Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

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IN THE MATTER OF
BINANCE HOLDINGS LIMITED

REASONS AND DECISION

(s. 144(1) of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Sandra Blake (chair of the panel) Timothy Moseley	
Hearing:	By videoconference, June 2, 2023; final written submissions received June 6, 2023	
Appearances:	Aaron Dantowitz Alvin Qian	For Staff of the Ontario Securities Commission
	Graeme Hamilton Caitlin R. Sainsbury Teagan Markin Brianne Taylor	For Binance Holdings Limited

REASONS AND DECISION

1. OVERVIEW

[1] These are the reasons for our decision,[1] issued on June 7, 2023, that the Capital Markets Tribunal does not have jurisdiction under s. 144(1) of the *Securities Act*[2] to revoke an investigation order made by the Ontario Securities Commission under s. 11 of the *Securities Act*.

[2] Binance Holdings Limited (**Binance**) operates a crypto-asset trading platform. On May 10, 2023, the Commission issued an order under s. 11, appointing various individuals to investigate Binance's conduct.

[3] Binance then applied to this Tribunal under s. 144(1) of the *Securities Act*, asking that the Tribunal revoke the investigation order. That subsection provides that "[t]he Commission may make an order revoking or varying a decision of the Commission".

[4] At a preliminary attendance, the Tribunal directed that before proceeding to the application's merits, the parties first address whether the Tribunal has jurisdiction to grant the relief sought.

[5] Following a hearing at which the parties made submissions on that question, we decided that the Tribunal does not have jurisdiction under s. 144(1) to revoke the investigation order. As we explain below, we concluded that under the amendments to the *Securities Act* made in 2022, only the Commission, exercising its executive function, can revoke its own s. 11 order.

2. ANALYSIS

2.1 Introduction

[6] We begin our analysis by reviewing the legislative framework as it existed before the 2022 amendments to the *Securities Act*. We then examine Binance's application under the amended framework. We conclude that the word "Commission" is capable of more than one meaning within the *Securities Act*,

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[1] *Binance Holdings Limited (Re),* (2023) 46 OSCB 5019

[2] RSO 1990, c S.5

and we must therefore apply principles of statutory interpretation to decide what "Commission" means in s. 144(1), the provision on which Binance relies.

2.2 Legislative framework before the 2022 amendments

[7] Before the 2022 amendments, the Commission was an integrated regulatory agency that comprised:

a. a quasi-legislative function (making rules and policies);

b. an executive function (applying and enforcing legislation, rules and policies); and

c. an adjudicative function (holding hearings at which parties appeared before panels of appointed members of the Commission).[3]

[8] Often in these reasons, we use the word "tribunal" to describe the Commission's adjudicative function before the 2022 amendments, even though that function was typically referred to as "the Commission". The Capital Markets Tribunal as currently constituted, to which we refer as "the Tribunal", did not yet exist.

[9] Before the 2022 amendments, the Commission, exercising its executive function, routinely issued investigation orders under s. 11 of the *Securities Act*. In some instances, an investigation resulted in an enforcement proceeding that was heard by a panel of appointed members of the Commission, sitting as a tribunal, exercising the Commission's adjudicative function.

[10] All members of the Commission, other than the person who was both Chair and CEO, sat as directors on the board of the Commission and as adjudicators on the tribunal. Despite this overlap of duties, the adjudicative function of the Commission operated independently from the executive function. The Chair/CEO supervised the enforcement branch of the Commission and therefore did not sit on any hearings before the tribunal. In addition, and with an irrelevant exception, s. 3.5(4) precluded any appointed member of the Commission who exercised a power under Part VI of the *Securities Act*, including issuing an investigation order under s. 11, from sitting on a hearing that dealt with that matter, unless the parties consented. Subsection 3.5(4) has since been repealed.

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[3] *Bridging Finance Inc (Re)*, 2022 ONSEC 3 at para 9

[11] Despite this separation, matters occasionally came before the Commission sitting as a tribunal, in which the tribunal was asked to make an order in relation to an ongoing investigation, as opposed to in relation to a proceeding that had already been commenced before the tribunal. One example is the 2003 case, *Universal Settlements International Inc (Re)*.[4] In that case, the Commission had issued a s. 11 investigation order, and an application was brought before the Commission (sitting as the tribunal) to revoke that order under s. 144(1). The applicant said that before issuing the s. 11 investigation order, the Commission ought first to have satisfied itself that the products that were the subject of the investigation order were indeed securities.

[12] The tribunal dismissed the application. There was no controversy that a s. 11 order was subject to being revoked or varied under s. 144(1), because while that provision allowed for revoking or varying a "decision", the word "decision" was defined in the *Securities Act* to include an order of the Commission. The question was whether the tribunal should revoke the order in that case.

[13] In dismissing the application, the tribunal held that at the investigation stage, the Commission had no obligation to satisfy itself that the products at issue were securities. Even though the tribunal decided not to revoke the s. 11 order, it contemplated that it had the power to do so. However, the oral reasons for the decision do not address the question of jurisdiction.

2.3 Binance's application under the current legislative framework

[14] In this application, Binance relies on s. 144(1) of the *Securities Act* in asking the Capital Markets Tribunal to revoke or vary a s. 11 order issued by the Commission. The central question is whether changes to the legislative framework in 2022 mean that the Tribunal does not have jurisdiction to grant that relief.

[15] Those changes include separating the Chair and CEO roles and creating the Tribunal as "a division of the Commission".[5] The newly created Tribunal began its existence carrying on what had previously been the adjudicative function of the

[4] (2003) 26 OSCB 1307

[5] *Securities Commission Act, 2021*, SO 2021, c 8, Sch 9, s 25

Commission. Proceedings that were ongoing before proclamation of the amendments continued without interruption. The most significant Tribunal-related changes are that:

a. there is no longer any overlap between the Commission's board of directors and the Tribunal members, who now have no role in the rule-making and policy-making functions of the Commission, or the oversight of its executive functions such as compliance and enforcement; and

b. conversely, the board has no involvement in, or oversight of, the Tribunal's adjudicative functions.

[16] The legislative amendments left s. 144(1) mostly intact, with the only change relating to who at the Commission can bring an application under that provision. Neither party before us suggested that this change was relevant on this application, and it does not factor into our decision.

[17] The most relevant change was the addition of a new section, s. 144.1. The operative words of s. 144.1(1) provide that the "Tribunal may make an order revoking or varying a decision of the Tribunal".

[18] As a result, there are now two parallel provisions in the *Securities Act* relating to the revocation or variation of orders. The first, s. 144(1), authorizes "the Commission" to revoke or vary a decision of "the Commission". The second, s. 144.1(1), authorizes "the Tribunal" to revoke or vary a decision of "the Tribunal".

[19] The narrow question we must decide is whether the first occurrence of "Commission" in s. 144(1) includes the Tribunal. In other words, does s. 144(1) authorize the Tribunal, as "a division of the Commission", to revoke or vary an order of the Commission?

2.4 Is the language of s. 144(1) precise and unequivocal?

[20] Focusing on that first occurrence of "Commission" in s. 144(1), *i.e.*, the reference to the body that can do the revoking, is the term precise and

unequivocal, capable of only one meaning? If so, we should simply apply it.[6] However, if the language is ambiguous, we must apply principles of statutory interpretation to decide whether the s. 144(1) authority extends to the Tribunal. As we will explain, we conclude that where the word "Commission" appears in the *Securities Act*, it can reasonably be read as either including or excluding the Tribunal, depending on the context. We must resolve the ambiguity.

[21] In deciding whether "Commission" is ambiguous, we did not limit ourselves to isolating the word and assessing its inherent ambiguity. We also referred to other occurrences of the word. This approach of considering other occurrences is consistent with Binance's submission that we should look at how "Commission" is defined in the *Securities Commission Act, 2021* to help understand the meaning of "Commission" in s. 144 of the *Securities Act*. When we look to other instances within the *Securities Act* itself, we conclude that "Commission" is ambiguous, because there is at least one instance of the word "Commission" in the *Securities Act* where the legislature has clearly intended it to include the Tribunal, and there is at least one instance where the legislature clearly intended it not to. We examine each of these in turn.

[22] The word "Commission" clearly <u>includes</u> the Tribunal in s. 1(1) of the *Securities Act*, which defines "Commission" to be "the Ontario Securities Commission continued under the *Securities Commission Act, 2021*".[7] That definition mirrors the definition of "Commission" found in the *Securities Commission Act, 2021*. Under these definitions, the Commission includes the Tribunal because the legal entity of the Commission is continued, and the legal entity contains within it the Tribunal "as a division of the Commission", according to s. 25 of the *Securities Commission Act, 2021*.

[23] In contrast, the word "Commission" clearly <u>does not include</u> the Tribunal in the definition of "Ontario securities law" in s. 1(1) of the *Securities Act*. That definition refers to decisions of "the Commission, the Tribunal or a Director". In

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[6] *Canada Trustco Mortgage Co v Canada,* 2005 SCC 54 at para 10; *R v McIntosh*, 1995 CanLII 124 (SCC) at para 34

[7] *Securities Commission Act,* 2021, SO 2021 c*, Sched 9

that phrase, the word "Commission" must exclude the Tribunal, or else there would have been no need to mention the Tribunal.

[24] These examples demonstrate the ambiguity of the word "Commission" when looking at the statute overall. In reaching that conclusion, we distinguish ambiguity from absurdity. We consider absurdity to arise when there are instances of a word or phrase where the text superficially permits a particular interpretation but that interpretation would yield an absurd result (examples of which we cite below). In the case of the definition of "Ontario securities law", the problem is more than saying it would be absurd for "Commission" to include the Tribunal; the problem is that the words do not permit that interpretation. As a result, we are highlighting the legislature's clear intention to use "Commission" in different ways, depending on the context. In the face of this kind of ambiguity, one must examine each occurrence on its own, and turn to other rules and aids to assist with interpreting that occurrence. We do that now with respect to s. 144(1).

2.5 Consistent expression

[25] We begin that interpretation exercise by considering the idea of consistent expression. A word or expression is presumed to have the same meaning throughout a statute, so that the statute is internally consistent.[8] As with all "rules" of statutory interpretation, though, the rule of consistent expression is not inflexible. It is an aid to construction, and we must exercise our judgment to decide what weight to attach to the rule.[9]

[26] We have already shown that the legislature did not intend the word "Commission" to have a consistent meaning throughout the *Securities Act*. Further, if all instances of "Commission" in the statute were to bear the interpretation that Binance proposes for s. 144(1) (*i.e.*, that it includes the Tribunal), the Tribunal would arguably be authorized to exercise powers granted to the Commission, with absurd results that include these examples:

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[8] *R v Zeolkowski*, 1989 CanLII 72 (SCC), [1989] 1 SCR 1378 at 1387; *Bapoo v Co-operators General Insurance Co.*, 1997 CanLII 6320 (ON CA) (***Bapoo***) at para 27

[9] *Bapoo* at para 28

a. the power under s. 11 of the *Securities Act* to appoint investigators, which would radically undermine rather than reinforce the separation of the investigation and adjudication functions; and

b. the power under s. 143 of the *Securities Act* to make rules in respect of a wide range of policy matters, including those relating to registration, the solicitation of trades, and record-keeping requirements, which would clothe the Tribunal with a quasi-legislative function that is antithetical to the adjudicative role of the Tribunal.

[27] Even more strikingly, it would yield an absurd result within s. 144(1) itself. If both occurrences of "Commission" within s. 144(1) include the Tribunal, then the Commission (including its executive function, *e.g.*, the Chief Executive Officer) could revoke an order of the Tribunal. For example, if Staff of the Commission were to bring an enforcement proceeding before the Tribunal, and were dissatisfied with the outcome, then instead of appealing the decision to the Divisional Court as contemplated by s. 10 of the *Securities Act*, the Commission could simply revoke the Tribunal's order at the conclusion of the proceeding. Such an interpretation would be nonsensical on its own, and worse, it could, in a particular matter, lead to a never-ending cycle of the Commission (through its executive function) and the Tribunal revoking each other's orders.

[28] Where the rule of consistent expression would yield the kinds of absurdities cited above, we ought not to apply it.[10] The rule is therefore of no help to us here.

2.6 Applying context and legislative purpose

[29] We turn to what has been described as the modern approach to statutory interpretation, which calls on us to interpret a provision in its total context and in a manner that complies with the legislative text, promotes the legislative purpose, and produces a reasonable and just meaning.[11]

[30] As we engage in that exercise, we note the great emphasis Binance places on the fact that the 2022 amendments did not effect any consequential change to the text of s. 144(1). As a result, says Binance, those amendments do not oust

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[10] *R v Middleton,* 2009 SCC 21 at paras 14-16

[11] *Bapoo* at para 8

the long-standing role of the Commission's adjudicative function with respect to s. 11 investigation orders.

[31] We cannot accept this singular focus on s. 144(1). The modern approach to statutory interpretation requires us to examine the full context, and as we noted above, that context includes the new s. 144.1.

[32] As for legislative purpose, that can be elusive. Binance submits that the 2022 amendments demonstrate the legislature's intent to enhance the Tribunal's oversight authority over the Commission, including over the Commission's investigatory activities. However, Binance did not offer any persuasive support for that assertion. The amendments clearly further the independence of the Tribunal, but we see no indication that the legislature intended the Tribunal to take on the greater supervisory role that Binance urges. Indeed, such a supervisory role over investigations would compromise rather than strengthen the Tribunal's independence, so we would need to see clear evidence of such a legislative intent. There is none.

[33] Indeed, the passage from the relevant legislative debates that Binance quoted in its submissions undermines rather than supports its position. According to remarks of the government representative at Second Reading of the amending bill, the new Tribunal "would ensure a clear separation between the regulatory and the policy functions of the commission [*sic*] and its adjudicative function."[12] The Commission's investigations are a regulatory function that should be clearly separated from, not supervised by, the Tribunal.

[34] In discussing legislative intent, we asked Binance for its position as to why the legislature added s. 144.1 as part of the 2022 amendments. If both occurrences of "Commission" include the Tribunal in s. 144(1), then that provision empowers the Tribunal to revoke an order of the Tribunal. That would make s. 144.1 completely unnecessary, since it accomplishes the same thing.

[35] In response, Binance submitted that s. 144.1 was added to make clear that it is only the Tribunal that can revoke an order of the Tribunal. We reject that

[12] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, No 240 (29 March 2021) at 12318 (Stan Cho)

submission. The words of s. 144(1) and s. 144.1 are more consistent with parallel grants of authority than they are with one section limiting the other. Had the legislature intended s. 144.1 to limit s. 144, it could easily have included clear language (*e.g.*, "subject to") to do so.

[36] Binance's argument that s. 144.1 is meant to limit s. 144 is further undermined by similar occurrences of parallel provisions. One such instance is in subsections 127(5) and 127(5.1), which empower the Tribunal and the Commission, respectively, to make certain temporary orders. The two provisions are identical, except that one grants the authority to the Tribunal and the other grants the same authority to the Commission. Binance's submission about the function of s. 144.1 (*i.e.*, limiting the Commission's authority) could not logically apply to this pair of parallel provisions. This is not fatal to Binance's argument on the point, but it makes it less persuasive.

[37] Staff submitted that we should also rely on s. 3 of the *Transitional Matters Regulation*[13] made under the *Securities Commission Act, 2021*. That section of the regulation empowers the Tribunal, under s. 144.1 of the *Securities Act*, to revoke or vary certain types of orders that the Commission made before the creation of the Tribunal. Staff submitted that such a provision would be unnecessary if, as Binance argues, that power already exists within s. 144(1).

[38] We are not persuaded by that argument. As Binance argued, the types of orders listed in s. 3 of the regulation are limited to orders that the prior adjudicative function of the Commission could have made. Accordingly, it is reasonable to conclude that the legislature merely intended to extend the application of s. 144.1(1) to orders made by the Tribunal's predecessor, before the Tribunal existed in its current form. We consider the existence of s. 3 of the regulation to be a neutral factor in our decision and reasoning.

[39] The final point we address in the context of legislative purpose is Binance's submission that the result Staff seeks would mean that a party seeking to challenge a s. 11 order would be left without an effective means of doing so. We disagree. Section 144(1) of the *Securities Act* expressly contemplates an

[13] O Reg 43/22, s 3, Schedule "B"

application to the Commission (*i.e.*, its executive function) for revocation or variation. In addition, we heard no submission to suggest that whatever routes may have been available through the courts have been changed in any way by the 2022 amendments. We understand the argument that there may be practical challenges associated with both of these options, but even if we were to so find, we could not rely on such a finding to clothe the Tribunal with jurisdiction it does not have. The Tribunal is a creature of statute with no inherent jurisdiction. It can exercise only those powers the legislature gives it, even if that leaves parties with options they consider less than ideal.[14]

3. CONCLUSION

[40] We concluded that in s. 144(1) of the *Securities Act*, the term "Commission" does not include the Tribunal. We therefore determined that s.144 does not give the Tribunal jurisdiction to revoke or vary a s. 11 order.

[41] Binance also asked that we quash a summons issued under s. 13 of the *Securities Act*, by a person appointed as an investigator under the s. 11 order. Given our decision that the Tribunal lacks jurisdiction to revoke the s. 11 order, we have no jurisdiction to consider the request to quash the summons.

[42] One final note is in order. At the hearing devoted to the jurisdictional question, we asked the parties for additional submissions about other occurrences of the word "Commission" in the *Securities Act*, and about potential issues arising from the interplay between "Commission" and "Director" in various provisions. In those additional submissions, it was common ground that we need not, and should not, address those issues in our decision. We agree. Accordingly, our decision and these reasons resolve only the interpretation of "Commission" in s. 144 of the *Securities Act*.

[14] *B (Re)*, 2020 ONSEC 21 at para 17

[43] In the result, we dismissed Binance's application.

Dated at Toronto this 14th day of July, 2023

"Sandra Blake"	*"Timothy Moseley"*
Sandra Blake	Timothy Moseley