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Securities
Commission

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**IN THE MATTER OF
DENNIS L. MEHARCHAND
and VALT.X HOLDINGS INC.**

**REASONS AND DECISION ON A MOTION
(Rule 28 of the *Rules of Procedure and Forms (2017)*, 40 OSCB 8988)**

Hearing: January 22, 2018

Decision: February 12, 2018

Panel: Timothy Moseley Vice-Chair and Chair of the Panel
Robert Hutchison Commissioner
Deborah Leckman Commissioner

Appearances: Dennis L. Meharchand For himself and Valt.X Holdings Inc.
Linda Fuerst For Staff of the Commission
Gavin Smyth

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REASONS AND DECISION ON A MOTION

I. OVERVIEW

- [1] Dennis Meharchand and Valt.X Holdings Inc. (**Valt.X**), of which Mr. Meharchand is the principal, are the respondents in an enforcement proceeding. They bring this motion, in which they seek recusal of two members of Staff of the Commission (**Staff**) who are involved in the investigation of their conduct and in the enforcement proceeding against them. Those Staff members are Christie Johnson, Litigation Counsel for Staff, who had carriage of a related proceeding in 2015 and of the current proceeding (although other counsel argued this motion on behalf of Staff), and Daniella Kozovski, Investigation Counsel for Staff, who has been the primary investigator throughout. Mr. Meharchand and Valt.X also seek to have "all uncorroborated evidence advanced or prepared by" Ms. Johnson or Ms. Kozovski "disallowed".
- [2] The respondents point to two events that they say demonstrate that Ms. Johnson and Ms. Kozovski have acted improperly and are biased against them:
- a. In material filed with the Commission in 2015, in support of Staff's request for the extension of a temporary order against the respondents and one other individual, the text on one page appended to Ms. Kozovski's affidavit was partially obscured. Staff explained that this was an inadvertent scanning error. The respondents do not accept that explanation. They allege that Staff was deliberately attempting to mislead the Commission.
 - b. A summary of anticipated evidence of Ms. Kozovski, provided to the respondents as part of pre-hearing disclosure in the enforcement proceeding, states that she will likely testify about a "complaint" received from an investor in the respondents' business. The respondents emphatically deny that the communication from the investor constituted a complaint, and they say that Staff's characterization reflects an improper bias against the respondents.
- [3] At the conclusion of the hearing of the motion, we advised the parties that we were dismissing the motion, for reasons to follow. These are our reasons.
- [4] As we explain below, none of the evidence before us supports the respondents' assertions. We see no evidence whatsoever of improper conduct by Staff, or of any bias against, or unfair treatment of, the respondents. There is no basis for the relief sought by the respondents.

II. HISTORY OF THE PROCEEDINGS

A. Temporary order proceeding

- [5] On September 11, 2015, the Commission issued a temporary order against the respondents and another individual (the **Temporary Order**),¹ pursuant to subsections 127(1) and 127(5) of the *Securities Act* (the **Act**).² That order states that it appeared to the Commission that, among other things:

¹ *Meharchand (Re)* (2015), 38 OSCB 8055.

² RSO 1990, c S.5.

- a. the named parties (including Mr. Meharchand and Valt.X) may have engaged in, or held themselves out as engaging in, the business of trading in securities, without being registered as required, contrary to subsection 25(1) of the Act; and
 - b. those parties may have engaged in an illegal distribution of securities, contrary to subsection 53(1) of the Act.
- [6] The Temporary Order provided that trading in securities of Valt.X was to cease, that trading in any securities by the named parties was to cease, and that the exemptions contained in Ontario securities law were not to apply to them. The Temporary Order was to expire on September 26, 2015, unless extended by the Commission.
- [7] At a hearing on September 23, 2015, Staff submitted Ms. Kozovski's affidavit (the **Kozovski Affidavit**), in support of Staff's request that the Commission extend the Temporary Order. In addition to the documents attached to that affidavit, Staff had others that it had received from the respondents but had not yet had an opportunity to review. The Commission adjourned the hearing to October 1, 2015, and extended the Temporary Order to October 2, 2015.
- [8] On October 1, 2015, the Commission again extended the Temporary Order, this time until October 15, 2015.
- [9] At a hearing on October 14, 2015, Staff sought a further extension of the order. The Commission denied Staff's request.³ The Temporary Order expired the next day, under the terms of the October 1 order.

B. Statement of Allegations

- [10] Staff's investigation continued over the next year and a half. On February 27, 2017, Staff filed a Statement of Allegations against the respondents. Consistent with the conduct described in the Temporary Order, Staff now alleges that the respondents engaged in unregistered trading and illegal distributions. In addition, Staff alleges that Mr. Meharchand has engaged in fraudulent conduct with respect to the use of investor funds.
- [11] That same day, on February 27, 2017, the Secretary to the Commission commenced this proceeding by issuing a Notice of Hearing in respect of Staff's Statement of Allegations. Since then, there have been numerous appearances before the Commission, and Staff has filed written material for the merits hearing. As of the hearing of this motion, the date for the respondents to deliver their material in response had not yet arrived, and the dates for the merits hearing had not yet been set.

C. This motion, and the respondents' request for an adjournment

1. Appearances preliminary to the merits hearing

- [12] At the hearing of this motion on January 22, 2018, the respondents requested an adjournment. We denied that request, for reasons set out below, following a review of the events leading up to this hearing.
- [13] On March 27, 2017, at the first appearance following the filing of the Statement of Allegations, the respondents were represented by duty counsel. Through

³ *Meharchand (Re)* (2015), 38 OSCB 10761.

counsel, the respondents advised that they would be seeking recusal of certain members of Staff, including litigation counsel with carriage of the matter. Mr. Meharchand stated that he was alleging that the Staff members “tampered with evidence and falsified information and [he was] asking for them to be removed.” Staff stated that it was aware of the issue, but that this was the first it was hearing of a request for recusal. The Commission panel indicated that any such motion should be dealt with sooner, rather than “later down the road”.

- [14] The next appearance in this proceeding took place on June 26, 2017. The respondents, through duty counsel, advised that they still intended to bring this motion. Staff counsel submitted that the motion should be heard soon, because a successful outcome for the respondents would have repercussions for Staff. The Commission panel repeated the admonition that the respondents would be “at some risk” if they delayed bringing the motion, due to the prejudice that might result.
- [15] The parties next appeared on August 21, 2017. Again, the respondents advised through duty counsel that they intended to bring the motion and that they were prepared to do so “within a reasonable period of time”. When the Commission panel repeated the concern about timing, Mr. Meharchand said that a hearing date within two weeks would be fine. He said: “I’ll get it in right away. In fact, over the next couple of days I’ll get it in... I do want to move it along as quickly as possible.” The Commission set a deadline of September 15, 2017, for the delivery of the respondents’ materials, and set October 16, 2017, for the hearing of the motion.
- [16] September 15 came and went without any materials from the respondents. At Staff’s request, and after confirming the respondents’ availability, the Commission convened a pre-hearing conference for September 29, 2017. In the morning of September 29, Mr. Meharchand advised by email that he would not attend because he was “not well”. He advised that he would submit this motion on October 2.
- [17] The pre-hearing conference proceeded in the respondents’ absence. At the pre-hearing conference, the Commission extended the deadlines for delivery of materials, and fixed a new date, October 27, 2017, for the hearing of the motion.

2. Respondents’ delivery of their Motion, and subsequent withdrawals of the Motion

- [18] The respondents delivered their Motion on October 3, 2017. The Motion, which was unaccompanied by any other material, was two pages long and:
- a. asked for the recusal of the two Staff members and that “uncorroborated evidence advanced or prepared by” either of the two individuals “be disallowed”;
 - b. set out numerous grounds for the motion, relating to (i) the alleged tampering with evidence, and (ii) the reference in the Staff investigator’s evidence summary (the **Kozovski Summary**) to a “complaint” from an investor; and
 - c. referred to an affidavit of Mr. Meharchand, although that appeared to be simply a reference to the various grounds set out earlier in the document.

- [19] On October 5, 2017, Mr. Meharchand advised the Commission's Registrar that the respondents wished to withdraw the motion. Staff responded on October 11, 2017, advising that the parties had agreed that the motion would in fact proceed on October 27, 2017, as scheduled. Staff filed its responding motion materials on October 16, 2017.
- [20] On October 18, 2017, Mr. Meharchand sent an email to the Registrar, saying:
- A hearing was scheduled for October 27th 2017 to hear a Staff Recusal Motion in the above Matter. I am withdrawing the Motion – Please vacate the date. I have no intention of refileing the Motion.
- [21] The following day, Staff consented to vacating the date for the motion but made clear that Staff had advised Mr. Meharchand that it would "strenuously object" to the respondents bringing the motion back on, because of the prejudice that Staff would suffer.
- [22] Two months passed. On December 13, 2017, the Commission conducted a confidential conference to address matters related to the merits hearing, including deadlines for the exchange and filing of written materials relating to the hearing on the merits of Staff's allegations. After hearing submissions from Staff and from the respondents, the Commission ordered, among other things, that the direct evidence for the merits hearing be adduced by way of affidavits. The Commission ordered a schedule for the delivery of the parties' written materials, beginning with Staff's materials being due on January 8, 2018.
- [23] On December 20, 2017, the respondents filed a Motion that was identical to that filed on October 3, although bearing a new date. Mr. Meharchand asked for "a hearing as soon as possible".
- [24] Staff did not object to the motion being brought back on. The Commission convened a hearing for 4:00pm on Friday, January 12, 2018, to address scheduling matters.
- [25] At 5:25am on January 12, Mr. Meharchand sent an email to the Registrar and to Staff, attaching a "Victim Impact Statement of Dennis Meharchand", which he asked be communicated to the panel. In that document, Mr. Meharchand advised, among other things, that as a result of the actions of the two Staff members, he felt "persecuted and both mentally and physically debilitated" knowing that the Staff members were using the Commission's resources to "tamper with and provide false and misleading evidence" against him. He asserted that their conduct was having "a severe mental impact" on him. Mr. Meharchand urged the Commission to "deal with this matter promptly and in a way providing Justice."
- [26] The parties appeared as scheduled at the 4:00pm hearing, at which Mr. Meharchand advised that the respondents did not intend to rely on any further material for the motion, and agreed that the motion should be heard as soon as possible. The Commission set January 22, 2018, as the hearing date.
- [27] Approximately two hours later, at 6:15pm on Friday, January 12, 2018, Mr. Meharchand sent an email to the Registrar and to Staff, in which he stated that due to "a bout of depression" he had been unable to follow the discussion at the hearing earlier that afternoon. He said that contrary to his statement at the

hearing, he did want to file additional material, and was seeking permission to do so on Monday, January 15.

- [28] The respondents filed no additional material. On January 18, 2018, Mr. Meharchand sent an email in which he advised that he was withdrawing the motion and that he would re-file it the next day, Friday, January 19, 2018. At our direction, the Registrar replied and advised that the hearing of the motion would proceed as scheduled on Monday, January 22, 2018, and that any issues regarding motion materials would be addressed at that time.

3. The hearing on January 22, 2018

- [29] The parties attended at the hearing on January 22, 2018. Mr. Meharchand appeared in person and on behalf of Valt.X. He confirmed that he was seeking an adjournment. Staff opposed the request.

- [30] Mr. Meharchand cited several reasons for his adjournment request:

- a. he advised that he wished to see additional documents in Staff's possession, in order to determine whether there was "any more" evidence of Staff's improper conduct and bias against the respondents, which evidence he required for the motion;
- b. he explained that he had requested documents from Staff, and that Staff had not fulfilled those requests; and
- c. he stated that his belief about Staff's conduct was inducing depression, which in turn had been interfering with his ability to respond properly to Staff's allegations against him.

- [31] After hearing submissions from Mr. Meharchand and from Staff, we denied the adjournment request. We did so for the following reasons:

- a. the respondents provided no evidence and no specifics regarding unfulfilled requests made to Staff for additional documents;
- b. the respondents provided no basis for a belief that any documents that were not before us would, if produced, suggest that Staff had tampered with evidence or otherwise acted improperly;
- c. at none of the three attendances since Staff filed its Statement of Allegations, at which attendances the respondents were represented by duty counsel, did Mr. Meharchand or duty counsel indicate any concerns about Mr. Meharchand's ability to understand the proceedings or to give instructions;
- d. Mr. Meharchand first raised the prospect of this motion almost one year ago;
- e. on numerous occasions, both Staff and the panel of the Commission have warned the respondents that the motion should be brought promptly and that the respondents' motion would be at risk if they delayed;
- f. the respondents have not given any meaningful and substantiated explanation as to why the steps that they wish to take now, to obtain additional documents, have not yet been taken; and

- g. the respondents' conduct in repeatedly filing and withdrawing the motion has served to prolong this proceeding, and a further adjournment would continue that pattern.
- [32] In reaching our decision, we considered Mr. Meharchand's assertion, made on several occasions in this proceeding, that he has been unable to respond properly to Staff's allegations because he has been depressed as a result of Staff's allegedly unfair treatment of him. We are sympathetic to the fact that an enforcement proceeding, especially one in which Staff alleges serious misconduct such as fraud, can be a difficult and stressful experience for a respondent. These difficulties are often compounded when the respondent is unassisted by counsel, as Mr. Meharchand has been for some portions of this proceeding.
- [33] In determining how much weight we should give to Mr. Meharchand's assertion, we took into account the following factors:
- a. Mr. Meharchand's assertion is neither substantiated by any evidence nor supported by a suggestion that he has sought professional assistance of any kind;
 - b. in his many attendances before the Commission, he has exhibited no difficulty understanding and responding to questions and comments from us or from Staff, and he has been able to advocate on his own behalf;
 - c. Mr. Meharchand has repeatedly advised that he intended to retain counsel through the Commission's Litigation Assistance Program, yet as of the hearing of this motion Mr. Meharchand had not completed arrangements to retain counsel, and offered no reason for not having done so; and
 - d. the Commission has repeatedly extended deadlines to benefit the respondents.
- [34] While our impression of Mr. Meharchand is that he is fully participating in this proceeding, our observations are not inconsistent with the possibility that Mr. Meharchand has, from time to time, experienced significant difficulties dealing with the pressures that this proceeding presents. Assuming that such difficulties do exist, we are not in a position to assess their seriousness, or to determine whether they involve any issues of mental health. We have only Mr. Meharchand's claim, which as noted above is unsupported by specifics or by evidence from a qualified professional.
- [35] As a result, we have no basis on which we can determine whether the difficulties that Mr. Meharchand describes rendered him unable to proceed. Therefore, while we took Mr. Meharchand's comments into account, his unsubstantiated claim is insufficient to affect our decision regarding his adjournment request.

4. Conclusion regarding the adjournment request

- [36] If the respondents were to succeed on their motion, Staff counsel with carriage of the matter, and the principal investigator, would have to be replaced. There is therefore a compelling public interest in having the motion resolved one way or the other, so that Staff knows whether it needs to take any steps, and so as to minimize the delay in the overall proceeding.
- [37] The Commission has been patient with the respondents and has, on numerous occasions over many months, given them every opportunity to have their motion

heard. Despite the respondents' repeated assertions that they want the motion to be heard as soon as possible, their actions, and their actions alone, have prevented that from happening.

- [38] Rule 29(1) of the Commission's *Rules of Procedure and Forms*⁴ provides that every hearing of a motion "shall proceed on the scheduled date unless a Party satisfies the Panel that there are exceptional circumstances requiring an adjournment." The respondents have not demonstrated any exceptional circumstances; nor have they offered a persuasive basis for a further delay in the hearing. It would be contrary to the public interest for us to grant the adjournment request, and we have therefore denied it.

III. THE RESPONDENTS' MOTION FOR RECUSAL AND OTHER RELIEF

- [39] Having denied the respondents' adjournment request, we then heard submissions from the parties about the issues raised by the respondents' motion. We turn now to our analysis of those issues.

A. Legal framework

- [40] In determining the standard that the respondents must meet to justify recusal of counsel on the ground of misconduct, we adopt the approach of the Ontario Superior Court of Justice in *R v Colson*,⁵ a criminal matter in which the court considered an application by the accused for the recusal of both Crown counsel on the basis of alleged professional misconduct. The court held that while it had discretionary authority to remove Crown or defence counsel, as part of its inherent power to control its own processes, such authority should be exercised sparingly, and only when necessary.⁶ An appropriate recusal application "must be based on evidence to support the proposition that the Crown has misconducted themselves either intentionally, recklessly, or with unacceptable negligence for the purpose of undermining the integrity of the administration of justice."⁷
- [41] As for bias specifically, we are guided by the words of the Supreme Court of Canada in *Boucher v R*,⁸ in which the Court held that the role of Crown counsel in a criminal prosecution is to adduce all available evidence relevant to what is alleged to be a crime. That duty "should be done firmly and pressed to its legitimate strength, but it must also be done fairly."⁹ Whether a prosecutor (or, in our case, a member of Staff) acts fairly must be viewed objectively in the same way as a claim of reasonable apprehension of bias of an adjudicator. In other words, would a reasonable and informed observer, "viewing the matter realistically and practically – and having thought the matter through – conclude" that the two members of Staff are improperly biased?¹⁰
- [42] We will now review the facts giving rise to the respondents' allegations. We assess those facts to determine whether they indicate any improper conduct by Staff, including falsifying or tampering with evidence, bias against the

⁴ *Ontario Securities Commission Rules of Procedure and Forms* (2017), 40 OSCB 8988, r 29(1).

⁵ [2002] OJ No 1576 (SCJ) (**Colson**).

⁶ *Colson* at para 4, citing *R v Brown*, [1996] OJ No 5319 (Gen Div) at p 10.

⁷ *Colson* at para 19.

⁸ [1954] SCJ No 54 (**Boucher**).

⁹ *Boucher* at para 26.

¹⁰ *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at para 40.

respondents, or other unfair treatment of the respondents. As we explain below, we conclude that there is no reasonable basis for their allegations.

B. Alleged tampering with evidence

1. Facts

- [43] The first of the respondents' two specific complaints relates to the Kozovski Affidavit submitted by Staff on September 23, 2015, in support of Staff's request that the Commission extend the Temporary Order.
- [44] The Kozovski Affidavit attached as an exhibit a Valt.X common share and subscription agreement provided to Staff by an investor in Valt.X who resides in Texas. The agreement appears to be a template; specific information that could be added regarding a particular investor has not been inserted.
- [45] The agreement refers to an accredited investor certification for Canadian residents, which certification is Schedule A to the agreement. However, the copy of the agreement attached to the Kozovski Affidavit does not include that Schedule A. In her affidavit, Ms. Kozovski explains that this is so because the document was received from a U.S. resident.
- [46] The agreement also refers to an accredited investor certification for U.S. residents, which certification is Schedule B to the agreement. Immediately following the signature page of the main agreement is a page, on which the text of the top portion is obscured. The bottom portion of the page (which is unaffected by the problem with the top portion), and the text on the next page (which is complete), make it obvious that those two pages are the U.S. accredited investor certification. Again, those two pages are in template form, with no date inserted, no signature on the signature line, and no name of the "Subscriber" inserted in the appropriate space. The two pages are followed by a Schedule C, a "Form of Voting Trust Agreement".
- [47] At the September 23 hearing, at which Staff adduced the Kozovski Affidavit, the Commission decided to adjourn the hearing for one week to allow for review of additional documents, including some brought by Mr. Meharchand to the hearing and not yet reviewed by Staff. At one point during that hearing, Mr. Meharchand said that the accredited investor certificate portion of the exhibit to the Kozovski Affidavit was "blank". It is not clear from the transcript whether Mr. Meharchand meant that a portion of one page was missing its text (and therefore "blank"), or that the certification was in template form, without any specific information added (and therefore "blank").
- [48] In any event, later that same day Mr. Meharchand sent an email to Staff, requesting the original subscription agreement that Staff had obtained from the investor. Staff replied that same day, advising that "there appears to have been an issue with the scanning of that document into Staff's electronic database, which resulted in a faulty printout." Staff attached to that email a properly scanned version of the subscription agreement and advised that Staff would provide the corrected version to the Commission at the next appearance.
- [49] Mr. Meharchand replied, again on September 23, expressing his concern that "the faulty scan and printout is in fact an attempt to deliberately tamper with evidence." Staff responded again, denying any attempt to tamper with evidence and assuring him that Staff would take all necessary steps to rectify the

inadvertent error. Further correspondence ensued over the following days, in which Mr. Meharchand sought to escalate his claims within the Commission, including to its Chair, and to obtain details about Staff processes, procedures and compensation. Staff did not accede to Mr. Meharchand's requests.

- [50] Two days later, on September 25, Staff served Mr. Meharchand with a further affidavit of Ms. Kozovski. That second affidavit explained that the original Kozovski Affidavit had attached an inaccurate reproduction of the U.S. accredited investor certification, explained that Staff had sent a proper copy to Mr. Meharchand on September 23, and attached a complete copy of the document.
- [51] When the parties appeared next on October 1, as scheduled, the respondents were represented by counsel, who had been retained only the day before. As a result, on consent of all parties the hearing was adjourned to October 14, and the Temporary Order extended to October 15. Before the hearing was adjourned, Staff referred to the September 25 affidavit of Ms. Kozovski, which attached the corrected version of the U.S. accredited investor certification. The panel confirmed that it had received the affidavit. Neither the respondents nor their counsel raised a concern about the corrected document or about Staff's conduct.
- [52] At the hearing on October 14, the Commission heard submissions from all parties. Neither the respondents nor their counsel raised a concern about the Kozovski Affidavit or about Staff's conduct. At the conclusion of the hearing, the Commission dismissed Staff's request for a further extension of the Temporary Order.

2. Analysis of the respondents' allegation that Staff tampered with evidence

- [53] The respondents' assertion that Staff tampered with evidence is based solely on the missing portion of the first page of the two-page U.S. accredited investor certification. While the respondents correctly submit that accredited investor certifications may play an important role in this proceeding, we must consider all of the surrounding circumstances in assessing whether the respondents' allegations give rise to any concerns about Staff's conduct.
- [54] We conclude that the circumstances do not give rise to any such concern, for a number of reasons:
- a. by reading the entire exhibit to the Kozovski Affidavit, including the main agreement, it is plain and obvious that the partially-obscured page is the first page of the U.S. accredited investor certification;
 - b. that document is a template version only, without any information that would identify a particular investor;
 - c. later the same day that the document was before the Commission in a hearing, Staff acknowledged the problem and provided a corrected copy to Mr. Meharchand;
 - d. Staff promptly delivered a supplementary affidavit attaching the corrected copy, and filed that affidavit with the Commission;

- e. Staff's explanation of a scanning problem is consistent with the document's appearance, is uncontradicted by any other evidence, and is reasonable, and we therefore accept it;
- f. it is obvious from the corrected version that Staff would have had nothing to gain by deliberately obscuring part of the document; and
- g. neither at the October 1, 2015, hearing nor at the October 14, 2015, hearing did the respondents or their counsel raise a concern about the document or about Staff's conduct.

[55] As a result, the facts with respect to the U.S. accredited investor certification do not provide any basis to conclude that Staff has misconducted itself in any way, let alone "intentionally, recklessly, or with unacceptable negligence for the purpose of undermining the integrity of the administration of justice", to use the words quoted in paragraph [40] above. Furthermore, the respondents cannot reasonably have suffered any prejudice as a result of Staff's inadvertent error. Finally, there is nothing about Staff's conduct that would lead an informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude from this inadvertent error that Staff is improperly biased against the respondents.

[56] The respondents' concern about the accredited investor certification therefore fails to support their motion for recusal.

C. Summary of Ms. Kozovski's anticipated evidence

[57] The respondents' second concern relates to the Kozovski Summary, which Staff provided to the respondents as part of disclosure in advance of the merits hearing.

[58] Staff often calls its investigator as a witness at a merits hearing, and parties must provide to each other summaries of the anticipated evidence of any witness the parties intend to call. However, such summaries are not filed with the Commission, absent exceptional circumstances. Rather, the panel hears or reads the witness's evidence directly. The summary acts simply as information for the opposite party.

[59] That practice applies in this case. The Kozovski Summary has not been filed with the Commission in advance of the merits hearing, nor did any of the parties include it in the materials filed on this motion. However, we do not need to review the Kozovski Summary in order to resolve this issue.

[60] According to the respondents, the Kozovski Summary anticipates that Ms. Kozovski will give evidence about a "complaint" received from the Texas investor who was the source of the subscription agreement discussed above. The respondents emphasize the use of the word "complaint" in the summary, and contrast that with another document that was contained in Staff's disclosure to the respondents. According to the respondents, that second document, which was also not in the record before us, reflects the Texas investor's insistence that in providing information to Staff, he was not making a "complaint".

[61] Staff did not take issue with the respondents' description of the contents of either of these two documents. Accepting those descriptions, then, for the purposes of this motion, we must determine whether the difference in the

descriptions reflects a bias by Staff, or any improper conduct. We conclude that there is no basis for such a concern.

- [62] As the respondents admitted in the hearing before us, they have no knowledge of Staff's procedures regarding information received from investors and others. In particular, the respondents do not know the basis, if there is one, upon which Staff distinguishes between "complaints", "inquiries", or similar terms.
- [63] It would be unsurprising to any reasonable observer that Staff regularly receives complaints from investors, so the use of that word in the Kozovski Summary does not raise any red flags for us. The respondents will have the opportunity to cross-examine Ms. Kozovski at the merits hearing, so if they choose to pursue this concern with her directly, they are free to do so.
- [64] In the meantime, however, and without anything more, the mere use of the word "complaint" in the Kozovski Summary provides no basis to conclude that Staff has engaged in misconduct or that it is improperly biased against the respondents. The use of that word cannot provide the basis for the relief requested by the respondents.

D. Other relief requested at the hearing

- [65] As noted above in paragraph [18], the respondents in their written Motion seek the recusal of Ms. Johnson and of Ms. Kozovski, and the disallowance of uncorroborated evidence advanced or prepared by either of them.
- [66] At the hearing of the motion, however, the respondents asked for additional relief, including payment by the Commission of fees that the respondents paid to counsel who appeared on their behalf on October 1 and 14, 2015. The respondents say that they needed to retain counsel for those appearances because of Staff's conduct relating to the accredited investor certification. That explanation is unreasonable, including because as noted above, counsel did not raise a concern at those hearings about the incomplete page, and the respondents succeeded in opposing Staff's extension request, on grounds unrelated to that document. In any event, we do not have jurisdiction to make the order requested, so we would not have made such an order even if it had been sought on proper notice and supported by proper material.
- [67] The respondents also asked at the hearing that the Commission pay for their counsel for this proceeding and for a contemplated *Canadian Charter of Rights and Freedoms*¹¹ challenge to the Commission's governing legislation. Again, we have neither a proper basis for, nor jurisdiction to order, the requested relief.

IV. CONCLUSION

- [68] The facts relied on by the respondents do not suggest any improper conduct whatsoever by Staff. At worst, the respondents identified an inadvertent error relating to the scanning of one page of a document. That error was corrected immediately with the respondents and with the Commission, and the error caused the respondents no prejudice.

¹¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

[69] The respondents' beliefs about Staff's conduct may be sincerely held, but they are not reasonable based on the evidence before us. It is for these reasons that we dismissed the respondents' motion.

Dated at Toronto this 12th day of February, 2018.

"Timothy Moseley"

Timothy Moseley

"Robert Hutchison"

Robert Hutchison

"Deborah Leckman"

Deborah Leckman