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LAW REVIEW



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# Controlling Crypto-Currencies

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LIBERAL ARTS  
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# The Law of Bitcoin in Canada

Controlling Crypto-Currencies

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# Introduction

- Background to Federalism
- Developments in Canada
- The Public Law of Bitcoin
- The Private Law of Bitcoin



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# The Canadian Federation

- Division of Powers: Under the Constitution Act, 1867, powers are allocated between the federal and provincial governments
- National government has certain powers under s. 91
- Provincial governments have powers pursuant to s. 92
- Residual or reserve power belongs to the feds



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# The Canadian Federation

- A narrow class of powers are exclusive to one or the other, but many are shared—these have a “double aspect” and the federal government and the provinces regulate concurrently



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# Notable Events

- Changes to Canada's AML-CTF laws (Bill C-31 & regulations)
- Senate Standing Banking, Trade & Commerce Committee hearings on digital currency
- Provincial securities commissions take note of bitcoin
- Tax developments in response to increased economic activity in the bitcoin space



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# Bitcoin: The Criminal Code

- Start with the Criminal Code
- Section 462.31: Laundering proceeds of crime—An offence to:
  1. use or deal with
  2. property or proceeds
  3. with intent to conceal or convert them
  4. knowing or believing they're from a designated offence



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# Further AML-CTF Rules

- “Designated offence” includes any offence prosecutable as an indictable offence
- *Mens rea* satisfied by wilful blindness



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# PCMLTFA

- Proceeds of Crime (Money Laundering) and Terrorist Financing Act—old (& current) rules:
- Money services businesses:
  - F/x dealing
  - Funds transmission
  - Issuing or redeeming money orders or traveller's cheques



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# PCMLTFA

- FinTRAC does not view bitcoins as “funds” within the meaning of the PCMLTFA and the regulations
- FinTRAC sees bitcoins as “goods”
- What is exempt?
- What isn’t exempt?



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# Why Does It Matter?

- Reporting people & entities have registration, record-keeping, ID verification, and reporting requirements



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# The New AML-CTF Regime

- 2014 Budget classified “virtual currencies, such as bitcoin” as an “emerging risk” in the AML-CTF world
- Bill C-31 (received royal assent on June 19, 2015): Modified the definition of “money services business”



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# What is an MSB Under the New Rules?

- MSB includes:
  - A place of business in Canada that is engaged in the business of “dealing in virtual currencies, as defined by regulation”
  - No place of business in Canada, but engaged in the business of providing services (dealing in virtual currencies) directed at entities in Canada and provides those services to customers in Canada



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# What is an MSB Under the New Rules?

- Don't know what "dealing in virtual currencies" means
- However: Objective is to cover entities like cryptocurrency exchanges, not individuals or businesses using cryptocurrencies for buying and selling goods and services
- Don't know what "directed at entities in Canada" means



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# When Will the Changes Take Effect?

- Regulations not yet in the Canada Gazette, so changes not yet in force
- Drafts to be released soon (?)
- Period of public consultation before finalized



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# Bitcoin & Taxation

- Unclear how CRA would treat bitcoin transactions
- Early November 2013: CRA issues fact sheet:
  - Rules for barter: IT-490
  - Rules for securities: IT-479R
  - “A barter transaction occurs when *any two persons agree* to exchange goods and services and carry out that exchange without using legal currency.”
  - This wording is too broad



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# Bitcoin & Taxation

- Subsequently: Internal memorandum (not a ruling) re: bitcoins issued December 23, 2013: Doc #2013-051470117
- Repeated main points of fact sheet
- Also: 2014 Technical Interpretation: Doc #2014-0525191E5
- Bulletins, memoranda, interpretations all lack force of law



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# Bitcoin-Denominated Securities

- January 2014: Ontario Securities Commission selects entity for an issue-oriented review of its continuous disclosure record.
- Letter touches on many aspects of modern securities law: marketing, roadshow, accounting under IFRS, corporate structure, registration issues



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# Bitcoin-Denominated Securities

- Subsequently, entity files material change report disclosing additional risk factors in bitcoin
- In presser, entity says following “discussions” with the OSC, it now believes that issuing its BTC funds “would likely require registration” and therefore won’t proceed



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# Bitcoin-Denominated Securities

- February 2014: Quebec's Autorité des marchés financiers cautions Quebeckers about the risk of fraud and a lack of deposit insurance in the bitcoin community; adds that it will prosecute any violations of the Securities Act, the Derivatives Act, and the Money Services Businesses Act
- February 2015: AMF issues new Policy Statement to the MSBA: “Businesses operating a virtual currency automated teller machine or a platform for trading must obtain a licence” issued by the AMF



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# Bitcoin-Denominated Securities

- May 2014: Saskatchewan's Financial and Consumer Affairs Authority obtains cease trade order against Dominion Bitcoin Mining
- FCAA states that it doesn't regulate BTC or mining, but it does regulate the issuance of securities and trading in securities in Sask
- FCAA alleges that Dominion was soliciting investors to purchase securities issued by it



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# Bitcoin-Denominated Securities

- Cease trade order expires
- Dominion Bitcoin's president quoted as saying that the FCAA has “absolutely no idea what bitcoin is.”



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# The Private Law of Bitcoin

- Currency Act:
  - Gives the Canadian dollar its power, such as it has
  - Defines legal tender & the monetary unit
  - All references in public accounts & in legal proceedings to money or monetary value are in Canadian currency



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# The Currency Act

- What is money?
  - Transferable credit, supported by accounting
  - Broader than just legal tender
  - Legally:
    1. Universal acceptance (whatever that means)
    2. State issued? (State Theory of Money)



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# The Currency Act

- Issuance of judgments (common law Canada):
  1. Currency-to-currency conversion
  2. Specific performance
  3. Hybrid: aim for specific performance, but convert to dollars in judgment



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# Bills of Exchange Act

- Rules can seem bizarre, but basically:
  1. Instrument in special form (negotiable);
  2. Transferred in a special way (negotiated);
  3. To a special person (Holder in Due Course),  
then takes clear of all but real defences
- The Holder in Due Course gets *better* title than the transferor. Transferees can have confidence that prior rights are extinguished.



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# Bills of Exchange Act

- Requirements for negotiability:
  - Unconditional promise
  - In writing and signed
  - Payable to order or bearer
  - Sum certain in money
- Not money, therefore no negotiability



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# Bills of Exchange Act

- What does this mean?
  - Level of uncertainty in commerce
  - No Holder in Due Course
  - ‘Virgin’ bitcoins trade at a premium?
  - Personal rights of action still present



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# Questions & Wrap-Up



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