

Ontario Courts Clarify OSC Investigative Powers: Key Takeaways for Market Participants

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Recent Ontario appellate decisions have provided important guidance on the permissible scope of investigative summons authorized under the *Securities Act*¹ and the subsequent use of transcripts of compelled interviews pursuant to these summonses. In *Binance Holdings Limited v Ontario Securities Commission*,² the Court of Appeal granted a *Charter*³ challenge and set aside a summons that was “staggering in its breadth,” a decision that may significantly impact future Ontario Securities Commission (OSC) regulatory investigations. In *Hogg v Chief Executive Officer*,⁴ the Divisional Court confirmed that compelled testimony can be used in a Capital Markets Tribunal (Tribunal) hearing against a respondent who does not testify, notwithstanding section 9 of the *Evidence Act*,⁵ effectively resolving uncertainty caused by the Tribunal’s decision earlier this year in *TeknoScan Systems Inc (Re)*.⁶

Binance Holdings: OSC Investigative Powers are Subject to Charter Limits

Background

Binance Holdings Limited (Binance) was a Cayman Islands corporation that operated an online crypto asset trading platform in Ontario without registration or exemption under the *Securities Act*. In 2021, an OSC-appointed investigator issued a broad summons under section 13 of the *Securities Act* that compelled Binance to produce extensive documents, communications and explanations.

The summons required Binance to provide the OSC with documents regarding the total fees and revenue earned on all Ontario accounts, the number of Ontario accounts, the aggregate holdings in the accounts at different dates, and a description of the methodology used to answer these questions. The summons also required Binance to “provide all communications regarding Ontario (or Canada generally) among directors, officers, employees, contractors, agents and consultants of Binance Holdings Limited and related entities” from January 2021 to the date of the summons.

Binance challenged the summons as unconstitutional under section 8 of the *Charter* before each of the Tribunal, the Divisional Court, and the OSC. Each body refused to address the merits of Binance’s constitutional argument. Binance appealed the Divisional Court and OSC decisions to the Court of Appeal.

Summons Set Aside

Binance argued that the summons was overbroad and amounted to an unreasonable seizure of documents under section 8 of the *Charter*. The OSC argued that the summons was a lawful exercise of its investigative powers under section 13 of the *Securities Act*, that Binance had a low expectation of privacy in its business records, and that the seizure of the documents was reasonable and necessary for the investigation.

The Court of Appeal set aside the summons, finding that an enforceable demand for business records by a regulator constitutes a “seizure” under section 8 of the *Charter*, even in a regulatory context where the expectation of privacy is low. The Court of Appeal found that the summons violated section 8 because it compelled the production of documents that the OSC had no foundation to believe may be relevant to the investigation.⁷

The Court of Appeal emphasized that even in regulatory contexts, seizures must be limited to documents reasonably believed to be relevant to the investigation. The OSC cannot embark on a fishing expedition in a speculative search for documents where there is no reasoned basis for believing that the documents may be relevant to the inquiry that is being undertaken.⁸ In this case, the summons sought all communications over multiple years from numerous individuals, including those unrelated to Ontario, without sufficient justification. The Court of Appeal described the summons as “staggering in its breadth and ... 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.”⁹

The Court of Appeal also noted in *obiter* that section 13 of the *Securities Act* does not give an investigator power to use a production order to require any person to provide written responses to demands made in a summons, finding that the wording of the first three demands was “arguably anything but clear in demanding only documents in the custody or possession of Binance” and discouraged the use of this kind of language in a summons.¹⁰

Jurisdiction of the Tribunal to Revoke a Summons

As noted above, Binance sought to challenge the summons through multiple avenues, including by way of application to the OSC under section 144(1) of the *Securities Act*, seeking to have the OSC revoke or vary it. The Court of Appeal affirmed that the OSC does not have the jurisdiction under section 144(1) to revoke a summons issued by an investigator because the issuance of a summons is a decision of the investigator, not the OSC.¹¹ The Court of Appeal held that the provision authorizing the OSC to appoint investigators reflects a legislative intent to separate investigative functions from the OSC's regulatory authority.¹²

Hogg: Compelled Transcripts are Admissible Against Non-Testifying

Respondents

Background

Troy Hogg and his companies (the appellants) raised over US\$51 million by selling cryptocurrency tokens falsely claimed to be backed by precious metals. The OSC investigated and brought enforcement proceedings, resulting in findings of fraud and securities law violations by the appellants.

During the investigation, the OSC conducted a compelled interview of Mr. Hogg in which he invoked protections under section 9 of the *Evidence Act*. At the Tribunal hearing, which the appellants did not attend, the OSC introduced redacted transcripts of the compelled interview as evidence. The redactions included the sections of the transcript in which Mr. Hogg took the protection of section 9 of the *Evidence Act*.

Admissibility of Compelled Transcripts

The appellants appealed to the Divisional Court on numerous grounds, including that the transcripts of Mr. Hogg's compelled interview were improperly admitted at the hearing under section 9 of the *Evidence Act*. While subsection 9(1) requires a witness to answer questions even if the answers could incriminate them or expose them to civil liability, subsection 9(2) provides that such compelled answers cannot later be used as evidence against the witness "in any civil proceeding or in any proceeding under any Act of the Legislature."

The appellants relied on the Tribunal's decision in *TeknoScan* in support of their argument that investigative transcripts may not be used in a Tribunal hearing because the investigation is distinct from the Tribunal proceeding, even though the latter stems from that investigation. In *TeknoScan*, the Tribunal held that the respondent's compelled testimony could not be admitted into evidence against that respondent where they had properly invoked the protection against self-incrimination contained in section 9(2) of the *Evidence Act*. The Tribunal reasoned that regulatory investigations are distinct from the various enforcement proceedings that could subsequently arise, including an administrative proceeding under section 127.¹³

The Divisional Court disagreed, relying on its previous decision in *Todorov v Ontario Securities Commission* and other precedents which confirmed that the use of compelled testimony under a section 13 summons at a subsequent hearing is not prohibited by section 9(2) of the *Evidence Act*.¹⁴ The Divisional Court confirmed that a Tribunal regulatory proceeding is part of the same proceeding as the investigation and that treating interviews and enforcement hearings as separate proceedings would undermine the purpose of the regulatory framework.¹⁵

Both Decisions Considered New Arguments on Appeal

Cassels

Generally, appellate courts will not hear arguments that are raised for the first time on appeal. However, in *Binance Holdings* and *Hogg*, both courts exercised their discretion to hear and decide these arguments on their merits.

In *Binance Holdings*, the Court of Appeal determined that hearing the *Charter* arguments for the first time on appeal was appropriate because it had much of the same record before it that the Divisional Court would have had, neither party's appeal rights were deprived by hearing these arguments for the first time, and Binance had been seeking to have these constitutional issues adjudicated since May 2023.

In *Hogg*, the Divisional Court reasoned that due to the appellants' lack of participation in the hearing at the Tribunal, the appellants were not present to offer their opposition to the admission of the transcript. The Divisional Court also determined that there were no further adjudicative facts required to decide the matter on appeal.

Key Takeaways

- The OSC's investigative powers are broad but not unlimited. Summons to compel documents under section 13 of the *Securities Act* must respect proportionality and relevance. Experienced securities litigation counsel will consider early challenges on this basis.
- Transcripts from compelled OSC interviews are once again (or still) admissible against respondents in subsequent hearings at the Tribunal. Careful preparation and skilled legal representation from experienced securities litigation counsel at the interview stage is critical to ensuring a fair interview and an accurate transcript.
- Appellate courts will exercise their discretion to consider issues raised on appeal for the first time in unique circumstances.

¹ *Securities Act*, [RSO 1990, c S.5](#).

² *Binance Holdings Limited v Ontario Securities Commission*, [2025 ONCA 751](#) at paras 31-40 [*Binance Holdings*].

³ *The Constitution Act, 1982*, [Schedule B to the Canada Act 1982 \(UK\), 1982, c 11, s 8](#) [*Charter*].

⁴ *Hogg v Chief Executive Officer*, [2025 ONSC 6214](#) [*Hogg*].

⁵ *Canada Evidence Act*, [RSC 1985, c C-5](#).

⁶ *TeknoScan Systems Inc (Re)*, [2024 ONCMT 32](#) [*TeknoScan*]. For more information on *TeknoScan*, read our Cassels Comment [here](#).

⁷ *Binance Holdings* at paras 119-120.

⁸ *Binance Holdings* at para 98.

⁹ *Binance Holdings* at para 81.

¹⁰ *Binance Holdings* at para 113.

¹¹ *Binance Holdings* at para 44.

¹² *Binance Holdings* at para 50.

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¹³ TeknoScan at paras 61-64.

¹⁴ Hogg at para 15; *Todorov v Ontario Securities Commission*, [2018 ONSC 4503](#) (Div Ct).

¹⁵ Hogg at paras 69-70.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.