before concluding on this point, I hasten to add that my decision has nothing to do with Mr. Black's argument that his reputation and integrity would be fatally tarnished by a decision of the Governor General to terminate his appointment to the Order. First of all, any harm to his reputation suffered as a result of such a decision arises first and foremost as a result of his convictions in the United States. More importantly, many criminal convictions are overturned on appeal, yet no one would argue that a person is entitled to challenge every interlocutory decision made by the trial judge on the basis that one's reputation and integrity will suffer irredeemably if they are found guilty, even if that decision is ultimately reversed.

b) Is the decision of the Council to deny the Applicant an oral hearing susceptible to judicial review?

[44] Counsel for the Respondent raised a second preliminary objection to Mr. Black's application for judicial review. It is argued that the granting and revocation of honours is not justiciable

because it is grounded in the Crown prerogative and involves one of the few remaining powers that is not susceptible to judicial review. Counsel for the Applicant objects to this line of reasoning and counters that prerogative acts are subject to judicial review where the rights or legitimate expectations of an individual are affected.

[45] Interestingly enough, the starting point for a proper analysis of that question is another case involving Mr. Black, that is, the Ontario Court of Appeal decision in *Black v Canada (Prime Minister)*, [2001] OJ no 1853, 54 OR (3d) 215 [*Black*]. In that case, Conrad Black brought an action alleging abuse of power, misfeasance in public office and negligence by Prime Minister Chrétien, who had advised the Queen not to appoint Mr. Black as a peer and member of the House of Lords, on the basis that it would be contrary to Canadian law. The respondents brought a motion to dismiss Mr. Black's claims. At issue was whether the Prime Minister had exercised a prerogative power of the Crown and, if so, whether the Prime Minister's actions were reviewable.

[46] Writing for the Court, Laskin JA began his reasoning with the non-controversial proposition that the granting of honours is a prerogative of the Crown, as are the making of treaties, the defence of the country, the prerogative of mercy, the dissolution of Parliament and the appointment of the Prime Minister and of ministers. The prerogatives are those discretionary powers exercised by the Crown and derived from the common law that have not been curtailed or abridged by statute. As the conferral of honours has never been displaced by statute in Canada, it remains a Crown prerogative in this country.

[47] Traditionally, the jurisdiction of the courts with respect to Crown prerogatives was very limited. Courts were entitled to determine whether a prerogative power existed and, if so, the scope of the power and whether it had been superseded by statute. It has come to be recognized, however, that the exercise of a prerogative power is no longer insulated from judicial review. In Canada, this development came about partly as a result of the entrenchment of the *Canadian Charter of Rights and Freedoms*, and its paragraph 32(1)(a), which states that it applies to the Parliament and Government of Canada in respect of all matters within the authority of Parliament.

[48] In order to determine how far courts can go in reviewing the use of a prerogative power, Laskin JA in *Black* relied heavily on *Council of Civil Service Unions v Minister for the Civil Service*, [1985] 1 AC 374, [*Council of Civil Service Unions*], in which the House of Lords concluded that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. Laskin JA adopted the English approach and summarized it in the following manner:

> I agree with the House of Lords' that the proper test for the review of the exercise of the prerogative is the subject matter test. It is that test that I will endeavour to apply in this case.
>
> At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), [1989] 2 S.C.R. 49, 61 D.L.R.(4th) 604; Thorne's Hardware Ltd. v R., [1983] 1 S.C.R. 106, 143 D.L.R.(3d) 577. Only those exercises of the prerogative that are justiciable are reviewable. 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] 2 S.C.R. 525 at 545, 58 B.C.L.R.(2d) 1.

> Under the test set out by the House of Lords, 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. [paras 49-51]

[49] The exercise of a prerogative power may thus qualify for judicial review where it affects either an individual's rights or an individual's legitimate expectations.

[50] I do not think it can be seriously contended that the conferral or withholding of an honour affects the rights or expectations of a person. By its very nature, the conferring of an honour is a discretionary decision that is not substantially governed by objective standards but rather rests on moral, ethical and political considerations. Neither can one claim a right or a legitimate expectation to receive an honour. As such, the granting or withholding of an honour is not amenable to judicial review, as the courts are not in the best position to determine whether a person should or should not be awarded an honour. As Laskin JA put it in *Black* (at para 60):

> The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour.

[51] Counsel for the Applicant tried to argue that a distinction must be drawn between the conferral of an honour and the removal of such an honour without ever expanding on the significance of that distinction. I fail to see how a person on whom an honour has been bestowed would have any greater right or expectation of keeping it than a person has of receiving it in the first

place. It may be that, once granted, an honour cannot be taken away except for some stated reasons and according to a specific procedure. This is a separate issue that I will turn to shortly. The mere fact that a privilege has been conferred, however, absent other external circumstances, does not transform that privilege into a right enforceable in court. Once it is recognized that an honour is granted at the discretion of the Crown and that no one is "entitled" to such an honour, the same must be true of the decision to withdraw it afterwards. That a person may feel his or her reputation will be tarnished by the loss of an honour is no more significant, from a legal perspective, than a person who feels aggrieved by the fact that he or she has not been recognized to be worthy of an honour in the first place. In both instances, the decision is discretionary and highly subjective, based on considerations that have little to do with ascertainable and objective (let alone legal) norms, and for that reason is ill-suited for judicial resolution. If, therefore, my decision were to be made solely on the basis of paragraph 25(c) of the *Constitution*, I would find that Mr. Black would clearly not be entitled to bring his application for judicial review before this Court.

[52] It seems that one must also ask, however, whether Mr. Black might have a legitimate expectation of procedural fairness based on the *Policy and Procedure for Termination of Appointment to the Order of Canada*. As previously mentioned, it is now accepted that there are two ways in which the exercise of a prerogative power may be found to be justiciable: either by altering the individual's legal rights, which I have just found not to be the case here, or by affecting the individual's legitimate expectations. In the *Council of Civil Service Unions* case, Lord Diplock elaborated on the notion of "legitimate expectations" and found that a decision will qualify as a subject for judicial review if it affects a person:

> …by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and

> which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker [that the benefit or advantage] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.
>
> (*Council of Civil Service Unions* at 408, in *Black* at para 48)

[53] Section 3 of the Policy clearly dispels any notion that Mr. Black may have a legitimate expectation to retain the Order, come what may, once it has been conferred upon him. It is clearly stated that a person's appointment to the Order may be terminated if that person has been convicted of a criminal offence, or if the conduct of that person constitutes a significant departure from the standards of public behaviour that could undermine the credibility or integrity of the Order or detracts from the original grounds upon which the appointment was based. Furthermore, paragraph 25(c) of the Constitution provides that a person's membership in the Order ceases when the Governor General makes an Ordinance terminating the person's appointment to the Order. In view of these provisions, Mr. Black cannot credibly argue that he has a legitimate expectation that his appointment to the Order is irrevocable and, in fairness, this is not what he is claiming.

[54] What the Applicant argues, is that he has a reasonable expectation that the Council will comply with the procedural fairness principles embedded in the Policy. I agree with Mr. Black's argument in this respect.

[55] Following the decision of the Ontario Court of Appeal in *Black*, the Federal Court of Appeal has accepted that a procedure established by a public authority could create a legitimate expectation sufficient to warrant judicial review of a decision made in the exercise of the prerogative power.

[56] In *Chiasson v Canada*, 2003 FCA 155, [2003] FCJ no 477 [*Chiasson*], the respondent had nominated his father for a Canadian Bravery Decoration in relation to a rescue dating back to 1943. The Canadian Decorations Advisory Committee, responsible for screening the nominations, did not recommend that nomination to the Governor General, on the ground that the incident had occurred more than two years prior to the nomination. This limitation period appeared on the nomination form provided by the Honours and Awards Directorate, but was nowhere to be found in the Canadian Bravery Decorations Regulations. Chiasson brought an application for judicial review of the Committee's decision not to recommend his father's nomination. Writing on behalf of the Court, Strayer JA distinguished that case from *Black* on the basis that a procedure had been established to govern the Committee's selection of nominations:

> … Unlike the Black case where there were no written instruments controlling the power being exercised by the Prime Minister, it is certainly arguable in the present case that the Regulations, once adopted, constitute a set of rules which provide criteria for a Court to determine if the procedure prescribed therein has been followed, and if the Committee has exercised the jurisdiction assigned to it. That the Regulations themselves were promulgated under the royal prerogative does not render questions of compliance with the procedure they prescribe matters plainly beyond judicial review.
>
> I respectfully agree with Laskin J.A. writing for the Ontario Court of Appeal in the Black case (paragraphs 60-63) that no one has a right to an honour, nor can he or she have a legitimate expectation, in a substantive sense, of receiving an honour. However, it is in my view arguable that where a procedure has been established by one public authority, in this case by way of Regulations published in the Canada Gazette, as to how and on what basis a specific Committee, another public body, is to deal with nominations made by any citizen, then a legitimate expectation is thereby created that the prescribed procedure will be followed to screen such nominations prior to the submission of a list of nominees for the exercise by the Governor General of the royal prerogative. … I am therefore not satisfied that it is plain and obvious that the principles enunciated in the Black case are applicable to the present case. In the Black case the Ontario Court of Appeal considered that review was being sought of advice given on honours for Canadians, a subject matter beyond judicial

> review. In the present case it appears to me that review is being sought of the actions of a committee, acting under specific Regulations, in the process of screening applicants for honours as a preliminary to the decision by the Governor-General actually conferring such honours. [para 8-9]

[57] In the case at bar, as in *Chiasson*, it is arguable that the Policy creates a legitimate expectation that the Council will follow the procedure it prescribes prior to submitting a recommendation for the exercise by the Governor General of the royal prerogative, despite the fact that Mr. Black has no right or legitimate expectation, in a substantive sense, of keeping the Order of Canada.

[58] Strayer JA made it clear that even if the Committee's ultimate opinion, as submitted to the Governor General, and the Governor General's ultimate decision are not judicially reviewable, this does not necessarily preclude the Court from reviewing the procedure and criteria followed by the Committee to determine if they comply with an established procedure. In his view, a body created by regulation, even under the authority of the prerogative power, is bound by those regulations, and its activities may be judicially reviewed if not in conformity with them. As he stated:

> … To say that the refusal of the Committee to consider such a nomination may be subject to judicial review is not to recognize that anyone has a right to, or a legitimate expectation of, an award. But arguably it could be a recognition that a person who is capable of nominating someone for an award has certain procedural rights to the consideration of that nomination by the Committee in accordance with duly adopted Regulations. [para 16]

[59] The Applicant also relied on *Chauvin*, described above, in which a member of the Order of Canada sought judicial review of the Council's decision to submit Dr. Morgentaler's name to the Governor General for conferral of an honour. The applicant did not contest the subsequent

appointment by the Governor General, but rather the process whereby the Council made the recommendation. In *Chauvin*, Prothonotary Aalto granted the respondent's motion to strike on the basis that the application was moot once the Governor General had appointed Dr. Morgentaler to the Order. However, he did not accept that it was plain and obvious that the Council's decision was not reviewable. Relying on *Chiasson*, he held that the Council's recommendation to the Governor General was reviewable because there was a written instrument governing the decision:

> The Court of Appeal for Ontario upheld the motions judge in striking the action on the basis that the actions of the Prime Minister were an exercise of a prerogative that was non-justiciable. However, on its facts, *Black* is distinguishable from the case at bar. In that case there was no written instrument governing or controlling the power being exercised by the Prime Minister. Here, there are clear criteria set out in sections 8, 9 and 18 of the *Constitution*: the person must have the greatest merit; have distinguished service in or to a particular community, group or field of activity, and be a Canadian citizen. Thus, as Justice Strayer observed in *Chiasson*:
>
> > Unlike the *Black* case where there were no written instruments controlling the power being exercised by the Prime Minister, it is certainly arguable in the present case that the Regulations, once adopted, constitute a set of rules which provide criteria for a Court to determine if the procedure prescribed therein has been followed, and if the Committee has exercised the jurisdiction assigned to it. That the Regulations themselves were promulgated under the royal prerogative does not render questions of compliance with the procedure they prescribe matters plainly beyond judicial review. (para. 8)
>
> Therefore, in applying this test to this motion to strike, it is arguable that it is not plain and obvious that the issues raised by Mr. Chauvin are not justiciable. … [paras 36-37]

[60] Counsel for the Respondent attempted to distinguish these two cases on the ground that, unlike the *Constitution*, the Policy is not a statutory instrument within the meaning of the *Statutory Instruments Act*, RSC 1985, c S-22. In the absence of a procedure prescribed by statutory

instrument, goes the argument, the process chosen by the Council in making its recommendation to the Governor General concerning the potential termination of an appointment should not be justiciable, just as the Governor General's decision itself is not justiciable.

[61] With all due respect, I believe that this argument misses the point. At the core of the notion of justiciability is the appropriateness of courts deciding a particular issue. Such an issue will be amenable to the judicial process if it relates to the rights of an individual or to his legitimate expectations, including, for example, an expectation that a particular process or procedure will be followed in coming to a decision. In other words, the fact that a procedure has been spelled out and made public, thereby providing a set of objective criteria upon which a court may rule, will be critical in assessing whether an individual has a legitimate expectation.

[62] A careful reading of the decision in *Chiasson* supports that view. Not only did Strayer JA distinguish the *Black* case on the basis that there were no "written instruments" controlling the power being exercised by the Prime Minister in *Black*, but he went on to say that the regulations "constitute a set of rules which provide criteria for a Court to determine if the procedure prescribed therein has been followed" (para 8). That the focus of the inquiry should be the existence of a procedure, as opposed to the legal nature of that procedure, is made even clearer in the following excerpt of his reasons, where he states at paragraph 9 that "where a procedure has been established by one public authority, in this case by way of Regulations published in the Canada Gazette, as to how and on what basis a specific Committee [is to function]" [emphasis added], it will be sufficient to create a legitimate expectation that the prescribed procedure will be followed. This notion of a

legitimate expectation also permeates the reasons given by Lord Diplock in *Council of Civil Service Unions*, particularly in the following paragraph quoted by Laskin JA in *Black*:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker [that the benefit or advantage] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.
>
> (*Council of Civil Service Unions*, 408, in *Black*, at para 48)

[63] On that basis, I do not think it can seriously be contended that the process adopted by the Council in making its recommendation to the Governor General concerning the potential termination of Mr. Black's appointment to the Order should fall beyond the Court's reach. While the exact legal nature of the Policy has not been clarified by the parties, there is no doubt in my mind that it is a "written instrument" or a "set of rules" governing the procedure to be followed by the Council before making a recommendation to the Governor General with respect to the termination of a person's appointment to the Order of Canada. The Policy appears to be an appendix to the *Constitution* and follows it immediately on the website of the Governor General under the heading of *The Constitution of the Order of Canada*. As previously mentioned, it spells out a detailed eleven-stage procedure to be followed by the Council before recommending

termination of an appointment. This Policy is public and states at section 5 that the termination procedure "will proceed" according to those eleven stages. As such, I fail to see how it can be argued that it does not create an expectation that it will be adhered to, or that the steps it prescribes do not provide an objective basis on which courts may be called upon to determine whether the Council has exercised the role assigned to it and followed the procedure according to which it is to fulfill its mandate.

[64] Counsel for the Respondent submitted that, even assuming that a policy may create a legitimate expectation that a prescribed procedure will be followed, the Council's decision in the specific context of this case would remain non-justiciable because Mr. Black has no legitimate expectation that an oral hearing will be held. According to counsel, "[l]egitimate expectations only give rise to procedural rights where a 'clear, unambiguous and unqualified' representation is made." Far from providing a right to an oral hearing, the Policy in the case at bar only provides for written submissions unless the Secretary General determines otherwise. As a result, the only expectation that could legitimately be established on the basis of the Policy is that an individual may make written representations.

[65] As interesting as this argument may be, it is an argument going to the merit of the Applicant's submissions and not an argument as to the justiciability of the decision now being challenged. I do not think it is relevant to this stage of the analysis. Once again, justiciability only pertains to the appropriateness of a court deciding a particular issue. As such, the Court is not called upon to assess the substance of an argument, but rather if the argument can be made at all in a judicial proceeding.

[66] For all of the foregoing reasons, I am therefore of the view that the subject matter of the application for judicial review brought by the Applicant is justiciable and is properly before this Court.

c) Did the Council breach a principle of procedural fairness?

[67] Counsel for the Applicant submits that the Council erred in denying the Applicant an oral hearing, because in the circumstances of this case the principles of natural justice and procedural fairness require an oral hearing. Relying on the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ no 39 [*Baker*], but without any attempt at applying them in any systematic way, counsel argued that they favour a higher degree of fairness, presumably because of the serious impact that the Council's ultimate recommendation will allegedly have on the Applicant's reputation. Counsel also relied on the Policy itself, which requires at section 2 that the recommendation of the Council "shall only be made after the Council has ascertained the relevant facts relating to the case under consideration". While an oral hearing is not mandatory, it is the Applicant's contention that the Secretary General ought to authorize it pursuant to stage 7 of the Policy because the findings and conclusions with respect to the relevant facts are in dispute and raise the Applicant's credibility as an issue.

[68] I am unable to subscribe to that argument. As acknowledged by the Applicant, the duty of procedural fairness does not confer an unqualified right to an oral hearing. The core issue, from a procedural fairness perspective, is whether an oral hearing is necessary to provide a reasonable opportunity for parties to effectively make their case. Indeed, the Supreme Court explicitly stated in *Baker* that an oral hearing is not always necessary:

> ...the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. ...
>
> (*Baker*, above at para 22)
>
> ...it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. …
>
> (*Baker*, above at para 33)

[69] Whether we focus on the Policy itself or on the factors enunciated in *Baker*, the Applicant has failed to demonstrate that he is entitled to an oral hearing. On the face of the Policy itself, there is simply nothing that would ground a legitimate expectation to an oral hearing. Quite to the contrary, stage 7 provides an opportunity to make representations in writing, but makes no mention of any entitlement to an oral hearing. It simply states that the Secretary General "may" authorize another way to make representations. The Secretary General is therefore conferred the power to authorize oral representations if he sees fit, but it cannot be inferred on any plain reading of that provision that he ever has a duty to do so. It is clearly a discretionary power, unconstrained by any criteria, and the Court is certainly in no better position to determine whether it is advisable to hold an oral hearing in any specific case. As stated by Justice Evans in *Xwave Solutions Inc v Canada (Public Works & Government Services)*, 2003 FCA 301, [2009] FCJ no 1089 at paragraph 34 [*Xwave*]:

> ... The function of procedural fairness is to set minimum standards, not to enable a reviewing court to determine how it would have exercised the Tribunal's discretion as to when to hold an oral

> hearing. Balancing the considerations relevant to determining whether to hold an oral hearing engages the expertise of the Tribunal, and the Court should only intervene to prevent manifest unfairness.

[70] What was true of a quasi-judicial hearing before the Canadian International Trade Tribunal is even truer in the context of an exercise of the prerogative power. In *Xwave*, Parliament had explicitly authorized the Tribunal to include a hearing within the conduct of an inquiry: *Canadian International Trade Tribunal Act*, 1985 RSC (4th Supp), c 47, s 30.13(1). Yet, the Federal Court of Appeal found that the Tribunal had not abused its discretion in refusing to hold a hearing in the circumstances of that case, stating explicitly that even if an oral hearing may well have assisted the applicant in the pursuit of its complaint, this was not the test of procedural fairness on judicial review. More relevant, according to the Court, was whether there were other means available to the applicant to establish its case.

[71] In the case at bar, the *Constitution* is silent as to the procedure to be followed by the Council, and the Policy adopted by the Council simply provides that the possibility of making representations other than in writing is at the discretion of the Secretary General. The Applicant may be of the view that he should be entitled to make his case orally, but this is not sufficient to create an entitlement to this specific form of representation.

[72] The application of the factors listed in *Baker* lead to the same result. The first factor to be considered is the nature of the decision and the process to be followed in making it. It is plain and obvious from the record that the Council does not exercise a judicial or quasi-judicial function. As previously mentioned, the role of the Council is limited to conducting a review of the facts and

providing its recommendation to the Governor General to assist him in the exercise of his prerogative. Neither the Council nor the Governor General are meant to act in a judicial or quasi-judicial capacity, and the ultimate decision whether or not to terminate the Applicant's appointment to the Order of Canada does not engage legal rights or entitlements. The process followed by the Council, as advertised in the Policy, bears no resemblance to judicial decision-making and is not adversarial in nature, and, as such, the same procedural constraints should not be applied.

[73] The second factor identified in *Baker* (the nature of the statutory scheme) is ill adapted to the present situation. Justice L'Heureux Dubé wrote in *Baker* that "[t]he role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made" (*Baker*, above at para 24). Here, as previously mentioned, there is no regulation or statutory instrument outlining the procedure for the granting or termination of honours. More importantly, the role of the Council is not to make a decision, let alone an administrative decision, but to help the Governor General in the exercise of his discretion by making a recommendation. Once again, the ultimate decision of the Governor General is discretionary, and it would be antithetical to such a scheme to have an appeal procedure or other remedial procedure either at the final stage or earlier in the process. Accordingly, the absence of any recourse against the Council or the Governor General cannot in any meaningful way be an indication that a higher degree of procedural fairness is required.

[74] The third factor in determining the nature and extent of the duty of fairness owed, according to *Baker*, is the importance of the decision to the individual affected. The more important the

decision is to the life of the person affected and the greater the impact on that person, the more stringent the mandated procedural guarantees will be. In the present case, the Applicant submits that a high degree of procedural fairness is required because his reputation is at stake.

[75] As previously mentioned, the interests affected by the decision do not engage any legal rights. There is no right or legitimate expectation to an honour, nor is there any right to maintain an honour once granted. The privileges associated with membership in the Order of Canada are purely symbolic and are clearly different from the rights at issue in most of the cases relied on by the Applicant in support of an oral hearing.

[76] It is true that both in *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 SCR 440, [1997] SCJ no 83 and in *Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 FCR 417, aff'd 2010 FCA 283, [2010] FCJ no 1274 the Supreme Court and this Court held that a high level of procedural fairness was required when an individual's reputation is at stake. Nevertheless, the overall context in those cases was much different, as they dealt with much publicized commissions of inquiry that were of a quasi-judicial nature and governed by detailed legislation and procedure. For example, section 13 of the *Inquiries Act*, RSC 1985, c I-11, pursuant to which both of these commissions operated, granted the Commissioners the power to make findings of misconduct in their report. This is a far cry from the discretion exercised by the Governor General in granting or terminating the Order of Canada, particularly where, as here, the Council has indicated in letters to Mr. Black that its decision will be based on the two criminal convictions arising from five U.S. decisions.

[77] It may well be that an Ordinance from the Governor General terminating Mr. Black's appointment to the Order of Canada could further tarnish his reputation. However, it is also fair to say that any damage Mr. Black's reputation may suffer if he is stripped of his Order is primarily the result of his convictions in the United States. If ever he was to be stripped of his Order, the letters he has received from the Council indicate that it would be as a consequence of these criminal convictions, and not on the basis of any new findings of wrongdoing.

[78] In light of all the foregoing considerations, I am unable to find that this third factor, in and of itself, is sufficient to tip the balance in favour of a heightened standard of procedural fairness.

[79] I have already dealt with the fourth factor, which has to do with the legitimate expectations of the person challenging a decision. There is nothing in the *Constitution* or in the Policy that could substantiate a legitimate expectation that an oral hearing will be held when the Council considers the termination of a person's appointment to the Order of Canada.

[80] The last factor is the level of deference owed to the decision-maker. The Supreme Court in *Baker* indicated that deference should be accorded to decision-makers in selecting their own procedures, especially when the statute leaves to the decision-maker the ability to choose its own procedure. This is clearly the case here, as there is nothing in the *Constitution* constraining the process to be followed by the Council in arriving at its recommendation. Therefore, the Council's decision to consider only written representations prior to formulating its recommendation to the Governor General is entitled to the highest level of deference.

[81] It follows that even if this Court were to apply the *Baker* factors, any requirement of procedural fairness in the circumstances ought to be minimal and certainly does not include the right to an oral hearing. In *Baker*, it will be remembered, the issue to be determined was whether Ms. Baker and her children should be allowed to stay in Canada on humanitarian and compassionate grounds. Notwithstanding the potential consequences of the tribunal's decision to Ms. Baker and her family, the Supreme Court of Canada found that Ms. Baker was not entitled to an oral hearing. I agree with the Respondent that it cannot reasonably be suggested that Mr. Black's interest in maintaining an honorary appointment is more worthy of protection than the personal interests at stake in *Baker*.

[82] Mr. Black agrees that the duty of procedural fairness does not confer an unqualified right to an oral hearing, but he suggests that the circumstances of his case are unique. In particular, he relies on *Khan v University of Ottawa* (1997), 34 OR (3d) 535, [1997] OJ no 2650 (CA) [*Khan*] for the proposition that an individual is entitled to an oral hearing where his or her credibility is at issue. In that case, a student had failed an exam in law school, and she appealed her failing grade on the basis that her instructor had marked her exam on the contents of three examination booklets while she maintained that she had handed in four booklets. The Faculty of Law Examinations Committee concluded, without granting her an oral hearing, that she had failed to prove the existence of a fourth booklet. On judicial review, Laskin JA, writing for the majority of the Ontario Court of Appeal, agreed with the student that she should have been granted an oral hearing because credibility was the "primary issue" before the Committee. Laskin JA cited *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, [1985] SCJ no 11, and *Masciangelo v Spensieri*, [1990] OJ no 1429, 1 CPC (3d) 124 (HC), according to which, when a decision turns on

credibility, a decision-maker should not make an adverse finding of credibility without affording the affected person an oral hearing. Laskin JA wrote:

> These observations apply with equal force to Ms. Khan's appeal to the Examinations Committee. The university submits, however, that an oral hearing was not required because Ms. Khan was not charged with any kind of misconduct. Admittedly she was not charged with dishonesty or any other wrongdoing, and the proceedings before the Examinations Committee were not strictly adversarial. But her credibility was, nonetheless, the primary issue before the Committee. The success of her appeal depended on the Committee's acceptance of her statement. If the Committee believed her assertion that she had written a fourth booklet, she would have met the onus on her to demonstrate that a significant error or injustice may have occurred. Because Ms. Khan's appeal turned on her credibility and because of the serious consequences to her of an adverse finding, fairness required an oral hearing. The Committee disbelieved Ms. Khan's explanation for the fourth booklet without hearing from her. This amounted to a denial of procedural fairness, which by itself fatally flawed the proceedings before the Committee. [para 23]

[83] The case at bar is quite different, as it cannot be said that credibility is the primary issue before the Council. The Council is not called upon to determine whether Mr. Black was rightly or wrongly convicted before the U.S. courts; it is not the role of the Council to reconsider the merits of Mr. Black's conviction or to inquire into the state of mind of Mr. Black during the events leading up to those convictions. It would be highly inappropriate for the Council to second-guess the decisions of the U.S. courts. If Mr. Black believes that he has been unjustly found guilty and that his conviction ought to be overturned, he has every right to appeal (as I believe he did) the guilty verdict. Unless and until Mr. Black's convictions are ultimately quashed by a higher court in the United States, the Council has no other choice but to consider the convictions entered against Mr. Black as a fact to be taken into consideration when assessing whether it should recommend the termination of his appointment to the Order of Canada. I fail to see how Mr. Black could use an

oral hearing to establish that he did nothing wrong, legally or morally, without by necessity attempting to relitigate the decisions of the U.S. courts.

[84] In his letter of August 17, 2011, to the Secretary to the Governor General, Mr. Black also stated that he would endeavour to convince the Council that no Canadian courts could possibly have returned a guilty verdict on the basis of the facts that were before the American courts. This is obviously a complex argument to make, and one that has very little to do with Mr. Black's credibility. If, as he submits, he was treated unfairly in the American justice system, there is nothing preventing him from making that argument in writing. Indeed, he has been provided with three separate invitations to provide written representations. He has provided the Council with a copy of his book on the subject of his convictions which runs to more than 500 pages. He could include in his submissions to the Council letters from his supporters, such as those submitted in the course of this application. Complex issues are often better dealt with in writing than orally.

[85] In short, Mr. Black has failed to demonstrate that an oral hearing is necessary to ensure that his arguments are dealt with fairly or that written submissions do not and cannot provide him a reasonable opportunity to participate effectively in the process leading to the Council's recommendation to the Governor General. Mr. Black has been advised that the Council will consider five U.S. decisions concerning his convictions in making its recommendation, and that he may file any written representations or other written material necessary in support of his position. Should the Council be unable to resolve any concerns when it considers these submissions, it could solicit additional information from Mr. Black. All of this to say that Mr. Black will have ample opportunity to present his side of the story and to make sure that the Council is well aware of his

views before deciding on its recommendation. Finally, and contrary to his assertion, credibility is not the key factor or the primary consideration for the Council in assessing whether it should recommend the termination of his appointment to the Order. For all of these reasons, I believe that Mr. Black's right to procedural fairness has not been breached by the Council's decision not to hold an oral hearing.

[86] Finally, Mr. Black also faulted the Council for not providing reasons for its decision not to hold an oral hearing. While certain administrative decisions may require some form of reasons, there is no duty to provide written reasons in all administrative decisions, nor is there a duty to explain every aspect of a decision: see, for example, *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, 2011 3 SCR 708, at para 20; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 54. I agree with the Respondent that, given the minimal procedural fairness attached to the process of granting or removing of honours, there can be no duty to provide reasons for the Council's preliminary procedural decision to consider the matter in writing.

CONCLUSION

[87] Having found that the Applicant has no legitimate expectation to an oral hearing, and that the requirements of procedural fairness do not require the Council to grant such a hearing before it formulates its recommendation, the application for judicial review of Mr. Black is dismissed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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