

## The Virtual Currency Regulation Review

By Alix d'Anglejan-Chatillon, Ramandeep K. Grewal,  
Éric Lévesque and Christian Vieira

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THE LAWREVIEWS

THE VIRTUAL  
CURRENCY  
REGULATION  
REVIEW

**Editors**

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## I SECURITIES AND INVESTMENT LAWS

Securities regulation in Canada is primarily a matter of provincial jurisdiction. While each province and territory have their own rules and securities regulators, the securities regulatory framework is largely streamlined and harmonised across Canada, with certain provincial or regional variances.<sup>2</sup> However, legislative jurisdiction in the area of derivatives is divided between the federal and provincial governments, and the harmonisation of rulemaking in this area has been more elusive.

Generally speaking, the two basic purposes of the securities laws are to provide protection from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in those capital markets.<sup>3</sup>

Securities regulation in Canada generally governs the distribution and trading of both securities and derivatives. The distribution and trading of securities and derivatives is primarily regulated through the imposition of prospectus requirements, dealer and adviser registration requirements, and certain requirements imposed upon those operating exchanges, alternative trading facilities or other marketplaces that facilitate their trading.

The Canadian Securities Administrators (CSA) is an umbrella organisation of Canada's provincial and territorial securities regulators whose objective is to improve, coordinate and harmonise regulation of the Canadian capital markets.<sup>4</sup> In the past year, the CSA has published two staff notices with respect to virtual currencies: Staff Notice 46-307 – Cryptocurrency Offerings<sup>5</sup> and Staff Notice 46-308 – Securities Law Implications for Offerings of Tokens.<sup>6</sup> These Staff Notices are intended to provide guidance to industry participants on the applicability of securities laws to virtual currencies, and are the primary basis for the discussion that follows.

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1 Alix d'Anglejan-Chatillon, Ramandeep K Grewal and Éric Lévesque are partners and Christian Vieira is an associate at Stikeman Elliott LLP.

2 While the province of Quebec has a separate Derivatives Act that regulates over-the-counter and exchange-traded derivatives, derivatives regulation in the remaining provinces is governed by the securities and, in certain provinces, commodities futures legislation.

3 Securities Act, R.S.O. 1990, c. S.5, s. 1.1.

4 Canadian Securities Administrators, Overview (Canadian Securities Administrators, 2018).

5 Canadian Securities Administrators, Staff Notice 46-307 – Cryptocurrency Offerings (2017), 40 OSCB 7231. (Canadian Securities Regulators, 2017).

6 Canadian Securities Administrators, Staff Notice 46-308 – Securities Law Implications for Offerings of Tokens (Canadian Securities Administrators, 2018).

**i Applicability of Canadian securities laws to virtual currencies**

Virtual currencies may be subject to Canadian provincial securities laws to the extent that a virtual currency is considered a security or a derivative for the purposes of such laws, such as the Securities Act (Ontario). The Securities Act defines a security to include, among other things, an investment contract. The seminal case in Canada for determining whether an investment contract exists is *Pacific Coast Coin Exchange v. Ontario (Securities Commission)*,<sup>7</sup> where the Supreme Court of Canada identified the four central attributes of an investment contract, namely:

- a* an investment of money;
- b* in a common enterprise;
- c* with the expectation of profit; and
- d* which profit is to be derived in significant measure from the efforts of others.

If an instrument satisfies the *Pacific Coin* test, the instrument will be considered an investment contract and, therefore, a security under Canadian securities laws. The application of the *Pacific Coin* test to virtual currencies is not always straightforward, however. Industry participants have taken the position that utility tokens, which have a specific function or utility beyond the mere expectation of profit (such as providing their holders with the ability to acquire products or services) should not be considered securities. The CSA has left the door open to the possibility that certain virtual currencies may be properly classified as utility tokens, but noted that most of the offerings of virtual currencies purporting to be utility tokens that it had reviewed to date involved the distribution of a security in the form of an investment contract.<sup>8</sup> Further, the CSA has stated that a virtual currency that is a utility token may also be an investment contract.

In assessing whether a particular virtual currency will be considered a security subject to Canadian securities laws, the CSA will consider the substance of the virtual currency over its form.<sup>9</sup> The CSA recently outlined a number of considerations in determining whether an investment contract exists. While no single factor is determinative, the CSA has stated that the existence of some or all of the following circumstances may cause a virtual currency to be considered an investment contract:<sup>10</sup>

- a* the underlying blockchain technology or platform has not been fully developed;
- b* the token is immediately delivered to each purchaser;
- c* the stated purpose of the offering is to raise capital, which will be used to perform key actions that will support the value of the token or the issuer's business;
- d* the issuer is offering benefits to persons who promote the offering;
- e* the issuer's management retains a significant number of unsold tokens;
- f* the token is sold in a quantity far greater than any purchaser is likely to be able to use;
- g* the issuer suggests that the tokens will be used as a currency or have utility beyond its own platform, but neither of these things is the case at the time the statement is made;
- h* management represents or makes other statements suggesting that the tokens will increase in value;
- i* the token does not have a fixed value on the platform;

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<sup>7</sup> *Pacific Coast Coin Exchange v. Ontario (Securities Commission)*, [1978] 2 SCR 112.

<sup>8</sup> *Ibid.*, footnote 5.

<sup>9</sup> *Ibid.*, footnote 5.

<sup>10</sup> *Ibid.*, footnote 5.

- j* the number of tokens issuable is finite or there is a reasonable expectation that access to new tokens will be limited in the future;
- k* the token is fungible;
- l* the tokens are distributed for a monetary price; and
- m* the token may be reasonably expected to trade on a trading platform or otherwise be tradeable in the secondary market.

A particular virtual currency that meets the criteria of the *Pacific Coin* test or has certain of the characteristics described in the CSA guidance discussed above may be properly considered an investment contract and therefore a security, subject to Canadian securities laws.

## ii Virtual currency offerings in Canada

Canadian securities laws generally require the filing of a prospectus to qualify any distribution of securities. No person or company may trade in a security where the trade constitutes a distribution unless a prospectus has been filed or the trade is made in reliance upon a prospectus exemption. Securities originally distributed under a prospectus exemption are generally subject to resale restrictions that require the issuer to have been a reporting issuer (i.e., a public company) for a specified period of time and, in some cases, that the securities be held for a specified period of time. To the extent that a virtual currency is considered a security or a derivative, the issuance or distribution to the public is subject to prospectus, qualification or similar requirements, or must be effected pursuant to applicable exemptions from prospectus or derivatives qualification requirements, as applicable.

There are a number of options available for distributing securities in Canada on a prospectus-exempt basis, generally referred to as exempt distributions or private placements. Most of these are harmonised under National Instrument 45-106 – Prospectus Exemptions.<sup>11</sup> The CSA has indicated that persons wishing to distribute virtual currencies may do so pursuant to these exemptions.<sup>12</sup> Specifically, distributions may be completed pursuant to the accredited investor exemption, which provides a prospectus exemption for trades of securities to entities and individuals that are qualified accredited investors.<sup>13</sup>

Distributions may also be made to investors who do not qualify as accredited investors in reliance on the offering memorandum prospectus exemption.<sup>14</sup> To rely on this exemption, investors must be provided with a written document that contains certain prescribed disclosure, but this exemption does not require the same level of disclosure as a prospectus. Importantly, an investor has certain rights in connection with this type of investment, including a two business day withdrawal right and a right of action for rescission or damages if the offering memorandum contains a misrepresentation.<sup>15</sup> Non-reporting issuers (generally, unlisted companies) that rely on the offering memorandum exemption will generally be required to provide to the applicable securities regulatory authority audited annual financial statements and a notice describing how the money raised has been used. The financial statements and notice must be made available to investors within 120 days of each financial year end.

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<sup>11</sup> Ontario Securities Commission, National Instrument 45-106 – Prospectus Exemptions (2018).

<sup>12</sup> Ibid., footnote 4.

<sup>13</sup> Ibid., footnote 4.

<sup>14</sup> Ibid., footnote 4.

<sup>15</sup> Ibid., footnote 10 at s. 2.9.

A number of companies have successfully completed virtual currency offerings in compliance with applicable securities law requirements and bespoke exemptions from such requirements. Montreal-based Impak Finance Inc (Impak) was the first Canadian company to complete a virtual currency offering with the approval of Canadian securities regulators. Impak issued Impak Coin (MPK), a new virtual currency based on the Waves blockchain platform, for gross proceeds of over C\$1 million by way of private placement, in reliance on the offering memorandum exemption.<sup>16</sup>

A few months later, Token Funder Inc (Token Funder) completed the first virtual currency offering under the oversight of the Ontario Securities Commission (OSC). Token Funder was established for the purpose of creating a smart token asset management platform that is intended to, *inter alia*, facilitate capital raising by third-party issuers through the offering of blockchain-based securities, including tokens and coins.<sup>17</sup> Token Funder issued its virtual currency, FNDR, in reliance on the offering memorandum exemption. In this case, the OSC granted an exemption from the dealer registration requirement for a period of 12 months from the date of the decision, subject to a number of conditions similar to those imposed on Impak.<sup>18</sup>

Notwithstanding the success stories of Impak and Token Funder, the prospectus and registration requirements imposed by Canadian securities laws may be an obstacle to the issuance of virtual currencies in Canada on a retail basis, even with negotiated bespoke exemptions.<sup>19</sup>

### iii Regulatory considerations for intermediaries

Any person or company engaging in, or holding themselves out as engaging in, the business of trading or advising in securities, and, in certain Canadian jurisdictions, in derivatives, must register as a dealer or as an adviser or, where available, conduct these activities pursuant to an exemption from the dealer or, as the case may be, adviser registration requirement under the applicable securities laws. Registration requirements are generally harmonised under National Instrument 31-103 – Registration Requirements, Exemptions and Ongoing Registrant Obligations,<sup>20</sup> which sets out requirements for dealers and advisers dealing with capital, proficiency, insurance, financial reporting, know your client, investor suitability, client disclosure, safekeeping of assets, recordkeeping, account activity reporting, complaint handling and other compliance matters.

In Canada, the requirement to register as a dealer or adviser is triggered where a person or company conducts a trading or advising activity with respect to securities or derivatives for a business purpose.<sup>21</sup> The mere holding out, directly or indirectly, as being willing to engage

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16 Ontario Securities Commission, AMF Impak Finance Decision, 16 August 2017.

17 Ontario Securities Commission, OSC Token Funder Decisions, 17 October 2017.

18 Ibid.

19 Kik Interactive opted to exclude Canadian investors from the initial offering of its virtual currency following discussions with the OSC. See Claire Brownell, 'Kik bans Canadians from investing in new crypto-token, cites 'weak guidance' from regulators', *Financial Post* (8 September 2017).

20 Ontario Securities Commission, National Instrument 31-103 – Registration Requirements, Exemptions and Ongoing Registrant Obligations.

21 Ontario Securities Commission, Companion Policy 31-103 CP – Registration Requirements, Exemptions and Ongoing Registrant Obligations.

in the business of trading in securities may trigger the requirement to register as a dealer; however, a number of factors must be considered when determining whether registration is required, including whether a business:

- a* is engaging in activities similar to a registrant;
- b* intermediating trades or acting as a market maker;
- c* is carrying on an activity with repetition, regularity or continuity;
- d* expects to be remunerated or compensated; and
- e* directly or indirectly soliciting.<sup>22</sup>

In the context of virtual currency distributions, the CSA has noted the following additional factors in determining whether a company may be considered to be trading in securities for a business purpose:<sup>23</sup>

- a* soliciting of a broad range of investors, including retail investors;
- b* using the internet to reach a large number of potential investors;
- c* attending public events to actively advertise the sale of a virtual currency; and
- d* raising a significant amount of capital from a large number of investors.

The CSA has stated that persons facilitating offerings of virtual currencies that meet the business trigger must collect know your client information and perform suitability assessments to ensure that purchases of virtual currencies are suitable, including with respect to investment needs and objectives, financial circumstances and risk tolerance.<sup>24</sup>

The creation and marketing of products related to virtual currencies are also subject to derivatives-related regulatory requirements, including in relation to qualification, registration and trade data reporting in a number of Canadian jurisdictions, including specifically Quebec, where the rules in relation to over-the-counter (OTC) and exchange-traded derivatives are more fully developed.<sup>25</sup>

The CSA has also issued recent proposals to establish a harmonised framework of registration and business conduct requirements for OTC derivatives market participants.<sup>26</sup> The proposals expressly define a commodity to include a cryptocurrency.

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22 Ibid.

23 Ibid., footnote 4.

24 Ibid., footnote 4.

25 Autorité des marchés financiers, Notice relating to the public offering of derivatives on cryptocurrencies and other innovative assets (22 May 2018).

26 Canadian Securities Administrators, Notice and Request for Comment – Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102 Derivatives: Registration (published 19 April 2018 for comment until 17 September 2018), and Notice and Second Request for Comment – Proposed National Instrument 93-101 Derivatives: Business Conduct and Proposed Companion Policy 93-101CP Derivatives: Business Conduct (published 14 June 2018 for comment until 17 September 2018).

**iv Exchanges and other platforms**

As marketplaces, exchanges are regulated pursuant to their applicable provincial securities statutes, as well as National Instrument 21-101 – Marketplace Operation (NI 21-101),<sup>27</sup> National Instrument 23-101 – Trading Rules (NI 23-101)<sup>28</sup> and their related companion policies.

NI 21-101 defines a marketplace as a facility that brings together buyers and sellers of securities, brings together the orders for securities of multiple buyers and sellers, and uses established non-discretionary methods under which the orders interact with each other.<sup>29</sup>

An exchange is a marketplace that may:

- a* list the securities of issuers;
- b* provide a guarantee of a two-sided market for a security on a continuous or reasonably continuous basis;
- c* set requirements governing the conduct of marketplace participants; or
- d* discipline marketplace participants.<sup>30</sup>

To operate as an exchange in Canada, a person or company must first apply for recognition as an exchange or for an exemption from the recognition requirement.<sup>31</sup> As another type of marketplace, alternative trading systems, which provide automated trading systems that match buyer and seller orders, are also regulated under NI 21-101 and NI 23-101.

It follows that exchanges or other platforms that facilitate the purchase, transfer or exchange of virtual currencies that are considered securities or derivatives may be subject to recognition requirements as securities or derivatives exchanges or marketplaces.<sup>32</sup> In the institutional market, prescribed or bespoke exemptions may be available in respect of platform-related recognition requirements under securities or derivatives laws, subject to the satisfaction of certain conditions and acceptance by the applicable regulators. To date, no virtual currency trading platform has been recognised as an exchange, or otherwise authorised to operate as a marketplace or dealer in Canada.<sup>33</sup>

In March 2018, TMX Group announced that one of its subsidiaries, Shorcan Brokers Ltd, is building the first exchange-owned brokerage platform for virtual currency investors.<sup>34</sup> The platform was expected to launch in the second quarter of 2018, but appears to remain a work in progress at this time.

The CSA has issued a steady stream of market advisories alerting market participants to risks related to products linked to virtual currencies, including futures contracts, on both

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27 Ontario Securities Commission, National Instrument 21-101 – Marketplace Operation (2018).

28 Ontario Securities Commission, National Instrument 23-101 – Trading Rules.

29 *Ibid.*, footnote 24.

30 *Ibid.*, footnote 24.

31 *Ibid.*, footnote 24.

32 Canadian Securities Administrators, CSA Investor Alert: Caution Urged for Canadians Investing with Crypto-Asset Trading Platforms, 6 June 2018.

33 *Ibid.*

34 TSX Inc. TSX's Shorcan Announces Cryptocurrency Initiatives (22 March 2018).

regulated and unregulated platforms.<sup>35</sup> In a June 2018 release, the CSA noted that no virtual currency trading platforms have to date been recognised as an exchange, or otherwise been authorised to operate as a marketplace or dealer in Canada.<sup>36</sup>

**v Asset management and investment funds**

With the meteoric price appreciation of certain virtual currencies over the past five years, the demand for economic exposure to virtual currencies has increased significantly. Investment funds have been a popular vehicle for obtaining this exposure. However, persons operating or administering collective investment structures that hold or invest in virtual currencies may also be subject to investment fund manager registration requirements in addition to dealer, adviser and prospectus or private placements requirements. The structures themselves may also be subject to reporting and conduct requirements that apply to investment funds.

In September 2017, First Block Capital Inc became the first registered investment fund manager (IFM) in Canada for a fund dedicated solely to investments in virtual currencies.<sup>37</sup> The British Columbia Securities Commission (BCSC) granted First Block Capital registration as an IFM and exempt market dealer in order to operate a Bitcoin investment fund, subject to certain bespoke exemptions from the applicable regime.<sup>38</sup> In its decision, the BCSC imposed a number of conditions on First Block Capital, including the requirement to seek the prior approval of the BCSC:

- a* to establish or manage any virtual currency investment fund;
- b* to change the investment objective of the virtual currency investment fund;
- c* to change the entity that maintains custody of the specified virtual currencies held by any investment fund;
- d* to change the entity responsible for the execution of trades in specified virtual currencies; and
- e* to change the firm's policies and procedures used to value any virtual currency held by any investment fund managed by the firm.<sup>39</sup>

The BCSC also imposed a number of other obligations on First Block Capital with respect to oversight of the third-party custodians and brokers.<sup>40</sup>

Three additional investment fund managers were approved by the CSA in January 2018 alone.<sup>41</sup>

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35 For example, the CSA reminds investors of the inherent risks associated with cryptocurrency futures contracts (18 December 2017). OSC Study: Lack of understanding of cryptoassets puts Ontarians at risk (28 June 2018).

36 CSA Investor Alert: Caution Urged for Canadians Investing with Crypto-Asset Trading Platforms (6 June 2018).

37 British Columbia Securities Commission, B.C. Securities Commission grants landmark bitcoin investment fund manager registration (6 September 2017).

38 Ibid.

39 Ibid.

40 Ibid.

41 See Canadian Securities Administrators, Majestic Asset Management; Canadian Securities Administrators, Rivemont Investments Inc; and Canadian Securities Administrators, 3iQ Corp.

The CSA has encouraged financial technology businesses interested in establishing a virtual currency investment fund to consider:

- a* the prospectus requirements when distributing securities to retail investors;
- b* the legal and operational suitability of virtual currency exchanges;
- c* the registrations required with respect to the investment fund;
- d* the valuation methodology for the virtual currencies; and
- e* the virtual currency expertise of the custodian for the virtual currencies.<sup>42</sup>

## II ANTI-MONEY LAUNDERING

The Financial Transactions and Reports Analysis Centre (FINTRAC) is Canada's financial intelligence unit. FINTRAC administers the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)<sup>43</sup> and its associated regulations, and assists in the detection, prevention and deterrence of money laundering and terrorist financing activities.<sup>44</sup> The PCMLTFA applies to a wide range of regulated entities, including money services businesses (MSBs). It requires that reporting entities develop a risk-based compliance programme to identify clients, monitor business relationships, keep records and report certain types of financial transactions.<sup>45</sup>

In 2017, the PCMLTFA was amended through the Budget Implementation Act, 2017<sup>46</sup> to, among other things, expand the application of the MSB rules to foreign persons and entities that have a place of business outside Canada but that are engaged in providing services to their customers in Canada as a foreign MSB. The application of the PCMLTFA was also extended to regulate the business of dealing in virtual currencies. These amendments are not yet in force, pending regulatory amendments that would operationalise these legislative changes.

On 9 June 2018, the amendments to the regulations to the PCMLTFA were published.<sup>47</sup> To mitigate the money laundering and terrorist activity financing vulnerabilities of virtual currencies, while at the same time not excessively obstructing innovation, the proposed amendments do not target virtual currencies themselves, but the persons or entities engaged in the business of dealing in virtual currencies. These dealing in activities include virtual currency exchange services and value transfer services. Persons and entities that are dealing in virtual currency would be financial entities, or domestic or foreign MSBs. As required of all MSBs, persons and entities dealing in virtual currencies would need to implement a full compliance programme and register with FINTRAC. Foreign MSBs would be subject to the same obligations (e.g., to register with FINTRAC, exercise customer due diligence, report transactions and keep records) for these activities. Furthermore, a foreign MSB found

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<sup>42</sup> Ibid., footnote 4.

<sup>43</sup> Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c.17.

<sup>44</sup> Financial Transactions and Report Analysis Centre of Canada, FINTRAC Annual Report Maximizing Results Through Collaboration, 2017.

<sup>45</sup> Ibid.

<sup>46</sup> Budget Implementation Act, 2017 No. 1 (S.C. 2017, c. 20). Note: the amendment was originally proposed and made in 2014 although not brought into force.

<sup>47</sup> Canada Gazette, Part I, Volume 152, Number 23: Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2018.

to be non-compliant with the PCMLTFA and its regulations could face an administrative monetary penalty, and in the case of a failure to pay, revocation of its MSB registration, making it ineligible to do business in Canada.

The proposed amendments define the term virtual currency as:

- a* a digital currency that is not a fiat currency and that can be readily exchanged for funds or for another virtual currency that can be readily exchanged for funds; or
- b* information that enables a person or entity to have access to a digital currency referred to in item (a).

The proposed amendments do not specifically outline what constitutes dealing in virtual currency, although guidance published with the proposed amendments states that dealing in activities would include virtual currency exchange services and value transfer services.<sup>48</sup>

A virtual currency exchange transaction is defined to mean an ‘exchange, at the request of another person or entity, of virtual currency for funds, funds for virtual currency or one virtual currency for another’.<sup>49</sup>

Quebec has enacted separate MSB legislation, which is administered by the AMF. The Money-Services Businesses Act<sup>50</sup> requires that any person or entity who operates a money-services business for remuneration be registered as an MSB. MSB registration issues in Quebec should be considered in connection with any virtual currency businesses with a Quebec nexus.

Canadian federal legislation also provides for economic and political sanctions, including additional monitoring and reporting obligations and prohibitions. These rules include offences such as knowingly collecting or providing funds to terrorist organisations or associated individuals, or dealing with sanctioned governments, entities or individuals.

### III REGULATION OF MINERS

The process of virtual currency mining, which utilises specialised, high-speed computers, is energy-intensive. While virtual currency mining is not specifically regulated in Canada at this time, the use of virtual currency mining hardware may be subject to provincial or municipal requirements, or both, relating to the use of energy.

Canada’s cold temperatures and low electricity costs make it particularly attractive for virtual currency miners.<sup>51</sup> This increased demand for electricity has caused some provincial and municipal governments to re-evaluate how to process requests from virtual currency miners going forward.

Quebec’s Régie de l’énergie recently approved a request by Hydro-Quebec to set conditions on services for new blockchain and virtual currency clients, including a temporary dissuasive rate of 15 cents per kilowatt-hour, double the rate paid by its residential clients, pending the introduction of more permanent regulations for the virtual currency industry.<sup>52</sup> There is uncertainty as to how the government of Quebec will assess and process requests

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48 Ibid.

49 Ibid.

50 Money-Services Businesses Act, CQLR, c. E-12.000001.

51 Hooman B, ‘Crypto-miners flood into Canada, boosting the hopes of small towns looking for a break’, *Financial Post*, 9 April 2018.

52 ‘Hydro-Québec allowed to charge cryptocurrency miners increased rates’, *Montreal Gazette*, 16 July 2018.

for electricity access from virtual currency industry participants going forward. Miners will likely be subject to a selection process to determine their potential economic impact in the province, with such factors as job creation and tax revenue taken into account.<sup>53</sup> It is also unclear whether similar actions will be taken by other provincial or municipal governments in Canada.

#### IV CRIMINAL AND CIVIL FRAUD AND ENFORCEMENT

Given the relatively nascent stage of the market, the policing of virtual currencies and virtual currency offerings in Canada presents unique enforcement challenges for both criminal prosecutors and securities regulatory authorities. While most of the litigation in the virtual currency market to date has occurred outside Canadian borders, one Canadian case is worth discussion.

In 2017, PlexCorps undertook an initial offering of its own virtual currency, PlexCoin. PlexCorps distributed to prospective investors a white paper stating that investors could expect a 1,354 per cent return on investment in less than 29 days.<sup>54</sup>

On 20 July 2017, at the request of the AMF, Quebec's Financial Markets Administrative Tribunal issued various *ex parte* orders against PlexCorps, PlexCoin and related businesses, prohibiting them from engaging in activities for the purpose of directly or indirectly trading in any form of investment described in Section 1 of the Securities Act (Quebec),<sup>55</sup> including the solicitation of investors in Quebec and the solicitation, from Quebec, of investors outside the province.<sup>56</sup> The orders effectively required PlexCorps to abandon the planned token offering. PlexCorps disregarded the order and pursued the offering, and, despite AMF warnings to potential investors that PlexCorps had disregarded its orders, PlexCorps still raised approximately US\$15 million from over 1,000 investors.<sup>57</sup>

The CSA has stepped up market advisories, sweeps and other enforcement actions to counter fraud-related risks associated with virtual currency offerings and ICOs. In its 2017–2018 Enforcement Report, the CSA commented on additional enforcement initiatives with the North American Securities Administrators Association, its engagement on virtual currency-related threats with Facebook, Google, MasterCard, Visa and other key financial and technology players, and its coordination work with global digital platforms to ban the advertising of virtual currencies and ICOs.<sup>58</sup>

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53 Bloomberg, 'Hydro-Quebec's new crypto framework risks deterring foreign players from Canada', 13 June 2018.

54 Jonathan Montpetit, 'Alleged Cryptocurrency fraud by Quebec company highlights need for more regulations, experts say', CBC News, 6 December 2017.

55 Quebec Securities Act, 1982, c.48; 2001, c.38. s.1.

56 Autorité des marchés financiers, Virtual Currency – Orders issued against PlexCorps, PlexCoin, DL Innov inc., Gestio inc. and Dominic Lacroix, 21 July 2017.

57 Autorité des marchés financiers, AMF urges utmost caution regarding solicitations relating to PlexCoin, 3 August 2017.

58 Canadian Securities Administrators, 2017/2018 Enforcement Report: Securities Enforcement in a Connected World, 10 July 2018.

## V TAX

### i Taxation of virtual currencies

For Canadian tax purposes, the Canada Revenue Agency (CRA) has taken the position that virtual currencies constitute a commodity rather than a currency.<sup>59</sup> As such, gains or losses resulting from the trade of virtual currencies are taxable either as income or capital for the taxpayer.<sup>60</sup> Whether a transaction is on the account of income or capital is a question of fact. As with any transactions in securities, the CRA examines the following criteria to determine the nature of a transaction:

- a* the primary and secondary intentions of a taxpayer;
- b* the frequency of transactions;
- c* the period of ownership;
- d* the taxpayer's expertise and knowledge of virtual currencies markets;
- e* the relationship between the virtual currency's transaction and the taxpayer's business;
- f* the time spent engaged in virtual currencies activities;
- g* the type of financing required to support the taxpayer's cryptocurrency activities; and
- h* the taxpayer's advertising of the activities, if any.

Where a transaction is considered on capital account, the taxpayer will be required to include in computing its income for the taxation year of disposition one-half of the amount of any capital gain (a taxable capital gain) realised in such year. Subject to and in accordance with the provisions of the Income Tax Act,<sup>61</sup> the taxpayer will generally be required to deduct one-half of the amount of any capital loss (an allowable capital loss) realised in the taxation year of disposition against taxable capital gains realised in the same taxation year. Allowable capital losses in excess of taxable capital gains for the taxation year of disposition generally may be carried back and deducted in any of the three preceding taxation years, or carried forward and deducted in any subsequent taxation year against net taxable capital gains realised in such taxation years, to the extent and under the circumstances specified in the Tax Act. Where a transaction is considered on income account, the resulting gains are taxed as ordinary income and the losses are generally deductible.

### ii Virtual currency mining

The tax treatment of virtual currency mining will depend on whether the activity is undertaken for profit or as a personal endeavour.<sup>62</sup> A personal endeavour is an activity undertaken for pleasure and does not constitute a source of income for tax purposes, unless it is conducted in a sufficiently commercial and businesslike way. However, the mining of virtual currencies is likely to be considered a business activity by the CRA considering the complexity of such activity. The mining of virtual currencies would therefore require the taxpayer to compute and report business income in compliance with the Income Tax Act, including the rules with respect to inventory.

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59 Canada Revenue Agency, Document No. 2013-0514701I7, 23 December 2013.

60 Canada Revenue Agency, Fact Sheets & Taxpayer Alerts, What You Should Know About Digital Currency, 17 March 2015.

61 Income Tax Act, RSC 1985, c.1.

62 Canada Revenue Agency, Document No. 2014-0525191E5, 28 March 2014.

**iii Paying with virtual currencies**

Where a virtual currency is used as payment for salaries or wages, the amount must generally be included in the employee's income computed in Canadian dollars.<sup>63</sup> As a result of the qualification of virtual currencies as a commodity, the use of virtual currencies to purchase goods or services is subject to the rules applicable to barter transactions.<sup>64</sup> Therefore, where virtual currencies are used to purchase goods or services, the value in Canadian dollars of the goods or services purchased must be included in the seller's income for tax purposes, rather than the value of the virtual currencies.<sup>65</sup> However, the CRA has stated that the fair market value of the virtual currency at the time the supply is made must be used to determine the goods and services tax and harmonised sales tax payable on the purchase of a taxable supply of a good or service.<sup>66</sup>

**iv Specified foreign property**

The CRA has finally stated that virtual currencies situated, deposited or held outside Canada fall within the definition of specified foreign property, as defined in the Tax Act.<sup>67</sup> As such, Canadian residents must report to the CRA when the total costs of virtual currencies situated, deposited or held outside Canada exceed C\$100,000 at any time in the year by filing Form T1135 with their income tax return for the year.

**VI LOOKING AHEAD**

To achieve a balance between investor protection and innovation, the CSA has introduced the CSA regulatory sandbox, an initiative to support financial technology businesses seeking to offer innovative products, services and applications in Canada.<sup>68</sup> The initiative, along with province-specific initiatives such as the OSC's Launchpad, allow firms to register or obtain exemptive relief from securities law requirements, or both, under a faster and more flexible process than through a standard application, in order to test products, services and applications in the Canadian market on a time-limited basis.<sup>69</sup> Regulated offerings of virtual currencies such as Impak Coin and FNDR, and approvals of virtual currency investment funds, represent early success stories of the CSA regulatory sandbox.

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63 Ibid., footnote 57.

64 Ibid., footnote 55.

65 Ibid., footnote 56.

66 Ibid., footnote 55.

67 Canada Revenue Agency, Document No. 2014-0561061E5, 16 April 2015.

68 Canadian Securities Administrators, CSA Regulatory, Sandbox, 2018.

69 Ibid.

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