The legal treatment of cryptocurrency in Canada: recent developments

November 09, 2022

Over the course of the last decade, cryptocurrencies have grown from the interest of a few online enthusiasts to a globally recognized medium of exchange valued in the trillions of dollars. But while Bitcoin, Ethereum, and Dogecoin have become household names, the legal rules that apply to cryptocurrency remain unclear and unsettled. In this article, we outline some of the recent developments in Canadian jurisprudence related to the legal treatment of cryptocurrencies.

Background

In general terms, **cryptocurrencies** are a kind of digital asset or 'token' that functions on the blockchain. **Blockchain** is a distributed ledger technology, meaning that every time a transaction occurs on a blockchain system, each component of that system independently checks the validity of every other component. Blockchain and cryptocurrency have been pitched as revolutionary in part because this allows for decentralized, 'trustless' transactions, without the need for central intermediaries.

One of the key legal questions that arises around cryptocurrency is how to categorize it legally – what exactly is cryptocurrency? Is it a form of currency? Security? A commodity? Or a new and novel type of asset with characteristics entirely its own? These distinctions are far from academic; how cryptocurrency is categorized can have far-reaching consequences in terms of how it is treated by legislators, courts and regulators.

Canadian courts have struggled with the question of how to treat cryptocurrency when considering whether to grant legal remedies and relief, as illustrated by a number of recent cases.

Cryptocurrency as funds

In *Li v. Barber*, 2022 ONSC 1176 (*Barber*), the Ontario Superior Court of Justice granted a Mareva injunction to freeze funds that 'Freedom Convoy' organizers had raised. A

Mareva injunction is an extraordinary remedy that will only be granted when the plaintiffs have a strong apparent case against the defendant, where the defendants have assets within the jurisdiction of the court, and where there is a serious risk that the defendants will remove or dissipate assets before the court can give judgment.

The assets sought to be frozen by the plaintiffs in *Barber* included cryptocurrency held in digital wallets. The question arose as to whether the cryptocurrency stored in digital wallets was in fact held by the defendants, and whether digital assets existing on a blockchain could be considered within the jurisdiction of the court.

The court found that the funds, "whether they were in the form of currency or cryptocurrency are now legally in the possession, power and control of the defendants." It also found that the organizers and many of the digital institutions holding their cryptocurrency were within the jurisdiction of the court. It pointed out that even an ordinary fiat currency like Canadian dollars, when deposited with a bank, "exist[s] not as bundle of money in a vault or a box, but as a ledger entry which records a debt by the financial institution to the client… In that sense, we already live in an age of digital currency." As such, "digital funds are not immune from execution and seizure to satisfy a debt any more than a bank account provided the individual or institution which can access the funds are within the reach of a court order."

Cryptocurrency as a digital asset

In *Shair.com Global Digital Services Ltd v Arnold*, 2018 BCSC 1512, the Supreme Court of British Columbia considered an application for a Mareva injunction and preservation order with respect to cryptocurrency. In this case, the defendant, a former employee of the plaintiff, purchased cryptocurrency with funds received from the plaintiff, but did not return a laptop with the applicable wallet information after the defendant's employment was terminated.

The Court held that the digital currency (*i.e.* cryptocurrency) and related wallet information at issue were "digital assets" and made an order that they be preserved pending trial.

Cryptocurrency as a *specie* of property

In *Cicada 137 LLC v. Medjedovic*, 2022 ONSC 369, and *Cicada 137 LLC v. Medjedovic*, 2021 ONSC 8581, Medjedovic, a math prodigy, was alleged to have stolen $15 million worth of cryptocurrency using sophisticated hacking methods. He avoided appearing for trial and resisted cooperating with authorities. The plaintiff requested an **Anton Piller order**, a type of injunctive relief that allows for search and seizure in civil cases. As part of that order, assets would be seized, and then controlled by a third party until the outcome of the case. In this case, cryptocurrency would be transferred from the defendant's digital wallet to the wallet of an independent custodian.

The Ontario court was careful not to come to any final conclusions about the exact nature of cryptocurrency as property. Instead, it stated that it was enough for now "to find that people invested value to obtain control of the tokens" that the defendant allegedly took. Further, the court stated that "the law will determine in due course whether the digital tokens are a *specie* of property…"

The court emphasized the importance of extending the possibility of injunctive relief into the sphere of cryptocurrency: "This is a very serious matter for which an Anton Piller order is justified… As this new form of investing and commerce grows, it is fundamentally important to the stability of the economy and the online market place that that the integrity of these assets be maintained. The investing and transacting public need assurance that the law applies to protect their rights. Despite what some might think, the law applies to the internet as it does to all relations among people, governments, and others."

Cryptocurrency as family property

In *M.W. v N.L.M.W.*, 2021 BCSC 1273, the Supreme Court of British Columbia dealt with cryptocurrency in the context of dividing family property after the breakdown of a marriage. Under the *Family Law Act*, SBC 2011, c 25, "family property" is defined in s. 84(1)(a) as all real and personal property owned or beneficially owned by either spouse on the date of separation, unless it is excluded property. The Supreme Court of British Columbia did not perform an analysis as to whether cryptocurrency fit within the definition of "family property" – the Court simply included the respondent's cryptocurrency when making allocations of the parties' assets and liabilities and attributed a value to the respondent's cryptocurrency holdings, essentially acknowledging that cryptocurrency met the definition of family property.

Other cases across the country have similarly included cryptocurrency as family assets to be included in family property division (for example, *Kostrinsky v Nasri*, 2022 ONSC 2926). In *M.M.D. v J.A.H.*, 2019 ONSC 2208, when considering whether to order redacted disclosure of cryptocurrency accounts in a family law matter, the Ontario Superior Court of Justice stated that cryptocurrency "is clearly a volatile, emerging, intangible source of wealth which the courts will have to grapple with more frequently in future."

Cryptocurrency as something to be decided on another day

In *Nelson v Gokturk*, 2021 BCSC 813, the plaintiff brought claims in breach of contract and conversion regarding the sale and delivery of 50 Bitcoin to the defendant. The plaintiff delivered the 50 Bitcoin to the defendant, but the defendant never paid the agreed upon sum. The Supreme Court of British Columbia held that the defendant breached the contract and ordered that the defendant pay to the plaintiff the amount agreed upon in the contract.

With respect to the claim in conversion, the Court assumed, without deciding, that the plaintiff could establish the tort of conversion regarding the Bitcoin. Although the Court stated that cryptocurrency was a "digital asset", nothing in the decision turned on this point. In its analysis, the Court determined that the damages were the same whether awarded in contract (breach of contract) or tort (conversion), and, as such, stated that there was no need to further consider the merit of the conversion claim. As a result, no decision was made with respect to the nature of cryptocurrency in relation to a conversion claim.

In *Kik Interactive v AIG*, 2020 ONSC 8194, the applicant sought indemnification from its insurer for the legal expenses it incurred in defending an action commenced by the Securities Exchange Commission in the United States which alleged that cryptocurrency offered by the applicant was a security and that the sale to the public was an unregistered public offering of securities. The applicant took the position that its cryptocurrency was not a security but instead an asset. The Ontario Superior Court of Justice determined that the allegation of a public offering of securities was sufficient to trigger the exclusion in the policy. As such, the issue did not turn on whether the cryptocurrency was actually a security, only on whether it was alleged, and the Court did not have to make a finding with respect to the nature of the cryptocurrency.

Takeaways

While major case decisions dealing with cryptocurrency have been relatively rare in Canada, the increasing prevalence of crypto assets and their integration into the broader financial system suggests that litigation involving these questions will become more common. Applying legal principles to cryptocurrency presents unique challenges, but Canadian courts are illustrating the characteristic flexibility and adaptability of the common law. The cases discussed in this article suggest that the courts have not yet settled on a clear doctrine about the exact legal nature of cryptocurrency. Instead, the courts have so far been inclined to set aside the task of defining a substantive doctrine about cryptocurrency, and taken a pragmatic approach to providing relief in relation to digital assets.

Our team at BLG can help navigate the evolving law with respect to the treatment of cryptocurrency. Please reach out to any of the authors or key contacts listed below, or connect with your BLG lawyer to learn more.

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