

## Civil Litigation

# Canadian court allows service via NFT 'airdrop'

By **Sohaib Mohammad**



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(July 26, 2023, 11:16 AM EDT) -- The Ontario Superior Court of Justice recently allowed service of a Statement of Claim and a Mareva ("freezing") Order via a non-fungible token (NFT) "airdrop" (distribution) into 13 cryptocurrency wallets for the purpose of notifying an unknown "John Doe" defendant.

The decision is in line with a continuing trend across Canadian courts to embrace technology in order to facilitate justice and access to justice. Canadian courts adapted rapidly to virtual proceedings in the wake of COVID-19 and most recently, the King's Bench for Saskatchewan in *South West Terminal Ltd. v. Achter Land*, 2023 SKKB 116 acknowledged the use of a thumb's up emoji (👍) met the requirements of a signature and confirmed the existence of a contract for the sale of goods.

### Similar orders in other jurisdictions

The court's decision follows jurisprudence in the United States and United Kingdom where similar orders were recently granted.

In March 2022, in *LCX AG v. John Doe Nos. 1-25*, N.Y. Supreme Ct., Index. No. 154644/2022, the Supreme Court of the state of New York allowed service via an NFT airdrop into a cryptocurrency wallet housing alleged stolen funds. The plaintiff, a European cryptocurrency exchange, LCX, alleges that it had approximately US\$8 Million stolen from one of its cryptocurrency wallets and transferred into another cryptocurrency wallet. The address of the cryptocurrency wallet housing the funds was the only known information about the defendants in question. The airdropped NFT in question included a hyperlink (a "grappling hook") which provided "a mechanism to track when a person clicked on the Service Hyperlink." The court deemed that "Such service shall constitute good and sufficient service for the purposes of jurisdiction under NY law on the person or persons controlling the Address."

In June 2022, in *D'Aloia v. Person Unknown and others*, [2022] EWHC 1723 (Ch), the English High Court of Justice allowed service via an NFT airdrop into cryptocurrency wallets belonging to a number of defendants. The plaintiff, Fabrizio D'Aloia, alleged himself to be the victim of fraudulent misappropriation of cryptocurrency in the amount of approximately US\$2.4 million in cryptocurrency equivalent. According to the decision, the airdrop of an NFT would "embrace the Blockchain technology" and "it is likely to lead to a greater prospect of those who are behind the [fraudulent] website being put on notice of the making of this order, and the commencement of these proceedings."

### NFT airdrops can serve purpose of notice in appropriate cases

At the Ontario Superior Court of Justice, the matter involved a class action lawsuit involving the sale of NFTs. According to the reasons of Justice Jaye Hooper:

[30] The purpose of allowing substituted service is to bring the proceedings to the attention of the party sought to be served. Because of the anonymity afforded by blockchains, allowing service through the airdropping of NFTs with the pages of the order is the best way to ensure

the owner of that crypto wallet has been given notice. In addition, a hyperlink will also be provided in an NFT to a website housing the full motion material.

The test for determining the appropriateness of substituted service is whether there is "some likelihood" or a "reasonable possibility" of bringing the action to the attention of defendant(s). Substituted service orders should only be sought once avenues of personal services and alternatives to personal service under the *Rules of Civil Procedure* are exhausted.

In cases where the only information known about a defendant is a cryptocurrency address, NFT airdrops can serve the purpose of service because a number of positive actions taken by the defendant can indicate they have received notice. The first of these is by clicking a "grappling hook" which is tied to the NFT in a manner that is only viewable by the owner of the cryptocurrency address receiving notice. The grappling hook works by recording that the unique link in question was viewed. A second mechanism which indicates notice has been effected is when the NFT received in the defendant's cryptocurrency wallet is transferred to a new address. Regardless of the mechanism used, the NFT can be programmed to display the Order or Statement of Claim on its face, which may itself be deemed sufficient notice.

### **Emerging issues**

For causes of action arising out of transactions on a blockchain, the only known information about a defendant may be their cryptocurrency wallet address. Transactions on most blockchains are public and can be viewed using the blockchain's native blockchain explorer. Tracing funds between cryptocurrency wallets can be tedious but made easier through a number of blockchain data visualization applications, such as Breadcrumbs or Bubblemaps.

One emerging issue is the use of "cryptocurrency mixers," often used for legitimate reasons, to obfuscate the source of funds on blockchains. In a standard transfer between two cryptocurrency addresses ("A" and "B"), a transfer of funds from "A" can be traced relatively easily to "B". Cryptocurrency mixers work by severing the link between sending and receiving addresses. In this case, "A" would transfer funds to a cryptocurrency address, "X", controlled by the cryptocurrency mixer application. "B" would receive the funds from a completely different and unconnected address, "Y", also controlled by the cryptocurrency mixer application, making it difficult, if not impossible, to connect addresses "A" and "B".

Given growing concerns surrounding the use of cryptocurrency mixers, the U.S. Department of the Treasury recently added popular cryptocurrency mixer, Tornado Cash, to its Specially Designated Nationals and Blocked Persons (SDN) list, citing its role in laundering over US\$7 billion in virtual currency since its inception in 2019.

Practitioners pursuing NFT airdrops as a means of service in cases involving the blockchain should ensure that the receiving cryptocurrency address belongs to the defendant in question, and not, for example, an application like a cryptocurrency mixer. Otherwise, service to the defendant will not be effective.

Blockchain technology continues to experience considerable growth and will continue to present novel challenges for legal practitioners. As evidenced by the court's decision to commence proceedings via an NFT airdrop, blockchain technology may nonetheless be leveraged to facilitate justice in appropriate cases.

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