

Commercial Litigation Insights: Securities Enforcement? But They're Crypto Tokens, Not Shares...

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Canadian and American regulators have made concerted efforts in the last year to definitively demonstrate that cryptocurrencies are under their securities purview and to accelerate aggressive enforcement proceedings. Yet, the crypto industry is mired in an indefinite and unenviable, and sometimes unknowable and often dangerous, game in Canada and the U.S., namely: regulation by enforcement, in the absence of crypto specific legislation. The events and trends of 2023 give some insight into what might be in store for cryptocurrency issuers and exchange platforms in 2024. However, only time will tell whether regulators will continue to double down on 'regulation by enforcement', or if sunnier days are ahead for crypto asset holders.

North of the border, the Canadian Securities Administrators ("**CSA**") have made the regulation of crypto assets a priority as crypto tokens and platforms have grown in the Canadian market over recent years. In September 2023, the CSA's council members, comprised of provincial regulators including the Ontario Securities Commission ("**OSC**"), reported taking action in 16 crypto-related enforcement matters in the prior year, as well as issuing 422 alerts, cautions, and warnings related to crypto. The CSA also confirmed that "coordinated enforcement activities" would continue to identify non-compliant trading platforms and those failing to engage with the registration process. For 2024 to 2025, the CSA has repeated its commitment to "strengthen oversight and enforcement in the crypto asset sector".

For the OSC, last year's crypto enforcement activities included an investigation into Binance Holdings Ltd. ("**Binance**"), which is touted as the world's largest crypto asset trading platform. The OSC also issued a summons to Binance requiring production of documents and information about Binance's fees and earnings in Ontario. While Binance fought, via multiple routes, to have the OSC revoke its investigation order and summons, it did so without success. Binance is also facing a proposed class action in Ontario, where the proposed class seeks rescission or damages against Binance for selling securities without filing or delivering a prospectus. The class action is in its early stages, but recently survived Binance's attempt to have the action stayed in favour of an arbitration clause.

South of the border, the U.S. Securities and Exchange Commission ("**SEC**") has pursued an increasingly aggressive crackdown on cryptocurrencies, seeking to capture tokens and exchanges under the SEC's jurisdiction. This increase in enforcement has been apparent since SEC Chair, Gary Gensler, took on the SEC's top role in 2021. In the SEC's past fiscal year, the SEC reported a record 784 enforcement actions, of which many were focused specifically on crypto fraud schemes, unregistered crypto asset offerings, and unregistered crypto platforms and intermediaries. The SEC also brought proceedings and charges against celebrities who endorsed crypto assets without disclosing that they had been compensated to do so. The SEC and Chair Gensler were sending a clear message on how the regulators intended to handle the gap in legislation until it was addressed by Congress: enforcement proceedings of all shapes and sizes, targeting players big and small.

In 2023, the SEC proceeded in several high-profile enforcement actions against crypto platforms, including against Ripple Labs, Inc ("**Ripple**"), one of the largest cryptocurrency platforms by market capitalization and the developer of the XRP ledger network. The SEC alleged that Ripple raised \$1.3 billion through offering its native digital token, XRP, as a security. During competing summary judgment

motions in July 2023, the Southern District of New York Court agreed with the SEC on multiple grounds but found partially in favour of Ripple with respect to public trading platform sales. In particular, the District Court concluded that XRP sales through trading algorithms and exchanges did not meet the *Howey* test for an investment contract and therefore did not constitute securities. The District Court's finding in *SEC v. Ripple* has garnered a lot of attention in the crypto world because Ripple's success, albeit narrow success, has potential broad implications for other tokens sold through public crypto asset trading platforms.

On the heels of the *Ripple* decision, the SEC also prosecuted similar enforcement actions, for failure to follow securities regulations, against Binance, as well as Coinbase Inc. and Coinbase Global Inc. (collectively "**Coinbase**"; Coinbase being the largest crypto asset trading platform in the U.S.). Binance and Coinbase each brought motions to dismiss their respective actions taking aim at the SEC's attempt to regulate cryptocurrencies under securities laws. These motions to dismiss were both heard in the Southern District of New York in January 2024 and decisions in each remain under reserve. The District Court's upcoming decisions in *SEC v. Binance* and *SEC v. Coinbase* are expected to expand on the *Ripple* analysis – regarding whether token sales through crypto trading platforms meet the *Howey* test – and could have big implications on the SEC's reach over cryptocurrencies.

Looking forward, it remains to be seen whether the *Ripple* decision, or arguments based on its analysis of public crypto trading platforms, will come up in the Canadian context to challenge regulatory enforcement. The outcomes of the motions to strike by Binance and Coinbase are also likely to impact the feasibility of Canadian crypto asset holders advancing a *Ripple*-type argument. The absence of clear guidance or legislation on crypto in the U.S. has led to an indefinite game of cat and mouse through enforcement proceedings (mostly, cat). It seems inevitable that the crypto industry in Canada will continue to follow suit with an even greater number of enforcement cases, growing the pressure of regulation by enforcement until legislators step in to fill the gap.

For more from the authors on crypto regulation by enforcement, check out their [recent article](#) that expands on crypto enforcement trends from last year and what is to come in 2024.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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