

CITATION: Binance Holdings Limited v. Ontario Securities Commission, 2023 ONSC 4541
DIVISIONAL COURT FILE NO.: 347/23
DATE: 20230928

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MCWATT A.C.J.S.C., STEWART and MATHESON JJ.

BETWEEN:)
)
BINANCE HOLDINGS LIMITED) *Graeme Hamilton, Teagan Markin and*
) *Brianne Taylor, for the Applicant/Moving*
Applicant/Moving Party) *Party*
)
– and –)
)
ONTARIO SECURITIES COMMISSION) *Aaron Dantowitz, Katrina Gustafson and*
) *Alvin Qian, for the Respondent*
Respondent)
)
)
)
) **HEARD at Toronto:** August 10, 2023, by
) videoconference, followed by written
) submissions

REASONS FOR DECISION

THE COURT:

[1] Binance Holdings Limited seeks judicial review of an order of the Ontario Securities Commission (“OSC”) dated May 10, 2023, issued under s. 11(1)(a) of the *Securities Act*, R.S.O. 1990, c. S.5, and a related summons dated May 11, 2023. Binance also moves to vary the order of Leiper J. dated June 26, 2023, dismissing its motion for an interim stay pending the disposition of its application for judicial review.

[2] Binance operates an online crypto asset trading platform. In 2021, the OSC informed Binance of concerns about regulatory compliance. Later steps included Binance giving the OSC an Undertaking and Acknowledgement in 2022. Binance submits that the Undertaking precludes the above order and summons, among other submissions, and seeks to bring a challenge to the Summons under s. 8 of *Charter of Rights and Freedoms* for the first time in this Court.

[3] For the reasons set out below, this application is dismissed. The review motion seeking an interim stay is therefore also dismissed.

Brief Background

[4] Binance is a Cayman Islands corporation that operates an online crypto asset trading platform that it describes as the largest in the world. On that platform, users can transfer and store various digital assets. The platform has been accessible in Ontario.

[5] On March 29, 2021, the OSC issued a press release indicating that crypto asset trading platforms doing business in Ontario were required to bring their operations into compliance with Ontario securities law. Those trading platforms, including Binance, were required to contact the OSC to start compliance discussions. Binance did not do so.

[6] By letter dated April 20, 2021, OSC Staff notified Binance that they were contemplating enforcement proceedings against Binance. The letter outlined concerns that Binance was trading in and distributing securities without registering with the OSC and without filing a prospectus or obtaining an exemption, and that Binance was carrying on business as a marketplace without authorization, all contrary to the *Securities Act*.

[7] Binance began discussions with OSC Staff about regulatory compliance. In June 2021, Binance advised its Ontario users that it could no longer service them and that operations would cease in Ontario as of December 31, 2021. However, on December 29, 2021, Binance communicated to its users that, because of its cooperation with securities regulators, it was permitted to continue operating.

[8] Binance has since acknowledged that the December communication to Ontario users was incorrect. Binance also mistakenly communicated to users and OSC Staff that restrictions were in place for Ontario accounts, when Ontario users were still able to trade on the Binance platform.

[9] On January 7, 2022, OSC Staff notified Binance of their intention to bring an application for a cease trade order.

[10] After further discussions, Binance and its Canadian corporation Binance Canada Capital Markets Inc. entered into the Undertaking and Acknowledgement to the OSC, dated March 16, 2022 (the “Undertaking”). Among other things, Binance acknowledged that it had given Ontario users incorrect information and had permitted Ontario investors to continue to trade after restrictions were supposedly in place to prevent continued trading.

[11] In the Undertaking, Binance undertook to prevent Ontario users from opening accounts on the Binance platform. Binance undertook to identify existing Ontario accounts and prevent all trading in those accounts except for specific steps to, for example, close existing positions or withdraw funds. Binance undertook to wind down its Ontario business in certain products entirely. Binance further undertook to provide quarterly reports to the OSC and retain an independent third party to review Binance’s implementation of its commitments and report to the OSC.

[12] The Undertaking included a reservation of rights. Binance expressly acknowledged that the OSC and OSC Staff retained the right to bring enforcement proceedings or seek temporary orders against Binance, with some exceptions. The scope of this reservation of rights is at issue on this application and is discussed below.

[13] Binance provided quarterly reports to the OSC and retained a third party to fulfill that aspect of the Undertaking. An audit plan for the third party report, acceptable to the OSC, was agreed on. Binance continued to pursue the possibility of doing business in Canada.

[14] A draft third party report was delivered. However, it diverged from the plan, in part because Binance had refused to provide access to its live database. OSC Staff made inquiries. From the standpoint of OSC Staff, Binance was not very responsive and when responses were received they were incomplete. With respect to the live database, after several months Binance said for the first time that it had concerns about an external party having access to its database.

[15] The OSC also became aware that another regulator, the United States' Commodity Futures Trading Commission, had filed a complaint against Binance and others in the U.S. District Court for the Northern District of Illinois (the "CFTC Complaint").

[16] The OSC then commenced the investigation into Binance that is challenged in this application for judicial review.

Investigation Order and Summons

[17] By order dated May 10, 2023, the OSC initiated the investigation under s. 11(1)(a) of the *Securities Act* (the "Investigation Order"). The Investigation Order provided, among other things, that it appeared to the OSC that Binance may have engaged in conduct contrary to Ontario securities law and/or contrary to the public interest, including the following:

- (i) trading in securities without registration or an exemption from the registration requirements;
- (ii) distribution of securities without either complying with or an exemption from the prospectus requirements;
- (iii) making misleading statements to the OSC; and,
- (iv) taking steps to circumvent Ontario securities law and compliance controls, including in relation to the Undertaking.

[18] On May 11, 2023, a summons (the "Summons") was issued, requiring the production of documents and provision of information about fees and revenue earned in Ontario, Ontario accounts that remained open, and the methodology used to provide that information. The scope of the Summons is at issue on this application.

[19] On May 12, 2023, Binance publicly announced that it would withdraw from operating in Canada.

Attempt to revoke

[20] Binance applied to the Capital Markets Tribunal, asking it to revoke the Investigation Order under s. 144(1) of the *Securities Act*. On June 7, 2023, the Tribunal decided that it did not have jurisdiction to do so, with reasons to follow. Binance then commenced this application for judicial review.

[21] Binance sought an interim stay of the Investigation Order and Summons in this Court, pending the disposition of its application for judicial review. That motion was denied¹ and is the subject of Binance’s review motion under s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[22] Another potential application to revoke under the *Securities Act* first became apparent after the stay motion, when the Tribunal released its reasons for decision on jurisdiction.

[23] The Tribunal’s reasons for decision were released on July 14, 2023.² The Tribunal interpreted the 2022 amendments to the *Securities Act*, including s. 144(1) and the new s. 144.1(1) of the *Act*. The Tribunal held, at para. 18, that “there are now two parallel provisions in the *Securities Act* relating to the revocation or variation of orders. The first, s. 144(1), authorizes “the Commission” to revoke or vary a decision of “the Commission”. The second, s. 144.1(1), authorizes “the Tribunal” to revoke or vary a decision of “the Tribunal””. The difficulty was that Binance had asked the Tribunal to revoke an order of the Commission, not an order of the Tribunal.

[24] The Tribunal rejected Binance’s submission that if s. 144(1) was unavailable it would be left without an effective means of challenging a s. 11 order. The Tribunal held, at para. 39, that s. 144(1) expressly contemplated an application to the Commission for revocation or variation of an order of the Commission.

[25] The Tribunal therefore held that only the Commission, and not the Tribunal, could revoke its own order. The Tribunal therefore held that it had no jurisdiction.

[26] Even though the above Tribunal decision held that there was another route through which Binance could apply to revoke the Investigation Order and Summons, Binance did not pursue that avenue of relief. Binance submits that it did not do so given the imminent hearing of the application for judicial review and the case management directions given on the interim stay motion. However, that route was not addressed by the case management directions, which were made before the reasons for decision were released.

[27] Before this Court, the OSC does not take the position that another application should have been made, suggesting that if prior law was applied under this new legislative regime, it would have been unproductive. However, the OSC obviously could not and did not know what would have transpired if the application had been made.

¹ 2023 ONSC 3825

² 2023 ONCMT 27

[28] The relief sought in this application for judicial review is discretionary and the court is most likely to intervene where there has been a denial of justice that cannot be cured within the administrative process. Further, it is preferable to consider the issues in light of a full record and with the benefit of the reasons of the administrative decision-maker. This is particularly important when this Court is being asked to consider *Charter* issues.

[29] This Court has the discretion to proceed where another avenue for relief has not been pursued but will do so only in exceptional circumstances. The consent of the parties is insufficient. In this application, we are persuaded to exercise our discretion to proceed with respect to the first of the two issues, given the record on that issue, but not the *Charter* issue, as discussed further below.

Issues and Standard of Review for Application for Judicial Review

[30] The issues on this application are as follows:

- (1) whether the Investigation Order and Summons are foreclosed by the Undertaking, and are therefore an abuse of process and contrary to the principles of promissory estoppel; and,
- (2) whether the Summons is, in any event, overbroad and unenforceable given s. 8 of the *Canadian Charter of Rights and Freedoms*.

[31] The presumptive standard of review for judicial review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 10. However, Binance submits that this application attracts a correctness standard because of the issues of abuse of process, promissory estoppel and constitutionality, relying on *Vavilov*, at paras. 53, 60, and *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 30.

[32] The OSC submits that regardless of the standard of review, this application fails.

[33] The standard of review is further addressed below, as needed.

(1) Whether the Investigation Order and Summons are foreclosed by the Undertaking

[34] Binance describes the Undertaking as a settlement and submits that, due to its terms, the OSC cannot pursue the investigation. In turn, Binance submits as follows:

- (i) that the Investigation Order is an abuse of process and is also precluded by issue estoppel; and,
- (ii) that the monitoring terms of the Undertaking do not permit the investigation.

[35] If the Investigation Order should be quashed, as submitted by Binance, the Summons issued under it must also be quashed.

[36] In administrative proceedings, abuse of process is a question of procedural fairness: *Law Society of Saskatchewan v. Abrametz*, at para. 38. The standard of review is correctness: *Law Society of Saskatchewan v. Abrametz*, at para. 30. Similarly, the alleged error regarding promissory estoppel attracts the standard of review of correctness.

[37] The doctrine of abuse of process “engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel”: *Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 35, quoting *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para. 40.

[38] It is not disputed that the threshold to show an abuse of process is high, especially where the remedy would amount to a stay of the proceedings, in this case the investigation itself: see, e.g., *Society of Saskatchewan v. Abrametz*, at paras. 76, 83.

[39] Binance submits that it would be manifestly unfair and contrary to the interests of justice to permit the investigation to proceed given the agreement made in the Undertaking. An ample record has been put forward regarding the events surrounding the making of the Undertaking and steps taken under it.

[40] The issues raised by Binance relate to the wording of the Undertaking, and whether or not it precludes the Investigation Order. Binance’s characterization of the Undertaking as a “settlement” does not materially change the analysis. If the Undertaking precludes the Investigation Order, the Order should be quashed in this case.

[41] The Undertaking has an express reservation of rights. In the Undertaking, the OSC and OSC Staff expressly retained “the right to bring enforcement proceedings or seek temporary orders” “for any past, present or future conduct contrary to the *Act* or the public interest”, with an exception. This reservation of rights is obviously broad. Binance must show that the Investigation Order falls within the exception.

[42] The exception precludes enforcement proceedings or temporary orders “arising from the facts set out ...in the ‘Facts’ section” of the Undertaking so long as Binance “remains in compliance with the Undertaking and, has not made any misrepresentations to Staff in respect of the Undertaking”. In addition, the Undertaking provides “for certainty” that the OSC and OSC Staff may bring enforcement proceedings or seek temporary orders for “any breach” of the Undertaking or “any misrepresentation made to OSC Staff” in respect of the Undertaking.

[43] Binance submits that the Investigation Order does arise from the facts set out in the “Facts” section of the Undertaking. Paragraph 1 of the Investigation Order sets out a lengthy series of statements. There is an overlap between those statements and the “Facts” in the Undertaking. However, paragraph 1 must be read in its entirety. It set out a chronology of events and went well beyond the overlap include material matters. Paragraph 1 included, for example, these statements of fact that do not form part of the “Facts” section of the Undertaking:

- (i) that Binance operated and continues to operate the crypto currency trading platform [website] through which it offers clients the ability to trade in products that include crypto assets, instruments and contracts, described as Security Tokens and Crypto Contracts;
- (ii) that Ontarians traded Security Tokens and Crypto Contracts on the Binance trading platform and, since the Undertaking was given, the Binance trading platform continued to have a significant presence in Ontario;
- (iii) that Binance had never been registered with the OSC, had no exemption from registration, had not filed a prospectus, and had no exemption from the prospectus requirement; and,
- (iv) that on March 27, 2023, the CFTC Complaint was filed against Binance and others, including allegations that Binance and others had taken steps to circumvent U.S. regulatory requirements and relevant compliance controls.

[44] Reading the entirety of paragraph 1, along with the entirety of the Undertaking, we do not conclude that the Undertaking precludes the Investigation Order because of the overlap relied upon by Binance. The statements of fact in the Investigation Order go well beyond and include that above serious factual statements, giving rise to the investigation.

[45] Further, even that part of the exception to the reservation of rights in the Undertaking did apply, it must be read along with the rest of the exception to the reservation of rights. The exception also does not apply where Binance has made a misrepresentation to Staff in relation to the Undertaking. The Investigation Order includes an allegation that Binance has made misleading statements to the OSC.

[46] Binance submits that this Court should have regard for evidence about the circumstances surrounding the Undertaking in interpreting the Undertaking. That evidence includes, for example, the draft notice of application for a cease trading order and dialogue with OSC Staff. The OSC disagrees. We find, as submitted by the OSC, that the Undertaking is clear and that, in any event, the surrounding circumstances support the OSC's position on interpretation.

[47] Binance further submits that the reporting requirements in the Undertaking were intended to be comprehensive, precluding any additional monitoring mechanisms such as the Investigation Order or the Summons. Again, the words of Undertaking and its reservation of rights do not support this submission.

[48] The Undertaking contains an express, broad, reservation of rights, under which the OSC retained the right to bring enforcement proceedings for any past, present or future conduct contrary to the *Act* or the public interest. The exception to that reservation does not apply here. Binance has not shown that the Investigation Order is precluded by the Undertaking, let alone that it is an abuse of process.

[49] Nor is the investigation barred by the doctrine of promissory estoppel. Binance accepts the high threshold it must meet to establish promissory estoppel in the public law context and

accepts that, even if met, it is subject to an overriding public interest: *Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34, [2014] 1 S.C.R. 784, at paras. 19-20. Given the express reservation of rights in the Undertaking, discussed above, this submission does not assist Binance.

[50] The Investigation Order will therefore not be quashed. However, there remains the issue of the scope of the Summons.

(2) *Scope of Summons/ s. 8 of the Charter*

[51] Binance submits that the Summons is an unreasonable seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*.

[52] The OSC submits that the *Charter* challenge to the Summons fails at the preliminary stage of the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 S.C.R. 613. More specifically, the OSC submits that the Summons does not engage the *Charter* protection against unreasonable search and seizure because it does not require production of private communications.

[53] There is no issue that the framework for the *Charter* analysis is as set out in *Doré* and *Loyola*, above, rather than under *R. v. Oakes*, [1986] 1 S.C.R. 103. For a discretionary administrative decision that “engages the protections enumerated in the *Charter*”, “the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that [the decision-maker] is obliged to pursue.”: *Loyola*, at para. 4, citing *Doré*.

[54] The first step is therefore to consider whether the Summons issued under the Investigation Order engages s. 8 of the *Charter*. If so, there must be a balancing of rights.

[55] As set out below, we decline to exercise our discretion to consider this issue in the circumstances summarized in these reasons for decision. In short, the law shows a lowered expectation of privacy in the securities industry, not no expectation of privacy, and we do not have a record to proceed differently based on evidence. Next, we do not have reasons that sufficiently assist us on how the balancing of rights was done, assuming that it was done below. Lastly, there appears to be a route available to Binance to raise the *Charter* issues at the OSC.

[56] On whether s. 8 is engaged, Binance submits that the Summons is very broad. The Summons seeks production of “all communications” among officers, directors, employees, contractors, agents and consultants of Binance and related entities, about Ontario and Canada more generally, commencing in 2021. The form of the communications is broadly defined and includes social media. Binance submits that this is a voluminous document production demand that engages the privacy interests of thousands of employees and other individuals, and covers, for example, millions of emails.

[57] The OSC submits that there is a lack of an evidentiary foundation for the assertion that there is a significant privacy interest at stake in this case.

[58] The OSC further relies on *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3. There is no doubt that this is a key decision, setting out important general principles regarding the s. 8 *Charter* right in the securities context. However, the Supreme Court did not rule that there was no expectation of privacy. It ruled, at para. 58, that people involved in the business of trading securities “do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation.”

[59] Binance accepts that the expectation of privacy is “undoubtedly lower” in the regulatory context but submits that there is a blurred distinction between business and personal records in the modern workplace. Again, the OSC submits that this is unsupported by evidence.

[60] Although *Branch* is very important to the s. 8 analysis, *Branch* does not rule that every summons in the securities industry, regardless of its breadth, does not engage s. 8 of the *Charter*. It therefore does not rule out the need for a balancing of interests under *Doré/Loyola*.

[61] We do not have reasons for decision on the *Charter* issue. In the absence of reasons, this Court must look to the record as a whole to understand the decision to issue the Summons: *Vavilov*, at para. 137. Here, the Investigation Order does provide helpful insight into the relevant statutory objectives of the Summons but, again, there is no discussion of s. 8 of the *Charter* or the balancing of interests.

[62] Some further legal principles are put forward, but we do not conclude that they remove the need for the balancing of interests. Specifically, there is no issue that the guarantee of security from unreasonable seizure under s. 8 of the *Charter* protects a “reasonable expectation” of privacy: *R. v. McKinlay Transport Ltd.*, [1990], 1 S.C.R. 627, citing *Hunter v. Southam*, [1984] 2 S.C.R. 145, at pp. 159-160. Further, the standard of reasonableness applicable in the criminal context is not the appropriate standard in the administrative/regulatory context: *Branch*, at para. 52. Given these principles, and the impact of regulatory context set out in *Branch*, Binance may well have an uphill challenge to show a breach of s. 8, but the issue is not pre-determined by the jurisprudence.

[63] Binance also challenges the Summons on the basis that a different part of the Summons is not authorized by s. 13 of the *Act* and therefore offside s. 8 of the *Charter*. However, there are no reasons for decision that inform the interpretation of that section, which appears to be raised for the first time before this Court.

[64] We are not persuaded that we should decide the s. 8 issues in this case. As discussed above, a *Charter* challenge should be raised before the administrative decision-maker and it would come to this Court with the related evidentiary record and analysis. This is particularly important when the framework requires a balancing of interests. As well, for the s. 13 issue, this Court would be assisted by the Commission’s reasons interpreting its home statute. There remains an avenue to pursue these issues at the OSC that has not been attempted – an application to the Commission under s. 144(1) of the *Securities Act*.

[65] We therefore decline to exercise our discretion to decide the s. 8 issues in the circumstances of this application for judicial review.

Review of Interim Stay Decision

[66] Given that the application has now been decided, there is no need to address a review of the denial of an interim stay.

Disposition

[67] This application is dismissed without prejudice to Binance moving forward with an application to the Commission under s. 144(1) of the *Securities Act*. There shall be costs to the OSC in the agreed upon amount of \$15,000. The review motion is dismissed without costs given the substantial overlap in the issues.

Associate Chief Justice McWatt

Justice Stewart

Justice Matheson

Released: September 28, 2023

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