

CRYPTOCURRENCY SECURITIES LAW UPDATE – PLATFORM FRAMEWORK AND SERVICE PROVIDERS

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Cryptocurrency is not necessarily a “security” under Canadian securities law. Nonetheless, Canadian regulators have sought to extend their reach over cryptocurrency in various ways. This bulletin advises of recent developments in the Canadian securities regulatory space particularly in the area of cryptocurrency platforms and other service providers.

As of the date of this bulletin, there are no cryptocurrency trading platforms recognized under Canadian securities laws as an exchange or authorized to act as a marketplace or dealer in Canada.

The Canadian Securities Administrators and Investment Industry Regulatory Organization of Canada recently issued Consultation Paper 21-402, *Proposed Framework for Crypt-Asset Trading Platforms*.^[1] The paper contains Canadian regulatory commentary on: the nature of crypto assets and application of securities legislation; risks related to platforms; regulatory approaches in other jurisdictions, and the proposed platform framework.

Comments from the public were solicited in writing until May 15, 2019. Materials filed in the course of the consultation have not yet been publicized or responded to by the CSA or IIROC.

It is apparent that the CSA and IIROC are of the view that various Canadian registration requirements apply to cryptocurrency platforms in Canada. *The Proposed Framework*, among other things, contemplates that cryptocurrency platforms will become registered as investment dealers and IIROC dealer and marketplace members. It also suggests that they may be recognized as exchanges under provincial securities regulation.

It is often the case that documents such as the *Proposed Framework* are used by regulators to purport to provide jurisdiction over according subject matter in their dealings with the public. Particularly with the *Proposed Framework* at the consultation stage, it is not clear that any exercise of purported regulatory authority derived from the document is necessarily valid. That said, entities contacted by securities regulators will want to consider what level of cooperation with those regulators is appropriate, whether the inquiries should be answered regardless of the *Proposed Framework* and what the attendant consequences could be by failing to engage.

While the status of cryptocurrency as a “security” may be disputed^[2], some products which leverage cryptocurrency are undeniably “securities” under Canadian securities laws. Several settlements have been reached with provincial securities regulators across Canada regarding trading platforms that have been alleged to offer Canadian customers access to cryptocurrency derivatives. The outcome of the settlements has depended greatly on the offerings of the platform, the conduct of the operators of the platform once they were aware that Canadian regulators viewed the offering of such derivatives as contrary to law and other facts which are described in the settlement agreements.^[3]

Platform operators and parties transacting in cryptocurrency assets are not the only parties receiving regulatory attention. Other forms of service providers are attracting scrutiny. As the result of a recent settlement, a Canadian company was fined and banned from certain market conduct for five years. The company’s CEO and director also gave personal undertakings about positions he would hold in the future. These consequences flowed from an agreement that certain conduct in marketing cryptocurrency tokens constituted acting in furtherance of trading of those tokens.^[4]

All this attention on cryptocurrency platforms and other services may seem unnecessary, particularly for those foreign to the Canadian market. There is relevant Canadian context, however. A prominent Canadian online cryptocurrency exchange, QuadrigaCX, suddenly ceased operations and declared bankruptcy this year. It has been estimated that up to CAD\$250 million was held in QuadrigaCX investor accounts. This background may make the attention on cryptocurrency platforms and services more understandable: securities regulators wish to demonstrate to the public that they are active in protecting the public interest.

McMillan’s securities and litigation lawyers have advised clients in relation to the application of the *Proposed Framework*, the application of Canadian securities laws to cryptocurrency and cryptocurrency platforms and have represented parties in matters resolved on both “no contest” and admitted liability bases in matters involving enforcement staff at Canada’s securities regulators.

by Adam Chisholm, Michael Burns and Kosta Kostic

[1] OSC - Consultation Paper 21-402.

[2] There have been recent instances of Canadian securities regulators finding that a particular cryptocurrency is a security: see *Autorité des marchés financiers c. PlexCorps*, 2018 QCTMF 91.

[3] See e.g. *eToro (Europe) Limited*, 2018 ONSEC 49 and *Ava Trade Ltd. (Re)*, 2019 ONSEC 2.

[4] *CoinLaunch Corp. (Re)*, 2019 ONSEC 26.

A Cautionary Note



The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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