

# Is Cryptocurrency Money and Why Does it Matter?

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The emergence of Bitcoin heralded the era of crypto and digital currencies designed for use in the general economy. But are these new currencies considered money and is current Canadian law adequate to accommodate them as money?

## What You Need To Know

- Cryptocurrency denotes a digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the execution of payment transactions on a decentralized network.
- "Money" is an element in definitions that determine the scope of a few statutes. As well, unlike property in general, money passes to a taker in good faith for value free of all adverse claims.
- Currency legislation in Canada does not define "money." Specific statutes may focus on national sovereign money but do not restrict the meaning of the term otherwise.
- The use of private currencies is legally recognized; however, whether a given cryptocurrency is money depends on whether its features meet the elements set out in case law and literature.
- Hence, a general recognition of cryptocurrency as money will not be appropriate. What ought to be considered is the adoption of amendments to the *Currency Act*, as well as other statutes, clarifying that money need not necessarily be limited to official national currencies.

## Introduction

A digital coin is "an entity that amounts to a string of bits." The string must have a numerical value and it must have a unique identity.<sup>1</sup> For its part, cryptocurrency consists of digital coins in which encryption techniques are used to regulate the generation of units of currency and verify the execution of payment transactions on a decentralized network.<sup>2</sup>

So, is cryptocurrency money? Money is required for the application of some statutes like the *Sale of Goods Act*<sup>3</sup> and the *Bills of Exchange Act*.<sup>4</sup> Accordingly, a transaction in which payment for goods is made other than in money is a barter and is not governed by the *Sale of Goods Act*. Consequently, for example, a buyer in a barter will not benefit from the statutory implied conditions relating to the goods.<sup>5</sup>

By the same token, an instrument payable other than in money is not a negotiable instrument and is not governed by the *Bills of Exchange Act*. Consequently, for example, neither holding in due course nor giving value presumption will benefit its 'holder' who may not be even entitled to sue on it on his or her name.<sup>6</sup>

Additionally, money differs from any other item of property in that it "[cannot] be recovered after it has passed in currency,"<sup>7</sup> so that its taker in good faith and for value takes it free from all adverse claims to it. Stated otherwise, unlike with respect to other property items, owners from whom money was misappropriated or stolen cannot trace and recover it from innocent parties who took it for value.

## Canadian Money Legislation

Under s. 8(1) of the *Currency Act*,<sup>8</sup> "a tender of payment of money is a legal tender," if made either in coins issued under the authority of *Royal Canadian Mint Act*<sup>9</sup> or banknotes issued pursuant to the *Bank of Canada Act*.<sup>10</sup>

Currency legislation defines neither 'money' nor 'legal tender'.<sup>11</sup> The latter is understood to mean tender of money in banknotes and/or coins which constitute the national currency under the legislation of the state. In the absence of an agreement to the contrary, a debtor may make such a tender, and the creditor must accept it, in discharge of a monetary debt.<sup>12</sup> However, "money which is current" need not necessarily be "money which is legal tender;"<sup>13</sup> legal tender must be money yet the reverse is not true.<sup>14</sup> For its part, being confined to legal tender, s. 8(1) of the *Canadian Currency Act* does not exclude payment of money other than in Canadian coins and banknotes, except that such payment is not "a legal tender."

For its own purposes, the Ontario *Personal Property Security Act*<sup>15</sup> s. 1(1) defines money to cover any sovereign national currency, and not only that of Canada. More broadly, and yet to the same end, while deeming contractual payments to be denominated in Canadian currency, s. 13 of the *Currency Act* permits payments to be made in foreign currency if so agreed.

## Private Currencies

Foreign currency is not the only type of non-legal tender money. While "[t]he right of issuing notes for payment of money, as part of the circulating medium" is said to belong to "the supreme power in every State,"<sup>16</sup> there is a solid line of case law holding that money may be privately issued.

In *Miller v. Race*, referring to then non-legal tender of Bank of England notes, Lord Mansfield observed that they were "treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind." He went on to conclude that this "[gave] them the credit and currency of money, to all intents and purposes" so as to be money,<sup>17</sup> the latter being "whatever common consent has fixed upon as a sign denoting a certain value."<sup>18]</sup>

Already towards the end of the 17<sup>th</sup> century, it was judicially acknowledged in England that "[t]he notes of goldsmiths" being privately issued "are always accounted among merchants as ready cash."<sup>19</sup> However, they were not 'legal tender' and a creditor could refuse a tender of goldsmith's notes and insist on payment in metallic money.<sup>20</sup>

Subsequently, Darling J. expressed his view in *Moss v. Hancock*<sup>21</sup> that money is

that which passes freely from hand to hand throughout the community in final discharge of debts ... being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it ...

Along the same lines, Duff CJ said in *Reference Re Alberta Statutes*<sup>22</sup>

... money as commonly understood is not necessarily legal tender. Any medium which by practice fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the words ...

## Conclusion

Accordingly, as "a generic term" money is said to be "any circulating medium in general use as the representative of value,"<sup>23</sup> or "anything that circulates as the ordinary medium of exchange in buying and selling property."<sup>24</sup> It is "something generally accepted as a medium of exchange, a measure of value, or a means of payment."<sup>25</sup> Its acceptance must be as a medium of exchange, a store of value<sup>26</sup> and a unit of account.<sup>27</sup>

Whether a given cyptocurrency is money or not depends on whether its features meet the elements set out above. This is a matter for specific fact finding in each case. Therefore, a general recognition of cryptocurrency as money will not be appropriate. What ought to be considered is the adoption of amendments to the *Currency Act* as well as other statutes clarifying that money need not necessarily be limited to official national currencies. Hence, by agreement, a debt may be incurred and payment be made in non-legal tender private money.

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<sup>1</sup> Gideon Samid, *Tethered Money: Managing Digital Currency Transactions* (London: Academic Press, 2015) at 105-106.

<sup>2</sup> This definition slightly modifies the one from <https://medium.com/@Wolfcrypto/basic-cryptocurrency-starter-guide-8f2071ea85de>; particularly, I replace 'transfer of funds' by the 'execution of payment transactions' to point at payment by the transmission of 'coins' rather than 'generic value' in the forms of funds.

<sup>3</sup> *Bills of Exchange Act* ( R.S.C. , 1985, c. B-4).

<sup>4</sup> R.S.O. 1990, c. S.1.

<sup>5</sup> *Sale of Goods Act*, ss. 13-16.

<sup>6</sup> *Bills of Exchange Act*, ss. 73 and 57.

<sup>7</sup> *Miller v. Race*, (1758), 1 Burr. 452 at 457, 97 E.R. 398 at 401 (K.B.).

<sup>8</sup> R.S.C., 1985, c. C-52.

<sup>9</sup> [R.S.C., 1985, c. R-9](#).

<sup>10</sup> [R.S.C., 1985, c. B-2](#).

<sup>11</sup> See in general, Guy David, "Money in Canadian Law" (1986), 65 Can Bar Rev. 192.

<sup>12</sup> "Legal tender" must be made in "money that is legally valid for the payment of debts and that [in the absence to an agreement to the contrary] must be accepted for that purpose when offered." See [http://www.merriam-webster.com/dictionary/legal\\_tender](http://www.merriam-webster.com/dictionary/legal_tender). Definition is however incomplete as it fails to include the bracketed language. See also Legal Tender Guidelines of the Royal Mint, available at <https://www.royalmint.com/aboutus/policies-and-guidelines/legal-tender-guideline>.

<sup>13</sup> See e.g., *State v. Finnegean* 103 NW 155 (Iowa, 1905).

<sup>14</sup> *Vick v Howard* (1923) 136 Va 101, 109. See Charles Proctor, *Mann on The Legal Aspect of Money* 7th ed. (Oxford: OUP, 2012) at 74 (§2.25).

<sup>15</sup> R.S.O. 1990, c. P.10.

<sup>16</sup> *Emperor of Austria v. Day and Kossuth* (1861), 3 De G.F. & J. 217 at 234, 45 E.R. 861 at 868 (Ch. App.), per Lord Campbell.

<sup>17</sup> (1758), 1 Burr. 452 at 457, 97 E.R. 398 at 401 (K.B.).

<sup>18</sup> (1758), 2 Keny 189, 199; 96 E.R. 1151, 1154 [Notes of Cases in KB].

<sup>19</sup> Tassell and Lee v. Lewis (1695), 1 Ld. Raym. 743 at 744, 91 E.R. 1397 at 1398 (K.B.).

<sup>20</sup> Ibid.

<sup>21</sup> [1899] 2QB 111, 116.

<sup>22</sup> [1938] SCR 100, 116.

<sup>23</sup> *Johnson v. State* 52 So. 652 (Ala, 1910).

<sup>24</sup> *State v. Finnegean supra* n. 13.

<sup>25</sup> See the definition of "money" available at <http://www.merriam-webster.com/dictionary/money> [Accessed 21 September 2016].

<sup>26</sup> W.S. Jevons, *Money and the Mechanism of Exchange* (London: Henry S King & Co, 1875), p.13 does not include this element in the definition. Indeed, money is a store of value only in the sense of being a "surplus" liquid resource available in one's hands for acquiring new commodities as may be needed and wished.

<sup>27</sup> N. Dodd, *The Sociology of Money: Economic, Reason & Contemporary Society* (New York: Continuum, 1994), p. xv. For G. Ingham, *The Nature of Money* (Cambridge, UK and Malden, Massachusetts: Polity Press, 2004), p.198, "money" is effectively something that, "[r]egardless of [its] particular form and substance", answers the promise and description provided (and measured) by the unit of account.

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