Navigating the Blockchain Revolution – Cryptocurrencies may be traced, but to where and whom?

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Some have claimed that business is in the midst of a "blockchain revolution" and that distributed ledger technologies will create a new world. This is particularly true in the financial services sector, where blockchain technology is being used to support new payment processing alternatives to support new trade finance technology. Generally, blockchain technology creates new ways to store data, is being used to create new forms of digital assets, and is creating new issues in the area of creditors' remedies as the law sorts out what these digital assets are in law and how to regulate them. Despite being available for nearly a decade, cryptocurrency jurisprudence is sparse and uncertain. What is clear, however, is that digital assets create new challenges in identifying, locating and recovering the assets of debtors for financial institutions.

Cryptocurrencies use blockchain technology to record transactions in a distributed ledger accessible to all. Bitcoin remains the best known of hundreds of cryptocurrency blockchains. Although, ether (Ethereum), XRP (Ripple), and others are well known and emerging competitors. Enforcing against digital assets that utilize blockchain technology will prove to be complex, as blockchain technology has created new means and methods of accessing information and tracing and holding assets. The true magnitude of blockchain's impact remains to be seen.

Enforcement in the cryptocurrency context faces three significant challenges: (1) finding the digital assets; (2) freezing them; and (3) gaining control over them so that they can be delivered up to the creditor. However, these challenges are subject to multiple unknowns (or at least continuing uncertainty), including:

(1) what the cryptocurrency is defined or argued to be in law;

(2) where the cryptocurrency is located;

(3) who holds the cryptocurrency; and

(4) the capacity in which they hold it.

How you best enforce against a digital asset depends substantially on the first "unknown" described above - what the cryptocurrency is defined or argued to be in law. There is much debate whether cryptocurrencies are commodities, securities, money, or something else – and they are treated differently in different contexts. This is central to creditor enforcement as one must consider the nature of the asset, how it is held, how it is dealt with, and other features of the asset to determine the best mechanism for enforcement. For example, is the asset something to seize? Does it represent a debt due and owing that may be subject to garnishment? Is it *sui generis* and something that could be more effectively seized by having a receiver or trustee in bankruptcy step into the shoes of the debtor to permit sale and recovery from the assets?

Our courts have been slow to comment on the legal landscape of the "blockchain revolution" or the scope of cryptocurrency enforcement remedies. One of the few decisions of our court to consider the tracing remedy in this context is *Copytrack Pte Ltd.* V. Wall, 2018 BCSC 1709 ("***Copytrack***"). In this case, the plaintiff, Copytrack, had created a cryptocurrency known as "CPY Tokens" as a part of an initial coin offering ("**ICO**"), which is a practice where companies raise equity financing by creating and selling blockchain tokens to investors.

The Defendant, Brian Wall, participated in the ICO and purchased 530 CPY tokens. Copytrack mistakenly transferred to Wall 530 Ether tokens, which was significantly more valuable. How much more valuable? While the CPY tokens Copytrack intended to transfer were valued at about $780 CDN, the value of the Ether tokens was $495,000 CDN.

Copytrack immediately realized that it had erroneously transferred the Ether tokens, and informed Wall of the same. Although Copytrack requested that Wall return the tokens, he initially refused and transferred the tokens from his wallet to a cryptocurrency trading account with a cryptocurrency exchange. Wall later agreed to return the Ether tokens to Copytrack, and transferred the Ether tokens back to his wallet.

In a bizarre twist of fate, after Wall had agreed to return the tokens, the tokens were transferred from Wall's wallet to five different wallets. Wall argued that this was orchestrated by an unknown third party (which Copytrack disputed).

Copytrack sought summary judgment against Wall, seeking various remedies, including monetary damages and a tracing order to facilitate the return of the Ether tokens. Copytrack relied on the torts of conversion and detinue, and argued that Wall had converted and wrongfully detained the Ether tokens. Wall's estate (as he passed away during the course of the litigation, which was immaterial) argued that the proper characterization of cryptocurrency was an issue, and that the matter was unsuitable for summary determination.

Mr. Justice Skolrood held that the proper characterization of cryptocurrency was central to the analysis of whether Copytrack's claims in conversion and detinue could succeed. However, the evidentiary record was inadequate to determine these issues. In any event, Skolrood J. determined that this issue was a complex and, as of yet, undecided question that was not suitable for determination by way of a summary trial application.

However, in light of the particular (and peculiar) facts of this case - with Wall dead and no additional evidence forthcoming - the Court ordered that there was no practical utility in sending this matter to trial. Further, Skolrood J. held that regardless of the proper characterization of the Ether tokens at law, it was undisputed that they were the property of Copytrack, that they were sent to Wall in error, they were not returned when a demand was made, and that Wall had no proprietary claim to them. As a result, it was unreasonable and unjust to deny Copytrack a remedy. The Court ordered that Copytrack be entitled to trace and recover the Ether tokens received by Wall from Copytrack, "...in whatsoever hands those Ether tokens may currently be held".

In practice, the Court's order may present a hollow remedy to Copytrack, absent some means of obtaining a trace through to the holder of the digital wallets used to receive the Ether tokens, or access to the relevant private keys to those wallets. Creditors seeking to navigate the blockchain revolution are likely to face the same challenges - finding, freezing and gaining control over the assets - until our courts clarify the status of cryptocurrency at law.

While *Copytrack* leaves uncertainty, our Courts want to ensure that the litigation process can provide effective remedies. Recovery of debts through enforcement against cryptocurrency assets presents challenges, but it is not impossible. Ultimately, enforcement comes down to locating and controlling the private encryption keys that provide evidence of ownership of cryptocurrency tokens. Those keys may be held by individual debtors, or by custodial wallet providers who hold cryptocurrency for their clients. The transparency of the blockchain, with adequate information, allows cryptocurrency to be traced, and recovery and control of private keys through seizure of debtor devices, assets held by custodians, Mareva injunctions, or (on proper cases) use of Anton Piller Orders in aid of enforcement may be viable.

With increasing use of cryptocurrencies, and billions of dollars in market capitalization, this is likely to be an increasingly important area of the law. At present, we know there are theories, opportunities and possibilities, and courts willing to fashion effective remedies.

By:

Robert Dawkins, Shelby Liesch, Kristina Mansveld

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Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749