

# COURT OF APPEAL FOR ONTARIO

CITATION: Binance Holdings Limited v. Ontario Securities Commission, 2024  
ONCA 805  
DATE: 20241030  
DOCKET: M55451 (COA-24-CV-0977)

Pepall J.A. (Motion Judge)

BETWEEN

Binance Holdings Limited

Appellant (Moving Party)

and

Ontario Securities Commission

Respondent (Responding Party)

Graeme Hamilton, Teagan Markin and Natalia Paunic, for the moving party

Katrina Gustafson and Aaron Dantowitz and, for the responding party

Heard: October 24, 2024

## ENDORSEMENT

### Introduction

[1] The moving party, Binance Holdings Limited, seeks an order under ss. 6(2) and (3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, joining two appeals: (1) its appeal to the Divisional Court from an April 30, 2024 decision of the Ontario Securities Commission; and (2) its appeal to the Court of Appeal from a September 28, 2023 decision of the Divisional Court for which it was granted leave to appeal on September 13, 2024.

[2] Binance submits that the appeals are “in the same proceeding” for the purposes of s. 6(2) of the *Courts of Justice Act*, as they involve identical challenges to the constitutionality of a summons issued by an Ontario Securities Commission investigator pursuant to an investigation order under the *Securities Act*, R.S.O. 1990, c. S.5. In addition, it argues that combining the appeals comports with the administration of justice.

[3] The responding party, the Ontario Securities Commission, resists this request. It maintains that the two appeals are not “in the same proceeding” as required by s. 6(2) of the *Courts of Justice Act* and, even if they could be so considered, I should not exercise my discretion to permit the requested order combining the appeals. It argues that: such an order would result in delay; the issues at the core of the two appeals are distinct; the risk of inconsistent decisions is low; and Binance ought not to be permitted to bypass the normal appellate hierarchy that is reflective of legislative intent.

[4] For the reasons that follow, I grant Binance’s motion.

### **Background Facts**

[5] Binance operates an online crypto asset trading platform. In May 2023, the Ontario Securities Commission issued an investigation order. An appointed investigator then issued an investigative summons to Binance under s. 13 of the *Securities Act*.

[6] The *Securities Commission Act, 2021*, S.O.2021, c. 8, Sched. 9, established the Capital Markets Tribunal. As a result of amendments to the *Securities Act*, the Tribunal became part of the Act's regulatory scheme. Section 144(1) of the Act provides that "[t]he Commission may make an order revoking or varying a decision of the Commission" (emphasis added).

[7] On May 18, 2023, relying on s. 144(1) and s. 13 of the *Securities Act*, Binance applied to the Capital Markets Tribunal seeking to revoke both the investigation order and the attendant summons. The Tribunal determined that it did not have jurisdiction; only the Ontario Securities Commission had jurisdiction and the Tribunal could not exercise powers under s. 144(1) of the Act.

[8] On June 9, 2023, Binance brought an application for judicial review of the investigation order and summons to the Divisional Court. It sought an order quashing the summons as an unreasonable seizure contrary to s. 8 of the *Charter of Rights and Freedoms*. Subsequently, it also unsuccessfully sought an interim stay pending the disposition of the application for judicial review.

[9] On September 28, 2023, the Divisional Court dismissed the judicial review application without prejudice to Binance to bring an application to the Ontario Securities Commission under s. 144(1) of the Act. At para. 29, the court stated:

This Court has the discretion to proceed where another avenue for relief has not been pursued but will do so only in exceptional circumstances ... In this application, we are persuaded to exercise our discretion to proceed with

respect to the first of the two issues [whether the investigation order and summons were foreclosed by an undertaking given by Binance], given the record on that issue, but not the *Charter* issue, as discussed further below.

[10] At para. 64, the Divisional Court stated that “[t]here remains an avenue to pursue these issues at the Ontario Securities Commission that has not been attempted – an application to the Commission under s. 144(1) of the *Securities Act*”.

[11] This order of the Divisional Court is the subject matter of Binance’s appeal to the Court of Appeal. It will be perfected within 30 days of this decision being rendered.

[12] As mentioned, leave to appeal this Divisional Court order was granted by this court on September 13, 2024. Although, as is customary, no reasons were given, the proposed appeal met the threshold for leave to appeal. The proposed appeal raised issues of statutory interpretation regarding which decision maker has jurisdiction to review and quash or vary a summons issued under s. 13(1) of the *Securities Act*, an arguable issue of law that goes beyond the interests of the immediate parties and is of general public importance.

[13] As contemplated by the Divisional Court’s decision and given that it had been rebuffed by the Capital Markets Tribunal, Binance brought an application to the Ontario Securities Commission under s. 144(1) of the Act on December 11, 2023.

[14] On April 30, 2024, the Commissioner dismissed the application on the basis that the Ontario Securities Commission did not have jurisdiction under s. 144(1) to quash a summons issued by an Ontario Securities Commission investigator because a summons is not a “decision of the Commission”.

[15] This order is the subject matter of Binance’s appeal to the Divisional Court. It is scheduled to be heard on November 25, 2024.

### **Test for Combining Appeals**

[16] Sections 6(2) and (3) of the *Courts of Justice Act* govern combining appeals.

Those provisions state:

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2).

[17] The test for combining appeals is twofold. First, given the language of subsection (2), the appeals must be in the same proceeding. Provided that threshold is met, the court must then consider whether separate appeals in different courts or combining the appeals in the Court of Appeal better comports with the administration of justice: *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 D.L.R. (4th) 670, at para. 87, and *Davis v. Amazon Canada Fulfillment Services, ULC*, 2023 ONCA 634, at para. 8. Factors that may be

considered in the exercise of that discretion include: the risk of inconsistent results; the extent of overlap in the two appeals; and whether combining the two appeals is contraindicated due to different issues in the two appeals: *Davis*, at para. 9.

[18] To these factors, I would add two others: what prejudice, if any, arises as a result of a combination of appeals; and whether a combination secures the just, most expeditious and least expensive determination of the issues in the appeals on their merits. This latter phraseology derives from r. 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which is stated to apply to the *Rules*. That provision is silent on the *Courts of Justice Act*. While there are some provisions of that Act to which such a provision would be inapt, I see no reason not to consider those factors in the exercise of a discretion relating to combining appeals pursuant to s. 6(2).

[19] The first issue to consider is whether the two appeals in issue on this motion are in the same proceeding.

[20] This issue is not one of first impression for this court. In *Confederation Trust Co. v. Donofrio* (1994), 73 O.A.C. 132 (C.A.), 33 appeals arose from separate actions and some appeals lay to Divisional Court. Nonetheless, Laskin J.A. determined that he had jurisdiction under s. 6(2) of the *Courts of Justice Act* to allow all of the appeals to be heard by the Court of Appeal. Similarly, in *McLeod v. Castlepoint Development Corp.* (1997), 31 O.R. (3d) 737 (C.A.), Moldaver J.A. (as

he then was), writing for the panel, considered whether this Court had jurisdiction under s. 6(2) to hear an appeal from an order overruling a Land Titles Deputy Director's decision under the *Land Titles Act*, R.S.O. 1990, c.L.5 and an order arising from a separate application to court. The former provided for an appeal to the Divisional Court and the latter to the Court of Appeal. He wrote at para. 35:

While the matter is not entirely free from doubt, I am satisfied that this Court has jurisdiction under s. 6(2) of the *Courts of Justice Act*. In this regard, I note that both appeals relate to the same subject matter; that the grounds of appeal and legal issues raised are identical in each; that MacKinnon J. heard and disposed of the application and the appeal from the Deputy Director together and that the order under appeal incorporates both matters. I note as well that the respondents did not raise the jurisdictional issue in their written material, nor did they pursue it when it was brought to their attention by the court in oral argument. Indeed, they submitted that it would be appropriate for the court to determine all aspects of the appeal. Accordingly, in the particular circumstances of this case, I am of the view that jurisdiction lies with this Court.

[21] The moving party relies on *McLeod v. Castlepoint Development Corp.* and *Confederation Trust Co. v. Donofrio* and urges me to adopt a purposive approach that focuses on the substance of the dispute and that interprets the language in s. 6(2) as meaning appeals that relate to the same *lis* or dispute. It argues that by enacting ss. 6(2) and (3), the Legislature provided a mechanism to avoid inefficiencies, reduce costs, and avoid inconsistent results and these provisions should be interpreted in that light. It argues that both of its appeals relate to the

same dispute or *lis*, and involve identical factual and legal issues relating to the constitutionality of the summons and the jurisdiction of the Ontario Securities Commission to hear the challenges.

[22] The Ontario Securities Commission acknowledges that the parties and issues overlap but submits that the decisions are legally distinct proceedings, as they were decided by two different adjudicators following two different hearings arising from two different originating processes. It argues that the cases relied upon by the moving party were unique decisions that turned on their particular facts. It particularly relies on *Wright v. Strauss*, 2019 ONCA 844.

[23] That case involved an appeal from an order striking a notice of application challenging the transfer of a mortgage from a family company to a trust and an appeal of a second order striking a statement of claim challenging the validity of the trust. One appeal lay to the Divisional Court and the other to the Court of Appeal. This court determined that it did not have jurisdiction under s. 6(2) as the appeals involved legally distinct proceedings each with its own originating process.

[24] I find in favour of Binance on the first component of the test.

[25] Although I accept that the two cases relied upon by Binance are factually different, this court determined in both that the words “in the same proceeding” could encompass proceedings commenced by different originating processes.



Thus, the fact that two procedural routes were taken does not preclude the application of s. 6(2).

[26] In this case, both appeals involve the same parties, the same facts and the same legal issues, and they have the same legal origin, namely the investigation order and the summons. In contrast, *Wright* involves two appeals concerning distinct legal issues.

[27] In my view, Binance has met the first hurdle associated with its request for a combination order.

[28] I turn now to the second component of the test. Again, I conclude that it favours Binance's position.

[29] I agree with Binance that combining the appeals will permit this court to fully and finally resolve which body has original jurisdiction to review and quash a summons issued by an investigator under s. 13(1) of the *Securities Act*, the issue raised in both appeals. Neither the Capital Markets Tribunal nor the Ontario Securities Commission would take jurisdiction. Meanwhile, the Divisional Court said that an unpursued avenue was an application to quash the summons before the Ontario Securities Commission under s. 144(1).

[30] Moreover, there is a risk of inconsistent findings on whether the Ontario Securities Commission has jurisdiction to quash a summons under s. 144(1).

[31] Further, there are no issues that contraindicate combining appeals and no real or compelling prejudice has been identified by the Ontario Securities Commission. The request to stay the summons was refused, and combining the appeals will permit the matters to be heard by just one court rather than two, since leave to appeal the Divisional Court's order was granted by this court.

[32] Lastly, combining appeals secures the just, most expeditious and least expensive determination of the issues in the appeals on their merits. In that regard, to ensure that there is no further delay, I am ordering that the hearing of the appeals be expedited.

[33] For these reasons, the motion is granted. I order that: (1) Binance's appeal to the Divisional Court be transferred from the Divisional Court to this court; (2) the transferred appeal be heard in combination with Binance's appeal to this court; (3) both appeals be expedited; and, as agreed by the parties, the respondent shall pay costs of \$2,500 to Binance.

"S.E. Pepall J.A."