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Overbroad Summons Thrown Overboard: Charter Limits to the OSCâ€™s Investigatory Powers

Receipt of a summons under section 13 of Ontario's *Securities Act* is no light matter. Delivered on the Ontario Securities Commission's (OSC) official letterhead, such letters typically set out a schedule of documents that must be produced on a deadline (often a short one) and notify the reader that it is highly confidential and can be disclosed only in accordance with section 16 of the Act. The letter cautions, consistent with the Act, that non-compliance can lead to a finding of contempt by the Court.

The letters are designed to encourage, and generally do achieve, compliance. In *Binance Holdings Limited v Ontario Securities Commission*, however, the Ontario Court of Appeal took the rare step of quashing such a summons on the basis that it was overbroad and therefore had violated section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

Background: Binance & the OSC Investigation

Binance Holdings Limited (Binance) is a Cayman Islands corporation that offers online crypto asset trading to users across the world, including in Ontario for a time. Since arriving in Canada, Binance triggered several lawsuits, including regulatory proceedings and a class action. The company withdrew from Canada in 2023, though the litigation continues.

In May 2023, the OSC obtained an order appointing investigators to examine whether Binance breached Ontario securities law or acted contrary to the public interest. An ensuing summons demanded, among other things, all communications among Binance's directors, officers, employees, contractors, agents, and consultants over a 2.5-year period.

Procedural Path: Multiple Challenges, Limited Review

Binance challenged the summons as unconstitutionally overbroad. It did so in multiple arenas by:

- Filing an application with the Capital Markets Tribunal to revoke the investigative order and summons (the Tribunal found it did not have the jurisdiction to make this order)

- Filing an appeal of the Tribunal's jurisdictional decision with the Divisional Court (this was later abandoned), for judicial review, and for a stay of the order and summons (ultimately denied)
- Filing an application for judicial review, also with the Divisional Court (denied)
- Filing a section 144(1) application with the OSC itself to revoke or vary the summons (the OSC found it did not have the jurisdiction to do so)

In each proceeding, the respective body declined to engage with the merits of the constitutional validity of the summons. Binance launched appeals of the decisions of the Divisional Court and the OSC, which brought the matter before the Ontario Court of Appeal.

The Court of Appeal's Decision: Unreasonable Seizure

The Court of Appeal found the Divisional Court had erred by exercising its discretion not to judicially review the *Charter* arguments before it. Rather than send the matter back down for deliberation, the Court of Appeal made its own finding that the summons constituted an unreasonable seizure.

Limited But Not Non-Existent: Section 8 Rights Apply

Where state agents undertake a "search" or "seizure" that may compromise an individual's reasonable expectation of privacy, section 8 of the *Charter* will apply. Section 8 demands three requirements:

1. The search and seizure be authorized by law.
2. The law itself must be reasonable.
3. The search or seizure must be carried out in a reasonable manner.

The OSC argued that section 13 investigatory powers were not limited by requirements of "minimal intrusion, necessity or relevance." The Court of Appeal disagreed, noting that Binance had a "modest but reasonable" expectation of privacy and that its section 8 interests were engaged by the compelled production of its documents. Applying the standard of relevance, the Court of Appeal found the summons overbroad because it:

- Demanded "all communications" without limitation to inquiry-specific events and activities of interest
- Required production from every person who might have managed or undertaken work not only at Binance but all of its "related entities"

- Sought communications concerning not just Ontario, where its jurisdiction lies, but concerning Canada at large, whether or not Ontario was referenced

The Court of Appeal accepted that broader demands may be reasonable in limited circumstances, such as where a regulated party refuses to identify and produce relevant records. That was not the case here. Binance had cooperated while challenging the summons, producing tens of thousands of documents and acknowledging that it had provided inaccurate information to the OSC in the past.

The Court of Appeal also refused to infer that Binance sought to evade regulatory oversight merely because it used Signal, a chat platform with auto-deleting messages.

Takeaways

- *Charter* protections apply to summonses issued by OSC-appointed investigators, and for a section 13 summons there must be a “reasonable foundation” to believe the requested productions will be relevant to an inquiry.
- The decision seems to strongly suggest the OSC cannot use section 13 to demand answers to written interrogatories.
- The OSC does not have jurisdiction, under section 144(1), to vary the order of an investigator it has appointed.
- Reliance on encrypted or auto-deleting platforms such as Signal may not, without more, imply an intent to evade regulatory oversight.