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• CALLING ON THE CODE: CIVIL CONSEQUENCES FOR CRYPTOCURRENCY •

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Would-be blockchain bandits that still believe that cryptocurrency is beyond the reach of the law should think again. In *Cicada 137 LLC v. Medjedovic*, the Ontario Superior Court of Justice had no qualms with taking a practical approach to providing relief in respect of digital assets.

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CIVIL RELIEF FOR CRYPTOCURRENCY CONDUCT

The Plaintiff in the proceeding, Cicada 137 LLC, a cryptocurrency holding platform, alleged that Andean Medjedovic, a 19 year-old with a master's degree in mathematics, hacked into its platform and removed over $15 million worth of cryptocurrency tokens.

The Plaintiff determined that the tokens had been transferred to Mr. Medjedovic's cryptocurrency wallet (he later admitted that he had taken the tokens). Justice Myers granted an *ex parte* preservation and *Anton Piller* (civil search and seizure) order, among other relief, to allow for the search of passwords and other evidence that could further efforts to both locate the tokens and prevent any dissipation.

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Justice Myers' decision makes it expressly clear that merely because assets may be of a digital nature does not mean that they exist lawlessly:

> This is a very serious matter for which an Anton Piller order is justified. A very substantial amount of value has been taken. Moreover, the plaintiff's expert provides evidence about the magnitude of hacking of digital assets to date. 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.[1]

CODE IS LAW

Mr. Medjedovic used his "formidable mathematical powers" to create a digital attack that forced the release of the tokens to him and others. The Plaintiff alleges that it was hacked and those using its platform were defrauded. Mr. Medjedovic's response at the preliminary stages of the proceeding indicate that he may later rely on "code is law" as part of his defence.

"Code is law" is a phrase which was originally developed by Lawrence Lessig in his 1999 book on the structure and nature of regulation on the internet, "Code and Other Laws of Cyberspace," to argue that the internet should incorporate organizing principles and rules. The contemporary use of the phase has become popular in the blockchain context to describe how the technical nature of the system inherently determines what can and cannot be done. As Justice Myers noted:

> The theory postulates that voluntary participants accept and are bound by the results of the use of the technology. That means that if a clever person can devise a way to exploit a loophole or weakness in the code to induce the holder to enter into an unexpected and unfavourable transaction, more power to him or her. The code is public and the users are deemed to take the risk of placing their cryptocurrency assets in a repository with a program that functions as it does with whatever vulnerabilities it may have.[2]

It remains to be seen whether and to what extent "code is law" will operate as a defence at trial. If successful, it would allow for conduct that the code permits to be exploited with no consequences at law.

PRACTICAL CRYPTOCURRENCY CONSIDERATIONS

As a decentralized system that has long been celebrated for its anonymity, cryptocurrency by its nature can be an obstacle in legal proceedings. Despite the relief granted in the *Cicada* matter to date, and while Mr. Medjedovic attended for an initial court appearance, he has since disappeared. Mr. Medjedovic has been found in contempt of court for his failure to attend court appearances and further efforts by the Plaintiff to locate him have been "stymied" by his parents.[3]

The use of cryptocurrency is becoming more mainstream, and with its popularity, the problems that can arise are becoming more prevalent. Courts in Canada have shown a willingness to develop the common law in a way that addresses the practical implications of its use. While the law in this area is still developing, we anticipate that litigation involving digital assets will become increasingly commonplace. For now, although it can be tempting to treat cryptocurrency in a manner akin to regular currency, it should be kept in mind that obtaining legal relief in relation to cryptocurrency is likely to remain complicated for some time. Any potential cryptocurrency considerations in a current or potential proceeding should be addressed early on to avoid later complications and potential disappointment.

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1 *Cicada 137 LLC v. Medjedovic*, [2021] O.J. No. 7421, 2021 ONSC 8581, at para 11.

2 *Cicada 137 LLC v. Medjedovic*, [2022] O.J. No. 204, 2022 ONSC 369, at para 6.

3 *Cicada 137 LLC v. Medjedovic*, [2022] O.J. No. 204, 2022 ONSC 369 at para 22; *Cicada 137 LLC v. Medjedovic,* [2022] O.J. No. 2169, 2022 ONSC 2765 at para 3.

• BILL C-18 (*ONLINE NEWS ACT*): CANADA LOOKING TO CREATE A LEVEL PLAYING FIELD FOR NEWS MEDIA •

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Earlier this month, Canadian Heritage Minister Pablo Rodriguez introduced Bill C-18 (*Online News Act*) in Parliament. This bill, which was largely inspired by similar legislation in Australia, aims to reduce bargaining imbalances between online platforms and Canadian news outlets in terms of how these "digital news intermediaries" allow news content to be accessed and shared on their platforms. If passed, the *Online News Act* would, among other things, require these digital platforms such as Google and Facebook to enter into fair commercial agreements with news organizations for the use and dissemination of news related content on their platforms.

Bill C-18, which was introduced on April 5, 2022, has a very broad scope, and covers all Canadian journalistic organizations, regardless of the type of media (online, print, etc.), if they meet certain eligibility criteria. With respect to the "digital news intermediaries" on which the journalistic content is shared, Bill C-18 specifically targets online communication platforms such as search engines or social media networks through which news content is made available to Canadian users and which, due to their size, have a significant bargaining imbalance with news media organizations.

The bill proposes certain criteria by which this situation of bargaining imbalance can be determined, including the size of the digital platform, whether the platform operates in a market that provides a strategic advantage over news organizations and whether the platform occupies a prominent position within its market. These are clearly very subjective criteria which make it difficult to precisely identify these "digital news intermediaries." Bill C-18 also currently provides that the intermediaries themselves will be required to notify the Canadian Radio-television and Telecommunications Commission ("**CRTC**") of the fact that the Act applies to them.

The mandatory negotiation process is really the heart of Bill C-18. If passed in its current form, digital platform operators will be required to negotiate in good faith with Canadian media organizations to reach fair revenue sharing agreements. If the parties fail to reach an agreement at the end of the negotiation and mediation process provided for in the legislation, a panel of three arbitrators may be called upon to select the final offer made by one of the parties. For the purposes of enforceability, the arbitration panel's decision is then deemed, to constitute an agreement entered into by the parties.

Finally, Bill C-18 provides digital platforms the possibility of applying to the CRTC for an exemption from mandatory arbitration provided that their revenue sharing agreements meet the following criteria:

i. provide fair compensation to the news businesses for news content that is made available on their platforms;
ii. ensure that an appropriate portion of the compensation would be used by the news businesses to support the production of local, regional and national news content;
iii. do not allow corporate influence to undermine the freedom of expression and journalistic independence enjoyed by news outlets;
iv. contribute to the sustainability of Canada's digital news marketplace;
v. ensure support for independent local news businesses, and ensure that a significant portion of independent local news businesses benefit from the deals; and

vi. reflect the diversity of the Canadian news marketplace, including diversity with respect to language, racialized groups, Indigenous communities, local news and business models.

A bill of this scope will certainly be studied very closely by the members of Parliament, and it would not be surprising if significant amendments were made during this process. We believe that some clarifications would be welcome, particularly as to the precise identity of businesses that will be considered "digital information intermediaries" for the purposes of the *Online News Act*.

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• KEY LEGAL ISSUES IN THE METAVERSE: A PRIMER FOR CANADIAN BUSINESSES •

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At a baseline, the metaverse is a constellation of different technologies that stand to transform the internet from a two-dimensional experience to a something that is far more tangible and immersive. This contemplates engagement in the metaverse for meetings, commerce, employee training, among other activities. In addition, the metaverse does not have national boundaries, so determining the applicable law may not be straightforward and instead may be influenced by the metaverse platform's terms of service, or the smart contracts entered into within the metaverse and the location of the persons transacting within the metaverse. The current unregulated nature of the metaverse presents legal risk as well as significant commercial opportunity.

In this introductory article of our multi-part series on the metaverse, we explore key legal considerations for the developing the metaverse ecosystem.

COMPETING AND COOPERATING BETWEEN METAVERSE SECTOR PARTICIPANTS:

Interoperability is a key feature of the metaverse and presents a significant challenge for businesses looking to move into the space. In theory and much like the

real world, industry participants would want to ensure that there are zero barriers to entry between metaverse spaces. Akin to two large retailers in the real world, while they may compete against each other, both are keen to ensure that infrastructure around their stores provide potential customers with easy access to both stores.

Similarly to the example above, users will want to move through different metaverse spaces. As such, like two competing retailers, metaverse industry participants, especially those who develop metaverse platforms themselves, will need to cooperate in order to create a seamless and barrier-free experience for consumers moving through metaverses. However, unlike the real world, cooperation between two metaverses is not as simple. Cooperation requires trust and brings significant legal risk as businesses may be forced to share trade secrets or proprietary information in order to ensure that users are seamlessly able to transition between what are, in reality, competing platforms. Traditional intellectual property sharing agreements, confidentiality clauses, and partnership agreements may not sufficiently protect the interests of parties who may be required to cooperate at a much deeper level than they are traditionally accustomed to in real world transactions. Moreover, parties looking to cooperate with each other to reduce barriers to competing metaverse spaces will need to clearly delineate responsibility for potential privacy and cyber security risks in contracts. Especially in situations where the parties are located in different jurisdictions.

To meet these challenges, parties will need to be creative, adaptive, and may need to incorporate non-traditional contractual arrangements, including the use of smart contracts to ensure that they create the level of protection required to cooperate while competing.

E-COMMERCE IN THE METAVERSE:

The metaverse represents an emerging space for digital asset sales. For instance, Non-Fungible Token (NFT) auction houses exist but are not truly immersive. As the natural successor to the conventional internet, the metaverse could create a truly digital market with the hallmarks of a real-world market where people can engage and interact with a digital item, at an almost tactile level. It is clear why industry-leading technology companies are moving quickly to seize the opportunity that digital commerce in the metaverse represents. That said, there are novel and traditional risks that must be considered

Analysts assess that e-commence in the metaverse could be worth $3 trillion dollars within the next decade. The metaverse represents a potentially massive market for traditional goods that can be examined, purchased and delivered to the customer virtually. Also, metaverse technology like augmented reality glasses or virtual reality headsets can be used to transform work, healthcare, and education.

From product liability concerns regarding physical equipment that customers use to engage with digital items, to privacy concerns, to tax and consumer protection risks, these hazards of doing digital business must be weighed and balanced against opportunities. For example, marketing and advertising claims in the metaverse that may abide by applicable legal and regulatory requirements in the jurisdiction in which they were created may, nonetheless, generate regulatory liability in the jurisdiction in which they are relied upon by the ultimate consumer.

Those looking to do business in the metaverse must account for a full-spectrum of risks that may not just be limited to their home jurisdictions. Specifically, the exchange and sale of NFTs, even digital items such as a digital piece of “land” or clothing on a metaverse platform could create very real-world securities law risks as these transactions may be considered sales of securities rather than goods. In addition to securities law risks, advertising the sale “digital land” is expected to generate truly novel legal issues. Some real property legal concepts and principles are hundreds of years old. Applying them to a digital parcel of land may strain courts and governments, creating unexpected outcomes and law. Finally, and for similar reasons, the tax implications to both parties to a digital transaction may have unexpected or novel tax repercussions.

Businesses looking to digitally go to market in the metaverse must take pro-active steps now to assess real world regulatory landscapes in their home jurisdictions and internationally that may be imposed on them as a function of the physical location of their digital customers.

M&A IN THE METAVERSE:

M&A activity has already begun and appears to be poised to increase. M&A with metaverse-based businesses creates unique issues for the acquirer and target. Traditional corporate considerations and risks become more complex. The nature of the metaverse itself plus the inherent risk associated with buying assets or business models that cannot work or do not exist in the real world creates material and unique challenges to effectively valuing and then legally structuring an M&A deal. For instance, how do parties quantify the risks around the purchase of a company that sells a digital asset that cannot be converted into something tangible. What kinds of representations and warranties could a wholly digital company who transacts in digital currency or NFTs give about its ability to generate real world currency. For example, a real world shoe manufacturer may think it is acquiring a digital shoemaker but in reality, may be acquiring an unlicensed seller of securities. Finally, as metaverse spaces consolidate there may be real-world competition risks that parties must consider.

Notwithstanding the complexity of these issues, effective planning and creativity can assist dealmakers and experienced corporate counsel to find ways to create value while minimizing risk in a space poised for growth for M&A transactions.

As the metaverse continues to evolve, businesses looking to capitalize on the opportunities must embrace creative contractual arrangements while ensuring that they properly hedge against the very real legal risks that will likely grow as the sector becomes more mature and complex. Involving legal advisors early is an effective way to deal with some of the uncertainty that doing business in a new and virtual sector entails.

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