

CANADA / JUDGMENT

Binance Holdings Limited v. Ontario Securities Commission

2025 ONCA 751

COURT

Court of Appeal for Ontario

DECIDED

6 November 2025

Source: norma.lexum.com · Research copy typeset by Esheria. Not court-issued or certified.

Binance Holdings Limited v. Ontario Securities Commission

Collection

Decisions of the Court of Appeal

Date

2025-11-06

Neutral citation

2025 ONCA 751

Docket numbers

COA-24-CV-0977

Judges

Miller, Bradley; Paciocco, David M.; Coroza, Steve A.

Subject

Civil

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: Binance Holdings Limited v. Ontario Securities Commission, 2025 ONCA 751

DATE: 20251106

DOCKET: COA-24-CV-0977

Miller, Paciocco and Coroza JJ.A.

BETWEEN

Binance Holdings Limited

Applicant/Moving Party

(Appellant)

and

Ontario Securities Commission

Respondent/Responding Party

(Respondent)

Graeme Hamilton, Teagan Markin, Brianne Taylor and Natalia Paunic, for the appellant

Aaron Dantowitz and Katrina Gustafson, for the respondent

Heard: May 27, 2025

On appeal from the order of the Divisional Court (Honourable Associate Chief Justice Faye E. McWatt, Justices Elizabeth Stewart and Wendy M. Matheson), dated September 28, 2023, with reasons reported at 2023 ONSC 4541, 539 C.R.R. (2d) 13, affirming the motion judgment of Justice Janet Leiper of the Divisional Court, dated June 26, 2023, with reasons reported at 2023 ONSC 3825 and the investigation order of the Ontario Securities Commission, dated May 10, 2023 and related summons, dated May 11, 2023.

On appeal from the order of the Ontario Securities Commission, dated April 30, 2024.^[1]

Paciocco J.A.:

OVERVIEW

- [1] The appellant, Binance Holdings Limited (“Binance”) is a Cayman Islands corporation that operates an online crypto asset trading platform available to, and used by, thousands of Ontario investors. As the result of events described below, the respondent, the Ontario Securities Commission (the “Commission”) launched an investigation into Binance’s business in Ontario relating to alleged violations of the Securities Act, R.S.O 1990, c. S.5. It appointed an investigator who issued a wide-ranging summons demanding the production of documents and, depending on how the summons is interpreted, responses to interrogatories (“information”) from Binance about its operations (the “Summons”).
- [2] Binance asserts that the Summons is so overbroad as to be unconstitutional. It attempted to challenge the Summons on this and other grounds before three successive decision-making bodies: (1) the Capital Markets Tribunal (the “Tribunal”), an adjudicative body created by s. 25 of the Securities Commission Act, 2021, S.O. 2021, c. 8, Sched. 9; (2) the Divisional Court; and (3) the Commission itself. But each body declined to address fully the question of the

constitutional validity of the Summons on its merits. Binance launched appeals arising from the Divisional Court and Commission decisions.

- [3] Those appeals were joined and are now before us. For reasons that follow, I would allow the joined appeal in part.
- I do not accept Binance's claim that the Commission has jurisdiction pursuant to s. 144(1) of the Securities Act to vary or revoke the decision of a person appointed to make an investigation to issue a summons pursuant to s. 13 of the Securities Act. The decision to do so is not "a decision of the Commission", which it must be before its s.144(1) jurisdiction arises.
 - I reject Binance's contention that the Divisional Court erred by failing to set aside Leiper J.'s decision refusing to stay the Summons pending the Divisional Court decision on judicial review. Leiper J. did not err by rejecting or failing to consider the constitutional right Binance now claims, namely the right to have a review of the Summons prior to compliance.
 - I agree with Binance that the Divisional Court has jurisdiction to judicially review an investigator's decision to issue a summons pursuant to s. 13 of the Securities Act, and that the Divisional Court erred in the exercise of its discretion to decline to judicially review the constitutional arguments Binance raised.
 - Finally, even though the constitutional arguments were not adjudicated below, I agree with Binance that this is an appropriate case for us to resolve the constitutional validity of the Summons, and I would do so. In my view, the Summons issued to Binance contravenes s. 8 of the Charter because it purports to compel Binance to produce documents that the Commission has no foundation to believe may be relevant to the investigation it is conducting.

MATERIAL FACTS

Regulatory Non-Compliance

- [4] Commission staff take the position that trading platforms offering crypto assets and instruments or contracts involving rights or claims to crypto assets may facilitate trade in "securities and/or derivatives" within the meaning of the Securities Act. Therefore, on March 29, 2021, Commission staff issued a general announcement that unregistered crypto asset trading platforms doing business in Ontario were required to contact the Commission to start compliance discussions. Binance, which claims to be the largest such platform in the world, did not do so, even though it had a significant presence in Ontario and was operating a trading platform accessible to Ontario residents without registering or securing an exemption under the Securities Act.

- [5] On April 20, 2021, Commission staff notified Binance of their concerns and advised Binance directly that they were contemplating enforcement proceedings. Binance then engaged in compliance discussions with Commission staff. In June 2021, Binance advised its Ontario users that it could no longer service them and that its operations in Ontario would cease by the end of the year.
- [6] In December 2021, Binance gave assurances to Commission staff that it had placed restrictions on Ontario accounts and that those restrictions would remain in place.
- [7] Those assurance proved to be inaccurate. Ontario investors were able to continue to trade after the restrictions were supposedly in place. And on December 29, 2021, Binance announced to its Ontario users, also inaccurately, that it was now permitted to continue operating in Ontario thanks to its cooperation with securities regulators.
- [8] In response, Commission staff threatened to issue a cease trading order, but on March 16, 2022, Binance provided an Undertaking and Acknowledgement (the “Undertaking”) to the Commission, promising to prevent Ontario users from opening accounts on its platform; to identify existing Ontario accounts and prevent further trading,[2] and to wind down its Ontario operations entirely. It also agreed to provide quarterly reports to the Commission and to retain an independent third party to review the implementation of its commitments and to separately report to the Commission. The Undertaking reserved the right of the Commission to take enforcement action against Binance, except for proceedings arising out of facts that were specifically stipulated in the Undertaking, so long as Binance complied with the Undertaking and made no misrepresentations to Commission staff.
- [9] Although steps were ultimately taken by Binance to deliver a third-party report via an audit plan that would identify the closed Ontario accounts, it refused to provide the third party reviewer with access to its live database. Commission staff were dissatisfied with the draft third party report and followed up with inquiries to Binance that were not answered to their satisfaction. In March 2023, Commission staff became aware of an untested complaint made against Binance by the United States Commodity Futures Trading Commission in the Northern District of Illinois which alleged that Binance had taken steps to circumvent regulatory requirements and compliance controls. Commission staff formed the view that Binance appeared to be doing the same in Ontario.

Investigation and Issuance of Summons

- [10] On May 10, 2023, Commission staff obtained an order from a commissioner, issued pursuant to s. 11(1)(a) of the Securities Act, appointing investigators to investigate and inquire into allegations of conduct by Binance contrary to Ontario securities law and/or contrary to the public interest (the “Investigation Order”). Specifically, the Investigation Order alleged that Binance had been trading in securities without registration or exemption; distributing securities without complying with prospectus requirements; taking steps to circumvent Ontario securities law and relevant compliance controls including by breaching its

Undertaking, and that it had submitted misleading statements to the Commission.

- [11] On May 11, 2023, one of the appointed investigators, Jocelyn Wang, a Senior Forensic Accountant with the Commission, issued the Summons to Binance under the authority of s. 13 of the Securities Act which provides:

13 (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court.

- [12] The Summons required Binance to provide the Commission with “the documents and other things” listed in Schedule “A” of the Summons within a two-week period. The first three demands listed in Schedule “A” required Binance to: (1) “Confirm the total fees and other revenue earned on all Ontario accounts since the inception of Binance.com”; (2) “[c]onfirm the number of Ontario accounts remaining open on the Binance Trading Platform and the aggregate value holdings in these accounts” on various dates in 2021 and 2022, and (3) “provide a description of the methodology used” to answer the first two demands.

- [13] The fourth demand listed in Schedule “A” stated:

For the period of January 1, 2021 to present, provide all communications regarding Ontario (or Canada generally) among directors, officers, employees, contractors, agents and consultants of Binance Holdings Limited and related entities

- [14] This fourth demand went on to provide a wide non-exclusive description of the form of “communications” that could include “e-mails, letters, [and] chats/texts on messaging platforms (e.g. Signal, WhatsApp, Telegram, Slack, etc.)”. The Summons directed that the requested communications “shall include”, but again, not be “limited to”, “those among directors, officers, employees, contractors, agents and consultants of Binance regarding” a list of events and activities. The non-exclusive list of events and activities included account opening and trading procedures, staff training, hiring and the preparation of quarterly reports pursuant to the Undertaking.

- [15] On May 12, 2023, Binance announced that it was withdrawing from Canada and asked users of its platform to close their positions by September 30, 2023, notifying them that as of October 1, 2023, all Canadian users would be placed into liquidation mode only.

Procedural History

- [16] On May 18, 2023, Binance filed an application with the Tribunal seeking an order revoking the Investigation Order and the Summons pursuant to s. 144(1) of the Securities Act. On June 7, 2023, the Tribunal found that it did not have jurisdiction to make the requested order under s. 144(1). It issued reasons on July 14, 2023, in which it explained that s. 144(1) authorized the “Commission” to revoke its own decisions, and the Tribunal, which had been assigned adjudicative functions to ensure a clear separation from the regulatory and policy functions of the Commission, was not the “Commission”. To buttress its conclusion that it could not review Commission decisions under s. 144(1), the Tribunal noted that the Tribunal had its own parallel jurisdiction to vary or revoke its own decisions under s. 144.1(1), a separate provision.
- [17] Binance simultaneously filed an appeal of the Tribunal’s jurisdiction decision with the Divisional Court, and an application for judicial review of the Investigation Order and the Summons.
- [18] It then sought an order from a single Divisional Court judge to stay the Investigation Order and Summons pending a determination of its appeal of the Tribunal decision and judicial review application. On June 8, 2023, it obtained an “interim stay” from O’Brien J. pending the final disposition of its stay application.
- [19] With case management assistance, the parties agreed to simplify the proceedings. Binance abandoned its appeal of the Tribunal decision,[3] and on June 21, 2023, it argued only the stay application pending the resolution of its judicial review application before Leiper J. On June 26, 2023, Leiper J. denied the stay application after finding that the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 was not satisfied.
- [20] On June 29, 2023, Binance then brought an urgent motion to the Divisional Court to set aside Leiper J.’s order not to stay (the “set aside motion”). The Divisional Court refused to schedule an urgent motion and directed that the set aside motion would be heard along with Binance’s judicial review application. Since the interim stay from O’Brien J. was no longer in effect, Binance had no choice but to begin complying with the Summons. It has since disclosed tens of thousands of pages of material on a rolling basis.
- [21] On August 10, 2023, the Divisional Court heard the judicial review application along with the set aside motion.
- [22] With respect to the judicial review application, Binance argued that the investigation was foreclosed by the terms of the Undertaking and that it was therefore an abuse of process and contrary to the principles of promissory estoppel for the Commission to pursue the Investigation Order and for the investigator to issue the Summons (the “abuse of process and estoppel arguments”). It also argued that the Summons was overbroad, contrary to s. 8 of the Charter, and that by including demands for information, the Summons was not authorized by s. 13 of the Securities Act. Moreover, since the Summons engaged Charter interests, the

Commission, as the discretionary decision-maker, was required pursuant to the decision in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, to balance the Charter interests at stake against the relevant statutory objectives (the “Charter arguments”).

- [23] On September 28, 2023, the Divisional Court released its decision denying the judicial review application. It exercised its discretion to resolve the abuse of process and estoppel arguments and rejected them, finding that the reservation in the Undertaking permitted the investigation. But it decided not to resolve Binance’s Charter arguments because Binance had not brought them before the Commission.
- [24] The question of whether Binance should have brought a s. 144(1) application before the Commission before seeking judicial review was addressed at the hearing of the judicial review application. Binance advanced an explanation for not doing so, and the Commission took the position that a s. 144(1) application to the Commission would not have been productive, in any event, because the Commission had already determined in prior decisions that s. 144(1) does not provide an avenue for reviewing a summons that has been issued during an investigation.
- [25] In coming to this decision not to engage with the Charter arguments, the Divisional Court interpreted the Tribunal as having concluded in its prior decision that s. 144(1) of the Securities Act “expressly contemplated an application to the Commission for revocation or variation of the order of the Commission.” Without exploring whether that conclusion was correct, it declined to resolve Binance’s Charter challenge because Binance had not pursued this avenue of relief. It explained that the Divisional Court is “most likely to intervene where there has been a denial of natural justice that cannot be cured within the administrative process”. It remarked that, “it is preferable to consider the issues in light of a full record and with the benefit of reasons of the administrative decision-maker”, particularly with respect to Charter issues.
- [26] Because the judicial review application had been determined, the Divisional Court dismissed the set aside motion without analysis. Shortly after, Binance filed an application for leave to appeal the Divisional Court decision to this court.
- [27] On December 11, 2023, Binance also brought a s. 144(1) application to the Commission to revoke or vary the Summons. It obtained a ruling from the Commission on April 30, 2024. In that decision Commissioner Kordyback found that the Divisional Court had not made a binding determination that the Commission in fact had jurisdiction to make the order Binance was seeking, and that the jurisdictional issue was therefore an “open question”. After engaging in a close analysis of the jurisdictional issue, she concluded that the Commission did not have jurisdiction under s. 144(1) to revoke or vary the Summons.
- [28] On May 30, 2024, Binance appealed the Commission’s decision to the Divisional Court.

[29] And in September 2024, its application for leave to appeal the Divisional Court decision on the judicial review and set aside motion to this court was granted. On October 30, 2024, Pepall J.A. granted a motion elevating Binance’s appeal of the Commission decision dated April 30, 2024, from the Divisional Court to this court, and joined it with the appeal of the Divisional Court decision of September 28, 2023, resulting in the appeal that is now before us.

THE ISSUES

[30] The parties have expressed the issues under appeal differently. In my view they can best be stated and most efficiently addressed, as follows:

A. Did the Commission err in finding that it did not have jurisdiction under s. 144(1) of the Securities Act to revoke or vary the Summons?

B. Did the Divisional Court err in declining to set aside the denial of the stay pending judicial review?

C. Did the Divisional Court err in declining judicial review of the Charter arguments?

D. Should this court address the Charter arguments, and if so: (a) is the Summons an unreasonable seizure; (b) did the Summons go beyond the authority to investigate provided in s. 13 of the Securities Act, and (c) was the discretion to issue the Summons exercised reasonably?

MATERIAL LEGAL PRINCIPLES – SECTION 8 OF THE CHARTER

[31] The last three grounds of appeal depend upon Binance’s claim that it is entitled to rely on s. 8 of the Charter, “the right to be secure against unreasonable search or seizure”, to challenge the Summons. It will assist the analysis that follows by addressing the application of s. 8 before engaging the issues on appeal. I will reserve my discussion of other legal principles pending my discussion of the issues to which they pertain.

[32] Section 8 of the Charter applies if state agents undertake a “search” or “seizure” in circumstances that compromise the reasonable expectation of privacy of the Charter claimant: *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60. It is settled law that an enforceable demand for production of business records made by state agents is a “seizure” within the meaning of s. 8: *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at paras. 59-60. It is also settled law that the holder of business records such as Binance has a reasonable expectation of privacy in the business records that are targeted by the seizure, but that this reasonable expectation of privacy is low: *Branch*, at para. 62.

[33] There are several reasons why Binance has only a low expectation of privacy in business records that are being compelled by a production order of the Commission, a securities regulator.

- [34] First, it is widely known to those involved in trading securities that the business is closely regulated to secure investor protection, market efficiency and public confidence in the financial system: Branch, at para. 54.
- [35] Second, business records tend to attract a diminished degree of privacy because they do not normally “deal with those aspects of individual identity which the right of privacy is intended to protect”: Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 517-18.
- [36] Third, in the context of securities trading, in order to enforce compliance with regulation, investigators need the ability to demand production of business records, even without reasonable and probable grounds or reasonable suspicion: Branch, at para. 53. And finally, the compelled production of documents is a significantly less intrusive means of obtaining documentary evidence than other alternatives: Thomson, at p. 594.
- [37] As low as that expectation is, it does not mean that Binance has “no expectation of privacy” in the context of a seizure of its business records through a production order, or that “there is no limitation to the potential scope of an order to produce documents which can be validly issued”: Thomson, at p. 530. Even where there is a “very low expectation of privacy”, the ability of regulators to compel the production of documents and information is limited to terms that are fair and reasonable, because “[t]hat is what s. 8 of the Charter is all about”: A.D. Reid and A.H. Young, “Administrative Search and Seizure Under the Charter” (1985) 10 Queen’s L.J. 392, at pp. 398-400, cited with approval in R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, at p. 646, per Wilson J.
- [38] Binance’s s. 8 rights are therefore engaged by the compelled production of its business documents by the Commission through the Summons that is being challenged.
- [39] I reject Binance’s supplementary claim that its reasonable expectation of privacy is heightened in this case because the demand in the Summons includes chats and texts on social media platforms which may include personal messages sent or received using these platforms. It is true that there is a higher reasonable expectation of privacy in personal documents; however, Binance has done nothing to show that any such personal messages were sent or received. Its claim that they were is a bald assertion. Moreover, I agree with the Commission that a regulated party cannot be permitted to increase the intensity of its expectation of privacy in its business platforms by allowing them to be used for personal purposes.
- [40] In summary, Binance is entitled to rely upon s. 8 of the Charter to protect the modest but reasonable expectation of privacy it has in its business documents from unreasonable seizure. In general terms, s. 8 requires that: (1) the search or seizure must be authorized by law; (2) the law itself must be reasonable, and (3) the search or seizure must be carried out in a reasonable manner: Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 48. It is trite law that the criminal law standards for a reasonable search or seizure identified in Hunter v. Southam Inc., “will not usually be the

appropriate standard for a determination made in an administrative or regulatory context”: Branch, at para. 52. This is primarily because of the lower expectations of privacy that operate in the regulatory context, and it is particularly true in the case of production orders for documents, which are far less intrusive than searches and seizures performed directly by state agents: Branch, at paras. 58, 60-61.

[41] I will return below to the limited rights that Binance has under s. 8.

ANALYSIS

A. Did the Commission err in finding that it did not have jurisdiction under s. 144(1) of the Securities ACT to revoke or vary the summons? [42] Binance makes two submissions relating to the jurisdiction of the Commission to make the requested s. 144(1) order. First, it argues that the Divisional Court resolved this question in its September 28, 2023 panel decision by concluding that the Commission has jurisdiction under s.144(1) to revoke or vary summonses and therefore the Commission erred by treating the issue as open. Second, it urges that correctly construed, s. 144(1) provides the Commission with jurisdiction to make the order, and therefore the Commission erred in deciding otherwise. I would not accept either of these arguments.

- (1) Did the Divisional Court find that the Commission had s.144(1) jurisdiction to revoke or vary a s. 13 summons? [43] The Divisional Court did not find affirmatively that the Commission had jurisdiction to make the s.144(1) order that Binance was seeking. It relied on what it concluded to be the Tribunal’s finding to this effect without engaging in any examination of s. 144(1). Nowhere in its decision did the Divisional Court identify an avenue for decision open to Binance that Binance had failed to use. Instead, it said that “[t]here remains an avenue to pursue these issues at the OSC that has not been attempted” (emphasis added). The selection of the word “attempted” suggests recognition by the Divisional Court that this attempted step could fail. Moreover, when it dismissed the Commission’s submission that an application to the Commission would not be productive given Commission case law holding that the Commission does not have s. 144(1) jurisdiction, the Divisional Court acknowledged that “the [Commission] obviously could not and did not know what would have transpired if the application had been made.” This, too, suggests that the Divisional Court viewed the issue as open. For these reasons I do not accept that the Commission erred by failing to follow a binding decision of the Divisional Court that the Commission had jurisdiction to make the requested order. There was no such binding decision.
- (2) Did the Commission err in its interpretation of the statute? [44] I am also persuaded that Commissioner Kordyback correctly interpreted the statute in finding that the Commission does not have s. 144(1) jurisdiction to vary or revoke a s. 13 summons issued by an appointed investigator. Section 144(1) of the Securities Act provides, in relevant part:

144(1) The Commission may make an order revoking or varying a decision of the Commission, on the application of the Chief Executive Officer of the Commission or a person or company affected by the decision, if in the Commission's opinion the order would not be prejudicial to the public interest. [Emphasis added.]

[45] I will begin by expressing my disagreement with a general contextual argument that Binance advances, namely that, given the recognition by the Supreme Court of Canada in *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22, 492 D.L.R. (4th) 613, at para. 90 of the important role administrative tribunals have in vindicating Charter rights, s. 144(1) should be interpreted to enable the Commission to vindicate Charter rights by revoking or varying a summons unreasonably issued by an appointed investigator.

[46] As Rowe J. explained at paras. 89-90 of *York Region*, tribunals play a “primary role in the determination of Charter issues falling within their specialized jurisdiction” (emphasis added). It follows that if a matter does not fall within the specialized jurisdiction of a tribunal, the tribunal does not play this role. He also explained at para. 90 that “Charter rights can be effectively vindicated [by tribunals] through the exercise of statutory powers and processes”. It follows that the Charter role that Rowe J. describes depends upon the scope of the tribunal's specialized jurisdiction and statutory power. It would therefore be circular, and incorrect, to rely upon the importance of a tribunal's role in vindicating Charter rights as a factor in defining the reach of its specialized jurisdiction and statutory power. The statutory discretion of the Commission provided by s. 144(1) is to be identified using the ordinary principles of statutory interpretation.

[47] In my view, Commissioner Kordyback applied those principles correctly. She identified them accurately and began with an examination of the ordinary, grammatical meaning of the provision, when read in the context of the entire statute: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. She found correctly that the opening phrase in s. 144(1), the “Commission may make an order revoking or varying a decision of the Commission”, imposes a jurisdictional constraint on the kind of decisions that can be revoked or varied. She noted, again correctly, that the issue before her was whether a summons is “a decision of the Commission”. She then recognized that s. 11(1) of the Securities Act authorizes the Commission to “appoint one or more persons to make such an investigation”, whereas, in contrast, s. 13 authorizes, a “person making an investigation or examination under section 11 or 12” (emphasis added) to issue a summons. She noted that both “Commission” and “person” are defined terms in s. 1(1) of the Securities Act. “Commission” is defined as “the Ontario Securities Commission”, and makes no reference to persons, whereas “person” is defined as including “an individual”. She therefore found that whereas the decision to appoint an investigator pursuant to s. 11(1) is a decision of the Commission, a decision to issue a summons pursuant to s. 13 is a decision of the person appointed, and not of the Commission. I agree with this reasoning.

- [48] Commissioner Kordyback went on to find that the definition of “decision” under s. 1(1) of the Securities Act “bolsters this interpretation”. The definition of “decision” is limited to “decisions of the Commission, the Tribunal or a Director”. She concluded that since the choice to issue a s. 13 summons is a decision of the person appointed to make an investigation and not of the Commission, it is not a “decision” within the meaning of s. 1(1). In this regard, she expressed agreement with an earlier Commission decision in *B (Re)*, 2020 ONSC 21, that a summons is not a “decision of the Commission” or a “Director”, and with the outcome in *Universal Settlement International Inc. (Re)*, (2003), 26 O.S.C.B 1307, aff’d 67 O.R. (3d) 670 (Div. Ct.), another Commission decision that came to the same conclusion. In my view, the plain language of the provisions supports this interpretation.
- [49] Binance argues, to the contrary, that when the statute is read in its entirety it must be recognized that the investigator “is the Commission” for the purposes of s. 144(1) because the statute makes plain that the investigation is undertaken for Commission purposes and the Commission exercises control over the results of the investigation. For example, the Commission has exclusive right to control the fruits of the investigation (s. 16(2)); the Commission Chair may require the investigator to provide a report (s. 15(2)), and it is the Commission that has authority to move for a finding of contempt if a summons is not complied with (s. 13(1)). Binance suggests that Commissioner Kordyback failed to recognize that the appointed investigator conducts their investigation “as the Commission” because she focused unduly on the language of the provision and failed to look at the substance of the entire statute. I disagree. The fact that the investigation is done in aid of the Commission’s work and the Commission ultimately controls the fruits of the investigation does not make the decision to issue a summons a Commission decision. As I have indicated, the plain meaning of the provisions indicates otherwise.
- [50] So, too, does the apparent scheme of the Securities Act. Section 11(1) empowers the Commission to “appoint” a person or persons to make an investigation “by order”. An order of appointment is “to choose someone officially for a job or responsibility”: *Cambridge Dictionary* (online edition). A formal act of appointment would not be needed if the Commission was going to conduct the investigation itself. It could simply assign the task within its organization, without the exercise of a statutory power of appointment. In my view, the only sensible explanation for a provision authorizing the Commission to appoint an investigator or investigators is that the legislators sought to create a separation between those who investigate, on the one hand, and the Commission, the body with regulatory authority over the matter investigated, on the other. I therefore disagree with Binance. In my view, an investigator does not conduct the investigation “as the Commission”.
- [51] Finally, Binance relies on the policy sense in placing applications for review before the Commission to support its interpretation. It argues that since applications to the Commission would be an appropriate, more expeditious and less expensive mechanism for reviewing investigative summons than a court application would be this court should interpret s. 144(1) as conferring that authority. Even if Commission review may be

preferable to judicial review as a policy matter, this consideration cannot drive whether the Summons is a decision of the Commission since there is no basis for giving the legislation a purposive interpretation to achieve this outcome. It would not be appropriate to do so in my view, both because it is not an interpretation the plain language of the statute can bear, and indications of legislative intention are to the contrary.

- [52] The Capital Markets Modernization Taskforce, in its final report of January 2021, at pp. 100-02, explicitly considered recommending that the Commission should have the power to review investigative summonses but declined to make that recommendation, balancing concerns about compromising and unduly delaying compliance. In its recommendations, it did suggest to the Minister that consideration should be given to “whether there is a need for a mechanism for parties to escalate summons-related issues beyond the CEO[4] potentially to the [Tribunal].” The Securities Commission Act, 2021, which created the Tribunal in March 2021, was introduced for the purpose of implementing recommendations made in the Capital Markets Modernization Taskforce report. The legislature clearly accepted the recommendation to create the Capital Markets Tribunal, but it did not change the relevant provisions of the Securities Act or recognize a right to have summonses reviewed by the Commission or Tribunal.
- [53] In my view, Commissioner Kordyback interpreted the provisions correctly. I would dismiss this ground of appeal.

B. Did the Divisional Court err in declining to set aside the denial of the stay pending judicial review? [54] The decision in *Hunter v. Southam Inc.* imposes a *prima facie* warrant requirement in criminal cases, requiring reasonable searches or seizures to be judicially authorized in advance. The parties agree that this requirement does not generally apply in regulatory cases, including in this case. However, Binance argues that in regulatory cases s. 8 includes a lesser, related “right to a reasonable opportunity to challenge a regulatory production demand” before being required to comply with it. It argues that the Divisional Court erred in denying its motion to set aside Leiper J.’s decision not to stay the Summons pending judicial review without recognizing this right.

- [55] This appeal is not a direct appeal of Leiper J.’s decision. Still Binance attempts to parlay Leiper J.’s alleged “error of law” in failing to recognize its claimed constitutional right to challenge the Summons before compliance into a challenge to the Divisional Court’s decision to deny its set aside motion. It makes two related submissions. First, it argues that the decision to dismiss its set aside motion without considering the motion on its merits was wrong because it prevented the Divisional Court from recognizing and addressing Leiper J.’s “error”. Second, it argues that it was an error for the Divisional Court to deny its set aside motion and leave the Summons in force given that the “required balancing” of Binance’s s. 8 rights “had not yet been adjudicated” at the time the stay was sought. I would not give effect to this ground of appeal, for two reasons.

- [56] First, the stay that Binance sought before Leiper J. would have put a halt to the Investigation Order and the Summons pending the Divisional Court’s judicial review decision. In my view, even if that stay had been granted it would have expired with the release of the Divisional Court decision. Since the requested stay would have no practical effect going forward, there was no point in the Divisional Court addressing the set aside order on its merits and it was not required to do so before dismissing the set aside motion.
- [57] Second, both of Binance’s arguments in favour of this ground of appeal are based upon its claimed constitutional right in regulatory cases to a reasonable opportunity to challenge a production order before compliance. I am not persuaded that this “right” even exists. In my view, the relevant authorities hold no more than that the availability of “oversight” is an important factor in assessing whether a seizure was reasonable: Goodwin, at para. 71. I will explain.
- [58] The decision that Binance relies upon most heavily in advancing its claimed constitutional right is Thomson, which addressed the constitutional validity of s. 17(1) of the Combines Investigation Act, R.S.C. 1970, c. C-23 (now the Competition Act), which authorized the Restrictive Trade Practice Commission to order the production of documents during an investigation. Specifically, Thomson considered the impact that s. 17(3) of the Act had on the constitutionality of s. 17(1). Although, by its terms, s. 17(3) operated by preventing a party from being punished for non-compliance with a s. 17(1) order, Wilson J. also characterized s. 17(3) as an opportunity to “challenge the validity of the order before producing the documents”: Thomson, at pp. 492-93, 495. I will therefore treat Thomson as an authority addressing the role that a right to challenge a production order before compliance plays in the s. 8 analysis.
- [59] Although there was variation in the approaches taken by members of the panel in Thomson with respect to this role, in Goodwin, Karakatsanis J. cited Thomson before explaining that “the availability of judicial supervision” is one of certain “considerations that may be helpful in the reasonableness analysis”: Goodwin, at para. 57. It follows that Karakatsanis J. did not interpret Thomson as holding that there is a constitutional right in regulatory cases to judicial supervision before compliance with orders to produce documents.
- [60] This reading of Thomson is entirely consistent with the analysis undertaken by a plurality of three of the five judges who decided the case, namely Wilson, Lamer, and L’Heureux-Dubé JJ. Wilson J. stated, “The fact that an individual can challenge the validity of the order before producing the documents goes, in my opinion, not to the question whether a seizure has occurred but to the question of whether the seizure is a reasonable one.” See Thomson, at p. 495. Lamer J. expressed agreement with Wilson J.’s s. 8 analysis: Thomson, at p. 442. And L’Heureux-Dubé J. also addressed the role that s. 17(3) played in “[a]ssessing the reasonableness of the invasion of privacy resulting from [a s. 17(1) order]”, describing it as “a safeguard”: Thomson, at pp. 593, 595. In my view, each of these judges therefore accepted that the availability of judicial review before compliance is a relevant factor in a s. 8 analysis but did not find it to be a free-standing constitutional right.

- [61] The positions taken by the remaining two judges in Thomson are nuanced, and when read carefully do not support the proposition that pre-compliance judicial supervision is a constitutional requirement. La Forest J. comes the closest to finding that it is a constitutional right, given that he referred to the opportunity to challenge a s. 17(1) order by judicial review as “an adequate guarantee against potential abuse of power”: Thomson, at p. 535. But La Forest J. did not address at what point the opportunity to challenge an order by judicial review must occur, or what form it must take. For his part, Sopinka J. found that the availability of oversight through s. 17(3) prevented the production order made under s. 17(1) from qualifying as a seizure within the meaning of s. 8: Thomson, at pp. 614-15. There was therefore no room for him to consider whether judicial oversight is a constitutional right, and his decision cannot fairly be read as supporting the proposition that it is. In any event, since three of five judges in Thomson treated the absence of judicial review as no more than a factor in assessing reasonableness rather than a right, the Thomson decision does not recognize the right that Binance claims.
- [62] In my view, the remaining cases relied upon by Binance do not support the proposition that Binance advances either. None of them proclaim a constitutional right to judicial oversight before compliance, and all treat it instead as a factor in assessing the reasonableness of the seizure in the case at hand: see, *Bogaerts v. Ontario (Attorney General)*, 2019 ONCA 876, 448 C.R.R. (2d) 1, at para. 42; *Law Society of Alberta v. Sidhu*, 2017 ABCA 224, 413 D.L.R. (4th), at para. 25; *Power Workers’ Union v. Canada (Attorney General)*, 2024 FCA 182, 498 D.L.R. (4th) 504, leave to appeal refused [2025] S.C.C.A. No. 28, at paras. 126, 128.
- [63] I am therefore persuaded that there is no freestanding constitutional right to challenge a regulatory production order. Judicial oversight is simply a consideration, albeit an important one, in determining whether a search is reasonable when a s. 8 challenge is being undertaken.
- [64] In my view, this conclusion completely undercuts Binance’s submission that the Divisional Court was obliged to consider the set aside motion on its merits because Leiper J. “failed to recognize or give effect to the right under s. 8 of the Charter to challenge a regulatory production demand prior to being required to comply with it.” Since there is no such right, Leiper J. did not err by failing to recognize that right and the Divisional Court did not err by failing to identify Leiper J.’s “error” through consideration of the set aside motion on its merits.
- [65] Similarly, since no such “right” exists, the “required balancing” that Binance claims the Divisional Court failed to consider was not “required”.
- [66] I would dismiss this ground of appeal.

C. Did the Divisional Court err in declining judicial review of the Charter arguments? [67] I am persuaded that the Divisional Court erred in principle in declining judicial review of Binance’s Charter arguments relating to the constitutional validity of the seizure. Although it would have been entitled to deny judicial review on the basis that Binance has an alternative path to

obtaining adequate relief on these issues, it denied judicial review based on a mere possibility that Binance might have an alternative path to obtaining relief. It also did so without any exploration of the adequacy of that relief if it did prove to be available. In my view, this was not a proper basis for exercising discretion to deny judicial review. I am also persuaded that even if it had not been an error in principle for the Divisional Court to deny judicial review on the basis it did, its decision to do so was an unreasonable exercise of discretion. I would not defer to its decision.

[68] I recognize that judicial review “has always been understood to be discretionary” and that “the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded”: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 37. This does not mean that the discretion not to undertake judicial review is immune from appellate oversight. Rather, “the exercise of discretion can be set aside when a judge ‘considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion’”, or when a judge declines judicial review “on the basis of a ‘wrong principle’”: *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, at para. 41, referring to *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paras. 39, 112.

[69] To be sure, there is a “well-established discretion to decline to undertake judicial review when some other, more suitable remedy is available” (emphasis added): *Strickland*, at para. 1. As Cromwell J. put it in *Strickland*, at para. 40, “[o]ne of the discretionary grounds for refusing to undertake judicial review is that there is an adequate alternative” (emphasis added). The test that he adopted for denying judicial review on this basis is premised on there being an alternative remedy available, as it asks: “is the alternative remedy adequate in all the circumstances to address the applicant’s grievance?” (emphasis in original): *Strickland*, at para. 42. There are therefore two parts to the test, the necessarily implicit part that there must be an alternative basis for obtaining the relief sought, and the second explicit part that requires that alternative basis to be “adequate”. It is instructive that in *Strickland*, before finding that deference should be given to a decision to decline judicial review based on an adequate alternative remedy, Cromwell J. engaged in a close, careful, and complete analysis of the jurisdiction of the proposed alternative decision maker (provincial superior courts) to address the vires of the Federal Child Support Guidelines, SOR/97-175. It was only after doing so and finding that the Federal Court’s premise that the provincial superior courts had such jurisdiction was “correct” that he deferred to the discretionary determination of the Federal Court to decline judicial review based on an alternative adequate remedy.

[70] As I have explained in para. 67 above, in this case, the Divisional Court declined judicial review of the constitutional issues without finding that Binance had access to an alternative remedy from another tribunal, on the basis that Binance had not attempted to have the Commission exercise jurisdiction to grant an alternative remedy. And it did so without exploring whether any remedy the Commission might provide would be “adequate”. It

therefore exercised its discretion to deny judicial review based on the mere possibility of an alternative remedy, rather than on the basis that there was an adequate alternative remedy. It failed to apply either of the two parts of the Strickland test.

- [71] The Commission argues that the Divisional Court was not required to apply the Strickland test in exercising its discretion because Cromwell J. made clear in that case that courts are not required to apply the Strickland factors as a “checklist”: Strickland, at para. 43. I do not accept this submission. Cromwell J. prefaced that comment, at para. 42, by making clear that the factors he was referring to were “a number of considerations” that he had listed as “relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application.” Those principles have nothing to do with the first part of the Strickland test, namely, whether there an alternative remedy exists. Moreover, although Strickland holds that the considerations listed in para. 42 need not be used as a checklist when applying the second part of the test by inquiring into the adequacy of an alternative remedy, it does not hold that a court is entitled to disregard entirely the adequacy of the proposed alternative remedy. Strickland requires that this issue be resolved, but the Divisional Court did not do so.
- [72] I am therefore persuaded that the Divisional Court erred in principle in declining judicial review, and I would allow Binance’s appeal of its decision on this basis.
- [73] In the alternative, I am persuaded that even if these shortcomings had not amounted to an error in principle, the decision of the Divisional Court to decline to undertake judicial review on the constitutional issues in the circumstances of this case was nonetheless an unreasonable exercise of discretion, not warranting deference. The Divisional Court was aware of the Commission’s position that an application to the Commission would be unproductive because it had already ruled at least twice that it did not have the jurisdiction to revoke or vary a summons. The Divisional Court was also aware that there was no stay of the Summons in place and that Binance was seeking a ruling on the constitutional validity of the Summons before engaging the expensive and time-consuming enterprise of delivering masses of documents within a short timeline. The Divisional Court certainly understood that if it declined judicial review Binance would be obliged, on pain of a contempt hearing, to continue to comply with the Summons that it believed to be unconstitutional until the Commission could render a decision on its jurisdiction at some unknown point in the future. Finally, the Divisional Court had to have been aware that if the Commission ultimately declined jurisdiction to provide an alternative remedy, no record of proceedings would be created addressing the constitutional issue, and no decision would be made on the merits by an administrative decision-maker. The application before it would therefore likely return on much the same record that the Divisional Court already had before it, after further delay and expense.
- [74] Yet the Divisional Court chose to accept these risks based on nothing more than speculation that requiring Binance to bring its s. 144(1) application to the Commission could possibly produce a more complete record and result in a decision of the regulator. In my view, it was

not reasonable for the Divisional Court to undertake these risks without resolving whether the Commission in fact had jurisdiction, and without considering the adequacy of the Commission's ability to respond to the concerns that Binance was raising. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 27, the Supreme Court affirmed that, "Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers." In my view, the decision to deny Binance the opportunity to do address that tension without first determining that a s. 144(1) application to the Commission was an alternative and adequate mechanism for doing so, was not a reasonable exercise of discretion.

[75] I would allow this ground of appeal.

D. Should this Court address the Charter arguments? [76] Given that the court below erroneously declined to resolve issues that were before it, those undecided issues would ordinarily be sent back for consideration. I would not do so in this case. I would exercise the authority of this court provided by s. 134(1)(a) of the Courts of Justice Act, to make an order that could have been made by the tribunal appealed from, by resolving the constitutional validity of the Summons.

[77] The constitutional issues in this case turn largely on the breadth of the Summons, which can be determined on its face, along with submissions about the nature and relevance of what is being sought. Those submissions were made before us. This is also an appeal from the Divisional Court involving judicial review. It is not a case such as *Mathur (Litigation guardian of) v. Ontario*, 2024 ONCA 762, 173 O.R. (3d) 81, leave to appeal refused [2024] S.C.C.A. No. 534, at para. 76, where this court declined to decide an application because of the institutional factfinding advantages of the court below. The Divisional Court does not have material institutional advantages on the constitutional issues in the circumstances of this case. If the matter is sent back, they will have much the same record as is now before us.

[78] I recognize that by deciding the constitutional issues, one level of appeal or review will be eliminated, and we will not have the benefit of a decision below to aid us in our decision but there are two countervailing considerations. First, there is no right of appeal to this court from any decision the Divisional Court may arrive at. Leave would be required. It is not as though by deciding the Charter issues without the benefit of prior adjudication we would be depriving either party of a right of appeal. Second, Binance has been trying to have these constitutional issues resolved since May 2023, and has expended resources and time at three levels of tribunal, yet still lacks any response to the questions it has raised more than two years later. I do not accept the Commission's position that Binance is suffering self-inflicted delay because of the procedural choices it has made. None of the efforts it has employed were irresponsible.

- [79] I recognize that these outstanding issues have not delayed the investigation after the stay pending judicial review was denied. However, they continue to hang over the investigation, creating uncertainty relating to the ultimate enforcement of important market protection legislation through this investigation. If we send the matter back, there will be a further period of delay during which the Commission will have control over Binance documents that Binance claims it should not have. We are equipped to resolve these issues. I would do so.
- (1) Is the Summons an unreasonable seizure? [80] I am persuaded that the power of an appointed investigator to issue a production order under s. 13 is limited to documents that may be relevant to an inquiry that is properly undertaken pursuant to the Securities Act. A seizure that purports to compel the production of documents in the absence of a reasonable foundation to believe they may be relevant is therefore overbroad and unreasonable, contrary to s. 8 of the Charter.
- [81] In this case, the inquiry that was being undertaken was described by the Commission in commendable detail in the Investigation Order, which set out both the events of interest and the Commission's concerns about Binance's regulatory non-compliance. However, the Summons demanded production, without limitation, of all communications between virtually anyone that may have managed, been employed by, or done work for either Binance or its related entities over a two-and-a-half-year period relating not only to Ontario but to all of Canada, regardless of the subject matter of those communications. This demand, enforceable by the threat of contempt proceedings, is staggering in its breadth and in my view was made without apparent concern about the relevance of what was being demanded, beyond mere speculation that there could be something relevant that would otherwise be missed. I am therefore persuaded that the s. 13 Summons issued in this case is unconstitutionally overbroad.
- [82] The Commission defended the breadth of the Summons with what appear to be alternative positions. It argued first in its factum that there are no restrictions in the Commission's power under s. 13 to compel the production of documents relating to "minimal intrusion, necessity or relevance". This position is untenable, and I would reject it, for reasons that follow. It also argued that in any event, the documents it demanded were relevant to the inquiries it was conducting. I would also reject this submission.
- [83] I will begin by returning to the principles that apply in assessing the reasonableness of searches and seizures in the regulatory context. As I have explained, the decision in *Hunter v. Southam Inc.* outlined the principles that operate in identifying the reasonableness of a search in criminal cases. Those principles were helpfully distilled by Wilson J., in *McKinlay Transport*, at pp. 642-43. In simple terms they require that: (1) a warrant be obtained from an impartial adjudicator; (2) based on reasonable and probable grounds to believe that an offence has been committed; and (3) reasonable and probable ground to believe that evidence of the offence will be obtained. Of most relevance to this appeal, they also require that (4) "only documents which are authorized to be seized are those which are strictly

relevant to the offence under investigation” (or “principle four”).

- [84] As I have acknowledged and explained, these criminal law principles cannot be applied in most circumstances to regulatory searches and seizures without undermining the ability of regulators to ensure compliance. Accordingly, reasonableness is determined in the regulatory context using a more flexible approach, sensitive to the needs and purposes of the regulatory model in question. In *McKinlay Transport Ltd.*, Wilson J. therefore endorsed the “rough model of reasonableness employed in production of documents in civil cases”, where “what is reasonable ‘depends upon consideration of what is sought, from whom, for what purpose, by whom, and in what circumstances’”: *McKinlay Transport Ltd.*, at p. 646, quoting *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan*, 1983 ABCA 207, 1 D.L.R. (4th) 301, at p. 307.
- [85] It is well established that when using this rough and ready metric that the first three *Hunter v. Southam Inc.* principles do not apply at all in most regulatory contexts: *Thomson*, at pp. 531-32, per La Forest J. Since they are not relevant to the issue before me, I will say no more about them.
- [86] I also accept the Commission’s position that principle four from *Hunter v. Southam Inc.* cannot generally be applied directly in regulatory cases. This is also well settled by the case law: *Thomson*, at p. 532; *Branch*, at para. 50-52. A moment’s reflection explains why this is so.
- [87] First, principle four requires in criminal cases that to constitute a reasonable seizure, the documents seized must be “strictly relevant to the offence under investigation” (emphasis added): *McKinlay Transport*, at p. 642-43. Yet, in the regulatory context, it will not ordinarily be possible to ensure effective regulation without permitting regulators to engage in general compliance inquiries, even where they do not have reasonable grounds or even reasonable suspicion that an offence has occurred: *McKinlay Transport Ltd.*, at pp. 648-49. Given that there may be no specific offence under investigation for a legitimate inquiry to be undertaken, it would be illogical to limit the seizure of documents or information to material “relevant to the offence under investigation” as set out in *Hunter v. Southam Inc.*
- [88] Second, principle four imposes a “strictly relevant” limitation. In circumstances where a physical search is underway to decide what, if anything, to seize, as is typically the case in the criminal context, it is possible for authorities to vet the documents before deciding what to take away. In the criminal context, using a “strictly relevant” restriction is generally workable. But where documents or information are ordered to be produced by a regulator, the regulator will not see those documents or receive that information until it arrives, and therefore will have no way of assuring relevance: *McKinlay Transport Inc.*, at p. 650. Hence, a “strict” relevance requirement cannot sensibly be imposed. The most that can be expected is that the regulator will identify categories of documents that they have reason to believe may be relevant.

- [89] Having said this, the fact that principle four does not generally apply to regulatory seizures does not mean that s. 8 is unconcerned about the relevance of the material demanded in the regulatory context. This is key. In Thomson, after finding that *Hunter v. Southam Inc.*'s principle four does not apply to production orders issued to regulate anti-competition restrictions, La Forest J. made clear in his discussion at p. 530, that a less demanding relevance requirement operates. Namely, "The material sought must be relevant to the inquiry in progress." He explained that "[t]he question of relevancy ... must be related to the nature and purpose of the power accorded". Then, at p. 532, speaking in the context of a subpoena duces tecum demanding the production of documents, he cited two components of the American "relevance to a lawful inquiry" test to explain how relevance is to be determined. The first component is that "the subpoena must be sufficiently clear and specific to inform the subpoenaed party of precisely what documents are being demanded", and the second is that "the subpoena must only be as broad as necessary for the purposes of the inquiry in progress." He added that in the United States any "unduly broad subpoena will be struck down on grounds of burdensomeness": Thomson, at p. 532. He described these requirements as "self-evidently sensible", "common sense standards by which to measure [relevance]": Thomson, at p. 532. It follows that La Forest J. determined that even in the regulatory context, "the material sought must be relevant to the inquiry in progress", although not strictly relevant, and that it will not be relevant if the demands made in the subpoena are broader than needed for the purposes of that inquiry.
- [90] Things would have been simpler had all the justices in Thomson either signed onto La Forest J.'s judgment or weighed in directly on whether they agreed with this approach, but they did not do so. What is clear, however, is that they all considered a relevance evaluation to be an essential component of the power to seize. Wilson J., with whom Lamer J. expressed agreement, would have applied the full fourth Hunter requirement that the documents be strictly relevant to an offence under investigation: Thomson, at p. 442, 446, 501. Although Sopinka J. found that s. 8 was not engaged, he affirmed that, altogether apart from the Charter, and despite the breadth of the language of the statutory authority to compel production in that case, that authority was limited by the requirement "that the documents be germane to the issues and not subject to privilege": Thomson, at p. 613, quoting with approval Marceau J. in *Canada (Director Of Investigation and Research) v. Can. (Restrictive Trade Practices Comm)*, (1985), 18 D.L.R. (4th) 750 (Fed. C.A.), at p. 63. He continued on p. 613 of Thomson to explain: "In order to comply with this duty, the Director must disclose the purpose of the inquiry in sufficient detail to enable the persons affected and the court to determine whether the documents are relevant to the issue. Anything less would enable the Director to embark on pure a fishing expedition." L'Heureux-Dubé J., who, unlike Sopinka J., found that s. 8 of the Charter was engaged, expressed agreement with Sopinka J. that "a judge sitting in review has significant powers which at least prevent the orders to be used in a 'fishing expedition'": Thomson, at p. 595. A review could not prevent a "fishing expedition" without a critical assessment of the breadth of the production order to ensure that the documents to be seized are relevant to the matter being investigated.

L'Heureux-Dubé J. can be taken as agreeing with La Forest J. that s. 8 imposes a relevance requirement even in regulatory cases. In my view, the relevance requirement that La Forest J. articulated is the lowest common denominator in the Thomson decision, and therefore represents the law. Even in the regulatory context, “The material sought must be relevant to the inquiry in progress.” See Thomson, at p. 530. It will not be if the demands made in the subpoena are broader than needed for the purposes of that inquiry.

[91] In support of its position that s. 13 is not subject to a relevance limitation, the Commission relied upon the broad language of s. 13, which does not reference relevance. It also submitted that in McKinlay Transport Ltd., the Supreme Court upheld a similar provision in s. 231(3) of the Income Tax Act, R.S.C. 1952, c. 148, which like s. 13 of the Securities Act, contained no relevance limitation. In my view, the Commission misreads McKinlay Transport Ltd. That decision, in fact strongly supports the approach that La Forest J. took in Thomson. As Wilson J. noted in McKinlay Transport Ltd., prior case law, including at the Supreme Court, had used ordinary principles of statutory interpretation to read down s. 231(3) (which was every bit as broadly worded as s. 13 of the Securities Act). As a result, the authority to order production of documents and information under that provision could be used only in circumstances where, examined objectively, production was for a purpose authorized under the Income Tax Act, and the information demanded was relevant to the tax liability of the person or persons whose liability was under investigation: McKinlay Transport Ltd., at pp. 639-40. Three things are noteworthy about this. First, these are the same essential relevance considerations that La Forest J. endorsed as constitutionally required in Thomson. Second, these requirements are so self-evident as reasonable limitations on any power to demand production that they were imposed on s. 231(3), even without Charter analysis, notwithstanding the breadth of the language of s. 231(3). And third, and most importantly, s. 231(3) was upheld as constitutionally valid only after Wilson J. emphasized that it satisfied this relevance requirement. When she posed the issue before the court, Wilson J. asked whether s. 231(3), which was already “narrowed in scope as a result of the common law rules relating to statutory interpretation”, could withstand Charter scrutiny: McKinlay Transport Ltd., at p. 640.

[92] Apropos of this last point, when Wilson J. explained why she was upholding s. 231(3) as against the Charter challenge she said, at p. 648, that the Minister “must be given broad powers in supervising this regulatory scheme to audit taxpayers’ returns and inspect all records which may be relevant to the preparation of these [tax] returns” (emphasis added). In explaining why s. 231(3) was “the least intrusive means by which effective monitoring of compliance with the Income Tax Act can be effected”, she added, “[i]t simply calls for the production of records which may be relevant to the filing of an income tax return” (emphasis added): McKinlay Transport Ltd., at pp. 649-50. It is evident that when she spoke of documents that “may be relevant”, Wilson J. was not endorsing a fishing expedition to examine all documents the taxpayer controls in the hope of uncovering something that could happen to prove relevant. She was no doubt proceeding on the understanding that the legislation required the production only of those documents for which there is a basis to

believe may be relevant to the preparation of the tax returns under investigation.

- [93] I am therefore persuaded that the s. 8 challenge to s. 231(3) of the Income Tax Act in McKinlay Transport Ltd. failed only because, as interpreted, that provision already limited production to documents that may have been relevant to the compliance investigation based on the same considerations that La Forest J. expressed as constitutional requirements in Thomson.
- [94] I have reviewed the authority the Commission relies upon to the contrary. It does not support its position that the power to demand production under s. 13 is not limited by a relevance requirement. *British Columbia (Securities Commission) v. Stallwood*, (1995), 7 B.C.L.R. (3d) 339 (B.C. Sup. Ct.), did not involve a production order but instead involved challenges to subpoenas compelling witnesses to testify in an investigation ordered by the securities regulator. The Court did not reject a relevance inquiry when it rejected the petitioners' submissions that the regulator in that case had an obligation to minimize or restrict the investigation it was undertaking. It noted instead that the effect of the "Investigating Order setting out the scope of the investigation" was to define "what is relevant": *Smallwood*, at para. 32. In effect, in the context of a subpoena or order to testify, it is sufficient that the regulator identify what is being investigated, and to give direction on the scope of the compelled testimony. But as La Forest J. made clear in Thomson, at p. 532, when it comes to the production of documents, there are two components to a necessary relevance inquiry. The first component is that "the subpoena must be sufficiently clear and specific to inform the subpoenaed party of precisely what documents are being demanded" and the second component is that "the subpoena must only be as broad as is necessary for the purposes of the inquiry in progress." This case, of course, involves a challenge to the breadth of a production order made by way of a Summons that makes wholesale demands for documents, whether there is any reason to believe they may be necessary for the purpose of the inquiry in progress or not. The *Smallwood* case is not instructive.
- [95] The decision in *North America Frac Stand. Inc. (Re)*, 2020 ABASC 40, does not reject a relevance inquiry, either. There the Alberta Securities Commission upheld what commission staff admitted was a broad demand for production only after the regulated party did not comply with an earlier demand to provide relevant business emails, making the demand for broader production appropriate: at para. 63. I need not express my views on this decision. The instant point is that it does not support the proposition advanced by the Commission.
- [96] In my view, the relevance requirement described by La Forest J. in Thomson is constitutionally required for most regulatory seizures, as a matter of principle. This is because the authority to demand production of documents, even in a regulatory setting, represents an imposing exercise of state authority, regardless of how low the reasonable expectation of privacy may be. Moreover, the power to demand production is conferred for a purpose. Speaking of the equivalent power to summons documents in British Columbia securities legislation in *Branch, Sopinka and Iacobacci JJ.* commented that, "the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the

instant proceedings”: para. 35. It only stands to reason that to be reasonable, a seizure must be related to the purpose for which the power of compulsion was created, and that if there is no realistic foundation for believing the target documents will be relevant to that inquiry, the seizure is not needed to facilitate a proper inquiry and is improper.

[97] I also note that the power of the investigator to issue a summons under s. 13 of the Securities Act is the same power that is vested in the Superior Court of Justice by r. 53.04 of the Rules of Civil Procedure “for the trial of civil actions”. Rule 53.04(1) empowers witnesses who are compelled to the trial of civil actions to produce “documents or other things in [their] possession, control, or power relating to the matters in question”. A document that is not relevant to the proceeding does not relate to the matters in question. A subpoena can be quashed if it demands the production of documents that the party issuing the subpoena cannot show to be relevant: *Ramos v. Ontario (Independent Police Review, Director)*, 2012 ONSC 7347 (Div. Ct.), at para. 18. This not only underscores the fundamental nature of the relevance requirement but also illustrates that a summons demanding information that the Commission has no basis to believe may be relevant is not authorized by law and would contravene s. 8.

[98] I hearken back to Wilson’ J.’s conclusion that what is reasonable “depends upon consideration of what is sought, from whom, for what purpose, by whom, and in what circumstances”: *McKinlay Transport Ltd.*, at p. 646. I cannot conceive that it would be reasonable for the Commission to demand an overbroad array of documents to enable it to conduct a fishing expedition of the entire business in a speculative search for documents where there is no reasoned basis for believing that they may be relevant to the inquiry that is being undertaken.

[99] I also disagree with the Commission’s alternative claim that the Summons in this case called for documents relevant to the inquiry in progress. I will focus here on the second component identified by La Forest J. in *Thomson*, namely, that “the subpoena must only be as broad as is necessary for the purposes of the inquiry of the inquiry in progress”, because that is where the problem lies. In my view, the Summons is “unduly broad” and therefore burdensome: *Thomson*, at p. 532.

[100] Paragraph four of Schedule “A” of the Summons creates the overbreadth problem. I will reproduce its opening sentences for convenience:

For the period of January 1, 2021 to present, provide all communications regarding Ontario (or Canada generally) among directors, officers, employees, contractors, agents and consultants of Binance Holdings Limited and related entities, including Binance Canada Capital Markets Inc.

- [101] First, on its face, this paragraph demands “all communications”, without any subject limitation. Although it goes on to provide a lengthy, clear list of events and activities of interest, it prefaces that list by directing that the demand for communications “shall include, but is not limited to” communications regarding those matters. It is evident that the demand exceeds the inquiry that was being undertaken.
- [102] Second, paragraph four demands communications from every person who could have managed or undertaken work (“directors, officers, employees, contractors, agents and consultants”) not only of Binance but all its “related entities”, again, without any limitation that would link that work to the inquiry that was being undertaken.
- [103] Third, paragraph four demands communications not only regarding Ontario, the province that the Commission has jurisdiction to regulate, but all communications regarding Canada generally, whether they regard Ontario or not.
- [104] In my view, the submissions made by the Commission about why this information is nonetheless relevant to the inquiry that was being undertaken are unhelpful.
- [105] First, the Commission stressed Binance’s low expectation of privacy. As I have indicated, although this supports a more modest relevance test than is applied in criminal cases, it cannot justify seizing documents that do not meet even that more modest relevance test.
- [106] Second, the Commission argued that it must have the power to inquire whether an offence has been committed and to use production as an exploratory tool. I agree that the Commission must have the power to do these things but neither mandate warrants the authority to demand virtually everything generated by the company under investigation, even where there is no reasonable basis for believing it may be relevant to the inquiry at hand.
- [107] Third, the Commission argued that it cannot know if a document is relevant without seeing it, and it relies on Wilson J.’s statement in *McKinlay Transport Inc.*, at p. 650, that, “The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them.” I accept that it will be impossible for the Commission to identify whether a particular document is relevant before examination, and that a strict relevance standard therefore cannot be imposed on regulatory production orders. But there is no reason why regulators cannot target their inquiries to categories of documents that are reasonably likely to contain relevant documents or otherwise describe the scope of their inquiry in a way that would enable the regulated party and the courts to identify relevant documentation. Wilson J.’s comment cannot, in the context of her decision, be read as supporting the Commission’s position that there is no relevance requirement in regulatory cases where production orders are used. Taking that view would sanction “fishing expeditions”, which the Thomson court made clear could not be countenanced. Moreover, as I have explained, Wilson J. stressed in *McKinlay* that s. 231(3) of the Income Tax Act had been interpreted narrowly to authorize only limited seizures of documents that “may be relevant”. It is evident that when read in context, Wilson J. offered this comment as

an explanation for why a “may be relevant standard” is appropriate in the regulatory context, not as a rejection of any relevance limitation.

[108] Finally, the Commission urged that it had reason to demand all Canadian communications because it had information from a sister regulator in the United States that Binance was avoiding compliance. I accept that there may be cases where it will be reasonable to widen a production demand after a regulated party has demonstrated that is not prepared to identify and produce relevant documents, but I am not persuaded that the record in this case goes this far. Binance did not defy the Summons. It sought a legal stay of the Summons, and when that failed, it produced tens of thousands of documents, even though it was challenging the Summons. It also acknowledged that it had provided inaccurate information to the Commission previously through its Undertaking. In my view, Binance’s use of Signal, a chat platform with an automatic delete function, does not support an inference in all the circumstances that it was doing so to defeat regulatory oversight. I am not persuaded that Binance’s conduct makes it reasonable to issue an unrestricted demand for production of all communications involving everyone who directed or did work for Binance or its related entities in any way that engaged “Canada” over a broad time frame.

[109] I am therefore persuaded that the Summons was overbroad and constituted an unreasonable seizure.

(2) Did the Summons go beyond the authority provided in s. 13 of the Securities Act? [110] Section 13 of the Securities Act authorizes a person making an investigation under s. 11 to “summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things”. Nowhere does it empower a person making an investigation to use a production order to require any person to furnish written answers to demands for information. Although the Summons requires Binance to provide “the documents and other things listed in Schedule ‘A’”, the first two demands listed in Schedule “A” ask Binance to “confirm” details about its Ontario accounts while the third demand requires Binance to “provide a description of the methodology used to identify Ontario accounts.” Binance argues that these three demands require “information”, not testimony, documents or other things. It argues on this footing that the Summons was not authorized by law and is therefore unreasonable.

[111] The Commission does not argue that s. 13 empowers it to demand information, other than through compelled testimony. It says this controversy was resolved by an understanding reached between the parties that the first three demands should be understood as demands for documents in Binance’s custody or possession that are relevant to the subjects identified in the those demands.

- [112] In her decision to deny Binance a stay of proceedings, Leiper J. interpreted the Summons in this way. She concluded that the general demand in the Summons to produce “documents and things”, as well as the caution in the Summons that Binance could be committed for contempt for “failure to produce ‘documents and things’” colour the first three demands, such that when the document is read as a whole, it does not demand information but only documents in the custody or possession of Binance.
- [113] Given the concession made by the Commission that it does not seek answers to written interrogatories, I need not resolve this issue, and I would not allow this ground of appeal. I will observe, however, that the Summons is arguably anything but clear in demanding only documents in the custody or possession of Binance. Schedule “A” forms part of the Summons, and its first three demands are expressed using language that can only be understood as demanding that Binance provide targeted information, whether it is contained in existing documents or not. It is not at all certain from the broader contextual considerations that the investigator was not demanding exactly what it said it was demanding in those paragraphs. As indicated, given the Commission's concession that it was not requiring Binance to generate written responses to the demands made, I need say no more, but I have recorded my concerns for consideration by the Commission going forward. I would discourage the use of this kind of language in a summons.
- (3) Was the discretion to issue the Summons exercised reasonably? [114] Binance argues that Doré governs since the investigator's statutory discretion to issue the Summons implicated its s. 8 Charter rights. It submits that pursuant to Doré the investigator was therefore required to consider proportionality and to balance the relevant Charter values before issuing the Summons. It argues that since the Commission failed to show that the investigator undertook to complete the required balancing of Binance's privacy interests as against the Commission's investigatory objectives the issuance of the Summons must be found to be unreasonable. The Commission argues, to the contrary, that Doré does not apply because Binance has not established that the seizure required by the Summons constituted an unreasonable seizure, and even if it did, the decision to issue the Summons was proportionate.
- [115] I agree with the Commission that the Doré test does not apply in the first place, but not for the reasons given by the Commission. The Commission misconceives the Doré test. Doré does not require a finding that a Charter right is infringed before it applies. As Côté J. explained in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, 487 D.L.R. (4th) 631, at para. 65, “it has consistently been held that the Doré framework applies not only where an administrative decision directly infringes Charter rights but also in cases where it simply engages a value underlying one or more Charter rights, without limiting these rights” (emphasis in original). Since Binance had a reasonable expectation of privacy, the issuance of the Summons to seize those documents clearly implicated Binance's Charter rights.

- [116] I nonetheless agree with the Commission's bottom line argument that the Doré test does not apply. In my view, the issues before us are not governed by the Doré test but by the legal standards established under s. 8 of the Charter, which provide a dedicated methodology for assessing the constitutional validity of searches and seizures. This s. 8 jurisprudence already balances competing interests and addresses the proportionality issue through its assessment of the intensity of the reasonable expectation of privacy and its relevance inquiry. I do not understand Doré to have overtaken this body of law by substituting a looser deferential examination of the proportionality of the balance that has been achieved between the Charter implications of the discretionary decision to exercise the power of search and seizure and the competing administrative interests. In my view, any state agent who authorizes or exercises a search or seizure is bound to comply correctly with the requirements of s. 8 of the Charter, even when exercising a statutory discretion. It would not be fitting to hold that even though the s. 8 requirements have not been met, it was reasonable for the party authorizing the seizure to strike the balance they did. The Doré standards add nothing to the instant case and can only confuse the law if applied in this context.
- [117] My views in this regard are assisted by the majority decision in York Region. This case involved the judicial review of a grievance arbitration decision that raised s. 8 issues. The majority did not resort to the Doré test in reviewing that decision. It applied a correctness standard based on the requirements of s. 8 of the Charter. Since the arbitrator erred in law in concluding that Charter rights did not apply to a search of a teacher's computer conducted by a public-school principal, and the decision of a school superintendent to seize a document, the decision was set aside.
- [118] I would therefore dismiss this ground of appeal.

CONCLUSION

- [119] I would allow the appeal. The Divisional Court erred in the exercise of its discretion not to judicially review the Charter issues that had been raised. Since this is a fitting case for this court to undertake that exercise, I would do so, and I would find that the Summons authorized an unreasonable search. It would not be fitting for this court to edit the Summons. I would set it aside without prejudice to the investigator to generate a Charter compliant summons.
- [120] I have considered permitting the Commission to retain the documents in its possession until it secures a Charter compliant summons, but I have decided that this would not be appropriate. Such an order would permit the Commission to continue to retain and then review documents, whether lawfully seized or not, thereby compromising Binance's expectation of privacy. I would order the documents seized pursuant to the invalid Summons to be returned.

[121] I would order costs of the appeal and the leave to appeal motion to be paid to Binance, in the collective amount of \$15,000, inclusive of applicable taxes and disbursements, as agreed.

Released: November 6, 2025 “B.W.M”

“David M. Paciocco J.A.”

“I agree. B.W. Miller J.A.”

“I agree. Coroza J.A.”

- [1] The appeal of the order of the Ontario Securities Commission (“In the Matter of Binance Holdings Limited and Binance.com”), dated April 30, 2024, was joined with the appeal of the order of the Divisional Court, dated September 28, 2023, pursuant to ss. 6(2) and (3) of the Courts of Justice Act, R.S.O. 1990, c. C. 43.
- [2] Exceptions were made to permit Ontario users to liquidate their holdings.
- [3] Accordingly, the Tribunal decision is not before us on this appeal.
- [4] In July 2021 the Enforcement Branch of the Commission published “Enforcement Investigation Guidance”, that sets out a protocol for addressing questions or concerns relating to an investigation or summons, with stepped mechanisms to have those questions or concerns referred to the Chief Executive Officer of the Commission.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF’s page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://norma.lexum.com/coa/coa/en/item/23680/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/binance-holdings-limited-v-ontario-securities-commission-2025>

Prepared on 28 October 2026 · Esheria