Federal Court Cour fédérale

Date: 20210406

Docket: IMM-6692-20

Citation: 2021 FC 294

Ottawa, Ontario, April 6, 2021

PRESENT: Mr. Justice Gascon

BETWEEN:

HELMUT OBERLANDER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant, Mr. Helmut Oberlander, brings a motion to be granted an order staying permanently his ongoing admissibility proceedings before the Immigration Division [ID] of the Immigration and Refugee Board of Canada or, in the alternative, an order staying temporarily these proceedings until such time as the Governor in Council [GIC] renders a decision on a reopening application submitted by Mr. Oberlander to the GIC on March 8, 2021. Mr. Oberlander filed this stay motion in the context of his underlying application for leave and

judicial review [ALJR] in this Court file, in which he challenges an interlocutory decision of the ID, dated December 11, 2020, denying his request to postpone the scheduling of his admissibility hearing [Scheduling Decision].

[2] For the reasons that follow, the motion will be dismissed. Further to my review of the parties' submissions, the evidence and the particular circumstances surrounding Mr. Oberlander's motion, I am not persuaded that the facts justify the exercise of the Court's discretion in favour of the stay sought by Mr. Oberlander. I instead agree with the Minister of Public Safety and Emergency Preparedness that, in the current circumstances and at this juncture, the Court should not entertain Mr. Oberlander's request. I find that Mr. Oberlander's motion for a permanent stay is premature since the ID has not had the opportunity to consider the allegations of unfair and misleading disclosure of evidence and breach of the Minister's duty to disclose made by Mr. Oberlander in support of his stay motion, and which he claims amount to an abuse of process. These issues should first be brought before the ID so that the ID can make findings and determinations on them, and the Court should not interfere with the administrative proceedings before the ID until these findings and determinations have been made. Moreover, with respect to the alternative request for a temporary stay, it is seeking more than what Mr. Oberlander could obtain if he was successful in his underlying ALJR, something which is beyond the purpose and objective of interlocutory injunctive reliefs. In light of these conclusions, the Court does not need, at this stage, to address the other objections raised by the Minister or the merits of Mr. Oberlander's motion.

I. Background

[3] Mr. Oberlander has a long and complex history of proceedings involving the government of Canada, the immigration authorities and the Canadian courts, spanning over some 35 years. For the purpose of this stay motion, the relevant facts can be summarized as follows.

[4] During the Second World War, Mr. Oberlander, who is now 97 years old, acted as an auxiliary interpreter in the Ek 10a, a Nazi killing squad.

[5] In 1985-1986, Mr. Oberlander was among those individuals subject to an inquiry on war criminals headed by the late Justice Deschênes, and which led to a report tabled in 1987 by the Commission of Inquiry on War Criminals in Canada [Deschênes Report]. The detailed assessment of Mr. Oberlander's circumstances and the findings regarding him were set out in Part II of the Deschênes Report, which was labelled secret and remained confidential until 2007. In his findings, Justice Deschênes found that there was insufficient evidence for a criminal prosecution against Mr. Oberlander, but went on to recommend his citizenship revocation.

[6] In 2017, the GIC revoked Mr. Oberlander's Canadian citizenship for the fourth time [GIC Revocation Decision], on the basis of misrepresentation made by Mr. Oberlander to Canadian immigration officials about his service with the Ek 10a during the Second World War, and his complicity in the crimes committed by this organization. Mr. Oberlander's efforts to challenge the GIC Revocation Decision before this Court, the Federal Court of Appeal [FCA] and the Supreme Court of Canada [SCC] were unsuccessful.

[7] In June 2019, two reports were made under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] reporting that, as a foreign national, Mr. Oberlander was inadmissible to Canada pursuant to paragraph 35(1)(*a*) and subparagraph 40(1)(*d*)(i) of the IRPA, for the commission of crimes against humanity and for misrepresentation. As a result, in August 2019, a request was made for the ID to hold an admissibility hearing, to determine whether Mr. Oberlander is inadmissible or not.

[8] In November 2019, Mr. Oberlander brought an application before the ID to challenge the ID's jurisdiction to consider the section 44 reports, which led to an interlocutory decision of the ID in October 2020 regarding its jurisdiction [Jurisdiction Decision]. Mr. Oberlander filed an application for leave and judicial review to challenge the Jurisdiction Decision (Court file IMM-5658-20), and he brought a first stay motion seeking to suspend his admissibility proceedings pending his application. Further to an order issued by Justice Southcott on February 5, 2021, that stay motion was dismissed by the Court on the basis that Mr. Oberlander failed to overcome the "prematurity principle" and to demonstrate a serious issue in his underlying application (*Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 119 [*Oberlander Stay 1*]. The prematurity principle prohibits judicial review of an interlocutory administrative decision before the administrative process has run its course, in the absence of exceptional circumstances.

[9] Following the issuance of the Jurisdiction Decision, the ID held a case management conference in November 2020 to discuss procedural matters including the scheduling of the admissibility hearing. At that time, Mr. Oberlander requested that the admissibility hearing not

yet be scheduled due to his inability to prepare for the hearing because of his advanced age, medical conditions and resulting communication difficulties, all of which were compounded by the COVID-19 pandemic. In the Scheduling Decision, the ID denied Mr. Oberlander's request. The ID then decided, after consultations with the parties, that the admissibility hearing would be held in February 2021. On December 24, 2020, Mr. Oberlander filed the ALJR in this matter, seeking to challenge the Scheduling Decision. In his ALJR, Mr. Oberlander challenges the reasonableness and fairness of the Scheduling Decision and seeks "an order in the nature of *certiorari*" quashing the Scheduling Decision as well as an "order prohibiting the [ID] from proceeding with the admissibility hearing at this time."

[10] In a second stay motion filed on January 20, 2021, Mr. Oberlander sought to suspend the commencement of his admissibility hearing until the determination of his ALJR, on the basis that his ALJR raised serious issues with respect to the Scheduling Decision, that he would suffer irreparable harm if the stay was not granted, and that the balance of convenience favoured granting the stay. In an order also issued on February 5, 2021 (*Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 124 [*Oberlander Stay 2*], Justice Southcott granted Mr. Oberlander's second stay motion in part. Justice Southcott was not prepared to grant a suspension extending to the time of determination of the ALJR but agreed to order a time-limited stay until March 19, 2021, to allow Mr. Oberlander to pursue solutions to his communication challenges and concerns about the fairness of the admissibility hearing. This stay order expired on March 19, 2021, and an informal request of Mr. Oberlander to extend it pending the hearing of this motion was denied by the Court on March 24, 2021. It appears that the parties have not yet agreed on a solution to Mr. Oberlander's communication challenges.

[11] In the meantime, the journalist Terry Pender made an Access to Information and Privacy [ATIP] request to obtain from the government of Canada access to documents stemming from the Deschênes Report, and he published an article in the Toronto Star in October 2020, discussing Mr. Oberlander's case and the Deschênes Report [Pender Article]. In anticipation of Mr. Oberlander's admissibility hearing, the Minister submitted the Pender Article as part of an additional disclosure package filed with the ID in February 2021, but omitted to provide the attachments to the article, which contained excerpts of Part II of the Deschênes Report. The Minister explained that the material was inadvertently omitted as it was not attached to the hard copy of the Pender Article, and the existence of the attachments was unknown to the Minister's counsel. The Minister subsequently provided the full article with the attachments to the ID on March 2, 2021.

[12] Through his counsel, Mr. Oberlander wrote to the ID on March 3, 2021, stating that he would not agree to the admissibility hearing until the ID received full and complete disclosure. In several correspondence with the ID and the Minister around the beginning of March 2021, Mr. Oberlander also complained about the misleading nature of the Minister's late disclosure of evidence and claimed that, by omitting to provide Part II of the Deschênes Report, the Minister (and others in the government of Canada) had breached their duty to disclose in the admissibility proceedings and in all processes leading up to it, including the GIC Revocation Decision. Rather than wait for the ID to consider the matter, Mr. Oberlander asked the GIC to reopen its 2017 Revocation Decision and he brought this third stay motion before this Court.

[13] On this new stay motion, Mr. Oberlander relies on paragraph 50(1)(*b*) of the *Federal Courts Act*, RSC 1985, c F-7 [FC Act] and submits that it is in the "interest of justice" to stay the admissibility proceedings before the ID, permanently or, in the alternative, on a temporary basis. Mr. Oberlander claims that the Minister unfairly relies on the misleading Pender Article submitted to the ID for the admissibility hearing and failed to disclose Part II of the Deschênes Report. Mr. Oberlander maintains that he only discovered the existence of this evidence by his own resources in February 2021. He further submits that the Minister had the duty to disclose Part II of the Deschênes Report earlier, that his failure to disclose it is an egregious breach of natural justice and procedural fairness, and that it amounts to an abuse of process. Mr. Oberlander contends that Part II of the Deschênes Report is highly probative and relevant to the admissibility proceedings before the ID, as it was to the issues decided by the GIC in 2017, which included his complicity in war crimes and crimes against humanity.

[14] I pause to observe that Mr. Oberlander has elected to file his stay motion in the context of his pending ALJR in this matter and that, in terms of remedies, his motion refers to two different types of stays: the main remedy sought by Mr. Oberlander is a permanent stay of the ID admissibility proceedings whereas the alternative remedy is a temporary or interlocutory stay of these proceedings pending the outcome of his new reopening application before the GIC.

II. Parties' Submissions

A. *Mr. Oberlander*

[15] The basis for Mr. Oberlander's stay motion is the Minister's late disclosure of the Pender Article as part of his case against Mr. Oberlander at the admissibility hearing, which article is itself grounded in Part II of the Deschênes Report. Mr. Oberlander claims that, in relying on this article, the Minister is raising new allegations not advanced against him in the prior proceedings brought before the immigration authorities, the Federal Courts and the GIC. Mr. Oberlander submits that Part II of the Deschênes Report has been available to the Minister since 1987 and was never disclosed to him. He maintains that this information only became known to him and his counsel in February 2021, after the Minister adduced the Pender Article into evidence in the context of the admissibility hearing before the ID.

[16] Mr. Oberlander argues that Justice Deschênes' conclusions and findings contained in Part II of the Deschênes Report are directly relevant to the proceedings before the ID on the issue of whether he is inadmissible to Canada pursuant to section 35 of the IRPA, and would have been relevant to the revocation proceedings before the GIC. He claims that, given the nature of these proceedings and the important rights at stake, the Minister had a duty to disclose Part II of the Deschênes Report to him prior to the ID proceedings and to the GIC revocation process. Mr. Oberlander contends that the Minister's failure to disclose this evidence is a breach of natural justice and procedural fairness, and that it amounts to an abuse of process warranting a permanent stay of the admissibility proceedings before the ID, or at least a temporary stay until the GIC renders a decision on his recent reopening application.

[17] In support of his stay motion, Mr. Oberlander relies on the SCC's decision in *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 [*Tobiass*], where the SCC described the different types of circumstances in which a permanent stay of proceedings may be warranted as a remedy for an abuse of process. These circumstances include unfairness to the individual that has resulted from state misconduct, as well as a "residual category" of conduct which is unfair or vexatious to such a degree that it contravenes fundamental notions of justice and undermines the integrity of the judicial process, although it may not be directly related to the fairness of the proceeding (*Tobiass* at paras 89-90). Mr. Oberlander submits that the circumstances of his case give rise to both of these categories. He argues that not only the Minister has failed to disclose the highly probative Part II of the Deschênes Report, but he is also unfairly attempting to rely on the Pender Article which refers to this evidence.

[18] Relying on *R v McNeil*, 2009 SCC 3 at paras 13, 48-49, *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*] at pp 336, 343-344 and other criminal cases, Mr. Oberlander claims that, where information in the possession of the government is obviously relevant to the defence, there is a duty to disclose it. Mr. Oberlander submits that not only did the Minister ignore this duty but the Minister also adduced evidence in a misleading way in the admissibility proceedings through the presentation of the Pender Article, by leaving out Part II of the Deschênes Report which contradicts parts of the statements contained in the article.

[19] According to Mr. Oberlander, the Minister had a duty to disclose Part II of the Deschênes Report or make reasonable inquiries of other Crown agencies to locate and disclose it, as he owes a high degree of procedural fairness and is obliged to do so given his obligations pursuant

to the *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*] and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Mr. Oberlander argues that section 7 of the *Charter* is engaged, as his right to security of the person is infringed by forcing him into an admissibility hearing which puts his fragile health at risk. He adds that he has been subjected to a legislative scheme which invokes protections provided for under the *Bill of Rights*. He claims that there is a direct correlation between allegations before the ID through the section 44 reports and the proceedings before the GIC in 2017, in which revocation of citizenship is the central feature. Thus, Mr. Oberlander argues that his right to a fair hearing as guaranteed in subsection 2(e) of the *Bill of Rights* is engaged (*Hassouna v Canada (Citizenship and Immigration)*, 2017 FC 473 [*Hassouna*] at para 79). Given the high degree of procedural fairness due to him in the citizenship revocation scheme, he submits that the Minister's failure to disclose Part II of the Deschênes Report is a breach of these requirements.

[20] Since the Crown's failure to disclose information to an accused amounts to a denial of the right to make full answer and defence (*R v Carosella*, [1997] 1 SCR 80 [*Carosella*]), Mr. Oberlander argues that, when a breach of the duty of disclosure is established, a permanent stay of proceedings is the appropriate remedy (*Carosella* at paras 53-56). Mr. Oberlander further submits that the extended duty of disclosure of the Minister and the government of Canada is not limited to criminal proceedings and applies in administrative ones, notably in the immigration context (*Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at paras 92-93; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at paras 53-55).

[21] According to Mr. Oberlander, the duty to disclose in the admissibility hearing before the ID and in the process before the GIC extends to any relevant information in the possession of the government of Canada as a whole. He contends that the Minister cannot rely on the fact that the records are not in his possession or in his particular department when his own counsel and his own officials had highly significant documents in their possession and could access them. Mr. Oberlander claims that all the ministers and departments involved in his case, including the prosecuting departments, had access to and possession of copies of the records and Part II of the Deschênes Report, but failed to disclose them. More specifically, he alleges that the War Crimes unit of the Department of Justice [DOJ], the Minister and/or others within the government of Canada were in the possession of Part II of the Deschênes Report and failed to make it available to him. Mr. Oberlander further argues that, contrary to what the Minister submits, even if the relevant documents are not in control of the Canada Border Services Agency [CBSA] or the DOJ, this does not relieve these departments of the responsibility to make reasonable inquiries of other departments.

[22] Furthermore, Mr. Oberlander argues that Part II of the Deschênes Report is directly relevant to the proceedings before the ID and would have been relevant to the GIC, had it been disclosed at the time. Although Justice Deschênes' conclusions are not enforceable nor binding to this Court, they are still relevant "findings of fact" (*Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada)*, [1997] 3 SCR 440 at paras 34-42). Mr. Oberlander also submits that presenting misleading evidence is unfair, and that relying on evidence that is relevant, exculpatory for himself and has been in the possession of or available

to the Minister since 1987 constitutes an ongoing unfairness, and has tainted both the admissibility proceedings before the ID and the GIC revocation process.

[23] Mr. Oberlander disputes the Minister's contention that he could or should have discovered the disputed material sooner since he was aware of the case being examined by Justice Deschênes. Mr. Oberlander claims that, while he knew about the Deschênes Commission, he was unaware of the findings of fact contained in Part II of the Deschênes Report. Moreover, he maintains that it was not his obligation to retrieve the information, particularly since access to Part II of the Deschênes Report was prohibited until 2007 and he had no knowledge that it could be accessed after that date. In the same vein, while Mr. Oberlander admits that some of the documentation relied on by Justice Deschênes were provided to him, he submits that he did not have them all. In addition, he no longer has any of those documents that were provided, he can therefore not rely on them or answer them at this point in time and, in any event, he never had Part II of the Deschênes Report and its conclusions and findings of fact.

[24] Mr. Oberlander thus disagrees that he had an obligation to pursue disclosure in a timely manner. Moreover, he says, it is the Minister who now attempts to rely on the Pender Article, which is directly contradicted by Part II of the Deschênes Report.

[25] Mr. Oberlander further complains about the late disclosure of Part II of the Deschênes Report by the Minister. He states that he cannot respond to the specific allegations contained in the materials now disclosed and relied upon by the Minister, as his health is too frail, his memory too uneven and his emotional well-being too fragile to be able to present a proper defence. In

these circumstances, he submits that advancing this evidence against him is abusive, and that it is therefore in the interest of justice to issue a permanent stay of proceedings before the ID or, in the alternative, a temporary stay until the GIC renders a determination on his request to reopen his revocation process.

B. *The Minister*

[26] In response to Mr. Oberlander's motion, the Minister strongly denies that Part II of the Deschênes Report was concealed from Mr. Oberlander and submits that Mr. Oberlander's allegations of bad faith, misleading disclosure and breach of duty to disclose are entirely unfounded. The Minister argues that the Court should not entertain Mr. Oberlander's stay motion, as: (1) the issues of the alleged unfair and misleading disclosure of evidence and breach of duty to disclose need to be first raised before the ID; (2) the alleged abuse of process has no nexus to the underlying ALJR in this matter; (3) Mr. Oberlander seeks remedies that go beyond what he is asking the Court in his ALJR; and (4) the ALJR is now moot. On the merits of Mr. Oberlander's stay motion, the Minister further claims that Mr. Oberlander and/or his counsel were aware of Part II of the Deschênes Report and elected not to pursue disclosure at the appropriate time, and that it is not in the interest of justice to grant the stay now sought by Mr. Oberlander.

[27] The Minister advances four reasons in support of his position that the Court should not entertain Mr. Oberlander's stay motion. First, the Minister argues that this Court is not the appropriate forum to deal with this motion and that the ID should rather assess Mr. Oberlander's allegations as it is "empowered to make an abuse of process finding and to stay admissibility

proceedings" (*Canada (Public Safety and Emergency Preparedness) v Najafi*, 2019 FC 594 [*Najafi*] at para 36; *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 [*Prassad*] at pp 568-569).

[28] Second, the Minister argues that the alleged abuse of process has no nexus to the ALJR in this matter, which concerns the ID's attempt to schedule the admissibility hearing and its refusal to grant Mr. Oberlander's request for a 30-day adjournment. This new stay motion goes well beyond the scope of the ALJR as it seeks a permanent stay of the admissibility proceedings as a primary remedy. Neither should the Court entertain Mr. Oberlander's alternative request for a temporary stay pending his application to reopen the GIC Revocation Decision, as this process has nothing to do with the ID's Scheduling Decision.

[29] Third, the Minister submits that the remedies sought on this stay motion seek more than what Mr. Oberlander could obtain if he were to be successful on his underlying ALJR, something which is contrary to section 18.2 of the FC Act regarding interim reliefs in the context of applications for judicial review.

[30] Finally, the Minister contends that the ALJR underlying this stay motion is now moot, as the admissibility hearing has now been effectively adjourned for several months, therefore making this motion a request for a freestanding stay, untethered to a live ALJR.

[31] Alternatively, the Minister submits that, if the stay motion were to be entertained, it should be dismissed, as it is not in the interest of justice to grant a permanent stay of the ID

proceedings nor a temporary stay pending the reopening of the GIC Revocation Decision. The Minister argues that Mr. Oberlander has not met the governing test for a permanent stay of proceedings based on an abuse of process. The unsupported accusations of bad faith and misleading disclosure do not establish an abuse of process, let alone constitute the "clearest of cases" of abuse of process which is required under the test set out by the SCC in *R v Babos*, 2014 SCC 16 [*Babos*] at paras 30-32. In the current case, says the Minister, the state has not adopted a conduct that compromises the fairness of the accused's trial nor a conduct that risks undermining the integrity of the judicial process.

[32] According to the Minister, proceeding with a determination on Mr. Oberlander's admissibility would not be harmful to the integrity of the justice system. In addition, there is an adequate alternative remedy as Mr. Oberlander can bring an application for judicial review of the ID's decision on admissibility if it is unfavourable to him. Finally, there is a compelling public interest to have a decision on Mr. Oberlander's admissibility to Canada (*Ratnasingam v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1096 at para 32; *Kanagaratnam v Canada (Citizenship and Immigration)*, 2015 FC 885 at paras 31, 43.)

[33] The Minister also submits that Mr. Oberlander's arguments regarding the Minister's intended use of the Pender Article to raise new allegations are unfounded and must be raised before the ID rather than this Court.

[34] The Minister adds that this stay motion is based on the false premise that Part II of the Deschênes Report only recently came to light in February 2021. According to the Minister, Mr.

Oberlander's claim that this evidence was "concealed" from him is entirely unfounded and his allegations of bad faith and "misleading disclosure" must be rejected. The facts demonstrate that Mr. Oberlander and/or his previous counsel were aware of the existence and/or findings of the Deschênes Report but did not pursue disclosure at the appropriate time, when the report was published in 1987, when the Minister filed his affidavit of documents in prior proceedings in 1998 and listed these documents, or when the Deschênes Report was declassified in 2007. The Minister maintains that Mr. Oberlander's own evidence and submissions made in previous proceedings refer to the findings of the Deschênes Report, and he points to an absence of evidence showing that the disputed material was not disclosed to Mr. Oberlander or that he was unaware of it.

[35] The Minister argues that Mr. Oberlander had an obligation to pursue disclosure with due diligence and at the earliest opportunity, and that waiting over two decades to do so does not qualify (*R v Dixon*, [1998] 1 SCR 244 at para 37). In previous proceedings involving Mr. Oberlander, disclosure was initially challenged but eventually dropped (*Canada (Minister of Citizenship and Immigration) v Oberlander*, 185 FTR 41, [2000] FCJ No 229 (QL)). Moreover, counsel in similar cases sought and obtained further disclosure of precisely the types of documents Mr. Oberlander asserts were "concealed" from him and which he made no similar efforts to obtain (*Canada (Minister of Citizenship and Immigration) v Dueck*, [1998] FCJ No 1206 (TD) at paras 2, 12).

[36] The Minister maintains that full disclosure under *Stinchcombe* does not apply to citizenship revocation proceedings or admissibility proceedings before the ID, and that section 7

of the *Charter* is not engaged in either of these contexts (*Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at paras 54-57; *Canada (Minister of Citizenship and Immigration) v Katriuk*, [1999] 3 FC 143 (TD) at para 5; *Canada (Minister of Citizenship and Immigration) v Dueck*, [1998] 2 FC 614 (TD)). The Minister submits that the duty of fairness does not require exhaustive disclosure by the Minister, and that it is sufficient if the disclosure enables the person to know and meet the case asserted against him or her (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 57; *May v Ferndale Institution*, 2005 SCC 82 at paras 91-92; *Ahani v Canad*a, [1995] FCJ No 1190 (QL) at para 38). The Minister adds that, in December 1997, Mr. Oberlander brought a motion involving the sufficiency of disclosure pursuant to section 7 of the *Charter* and citing *Stinchcombe* before this Court. The Court found that section 7 did not apply, and rejected Mr. Oberlander's argument that criminal law principles should apply to citizenship revocation proceedings (*Canada (Citizenship and Immigration) v Oberlander*, [1997] FCJ No 1828 (QL)).

[37] In response to Mr. Oberlander's assertion that section 7 of the *Charter* applies because of his health, the Minister submits that, unlike in the criminal context, the *Immigration Division Rules*, SOR/2002-229 [ID Rules] expressly provide that a designated representative may be appointed when a person is not able to participate in the proceedings. The Minister also argues that Mr. Oberlander's argument that the entire legislative scheme involves protections under the *Bill of Rights* must fail. Although this Court in *Hassouna* found that subsection 2(e) of the *Bill of Rights* was engaged by the citizenship revocation process, no authority supports a finding that the same applies in admissibility proceedings. The Minister claims that, since there is no right to full answer and defence in the immigration context, there can be no breach of procedural fairness

in this regard (*R v O'Connor*, [1995] 4 SCR 411 [*O'Connor*] at para 141; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 227).

[38] The Minister further argues that, even in the criminal law context where *Stinchcombe* applies, the duty to disclose does not extend to third parties or to records that are not within the possession or control of the party (*O'Connor* at para 101). In the case at bar, the CBSA is not the holder of the documents and never has been, and is therefore not responsible for not disclosing third party information (*Seyoboka v Canada (Citizenship and Immigration)*, 2009 FC 104 at paras 40-44). The Minister therefore claims that there is no obligation for the CBSA or the DOJ to seek, gather and then disclose all the materials that are in the entire file of the government at large in order to conduct an admissibility hearing.

[39] Moreover, the Minister contends that Part II of the Deschênes Report is immaterial to the proceedings before the ID or the GIC, as it simply confirms the course of action ultimately followed by the government of Canada, namely no criminal prosecution and the revocation of Mr. Oberlander's citizenship. Finally, with respect to the temporary stay sought as an alternative remedy, the Minister observes that no legislative schemes provide a process for reopening the GIC Revocation Decision, which is final and was upheld by the courts up to the SCC.

[40] The Minister is asking for a special award of costs under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, and claims that the high threshold for establishing "special reasons" to award costs in immigration matters has been met in this case. He submits that Mr. Oberlander and his counsel have acted in a manner "that may be

characterized as unfair, oppressive, improper or actuated by bad faith" by making baseless accusations of bad faith and abuse of process (*Singh Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 201 at para 31), and that they were engaged in conduct that unnecessarily or unreasonably prolonged the proceedings by filing this improper stay motion before this Court instead of the ID.

III. Analysis

[41] I do not dispute that, in light of this detailed description of the submissions made by both parties in this stay motion, the allegations and arguments made by Mr. Oberlander certainly raise important issues regarding the additional disclosure made by the Minister, the use of this evidence in the admissibility proceedings before the ID and other processes before the GIC, the nature and scope of the Minister's obligation to disclose, and the extent of the knowledge that Mr. Oberlander may have had of Part II of the Deschênes Report.

[42] However, for the reasons that follow, I come to the conclusion that the Court should not entertain Mr. Oberlander's request and should not exercise its discretion in favour of a permanent stay of proceedings at this point in time. The questions and issues underlying Mr. Oberlander's stay motion, and whether they amount to an abuse of process justifying a permanent stay of the admissibility proceedings before the ID, should first be brought before the ID so that it can make findings and determinations on those matters as part of its administrative process. Moreover, Mr. Oberlander has elected to file his stay motion in the context of his ALJR, and his alternative remedy for a temporary stay seeks more than what Mr. Oberlander could

obtain if he was successful in his underlying ALJR, something that is contrary to section 18.2 of the FC Act regarding interim reliefs in the context of applications for judicial review.

A. *The Test Governing the Consideration of this Stay Motion*

[43] At the outset, I must underline that a stay of proceedings is an extraordinary, discretionary equitable relief. It is an exceptional remedy, and compelling circumstances are required to justify the intervention of the Court and the exercise of its discretion to grant a stay. It is true for both permanent and temporary/interlocutory stays. Moreover, a permanent stay of proceedings as a remedy for an abuse of process is a rare relief that can only be granted in the "clearest of cases." The onus lies upon an applicant to demonstrate the "clearest of cases" warranting such an extraordinary finding (*Babos* at para 31; *Tobiass* at paras 88-92; *O'Connor* at para 68).

[44] In terms of the applicable test for the issuance of a permanent stay of proceedings as a remedy for an abuse of process, Mr. Oberlander relies on the SCC decisions in *O'Connor* and *Tobiass*. These cases established that two situations may give rise to such a remedy: (1) where the conduct of state actors compromises the fairness of an accused's trial, which is considered as the main category, or (2) where the state misconduct creates no threat to the fairness of the trial but risks to undermine the integrity of the judicial process, which is the residual category (*Tobiass* at paras 88-89; *O'Connor* at para 73). In both instances, two criteria must be satisfied before a permanent stay for abuse of process will be considered appropriate: (1) the prejudice caused by the abuse of process will be manifested, perpetuated or aggravated through the

conduct of the trial or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice (*Tobiass* at para 90; *O'Connor* at para 75). The SCC added in *Tobiass* that, after considering these two requirements, it may be necessary for the courts to consider a third factor, namely balancing the interest that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits of the proceedings (*Tobiass* at para 92).

[45] For his part, the Minister relies on the more recent decision of the SCC in *Babos*, where the court affirmed the two types of state conduct that may warrant a stay and stated that, in either case, three requirements must be met: (1) there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome"; (2) there must be no alternative remedy capable of redressing the prejudice; and (3) where there is still uncertainty over whether a stay is warranted after the first two steps, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*Babos* at para 32).

[46] It is not disputed that the substantive tests articulated by the SCC in *Tobiass* and *Babos* for a permanent stay of proceedings as a remedy for an abuse of process are similar, and that they apply to the merits of Mr. Oberlander's stay motion.

[47] That said, Mr. Oberlander brings this stay motion under paragraph 50(1)(*b*) of the FC Act, and it is important to consider the framework governing the issuance of stays under that provision.

[48] Subsection 50(1) of the FC Act grants jurisdiction to the FCA and to this Court to stay a proceeding "in any cause or matter", in its discretion, on the ground that the claim is proceeding in another court or jurisdiction (paragraph 50(1)(*a*)) or where it is in the interest of justice to do so (paragraph 50(1)(*b*)). While it could be argued that the power to authorize a stay of proceedings pursuant to subsection 50(1) should be solely limited to proceedings before the Federal Courts (see: *Canadian National Railway v BNSF Railway Company*, 2019 FC 142 at paras 18-19), the FCA has determined that this power is not restricted to proceedings pending before the FCA or this Court, and that it can include stays of proceedings before other administrative bodies (*Canadian National Railway v BNSF*, 2016 FCA 284 [*BNSF*] at paras 8-9; *Yri-York Ltd v Canada (Attorney General)*, [1988] 3 FC 186 (FCA) at para 18).

[49] Using paragraph 50(1)(*b*) to stay proceedings pending before a federal board, commission or other tribunal brings an additional difficulty to which the FCA turned its mind in several decisions, namely the test that the Federal Courts should apply in those circumstances. Is it the usual tripartite test set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] – which has been used in the exercise of the power granted by section 18.2 of the FC Act for the issuance of interim orders in the context of judicial reviews –, is it the arguably more flexible "interest of justice" test flowing from the language of paragraph 50(1)(*b*) of the FC Act, or is it some other test?

[50] In *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 [*Mylan*], subsequently approved in *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 and *Clayton v Canada (Attorney General)*, 2018 FCA 1, the FCA distinguished between those situations where, under paragraph 50(1)(*b*) of the FC Act, the court is enjoining another body from exercising its jurisdiction and others where the court is deciding not to exercise its own jurisdiction until later. In *Mylan*, the FCA was being asked to adjourn its own proceedings pending the result of an appeal before the SCC in another case involving different parties but similar issues.

[51] The FCA held that, when the court is deciding whether to delay its own hearings pending another appeal, the more flexible "interest of justice" test governs. However, the FCA stated that the stricter *RJR-MacDonald* tripartite test is the usual test to be followed when the court enjoins another body from exercising its jurisdiction (*Mylan* at para 5). As Justice Stratas explained in *Mylan* and in *BNSF*, where "a party is seeking to stay an administrative decision-maker's proceedings, the party is actually seeking prohibition of those proceedings" (*BNSF* at para 14). When the court issues a stay against another administrative body, it is in fact forbidding that body from going ahead and exercising the powers granted by Parliament that it normally exercises. In short, the court is forbidding that body from doing what Parliament says it can do (*Mylan* at para 5). This requires the satisfaction of a demanding test.

[52] Of course, stays of proceedings before administrative bodies can also be sought under paragraph 50(1)(*b*) in circumstances where the *RJR-MacDonald* test does not necessarily apply. One example is, as in this case, a permanent stay of proceedings sought on the basis that the conduct

of state actors is such that the proceeding in question constitutes an abuse of process. But, in all situations involving another administrative body, the court is called upon to prevent the administrative decision-maker from conducting its own administrative process and from exercising the powers conferred to it, and this calls for judicial restraint in the exercise of the discretion provided by paragraph 50(1)(*b*) of the FC Act.

[53] The power to stay proceedings is a discretionary one and, even if the court has the jurisdiction to grant stays concerning other administrative proceedings and decisions, it can decide not to exercise it and not to entertain a stay motion in certain circumstances (*BNSF* at paras 13-18; *Association des Compagnies de Téléphone du Québec Inc v Canada (Attorney General)*, 2012 FCA 203 [*ACTQ*] at paras 24-26). This can notably arise when there are "other available, adequate and effective administrative avenues for relief" or when another forum possesses "superior expertise or [is] better suited to deciding the issue" (*ACTQ* at para 26).

[54] In *ACTQ*, the moving parties were seeking an order staying certain decisions and policies of the Canadian Radio-Television and Telecommunications Commission, and the respondent had raised preliminary objections based on the FCA's jurisdiction and the existence of "discretionary bars" against the exercise of the court's jurisdiction. The FCA found that the existence of other available, adequate and effective administrative avenues for relief and of another forum better suited to decide the issue foreclosed the court's consideration of the stay motion. In *BNSF*, relying on section 50 of the FC Act, the moving party had come directly to the FCA by way of notice of application, seeking a stay of certain administrative proceedings before the Canadian Transportation Agency. The moving party had not asked the Agency to suspend its proceedings.

The FCA found that, in the circumstances of that case, it should have. It is useful to reproduce the following passage from the FCA decision in *BNSF*:

> [13] The respondents submit that the notice of application should be removed from the file because the applicant has proceeded prematurely to the Court. The respondents note that the applicant did not ask the Agency to adjourn its proceedings. They say that asking the Agency to adjourn its proceedings was an adequate alternative recourse the applicant should have pursued before seeking a stay in this Court.
>
> [14] There is much force in this submission. Where, as here, a party is seeking to stay an administrative decision-maker's proceedings, the party is actually seeking prohibition of those proceedings. It is requesting an order that the administrative decision-maker stop its proceedings. In circumstances such as these, the standards governing the grant of a section 50 stay of an administrative decision-maker's proceedings must mirror those for the grant of prohibition.
>
> [15] Just as prohibition is an administrative law remedy that should not be pursued where there is adequate alternative recourse or a lack of extraordinary circumstances or unusual urgency (see *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332), the same is true for an application for a stay of the sort brought here. The rationales preventing early or premature access to a reviewing court canvassed in *C.B. Powell* at para. 32 apply equally here too.
>
> [16] This is not just judge-made doctrine. It falls out of the scheme of the *Canada Transportation Act*, a law binding upon this Court. Under the *Canada Transportation Act*, Parliament has given the Agency full power over proceedings before it, including determining whether the Agency should adjourn or suspend proceedings before it. Allowing parties to bypass the Agency and go directly to court to suspend the Agency's proceedings would offend that statutory scheme. It would not be in accordance with or pursuant to the *Canada Transportation Act*.
>
> [17] There may be circumstances of exceptionality or unusual urgency such that immediate recourse to the Agency is not adequate (see *e.g.*, *C.B. Powell*, above at para. 33) and immediate access to a court must be permitted. In this case, I need not comment further: the notice of application reveals no

> circumstances of unusual urgency or other exceptional reasons why immediate access to a court is necessary.

[55] In my view, these precedents indicate that the rationale underlying the principle of judicial non-interference in administrative matters – also known as the prematurity principle discussed extensively and applied by Justice Southcott in *Oberlander Stay 1* and *Oberlander Stay 2* – also generally applies in the context of a stay of proceedings before other administrative bodies pursuant to paragraph 50(1)(*b*) of the FC Act, where a party is in fact seeking a prohibition of administrative proceedings. I note in passing that, in both *BNSF* and *ACTQ*, the FCA drew a parallel with the seminal decision on premature access to a reviewing court, namely *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*], and extended its rationales to the context of stays of proceedings under paragraph 50(1)(*b*) of the FC Act. I acknowledge that these precedents did not involve motions to a permanent stay of proceedings as a remedy for an abuse of process, but I see no principled reason why the discretionary bars identified by the FCA should not be considered by the Court in a situation like the present case.

[56] I pause to observe that this principle of judicial non-interference with ongoing administrative proceedings in the absence of exceptional circumstances or unusual urgency is well established. In essence, it provides that administrative processes must first be followed to completion before an applicant can seek relief from the courts and ask a motion judge to stop such processes in their tracks (*Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880 at para 46). In an oft-quoted passage found in *CB Powell* and reproduced in many decisions, the FCA summarized the rationales for this principle in the context of judicial reviews as follows:

[30] 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 […].

[31] 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 reviews 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.

[32] 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 […]. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience […]. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge […].

[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. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts 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 […]. [T]he presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
>
> [Emphasis added; citations omitted.]

[57] This approach of judicial restraint in the context of an ongoing or pending administrative proceeding has regularly been recognized by the courts and was endorsed by the SCC in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35-36. When legislation sets out an administrative process consisting of a series of assessments, decisions and remedies, it must be followed to the end, barring exceptional circumstances or unusual urgency, before the courts may be asked to intervene. The parties must first exhaust all adequate remedial recourses when Parliament has given administrative decision-makers the authority to make decisions rather than courts of law.

[58] True, the doctrine of exhaustion of administrative remedies contemplates certain exceptions. However, the range of situations that allow for the general rule to be set aside is narrow and the threshold for exceptionality is high (*CB Powell* at para 33). They only encompass circumstances of exceptionality or unusual urgency (*BNSF* at para 17). The fact that an important legal issue is at stake or that concerns about procedural fairness arise do not allow the courts to expand the exception to the rule against the early interference in the administrative process (*CB Powell* at para 33). In addition, the presence of challenges raising jurisdictional ground does not

open the door to early recourses to the courts, when the administrative process allows the issues to be raised and provide an effective remedy (*CB Powell* at paras 39-40).

[59] As the FCA stated in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 [*Wilson*], the general principle of non-interference is anchored in two public law values: "good administration – encouraging cost savings, efficiencies, promptness and allowing administrative expertise and specialization to be fully brought to bear on the problem before reviewing courts are involved" and "democracy – elected legislators have vested the primary responsibility of decision-making in adjudicators, not the judiciary" (*Wilson* at para 31).

B. *Application to this Stay Motion*

[60] Turning now to the stay motion brought by Mr. Oberlander, and looking at it through the lens developed by the FCA for the consideration of stays of proceedings before other administrative bodies, the preliminary question that the Court needs to answer is the following: even though the Court has the jurisdiction and could consider the matter placed before it by Mr. Oberlander on his stay motion, should it do so in the current circumstances and at this point in time? In my view, and in the particular circumstances of this case, the answer is no. This is a situation where another available, adequate and effective administrative avenue for relief exists before the ID, where Mr. Oberlander's stay motion raises underlying issues that can and should first be determined by the ID, and where the ID is a more appropriate forum with expertise and regulatory experience and better suited to determine many of the factual and legal issues underpinning Mr. Oberlander's request. Put differently, I find that it is not a situation where the Court should consider the merits of

Mr. Oberlander's stay motion at this point in time, before the ID has had the opportunity to make findings and determinations on the allegations and arguments raised by Mr. Oberlander.

[61] In essence, Mr. Oberlander's stay motion is asking the Court to determine the following three issues: (1) whether there was an unfair disclosure of evidence by the Minister and a breach of his duty to disclose; (2) whether, assuming there was such an unfairness or breach regarding the disclosure of evidence, this amounts to an abuse of process; and (3) whether, assuming there was an abuse of process, a permanent or temporary stay of the administrative proceedings before the ID is warranted. As pointed out by the Minister, Mr. Oberlander brings before this Court his allegations of unfairness in the Minister's late disclosure and of a breach of the Minister's duty to disclose as grounds for a possible abuse of process, at a moment where the ID has not issued any finding or determination on these allegations and where the ID has not even had the opportunity to consider these matters. In my view, these issues should first be considered by the ID itself, so that the administrative decision-maker can make findings and determinations on them.

[62] Before the question of an abuse of process can be considered, and before it can be determined whether the alleged abuse of process could justify a permanent stay of proceedings, Mr. Oberlander's stay motion raises numerous factual and legal questions regarding the very source of the alleged abuse. These notably include: (1) whether the additional disclosure of evidence made by the Minister was unfair, misleading or done in bad faith; (2) whether, in the circumstances, the late disclosure of the disputed evidence was inappropriate and whether the evidence should or could be accepted by the ID for the purpose of the admissibility hearing; (3) what is the intended use of the allegedly misleading evidence by the Minister and whether it will

be used to advance new allegations of direct participation in crime; (4) whether Part II of the Deschênes Report constitutes relevant, probative and exculpatory information that should have been disclosed earlier by the Minister; (5) what is the extent and scope of the Minister's disclosure obligations and duty to disclose in the context of the admissibility proceedings; (6) whether there was a failure to disclose Part II of the Deschênes Report by the Minister or, conversely, whether Mr. Oberlander was aware or could have been aware of this evidence; and (7) whether, at any point, there was a breach by the Minister of his duty or obligation to disclose.

[63] All of these elements arising from the disclosure of evidence in the administrative process before the ID need to be determined prior to assessing whether they could amount to an abuse of process justifying the stay of proceedings sought by Mr. Oberlander. In other words, one has to determine whether there is an alleged failure to disclose, unfair disclosure or breach of the duty to disclose; if the answer is yes, whether this amounts to an abuse of process in the context of the proceedings; and if there is an abuse of process, whether it justifies a stay of the admissibility proceedings before the ID. Of course, should it be determined that there was no unfair disclosure, no failure to disclose or no breach of a duty to disclose, there would be no support for any alleged abuse of process or for a stay of the proceedings before the ID.

[64] In my view, these are findings and determinations that first have to be raised before the ID as part of its administrative process, not before the Court. This has not been done.

[65] Pursuant to the IRPA and the ID Rules, the ID has full powers to decide how cases proceed before it, and notably on issues relating to the treatment and receipt of evidence. Section

173 of the IRPA provides that, in any proceeding before it, the ID "is not bound by any legal or technical rules of evidence" (paragraph (*c*)) and it "may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances," even if such evidence were not admissible in a court proceeding (paragraph (*d*)). Section 3 of the ID Rules also refers to the evidence to be presented by the Minister at an admissibility hearing and section 26 specifically deals with the disclosure of documents in the context of a hearing. Therefore, with respect to the treatment of evidence in proceedings before it, including issues of disclosure of evidence and exclusion of evidence, the ID appears to be the master of its own house (*Prassad* at pp 568-569). In addition, section 49 of the ID Rules provides that, in the absence of a provision dealing specifically with a matter, the ID "may do whatever is necessary to deal with the matter."

[66] In light of that framework, the questions raised by Mr. Oberlander's stay motion with respect to the disclosure of evidence and the duty to disclose Part II of the Deschênes Report are part and parcel of the administrative process before the ID, and the Court should not interfere with it at this stage. I am not saying that the Court would not have the broad discretion to deal with those issues. I am instead saying that, in this case, these matters should be raised with the ID first, and the ID should be given the opportunity to make findings and determinations on Mr. Oberlander's allegations regarding the disclosure of evidence in the ID's administrative process and the alleged abuse of process, before the matter is brought before the Court.

[67] If Mr. Oberlander is not satisfied with the ID's findings and determinations to be made on these issues, he has an effective alternative administrative recourse as he can challenge them

before the Court through an application for judicial review, and seek a stay ancillary to such application. Until the moment where the ID makes determinations on the issues raised by Mr. Oberlander in his stay motion, I am not persuaded that the Court should be the forum to deal with the matter.

[68] I observe that Mr. Oberlander has already raised his allegations of inappropriate disclosure and breach of the Minister's duty to disclose before the ID, but he brought this stay motion to the Court before the ID could effectively consider them. The materials filed by both parties in support of their respective positions on this stay motion indicate that detailed submissions were made to the ID by both parties on the issues of disclosure of evidence and the Minister's duty to disclose. The record contains numerous letters exchanged in February and March 2021, emanating from counsel for Mr. Oberlander and for the Minister, further to which most if not all of the arguments made on this stay motion were in fact put before the ID. This correspondence includes letters from counsel for Mr. Oberlander where he objected to the Minister's additional disclosure and sought a preliminary determination on the Minister's disclosure materials, and where he applied to exclude evidence from being considered by the ID.

[69] Not only does this confirm that these matters relating to the treatment and disclosure of evidence are part of the ID's administrative process, but it illustrates that the ID is certainly an adequate, appropriate and available forum to deal with those matters. In fact, I am of the view that, in the circumstances, the ID is the preferable and more appropriate forum to do that, given its extensive expertise and regulatory experience in admissibility matters and its detailed and more complete knowledge of Mr. Oberlander's file.

[70] I therefore agree with the Minister that this Court is not the proper place, at this point in time, to deal with Mr. Oberlander's request for a permanent stay of the ID's admissibility proceedings. The underlying issues at the source of Mr. Oberlander's arguments for seeking a stay of the admissibility proceedings concerns the Minister's disclosure of evidence to the ID. The ID, as the master of its own house, can and should consider and make findings on Mr. Oberlander's contentions on this front, which he will have the opportunity to challenge if he is not satisfied with the result.

[71] With respect to the allegations of abuse of process, assuming the ID finds that there has been an unfair disclosure of evidence by the Minister, or a breach of his duty to disclose, I am not persuaded that the ID is prevented from making a determination on whether the conduct of the Minister amounts to an abuse of process opening the door to a permanent stay of the proceedings before it.

[72] Mr. Oberlander raises particular concerns about the ID's ability and power to issue a permanent stay of its own proceedings, on the basis of an abuse of process. Relying on this Court's decisions in *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 [*Torre*] and *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427 [*Ismaili*], Mr. Oberlander submits that the ID does not have the jurisdiction to issue an order staying its proceedings permanently in this matter. I am not convinced that these decisions actually come to such a definite conclusion. In my view, they instead establish that the ID's ability to consider abuses of process and to permanently stay its proceedings on that basis is "very limited," in the context of alleged abuses of process for unreasonable delays.

[73] In *Torre*, the Court considered whether the ID had jurisdiction to grant a permanent stay of proceedings for unreasonable delay, and concluded that it was unlikely to be the case (*Torre* at para 21). The Court thus held that the ID did not err when it declined to hear an application for stay of proceedings on jurisdictional grounds. In *Ismaili*, the Court also considered the ID's jurisdiction to grant a permanent stay of proceedings based on an abuse of process for unreasonable delays, and followed *Torre* in confirming the "ID's very limited ability to consider abuse of process" arguments for the purposes of granting a stay of proceedings (*Ismaili* at paras 12, 24). In my view, *Torre* and *Ismaili* left the door open for the ID to consider, in limited circumstances, potential abuses of process alleged to have taken place because of delays between the decision made by the Minister to prepare a report under section 44 of the IRPA and the ID's admissibility finding.

[74] As mentioned by the Minister, the question of whether the ID has the jurisdiction to permanently stay an admissibility hearing for abuse of process was also raised more recently in *Najafi*. In that case, the Court concluded that the question has not been conclusively settled and that a matter could fall within what has been identified by the Court in *Torre* and *Ismaili* as the ID's "limited discretion" to stay proceedings before it for abuse of process. In *Najafi*, the ID had granted a permanent stay of proceedings for abuse of process due to excessive delays, and the Court confirmed that the ID "is empowered to make an abuse of process finding and to stay admissibility proceedings" on the basis of an abuse of process (*Najafi* at para 36). The Court observed that, as any other administrative tribunal, the ID may take into account the principles of natural justice and the duty of fairness in its proceedings. In considering whether the ID had the discretion to stay proceedings before it for abuse of process, the Court found that the ID has the

"broad jurisdiction to hear and determine all questions of law, fact and jurisdiction" and that "[i]n the appropriate circumstances, it may exercise its jurisdiction to stay an admissibility hearing" (*Najafi* at para 51), including a permanent stay of proceedings on the basis of an abuse of process.

[75] It thus appears that the matter remains unsettled in the jurisprudence and that, at the very least, it can be said that the ID has a limited jurisdiction to consider alleged abuses of process, that it can have the power to permanently stay its proceedings on that basis in certain cases, and that it has shown a willingness to exercise that power.

[76] I observe that, in those three decisions mentioned by the parties (*Torre*, *Ismaili* and *Najafi*), the Court was dealing with the ID's jurisdiction to grant a permanent stay of proceedings based on an abuse of process for unreasonable delays, not on an abuse of process stemming from an alleged failure to disclose evidence or breach of a duty to disclose in the admissibility proceedings, as is the case here. I am aware of no precedent where the Court or the ID discussed or limited the extent of the ID's jurisdiction to issue a stay of proceedings on the basis of an abuse of process resulting from an alleged failure to disclose evidence, or breach of the Minister's duty to disclose in the context of admissibility proceedings.

[77] In view of the foregoing, I am not persuaded that the ID cannot consider staying its proceedings as a remedy to an abuse of process resulting from a disclosure of evidence issue, or that it cannot make a determination on the alleged abuse of process raised by Mr. Oberlander in his stay motion. I mention in passing the reference made by the Minister to the fact that, in

November 2019, Mr. Oberlander himself brought an application to the ID asking for a permanent stay of the admissibility proceedings on the ground that the ID did not have the required jurisdiction and claiming, among other things, that the ID's admissibility proceedings were an abuse of process.

[78] I therefore conclude that the ID offers an adequate, available and appropriate avenue of relief where Mr. Oberlander can raise the issues and arguments made in his stay motion, and which could efficiently and promptly deal with Mr. Oberlander's request for a permanent stay.

[79] I pause to make the following comment on Mr. Oberlander's alternative remedy, which is a more usual temporary or interlocutory stay of proceedings. Mr. Oberlander elected to attach his stay motion to his pending ALJR in this matter, and his alternative request for a temporary remedy must be considered in that context. One should not lose sight of the fundamental nature of a temporary or interlocutory stay and its relation to a cause of action or an application. The right to obtain an interlocutory injunctive relief – and stays are a form of injunctive relief – is merely ancillary and incidental to a pre-existing cause of action or application. Unlike a request for a permanent injunction or permanent stay, a request for an interlocutory stay or injunction does not have an independent life of its own; it is instead a remedy attached to an underlying action or application. As the SCC reminded in *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*], an interlocutory injunction is generally "a remedy ancillary to a cause of action" [emphasis in original] (*CBC* at para 24, citing *Amchem Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897 at p 930). Mr. Justice Sharpe (writing extrajudicially) echoed this principle when he noted that "[i]nterlocutory injunctions are 'a

prophylactic measure associated directly with the ongoing case' whereas 'permanent injunctions are of a different order and amount to a final adjudication of rights'" (Robert Sharpe J., *Injunctions and Specific Performance*, 4th ed (Toronto: Canada Law Book, 2012) at paras 1.40, 1.60). That is, an interlocutory injunctive relief is a preservative and precautionary remedy intimately linked to an ongoing matter, be it an action or an application.

[80] Given the accessory nature of interlocutory stays or injunctions, and the direct connection they must have with an underlying action or application, the courts will be hesitant to use their discretion to grant such an exceptional relief when a moving party, by way of an interlocutory stay or injunction, asks for more relief and remedy than what it is seeking in the underlying action or application. Put differently, it will hardly be just and equitable for a court to issue an interlocutory stay if the moving party is in fact claiming, as interlocutory relief, more than what it is asking the court in its underlying action or application.

[81] In the context of applications for judicial review, section 18.2 of the FC Act echo this principle by stating that the Court "may make any interim orders that it considers appropriate pending the final disposition of the application". In other words, an applicant cannot ask for more than what he or she could obtain if ultimately successful on the underlying ALJR: "in order for a stay to be granted in immigration matters, there must be a leave or judicial review proceeding to which the stay is ancillary" (*D'Souza v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1304 at para 40.

[82] I find that this is what Mr. Oberlander is attempting to obtain through the alternative temporary remedy sought in his stay motion. The relief he is seeking (i.e., a stay of ID admissibility proceedings until such time as the GIC renders a decision on his March 8, 2021 reopening application) is not contemplated in his underlying ALJR, which seeks an "order prohibiting the [ID] from proceeding with the admissibility hearing at this time." In his ALJR, Mr. Oberlander has no conclusions tying the scheduling of the admissibility hearing to the outcome of a separate administrative process before the GIC or elsewhere. Pursuant to his judicial review application, Mr. Oberlander is only asking the Court to prohibit the ID from proceeding with the admissibility hearing at this time, in order to pursue solutions to his communications challenges. In other words, by seeking a suspension of the admissibility proceedings until a decision on his reopening application before the GIC, I find that, in this stay motion, Mr. Oberlander is asking for an alternative temporary remedy that would go beyond what he is actually seeking in his underlying ALJR. This is not what interlocutory stays are intended to accomplish.

[83] In my view, it defeats the purpose and objective of interlocutory injunctive reliefs if a moving party seeking a temporary or interlocutory stay could request remedies that are different and go further than the remedy forming the basis of the underlying application or cause of action. In such situations, the Court should refrain from entertaining the request and from exercising its discretion to issue an exceptional temporary stay. This is the case here and, in my view, this is sufficient to conclude that the Court should not entertain Mr. Oberlander's request for his alternative temporary remedy.

[84] In the present case, the IRPA and the ID Rules establish an administrative process of assessment, hearing and adjudication on admissibility matters before the ID, and this process must first be followed. In this administrative process, Parliament has assigned the decision-making authority to the ID, not to the courts, notably on matters relating to the treatment and consideration of evidence. The ID should therefore have an opportunity to make findings and determinations on the issues raised by Mr. Oberlander before he asks the Court to do so. Absent extraordinary compelling circumstances or unusual urgency, the parties should exhaust their rights and remedies under an available administrative process like this one before resorting to the courts to determine the issues and to stay administrative proceedings. Here, I do not find that, at this point in time, there are compelling circumstances of exceptionality or an unusual urgency that would justify a premature foray to the Court.

[85] Until the matters raised by Mr. Oberlander are assessed and determined by the ID, the Court should not intervene in the ID administrative process. In this case, there is an available effective remedy at the end of the process before the ID as any applicant who is unsatisfied of the ID's decision on admissibility has a right to apply for leave and judicial review from the decision which will eventually be made on the merits of admissibility.

[86] I am mindful of the fact that, depending on what the ultimate decisions of the ID will be, the matter could come back before the Court at a later stage, after the ID has completed its work and made findings and determinations on the allegations and arguments raised by Mr. Oberlander on the disclosure of evidence issues and the alleged abuse of process. But, if that is the case, the Court will then have the benefit of the ID's findings and determinations made on the

basis of a complete record, and will have allowed the ID to exercise the powers conferred to it by the applicable legislation.

IV. Conclusion

[87] For the foregoing reasons, the Court will not entertain Mr. Oberlander's request at this point in time and Mr. Oberlander's stay motion is therefore dismissed. Mr. Oberlander's motion for a permanent stay is premature as the allegations and arguments raised by Mr. Oberlander in his stay motion ought first to be determined by the ID, rather than this Court pre-empting the ID's jurisdiction. There are no exceptional circumstances warranting the immediate interference by the Court, and the ID should first have the opportunity to consider the allegations and arguments raised by Mr. Oberlander, and to make findings and determinations on them. In the present circumstances and at this juncture, I consider that it would not be appropriate to exercise my discretion in favour of the exceptional permanent stay sought by Mr. Oberlander, and for the Court to entertain Mr. Oberlander's stay motion. Moreover, with respect to the alternative request for a temporary stay, it is seeking more than what Mr. Oberlander could obtain if he was successful in his underlying ALJR, something which is beyond the purpose and objective of interlocutory injunctive reliefs sought in the context of judicial reviews. In light of these conclusions, the Court does not need, at this stage, to address the other objections raised by the Minister or the actual merits of Mr. Oberlander's motion.

[88] Regarding costs, I do not find that the circumstances of this case are similar or close to those rare situations which have justified an order of costs in immigration matters, and I decline to make such an order against Mr. Oberlander. I am not convinced that, in bringing this stay

motion before the Court, Mr. Oberlander or his counsel acted in such an unfair, oppressive or improper manner or engaged in such an abusive conduct that an award of costs could be triggered. Special reasons do not arise merely because a party elects to exercise a legal option and is not successful.

[89] In making its findings and determinations on the allegations and arguments raised by Mr. Oberlander in his stay motion, the ID shall bear in mind the comment made by Justice Southcott in his February 5, 2021 stay order, to the effect that Mr. Oberlander's admissibility proceedings should be progressed and brought to a conclusion as quickly as possible.

ORDER in IMM-6692-20

THIS COURT'S ORDER is that:

1. The Applicant's motion for a stay is dismissed.

2. No costs are awarded.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6692-20
STYLE OF CAUSE:	HELMUT OBERLANDER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN MONTRÉAL, QUEBEC AND TORONTO, ONTARIO
DATE OF HEARING:	MARCH 30, 2021
ORDER AND REASONS:	GASCON J.
DATED:	APRIL 6, 2021

APPEARANCES:

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Angela Marinos Daniel Engel Meva Motwani	FOR THE RESPONDENT

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