

ALBERTA LAW REFORM INSTITUTE

ACCESS TO DIGITAL ASSETS

FINAL REPORT

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ACCESS TO DIGITAL ASSETS

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Benjamin Kormos

Nancy L Golden, KC

William Musani

Maya Gordon

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Jason Morris

Les S Scholly

Peter JM Lown, KC

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Within ALRI, Stella Varvis, Legal Counsel, had carriage of the project and carried out the work of the research, analysis, consultation and writing for this report. Barry Chung provided support with surveys. Jenny Koziar prepared the report for publication. Sandra Petersson, Executive Director, contributed project and editorial support. Summer students, Aydin McClelland and Brennan Shepherd, undertook additional research and checked the footnotes.

As always, we appreciate the guidance and input of the ALRI Board in developing both initial and final recommendations. In particular, we express our thanks to Board member, Donna L Molzan, KC, who was also a member of the national working group that prepared the Uniform Access to Digital Assets by Fiduciaries Act.

Summary

In this report, the Alberta Law Reform Institute [ALRI] recommends enacting new legislation to confirm that the existing powers of fiduciaries in Alberta extend to digital assets. Specifically, ALRI recommends that the Uniform Law Conference of Canada's [ULCC] Uniform Access to Digital Assets by Fiduciaries Act [Uniform Act] be implemented in Alberta, with some minor amendments to make the legislation more responsive to the provincial context.

What is the problem?

When a person dies or is incapacitated, their assets typically fall under the management of a third-party fiduciary. The fiduciary's role in managing an individual's physical or tangible assets is relatively straightforward. However, more and more Albertans are engaging in online activity including sending emails, sharing photos, posting to social media, developing websites, making transactions, and purchasing crypto assets. Electronic records generated by these online activities - known as digital assets - pose a new challenge for fiduciaries seeking to access such records to fulfill their legal obligations in managing a deceased or incapacitated person's estate.

Digital assets are often governed by restrictive service agreements that limit access to the original account holder. Issues arise when a third-party fiduciary, tasked with managing an individual's digital assets, is denied access to the digital asset by an online service provider or other custodian. Even if a service agreement allows third-party access, the process set out in the service agreement can be limited, time-consuming, and labour intensive to the fiduciary.

What does the Uniform Act say about access to digital assets?

This report recommends implementing the ULCC's Uniform Act in Alberta. In developing its recommendations, ALRI analyzed the Uniform Act and tailored certain parts of the model legislation to Alberta's legal landscape.

The Uniform Act is not designed to change existing fiduciary law. Instead, the Uniform Act proposes confirming that the powers granted to fiduciaries extend to digital assets. Fiduciaries appointed by formal instruments (such as a will or power of attorney), statute, and court order, would be able to exercise their access rights to a person's digital assets consistent with the source of their authority. These access rights are necessary to allow fiduciaries to meet their legal obligations in administering and managing the account holder's estate after death or incapacity.

The Uniform Act also proposes imposing a variety of obligations upon custodians of digital assets, which include online service providers and

individuals with control or access to the electronic data of an account holder. Under the Uniform Act, a custodian of digital assets would have to provide a fiduciary with access to this digital asset within 30 days of receiving proof of the fiduciary's authority. Any provisions within a service agreement that limit or restrict fiduciary access would be considered void under the Uniform Act.

ALRI's approach to the problem

Through extensive consultation, research, and analysis, ALRI identified these general principles to guide the recommendations.

- clarity and predictability;
- legislative uniformity;
- jurisdictional harmonization; and
- efficient and effective administration of estates.

Following these guiding principles, ALRI has developed 18 recommendations designed to reduce barriers to fiduciary access to digital assets held both domestically and abroad.

Consultation

Between December 2021 and May 2022, ALRI sought input from various stakeholder groups to help develop the recommendations within this report. ALRI's consultation strategy involved two parts, with the first branch designed to gather opinions, concerns, and recommendations from lawyers and other estate professionals, and a second branch designed to gauge public engagement with and understanding of digital assets.

ALRI conducted online surveys, in-person and online presentations, individual interviews, and convened a Project Advisory Committee. Through these consultations, ALRI identified areas of concern among estate professionals, assessed the use of digital assets among the general public, and developed recommendations tailored for implementing access to digital assets legislation in Alberta.

ALRI's consultation results confirm that there is widespread general support from lawyers and other estate professionals to adopt the Uniform Act in Alberta.

What we're recommending

This report recommends that the existing powers given to fiduciaries in Alberta be extended to digital assets, which are defined as a "record that is created, recorded, transmitted or stored in digital or other intangible form by electronic,

magnetic or optical means or by any other similar means.”. Specifically, ALRI recommends legislation that establishes a procedure by which a fiduciary can request access to the digital assets and records of a deceased or incapacitated person from a custodian, regardless of where the custodian is located.

It is important to note that the recommendations in this report specifically apply to digital assets held by an identifiable and compellable custodian. Non-custodial assets, which can include decentralized blockchain-based assets such as cryptocurrency and non-fungible tokens, fall outside the legislative regime set out in the Uniform Act.

ALRI recommends that the Uniform Act include the following categories of fiduciary:

- personal representatives for the estate of a deceased person;
- guardians of represented adults appointed under the *Adult Guardianship and Trusteeship Act*, including the Public Guardian;
- trustees appointed under the *Trustee Act* and the *Adult Guardianship and Trustee Act*, including a Public Trustee appointed under the *Public Trustee Act* but not including trustees in bankruptcy;
- attorneys appointed under a power of attorney; and
- agents appointed under the *Personal Directives Act*.

Fiduciaries seeking to access the digital assets must make the request to the custodian in writing and provide proof of their identity and authority. Proof of authority may include original or certified copies of the relevant documentation establishing the fiduciary’s authority to deal with the digital asset on the account holder’s behalf (for example, a will and a death certificate in the case of a deceased account holder). An Alberta Act would confirm that any writing requirements can be satisfied electronically.

Once a fiduciary has submitted proof of their authority to the custodian, the custodian must respond by granting access to the digital asset within a set time frame – 30 days for Canadian-based custodians, and 60 days for international custodians. The Uniform Act is intended to override any service agreement provisions that limit or restrict fiduciary access, unless the account holder agreed to these provisions by an affirmative act separate from the rest of the service agreement after the Uniform Act comes into force.

ALRI further recommends that a custodian who provides access to a fiduciary in good faith and in accordance with the Uniform Act ought to be protected from liability.

If there are conflicting instructions regarding access to the digital asset, ALRI recommends prioritizing instructions given in formal instruments – such as a

will, power of attorney, personal directive, or court order – over instructions given in online tools. If there is a conflict between formal instruments, generally the most recent instrument will prevail subject to the court providing advice and directions. If an account holder has not left instructions in any formal instrument, then instructions contained in an online tool may be the most efficient means of determining access rights.

There may be situations that arise where different fiduciaries have access rights to the same digital asset. To address these situations, ALRI recommends that an Alberta Act be flexible enough to allow overlapping access rights to digital assets consistent with the source of the fiduciary's authority. Disputes regarding a fiduciary's right to access a digital asset can be brought to the Court of King's Bench for advice and direction.

ALRI recognizes that an Alberta Act may have limited application to custodians outside the province due to the presumption against extra-territoriality. During consultation, many lawyers and estate professionals were concerned that the Uniform Act would not be recognized by these extra-jurisdictional custodians. In addition, many service agreements include choice of law and forum selection clauses. To address these concerns, an Alberta Act should specify that it is intended to apply to all account holders who reside in Alberta at the time of their death or incapacity. An Alberta Act should also include a provision that confirms that any choice of law or forum selection clauses contained in a service agreement that restrict a fiduciary's access rights are unenforceable.

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RECOMMENDATION 4

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RECOMMENDATION 5

An Alberta Act should include the following six categories of fiduciaries that have access rights to an account holder’s digital assets:

- personal representatives for a deceased account holder,
- attorneys appointed for an account holder who is the donor of the power of attorney under the *Powers of Attorney Act*,
- guardians appointed for a represented adult pursuant to the *Adult Guardianship and Trusteeship Act*,
- trustees appointed to hold in trust a digital asset or other property of an account holder, including a trustee appointed for a represented adult under the *Adult Guardianship and Trustee Act*,
- agents appointed under the *Personal Directives Act*,
- the Public Guardian and Public Trustee when acting in the above capacities. 66

RECOMMENDATION 6

An Alberta Act should provide that a “fiduciary” as defined by the legislation may include additional categories of persons as prescribed by regulation. 66

RECOMMENDATION 7

An Alberta Act should expressly exclude trustees in bankruptcy from the definition of “trustee”. 66

RECOMMENDATION 8

In determining who should have access to a digital asset, an Alberta Act should prioritize instructions given in formal instruments such as wills, powers of attorney, personal directives, and trust documents, over instructions given in online tools provided by the custodian. Where there is a conflict between formal instruments, priority will generally go to the most recent instrument. 76

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RECOMMENDATION 10

An Alberta Act should allow a fiduciary to apply to the court for directions and advice relating to the fiduciary's right to access a digital asset of the account holder. Fiduciaries who follow the directions of the court are protected from liability unless the fiduciary is guilty of fraud, willful concealment, or misrepresentation in obtaining the directions. 80

RECOMMENDATION 11

An Alberta Act should include the following requirements for establishing proof of a fiduciary's authority to access digital assets.

- For a deceased account holder who died with a will, a certificate of death and the will may be provided to establish the personal representative's authority.
- For a deceased account holder who died without a will, a grant of administration may be provided to establish the administrator's authority.
- For an incapacitated account holder, proof of the fiduciary's authority may be providing in formal instruments including powers of attorney, personal directives, trust documents, and court orders.
- Other documentation establishing proof of authority that may be set out in the regulations. 82

RECOMMENDATION 12

An Alberta Act should provide that original or certified copies of any required documents are allowed, and the writing requirement may be satisfied electronically, 82

RECOMMENDATION 13

An Alberta Act should require a fiduciary seeking access to provide proof of their identity to the custodian. 83

RECOMMENDATION 14

An Alberta Act should include a provision to protect custodians from liability when complying with the legislation in good faith..... 85

RECOMMENDATION 15

An Alberta Act should require custodians located within Canada to provide a fiduciary with access to a digital asset within 30 days of receiving a request for access. An Alberta Act should require custodians located outside of Canada to provide a fiduciary with access to a digital asset within 60 days of receiving a request for access. 86

RECOMMENDATION 16

An Alberta Act should include a provision confirming that the legislation is intended to apply to extra-jurisdictional custodians if the account holder is resident in Alberta at the time of their death or incapacity. 100

RECOMMENDATION 17

An Alberta Act should include a provision confirming that any clause in a service agreement that has the effect of restricting the access rights of a fiduciary to an account holder’s digital assets is void and unenforceable. The provision should specify that it is also intended to apply to contractual terms including choice of law and forum selection clauses.100

RECOMMENDATION 18

An Alberta Act should include a provision that the location of a digital asset has no effect on whether an Alberta court can take jurisdiction to confirm a fiduciary’s right to access the digital asset.111

Table of Abbreviations

LEGISLATION

AGTA	<i>Adult Guardianship and Trusteeship Act</i> , SA 2008, c A-4.2
New Brunswick Act	<i>Fiduciaries Access to Digital Assets Act</i> , SNB 2022, c 59
PEI Act	<i>Access to Digital Assets Act</i> , SPEI 2021, c A-1.1
Saskatchewan Act	<i>Fiduciaries Access to Digital Information Act</i> , SS 2020, c 6
Yukon Act	<i>Fiduciaries Access to Digital Assets Act</i> , SY 2023, c 15
American Act	National Conference of Commissioners of Uniform State Laws, Uniform Fiduciary Access to Digital Assets Act (2014), s 7(b)–(c), online: < www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6745a319-c0e5-6240-bdb5-336214d245c5&forceDialog=0 > [perma.cc/BM58-USDF]
Revised American Act	Uniform Law Commission, Revised Uniform Fiduciary Access to Digital Assets Act (2015), online: < www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=112ab648-b257-97f2-48c2-61fe109a0b33&forceDialog=0 > [perma.cc/TS3W-U4P5]
Uniform Act	Uniform Law Conference of Canada, Uniform Access to Digital Assets by Fiduciaries Act (2016), online: < www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Act-(2016).pdf > [perma.cc/V4XS-6X7B]

LAW REFORM PUBLICATIONS

New South Wales Report	New South Wales Law Reform Commission, <i>Access to digital records upon death or incapacity</i> , Report 147 (2019) at 2.38-2.46, online: < www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20147.pdf > [perma.cc/5ABD-LMXE]
ULCC Progress Report	Uniform Law Conference of Canada, “Uniform Access to Digital Assets by Fiduciaries Act - Progress Report” (August 2015) at para 1, online < ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Ac/Uniform-Access-to-Digital-Assets-by-Fiduciarie-(2) > [perma.cc/NAV2-FZ8H]

CHAPTER 1

Introduction

A. Introduction

[1] In this report, ALRI recommends enacting the Uniform Access to Digital Assets by Fiduciaries Act [the Uniform Act] for use in Alberta.¹

[2] The Uniform Act was adopted by the Uniform Law Conference of Canada [ULCC] in 2016 to address a very specific access problem. Currently, a fiduciary's authority to deal with digital assets may be severely limited by the terms and conditions set out in service agreements between the original account holder and an online service provider. If the original account holder dies or is incapacitated, these restrictive service agreements can limit a fiduciary's ability to administer the estate effectively and efficiently.

[3] Even if estate lawyers regularly include digital assets in estate planning, an instrument that confirms a fiduciary's authority may not be enough to take precedence over restrictive online service agreements. An online service provider may refuse to recognize the instrument or the fiduciary's authority under it, which may require expensive litigation to resolve.

[4] The recommendations in this report are based in fiduciary law. This report does not propose any significant or substantive changes to the law of fiduciaries. Instead, the recommendations in this report are intended to confirm a fiduciary's authority to deal with digital assets as part of a person's overall estate. The report considers the procedural and recognition aspects of a fiduciary exercising its authority. It does not purport to create new fiduciary rights or obligations.

[5] One of the goals of the Uniform Act is to promote uniformity and harmonization among different Canadian jurisdictions. The recommendations in this report are largely consistent with the existing provisions of the Uniform Act. Some recommendations may be seen as a departure from the Uniform Act. However, it is important to recognize that eight years have passed since the ULCC adopted the Uniform Act in 2016. The digital landscape is changing and it is difficult for legislation to keep up in real time. While the Uniform Act does an

¹ Uniform Law Conference of Canada, Uniform Access to Digital Assets by Fiduciaries Act (2016), online: <[www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Act-\(2016\).pdf](http://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Act-(2016).pdf)> [perma.cc/V4XS-6X7B] [Uniform Act].

admirable job in trying to address this ever-changing environment – for example, by including a broad and adaptable definition of digital assets – there may be some need to revise certain provisions of the Uniform Act based on more recent developments. Regardless, ALRI’s recommendations are not intended to substantively change the operation of the Uniform Act but to adapt it to better fit the current landscape.

B. Overview of the Uniform Act

[6] The Uniform Act operates as a set of default rules. It does not purport to change the legal framework of fiduciaries. Instead, the Uniform Act confirms “that the usual powers of fiduciaries extend to digital assets, with whatever practical implications that extension may have.”² Its purpose is not to create new powers, but to affirm and codify a fiduciary’s existing authority to deal with all of the assets of the deceased or incapacitated person “without restriction on whether the asset is tangible or digital property.”³ Under the Uniform Act, a fiduciary is deemed to be an authorized user of the digital asset.⁴ It would apply to fiduciaries who are appointed or instruments that take effect before, on, or after the legislation comes into force.⁵

1. DIGITAL ASSETS

[7] The Uniform Act defines “digital assets” to mean “a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means”.⁶ A digital asset is the electronic record only; the underlying tangible asset or liability is not included in the definition unless the asset or liability itself is an electronic record. For example, the electronic record of a person accessing their bank account online is

² See also Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act – Final Report of the Working Group (2016)*, s 4, online: [www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Ac/Uniform-Access-to-Digital-Assets-by-Fiduciarie-\(1\)\[perma.cc/EY5G-FR7A\]](http://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Ac/Uniform-Access-to-Digital-Assets-by-Fiduciarie-(1)[perma.cc/EY5G-FR7A]) [ULCC Final Report]. See also the Uniform Act, s 4:

The duties imposed by law on a fiduciary in relation to tangible personal property, including requirements on the performance of those duties, also apply to the fiduciary in relation to the digital assets of the account holder.

³ ULCC Final Report, note 2 at 9.

⁴ Uniform Act, s 5(1)(c).

⁵ Uniform Act, s 2(1). See also related commentary.

⁶ Uniform Act, s 1. Commentary to this definition confirms that the term “digital assets” includes products currently in existence and those yet to be invented that are available only electronically.

a digital asset. However, the underlying asset - money in the bank account - is not a digital asset. In contrast, cryptocurrency is a digital asset in which the underlying asset is also the electronic record.

[8] The definition of digital assets is intentionally wide to include products currently in existence and those yet to be developed. Based on this definition, digital assets may include “everything from cryptocurrencies to eBay and PayPal accounts to loyalty reward programs and social media sites.”⁷ It includes any information stored on a computer or other digital devices, content uploaded onto websites, and rights to digital property such as domain names. Many have monetary value. Others, like family photos posted on a Facebook account, may have strong sentimental value.

[9] The financial value of an electronic record does not determine whether the record qualifies as a digital asset. The definition of digital assets does not make any distinctions based on value. It is worth noting that the same type of digital asset may have financial value in one context but not in another. Take the example of photographs that are stored online. If the original account holder is a professional photographer, then the online photos may have financial value. However, if the original account holder is a casual photographer who uses their phone to take pictures of their family while on vacation, then those photos probably have little financial value. In both cases, the photographs stored electronically on a phone or online qualify as digital assets. A fiduciary’s ability to access those digital assets does not change depending on whether the photographs have financial value. The Uniform Act makes no distinctions based on the value - real or perceived - of the digital asset.

⁷ Brenda Bouw, “Don’t forget digital assets in your estate plan” (24 September 2018), online: <www.theglobeandmail.com/investing/globe-wealth/article-dont-forget-about-digital-assets-in-your-estate-plan/> [perma.cc/MQ23-P2NX]. See also Patricia Sheridan, “Inheriting Digital Assets: Does the Revised Uniform Fiduciary Access to Digital Assets Act Fall Short?” (2020) 16:2 Ohio St Tech LJ 363 at 365–6 [Sheridan]. “Digital assets” have been interpreted to include email accounts, text messages, social networking accounts, online credit card and bank accounts, digital photographs and videos, cloud storage accounts, digital music subscriptions, domain names, blogs, web pages, virtual currencies, and hotel and travel rewards accounts.

2. FIDUCIARIES AND ACCESS

[10] While the Uniform Act’s definition of “digital assets” is intended to be broad enough to capture all types of electronically stored information – even those yet to be invented – the definition of “fiduciaries” is relatively closed:⁸

“fiduciary”, in relation to an account holder, means

- (a) a personal representative for a deceased account holder,
- (b) a guardian appointed for an account holder,
- (c) an attorney appointed for an account holder who is the donor of the power of attorney, or
- (d) a trustee appointed to hold in trust a digital asset or other property of an account holder.

[11] There are three main sources of a fiduciary’s authority: formal instruments executed by the account holder before their death or incapacity, such as a will or power of attorney; statutes that create or govern fiduciary relationships, such as the *Adult Guardianship and Trusteeship Act*; and court orders that appoint a fiduciary to act on behalf of a deceased or incapacitated account holder. Fiduciaries may be given broad, general authority to deal with all of a person’s digital assets, or specific, directive authority limited to a particular digital asset.

[12] A fiduciary’s right to access a person’s digital assets must be consistent with the source of their authority. The default access rights set out in the Uniform Act include:⁹

- a right to access the content of an electronic communication,
- a right to access a catalogue of electronic communications sent or received by the account holder,
- a right to access any other digital asset in which the account holder has an interest, and

⁸ Uniform Act, s 1. The Uniform Act defines “account holder” as an individual who entered into a service agreement with a custodian, and includes a deceased person who entered into a service agreement during their lifetime. Commentary provides that the term “guardian” is not intended to apply to guardians of a minor who is not deceased, and “trustee” is not intended to apply to a trustee in bankruptcy.

⁹ Uniform Act, s 5. See also related commentary. The ULCC Working Group did not identify any privacy or criminal law barriers to fiduciary access in Canadian law: see ULCC Final Report, note 2 at 7.

- a right to access, control and copy digital assets to the extent permitted by Canadian copyright laws.

[13] Account holders may choose to opt out of the default rules. For example, account holders may designate a different fiduciary to deal with the digital asset, restrict a fiduciary's access to the digital asset, or direct a custodian to delete an account. Any departures from the default rules would be set out by formal instrument or through court order.¹⁰

[14] Fiduciaries under the Uniform Act are subject to the same duties and obligations in relation to a person's digital assets as they would be if dealing with the person's tangible personal property.¹¹

3. CUSTODIANS' OBLIGATIONS

[15] The Uniform Act imposes obligations on custodians, which includes online service providers as well as any other person who holds, maintains, processes, receives or stores electronic data of an account holder.¹² Once the proper documentation establishing the fiduciary's authority is submitted, the custodian must provide the fiduciary with access to the digital asset within 30 days.¹³ The ULCC Working Group noted that documentation requirements may vary depending on the province or territory. It recommended that as long as those requirements are met in the jurisdiction of origin, the authority should be recognized across Canada.

[16] The Uniform Act confirms that any provision in a service agreement that limits a fiduciary's access to the digital asset is void, unless the account holder expressly agrees to that provision after the legislation comes into force.¹⁴ The Uniform Act also prohibits custodians from opting out of the legislative regime if

¹⁰ See Uniform Act, s 3(2). There is also an exception in s 3(3) that allows a custodian to restrict a fiduciary's access through a service agreement, so long as the account holder agreed to that provision separately from the other terms of the service agreement after the Uniform Act comes into force.

¹¹ The Uniform Act, s 4.

¹² The Uniform Act applies to "custodians", which includes online service providers as well as any other person that holds, maintains, processes, receives or stores electronic data of an account holder.

¹³ Uniform Act, s 7.

¹⁴ Uniform Act, s 5(2). A valid consent requires an affirmative act by the account holder that is separate from the other provisions of a service agreement. For example, clicking "I agree" at the end of a service agreement's terms and conditions – sometimes referred to as a "click wrap agreement" – would likely be insufficient. Instead, the custodian may be required to isolate the specific provision limiting a fiduciary's access from the rest of the service agreement so that the account holder can expressly consent to that provision separately from the rest of the service agreement.

a service agreement's choice of law provision limits fiduciary access to a digital asset.¹⁵

C. The Need for Reform

1. THE CENTRAL PROBLEM

[17] Many estate lawyers have turned their minds to digital assets. Some ask their clients to identify whether they have any online accounts.¹⁶ Some provide advice to clients including:¹⁷

- identifying all digital assets and accounts, including documenting the location of all mobile devices, computers and flash drives;
- instructing exactly what to do with each digital asset, including whether to appoint a separate trustee;
- providing access by leaving a password-protected list of digital assets and accounts, or using an online password manager; and
- updating digital assets and digital accounts as often as possible.

[18] There are also companies that offer services that allow account holders to plan their "digital death" by storing passwords and account information, nominating digital executors, and transferring online assets to designated beneficiaries.

[19] However, these piecemeal approaches do not deal with the underlying problem of restrictive service agreements that limit access to the original account holder. In fact, an account holder may be inadvertently breaching the terms of the service agreement if they provide login information and passwords to their fiduciary or other third party.

¹⁵ Uniform Act, s 6.

¹⁶ See eg Emma Banfield, "Digital Assets: Why and How They Should be Considered in Your Estate Planning" (17 June 2020), online: <rmrf.com/digital-assets-why-and-how-they-should-be-considered-in-your-estate-planning/> [perma.cc/SZC3-9HH6].

¹⁷ Marika Cherkawsky, "The Value of Digital Assets and Why It Should Not Be Ignored in Estate Planning" (30 July 2018), online (blog): <willsandestateslawblog.blogspot.com/2018/07/the-value-of-digital-assets-and-why-it.html> [perma.cc/K7L3-MKXF].

[20] In addition to restrictive service agreements, custodians have different policies and procedures regarding third party access to the digital asset.¹⁸ There is no standard or uniform approach, which can cause uncertainty and delay for fiduciaries who need access to the digital asset to effectively administer the estate.

[21] Legislation that confirms a fiduciary's authority to access the digital assets of a deceased or incapacitated account holder is a potential solution to the problem of restrictive service agreements.

2. UNIFORM LAW CONFERENCE OF CANADA (ULCC)

[22] In 2014, the ULCC established a Working Group to look at the issues relating to access to digital assets by fiduciaries. The members of the Working Group included wills and estates lawyers, in-house counsel for financial services companies, and government lawyers in policy development and legislative reform.

[23] The goal of the ULCC Working Group was to consider legislative options to allow fiduciaries easier access to a person's digital assets. It was meant to address problems that arise when online service providers restrict access rights to the original account holder based on service agreements entered into before the account holder dies or is incapacitated.

[24] The ULCC Working Group was established in response to US developments in the area of digital assets. In July 2014, the American Uniform Law Commission approved the *Uniform Fiduciary Access to Digital Assets Act* [the

¹⁸ See New South Wales Law Reform Commission, *Access to digital records upon death or incapacity*, Report 147 (December 2019) at 2.38–2.46, online: <www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20147.pdf> [perma.cc/5ABD-LMXE] [New South Wales Report].

American Act].¹⁹ The American Act was revised in July 2015 [the Revised American Act],²⁰ and has since been enacted in 47 states.²¹

[25] One of the first questions considered by the ULCC Working Group was whether the Uniform Act ought to be consistent with the American Act/Revised American Act. The ULCC Working Group noted that organizations that carry, maintain, process, receive, or store digital assets – which are referred to as “custodians” under the American Acts – tend to be located in the United States and are subject to US state and federal laws. As such, it concluded that uniform legislation in Canada ought to be informed by and consistent with the American Act/Revised American Act to encourage US-based custodians to comply.²²

[26] The ULCC adopted the Uniform Act in August 2016.²³

3. OTHER PROVINCES

[27] In response to the work completed by the ULCC, Saskatchewan was the first province to adopt the Uniform Act by passing the *Fiduciaries Access to Digital Information Act*, which came into force on June 29, 2020.²⁴ Prince Edward Island has also enacted the *Access to Digital Assets Act*, which came into force on

¹⁹ National Conference of Commissioners of Uniform State Laws, Uniform Fiduciary Access to Digital Assets Act (2014), s 7(b)–(c), online: <www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6745a319-c0e5-6240-bdb5-336214d245c5&forceDialog=0> [perma.cc/BM58-USDF] [American Act].

²⁰ See Uniform Law Commission, Revised Uniform Fiduciary Access to Digital Assets Act (2015), online: <www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=112ab648-b257-97f2-48c2-61fe109a0b33&forceDialog=0> [perma.cc/TS3W-U4P5] [Revised American Act]. Many commentators have argued that the revised American Act is more restrictive in terms of allowing for fiduciary access than its predecessor. See eg Emily Lynch, “Legal Implications Triggered by an Internet User’s Death Reconciling Legislative and Online Contract Approaches in Canada” (2020) 29 Dal J Leg Stud 135 at 153, and related footnotes.

²¹ As of January 8, 2024: see Uniform Law Commission, “Fiduciary Access to Digital Assets Act, Revised” (2015), online: <www.uniformlaws.org/committees/community-home?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&tab=groupdetails> [perma.cc/LA5H-FYLZ]. Massachusetts and California have introduced the Revised American Act but have yet to fully enact it. Louisiana has not enacted the revised Act. Delaware enacted the previous version. California previously adopted some provisions of revised Act in 2017, namely those that address digital assets after an account holder’s death, while deleting others relating to digital assets while the account holder is alive. See Michael T Yu, “Towards a New California Revised Uniform Fiduciary Access Act” (2019) 39:2 Loy LA Ent L Rev 115, online: <digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1624&context=elr> [perma.cc/9CM9-UWE4].

²² For a comparison of the Revised American Act and the Uniform Act, see Faye L Woodman, “Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada’s Proposed Uniform Act and Comparable American Model Legislation” (2017) 15:2 CJLT 193 [Woodman].

²³ See Appendix A, Uniform Act.

²⁴ *Fiduciaries Access to Digital Information Act*, SS 2020, c 6 [Saskatchewan Act].

January 1, 2022.²⁵ On December 16, 2022, New Brunswick became the third Canadian province to adopt the Uniform Act.²⁶ The Yukon Legislature passed the *Fiduciaries Access to Digital Assets Act* on November 15, 2023.²⁷ As of the date of publication, it appears that the Uniform Act has not yet been introduced in any other Canadian jurisdiction.

[28] The Saskatchewan, PEI, New Brunswick, and Yukon legislation largely follow the provisions of the Uniform Act, with minor revisions to reflect drafting conventions and specific terminology used in each jurisdiction to describe individuals who are designated to act on behalf of an incapacitated or deceased person. Notably, the New Brunswick legislation includes a provision dealing with forum selection clauses in online service agreements that was not included in the Uniform Act.²⁸ Substantively, however, all four jurisdictions have enacted legislation that is identical to the Uniform Act.²⁹

4. INTERNATIONAL DEVELOPMENTS

[29] Outside of Canada, the New South Wales Law Reform Commission published *Access to Digital Records Upon Death or Incapacity* in December 2019, which was tabled in the Parliament of New South Wales on March 5, 2020.³⁰ The New South Wales Report expressly considered both the Uniform Act and Revised American Act when it developed its recommendations.³¹ One thing that it did differently from the Uniform Act was to recognize certain informal arrangements in addition to traditional fiduciary roles.³² The New South Wales Report also distinguished between “digital records” – such as social media accounts and loyalty programs – and “digital assets” – such as cryptocurrencies and digital material in which users have intellectual property rights.³³ Otherwise, the legislative scheme set out in the New South Wales Report looks similar to the

²⁵ *Access to Digital Assets Act*, SPEI 2021, c A-1.1 [PEI Act].

²⁶ *Fiduciaries Access to Digital Assets Act*, SNB 2022, c 59 [New Brunswick Act].

²⁷ *Fiduciaries Access to Digital Assets Act*, SY 2023, c 15 [Yukon Act].

²⁸ The importance of including forum selection clauses in an Alberta Act will be discussed in Chapter 6 of this Final Report.

²⁹ See Appendix B, “Comparing Canadian Responses to the Uniform Act”.

³⁰ New South Wales Report. See also the survey data from the project in *New South Wales Law Reform Commission, Access to digital records upon death or incapacity: survey results*, Research Report 15 (December 2019), online: <lawreform.nsw.gov.au/documents/Publications/Other-Publications/Research-Reports/RR15.pdf> [perma.cc/92W6-UT6D].

³¹ See eg, New South Wales Report at paras 2.78–2.86.

³² New South Wales Report at paras 1.40–1.42, 3.9–3.11, 4.29–4.37.

³³ New South Wales Report at paras 1.12–1.15, 3.16–3.36.

Uniform Act. As of the date of publication, it seems that New South Wales has yet to introduce legislation.

[30] In March 2019, the European Law Institute (“ELI”) also embarked on a digital assets project.³⁴ The ELI project began with an analysis of the Revised American Act and the Uniform Act to see if a European model act could be developed. However, there were some concerns that the goals of uniformity across Europe member states could not be achieved through a model act. ELI recognized that harmonization is still an important goal and to that end, is working towards developing guiding principles including a common understanding of what is meant by “digital assets” and what are the basic rights of people entitled to use or access such assets. It appears that the ELI project has pivoted away from fiduciary access to digital assets and moved towards using digital assets as security.³⁵

D. The Current Project

[31] This is a ULCC implementation project, which means that it is guided by an assessment of the Uniform Act dealing with fiduciary access to digital assets. The objective is to determine whether the Uniform Act is suitable for implementation in Alberta either as is, or with some modifications.

1. GUIDING PRINCIPLES

[32] ALRI has identified several principles to guide the recommendations set out in this report. Some of these principles are reflected in ALRI’s other work, while others are specific to this project.

2. GENERAL PRINCIPLES

[33] An important general principle is that laws should be clear and produce predictable results. Currently, it is unclear whether a fiduciary’s authority to deal with estate matters – including accessing a person’s digital assets – will be recognized by custodians and online service providers. It is also somewhat

³⁴ See European Law Institute, *Access to Digital Assets*, (2019), online: <www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/access-to-digital-assets/> [perma.cc/TK7C-SZNH] (ELI is an independent body from the European Union).

³⁵ See European Law Institute, *ELI Principles on the Use of Digital Assets as Security* (2022), online: <www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_the_Use_of_Digital_Assets_as_Security.pdf> [perma.cc/E56G-BP6W].

unclear whether the authority of some fiduciaries – such as guardians, trustees, and agents – extends to dealing with a person’s digital assets. Reform would bring clarity and certainty to this area of the law.

3. UNIFORMITY AND HARMONIZATION

[34] Given the current digital landscape, it is very likely that fiduciaries in Alberta will be dealing with custodians and online service providers in other jurisdictions. Some of these custodians – particularly those located in the United States – are already subject to uniform legislation that aims to facilitate fiduciary access to digital assets. The Uniform Act – which has been enacted in four Canadian jurisdictions so far – is itself a response to legislation that was first developed in the United States. Other jurisdictions, including Australia and Europe, are also considering adopting uniform legislation based on the Uniform Act and the Revised American Act.

[35] Uniformity promotes familiarity, particularly when dealing with international and foreign parties. There are many potential benefits to uniformity and harmonization. For example, an Alberta Act that is consistent with legislation in other jurisdictions contributes to growing international consensus regarding the need to regulate the digital space. A fiduciary in Alberta may find it easier to obtain access to a digital asset from an online service provider that is subject to similar legislation in a different jurisdiction. A custodian might be more likely to recognize orders issued from an Alberta court if both jurisdictions have similar legislation, which may reduce the need for fiduciaries to seek orders from a foreign court.

[36] An Alberta Act will require some modification to make it consistent with provincial law. It may also require additional provisions to address issues that may not have been pressing when the ULCC adopted the Uniform Act in 2016. Even with these modifications, an Alberta Act will promote uniformity and harmonization with other jurisdictions that have already adopted legislation to facilitate fiduciary access to digital assets.

4. EFFICIENT AND EFFECTIVE ADMINISTRATION OF ESTATES

[37] Canadians are increasingly living their lives online. In 2020, ninety-two percent of Canadians used the internet.³⁶ Seventy-one percent of Canadians used social networking sites to communicate and share content. A 2017 report estimates that Canadians participate in at least 12 loyalty programs on average.³⁷

[38] Fiduciaries need tools to efficiently and effectively administer the estate of a person who has died or is incapacitated:³⁸

Preventing financial losses to the estate includes not only traditional assets but also, in today's digital world, online bill payments and online business, domain names, encrypted files, and other virtual property.

[39] While some of those tools may be set out by instrument – such as a will or power of attorney – extra-jurisdictional custodians might not recognize those tools. The Uniform Act will assist fiduciaries to meet their legal obligations. In the absence of legislation, it is unlikely that the marketplace will respond to allow access to digital assets by fiduciaries.

E. Scope

[40] This project is grounded primarily in fiduciary law. It is outside the scope of this project to resolve any specific property interests that might arise from the use or ownership of digital assets. For example, a fiduciary's right to access the digital assets of an account holder does not depend on whether the digital asset in question is "owned" by the account holder, the custodian, or another party. The fiduciary's right to access a digital asset exists independently of any proprietary interest the account holder may (or may not) have in that digital asset. If the account holder has a right to access a particular digital asset, then that right ought to extend to a fiduciary based on the principles of fiduciary law.

[41] This project focuses only on a fiduciary's access to digital assets. This means that access requests by family, close friends, or other interested persons

³⁶ Statistics Canada, "Canadian Internet Use Survey, 2020" (2020), online: <www150.statcan.gc.ca/n1/daily-quotidien/210622/dq210622b-eng.htm> [perma.cc/4RS6-QFR9].

³⁷ Sophia Harris, "Canadians hoarding \$16B worth of unused loyalty points", CBC News (25 May 2017) online: <www.cbc.ca/news/business/loyalty-program-rewards-1.4129867> [perma.cc/V42F-HK3Q].

³⁸ Michael T Yu, "Towards a New California Revised Uniform Fiduciary Access to Digital Assets Act" (2019) 39:2 Loy LA Ent LR 115 at 137, online: <digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1624&context=elr> [perma.cc/9CM9-UWE4].

are out of scope unless the individual making the request is also a fiduciary.³⁹ The recommendations in this report are not intended to apply to parents and guardians of minor children.

[42] While there may be some intersection between accessing digital assets and privacy law, a fulsome review of the privacy issues relating to a person's digital footprint is outside the scope of this project.⁴⁰ Pirated or illegally held digital assets are also not considered in this project. Any potentially unfair trading practices that might arise between custodians and account holders are likewise out of scope.⁴¹

[43] Although a financially valuable digital asset may offset the estate's liabilities, this project does not consider the broader question of whether a digital asset can be attached through the civil enforcement process. In addition, this project does not consider any issues that arise from using digital assets as security.⁴² Valuation of digital assets is also outside the scope of this project.

F. Non-Custodial Digital Assets

[44] The recommendations in this report are intended to apply to digital assets that are held by a custodian. If there is a custodian, then the Uniform Act can be used as a tool to facilitate a fiduciary's access to the digital asset if the original account holder has died or does not have legal capacity.

[45] It may not be possible to use legislation to regulate access to non-custodial digital assets, which means that such assets would fall outside the project's scope. The New South Wales Report recognized this challenge and noted that its legislative scheme "has no practical application in relation to digital records without custodians."⁴³ Since legislation cannot provide an answer for these types

³⁹ For example, in some cases involving suicide, parents have tried to search their child's social media profiles for insight into the circumstances leading to the child's death. See eg "Parents have no right to dead child's Facebook account, German court says", Reuters (31 May 2017), online: www.reuters.com/article/us-germany-facebook-privacy-idUSKBN18R1PI [perma.cc/JY9M-MQ43].

⁴⁰ For a brief discussion on Canadian privacy laws related to accessing digital assets, see Woodman, note 22 at 207-12.

⁴¹ For a brief discussion of the issues raised by unfair trading practices, including unfair contract terms, see New South Wales Report at 6.26-6.31.

⁴² The European Law Institute recently completed its project on using digital assets as security: see *ELI Principles on the Use of Digital Assets as Security* (2022), online: www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_the_Use_of_Digital_Assets_as_Security.pdf [perma.cc/E56G-BP6W].

⁴³ New South Wales Report at para 6.25.

of situations, account holders must make adequate provisions to avoid losing access to these assets.⁴⁴

G. Structure of this Report

[46] The consultation process is set out in Chapter 2 of this report. The chapter reviews feedback gathered from lawyers and other estate professionals, as well as analysing information gathered from members of the general public through ALRI's online survey.

[47] Some preliminary matters, including definitions that should be incorporated into an Alberta Act, are discussed in Chapter 3. The question of which fiduciaries ought to have access to a person's digital assets is considered in Chapter 4. Procedural issues raised by the Uniform Act are the focus of Chapter 5.

[48] Issues regarding extra-jurisdictional recognition of the Uniform Act are discussed in Chapter 6. Procedural issues raised by the Uniform Act are the focus of Chapter 6. This report concludes with Chapter 7, which considers the special case of non-custodial digital assets that fall outside of the legislative regime contemplated by the Uniform Act.

⁴⁴ Even the living may have trouble accessing their digital assets. See CBC Radio "This man owns \$321M in bitcoin - but he can't access it because he lost his password", CBC News (15 Jan 2021), online: <www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.5875363/this-man-owns-321m-in-bitcoin-but-he-can-t-access-it-because-he-lost-his-password-1.5875366> [perma.cc/4SE7-GY2V].

CHAPTER 2

Consultation Results

A. Consultation Process

[49] ALRI's consultation process for this project involved two main branches. During the first branch, which consisted primarily of discussions with lawyers and other estate professionals, ALRI tried to identify potential barriers to adopting the Uniform Act in Alberta. In the second branch, which consisted of an online survey given to members of the general public, ALRI attempted to understand how and why Albertans engage with digital assets and whether they have turned their minds to what should happen to their digital assets if they die or are incapacitated.

[50] Most of ALRI's consultation took place between December 2021 and May 2022. During the consultation period, ALRI carried out the activities discussed below.

B. Lawyers and Estate Professionals

[51] The general consensus among the lawyers and estate professionals consulted during this project is that fiduciary access to digital assets will become a bigger issue as time goes on, particularly as the market for certain kinds of digital assets such as cryptocurrency continues to grow. There was broad overall support for adopting the Uniform Act in Alberta, and many respondents appreciated the proactive nature of the project. Many respondents emphasized the need for flexible legislation that can adapt to an evolving technological landscape.

1. PRESENTATIONS

[52] Four presentations to the legal profession were given during the course of this project:

- On December 21, 2021, ALRI made a presentation to the CBA (North) Wills, Estates & Trusts section on access to digital assets by fiduciaries. There were approximately 70 lawyers in attendance over Zoom.

- On May 5, 2022, ALRI did an in-person presentation to STEP Calgary during their annual general meeting. There were approximately 30 people in attendance.
- On November 15, 2022, ALRI gave an in-person presentation to the CBA (North) Wills, Estates & Trusts section on access to digital assets by fiduciaries. The presentation was also simultaneously available on Zoom. There were 15 lawyers attending in person and 38 lawyers online.
- On January 20, 2023, ALRI was part of a panel discussion on “The Road Forward for Law Reform” at the Manitoba Bar Association Midwinter meeting. ALRI’s presentation was attended by 20 lawyers in person and 38 lawyers online.

[53] In total, approximately 211 people attended these presentations either virtually or in-person, most of whom were lawyers and estates professionals. ALRI gathered questions, comments, and other feedback from all four presentations. The comments can be grouped into the following main themes.

a. Past experiences dealing with digital assets during estate administration

[54] Some lawyers shared their past experiences dealing with digital assets during estate administration:

- One lawyer indicated that he had a client who was only able to obtain access to a digital asset after getting a court order. He asked whether the Uniform Act would make it easier to get online service providers to comply with court orders or enforce compliance with the legislation.
- One lawyer indicated that they regularly include digital assets clauses when drafting wills for clients. This lawyer wondered whether digital assets clauses ought to be included in other estate planning documents such as enduring powers of attorney, as a standard of practice.
- Some lawyers suggested that details of online accounts do not belong in a will or enduring power of attorney, but the account holder should have a discussion with their personal representative about how to access their digital assets. There should also be a record of the account holder’s decisions or wishes.
- One lawyer suggested that as a practical matter, password managers or vaults that allow a person to store their passwords for various

online accounts are a good idea and should be encouraged – if the fiduciary has the password to the vault, then they would have everything they need to deal with the person’s online accounts.

- One lawyer noted that many online platforms are using biometrics instead of or in addition to passwords – so even if the account holder shared their password with the fiduciary, that would not help the fiduciary access the digital asset.
- Some lawyers indicated that while they had not yet personally encountered any difficulties dealing with digital assets, they believed that digital assets are poised to become a larger and more important part of estate planning in the future. They suggested that ALRI consider including recommendations for best practices as part of this project.

b. Who should be included as a fiduciary under the Uniform Act?

[55] Some lawyers wondered whether the Uniform Act should apply to additional categories of fiduciaries:

- Many lawyers agreed that agents appointed under a personal directive ought to be included in the Uniform Act – for example, to be able to access digital records relating to health, medical, and other personal information.
- Although some lawyers recognized that parents and guardians might wish to access their children’s digital assets to monitor their online activities, these lawyers agreed that guardians of minor children who are still alive should not be included in the Uniform Act.

[56] One lawyer asked about the extent of a fiduciary’s powers under the Uniform Act:

- Would the fiduciary be able to access all the records of every transaction that the account holder ever did? Does the Uniform Act allow the fiduciary to delete or destroy online content?

c. Will extra-jurisdictional custodians comply with the Uniform Act?

[57] While there seemed to be general agreement about the value of adopting uniform legislation in Alberta, many lawyers and estate professionals were

concerned about whether the Uniform Act will be recognized and followed by online service providers and other custodians located outside Alberta:

- How do we ensure that online service providers located in other jurisdictions will comply with the Uniform Act?
- Will the Uniform Act be effective in preventing online service providers from relying on choice of law or choice of jurisdiction clauses included in their service agreements?
- The Revised American Act favours custodians much more than the Uniform Act – will there be recognition issues if an Alberta Act is substantively different from the Revised American Act?
- Many US-based custodians are notorious for not following rules. What is being done in other jurisdictions – such as the European Union, Australia – to encourage custodians to provide fiduciary access to digital assets?

d. Can custodians simply modify their service agreements to avoid complying with the Uniform Act?

[58] Some lawyers were concerned that the Uniform Act would not be very effective if custodians can simply change their service agreements to “work around” and avoid complying with the legislation:

- Most service agreements between an account holder and custodian are heavily in favour of the custodian. The account holder does not really have any power to change or refuse any terms in the agreement if they want to use the service. If the Uniform Act allows account holders to opt out of the default rules, it seems that many custodians would just update their service agreements to force account holders to opt out.
- Can online service providers require account holders to limit fiduciary access as a condition of service after the Uniform Act comes into force? Does the legislation prevent this from happening?
- Some online platforms allow users to designate a fiduciary or legacy contact – what happens if the online tool designates different people than those set out in the will or power of attorney? Would an Alberta Act respect these online designations?

2. INTERVIEWS

[59] In December 2021, ALRI conducted virtual interviews with three estates lawyers about the access to digital assets by fiduciaries project. ALRI provided them with copies of the Uniform Act and asked them to review it before the interviews. ALRI also received written feedback from a fourth lawyer. Some of the feedback received included:

- Keeping a broad definition of “digital assets” and limiting access to fiduciaries only was generally supported.
- Questions about whether custodians in other jurisdictions outside of Canada would recognize or comply with the Uniform Act.
- While the powers of a personal representative set out in s 20 of the *Estate Administration Act* are sufficiently broad to include access to digital assets, there may be some value to having specific legislation like the Uniform Act to compel custodians – particularly those located outside Alberta – to provide access.
- Concerns about whether the Uniform Act would eliminate the need for a fiduciary to seek a court order in the jurisdiction in which the digital asset is held (eg if the personal representative is given a grant of authority in Alberta but the custodian of the digital asset is located in California, will the Uniform Act be enough to compel the custodian to provide access without an order from a California court?).
- Even if lawyers provide relatively consistent advice to their clients about what to do with their digital assets (and one lawyer questioned whether there is consistent advice given the speed of technological advances), there is no consistency when it comes to how clients actually deal with their digital assets. A Uniform Act might be helpful to create a default position for people who might not otherwise have specific provisions regarding digital assets in their estate planning or trust documents.
- Concerns about whether excluding non-custodial digital assets (meaning those without a custodian who can be compelled to provide access, such as most cryptocurrencies, non-fungible tokens, and other decentralized blockchain-based assets) is too big of a legislative gap.

- One lawyer wondered about potential generational issues as younger generations – who are more likely to be early adopters of digital assets such as cryptocurrency and non-fungible tokens – may also be less likely to think about estate planning or to consider what will happen to those assets if they die or are incapacitated. This lawyer suggested reaching out to lawyers in their 20s or 30s who may be more attuned to what people in their peer group are doing when it comes to these types of digital assets.
- One lawyer who practices in a smaller centre in southern Alberta indicated that their standard estate questionnaire does include a section on digital assets, and distinguishes them based on whether they have value or not. They indicated that when it comes to digital assets that are mainly of sentimental value – such as Facebook accounts - many of their clients do not seem to care what happens to them after they die. For those that do care, the lawyer may suggest drafting a letter of direction that can accompany the will. The challenge is that very few clients may take the extra step of writing a letter of direction, and even fewer may keep it up to date.
- One lawyer noted that in rural or remote areas of the province, it is common for older people to remain in the community while their adult children live somewhere else. If the adult children are also appointed as personal representatives or attorneys, it is often the case that they would deal with the estate assets remotely and by digital means. Given the increased mobility of younger generations, the ability to access digital assets and other estate assets remotely becomes even more important. Uniform legislation may help facilitate access in this context.
- One lawyer noted that section 5(2) of the Uniform Act allows custodians to “contract out” of their obligations to provide access to fiduciaries.⁴⁵ In their opinion, this provision could make things worse for fiduciaries because consumers have no bargaining power when it

⁴⁵ Section 5(2) of the Uniform Act states:

Unless an account holder assents, on or after the date this Act comes into force and by an affirmative act separate from the account holder’s asset to other provisions of the service agreement, to a provision in the service agreement that limits a fiduciary’s access to a digital asset of the account holder,

- (a) any provision in the service agreement that limits the fiduciary’s access to the digital asset of the account holder is void, and
- (b) the fiduciary’s access under this Act to a digital asset, despite the service agreement, does not require the consent of any party to the service agreement and is not in breach of any provision of the service agreement.

comes to large online service providers. It would be far easier and more efficient for custodians to simply require account holders to agree to limit fiduciary access – or to opt-out altogether – as a condition of providing that service.

- One lawyer noted that section 7(2) of the Uniform Act, which requires custodians to respond to the fiduciary’s access request within 30 days of receiving the required documentation confirming the fiduciary’s authority, is unrealistic when dealing with a custodian located in another jurisdiction outside Canada. They also questioned whether a Canadian court could impose any consequences if a custodian outside of the jurisdiction fails to comply with the 30-day timeline.
- One lawyer wondered how the Uniform Act would apply to completely autonomous systems that do not involve any human discretion. The Uniform Act seems to address situations in which someone – a person, organization, or other similar custodian – has the discretion to provide the fiduciary with access to the digital asset but refuses to do so. But some systems are designed to eliminate this discretion, which seems to create another technology-based legislative gap.⁴⁶

3. PROJECT ADVISORY COMMITTEE (PAC)

[60] ALRI established a Project Advisory Committee (PAC) which consisted of five lawyers specializing in estate matters from across Alberta. The PAC was asked to review the Uniform Act and related commentary. They raised the following questions and concerns:

- There ought to be consistency with other Alberta legislation that defines “records.”
- Whether the Uniform Act is procedurally robust enough to encourage online service providers located in other jurisdictions to follow it.

⁴⁶ This lawyer gave as an example decentralized autonomous organizations or “DAOs”, in which the operating rules of the organization are embedded in the code and therefore not subject to any human discretion. For a general introduction to DAOs and how they work, see Cathy Hackl, “What are DAOs and Why You Should Pay Attention” (1 June 2021), Forbes online: <www.forbes.com/sites/cathyhackl/2021/06/01/what-are-daos-and-why-you-should-pay-attention/?sh=580a4a3a7305> [perma.cc/JG9A-UGVP].

- There ought to be consistency in court orders to encourage recognition by foreign entities.
- Many jurisdictional questions were raised, including: How do we know where the digital asset is located? In which jurisdiction should we be getting a court order? Could something like the *Reciprocal Enforcement of Judgments Act* be used to help facilitate the process?⁴⁷
- The market for cryptocurrency and non-fungible tokens is expanding and more people are getting involved with these types of assets than ever before. The fact that these assets mainly fall outside of the legislative regime may be problematic, especially since the market seems to prefer non-custodial arrangements for liability reasons.⁴⁸ There is also no way to freeze or preserve a non-custodial asset if estate litigation is pending.
- Perhaps it is not necessary for the Uniform Act to cover all types of digital assets (for example, non-custodial digital assets). While it is impossible to predict the future, how do we ensure that the Uniform Act can evolve and adapt to changing technology?
- Should the Uniform Act be expanded beyond fiduciaries (for example, family members or next of kin)?
- Should the Uniform Act exclude “guardians” from the list of fiduciaries, as guardians do not typically deal with estate assets?

4. OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

[61] ALRI also conducted interviews with representatives from the Office of the Public Guardian and Trustee (OPGT) in February and December, 2023. A copy of the Uniform Act was provided to the OPGT before the interviews. Much of the discussion involved exploring the OPGT’s broad statutory authority as set

⁴⁷ *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6.

⁴⁸ One PAC member noted that some investors are getting into the cryptocurrency market by purchasing exchange traded funds (ETFs) instead of purchasing cryptocurrency directly. ETFs are similar to (but not the same as) mutual funds in that they usually involve a fund or portfolio manager: See Nathan Reiff, “How Do Cryptocurrency Exchange-Traded Funds (ETFs) Work?” (7 February 2024), online: <www.investopedia.com/investing/understanding-cryptocurrency-etfs/> [perma.cc/9GFV-MFCK]. See also Pete Evans, “New exchange-traded crypto funds launching in Canada today will be 1st to pay monthly yield”, CBC News (30 Nov 2021), online: <www.cbc.ca/news/business/bitcoin-ether-etf-purpose-1.6266783> [perma.cc/6BJE-VKLE]. Digital assets held in a cryptocurrency ETF would most likely fall within the Uniform Act.

out in the *Adult Guardianship and Trusteeship Act* and the *Public Trustee Act*, and how that authority might relate to digital assets. Some of the issues raised during these discussions included:

- The importance of maintaining the OPGT's broad statutory authority to access information, including digital records, for both clients and potential clients. This is particularly important as the OPGT is often considered the "office of last resort."
- Concerns that the Uniform Act's provisions for accessing digital assets and records might be more onerous for the OGPT to follow than what is set out in its enabling legislation. If there is a conflict between the Uniform Act and the OGPT's enabling legislation, then ALRI should consider whether an Alberta Act ought to include a paramountcy clause to confirm that the Uniform Act does not limit or restrict the OGPT's powers.
- Typically, the parents or legal guardians of minor children are considered to act both as guardians and trustees of the child. If a minor child is subject to a permanent guardianship order granted under section 34(4) of the *Child, Youth and Family Enhancement Act*, then the Director of Children's Services becomes the sole guardian of the child's person and the Public Trustee becomes the sole trustee of the child's estate.⁴⁹ There were concerns that the Uniform Act could be interpreted in such a way as to limit or restrict the Public Trustee's authority if it is acting on behalf of a living minor child.

C. General Public

1. ONLINE SURVEY

[62] ALRI commissioned an online survey using SurveyMonkey Audience in December 2021. The survey asked Alberta respondents about their online activity and whether they have told their family members or friends how to access their digital assets if they die or become incapacitated. Many of the questions are

⁴⁹ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 34(4). See also *VB v Alberta (Minister of Children's Services)*, 2004 ABQB 788 at paras 12-16, 21.

similar to those used by the New South Wales public survey on digital assets.⁵⁰ ALRI revised and added new questions to make the survey more relevant to Alberta.

[63] There were four general categories of survey questions including: social media, websites and domain names, cryptocurrency, and estate planning considerations. The survey questions were primarily quantitative in nature and some questions allowed multiple answers.

a. Demographics

[64] The survey generated a total of 405 Alberta respondents. Demographic targets included a 50-50 gender split, as well as an age split:

Age group	Percentage of respondents
18-29	19%
30-39	20%
40-49	20%
50-59	20%
60+ ⁵¹	21%

[65] While ALRI did not include any demographic targets to account for location or urban-rural split, 35% of respondents indicated they were located in Calgary and 35% were located in Edmonton. There was also representation from Red Deer, Grande Prairie, Medicine Hat, Fort McMurray, and Lethbridge, as well as people living on reserve.

[66] ALRI also asked respondents for their annual personal income:

⁵⁰ See New South Wales Law Reform Commission, *Access to digital records upon death or incapacity: survey results*, Research Report 15 (December 2019), online: <www.lawreform.justice.nsw.gov.au/Documents/Publications/Other-Publications/Research-Reports/RR15.pdf> [perma.cc/A2BY-4N6C].

⁵¹ The 60+ age group is represented as follows: 60-69 (13%), 70-79 (6%) and 80+ (2%).

Annual income	Percentage of respondents
Under \$25,000	21%
\$25,000–75,000	44%
\$75,000–100,000	12%
\$100,000–125,000	8%
\$125,000–150,00	4%
Over \$150,000	3%
Prefer not to say	8%

b. Social media use

[67] Ninety-one percent of survey respondents indicated that they use social media. The most frequently used platforms were Facebook, YouTube, and Instagram. When asked why they use social media, the most common responses were to keep in touch with family and friends, to share photos or videos, and to share thoughts and ideas with others. Nineteen percent of respondents who use social media indicated that they use their social media accounts to make money. A few respondents indicated that they use social media primarily for news or entertainment purposes.

[68] When asked when they set up their first social media account, 51% of respondents estimate that they did so between 2006–2011, while 24% indicated that they did so before 2005. Perhaps not surprisingly, 43% of respondents indicated that they have social media accounts that exist but are no longer used, while an additional 15% are unsure. When asked why unused social media accounts continue to exist, the respondents gave the following answers:

I don't know how to delete it	35%
I can't be bothered to delete it	31%
It still serves a purpose, even though I don't use it any more	25%
Other ⁵²	9%

[69] Only 12% of respondents indicated that they have shared their social media passwords with someone else. When asked what should happen to their

⁵² The most common answer in the "other" category was that the respondent had forgotten or lost the password.

social media accounts if they die or are incapacitated, the respondents gave the following answers:

A person of my choice should get access to them and they should decide what to do with them	35%
My accounts should be automatically deleted by the provider	33%
I'd like my social media profiles to be turned into a memorial so my family and friends can view them, but not make any changes	17%
I don't care	11%
My social media profiles are part of my business, so they should be accessible to my person of choice	4%

c. Websites and domain names

[70] Sixteen percent of respondents indicated that they have a website or domain for business use (43%), personal use (42%) or both (12%). It appears that only 6% of these respondents have shared their website or domain passwords with someone else.⁵³

d. Cryptocurrency

[71] The survey provides some insight into the prevalence of cryptocurrency and the habits of its users in Alberta. Twenty-two percent of respondents indicated that they own Bitcoin or other cryptocurrency. Respondents who own cryptocurrency are more likely to be male (60%) than female (40%), with the largest proportion (29%) being between 40 and 49 years of age. Most crypto owners (79%) live in either Edmonton (31%) or Calgary (48%). Almost half of respondents (48%) who own cryptocurrency have an annual income between \$25,000 and \$75,000. ALRI did not ask respondents to estimate the value of their cryptocurrency holdings.

[72] While almost 74% of respondents who own cryptocurrency have spoken to their family or friends about their cryptocurrency wallet or account, less than 16% have given someone permission to access their wallet or account if something happens to them. Interestingly, respondents who own cryptocurrency are twice as likely to have spoken to their family or friends about what they

⁵³ Seventy-one percent of these respondents left this question blank, so it is unclear whether 6% is an accurate representation of respondents who have shared their passwords.

would like to happen to their digital assets if something that happens to them compared to other respondents. Respondents who own cryptocurrency are also almost twice as likely to have left written instructions about how to access their digital assets if they die or can no longer manage them compared to other respondents.

e. Password managers and vaults

[73] Twenty-eight percent of all respondents indicate that they use a password manager or vault. Password managers or vaults are usually third-party applications or devices that store passwords and login information for multiple accounts. Of those respondents who use a password manager or vault, 7% have given someone permission to access their password manager or vault if something happens to them.

f. Digital assets and estate planning

[74] Respondents were asked about estate planning for their digital assets:

Have you ever spoken to friends or family about what you would like to happen to your digital assets if something happens to you?	
Yes	18%
No	77%
Not sure	3%

Have you left any written instructions to your friends or family about how they can access your digital assets (for example, a list of accounts and passwords) if you die or can no longer manage them?	
Yes	15%
No	82%
Not sure	1%

[75] Respondents were also asked whether they had a will or enduring power of attorney [EPA], and what those documents might say about what should happen to their digital assets. Thirty-six percent of respondents indicated that they had a will, but of those, 71% indicated that their will did not include any details about their digital assets. Twenty-five percent of respondents indicated

that they had an EPA, but of those, 62.5% indicated that their EPA did not include any details about their digital assets.

[76] For those respondents who did include details about their digital assets in either their will or EPA, such details included:⁵⁴

- what they want to happen to their social media profiles;
- what they want to happen to their websites or domains;
- passwords to personal computer, phone, and/or online accounts;
- details of cryptocurrency keys, wallets, or accounts; and
- details about password manager or vault.

[77] Almost 39% of respondents who own cryptocurrency also have a will. Of those respondents, approximately 17% have included detailed information about their cryptocurrency keys, wallets, or accounts. However, 26% of respondents who own cryptocurrency and have a will did not include any details about their digital assets in their wills.

[78] Slightly over 25% of respondents who own cryptocurrency indicated that they have an EPA. Of these respondents, 21% have included details about their cryptocurrency keys, wallets, or accounts.

g. Additional information

[79] There was an open-ended text box at the end of the survey that approximately 10% of respondents answered. Of those respondents, many indicated that they had never thought about their digital assets and what should happen to them if they die or are incapacitated before answering the survey questions.

⁵⁴ The survey allowed multiple responses to this question.

CHAPTER 3

Preliminary Matters

A. Introduction

[80] The purpose of this chapter is to resolve certain preliminary matters that either were left open by the Uniform Act or arose during research and consultation. These preliminary matters include refining the definitions section of the Uniform Act, including a provision that binds the Crown when acting as a custodian of a digital asset, and confirming that there are no perceived conflicts between the Uniform Act and the statutory powers granted to the Office of the Public Guardian and Trustee under its enabling legislation.

B. Definitions

1. “COURT”

[81] Section 8 of the Uniform Act allows fiduciaries to apply to a court for directions. For the purposes of the Uniform Act, “court” is intended to mean the “superior court of the enacting jurisdiction”.⁵⁵ This approach has been adopted in the Saskatchewan, PEI, New Brunswick, and Yukon statutes.

[82] An Alberta Act should define “court” as meaning the Court of King’s Bench. This approach is consistent with the definition of “court” included in other legislation related to estates and incapacity.

RECOMMENDATION 1

An Alberta Act should define “court” as meaning the Court of King’s Bench of Alberta.

2. “RECORD”

[83] The Uniform Act does not include a specific definition of “record”:⁵⁶

⁵⁵ Uniform Act, s 1, definition of “court”.

⁵⁶ Uniform Act, commentary on s 1, “record” at 5.

The term “record” should be defined by the jurisdiction if not defined in the *Interpretation Act* for the jurisdiction.

[84] The term “record” is not defined in Alberta’s *Interpretation Act*.⁵⁷ Saskatchewan, PEI, and New Brunswick all define “record” as meaning “a record of information in any form”.⁵⁸

[85] During consultation, one lawyer suggested that the definition of “record” in the Uniform Act ought to be consistent with other Alberta legislation that defines “records.” For example, the *Personal Information Protection Act* defines “record” as:⁵⁹

a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or any other form, but does not include a computer program or other mechanism that can produce a record.

[86] The *Freedom of Information and Protection of Privacy Act* includes a more specific definition of “record”:⁶⁰

“record” means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.

[87] While the definitions set out in the *Personal Information Protection Act* and the *Freedom of Information and Protection of Privacy Act* exclude software, computer programs, or other mechanisms that produce records, there may be some circumstances in which these types of programs would be considered digital assets for the purposes of the Uniform Act. When considering how to approach the definition of “record” in the Uniform Act, it is important to keep the broad definition of “digital asset” in mind:⁶¹

⁵⁷ *Interpretation Act*, RSA 2000, c I-8.

⁵⁸ Saskatchewan Act, s 2; PEI Act, s 1(g); New Brunswick Act, s 1. The definition of “record” in the Yukon statute is slightly modified to “information stored in any form”: Yukon Act, s 1.

⁵⁹ *Personal Information Protection Act*, SA 2003, c P-6.5, s 1(1)(m).

⁶⁰ *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 1(q). The identical definition is used in the *Electronic Transactions Act*, SA 2001, c E-5.5, s 1(i), and the *Health Information Act*, RSA 2000, c H-5, s 1(1)(t).

⁶¹ Uniform Act, s 1. Commentary to this definition confirms that the term “digital assets” includes products currently in existence and those yet to be invented that are available only electronically.

“digital asset” means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means.

[88] The definition of digital assets is intentionally wide to allow the legislation to adapt and respond to the evolving nature of the digital landscape. Similarly, a broad approach ought to be taken to the definition of “record” under the Uniform Act. While it may be tempting to adopt a definition that currently exists under Alberta law – such as the ones set out in the *Personal Information Protection Act* or the *Freedom of Information and Protection of Privacy Act* – ALRI recommends that an Alberta Act take a broader approach consistent with the definitions enacted in Saskatchewan, PEI, and New Brunswick.

RECOMMENDATION 2

An Alberta Act should define “record” as meaning a record of information in any form.

3. “ONLINE TOOL”

[89] The Uniform Act contemplates that the service agreement between a custodian and an account holder might include instructions that limit a fiduciary’s access to the digital asset.⁶² Some custodians have created online tools that are intended to help account holders decide what to do with their digital assets if they die or are incapacitated. For example, Google has an “Inactive Account Manager” tool that allows account holders to share account information with a designated person if the account holder has not accessed their account within a specified time period.⁶³

[90] While online tools are not specifically referenced in the Uniform Act, they would likely be considered part of the service agreement between the custodian and the account holder. That said, it may be helpful to include a definition of “online tool” in an Alberta Act. For example, determining priority of instructions, which is discussed in Chapter 5, may depend on the specific instructions given in an online tool. Understanding what is meant by an online tool separately from other provisions in a service agreement may assist

⁶² Uniform Act, s 3(3). Instructions contained in a service agreement that limit a fiduciary’s access to a digital asset must be made by the account holder after the Uniform Act comes into force.

⁶³ . See Google, “About Inactive Account Manager”, online: <support.google.com/accounts/answer/3036546?hl=en> [perma.cc/E3XY-G8UE].

fiduciaries in deciding which instruments ought to govern access to a digital asset.

[91] The Revised American Act, section 2(16) includes the following definition of online tool:

“online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

[92] The New South Wales Report includes a similar definition of “online tool” in its model legislation:⁶⁴

“Online tool” means a tool provided by a custodian online that allows the user to give directions or permissions to a third party for managing the digital records of the user stored or maintained by that custodian.

[93] ALRI recommends including a similar definition of “online tool” in an Alberta Act to improve clarity, particularly in situations that require fiduciaries to determine priority where there are conflicting access instructions given in different types of instruments. The definition of “online tool” should be limited to tools provided by the custodian.⁶⁵

RECOMMENDATION 3

An Alberta Act should include a definition of “online tool” to improve clarity and assist fiduciaries in determining priority of instructions.

C. Binding the Crown

[94] Section 3 of the New Brunswick statute includes a provision that confirms the legislation is binding on the Crown.⁶⁶ This provision is not included in the Uniform Act, nor in the Saskatchewan, PEI, and Yukon statutes.

⁶⁴ See New South Wales Report, Recommendation 3.2(6), also commentary at 3.38–3.39.

⁶⁵ The definition of “online tool” should not include password managers, after-death planning services, or other third-party online tools, which are discussed later in this chapter. As noted in the New South Wales Report, these third-party services are not operated by custodians so they do not affect priority of instruction: see New South Wales Report at 3.40.

⁶⁶ New Brunswick Act, s 3.

[95] In Alberta, section 14 of the *Interpretation Act* confirms that legislation is not binding on the Crown unless it expressly says so:

No enactment is binding on His Majesty or affects His Majesty or His Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds His Majesty.

[96] The presumption that legislation is not binding on the Crown unless expressly stated also applies in Saskatchewan, while the presumption is reversed in PEI.⁶⁷

[97] The Uniform Act is intended to bind custodians, meaning someone who holds, maintains, processes, receives or stores a digital asset of an account holder.⁶⁸ There may be cases where the custodian of the digital asset is the Crown. If a fiduciary wishes to use the procedures set out in the Uniform Act to obtain access to a digital asset held by the Crown, then the legislation must expressly say so. Otherwise, the Crown would not be bound by the Uniform Act.

RECOMMENDATION 4

An Alberta Act should include a provision that binds the Crown when it is a custodian of the digital asset.

D. Paramountcy

[98] During discussions with representatives from the Office of the Public Guardian and Trustee (OPGT), concerns were raised about whether the Uniform Act might inadvertently fetter the broad statutory powers granted to the OPGT under other legislation. Specifically, the OPGT has authority to gather information about a person, including access to digital records. The OPGT suggested that including a paramountcy clause could be useful to confirm that the OPGT's broad powers and authority are not limited by the provisions in the Uniform Act.

[99] Where there is a conflict between different legislation, a paramountcy clause can help determine which legislation ought to govern. There are two main

⁶⁷ See *The Legislation Act*, SS 2019, c L-10.2, s 2-20: "No enactment binds the Crown or affects the Crown or any of the Crown's rights or prerogatives, except as is mentioned in the enactment." Contrast with *Interpretation Act*, RSPEI 1988, c I-8.1, s 20(1): "Every Act and every regulation made under it is binding on the Government unless the Act specifically provides otherwise."

⁶⁸ Uniform Act, ss 1, 2(1)(e).

ways of setting out paramountcy in a piece of legislation. One way is by confirming that the statute in question is paramount to other statutes. For example, section 5 of the *Freedom of Information and Protection of Privacy Act* confirms it prevails over other conflicting legislation unless the other legislation expressly says otherwise.⁶⁹

If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

- (a) another Act, or
- (b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[100] The second way is by confirming that another statute is paramount to the statute in question. An example of this second approach to paramountcy can be found in the *Wills and Succession Act*, which confirms that any conflicts between that statute and the *Dower Act* ought to be resolved in favour of the *Dower Act*:⁷⁰

In the event of a conflict between the *Dower Act* and a provision of Part 2 or 3 respecting a spouse's rights in respect of property after the death of the other spouse, the *Dower Act* prevails.

[101] The OGPT's concerns are rooted in its history as a "catch-all" or "place of last resort", and the broad provisions in their legislation enable the office to act to protect the property or ensure the safety of an incapacitated person. The OGPT often receives referrals about potential clients in need of its services. In these cases, the OGPT gathers information to determine whether to apply for a guardianship or trusteeship order. For example, the broad authority to access information for capacity assessments can be found in section 103(1) of the *Adult Guardianship and Trusteeship Act*:⁷¹

For the purpose of carrying out a capacity assessment of an adult, a capacity assessor may access, collect or obtain from a public body, custodian or organization personal information about the adult, except financial information, that is relevant to the capacity assessment.

⁶⁹ *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 5.

⁷⁰ *Wills and Succession Act*, SA 2010, c W-12.2, s 2.

⁷¹ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 103(1) [AGTA]. Section 103(3) allows a capacity assessor to request a court order to access financial information if such information is necessary to the capacity assessment. Capacity assessors are health professionals designated in the regulations as being qualified to conduct capacity assessments.

[102] At first blush, there does not appear to be any conflict between the broad statutory powers of the OGPT and the Uniform Act. The Uniform Act is intended to confirm a fiduciary's authority to deal with digital assets as part of a person's overall estate. It does not purport to create new fiduciary rights or obligations, nor to limit existing fiduciary rights or obligations. A fiduciary's right to access a person's digital assets must therefore be consistent with the source of the fiduciary's authority to act on the person's behalf.

[103] While the Uniform Act is intended to apply to the Public Guardian and Public Trustee when acting in a fiduciary capacity, the purpose of the legislation is to make it easier for fiduciaries to access the account holder's digital assets. The Uniform Act does not create a right to access if that access right does not otherwise exist. A fiduciary's right to access the digital asset must be found in the source of the fiduciary's authority. For the OGPT, that authority is set out in the *Public Trustee Act* and other enabling legislation such as the *Adult Guardianship and Trusteeship Act*. As such, the Uniform Act would not affect the source of the OGPT's authority, which can be found in its enabling legislation.

[104] Given the lack of perceived conflict between the broad statutory powers of the OGPT and the Uniform Act, it does not seem necessary to include a paramountcy clause in an Alberta Act.

CHAPTER 4

Fiduciaries

A. Introduction

[105] It is well-established that a fiduciary relationship is one in which “one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power.”⁷² There are three general characteristics of a fiduciary relationship:⁷³

- the fiduciary has scope for the exercise of some discretion or power
- the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests
- the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[106] Problems often arise when a fiduciary tries to gain access to digital assets after the account holder dies or becomes incapacitated, but is prevented from doing so by online service providers:⁷⁴

The rights of fiduciaries to deal with digital assets is not clear to everyone in the digital world; nor is it the duty of custodians of the digital assets to provide access to these assets to fiduciaries.

[107] Even if the fiduciary has the legal authority to deal with digital assets through a will or power of attorney, this authority may not necessarily be recognized by online service providers and other similar custodians. If a fiduciary has the usernames and passcodes to online accounts, the service agreement between the custodian and the original account holder may nevertheless prohibit their use by a third party. These agreements often include restrictions on sharing usernames and passwords, or state that the only authorized user is the original account holder.

⁷² Daphne A Dukelow, *The Dictionary of Canadian Law*, 3rd ed (Toronto: Thomson Canada Limited, 2004) at 469.

⁷³ *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 27.

⁷⁴ Uniform Law Conference of Canada, “Uniform Access to Digital Assets by Fiduciaries Act – Progress Report” (August 2015) at para 1, online <ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Ac/Uniform-Access-to-Digital-Assets-by-Fiduciaries-2> [perma.cc/NAV2-FZ8H] [ULCC Progress Report].

[108] While restrictive terms in service agreements may be in place to guard against certain threats such as identity theft, fraud, and breaches of privacy, they can also be seen as coming into direct conflict with the principles of estate administration.⁷⁵ The ULCC Working Group recommended clarifying a fiduciary's access to digital assets through legislation:⁷⁶

The consensus of the Working Committee favoured a statutory rule to confirm the implied authority of a fiduciary over all digital assets unless its scope was expressly varied in an instrument. This eliminates the need to redo all instruments and avoids creating gaps in the law, so as to allow fiduciaries to deal with the property of deceased or incapacitated persons in all media.

[109] The purpose of this chapter is to consider the types of fiduciaries that ought to be included in an Alberta Act. The chapter will begin by outlining the four categories of fiduciaries set out in the Uniform Act, as well as the source of a fiduciary's authority to access the digital assets of a deceased or incapacitated person. An example will be used to show how the provisions of the Uniform Act are intended to apply when a fiduciary has been appointed, and how that fiduciary's right to access the digital asset may still be limited by the terms of a service agreement. The chapter will then move on to consider how the different categories of fiduciaries set out in the Uniform Act would apply in Alberta. Each category will include references to applicable Alberta legislation that sets out the respective sources of a fiduciary's authority, as well as any statutory access rights they might already have to deal with a person's digital assets. Lastly, the chapter will discuss whether the four categories of fiduciaries included in the Uniform Act ought to be expanded to include additional fiduciaries or authorized persons.

[110] There are also some practical implications to consider when it comes to which fiduciaries ought to be included in an Alberta Act – such as which documentation ought to be sufficient to satisfy a custodian that the fiduciary has authority to access an account holder's digital assets. Those procedural issues will be considered in Chapter 5.

⁷⁵ Emily Lynch, "Legal Implications Triggered by an Internet User's Death: Reconciling Legislative and Online Contract Approaches in Canada" (2020) 29 Dal J Leg Stud 135 at 145.

⁷⁶ ULCC Progress Report at para 25.

B. Who is a Fiduciary under the Uniform Act?

[111] A fiduciary is defined as a person.⁷⁷ The ULCC commentary does not expressly state whether corporations are considered “persons” for the purposes of the Uniform Act. However, the *Interpretation Act* defines “person” to include “a corporation and the heirs, executors, administrators or other legal representatives of a person”.⁷⁸

[112] Section 1 of the Uniform Act contemplates four main categories of fiduciaries:

- a personal representative for a deceased account holder,
- a guardian appointed for an account holder,
- an attorney appointed for an account holder who is the donor of the power of attorney, and
- a trustee appointed to hold in trust a digital asset or other property of an account holder.

[113] The Uniform Act does not purport to create new legal categories or redefine existing fiduciary relationships. The definition and authority of a fiduciary is based on the law of each specific jurisdiction.

[114] There is a distinction between the source of a fiduciary’s authority to deal with another person’s digital assets and the access rights that flow from the granting of such authority. For example, the source of a personal representative’s authority to deal with a deceased person’s digital assets is the will. However, the will may contain specific provisions that limit or prescribe what the personal representative can do with the digital asset. It may be useful to keep this conceptual distinction between the source of a fiduciary’s authority and access rights in mind when considering how the Uniform Act is intended to operate.

C. What is the Source of a Fiduciary’s Right to Access Digital Assets?

[115] A fiduciary’s right to access the digital assets of an account holder must be consistent with the source of the fiduciary’s authority. Fiduciaries get their

⁷⁷ Uniform Act at 4.

⁷⁸ *Interpretation Act*, RSA 2000, c I-8, s 28(1)(nn).

authority in one of three main ways: instrument, statute, or court order. The Uniform Act, section 3 specifically contemplates the following sources of authority:

- will or grant of estate administration;
- guardianship order;
- power of attorney;
- trust; and
- court order.

[116] Regardless of the source of the fiduciary's authority, a fiduciary's right to access the digital asset may be limited by the terms of the service agreement between the custodian and original account holder.

D. What can a Fiduciary do with a Person's Digital Assets?

[117] The Uniform Act, section 5 confirms that fiduciaries have broad authority to deal with a person's digital assets. For the purposes of the legislation, a fiduciary is deemed to be an authorized user of the digital asset. This means that a fiduciary can essentially step into the shoes of the account holder and take any action concerning the digital asset that the account holder could have taken if they were still alive and of full legal capacity. The fiduciary is also deemed to be acting with the consent of the account holder, which can be an important consideration from the custodian's perspective in determining whether to divulge the contents of the digital asset to the fiduciary.⁷⁹

[118] As noted in Chapter 1, the Uniform Act operates as a set of default rules. If a service agreement between the custodian and account holder contains a term that limits a fiduciary's ability to access the digital asset, then that term is void under section 5. Section 5 also confirms that the fiduciary's ability to access the digital asset does not require the consent of any parties to the service agreement. This means that if an account holder has not left any directions that limit the fiduciary's authority to deal with the digital asset, then the fiduciary can take any

⁷⁹ This type of "deemed consent" provision removes any doubt about whether the fiduciary can access the content of the digital asset, which is particularly important when dealing with US-based custodians: see New South Wales Report at 4.93–4.96.

action that the account holder could have taken while alive and of full legal capacity.

[119] However, an account holder can choose to limit what a fiduciary can do with a particular digital asset even if the fiduciary otherwise has the right to access it. The account holder can limit the fiduciary's authority in two main ways: by including specific instructions in the instrument appointing the fiduciary, or by agreeing to a term in the service agreement after the Uniform Act comes into force. To be effective, the account holder must agree to the term as a separate act from the rest of the service agreement.

[120] It is important to note that providing a fiduciary with access to a digital asset is not the same as transferring ownership of the digital asset to the fiduciary. Some digital assets may have financial value in and of themselves. Digital assets – particularly those with financial value – may form part of an account holder's estate. If the account holder has died, then the digital asset would be distributed to the beneficiaries according to the terms of the will or the rules of intestacy. In these cases, the fiduciary's access to the digital asset is necessary to determine the value of the estate assets and to facilitate distribution of the assets to the beneficiaries.

E. How Have Other Jurisdictions Defined “Fiduciary”?

[121] In considering which categories of fiduciaries should be included in an Alberta Act, it can be helpful to look at what other jurisdictions have already done. As noted by the ULCC Working Group, each jurisdiction may wish to include its own statutory definitions for each type of fiduciary listed in the Uniform Act:⁸⁰

Jurisdictions should insert the appropriate term for **a person named in a fiduciary capacity to manage another's property** (for example, in Quebec the term “liquidator” may be used) and the appropriate term for the individual that would be subject to a guardianship order or comparable proceeding (such as a guardian or curator)... As well, depending on the jurisdiction, this Act is intended to apply to the Public Guardian and Trustee when that office is acting as a trustee or personal representative.

⁸⁰ Uniform Act at 4–5. The term “guardian” is not intended to apply to the guardians of minor children, and the term “trustee” does not include a trustee-in-bankruptcy [**emphasis added**].

[122] The Uniform Act has been adopted in Saskatchewan, Prince Edward Island, New Brunswick, and the Yukon. All three provinces have taken a consistent approach to the Uniform Act in their respective definitions of “fiduciary” as someone who manages another’s property:

Saskatchewan	Prince Edward Island	New Brunswick
<p>“fiduciary” means, in relation to an account holder:</p> <p>(a) an executor or administrator for a deceased account holder;</p> <p>(b) a property guardian;</p> <p>(c) a property attorney; or</p> <p>(d) a trustee appointed to hold in trust a digital asset or other property of an account holder;</p> <p>and includes the Public Guardian and Trustee when acting in one of those capacities⁸¹</p>	<p>“fiduciary”, in relation to an account holder, means</p> <p>(i) a personal representative for a deceased account holder,</p> <p>(ii) a trustee, other than a trustee in bankruptcy, for an account holder, appointed in accordance with an enactment,</p> <p>(iii) an attorney appointed under a power of attorney made by an account holder,</p> <p>(iv) a trustee appointed to hold in trust a digital asset or other property of an account holder, or</p> <p>(v) a committee of the estate of an account holder⁸²</p>	<p>“fiduciary”, in relation to an account holder, means</p> <p>(a) a representative appointed for the account holder,</p> <p>(b) an attorney for property appointed by the account holder under the <i>Enduring Powers of Attorney Act</i>,</p> <p>(c) a personal representative, in the case of an account holder who is deceased,</p> <p>(d) a trustee, other than a trustee in bankruptcy, appointed to hold a digital asset or other property of the account holder in trust, or</p> <p>(e) any other person or class of person prescribed by regulation.⁸³</p>

⁸¹ Saskatchewan Act, s 2. A “property guardian” means a person appointed by the account holder under *The Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3, a “property attorney” means a person appointed by the account holder under *The Powers of Attorney Act*, 2002, SS 2002, c P-20.3.

⁸² PEI Act, s 1(e). A “personal representative” is defined in the *Probate Act*, RSPEI 1988, c P-21.

⁸³ New Brunswick Act, s 1. A “representative” means a person who becomes or is appointed as a committee of the estate under one of the following acts: *Infirm Persons Act*, RSNB 1973, c I-8; *Mental Health Act*, RSNB 1973, M-10; or *Presumption of Death Act*, RSNB 2012, c 110.

[123] The Yukon legislation adopted the definition of “fiduciary” set out in the Uniform Act, which includes personal representatives, guardians, attorneys, trustees, and the Public Guardian and Trustee.⁸⁴

[124] The Revised American Act, which helped to inform the Uniform Act, also applies to fiduciaries who deal primarily with estate and financial matters, including:

- agents appointed under a power of attorney,
- conservators appointed by a court to manage the estate of a living person,
- personal representatives, such as executors, administrators, special administrators, or similar, and
- trustees, who are fiduciaries with legal title to property under an agreement or declaration that creates a beneficial interest in another.

[125] Australia has yet to adopt legislation relating to access to digital assets by fiduciaries. However, the New South Wales Report recommended using the term “authorised person” rather than “fiduciary”.⁸⁵ It further recommended that “authorised person” include fiduciaries such as executors, administrators, guardians, attorneys, and financial managers – namely, individuals appointed by various instruments or by court order to deal with an individual’s personal property and financial affairs.⁸⁶

[126] The question of which categories of fiduciaries ought to be included in an Alberta Act should also be considered within the context of what constitutes a digital asset under the proposed legislative scheme. The Uniform Act, section 1 defines “digital asset” to mean “a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by other similar means.” Importantly, this definition of “digital asset” does not suggest that the record must have financial value. By adopting a broad definition of “digital assets” that can adapt to evolving technology, the Uniform Act does not draw a distinction between digital assets that have some financial value and those that do not. In this way, “digital assets” may be seen to include a

⁸⁴ Yukon Act, s 1.

⁸⁵ New South Wales Report at 3.9-3.11.

⁸⁶ New South Wales Report at 2.13-2.23. Recommendation 4.1 sets out a hierarchy for determining who the authorised person is in relation to particular digital records of a deceased or incapacitated account holder.

broader range of items that go beyond proprietary rights and interests that would traditionally fall within a person's estate.⁸⁷

[127] In contrast, the Revised American Act's definition of "digital assets" is narrower than in the Uniform Act and is intended to apply only to property rights and interests. The Revised American Act defines "digital asset" to mean "an electronic record in which an individual has a right or interest" and does not include "an underlying asset or liability unless the asset or liability itself is an electronic record." This means that the Revised American Act allows fiduciaries "to manage digital property like computer files, web domains, and virtual currency", but restricts fiduciaries "from accessing electronic communications such as email, text messages, and social media accounts" unless the original account holder consented to such access in the instrument or other record appointing the fiduciary.⁸⁸

[128] The New South Wales Report uses a narrower definition of "digital assets" that is restricted to digital material in which users have proprietary rights and interests (for example, intellectual property rights for digital photography and digital artwork).⁸⁹ The New South Wales Report also refers to the broader term "digital records", which includes digital assets but also other electronic records that are "not strictly the property of the user" (for example, social media accounts, loyalty program benefits, sports gambling accounts, and online gaming accounts).⁹⁰ The New South Wales Report's recommendations were intended to apply to all digital records regardless of their financial value.⁹¹

⁸⁷ For example, s 1(h) of the *Estate Administration Act*, SA 2014, c E-12.5 [EAA], defines "property" as including: any right or interest in real and personal property; any legal or equitable right or interest in property; any right or interest that can be transferred for value from one person to another; any right, including a contingent or future right, to be paid money or receive any other kind of property; and any cause of action to the extent that it relates to property or could result in a judgment requiring a person to pay money.

⁸⁸ See Uniform Law Commission, "Fiduciary Access to Digital Assets Act, Revised" (2015), online: Uniform Law Commission <www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecd22> [perma.cc/E37V-LT6S]. Some custodians acknowledge in their terms of service agreements that account holders may retain property interests in the content they create or share using the online service platform, usually on the basis of copyright. That said, even if an account holder retains a property interest in their digital asset, the custodian maintains control over the account where the digital asset is stored. See Sheridan, note 7 at 373-7.

⁸⁹ New South Wales Report at 1.11-1.15.

⁹⁰ New South Wales Report at 1.14, see also 3.16-3.31.

⁹¹ New South Wales Report at 1.25-1.27.

F. Personal Representatives for the Estate of a Deceased Person

[129] The first category of fiduciaries set out in the Uniform Act is personal representatives. Personal representatives are persons who have been designated to deal with the estate of someone who has died. This category of fiduciaries has been included in the Saskatchewan, PEI, New Brunswick, and Yukon Acts⁹².

[130] In Alberta, the *Estate Administration Act* [EAA] defines a personal representative to mean “an executor, administrator or judicial trustee of the estate of a deceased person”.⁹³ Section 20 of the Act confirms a personal representative’s authority to deal with the estate property of a deceased person:⁹⁴

20(1) Subject to the will, if any, and this Act or any other enactment, a personal representative has the following authority in regard to the property included in the estate of the deceased person:

- (a) to take possession and control of the property;
- (b) to do anything in relation to the property that the deceased person could do if he or she were alive and of full legal capacity;
- (c) to do all things concerning the property that are necessary to give effect to any authority or powers vested in the personal representative.

(2) Any action taken, decision made, consent given or thing done by a personal representative with respect to a matter within the personal representative’s authority has the same effect for all purposes as if the deceased person had taken the action, made the decision, given the consent or done the thing while he or she was alive and of full legal capacity.

[131] A personal representative’s core responsibilities include identifying estate assets and liabilities, which includes online accounts.⁹⁵ It appears that Alberta was the first Canadian jurisdiction with legislation that specifically contemplates online accounts as forming part of a deceased person’s estate.⁹⁶ That said, the

⁹² The Saskatchewan Act uses the term “executor or administrator” instead of personal representative.

⁹³ EAA, note 87, s 1(g). This definition also includes a personal representative appointed in a will even if a grant of probate or administration has not been issued.

⁹⁴ EAA, note 87. Section 1(h) of the legislation defines “property” as real and personal property, as well as rights or interests in them; anything regarded in law or equity as property or as an interest in property; any right or interest that can be transferred for value from one person to another; and any right, including a contingent or future right, to be paid money or receive any other kind of property.

⁹⁵ EAA, note 87, s 7(1)(a), see also Schedule, s 1(b).

⁹⁶ EAA, note 87. See also Woodman, note 22 at 199.

EAA provides limited guidance on how to deal specifically with the broader category of “digital assets” as contemplated in the Uniform Act, particularly if the digital asset has no inherent financial value or is subject to an online service agreement restricting access. While the EAA does allow a personal representative to apply to the court for advice and direction on how an estate ought to be administered,⁹⁷ the Uniform Act provides a personal representative with additional legislative guidance on administering digital assets. The Uniform Act confirms the personal representative’s authority to deal with the digital assets of a deceased person and provides a roadmap for securing the right to access the digital asset even in the face of restrictive online service agreements.

[132] For these reasons, ALRI recommends that personal representatives ought to be included as a category of fiduciaries in an Alberta Act.

G. Fiduciaries for Adults Without Legal Capacity

1. GUARDIANS OF REPRESENTED ADULTS

[133] The second category of fiduciaries is guardians. Guardians are persons who are appointed to make certain kinds of decisions on behalf of someone without legal capacity. The Yukon Act specifically includes “a guardian appointed for an account holder” in its list of fiduciaries. The Saskatchewan Act uses the term “property guardian” to mean a person appointed pursuant to the *Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3, and includes the Public Guardian when acting in this capacity. There are no express references to “guardians” in either the PEI or New Brunswick Acts.

[134] In Alberta, a guardian for an adult without legal capacity (a represented adult) may be appointed by a court order under the *Adult Guardianship and Trusteeship Act* [AGTA].⁹⁸ The Public Guardian may be appointed as a represented adult’s guardian if there if there is no other suitable person available

⁹⁷ EAA, note 87, s 49(1).

⁹⁸ The AGTA, s 1(d) defines “capacity” as “the ability to understand the information that is relevant to the [making of a] decision and to appreciate the reasonably foreseeable consequences of (i) a decision, and (ii) a failure to make a decision”.

to fulfill that role.⁹⁹ The Public Guardian may also authorize in writing another person to exercise its powers, functions, and duties.¹⁰⁰

[135] It is important to note that guardians can only make decisions regarding personal matters.¹⁰¹ “Personal matters” include decisions regarding health care, living conditions, employment, education, and social and recreational activities.¹⁰² Financial matters – meaning anything related to the acquisition, disposition, management or protection of property – are expressly excluded.¹⁰³

[136] Guardians have certain access rights to the represented adult’s personal information.¹⁰⁴ The personal information must be relevant to the decision being made or the exercise of authority. Access rights do not extend to financial information.

[137] An Alberta Act could choose to exclude “guardians” as a category of fiduciaries to which the Uniform Act applies, which is similar to the approach taken in the PEI and New Brunswick Acts. This would mean that if a guardian appointed under the AGTA to deal with personal matters wishes to access the digital assets of a represented adult, their access rights would be governed by the provisions of the AGTA only. These provisions might have the effect of limiting a fiduciary’s access rights to digital assets held by public bodies, custodians, and organizations located in Alberta. The implications of similar access provisions in the *Personal Directives Act*, which are discussed later in this chapter, would equally apply to the AGTA.

[138] In summary, ALRI recommends that guardians of represented adults appointed under the AGTA ought to be included as a category of fiduciaries in an Alberta Act for the following reasons:

⁹⁹ AGTA, ss 26(2), 29.

¹⁰⁰ AGTA, s 107(2).

¹⁰¹ AGTA, ss 3, 12, and 25.

¹⁰² AGTA, s 1(o).

¹⁰³ AGTA, s 1(bb).

¹⁰⁴ AGTA, ss 9, 22, and 41. A guardian can access information from public bodies (including Alberta government departments), custodians of health information (including hospitals, nursing homes, regional health authorities, and health service providers), and other organizations (including corporations, unincorporated associations, partnerships, and individuals acting in a commercial capacity). Public bodies, custodians, and other organizations are also defined in the same way in the *Personal Directives Act*, which will be discussed in greater detail below.

- Guardians have broad statutory authority to make personal decisions on behalf of represented adults, including personal matters of a non-financial nature.
- A guardian's access rights do not extend to financial information.
- It is desirable for guardians to be able to access a represented adult's digital assets (such as online accounts) to exercise their statutory authority and fulfil their fiduciary obligations.

[139] ALRI further recommends that the Public Guardian be included in the list of fiduciaries with access rights under the Uniform Act.

2. SUPPORTERS FOR SUPPORTED ADULTS AND CO-DECISION-MAKERS FOR ASSISTED ADULTS

[140] The AGTA sets out different decision-making authorities based on three legislated categories of adults who need assistance:

- supporters for supported adults, who require some support from a third party to make their own decisions;
- co-decision-makers for assisted adults, who require a higher level of assistance from a third party to make decisions; and
- guardians for represented adults, who require a third party to make decisions on their behalf.

[141] As discussed above, ALRI recommends including guardians of represented adults in the definition of fiduciary under the Uniform Act. This raises the question of whether the Uniform Act should also be extended to supporters of supported adults or co-decision-makers for assisted adults.

[142] To help answer this question, it may be useful to consider how supporters, co-decision-makers, and guardians are appointed under the AGTA, as well as their respective authority. A person seeking to appoint a supporter to help them make decisions may do so by completing an authorization in the form prescribed in the regulation.¹⁰⁵ A person seeking to appoint a co-decision-maker on their own behalf may do so by applying for a court order.¹⁰⁶ An interested person –

¹⁰⁵ AGTA, s 4; see also *Adult Guardianship and Trusteeship (Ministerial) Regulation*, AR 224/2009, Schedule, Form 1.

¹⁰⁶ AGTA, s 13(1).

meaning someone who is concerned for the welfare of the person needing assistance with decision-making – can apply to the court for a co-decision-making order. An interested person can also bring a court application for a guardianship order on another person’s behalf.¹⁰⁷ While the Public Guardian may act as a represented person’s guardian, the AGTA expressly prohibits the Public Guardian from acting as either a supporter or co-decision-maker.¹⁰⁸

[143] There are different expectations of supporters, co-decision-makers, and guardians when it comes to their respective duties and obligations. For example, section 18 of the AGTA requires a co-decision-maker to exercise their authority in the assisted adult’s best interests, and with diligence and good faith. While no similar provision exists with respect to a supporter, there are additional obligations on a guardian exercising their authority on behalf of a represented adult.¹⁰⁹ This range of duties and obligations reflects the different levels of assistance required by supported adults, assisted adults, and represented adults respectively.

[144] Unlike supporters or co-decision-makers, guardians essentially step into the shoes of the represented adult. Section 34(2) of the AGTA confirms that “[a]ny action taken, decision made, consent given or thing done by a guardian with respect to a personal matter of the represented adult... has the same effect for all purposes as if the represented adult had taken the action, made the decision, given the consent or done the thing while having capacity.” There is no similar provision that applies to supporters or co-decision-makers.

[145] It is well-established in law that a guardian acting on behalf of a person without legal capacity is engaged in a fiduciary relationship with that person. It is less clear if a supporter or co-decision-maker has the same type of fiduciary relationship, if at all. An Alberta Act can include supporters or co-decision-makers within the category of “guardian” – but doing so would not necessarily answer the question of whether they can be considered fiduciaries for purposes unrelated to the Uniform Act. Their respective authority, duties, and obligations

¹⁰⁷ AGTA, s 26(1).

¹⁰⁸ AGTA, ss 5, 15.

¹⁰⁹ AGTA, s 35(1) provides that “A guardian shall exercise the guardian’s authority (a) in the represented adult’s best interests, (b) diligently, (c) in good faith, (d) in a way that encourages the represented adult to become, to the extent possible, capable of caring for himself or herself and of making decisions in respect of matters relating to his or her person, and (e) in the least intrusive and least restrictive manner that, in the opinion of the guardian, is likely to be effective.”

would still be governed by the AGTA, including any limitations set out in the legislation.¹¹⁰

[146] Given that one of the central principles of the AGTA is to preserve a person's autonomy "by ensuring that the least restrictive and least intrusive form of assisted or substitute decision-making that is likely to be effective is provided", it makes sense to limit the category of "guardian" to the most restrictive – namely, a guardian appointed to make decisions on behalf of a represented adult.¹¹¹ When it comes to supporters and co-decision-makers, the principle of preserving a person's autonomy suggests that decision-making ought to remain with the supported or assisted adult to the greatest degree possible. This might not be an available option for represented adults who require guardians to act on their behalf.

[147] For these reasons, ALRI does not recommend expanding an Alberta Act to include supporters and co-decision-makers. Limiting fiduciary access to guardians under the AGTA is consistent with preserving the autonomy of supported and assisted adults.

3. ATTORNEYS

[148] The third category of fiduciaries to consider is attorneys. Attorneys are persons appointed by instrument – a power of attorney – to make decisions about another person's estate on their behalf. The Saskatchewan Act uses the term "property attorney" to mean a person appointed pursuant to the *Powers of Attorney Act*, SS 2002, c P-20.3. The New Brunswick Act includes attorneys appointed under the *Enduring Powers of Attorney Act*, RSNB 2012, c 10. The PEI and Yukon Acts also include attorneys but do not reference any specific legislation.

[149] In Alberta, the *Powers of Attorney Act* defines "attorney" as a person who is empowered to act on behalf of the donor under a power of attorney.¹¹² The donor must be an adult and mentally capable of understanding the nature and effect of the EPA on the date of execution.¹¹³ An EPA can come into effect at a specified future time or on the occurrence of a specified contingency, such as the mental

¹¹⁰ See Woodman, note 22 at 219.

¹¹¹ AGTA, s 2(c).

¹¹² *Powers of Attorney Act*, RSA 2000, c P-20, s 1(a) [PAA].

¹¹³ PAA, note 112, ss 2(1)(a), (3).

incapacity of the donor.¹¹⁴ Depending on the specific terms set out in the instrument – for example, if the EPA comes into effect on a particular date – it is possible that an EPA could be triggered even if the donor has full legal capacity.

[150] Attorneys have relatively broad powers to deal with a donor’s estate. The PAA provides that an attorney has “authority to do anything on behalf of the donor that the donor may lawfully do by an attorney.”¹¹⁵ The attorney has a duty to exercise their powers to protect the donor’s interests.¹¹⁶

[151] ALRI’s previous work on EPAs focused on preventing potential abuses of the attorney’s authority over the donor’s estate.¹¹⁷ That work recognised the fiduciary relationship between a donor – especially one who cannot effectively supervise the attorney’s activities due to mental incapacity or infirmity – and the attorney.

[152] The PAA does not include any provisions regarding the right to access the donor’s personal information similar to those contained in the AGTA and *Personal Directives Act*. Section 6 of the PAA does authorize limited disclosure of confidential information about the donor’s mental or physical health but only to the extent that the information is necessary to confirm the donor’s legal capacity.

[153] ALRI recommends including attorneys appointed under a power of attorney in an Alberta Act for the following reasons:

- Including attorneys would help clarify their rights to access the donor’s digital assets.
- Including attorneys is consistent with the approach taken in other provinces and territories that have already adopted the Uniform Act.
- Including attorneys would help contribute to uniformity and extra-jurisdictional recognition of the attorney’s authority to access a person’s digital assets.

¹¹⁴ PAA, note 112, s 5(1).

¹¹⁵ PAA, note 112, s 7(a).

¹¹⁶ PAA, note 112, s 8.

¹¹⁷ Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Final Report 88 (2003), online: www.alri.ualberta.ca/2003/02/enduring-powers-of-attorney-safeguards-against-abuse/.

4. TRUSTEES

[154] The fourth category of fiduciaries referenced in the Uniform Act is trustees. Trustees are persons who have been appointed by instrument or enactment to deal with property for the benefit of another person (known as a beneficiary). There is a fiduciary relationship between trustees and beneficiaries. The Saskatchewan, PEI, New Brunswick, and Yukon Acts all include trustees in their respective statutes. The Saskatchewan and Yukon Acts expressly include the Public Trustee.

[155] There are many different types of trusts. ALRI's most recent work on trusts was a comprehensive review of uniform legislation proposed by the ULCC.¹¹⁸ ALRI's recommendations were adopted with the enactment of the new *Trustee Act*, which came into force on February 1, 2023.¹¹⁹ Trustees may also be appointed under the AGTA. In addition, the Public Trustee may be appointed to manage the affairs of an incapacitated person under the *Public Trustee Act*.¹²⁰ These three pieces of legislation are all relevant for determining who is a trustee for the purposes of the Uniform Act.

a. *The Trustee Act*

[156] A trustee can be appointed by trust instrument – such as a deed, will, or other legal instrument – or by court order.¹²¹ Once appointed, a trustee must act in good faith and in accordance with the legislation, the terms of the trust, and the best interests of the beneficiary.¹²² A trustee must avoid potential conflicts of interest and exercise the authority granted to them solely in the best interests of the beneficiary.¹²³

[157] In Alberta, section 31 of the Trustee Act sets out the powers of a trustee in dealing with the trust property. These powers are quite broad and include selling or leasing trust property, borrowing money for the purpose of carrying out the

¹¹⁸ Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Final Report 109 (2017), online: <www.alri.ualberta.ca/2017/01/a-new-trustee-act-for-alberta-final-report-109/>.

¹¹⁹ *Trustee Act*, SA 2022, c T-8.1 [Trustee Act]. According to section 4, the *Trustee Act* does not apply to the following types of trusts: implied, resulting, constructive, or any other trust that arises by operation of law.

¹²⁰ *Public Trustee Act*, SA 2004, c P-44.1 [PTA].

¹²¹ Trustee Act, note 119, s 1(s). Other trust instruments include oral declarations and enactments other than those contained in the Trustee Act.

¹²² Trustee Act, note 119, s 27. If the trustee is a professional – meaning someone whose profession, occupation or business is being a trustee – then the trustee is held to higher standard of skill in the performance of their duties.

¹²³ Trustee Act, note 119, s 28.

trust, or granting a security interest in the trust property. It is worth noting that property in the trust vests in the trustee – which means that the trustee is considered to be the legal owner of the property.¹²⁴ This is not the case for personal representatives of a deceased’s estate or attorneys acting on behalf of an incapacitated person. Unless they are also acting as trustees – which is a separate role – personal representatives and attorneys do not actually own the property that they have been tasked to administer on a person’s behalf.

[158] This is an important distinction because a trustee’s right to access a digital asset will depend on whether the digital asset falls within the trust property. If the digital asset is part of the trust property, then the trustee can deal with the asset as if they are the legal owner. This result is consistent with the language of the Uniform Act. A trustee does not have any authority to access any digital assets that are not part of the trust property.

[159] Some – but not all – trusts are created for the benefit of an incapacitated person. For the purposes of the Trustee Act, an incapacitated person includes a represented adult under the AGTA, an incapacitated person under the PTA, or a person who has an attorney acting under the PAA. Trustees appointed pursuant to the AGTA to act on a represented adult’s behalf are legislatively distinct from trustees who are subject to the Trustee Act. For example, the AGTA states that the Trustee Act does not apply to trustees appointed under the former statute except for certain provisions related to investments.¹²⁵

[160] An example will help to illustrate this point. John, a wealthy man, has a grandchild named Michael. When he was 23 years old, Michael was in an accident that resulted in a serious traumatic brain injury. Anna, Michael’s

¹²⁴ The effect of the vesting provisions of the Trustee Act, note 119 are discussed in greater detail in Chapter 6 of Alberta Law Reform Institute, *A New Trustee Act for Alberta*, Final Report 109 (2017), online: <www.alri.ualberta.ca/2017/01/a-new-trustee-act-for-alberta-final-report-109/>.

¹²⁵ AGTA, s 44(2). Section 59, which deals with investments, sets out the following exceptions:

Investments

59(1) The following sections of the *Trustee Act* apply to a trustee appointed under this Act, other than the Public Trustee:

- sections 2 and 3;
- section 33 except subsection (4)(b);
- sections 34 to 38;
- sections 51 to 57.

(2) Section 36 of the *Trustee Act* does not apply in the case of liability for loss arising from a decision or course of action by a trustee that

- (a) contravenes the express terms of the trusteeship order, or
- (b) is contrary to the express terms of a trusteeship plan approved by the Court.

(3) A trusteeship order and any trusteeship plan approved by the Court are deemed to be an instrument creating a trust for the purposes of section 3 of the *Trustee Act*.

mother, is appointed as his trustee under the AGTA. John decides to use some of his money to create a trust with Michael as the beneficiary. John selects TrustCo to be the trustee responsible for administering Michael's trust. TrustCo is subject to the duties and responsibilities set out in the Trustee Act when it comes to administering the trust property. Anna, as Michael's trustee appointed under the AGTA, is Michael's representative for the purposes of the Trustee Act. This means, for example, that if the Trustee Act requires TrustCo in certain circumstances to provide notice to Michael as the beneficiary, the notice can be given to Anna instead.¹²⁶

[161] The Trustee Act does not include any provisions regarding the right to access a beneficiary's personal information similar to those contained in the AGTA and *Personal Directives Act*. This makes sense given that a trustee can exercise their authority only over the trust property. In the above example, if Anna is Michael's guardian as well as his trustee, she would have the right to access Michael's personal and financial information under the terms of the AGTA. If Michael has any digital assets, the Uniform Act would confirm that Anna – not TrustCo – has the right to access Michael's digital assets pursuant to the authority granted to her as his trustee under the AGTA.

b. The AGTA

[162] As mentioned earlier, a trustee may also be appointed by court order under the AGTA, section 46 to act on behalf of a represented adult:

46(5) The Court may, on an application under this section, appoint a trustee for an adult if the Court is satisfied that

- (a) the adult does not have the capacity to make decisions respecting any or all financial matters,

¹²⁶ See section 95 of the Trustee Act, note 119 which provides that:

95(1) If a beneficiary is an incapacitated person for whom an attorney has been appointed under the *Powers of Attorney Act* or a trustee has been appointed under the *Adult Guardianship and Trusteeship Act*, the attorney or trustee, as the case may be, is the representative of that beneficiary for the purposes of this Act.

(2) Without limiting subsection (1),

- (a) any action required or permitted to be taken by the beneficiary,
- (b) any notice or report required or permitted to be given to the beneficiary, and
- (c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if it is taken by, given to or given by the attorney or trustee, as the case may be, on behalf of the beneficiary.

- (b) less intrusive and less restrictive alternative measures than the appointment of a trustee would not adequately protect the adult's interests in respect of financial matters, and
- (c) it is in the adult's best interests for a trustee to be appointed.

[163] The trustee's authority is limited to dealing with financial matters – meaning any matter relating to the acquisition, disposition, management or protection of property.¹²⁷ Unless otherwise provided, a trusteeship order applies to all of the represented adult's personal property. Any digital assets owned by the represented adult would therefore become part of the trust property. The trustee has the authority to take control and possession of the property, and to deal with it in the same way the represented adult could do if they had the legal capacity to make financial decisions.¹²⁸ A court may limit or set conditions on the trustee's authority to deal with certain property in the trusteeship order.¹²⁹ Anything that the trustee does with the property that is within their authority to do is treated as if the represented adult had done the thing themselves.¹³⁰ The trustee has the duty to exercise their authority in the best interests of the represented adult and in accordance with the trusteeship order and plan approved by the court.¹³¹

[164] Trustees appointed under the AGTA have certain access rights to the personal information of the represented adult.¹³² The personal information must be relevant to the exercise of the trustee's authority or to the carrying out of their duties and responsibilities. The trustee must also take reasonable care to ensure

¹²⁷ AGTA, s 1(o).

¹²⁸ AGTA, s 55. It is important to note that a trustee appointed under the may not sell, transfer or encumber any real property owned by the represented adult, or purchase real property on the represented adult's behalf: s 55(2). The trustee can register the trusteeship order against title of the represented adult's real property: s 55(3). These restrictions apply to a trustee who is not the Public Trustee.

¹²⁹ AGTA, s 54:

54(4) When appointing a trustee, other than the Public Trustee, the Court

- (a) shall consider whether it would be in the represented adult's best interests to impose any limits or conditions on the trustee's authority, and
- (b) may, in the trusteeship order, impose any limits or conditions on the trustee's authority that the Court considers appropriate.

¹³⁰ AGTA, s 55(4).

¹³¹ AGTA, s 56(1).

¹³² AGTA, ss 72(4)–(7). A trustee can access information from public bodies (including Alberta government departments), custodians of health information (including hospitals, nursing homes, regional health authorities, and health service providers), and other organizations (including corporations, unincorporated associations, partnerships, and individuals acting in a commercial capacity). Public bodies, custodians, and other organizations are also defined in the same way in the *Personal Directives Act*, which will be discussed in greater detail below.

that the represented adult's personal information is kept secure from unauthorized access, use, or disclosure.

[165] If there is no suitable person who may be appointed as a trustee for a represented adult, a court may order the Public Trustee to serve this role instead.¹³³

c. Public Trustee Act

[166] In Alberta, the Office of the Public Trustee is established under the PTA.¹³⁴ The Public Trustee can take many roles, including:¹³⁵

- a personal representative of a deceased person
- a trustee of any trust or to hold or administer property in any other fiduciary capacity
- protecting the property or estate of minors and unborn persons, and
- any capacity in which the Public Trustee is authorized to act by court order or legislation.

[167] The role of the Public Trustee as a trustee appointed by court order to act on the behalf of a represented adult is most relevant for the purposes of the Uniform Act.¹³⁶ Similar to other trustees appointed under the *AGTA*, the Public Trustee has the broad authority to deal with the represented adult's property in the same way the represented adult could do if they were legally capable of dealing with the property.¹³⁷

[168] The Public Trustee also has certain access rights to a represented adult's personal, financial, or health-related information, including the right to compel another person (including a public body) to provide that information or record to the Public Trustee.¹³⁸ The Public Trustee may use or disclose this information only for the purpose of carrying out a duty or function related to the represented

¹³³ *AGTA*, s 50.

¹³⁴ PTA, note 120.

¹³⁵ PTA, note 120, s 5.

¹³⁶ The PTA, note 120, s 1(j) incorporates the *AGTA* definition of "represented adult" but also includes an "incapacitated person" – meaning "a person who is the subject of a certificate of incapacity that is in effect" – in the definition. Certificates of incapacity were issued under the now-repealed *Dependant Adults Act*, RSA 2000, c D-11. Section 47 of the *Public Trustee Act* confirms that certificates of incapacity continue to have effect until they are terminated or replaced by a trusteeship order under the newer legislation.

¹³⁷ PTA, note 120, s 25(1).

¹³⁸ PTA, note 120, s 44.

adult. The Public Trustee's access rights are arguably the broadest access rights granted to any fiduciaries considered in this chapter.

d. Summary

[169] In summary, ALRI recommends that trustees ought to be included as a category of fiduciaries in an Alberta Act for the following reasons:

- Including trustees is consistent with the approach taken in other Canadian jurisdictions that have already adopted the Uniform Act.
- A trustee's access rights will depend on whether the digital asset falls within the trust property.
- A trustee's access rights are limited to dealing with financial matters.
- Including trustees would help contribute to uniformity and extra-jurisdictional recognition of the trustee's authority to access a person's digital assets.

[170] Given their broad statutory authority to deal with an incapacitated person's property, ALRI further recommends that the Public Trustee be included in the list of fiduciaries with access rights under the Uniform Act.

5. AGENTS

[171] During consultation, a question arose regarding whether the definition of "fiduciary" under the Uniform Act ought to include agents designated in a personal directive. While the ULCC Working Group made a passing reference to fiduciaries appointed under a personal directive, there was no discussion in the 2015 Progress Report that expressly excluded or included agents appointed under a personal directive in the list of fiduciaries to which the Uniform Act would apply.¹³⁹

[172] In Alberta, personal directives are not intended to deal with estate assets or financial matters such as a disposition of property. While there may be a commonly held perception that personal directives are focused mainly on health care issues, the legislation is wider in scope. Section 14(1) of the *Personal Directives Act* grants broad authority to the agent "to make personal decisions on

¹³⁹ ULCC Progress Report. Personal directives were included in a list of instruments appointing fiduciaries, along with wills, grants of probate, powers of attorney, and court orders granting guardianship or trusteeship.

all personal matters of the maker.”¹⁴⁰ The legislation defines “personal decisions” and “personal matters” as:¹⁴¹

“personal decision” means a decision that relates to a personal matter and includes, without limitation, the giving of consent, the refusal to give consent or the withdrawal of consent to health care

...

“personal matter” means, subject to the regulations, any matter of a non-financial nature that relates to an individual’s person and without limitation includes:

- (i) health care;
- (ii) accommodation;
- (iii) with whom the person may live and associate;
- (iv) participation in social, educational and employment activities;
- (v) legal matters;
- (vi) any other matter prescribed by the regulations.

[173] In reviewing ALRI’s previous work on personal directives, there is not much discussion regarding the meaning of “personal decisions”.¹⁴² In its 1991 Report for Discussion, ALRI initially recommended that the new legislation ought to apply only to health care decisions and declined to extend it to other personal care decisions.¹⁴³ After consultation, ALRI changed its perspective and recommended that the proposed legislation should include a broad definition of

¹⁴⁰ *Personal Directives Act*, RSA 2000, c P-6, s 14(1). The personal directive may set out limits to the agent’s authority.

¹⁴¹ *Personal Directives Act*, RSA 2000, c P-6, ss 1(j), (l).

¹⁴² ALRI’s previous work on personal directives includes: Alberta Law Reform Institute, *Interprovincial Recognition of Substitute Decision-Making*, Report for Discussion 32 (2017), online: <www.alri.ualberta.ca/2017/12/interprovincial-recognition-of-substitute-decision-making-documents-report-32/>; Alberta Law Reform Institute, *Interprovincial Recognition of Substitute Decision-Making Documents: Personal Directives*, Final Report 113 (2019) online: <www.alri.ualberta.ca/2019/03/interprovincial-recognition-of-substitute-decision-making-documents-personal-directives/>; Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care*, Report for Discussion 11 (1991) online: <www.alri.ualberta.ca/1991/11/advance-directives-and-substitute-decision-making-in-personal-health-care-report-for-discussion-11/>; Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care*, Report 64 (1993), online: <www.alri.ualberta.ca/1993/03/advance-directives-and-substitute-decision-making-in-personal-health-care-final-report-64/>.

¹⁴³ See Recommendation 7 and related discussion at 57–58 in Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care*, Report for Discussion 11 (1991), online: <www.alri.ualberta.ca/1991/11/advance-directives-and-substitute-decision-making-in-personal-health-care-report-for-discussion-11/>.

“health care” to include other personal care matters ancillary to health care such as nutrition and hydration, personal hygiene, and choice of residence.¹⁴⁴ The current legislative definition of “personal matters” – which was adopted in 1996 – suggests an even broader scope than what ALRI contemplated in 1993.¹⁴⁵

[174] The definition of “personal matters” specifically excludes decisions of a financial nature from the agent’s authority, yet it is possible that an agent’s decision on non-financial matters may nevertheless have financial implications on the person’s estate. For example, if the agent determines that hiring nursing staff to allow the maker to continue to live at home is more consistent with the maker’s wishes than moving to a long-term care facility, the agent’s decision to hire home care staff will affect the maker’s estate. Practically speaking, the agent’s decision to hire home care staff would likely be made in consultation with the attorney appointed under a power of attorney – and in some cases, the agent and the attorney may even be the same person – yet the roles are conceptually separate.¹⁴⁶

[175] An agent appointed under a personal directive has certain rights to access information:

30(1) Subject to any limitation set out in a personal directive, when a personal directive is in effect with respect to a personal matter, an agent who has authority to make decisions with respect to that matter has the same right as the maker to access, obtain or collect from any person personal information respecting the maker that is relevant to the personal decision to be made.

[176] Section 30(3) of the *Personal Directives Act* also confirms the agent’s right to access the maker’s personal information from:

¹⁴⁴ See Recommendation 8 and related discussion at 21–22 in Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care*, Report 64 (1993), online: <www.alri.ualberta.ca/1993/03/advance-directives-and-substitute-decision-making-in-personal-health-care-final-report-64/>.

¹⁴⁵ *Personal Directives Act*, SA 1996, c P-4.03, s 1(l).

¹⁴⁶ In its 1991 Report for Discussion, ALRI held the view that powers of attorney and personal directives should be kept as separate instruments despite being part of the same overall “scheme” for planning for incapacity: see Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care*, Report for Discussion 11 (1991) at 54, online: <www.alri.ualberta.ca/1991/11/advance-directives-and-substitute-decision-making-in-personal-health-care-report-for-discussion-11/>.

- public bodies within the meaning of the *Freedom of Information and Protection of Privacy Act*;¹⁴⁷
- custodians within the meaning of the *Health Information Act*;¹⁴⁸ and
- organizations within the meaning of the *Personal Information Protection Act*.¹⁴⁹

It is worth noting that these rights of access seem to be geographically limited in the sense that the public bodies, custodians, and organizations who can be compelled to provide access to the agent are mainly located in Alberta.¹⁵⁰

[177] The information that an agent has a right to access pursuant to the *Personal Directives Act* may overlap with the definition of digital assets under the Uniform Act. For example, health information stored as an electronic record would likely fall within the definition of a digital asset.¹⁵¹ The *Personal Directives Act* ensures that an agent has access to health information including electronic records. Certainly an argument can be made that since the *Personal Directives Act* already deals with an agent's access to electronically-stored health information, it is unnecessary to include agents within the list of fiduciaries under the Uniform Act.

[178] Yet this approach does not take into account the agent's broad authority to make other types of personal decisions on behalf of an incapacitated person. As noted earlier, the agent's authority can extend to personal decisions about who may live or associate with the person, as well as their participation in social, educational and employment activities. While we may traditionally view such associations and activities as taking place in-person, similar interactions are

¹⁴⁷ "Public bodies" include Alberta government branches, departments, agencies, boards, commissions, but does not include the offices of the Speaker or Members of the Legislative Assembly, or the courts: for the complete list, see *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25.

¹⁴⁸ "Custodians" include hospitals, nursing home and ambulance operators, pharmacies, regional health authorities, health services providers, the Minister of Health and the department: for the complete list, see *Health Information Act*, RSA 2000, c H-5, s 1(f), and related regulations.

¹⁴⁹ "Organizations" include corporations, unincorporated associations, trade unions, partnerships, and individuals acting in a commercial capacity: see *Personal Information Protection Act*, SA 2003, c P-6.5, s 1(i).

¹⁵⁰ While the definition of "organization" in the *Personal Information Protection Act* is especially broad, and s 13.1 contemplates that organizations may use service providers outside of Canada to collect and store personal information, the act itself appears to apply only to provincially regulated private sector organizations: see Alberta Government, *Personal Information Protection Act – Overview*, online: <www.alberta.ca/personal-information-protection-act-overview> [perma.cc/5VHE-MV3F].

¹⁵¹ Section 1(f.1) of the *Personal Directives Act*, RSA 2000, c P-6 defines "health information" as "health information within the meaning of the *Health Information Act*", and includes registration, diagnostic, treatment, and care information: see *Health Information Act*, RSA 2000, c H-5, s 1(k). Further, s 9(1)(c) of the *Personal Directives Regulation*, AR 99/2008, allows an agent to "review any health or other records concerning the maker that are relevant to the assessment of the maker's capacity".

increasingly taking place online. For example, online gaming communities that include significant social interactions as part of gameplay may lead to real-life friendships and relationships. There can also be a dark side to online interactions, particularly if the person is vulnerable to exploitation by unscrupulous actors. It is arguable whether the access rights set out under the *Personal Directives Act* are sufficient to allow the agent to intervene in such situations, particularly if the online service provider is located outside of Alberta. To ensure that the agent has the authority to access digital assets such as social media accounts, email accounts, and other non-financial electronic records, it may be appropriate to extend the Uniform Act to include agents appointed under a personal directive.

[179] Including agents within the list of fiduciaries with access rights under the Uniform Act may also assist with extra-jurisdictional recognition. For example, a personal directive can include instructions with respect to accessing the confidential information of the person making the personal directive.¹⁵² While a personal directive may expressly grant authority to the agent to access a person's social media accounts, an online service provider in another jurisdiction may not feel compelled to respect this instruction, particularly if they take the position that granting access to the agent would violate their service agreements with the original account holder. Unlike the *Personal Directives Act*, the Uniform Act states that it takes precedence over restrictive service agreements that limit the fiduciary's access to the digital asset.¹⁵³ Further, the Uniform Act provides that the fiduciary is deemed to have the consent of the account holder and deemed to be the authorized user of the digital asset.¹⁵⁴ These provisions of the Uniform Act help to strengthen an agent's claim to have their access rights recognized by online service providers and other custodians of digital assets outside the province of Alberta. Including agents appointed under personal directives in the list of fiduciaries under the Uniform Act would assist them in exercising their authority over personal matters including online activities.

[180] In summary, ALRI recommends that agents ought to be included as a category of fiduciaries in an Alberta Act for the following reasons:

- The purposely broad definition of "digital assets" includes electronic records that hold no financial value or proprietary rights or interests.

¹⁵² *Personal Directives Act*, RSA 2000, c P-6, s 7(1)(d).

¹⁵³ Uniform Act, s 6. The only exception to this rule is if the account holder specifically agrees to the provision in the service agreement restricting a fiduciary's access to the digital asset after the date the Uniform Act comes into force: see s 3(3).

¹⁵⁴ Uniform Act, s 5(1).

- Agents have broad statutory authority to make personal decisions on behalf of incapacitated persons, including personal matters of a non-financial nature.
- It is desirable for agents to be able to access an incapacitated person's digital assets (such as online accounts) to exercise their statutory authority and fulfil their fiduciary obligations.
- An agent's access rights to an incapacitated person's digital assets must be consistent with the source of the agent's authority and does not extend to dealing with digital assets of a financial nature.
- The access rights to information set out in the *Personal Directives Act* may be geographically limited to Alberta-based entities.
- Including agents in the Uniform Act may increase extra-jurisdictional recognition of their access rights to electronic records held by online service providers and custodians located outside of Alberta.

6. AUTHORIZED PERSONS

[181] As discussed earlier in this chapter, the New South Wales Report recommended using the term "authorised person" rather than "fiduciary".¹⁵⁵ The New South Wales Report recognized that their proposed legislative scheme may result in a situation in which a person may qualify as an "authorized person" even if they are not a fiduciary in the more traditional sense: for example, a person who has been given the password to an online account before the account holder dies or is incapacitated. Any "authorized person" under the proposed legislation would be subject to fiduciary duties even if they would not be considered a fiduciary outside of the legislative scheme.

[182] An example will help illustrate this point. Martha created a will that appoints her sister Lois to be the personal representative of her estate, including all her digital assets. One of Martha's digital assets is her online account on SocialMedia.Com. SocialMedia.Com allows account holders to designate someone to be their "legacy contact", meaning that the designated person would have access rights to the online account if the account holder dies. A few months after Martha executed her will, she designated her brother Robert to be her legacy contact on SocialMedia.Com. As will be discussed in the next chapter, the

¹⁵⁵ New South Wales Report at 3.9–3.11.

Uniform Act resolves this apparent inconsistency by favouring the most recent instruction. Robert will have the right to access Martha's account after she dies according to the terms of the SocialMedia.Com service agreement. Lois is still the personal representative of Martha's estate, but the authority granted to her under the will does not extend to the SocialMedia.Com account. In this example, Robert does not fall within any of the other categories of fiduciary under the Uniform Act. The New South Wales Report suggests that Robert would fall within the category of "authorized person" because he has been nominated through an online tool to manage that specific digital asset.¹⁵⁶ Should Robert be subject to the same duties under the Uniform Act as other fiduciaries?

[183] It is important to recognize that the New South Wales Report creates a different hierarchy of access rights than what is set out in the Uniform Act. The legislation proposed in the New South Wales Report prefers formal appointments for the management of a person's affairs – such as executors, guardians, and attorneys – ahead of a person nominated by an online tool.¹⁵⁷ In contrast, the Uniform Act determines priority by looking to the most recent instruction without distinguishing if that instruction comes from an instrument or court order appointing the fiduciary, or from a designation through an online tool.

[184] There is another challenge that arises if an Alberta Act includes a person nominated through an online tool as an additional category of fiduciaries. Given the relatively casual nature of online tools – which can be frequently updated and changed without much effort or expense – it is reasonable to assume that a person nominated through an online tool did not consent to the nomination in many instances. In fact, a person will not even know that they have been designated as a legacy contact until after the account holder dies. Unlike formal appointments – which are usually done with the knowledge or consent of the person selected to act as a fiduciary – it is not desirable to impose fiduciary-like obligations on a person nominated through an online tool.

[185] For the above reasons, ALRI does not recommend following the "authorized persons" approach set out in the New South Wales Report.

¹⁵⁶ New South Wales Report at 4.21, 4.49–50.

¹⁵⁷ New South Wales Report at 4.50.

7. OTHER REPRESENTATIVES

[186] The New Brunswick Act included an additional category of fiduciaries with access rights to another person’s digital assets known simply as “representatives”. The New Brunswick Act defines “representative” as a person who becomes or is appointed as a committee of the estate under one of the following acts:

- *Infirm Persons Act*, RSNB 1973, c I-8
- *Mental Health Act*, RSNB 1973, M-10, or
- *Presumption of Death Act*, RSNB 2012, c 110.

[187] It is unclear why the New Brunswick Act included representatives as a separate category of fiduciary in its legislation. For example, “representative” is not a defined term in the New Brunswick *Mental Health Act*. In contrast, Alberta’s *Mental Health Act* defines “guardian” as including a guardian appointed under the *AGTA*.¹⁵⁸ There does not seem to be a compelling reason to include a similar category in an Alberta Act.

[188] The New Brunswick Act specifically contemplates that the definition of fiduciary could be expanded in the future:

“fiduciary”, in relation to an account holder, means...

- (e) any other person or class of person prescribed by regulation.

[189] While it is difficult to think of an example of a fiduciary needing to access the digital assets of a deceased or incapacitated person that is not already included in one of the other existing categories, it would be prudent to include a similar provision in an Alberta Act. Should the need arise to add another category of persons under the definition of “fiduciary”, it would likely be more efficient to do so by regulation rather than legislative amendment. For these reasons, ALRI recommends including a provision to allow the government to add new categories of fiduciaries as needed.

¹⁵⁸ *Mental Health Act*, RSA 2000, c M-13, s 1(f). The other two types of guardians included in the definition are a parent or guardian of a minor, and a director under the *Child, Youth and Family Enhancement Act*, RA 2000, c C-12, acting pursuant to a temporary or permanent guardianship order for a child.

H. Trustees in Bankruptcy

[190] The ULCC Working Group noted that bankruptcy trustees are not fiduciaries as defined by the Uniform Act.¹⁵⁹ The PEI and New Brunswick Acts expressly state that a trustee does not include a trustee in bankruptcy.¹⁶⁰ The Saskatchewan and Yukon Acts do not mention trustees in bankruptcy.

[191] The ULCC Working Group distinguished bankruptcy trustees from other trustees included in the Uniform Act:¹⁶¹

Trustees in bankruptcy or insolvency will not be included in a Uniform Act. These officials are subject to other federal and provincial legislation. They also differ from the fiduciaries named above in that they do not act for the individuals who are bankrupt or insolvent, but for their creditors.

[192] Some bankruptcies are voluntary; others are involuntary where a creditor applies to a court to have a debtor assigned into bankruptcy.¹⁶² During bankruptcy proceedings, most of the debtor's property is transferred to the bankruptcy trustee to be used for the benefit of the creditors.¹⁶³ While some exemptions are allowed, the bulk of a debtor's estate must be liquidated and converted to cash to repay the creditors. In this way, a trustee in bankruptcy can be seen as acting more on the creditors' behalf instead of the debtor's.

[193] Unlike other fiduciaries contemplated under the Uniform Act, a trustee in bankruptcy is not usually representing a person who is dead or lacks legal capacity. Insolvency in and of itself does not eliminate a person's ability to make decisions for themselves. While it is certainly possible that a debtor may also lack legal capacity for unrelated reasons, such a determination would be based on a separate legislative regime (for example, the AGTA) and distinct from insolvency proceedings.

[194] ALRI recognizes that digital assets may be included in a debtor's estate and that trustees in bankruptcy should be able to access those digital assets to satisfy creditors. However, the Uniform Act is not the correct tool for doing so. Setting aside the fact that bankruptcy falls within federal jurisdiction and

¹⁵⁹ Uniform Act at 5.

¹⁶⁰ PEI Act at s 2(1)(b); New Brunswick Act at s 1.

¹⁶¹ ULCC Progress Report at para 10.

¹⁶² See Anna Jane Samis Lund, *Trustees at Work: Financial Pressures, Emotional Labour, and Canadian Bankruptcy Law* (Vancouver: UBC Press, 2019) at 24–26.

¹⁶³ Anna Jane Samis Lund, *Trustees at Work: Financial Pressures, Emotional Labour, and Canadian Bankruptcy Law* (Vancouver: UBC Press, 2019) at 26.

therefore outside of ALRI’s mandate, the Uniform Act is intended to apply in cases where the original account holder has died or is incapacitated and no longer able to manage their digital assets themselves. The same cannot be universally said about insolvent debtors. For these reasons, ALRI recommends expressly excluding trustees in bankruptcy from operation of the Uniform Act.

I. Recommendation

[195] ALRI’s recommendations regarding which categories of fiduciaries should be included in an Alberta Act are as follows.

RECOMMENDATION 5

An Alberta Act should include the following six categories of fiduciaries that have access rights to an account holder’s digital assets:

- personal representatives for a deceased account holder,
- attorneys appointed for an account holder who is the donor of the power of attorney under the *Powers of Attorney Act*,
- guardians appointed for a represented adult pursuant to the *Adult Guardianship and Trusteeship Act*,
- trustees appointed to hold in trust a digital asset or other property of an account holder, including a trustee appointed for a represented adult under the *Adult Guardianship and Trustee Act*,
- agents appointed under the *Personal Directives Act*,
- the Public Guardian and Public Trustee when acting in the above capacities.

RECOMMENDATION 6

An Alberta Act should provide that a “fiduciary” as defined by the legislation may include additional categories of persons as prescribed by regulation.

RECOMMENDATION 7

An Alberta Act should expressly exclude trustees in bankruptcy from the definition of “trustee”.

CHAPTER 5

Procedures for Accessing Digital Assets

A. Introduction

[196] The purpose of this chapter is to consider the procedural aspects of fiduciary access to digital assets set out in the Uniform Act.

B. Priority of Instructions for Digital Assets

[197] A fiduciary's right to access a digital asset may be limited by the terms of the service agreement between the custodian and original account holder if the account holder agreed to them after the Uniform Act comes into force. An account holder may use an online tool to designate a different fiduciary to deal with the digital asset, restrict a fiduciary's access to the digital asset, or direct a custodian to delete an account. Where there are conflicting instructions, a fiduciary appointed by a formal instrument can apply to the court for directions regarding their access rights to and authority over the digital asset.¹⁶⁴

[198] There may be cases where an account holder has given multiple instructions when it comes to who has authority to access their digital assets upon death or incapacity. For example, an account holder may have appointed one person to act as the personal representative in their will, while also designating a different person to deal with their email account using an online tool provided by the custodian. Instructions contained in a custodian's service agreement limiting fiduciary access to the digital asset are allowed under section 3(3) of the Uniform Act:¹⁶⁵

Subject to subsection (4), the fiduciary's right of access... is subject to instructions in a provision in the service agreement that limits the fiduciary's access to the digital asset of the account holder if the account holder assents to the provision

(a) on or after the date this Act comes into force, and

¹⁶⁴ Uniform Act, s 8(1).

¹⁶⁵ A custodian cannot simply rely on an account holder accessing a digital asset or using an account as confirmation of the account holder's intention to limit fiduciary access: see Uniform Act, s 3(5).

- (b) by an affirmative act separate from the account holder's assent to other provisions of the service agreement.

[199] Section 3(4) of the Uniform Act resolves the question of multiple instructions by prioritizing the most recent instruction:¹⁶⁶

If more than one instruction in relation to the fiduciary's right to access a digital asset has been given in an order or other document referred to in subsection (2) or given by assent described in subsection (3), the fiduciary's right to access the digital asset is subject to the most recent instruction.

[200] The ULCC commentary to section 3(4) confirms that:¹⁶⁷

Section 3(4) provides that the "last-in-time" instrument or order takes precedence over any earlier instrument, order or online instructions of an account holder.

[201] Saskatchewan, Prince Edward Island, New Brunswick, and the Yukon have adopted the "most recent instruction" rule set out in the Uniform Act.¹⁶⁸

[202] Other jurisdictions have taken different approaches. The Revised American Act prioritizes instructions contained in online tools over formal instruments regardless of the most recent instruction:¹⁶⁹

SECTION 4. USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS

(a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, **a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.**

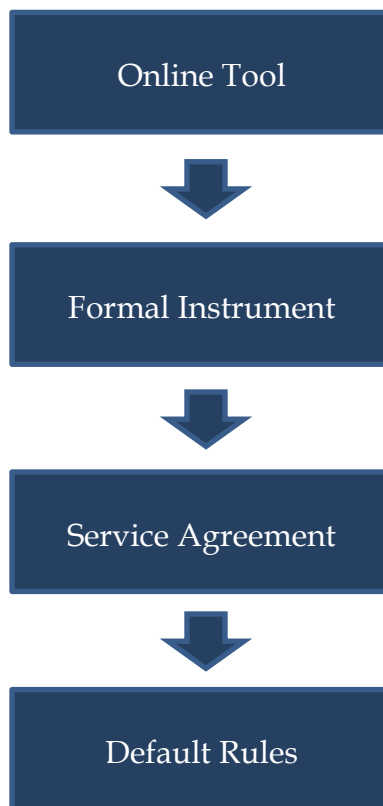
¹⁶⁶ Subsection (2) provides that the fiduciary's right to access the account holder's digital assets is subject to any instructions given in formal instruments including wills, grants of administration, guardianship orders, powers of attorney, trusts, and court orders.

¹⁶⁷ ULCC Final Report, note 2.

¹⁶⁸ Saskatchewan Act, s 4(4); PEI Act, s 3(4); New Brunswick Act, s 4(4); Yukon Act, s 3(4).

¹⁶⁹ Revised American Act, s 4 [**emphasis added**]. Section 2 of the Revised American Act defines an "online tool" as "an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person." While the Uniform Act does not expressly mention "online tools", such tools would likely fall within the ambit of s 3(3) as instructions set out in the terms of service agreement.

[203] In this way, the Revised American Act sets out a four-tier priority system for determining who has access to the account holder's digital assets based on the source of the instructions.¹⁷⁰ The highest priority is given to any instructions set out in the custodian's online tool, even if those instructions conflict with other formal instruments. The next level of priority is given to instructions contained in formal instruments such as wills, trusts, powers of attorney or similar records – but these formal instructions govern only if the account holder has not used an online tool or the custodian has not provided an online tool. The third level of priority is given to any access provisions set out in the service agreement. If the service agreement does not address fiduciary access to digital assets, then the Revised American Act default rules will apply.

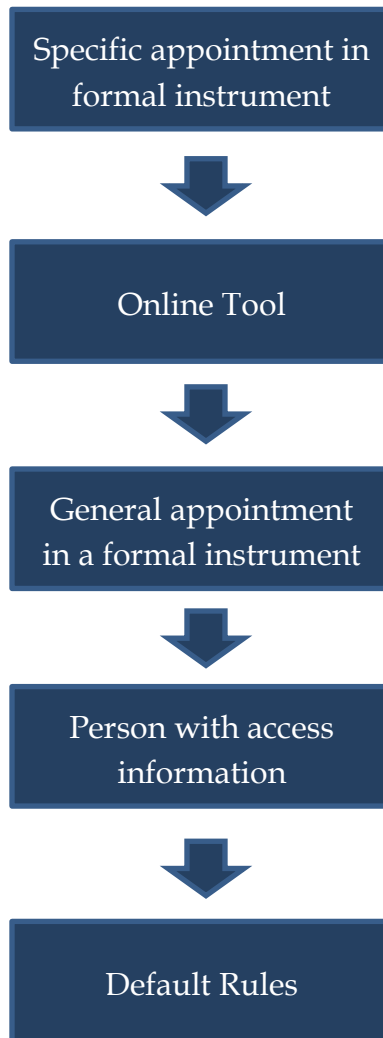


[204] In contrast, the New South Wales Report sets out a different hierarchy of access rights that prioritizes specific instructions contained in formal instruments – like wills and court orders – ahead of instructions set out in an online tool.¹⁷¹ Where the account holder has died, the highest priority goes to a person who has been expressly and specifically appointed in the will to manage the account

¹⁷⁰ See Revised American Act at 10.

¹⁷¹ New South Wales Report at 4.7–4.57.

holder's digital assets.¹⁷² The second level of priority goes to a person who has been designated through an online tool to manage that particular digital asset.¹⁷³ If an account holder has not specifically appointed anyone in their will or through an online tool to deal with their digital assets, then the third level of priority goes to the executor appointed generally under the will or where there is no will, to the administrator of the estate. The lowest level of priority goes to a person who was given the access information by the account holder before death or incapacity.



¹⁷² In the case of incapacitated persons, the New South Wales Report sets out a list of formal instruments that would take priority over instructions contained in online tools. For an incapacitated person, priority is given to a guardian appointed under an enduring guardianship arrangement or an attorney appointed under an enduring power of attorney. If there is no enduring guardianship arrangement or enduring power of attorney, then priority is given to a guardian appointed under a guardianship order or a financial manager appointed under a financial management order. Their authority extends to digital assets that are specified in the relevant instrument or are otherwise relevant to their roles as an enduring guardian, enduring attorney, guardian, or financial manager: see New South Wales Report at 4.38–4.48.

¹⁷³ The New South Wales Report takes a similar approach to the definition of “online tool” as the Revised American Act: see New South Wales Report at 3.38–3.4.

[205] The three priority regimes outlined above can be summarized as follows:

- Option 1: Priority given to most recent instruction (Uniform Act).
- Option 2: Priority given to online tools (the Revised American Act).
- Option 3: Priority given to specific instructions in formal instruments (New South Wales Report).

[206] The New South Wales Law Reform Commission approach can also be modified to create two additional options:

- Option 4: Priority given to formal instruments, regardless of whether the instructions are specific or general.
- Option 5: Priority given to specific instructions over general instructions, regardless of the source.

[207] The relative pros and cons of each option are briefly outlined below.

1. PRIORITY GIVEN TO MOST RECENT INSTRUCTION

[208] The Uniform Act determines priority by referring to the most recent instruction without distinguishing if that instruction comes from a formal instrument or through an online tool. This priority regime essentially treats all instructions as having equal legal weight regardless of their original source. Which leads to the main issue: should an instruction contained in an online tool be able to override a formal instrument such as a will or court order simply because the online tool was last in time?

[209] Certainly, the law takes a “last in time” approach when dealing with conflicting instructions set out in different wills. For example, if a person has executed two wills appointing different personal representatives, the law will usually give effect to the most recent will. Online tools operate in the same way, in that the most recent instruction will usually replace any previous instructions. When dealing with similar kinds of instruments, adopting a “last in time” or “most recent instruction” approach makes intuitive sense.

[210] It may be appropriate, however, to treat different kinds of instruments differently for the purposes of determining which instructions ought to take priority. Formal instruments such as wills usually reflect a deliberative thought process by the testator in determining who should be appointed to deal with the assets of the estate. If the formal instrument has been drafted by a lawyer, the

executed document will also reflect legal advice provided to the account holder to help them select who might be an appropriate fiduciary. Instructions made in formal instruments after careful consideration could be set aside in favour of an online tool simply because the online tool contains the most recent instruction.

[211] There may be additional complications when dealing with incapacitated account holders. For example, it may be possible for an account holder to agree to instructions in an online tool while they do not have legal capacity. If the online tool purports to limit a fiduciary's access to the account holder's digital asset, it is difficult to justify why the instructions contained in the online tool ought to be prioritized over formal instruments such as an enduring power of attorney or a court order simply because the online tool is "last in time."

[212] In some cases, it may not always be possible to easily discern which instructions are the most recent. While wills and other formal instruments are usually dated, it is unclear whether online tools will disclose the exact date on which the account holder made the instruction. That said, it is likely that custodians can access internal information about the exact date the instructions were given even if such information is not readily apparent on the user interface. The goal of efficient and effective estate administration may be more challenging to achieve if date information is missing or not readily available on the face of the online tool.

2. PRIORITY GIVEN TO ONLINE TOOLS

[213] From the custodian's perspective, prioritizing instructions given in the custodian's online tool over those given in other instruments is relatively easy and straightforward. Depending on the specific online tool, access to the digital asset would likely be automatic and not require additional steps such as providing the custodian with documentation to support the designated person's request for access.

[214] An account holder can also use an online tool to designate a person who is not a fiduciary to access their digital asset. The Uniform Law Commission's comments on the Revised American Act confirm that a person who is not a fiduciary can have similar access rights to an account holder's digital assets while not being subject to the same legal obligations:¹⁷⁴

¹⁷⁴ Revised American Act, comment at 8.

An “online tool” is a mechanism by which a user names an individual to manage the user’s digital assets after the occurrence of a future event, such as the user’s death or incapacity. The named individual is referred to as the “designated recipient” in the act to differentiate the person from a fiduciary. A designated recipient may perform many of the same tasks as a fiduciary, but is not held to the same legal standard of conduct.

[215] Similarly, the New South Wales Report recognized that their proposed legislative scheme may result in a situation in which a person could qualify as an “authorized person” even if they are not a fiduciary in the more traditional sense.¹⁷⁵ However, an “authorized person” who has access to an account holder’s digital assets would nevertheless be subject to fiduciary duties even if they would not be considered a fiduciary outside of the legislative scheme.

[216] Section 4 of the Uniform Act confirms that fiduciary duties apply to digital assets:

The duties imposed by law on a fiduciary in relation to tangible personal property, including requirements on the performance of those duties, also apply to the fiduciary in relation to the digital assets of the account holder.

[217] Given the relatively casual nature of online tools – which can be frequently updated and changed without much effort or expense – it may not be desirable to impose fiduciary-like obligations on a person nominated through an online tool. In Chapter 4, ALRI declined to include “authorized persons” as a category of fiduciaries subject to the Uniform Act.

[218] One potential way to address the different legal obligations that attach to a fiduciary but not necessarily to a designated person, is to consider whether the digital asset might fall outside of the estate. Life insurance may provide a useful analogy. If the policy holder has designated a beneficiary in their life insurance policy, then the proceeds of the life insurance policy fall outside the estate and are transferred directly to the beneficiary. If the policy holder has not designated a beneficiary, then the proceeds of the life insurance policy form part of the estate and the personal representative must deal with the funds in accordance with the will. Applying this analogy to digital assets, the online tool might be treated similarly to a beneficiary designation – if the account holder has used the online tool to grant access to a designated person, then the digital asset could be deemed as falling outside the account holder’s estate. In this way, the

¹⁷⁵ New South Wales Report at 3.9–3.11.

instructions contained in the online tool are prioritized over any other instructions.

[219] The life insurance analogy does have certain limitations. It is worth remembering that the Uniform Act is intended to deal only with access to the digital asset. Questions about transferring ownership or other property rights related to the digital asset are not within the scope of the Uniform Act. From an estate administration perspective, it is important to consider whether a fiduciary's broad access rights to a digital asset ought to be restricted by giving preference to a designation made in an online tool.

3. PRIORITY GIVEN TO SPECIFIC INSTRUCTIONS IN FORMAL INSTRUMENTS

[220] As already discussed, it may be appropriate to prioritize formal instruments because they reflect the account holder or court's careful and deliberate consideration of the most appropriate person to deal with the assets of the estate of a deceased or an incapacitated person. Prioritizing specific instructions contained in formal instruments is supported by the New South Wales Report:¹⁷⁶

If the deceased user gave conflicting instructions in their will and an online tool (for example, one person was appointed in the will to manage particular digital records, and another person was nominated through an online tool to manage the same records), we think that the authorised person should be the person appointed in the will. This aligns with the traditional approach of wills and estates law, which is to give effect to the user's wishes as expressed in their will.

[221] The New South Wales approach is consistent with the interpretation rule that the specific governs the general. In this way, specific instructions about a particular digital asset are prioritized over general grants of authority relating to all digital assets falling within an estate. The New South Wales approach also prioritizes specific instructions about a particular digital asset as set out in an online tool over a general grant of authority in a formal instrument.

[222] If Option 3 is adopted, the fiduciary will need to identify both the source of the instructions – formal instrument or online tool – as well as determine the relative specificity of the instructions. It may be challenging for a fiduciary to make these distinctions on their own. It is also unclear whether time ought to

¹⁷⁶ New South Wales Report at 4.16.

factor into the determination of which set of instructions should govern access to the digital asset.

4. PRIORITY GIVEN TO FORMAL INSTRUMENTS REGARDLESS OF SPECIFICITY

[223] Option 4 modifies the New South Wales approach by prioritizing instructions given in formal instruments over those given in online tools, regardless of specificity. Under Option 4, the formal instrument governs in all cases unless there is a court order that says otherwise.

[224] One potential benefit of this approach is ease of estate administration. A fiduciary can likely identify and distinguish instructions contained in formal instruments from those contained in other online tools. The fiduciary also does not need to interpret whether instructions are specific or general to determine which instructions should govern access to the digital asset, so long as the source of those instructions is the formal instrument.

[225] If an account holder wishes for someone other than their fiduciary to have access to a particular digital asset, they can say so in the formal instrument. It may be as simple as including a clause that confirms the fiduciary's authority to access all the account holder's digital assets unless the account holder has designated someone else using an online tool. Such a clause would give effect to the account holder's wishes – for example, using an online tool to share access with a non-fiduciary – while maintaining the overall priority of the formal instrument in the legislative scheme.

5. PRIORITY GIVEN TO SPECIFIC INSTRUCTIONS REGARDLESS OF SOURCE

[226] Option 5 also modifies the New South Wales approach by prioritizing specific instructions over general instructions, regardless of whether those instructions are contained in a formal instrument or online tool. This option is a stronger expression of the interpretation rule that the specific governs the general. Adopting Option 5 would confirm this interpretation rule in all cases involving access to the digital asset, regardless of the source of the instructions.

[227] One potential challenge to Option 5 is that it might make estate administration less straightforward than other options. Fiduciaries would be required to gather all instructions related to a digital asset to assess their relative specificity before determining which instructions should govern access. For example, it may be difficult for a fiduciary to resolve on their own the question of whether specific instructions set out in a formal instrument should override

specific instructions set out in an online tool. It is also unclear whether time plays a role in considering which instructions ought to govern.

6. RECOMMENDATION

[228] ALRI recommends that an Alberta Act adopt Option 4, which prioritizes instructions given by an account holder in formal instruments – such as a will, power of attorney, personal directive, trust document, or court order – over a designation made using an online tool. Under this approach, the formal instrument governs in all cases. Prioritizing instructions contained in formal instruments will help promote efficient and effective estate administration. Prioritizing instructions in formal instruments will also reduce issues that arise if an incapacitated person has agreed to conflicting instructions contained in online tools. If there is a conflict between formal instruments, generally the most recent instrument will prevail subject to the court providing advice and directions.¹⁷⁷

[229] ALRI does not suggest that there is no place for online tools in an Alberta Act. There may still be an important role for online tools to play, particularly if an account holder died without a will or has not left instructions in any formal instrument:¹⁷⁸

The concept of an online tool provides a solution to the problem of a deceased who dies intestate and for whom no administrator is appointed by a court.

[230] ALRI's recommendation regarding priority of instruction is intended to resolve situations where there are conflicting instructions given in different instruments or online tools. It recognizes that while there may be some situations in which a designation made in an online tool governs access to a digital asset – particularly in the absence of other instructions – fiduciaries appointed through formal instruments or by court order ought to have the highest priority.

RECOMMENDATION 8

In determining who should have access to a digital asset, an Alberta Act should prioritize instructions given in formal instruments such as wills, powers of attorney, personal directives, and trust documents, over instructions given in online tools provided by the

¹⁷⁷ For example, where there are multiple wills, the most recent will governs if the wills conflict. Any potential conflicts can be brought to the court for advice and directions under s 8 of the Uniform Act.

¹⁷⁸ Woodman, note 22 at 216.

custodian. Where there is a conflict between formal instruments, priority will generally go to the most recent instrument.

C. Overlapping Access Rights

[231] Access rights are relatively straightforward when the original account holder has died. In cases involving a deceased account holder, there is usually only one category of fiduciary – a personal representative appointed under a will or by court order – who has the authority to deal with the digital assets. However, if the account holder is alive but does not have legal capacity, then there would likely be at least two categories of fiduciaries – guardians and attorneys – who may have overlapping access rights to the incapacitated person’s digital assets.¹⁷⁹

[232] Consider the following example. Mattea, an adult without legal capacity, has various digital assets including an email account. Aydin is appointed under a power of attorney to handle Mattea’s financial matters. Brennan is appointed under a personal directive to handle Mattea’s personal matters. A typical email account is often used for multiple purposes – from keeping in touch with friends to sending and receiving funds through e-transfers. Aydin and Brennan would both have access rights to Mattea’s email account but for different purposes. Aydin and Brennan’s access rights must be consistent with the authority given to them as attorneys and agents respectively. In this scenario, Aydin’s access rights to Mattea’s email account would be limited to dealing with financial matters, while Brennan’s access rights are limited to dealing with personal matters.

[233] It is unclear how the Uniform Act deals with potentially overlapping access rights. The legislation does not appear to distinguish among different types of fiduciaries:¹⁸⁰

They are treated alike, at least in the first instance, in which they are permitted default access to digital assets. This default position can be changed only by the terms of a power of attorney, trust, will or a grant of administration, or by a court order.

[234] That said, the Uniform Act seems to contemplate that there will only be one fiduciary with access rights to a digital asset at any given time. While that may be the case if the account holder has died, other scenarios involving

¹⁷⁹ In some cases, trustees might also have overlapping access rights.

¹⁸⁰ Woodman, note 22 at 212

multiple fiduciaries acting on behalf of incapacitated account holders may also arise.

[235] An Alberta Act ought to be flexible enough to allow overlapping access rights to digital assets. It is not necessary to create a statutory hierarchy to determine which fiduciary ought to have preferred access rights to a digital asset. Access rights must be exercised in a manner that is consistent with the source of the fiduciary's authority – for example, an agent appointed under a personal directive cannot exercise their access rights over digital assets involving financial matters.

RECOMMENDATION 9

An Alberta Act should allow overlapping access rights to digital assets that are consistent with a fiduciary's source of authority.

D. Applying to the Court for Directions

[236] Section 8 of the Uniform Act allows fiduciaries to apply to the court for directions regarding the fiduciary's right to access a digital asset.¹⁸¹ A fiduciary who follows the court's directions is protected from liability:¹⁸²

A fiduciary who follows the directions of the court is discharged with respect to the subject matter of the directions unless the fiduciary is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

[237] Saskatchewan, Prince Edward Island, New Brunswick, and the Yukon all include a similar provision in their respective statutes.¹⁸³

[238] The Uniform Act is intended to clarify and simplify the steps a fiduciary may need to take to gain access to a digital asset. If a fiduciary provides proof of authority to a custodian according to the process set out in the Uniform Act, then the need for a court order to establish the fiduciary's authority to the custodian should be minimal. The New South Wales Report supports this approach:¹⁸⁴

The recommended scheme minimizes the formal legal steps that a person with a legitimate interest must take to gain access to a

¹⁸¹ Uniform Act, s 8(1).

¹⁸² Uniform Act, s 8(2).

¹⁸³ See Saskatchewan Act, s 9; PEI Act, s 8; New Brunswick Act, s 9; Yukon Act, s 8.

¹⁸⁴ New South Wales Report at 1.28.

deceased or incapacitated person's digital records. Because the scheme identifies who the authorized person is in most circumstances, it limits the cases in which interested parties would have to seek a court order to gain access.

[239] Section 8 of the Uniform Act should not be used in cases where the fiduciary's authority is clear and uncontroversial. It should be reserved for situations where there are conflicting instructions between formal instruments, overlapping access rights, or when a fiduciary's authority to deal with the digital asset is otherwise unclear. Other exceptional situations that may require court orders include the following:¹⁸⁵

- The fiduciary is unsure of the extent of their authority (for example, whether their authority extends to a particular digital asset).
- The fiduciary is unable to provide the custodian with proof of their authority in the manner set out in the Uniform Act.
- There is a dispute among potential fiduciaries about who should have access.

[240] In the United States, section 7(5)(c) of the Revised American Act allows a custodian to require the fiduciary to seek a court order before providing access to the account holder's digital assets, even if the account holder had left express instructions about how to deal with the digital assets in a valid will.

[241] Some legal academics have raised concerns that US-based custodians are routinely exercising their discretion to require court orders before providing access to digital access to fiduciaries.¹⁸⁶ Requiring fiduciaries to obtain court orders as a matter of routine creates unnecessary burdens on fiduciaries, congestion in the courts, and delays in the estate administration process.¹⁸⁷ It can also have a particularly pernicious effect on small estates, which may not have the necessary resources to obtain a court order to access digital assets that hold sentimental rather than financial value.¹⁸⁸

[242] An Alberta Act should avoid being interpreted in such a way that court orders become a default requirement before a custodian grants access to the digital asset. In most cases, providing proof of a fiduciary's authority should be

¹⁸⁵ New South Wales Report at 4.62.

¹⁸⁶ For example, see Sheridan, note 7 at 382-84. This routine approach of US-based custodians requiring court orders before granting access to fiduciaries has also been noted in the New South Wales Report at 5.30.

¹⁸⁷ Sheridan, note 7 at 385. See also New South Wales Report at 5.28.

¹⁸⁸ Sheridan, note 7 at 385.

sufficient for establishing the fiduciary's access rights to the digital asset. Court applications ought to be used as a "last resort" in cases where the fiduciary's authority to access the digital asset is unclear.

RECOMMENDATION 10

An Alberta Act should allow a fiduciary to apply to the court for directions and advice relating to the fiduciary's right to access a digital asset of the account holder. Fiduciaries who follow the directions of the court are protected from liability unless the fiduciary is guilty of fraud, willful concealment, or misrepresentation in obtaining the directions.

E. Proof of Authority

[243] Section 7 of the Uniform Act provides that a fiduciary may request access from the custodian of the digital asset by making the request in writing and providing authenticated copies of the documents relevant to the enacting jurisdiction.

[244] The ULCC's commentary on section 7 provides examples of what kind of documentation may be required to show proof of the fiduciary's authority:¹⁸⁹

For example, if there is a will providing that an individual is a personal representative, a notarized copy of the death certificate and will setting out that the individual is authorized to administer the estate may be required. If there is no will (intestacy), a fiduciary may be required to provide a notarized copy of the death certificate and documents setting out that the fiduciary is the individual authorized to apply for administration of the estate.

[245] In Saskatchewan, Prince Edward Island, and New Brunswick, the following documentation can be provided to establish proof of the fiduciary's authority to access the digital assets of a deceased or incapacitated person:

¹⁸⁹ ULCC Final Report, note 2 at 10.

Saskatchewan	Prince Edward Island	New Brunswick
Request must be made in writing and must include either the original order or certified copy of the court order or other document granting authority to the fiduciary. ¹⁹⁰	Request must be made in writing and must include either the original order or certified copy of the court order or other document granting authority to the fiduciary. ¹⁹¹	Request must be made in writing and must include proof of the fiduciary's identity. If the account holder has died, the fiduciary must provide the original or certified copy of the letters probate of a will or letters of administration OR the original or certified copy of the account holder's will and death certificate or other proof of death. If the account holder is alive, the fiduciary must provide the original or certified copy of the court order, enduring power of attorney, or trust instrument that grants authority to the fiduciary OR a document prescribed by regulation that grants authority to the fiduciary. ¹⁹²

[246] The Yukon legislation also includes the regulatory power to prescribe additional documents establishing proof of the fiduciary's authority.¹⁹³

[247] While the Saskatchewan and PEI provisions suggest a broad interpretation of "document granting authority to the fiduciary", they may inadvertently introduce some uncertainty when it comes to establishing proof of authority. Take the example of an account holder who has died with a will. Will the custodian require the personal representative named in the will to obtain a grant of probate before providing access to the account holder's digital assets? Or is it sufficient to provide a certified copy of the will as proof of the fiduciary's authority?

¹⁹⁰ Saskatchewan Act, s 8(1).

¹⁹¹ PEI Act, s 7(1).

¹⁹² New Brunswick Act, s 8(1).

¹⁹³ Yukon Act, s 7(2), 10(c).

[248] In contrast, the New Brunswick legislation includes provisions that specify which documents are required to establish proof of authority. This approach is clear for both custodians and fiduciaries to follow. The New Brunswick approach also requires a fiduciary to provide proof of their identity to the custodian, which helps protect the custodian and the estate against identity fraud.

[249] ALRI recommends that an Alberta Act adopt a similar approach to New Brunswick in establishing proof of authority. The legislation should allow original or certified copies of the relevant documentation, and that writing requirements may be satisfied electronically.¹⁹⁴ An Alberta Act should also require fiduciaries seeking access to provide the custodian with proof of identity.

RECOMMENDATION 11

An Alberta Act should include the following requirements for establishing proof of a fiduciary's authority to access digital assets.

- For a deceased account holder who died with a will, a certificate of death and the will may be provided to establish the personal representative's authority.
- For a deceased account holder who died without a will, a grant of administration may be provided to establish the administrator's authority.
- For an incapacitated account holder, proof of the fiduciary's authority may be providing in formal instruments including powers of attorney, personal directives, trust documents, and court orders.
- Other documentation establishing proof of authority that may be set out in the regulations.

RECOMMENDATION 12

An Alberta Act should provide that original or certified copies of any required documents are allowed, and the writing requirement may be satisfied electronically,

¹⁹⁴ See ULCC Final Report, note 2 at 10. See also Alberta Law Reform Institute, *Creation of Electronic Wills*, Report 119 (2023) at paras 133, 408, online: <www.alri.ualberta.ca/2023/10/creation-of-electronic-wills/>, which discusses electronic forms of text being recognized as "writing" by Alberta courts.

RECOMMENDATION 13

An Alberta Act should require a fiduciary seeking access to provide proof of their identity to the custodian.

F. Protection From Liability for Custodians

[250] Section 9 of the Uniform Act protects custodians complying with the legislation from liability:

A custodian who complies with this Act, the regulations or any order of the court made under this Act is not liable for a loss arising from anything done or omitted from being done, unless it was done or omitted from being done in bad faith.

[251] The Yukon Act adopts this wording in section 9 of its legislation. Although the specific wording is somewhat different, the legislation enacted in Saskatchewan,¹⁹⁵ Prince Edward Island,¹⁹⁶ and New Brunswick¹⁹⁷ all include similar immunity clauses:

Saskatchewan	Prince Edward Island	New Brunswick
<p>10 A custodian is not liable for any loss incurred with respect to a digital asset of an account holder if the custodian complies with this Act, the regulations, an order or other document mentioned in subsection 4(2) or an agreement described in subsection 4(3), unless the loss is due to that custodian's own: dishonesty; or willful conduct that the custodian knows or ought to know is inconsistent with this Act, the regulations, an order or other document mentioned in subsection 4(2) or an agreement described in subsection 4(3).</p>	<p>9 A custodian who complies with this Act, the regulations or any order of the court made under this Act is not liable for a loss arising from anything done or omitted from being done, unless it was done or omitted from being done in bad faith.</p>	<p>10 No action or other proceeding lies or shall be instituted against a custodian for anything done or purported to be done in good faith or in relation to anything omitted in good faith by the custodian under this Act or the regulations.</p>

¹⁹⁵ Saskatchewan Act.

¹⁹⁶ PEI Act.

¹⁹⁷ New Brunswick Act.

[252] An immunity provision for custodians acting in good faith is included in the Revised American Act:¹⁹⁸

A custodian and its officers, employers, and agents are immune from liability for an act or omission done in good faith in compliance with this [act].

[253] The New South Wales Report also recommends including a provision to protect custodians who make good faith attempts to comply with the legislation from liability.¹⁹⁹

[254] Perhaps the most obvious scenario that potentially opens custodians to liability is when access is given to a person who does not otherwise have the necessary authority to deal with the digital asset. An example may help illustrate this point. Teela has recently died. Her will appoints her brother Myron as the personal representative of Teela's estate. However, Teela's sister Yara thinks that she should have been appointed instead of Myron. Yara submits an altered copy of Teela's will that replaces Myron's name with Yara's to OnlineBank.Com to gain access to Teela's electronic financial records. Unaware of Yara's fraud, OnlineBank.Com grants access to Yara. Myron discovers Yara's deception and sues OnlineBank.Com for wrongly providing access to Teela's financial records.

[255] In this example, section 9 of the Uniform Act would shield OnlineBank.Com from liability because it was complying with the legislation in good faith when it allowed Yara to access Teela's digital asset. Protection from liability ensures that custodians can rely on the proof of authority provided by a fiduciary under the statutory scheme.²⁰⁰ This protection also reduces the need for custodians to routinely ask fiduciaries for court orders as proof of authority to access the digital asset. If proof of authority is submitted, then the custodian has the burden of justifying any refusal to comply with the fiduciary's request for access.²⁰¹

[256] An Alberta Act should include a provision to protect custodians from liability when complying with the legislation in good faith. Including such protection for custodians helps facilitate access requests and reduce administrative burden on both fiduciaries and custodians.

¹⁹⁸ Revised American Act, s 16(f).

¹⁹⁹ New South Wales Report at 5.37-5.38.

²⁰⁰ New South Wales Report at 1.39.

²⁰¹ Sheridan, note 7 at 386.

RECOMMENDATION 14

An Alberta Act should include a provision to protect custodians from liability when complying with the legislation in good faith.

G. Time to Respond to Fiduciary Request for Access

[257] Section 7(2) of the Uniform Act requires custodians to provide the fiduciary with access to a digital asset within 30 days of receiving the access request and supporting documentation. During consultation, one lawyer stated that it is unrealistic to expect extra-jurisdictional custodians to respond to an access request within 30 days. They also questioned whether a Canadian court could impose any consequences if a custodian outside the jurisdiction fails to comply with the 30-day timeline.

[258] The ULCC Working Group noted that the American Act provides for 60 days notice for custodians to respond to an access request but was of the opinion that this was too long.²⁰² While the Working Group did not specifically recommend the 30 day period that was eventually adopted in the Uniform Act, it stated that the time limit ought to have “an eye to the US law which custodians may be familiar with.”²⁰³ Section 16(a) of the Revised American Act maintains the 60 day period to provide access after receiving a request. The relevant provisions of the Saskatchewan, PEI, New Brunswick, and Yukon acts adopted the 30-day period set out in the Uniform Act.

[259] While harmonization with the Revised American Act is certainly one of the goals of the Uniform Act, in this case it may make more sense for an Alberta Act to adopt the same time period as other Canadian jurisdictions that have already enacted the Uniform Act. Consistency among Canadian provinces might make it easier for extra-jurisdictional custodians to know what to expect – and how much time they have to respond – when receiving a request from a fiduciary based in Canada.

[260] It is possible, however, that an extra-jurisdictional custodian might need more time to respond than a custodian located in Alberta. Setting aside practical considerations such as time zone and language differences, an extra-jurisdictional custodian may need additional time to consult with legal professionals to ensure that providing a fiduciary in Alberta with access to a

²⁰² ULCC Progress Report at para 42.

²⁰³ ULCC Progress Report at para 42.

digital asset does not violate the laws of their home country. It may make sense to include two time periods in an Alberta Act – for example, 30 days for custodians in Canada, and 60 days for custodians located outside of Canada.

[261] Another possibility is to include a provision in an Alberta Act that would allow a custodian – domestic or extra-jurisdictional – to ask for more time to respond to an access request. The onus would be on the custodian to justify the extension. Such a provision would likely have to circumscribe the specific circumstances under which an extension would be appropriate, to prevent custodians from using extensions unreasonably to delay access.²⁰⁴

[262] Given the additional complexities that may arise when dealing with extra-jurisdictional custodians, ALRI recommends that an Alberta Act include two time-limits for providing access to fiduciaries: 30 days for custodians located within Canada, and 60 days for custodians outside of Canada. At the present time, ALRI does not recommend including a statutory mechanism that allows custodians to ask for more time.

RECOMMENDATION 15

An Alberta Act should require custodians located within Canada to provide a fiduciary with access to a digital asset within 30 days of receiving a request for access. An Alberta Act should require custodians located outside of Canada to provide a fiduciary with access to a digital asset within 60 days of receiving a request for access.

H. Failure to Comply with Access Requests

[263] The Uniform Act does not contain any penalties for custodians – domestic or extra-jurisdictional – who fail to provide access to a fiduciary within the 30-day statutory time-limit. If a custodian fails to comply under the Revised American Act, section 16(a) allows a fiduciary to apply to the court for an order directing compliance. Section 8(1) of the Uniform Act allows a fiduciary to apply to the court for directions in relation to the fiduciary’s right to access an account holder’s digital assets, which could arguably include an order made against a custodian to comply with the access request.

²⁰⁴ The New South Wales Report recommends that the only exception to the 30-day requirement is if the custodian can demonstrate that granting access to the digital asset is not technologically feasible – for example, due to encryption: see New South Wales Report at 5.36.

[264] While the question of whether the Uniform Act ought to include some sort of statutory enforcement mechanism or penalties for non-compliance is a question for another day, it is important to recognize that there may be significant legal and practical complexities in trying to enforce contempt orders or orders directing compliance made against extra-jurisdictional custodians.

I. Model Forms for Court Orders

[265] Section 7(1) of the Uniform Act sets out a simple, uncomplicated process for requesting access to the digital asset:

A fiduciary with a right under this Act to access a digital asset of an account holder may request access from the custodian of the digital asset by making the request in writing and by including with the request [authenticated copies of the documents relevant for the enacting jurisdiction].

[266] During consultation, one lawyer suggested that the Uniform Act ought to include model forms that fiduciaries can modify and use when making access requests to custodians.²⁰⁵ For example, a model court order might encourage extra-jurisdictional custodians in recognizing and complying with access requests made under an Alberta Act. Including model forms in the legislation may also make the request process easier for a fiduciary to navigate on their own without requiring additional support from a lawyer, thus reducing the costs of administration for fiduciaries and increasing access to justice.

[267] That said, many custodians have set out in their service agreements their own processes for access requests that they may prefer fiduciaries to follow. If the process does not limit fiduciary access to the digital asset, then the service agreement would likely govern the request process. The Uniform Act is not intended to supersede the entire service agreement – only those parts that would limit or restrict fiduciary access.

[268] Nevertheless, there may be value in including model forms in the legislation to help fiduciaries with their access requests – particularly when a service agreement is silent on fiduciary access – and to encourage extra-jurisdictional recognition and compliance. Such model forms could be adopted

²⁰⁵ In Alberta, applications for a grant of probate or grant of administration include a section on digital assets: *Surrogate Rules*, Alta Reg 130/1995, Form GA1.

by regulation and fall within the regulatory powers set out in section 10 of the Uniform Act.

[269] ALRI has not made a specific recommendation regarding whether model forms ought to be included in an Alberta Act. ALRI's main concern is that extra-jurisdictional custodians may decide not to comply with the model forms, particularly if the model forms are inconsistent with the custodian's service agreement. Model forms may have limited usefulness if the custodian's service agreement set out a different process for requesting fiduciary access.

[270] That said, ALRI encourages the government to consider the potential benefits of developing model forms to make it easier for fiduciaries to make access requests. An Alberta Act could be enacted without including model forms. After an Alberta Act comes into force, the government could review whether model forms are needed to improve the overall effectiveness of the legislation.

CHAPTER 6

Extra-Jurisdictional Recognition of the Uniform Act

A. Questions about Jurisdiction

[271] During consultation, a number of people expressed concerns about whether the Uniform Act would be effective in compelling custodians located outside of Alberta to provide access to an account holder's digital assets. Some of their questions included:²⁰⁶

- a. Is there a way to ensure that online service providers located in other jurisdictions will recognize or comply with the Uniform Act?
- b. Where there are multiple jurisdictions whose laws might apply – for example, an account holder, custodian, and the digital asset itself might be situated in different jurisdictions – does the Uniform Act adequately address which jurisdiction's laws ought to govern?
- c. Will the Uniform Act eliminate the need for a fiduciary to seek a court order in the jurisdiction in which the digital asset is held?

[272] When considering the potential effect of the Uniform Act outside of Alberta, it is important to keep in mind the presumption against extraterritoriality: “[u]nless implicitly or explicitly provided otherwise, the legislature is presumed to enact for persons, property, juridical acts and events within the territorial boundaries of its jurisdiction”.²⁰⁷ While it is possible to enact legislation using express language and intention to extend the legislation's reach beyond provincial borders, determining the effectiveness of such efforts would likely require judicial interpretation. As noted by one Canadian legal scholar:²⁰⁸

The challenges arising from the assumption of jurisdiction by Canadian courts (including the effect of forum selection clauses), the selection of the applicable law, and the enforcement of orders of

²⁰⁶ Related to this question is the concern that some digital assets may be stored in multiple servers located in different countries, so determining the location of the digital asset might not be straightforward.

²⁰⁷ Pierre-Andre Côté, in collaboration with S Beaulac and M Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 212.

²⁰⁸ Woodman, note 22 at 225.

Canadian courts in foreign jurisdictions are yet to be fully addressed by the courts with respect to digital asset management.

[273] There are other potentially limiting factors grounded in contract law. Many custodians of digital assets have service agreements that include choice of law and forum selection clauses. For example, Google's service agreement states that:²⁰⁹

California law will govern all disputes arising out of or relating to these terms, service-specific additional terms, or any related services, regardless of conflict of laws rules. These disputes will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.

[274] In the Google example, the service agreement includes both a choice of law clause (California law will govern) as well as a forum selection clause (disputes will be resolved in a Santa Clara County court). While the two types of clauses are related, "choice of law" and "forum selection" are conceptually distinct: the former specifies the law of the contract, while the latter ousts the jurisdiction of otherwise competent local courts in favour of a foreign jurisdiction.

[275] There are significant implications of choice of law and forum selection clauses on fiduciaries seeking access to a person's digital assets. Fiduciaries may be forced to bring actions in other jurisdictions to confirm their access rights at great cost and inconvenience. In many cases, the cost of pursuing an action in another jurisdiction would likely outweigh the financial value of the digital asset. A fiduciary's ability to properly administer the account holder's estate may be considerably hindered, particularly if there are digital assets spread out across multiple jurisdictions.

[276] This chapter discusses potential approaches to resolving these jurisdictional concerns. However, the recommendations contained in this chapter come with a word of caution. If one of the goals of the Uniform Act is to promote the efficient and effective administration of estates, then it will be important to manage expectations of fiduciaries as well as account holders when it comes to dealing with extra-jurisdictional custodians. Even if the Uniform Act is enacted in Alberta, custodians located outside of Alberta may still require fiduciaries to apply to a foreign court before granting access to the digital asset. It is unlikely

²⁰⁹ *Google Terms of Service, Canada* (5 Jan 2022), online: <polices.google.com/terms> [perma.cc/42M7-SMD6].

that the jurisdictional issues will be resolved in Alberta without additional litigation.

B. Legislative Responses

[277] Canada, the United States, and Australia have all considered legislative responses to the jurisdictional issues. At one end of the spectrum, the Revised American Act makes limited reference to territoriality while being completely silent regarding both choice of law and forum selection clauses. At the other end, the New South Wales Report recommends including references to territoriality as well as choice of law and forum selection clauses. The Uniform Act falls somewhere in the middle, as it includes a choice of law provision but does not refer to territoriality or forum selection clauses.

1. CANADA: THE UNIFORM ACT

[278] It is unclear as to what extent the Uniform Act contemplates its applicability to extra-jurisdictional custodians. Section 2(e) of the Uniform Act states that the legislation applies to “a custodian of, or a person who may be a custodian of, a digital asset created, recorded, transmitted or stored before, on or after the date this Act comes into force” without any reference to territoriality. Section 6 of the Uniform Act responds to choice of law clauses in service agreements, and asserts that a service agreement is unenforceable if it limits fiduciary access:

6 Despite any other applicable law or a choice of law provision in a service agreement, a provision in a service agreement is unenforceable against a fiduciary to the extent that the provision limits, contrary to this Act, a fiduciary’s access to a digital asset.

[279] It appears that section 6 was included in the Uniform Act to address the ULCC Working Group’s concerns that custodians might intentionally limit fiduciary access to digital assets by adding a choice of law clause to their service agreements:²¹⁰

It was thought undesirable that custodians should be able to avoid giving fiduciaries access – essentially preventing them from doing their legal duty – simply by making their service account agreements subject to a law that does not provide for fiduciary access. Different options are available to ensure that [service agreements] do not opt

²¹⁰ ULCC Progress Report at para 36.

out of the Uniform Act by choosing such a law: no waiver provisions, consumer protective provisions or “real and substantial connection to contract” provisions.

[280] Ultimately, the ULCC Working Group recommended that the Uniform Act ought to include a provision that prohibits a custodian from using a choice of law clause in a service agreement to limit fiduciary access to a digital asset.

[281] During consultation, one lawyer commented that section 6 of the Uniform Act would likely not solve any jurisdictional issues that arise if the custodian is located outside the province:

A custodian who is physically located entirely in a different jurisdiction can simply refuse to follow a Canadian court order. Without an international treaty, [s 6] doesn't solve the problem.

[282] There seems to be an implicit recognition of the Uniform Act's limited application outside the jurisdiction of origin. For example, the ULCC Working Group concluded that “it would be helpful to Canadian account holders if uniform legislation to provide access to digital assets by fiduciaries in Canada is informed and consistent with [the American Act] so that US-based custodians find it familiar and thus easy to comply with.”²¹¹ Stated in this way, one of the goals of the Uniform Act is to contribute to uniformity across multiple jurisdictions with the hope that such uniformity would increase extra-jurisdictional recognition of a fiduciary's authority to access a person's digital assets.

[283] It is important to note that the Uniform Act specifically speaks only to choice of law clauses in service agreements, and not to forum selection clauses. One could argue that section 6 ought to capture forum selection clauses as well as any other terms-of-service provision that limits fiduciary access to a digital asset. However, a 2017 decision of the Supreme Court of Canada suggests that the wording of section 6 is not specific enough to override a forum selection clause.²¹² Further, there is no express provision in the Uniform Act that would direct a domestic court to take jurisdiction even when dealing with extra-jurisdictional custodians.

²¹¹ ULCC Progress Report at para 7.

²¹² *Douez v Facebook, Inc*, 2017 SCC 33.

[284] The ULCC's commentary on the Uniform Act provides little guidance regarding the proposed legislation's applicability to extra-jurisdictional custodians or how potential conflicts of law problems might be resolved.

[285] Saskatchewan, Prince Edward Island and the Yukon have adopted the choice of law provision set out in section 6 of the Uniform Act.²¹³ Neither province nor territory has included a provision overriding forum selection clauses in service agreements. As of the date of publication, it does not appear that any of these Acts have been judicially considered. However, concerns about jurisdiction were raised in the Saskatchewan Legislature during the second reading for Bill 176:²¹⁴

Mr Pedersen: Now, Mr Deputy Speaker, I do have possibly a few concerns about this bill... all that we can do in this Assembly and this legislature, Mr Deputy Speaker, all we can do is pass laws that relate to Saskatchewan.

And so if this bill becomes law, it will apply to SaskTel and it will apply to Access Communications and it will apply to Shaw. But it's not going to apply to Facebook. It's not going to apply to Instagram. It's not going to apply to Snapchat. It's not going to apply to Microsoft and it's not going to apply to Apple. And, Mr Deputy Speaker, the reality is that most of our digital assets, if you use that term from the bill, that's where those assets reside is outside of Saskatchewan. So we're going to have one set of rules that apply to SaskTel and Access and another set of rules that apply to other people.

[286] Jurisdictional issues were further explored during the committee meetings for Bill 176, during which it was conceded that the proposed legislation would have limited extra-jurisdictional reach:²¹⁵

Ms Sarauer: I have a question about jurisdiction. I'm curious to know how that works. When we talk about large digital companies that are international frankly, how does that work in terms of what laws they have to follow? Can you just explain for the purposes of the committee how that works around the obligations in this legislation and these large corporations who conduct activity in, for example, all the jurisdictions in Canada and all the jurisdictions in North America?

Mr McGovern: Thank you for the question. Conflicts of law, of course as you know, are a complicated area when you are dealing with

²¹³ See Saskatchewan Act, s 7, PEI Act, s 6, and Yukon Act, s 6.

²¹⁴ Saskatchewan, Legislative Assembly, *Hansard*, 28th Leg, 4th Sess (20 November 2019) at 6487 (Yens Pedersen).

²¹⁵ Saskatchewan, Standing Committee on Intergovernmental Affairs, *Hansard Verbatim Report*, 28th Leg, 4th Sess, No 42 (2 March 2020) at 649-650 (Hon Don Morgan, Nicole Sarauer, Darcy McGovern).

extrajurisdictional effect for different statements. And one of the benefits of taking a uniform approach is that by having a similar approach to other states in this case, or hopefully soon in other provinces, is that you're able to take on, to the degree you can, some of those extrajurisdictional issues.

...

And so, you know, your jurisdictional question is a valid one... . But if you have a web organization based on an island somewhere without jurisdiction, you know, we're not going to come here and say we've got that covered. Because of course that's a real challenge.

But a piece like this is able to deal with the mainstream players and we think to do so quite well. So that if you have the Googles and the Facebooks and you have these different bitcoin operations who are required to think through this process and adhere to it in a number of states, that becomes their operating practice, and it's something that we can enforce here.

So when the assets are here, that gives our jurisdictional subject matter and asset jurisdiction to be able to deal with it here. But fair enough, if there's a small Caribbean island somewhere where they're operating this, there's only so much we can do.

Hon Mr Morgan: If your question is, does this piece of legislation change any of the conflict-of-laws provisions, it doesn't. But to the extent that it adopts a standardized approach in every jurisdiction that follows the ULC [Uniform Law Conference] law, it probably won't matter for somebody where they've applied. They'll say, okay, well we'll get the same answer wherever it is. And it would make it easier for somebody that's trying to deal with an estate matter or something.

[287] New Brunswick took a modified approach to section 6 of the Uniform Act by adopting the choice of law provision and adding a new subsection dealing with forum selection:²¹⁶

7(2) A provision in a service agreement that purports to restrict jurisdiction or venue to a forum outside of New Brunswick is void with respect to a dispute in relation to a fiduciary's right to access a digital asset of an account holder under this Act.

²¹⁶ New Brunswick Act, s 7(2).

[288] Concerns about potential jurisdiction issues were raised after second reading of the bill at the Standing Committee on Economic Policy, resulting in a similar concession about the territorial limits of the legislation:²¹⁷

Mr McKee: So dealing with this Act, different provinces, different states, are implementing this legislation. You use the example of writing a letter or something to a firm in San Jose where a tech company might be headquartered. Does this legislation bind that firm to give out the information or enabling legislation in that manner, or would the local legislation where that company might be headquartered determine what they can and can't do?

Hon Mr Flemming: As you know, under conflict of laws, we have no capacity, the legislature of the province of New Brunswick has no capacity to bind another jurisdiction. That's just by operation of law. But if everybody agrees that our courts and our fiduciaries have access to these kinds of assets within the scope of their authority – if everybody does that, then it would make it easier. But you're quite correct in pointing out that there's no capacity for the province of New Brunswick, we can't pass a law here that is binding on the province of British Columbia or the state of Louisiana, or whatever, we don't have capacity to do that. But if everybody does this, then the courts, fiduciaries, administrators, will have access through universal application.

[289] Regardless of these jurisdictional concerns, both Saskatchewan and New Brunswick enacted the Uniform Act.

2. UNITED STATES: REVISED AMERICAN ACT

[290] Section 6 of the Uniform Act appears to take its inspiration from a similar choice of law provision in the original American Act:²¹⁸

A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this [act] to the extent the provision designates law that enforces a limitation on a fiduciary's access to digital assets which limitation is void under subsection (b).

²¹⁷ New Brunswick, Legislative Assembly, Standing Committee on Economic Policy, *Bill 19 Fiduciary Access to Digital Assets Act* (30 November 2022), at 22:05 (Hon Hugh JA Flemming, KC, Robert McKee) online (video): <www.legnb.ca/en/webcasts/826> [perma.cc/TKZ6-P2X6].

²¹⁸ American Act, s 7(b)–(c). Subsection (b) states “a provision in a terms-of-service agreement limits a fiduciary's access to the digital assets of the account holder... is void as against the strong public policy of this state” unless the account holder agrees to the provision separately after the legislation comes into force.

[291] The draft American Act provision also included commentary and an example to explain how the choice of law provision was intended to work.²¹⁹ Arthur, who lives in State X, is a professional photographer. He stores his digital photos in an online account with InterComp, an online service provider located in State Y. Arthur dies and Barbara, who also lives in State X, is appointed as his personal representative. Barbara needs access to Arthur's online storage account so that she may take inventory of Arthur's estate assets. During Arthur's lifetime, he entered into a service agreement with InterComp that included a choice of law provision which specified that the laws of State Y govern the agreement. In the example, State X has enacted the American Act while State Y has not. According to the commentary, section 7(c) of the American Act would operate to allow a court in State X to void the terms-of-service provision prohibiting Barbara's access to Arthur's online account, essentially overriding the choice of law provision inserted by InterComp that the law of State Y ought to apply to the agreement.²²⁰

[292] However, section 7(c) of the American Act was not included in the final version of the Revised American Act.²²¹ It is unclear from the available commentary as to why the choice of law provision was removed from the final draft of the Revised American Act. Some of the amendments that were incorporated in the Revised American Act suggest that the proposed legislation was not intended to override service agreements unless the original account holder consented to disclosure before their death or incapacity.²²² In this way, the

²¹⁹ National Conference of Commissioners of Uniform State Laws, Draft Uniform Fiduciary Access to Digital Assets Act (6 June 2014) at 17-18, online:

www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=57464d13-e7d5-3133-1c1e-775ef997c0b7&forceDialog=0 [perma.cc/S36L-CZGL].

²²⁰ This example seems to suggest that because State Y has not enacted the American Act, the laws of State Y would operate to restrict Barbara from accessing Arthur's digital assets if the choice of law clause is enforced. In such a case, section 7(c) of the American Act would apply to override the choice of law clause since the laws of State Y limits Barbara's fiduciary access rights. However, if the laws of State Y would not restrict Barbara's access to Arthur's digital assets, then there would be no need to override the choice of law clause contained in the terms-of-service agreement.

²²¹ See National Conference of Commissioners of Uniform State Laws, [Revised/Amended] Uniform Fiduciary Access to Digital Assets Act (strike and score version) (10 July 2015) at 16, online:

www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f74b06e1-4ce3-ee7f-b8fd-212a7338ebf2&forceDialog=0 [perma.cc/E28V-NYGA].

²²² See Uniform Law Commission, Proposed Changes to the Uniform Fiduciary Access to Digital Assets Act (2015), online:

www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6cdd65e9-e4ee-3791-2132-7f4223fb6cef&forceDialog=0 [perma.cc/2E3P-AZCU]. This result is contrary to the intention of the American Act drafting committee, which believed that allowing the terms-of-service agreements to control what happens to a person's online accounts after their death "would neutralize the effectiveness of the Act." See Uniform Law Commission, 2014 Annual Meeting Issues Memo (27 May 2014) at 3, online:

Uniform Act is distinct from the Revised American Act as the Uniform Act continues to include a choice of law provision.

[293] Neither the American Act nor the Revised American Act include provisions dealing with forum selection clauses in service agreements. This is not surprising given that amendments to the Revised American Act appear to maintain, in most cases, the importance of service agreements in determining access to digital assets.²²³ In this way, the Revised American Act does not seek to override choice of law and forum selection clauses even if such clauses have the potential effect of limiting fiduciary access to digital assets.²²⁴

[294] Unlike section 2(e) of the Uniform Act, section 3(b) of the Revised American Act appears to incorporate territoriality when it comes to determining which custodians are subject to the legislation:²²⁵

This [act] applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

[295] While this provision does not specifically reference extra-jurisdictional custodians, it may be interpreted to extend the Revised American Act's reach beyond a state's territorial limits as long as the user (or account holder) lived in the state at the time of their death. Indeed, the related commentary on section 3(b) confirms this intention:²²⁶

Subsection (b) states that custodians are subject to the act if the custodian's user was a resident of the enacting state. This includes out-of-state custodians, who must respond to requests for access in the same way that out-of-state banks or credit card companies must respond to requests from a fiduciary requesting access to a customer's account.

www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4b0ebf8f-83f0-cfee-4c05-69ee1c53fa05&forceDialog=0 [perma.cc/GBX4-3MZQ].

²²³ It is interesting to note that the American Act, which granted fiduciaries broad access to digital assets unless the account holder expressed a contrary intention before their death, was strongly opposed by Internet service providers and privacy advocates: see Sheridan, note 7 at 368; Elizabeth Sy, "The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught up with Technology?" (2016) 32 *Touro L Rev* 647 at 664-5.

²²⁴ There have been some calls to revise the Revised American Act to prevent any forum selection or choice of law provisions contained in service agreements from being enforced against fiduciaries: see Sheridan, note 7 at 393.

²²⁵ Revised American Act, s 3(b). The definition of "user" under the Revised American Act is similar but not identical to the definition of "account holder" under the Uniform Act.

²²⁶ Revised American Act at 9.

3. AUSTRALIA: NEW SOUTH WALES LAW REFORM COMMISSION

[296] The New South Wales Law Reform Commission concluded its project on fiduciary access to digital assets in December 2019. While new legislation has yet to be enacted anywhere in Australia, the New South Wales Report is useful in identifying three possible ways to resolve jurisdictional concerns.

[297] First, the New South Wales Report noted that the presumption against extraterritoriality – meaning that the legislation of a particular state only applies to that state – is subject to any contrary intention expressly set out in the legislation.²²⁷ In the context of digital assets, the New South Wales Report recommended that:²²⁸

Therefore, the [legislative] scheme should expressly provide that it applies to a custodian, even if the custodian is not located in NSW, so long as the user is domiciled in NSW or was domiciled in NSW at the time of their death. The relevant connection between the custodian and NSW is that the custodian stores or maintains digital records of a NSW user.

[298] It is interesting to note that the New South Wales Report preferred using the term “domiciled” instead of “resides”, which is used in section 3(b) of the Revised American Act. New South Wales reasoned that the concept of “domicile” is well-established under Australian law and largely governed by legislation in each state and territory, whereas “residence” is not a fixed concept and can give rise to uncertainty.²²⁹ In contrast, Alberta legislation seems to have largely done away with the term “domicile” in favour of residency.

[299] Second, the New South Wales Report also recommended adopting a choice of law provision similar to section 6 of the Canadian Uniform Act:²³⁰

We recommend that, despite any other applicable law or choice of law provision, a provision in the relevant service agreement or custodian policy that limits the authorize person’s right to access particular digital records of a deceased or incapacitated user, contrary to the [legislative] scheme, should be rendered unenforceable. This approach is supported by some submissions and is similar to the Canadian model law.

²²⁷ New South Wales Report at 3.3–3.4.

²²⁸ New South Wales Report at 3.5, see also Recommendation 3.1.

²²⁹ New South Wales Report at 3.6–3.8.

²³⁰ New South Wales Report at 5.44, see also Recommendation 5.4(1).

[300] Third, the New South Wales Report recommended that any proposed legislation ought to include a specific provision that if the account holder was domiciled in New South Wales, the New South Wales courts are the proper forum for determining disputes about access to digital assets even when the service agreement nominates another jurisdiction in a forum selection clause.²³¹ Legislative provisions relating to choice of law and forum selection would work together to confirm jurisdiction in the courts of New South Wales and avoid costly and inconvenient legal proceedings in other jurisdictions:²³²

If the recommended scheme is implemented, NSW would be the forum for disputes concerning access to particular digital records of a deceased or incapacitated user (where the user is or was, at the time of their death, domiciled in NSW). The scheme would override a choice of law term, if its effect would be to prevent an authorised person from accessing the user's records.

[301] The three-step approach outlined in the New South Wales Report has yet to be implemented into legislation, so it is difficult to predict how effective the provisions would be in retaining jurisdiction over extra-jurisdictional custodians. Certainly, the goal of including similar legislative provisions in a model act is to resolve doubts about the enforceability of both choice of law and forum selection clauses. In the Revised American Act, those doubts are resolved in favour of the custodian. In the New South Wales Report, those doubts are resolved in favour of the fiduciary.

4. SUMMARY AND RECOMMENDATIONS

[302] Given the prevalence of extra-jurisdictional custodians, it is important that the Uniform Act address territoriality. The presumption against extra-territoriality is not absolute. The Uniform Act can include clear and specific language to express its intention to include extra-jurisdiction custodians within its purview. Enacting the Uniform Act in Alberta also contributes to consistency among Canadian jurisdictions when it comes to dealing with custodians outside of Canada. Taken together, uniform legislation supports a clear and express intention to apply to custodians beyond its borders that helps to rebut the presumption against extra-territoriality.

²³¹ New South Wales Report at 5.59–5.60, see also Recommendation 5.5.

²³² New South Wales Report at 5.49.

[303] If Alberta wishes to claim jurisdiction over custodians located outside of the province, then it will need to do so expressly through legislation – otherwise, the presumption against extraterritoriality would apply. In considering whether to enact the Uniform Act, Alberta should incorporate the recommendations in the New South Wales Report outlined above that address residence,²³³ choice of law, and forum selection. These recommendations would work in concert with the 2017 Supreme Court of Canada decision in *Douez v Facebook, Inc* which is discussed below.

RECOMMENDATION 16

An Alberta Act should include a provision confirming that the legislation is intended to apply to extra-jurisdictional custodians if the account holder is resident in Alberta at the time of their death or incapacity.

RECOMMENDATION 17

An Alberta Act should include a provision confirming that any clause in a service agreement that has the effect of restricting the access rights of a fiduciary to an account holder’s digital assets is void and unenforceable. The provision should specify that it is also intended to apply to contractual terms including choice of law and forum selection clauses.

C. Judicial Response: *Douez v Facebook, Inc*

[304] *Douez v Facebook, Inc* is instructive in how forum selection clauses in service agreements might be resolved in favour of a domestic account holder.²³⁴ While *Douez* dealt with privacy interests, the reasoning could also apply to fiduciaries seeking to access the digital assets of a deceased or incapacitated account holder.

[305] In *Douez*, the claimant was a resident of British Columbia. When she joined Facebook in 2007, she agreed to its service agreement which included both a choice of law provision (any disputes must be resolved according to California law) and a forum selection provision (any claims must be brought before Santa Clara County courts). In 2011, Facebook used the claimant’s name and profile

²³³ See eg, section 2(1(a) of the EAA, note 87, which confirms that the legislation applies “to the estate of a deceased person if... on the date of death the deceased person was a resident of Alberta”.

²³⁴ *Douez v Facebook, Inc*, 2017 SCC 33 [*Douez*].

picture in one of its advertising products. The claimant brought an action against Facebook in British Columbia and argued that using her name and profile picture without her consent for the purposes of advertising was in contravention of BC's *Privacy Act*.²³⁵ Facebook brought a preliminary motion to stay the claimant's action in BC based on the forum selection clause in the service agreement.

[306] In a 4–3 split on the result, the SCC agreed that Facebook could not rely on its forum selection clause to prevent the claimant from bringing her action in BC.²³⁶ The majority decision noted that since there was no legislation in BC that effectively overrode the forum selection clause, a two-step common law test would apply to determine whether the court ought to enforce the clause:²³⁷

1. The party seeking a stay based on the forum selection clause must establish that the clause is “valid, clear and enforceable and that it applies to the cause of action before the court” using principles of contract law.
2. If the first step is met, then the onus shifts to the plaintiff to show “strong cause” why the court should not enforce the forum selection clause. The court may consider “all of the circumstances” including the convenience of the parties, fairness between the parties, the interests of justice, and public policy.

[307] The majority judgment distinguished between commercial contracts between two sophisticated parties, and consumer contracts in which the parties often have unequal bargaining power:²³⁸

But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on other circumstances of the case.

²³⁵ *Privacy Act*, RSBC 1996, c 373, s 3(2) establishes a statutory tort of privacy that is actionable without proof of damages.

²³⁶ Justices Karakatsanis, Wagner (as he then was), and Gascon penned joint reasons for judgment, while Justice Abella wrote separate reasons concurring in the result. When I refer to the “majority judgment”, I mean the joint reasons authored by the former three justices.

²³⁷ *Douez*, note 234 at paras 28–29.

²³⁸ *Douez*, note 234 at para 33.

[308] The burden remains on the party seeking to avoid the forum selection clause in the service agreement, and “gross inequality of bargaining power” is likely insufficient on its own to establish strong cause.²³⁹

[309] In *Douez*, the claimant was successful at the second stage of the two-part test.²⁴⁰ The majority judgment agreed that there was “gross inequality of bargaining power between the parties” in a consumer context that supported not enforcing the forum selection clause. The majority judgment also considered the statutory privacy right at issue and held that “privacy legislation has been accorded quasi-constitutional status” and “there is an inherent public good in Canadian courts deciding these types of claims”:²⁴¹

[S]ince Ms Douez’s matter requires an interpretation of a statutory privacy tort, only a local court’s interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province.

[310] The majority judgment considered two other secondary factors – the interests of justice, and the comparative convenience and expense of litigating in another forum – as part of the second stage of the test, and held that while these two factors may not have been sufficient to show strong cause on their own, they certainly supported the court’s conclusion that Facebook’s forum selection clause should not be enforced.

[311] While the court resolved *Douez* using the common law test for determining whether to enforce the forum selection clause, that analysis would not have been necessary if the BC *Privacy Act* included a clear legislative intention to override forum selection clauses. The claimant attempted to make this argument based on s 4 of the *Privacy Act*, which provides that:

Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.

²³⁹ *Douez*, note 234 at paras 38–39.

²⁴⁰ At the first stage of the test, the majority judgment was satisfied that the forum selection clause was otherwise enforceable based on the general principles of contract law. In her concurring judgment, Justice Abella found that Facebook failed at the first stage of the test based on other considerations. See *Douez*, note 234 at paras 96–99. The majority judgment preferred to deal with those other considerations as part of the second stage of the common law test. See also *Douez*, note 234 at para 49.

²⁴¹ *Douez*, note 234 at paras 58–59.

[312] The majority judgment held that this section did not apply to contractual provisions and that legislation can override forum selection clauses only if clear and specific language is used:²⁴²

[A]lthough s 4 of the *Privacy Act* expressly provides that it applies “[d]espite anything contained in another Act”, it is silent on contractual provisions. If the legislature had intended to override forum selection clauses, it would have done so explicitly. While the legislature intended s 4 of the *Privacy Act* to confer jurisdiction to the British Columbia Supreme Court to resolve matters brought under the Act, nothing suggests that it was also intended to override forum selection clauses.

[313] In her concurring judgment, Abella J noted that the *Civil Code of Quebec* includes statutory protections that override forum selection clauses in consumer contracts. The *Civil Code of Quebec* provides:²⁴³

3149. Quebec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Quebec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

[314] Although agreeing in the result, Justice Abella disagreed with the majority judgment’s interpretation of s 4 of the *Privacy Act*, finding that the wording of the legislative provision was sufficient to include forum selection clauses in private contracts.²⁴⁴ In contrast, the dissenting opinion agreed with the majority judgment that “[n]othing in the language of s 4 suggests that it can render an otherwise valid contractual term unenforceable” and that clear legislative language is required to limit the scope of forum selection clauses.²⁴⁵

[315] The court’s reasoning in *Douez* leaves the door open for legislation like the Uniform Act to override forum selection clauses in service agreements. To be effective, the relevant legislative provisions must be clear and unambiguous in their intention to override contractual provisions. Otherwise, a claimant – for example, a fiduciary seeking to avoid applying for a court order in a foreign jurisdiction – would have to rely on the common law test for consumer contracts articulated in *Douez*. While a fiduciary could successfully establish a “gross

²⁴² *Douez*, note 234 at para 44.

²⁴³ Art 3149, CCQ.

²⁴⁴ *Douez*, note 234 at para 110.

²⁴⁵ *Douez*, note 234 at paras 142–3. The dissenting opinion also referred to article 3149 of the *Civil Code of Quebec* as an effective way of avoiding forum selection clauses.

inequality of bargaining power” between an individual account holder and a powerful corporate extra-jurisdictional custodian, this likely would not be enough by itself to override the forum selection clause. In *Douez*, the fact that the majority judgment viewed the privacy interest at the heart of the case as quasi-constitutional played a significant role in the court’s decision to not enforce the forum selection clause. It is questionable whether a fiduciary’s interest in the efficient and effective administration of an estate would attain the same status.

[316] It is interesting to note that *Douez* was released in June 2017, almost one full year after the ULCC adopted the Uniform Act in 2016. While Saskatchewan, PEI, New Brunswick, and the Yukon enacted their respective versions of the Uniform Act after *Douez*, only New Brunswick included a forum selection clause in its legislation. It is unknown whether New Brunswick’s forum selection clause was specifically inspired by the reasoning in *Douez*.

[317] Enacting the Uniform Act in Alberta may not entirely remove the requirement to seek extra-jurisdictional court orders. However, incorporating the recommendations set out in the New South Wales Report in an Alberta Act that is consistent with the reasoning in *Douez* may be the best available means of avoiding the presumption against extraterritoriality.

D. Extra-Jurisdictional Court Orders

[318] According to one commentary, fiduciaries seeking to access digital assets from US-based custodians would likely still be required to obtain a court order from the jurisdiction in which the custodian is based:²⁴⁶

Regardless of whether jurisdictions outside the United States enact digital asset access laws, many account holders will still be subject to US laws and may be forced to comply with [the American Act], as many service providers are based in the United States and will still require a fiduciary, regardless of whether the user or the user’s estate would be otherwise subject to US laws, to comply with [the American Act’s] provisions before any access will be granted to a user’s digital accounts.

²⁴⁶ Sharon Hartung & Jennifer L Zegel, *Digital Assets Entanglement: Unraveling the Intersection of Estate Laws & Technology* (LexisNexis Canada, 2022) at 28. The authors note that section 16(e) of the Revised American Act, which allows a custodian to require a fiduciary to seek a court order before granting access to the digital asset, is routinely used by some service providers such as Google and Apple.

[319] In 2017, Maureen Henry obtained an Ontario court order against Bell Mobility, Google Canada, Facebook, and Apple Canada, to get access to her deceased son's social media accounts and phone records.²⁴⁷ It appears that it was an ex parte application in which the applicant appeared on her own behalf and no one appeared from the other parties. According to a 2019 Globe and Mail article, only Bell Mobility and Apple complied with the Ontario order while Facebook ignored it and Google indicated that "it would only respond to a US court order".²⁴⁸ While it appears that a procedural application was brought by Google in Ontario related to this action,²⁴⁹ it is otherwise unclear whether either Facebook or Google continue to resist the Ontario order. According to CBC Radio, Mrs Henry sought a court order in California where Facebook and Google are based.²⁵⁰

[320] A rather more notorious example illustrates another situation requiring extra-jurisdictional court orders.²⁵¹ Gerald Cotten was the founder of Canadian cryptocurrency exchange Quadriga CX. After his unexpected death in 2018, a bankruptcy trustee in Ontario was appointed to deal with the company's assets. Cotten's will included a digital assets clause, which authorized his executrix to access his email accounts, among other things. The bankruptcy trustee was interested in accessing Cotten's personal Gmail account, which he often used to conduct company business before he died. By way of a settlement agreement, the executrix of Cotten's estate agreed to approach Google to ask for access to the Gmail account on the bankruptcy trustee's behalf. To compel Google to provide access to Cotten's personal email account, the executrix was required to apply to a court in Santa Clara County, California, for a declaration that she was entitled

²⁴⁷ *Henry v Bell Mobility*, 2017 ONSC 6070. The order was issued after *Douez*, but it did not reference the SCC decision. See also Samantha Beattie, "Mother takes tech giants to court to get passwords for her dead son's social media accounts", *Toronto Star* (20 October 2017), online: <www.thestar.com/news/gta/2017/10/20/mother-takes-tech-giants-to-court-to-get-passwords-for-her-dead-sons-social-media-accounts.html?fbclid=IwAR1YSPE-_30eqITyyIAkcrWSTIO6tMMr7InrgwnzM18OoEUU9yf8FVuPr6U> [perma.cc/CP3N-ZBK7].

²⁴⁸ Molly Hayes, "Pressing Google and Facebook for answers in her son's death, an Ontario mother stirs the digital-privacy debate", *Globe and Mail* (27 August 2019), online: *CBC Radio* <www.theglobeandmail.com/canada/article-pressing-google-and-facebook-for-answers-in-her-sons-death-an/> [perma.cc/7UGW-GDAS].

²⁴⁹ *Henry v Google Canada et al*, 2021 ONSC 666.

²⁵⁰ CBC Radio, "Ottawa mother's quest for her late son's passwords an uncharted legal road, say experts" (24 November 2019), online: <<https://www.cbc.ca/radio/outintheopen/diy-justice-1.5351892/ottawa-mother-s-quest-for-her-late-son-s-passwords-an-uncharted-legal-road-say-experts-1.5366292>> [perma.cc/M2XF-XKZV].

²⁵¹ See Sharon Hartung & Jennifer L Zegel, *Digital Assets Entanglement: Unraveling the Intersection of Estate Laws & Technology* (LexisNexis Canada, 2022) at 110-17.

to access and distribute Cotten's digital assets, including his Gmail and other associated Google accounts. In July 2020, the California court ordered Google to provide access to Cotten's Gmail account upon the executrix's emailed request.

[321] While California has not enacted the Revised American Act as a separate act, it has incorporated most of its provisions relating to deceased account holders in the California Probate Code.²⁵² Section 876(3) of the Code allows a custodian to require a fiduciary to apply for a court order before granting access to the digital asset. However, the Code also grants custodians the discretion to provide full access to the digital asset without a court order. It is unclear whether Google has developed a practice of requiring a court order before granting access to a digital asset, or in what circumstances it might exercise its discretion to provide access without a court order.

[322] It is also worth mentioning that the Quadriga CX bankruptcy proceedings were in Ontario, which has not enacted the Uniform Act. It is difficult to speculate whether the executrix for Cotten's estate would have been able to avoid court proceedings in California if the Uniform Act had been in force at the time.²⁵³ One perspective suggests that adopting the Uniform Act in Ontario would have made no difference:²⁵⁴

It should be further noted at the time of Cotten's death, in his jurisdiction there was no recognition of fiduciary access to digital assets, and even if there was a law authorizing such access, then and even at the present time, Google will still first insist upon obtaining a US court order legally authorizing Google's release of the information.

[323] While both the Henry and Cotten examples involved personal Google accounts, there are also some stark differences. In the Henry example, Mrs Henry was seeking access to her son's accounts to try to explain the circumstances surrounding his death. Google's response to Mrs Henry's request for access was met with the requirement that she seek a court order in California. There was no suggestion of any financial value associated with his accounts, and Mrs Henry represented herself during the Ontario proceedings. Given that her son, Dovi Henry, was a 23 year old university student when he died, it may be reasonable to assume that he did not leave behind a large estate. If Mrs Henry was required to retain legal counsel in California, it may be that the cost of obtaining a court

²⁵² California has also introduced legislation to adopt the Revised American Act. See note 21.

²⁵³ It is likely that Gerald Cotten's estate was probated in Nova Scotia, where he lived before his death. Nova Scotia has not yet enacted the Uniform Act.

²⁵⁴ Sharon Hartung & Jennifer L Zegel, *Digital Assets Entanglement: Unraveling the Intersection of Estate Laws & Technology* (LexisNexis Canada, 2022) at 127.

order to compel Google to provide access surpassed the value of the estate. While those costs may be worth it to Mrs Henry if she finds answers about her son's death, other similarly situated fiduciaries may abandon their claims because the costs associated with confirming access rights in a foreign jurisdiction cannot be justified given the overall value of the estate.

[324] In contrast, the Cotten example involved a very large estate and significant company shortfalls totalling in the hundreds of millions of dollars. Given the unique circumstances of that case – namely, that no one knew where Gerald Cotten kept the keys to approximately \$250 million worth of cryptocurrency – it is easy to justify the costs associated with seeking a California court order to access his personal Gmail account. Other fiduciaries dealing with large estates may find it worthwhile to spend estate funds to obtain a court order in a foreign jurisdiction if the value of the digital asset is high enough to justify the cost.

E. Reciprocal Enforcement of Judgments Act

[325] During consultation, one lawyer asked whether the *Reciprocal Enforcement of Judgments Act* might be a useful tool to promote extra-jurisdictional recognition of an Alberta Act.²⁵⁵

[326] In Alberta, a party can seek to enforce a judgment obtained in another jurisdiction either by commencing a common law action for enforcement or by registering the judgment under REJA.²⁵⁶ To register a judgment under REJA, two conditions must first be met: the judgment must be for money (except for maintenance and support orders made in the family law context),²⁵⁷ and the original court must be in a reciprocating jurisdiction. Reciprocating jurisdictions are designated in regulation and include all Canadian provinces and territories (except Quebec), Australia, and the US states of Washington, Idaho, Montana, and Arizona.²⁵⁸ If a judgment creditor follows the registration procedure set out in REJA, then as of the date of the registration the judgment has the same force and effect as if it had been originally given by the Court of King's Bench.²⁵⁹

²⁵⁵ *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6 [REJA].

²⁵⁶ 687725 BC Ltd v Rakov, 2022 ABCA 311 at para 1.

²⁵⁷ REJA, note 255, s 1(1)(b).

²⁵⁸ *Reciprocating Jurisdictions Regulation*, Alta Reg 344-1985, s 1.

²⁵⁹ REJA, note 255, s 5.

[327] There are some obvious limitations of REJA in the context of fiduciary access to digital assets. First, the judgment must involve a sum of money payable to a judgment creditor. A grant of probate or other court order designating a personal representative, guardian, trustee, or other fiduciary would not be considered a “judgment” as defined by REJA. Second, the list of reciprocating jurisdictions designated in the regulation is rather short and does not include many jurisdictions with high numbers of large online service providers, such as California.²⁶⁰

[328] More importantly, REJA is used as a tool to recognize certain foreign judgments in Alberta. In contrast, the Uniform Act contemplates Alberta as the original jurisdiction. The purpose of the Uniform Act is to increase broader recognition of Alberta instruments and court orders in other jurisdictions. In this way, the Uniform Act can be seen to work in the opposite direction from REJA.

[329] Other jurisdictions may have enacted their own version of REJA that recognizes Alberta as a reciprocating jurisdiction. However, if the definition of “judgment” in another jurisdiction is similarly limited to money judgments, then the foreign legislation would likely have limited utility to a fiduciary seeking to access digital assets outside of Alberta.

F. Need for International Cooperation

[330] During their review of this Project, the ALRI Board agreed that there is a strong need for international cooperation to help address the jurisdictional issues raised by the Uniform Act. As described in this chapter, adopting an Alberta Act will not necessarily eliminate the many challenges related to extra-jurisdictional recognition. That said, enacting the Uniform Act in Alberta could contribute towards growing international consensus about the need to regulate the digital space.

[331] One example of international cooperation is the recognition of international wills. In 1973, the International Institute for the Unification of Private Law developed the *Convention Providing a Uniform Law on the Form of an International Will* [Convention]. The purpose of the Convention is “to harmonise and simplify proof of formalities for wills... by setting up a uniform law introducing a new form of will, known as an ‘international will’, which is

²⁶⁰ It is interesting to note that the headquarters of Amazon.com is located in Seattle, Washington, which is a reciprocating jurisdiction under REJA.

recognised as a valid form in all countries that are party to the convention.”²⁶¹ There are 13 contracting states to the *Convention*, including Canada, Australia, the United Kingdom, and the United States.²⁶² In Alberta, the *Convention* has been adopted by reference in the *Wills and Succession Act* and applies to all wills as of December 1, 1978.²⁶³

[332] The Hague Conference on Private International Law offers other examples of international cooperation. For example, the Alberta Court of King’s Bench has guidelines to serve parties located outside of Canada based on the Hague Conference on Private International Law 1965 *Service Convention*.²⁶⁴ Another convention that may be relevant to jurisdictional issues in the future is the 2005 *Choice of Court Convention*, which aims to protect forum selection clauses in cross-border commercial transactions contracts.²⁶⁵ Despite the fact that Canada is not currently a party to the *Choice of Court Convention*, the ULCC adopted the *Uniform Act to Implement the 2005 Convention on Choice of Court Agreements* in February 2020.²⁶⁶ While the implications of adopting the *Choice of Court Convention* in Canada have been academically considered, it is less clear how the *Choice of Court Convention* may interact with the Uniform Act when it comes to enforcing forum selection clauses in online service agreements restricting fiduciary access to digital assets.²⁶⁷ It is likely premature to consider the potential effects of the *Choice of Court Convention* given that Canada is not a signatory.²⁶⁸

²⁶¹ Australia, Attorney-General’s Department, International wills, online: <www.ag.gov.au/international-relations/private-international-law/international-wills> [perma.cc/D86G-GCAL].

²⁶² UNIDROIT, *Status – Convention Providing a Uniform Law on the Form of an International Will*, online: <www.unidroit.org/instruments/international-will/status/> [perma.cc/8KVV-XETG].

²⁶³ See *Wills and Succession Act*, SA 2010, c W-12.2, Part 2, Division 3, and Schedule. See also *International Wills Registration System Regulation*, Alta Reg 8/2012.

²⁶⁴ Court of King’s Bench of Alberta, “Service Outside Canada (Includes Hague Service Convention”, online: <www.albertacourts.ca/kb/areas-of-law/civil/service-outside-canada> [perma.cc/QXJ8-83DH].

²⁶⁵ Hague Conference on Private International Law, “Choice of Court Section”, online: <www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> [perma.cc/6TG3-GVCU].

²⁶⁶ Uniform Law Conference of Canada, *Uniform Act to Implement the 2005 Convention on Choice of Courts Agreements (2020)* (1 February 2020), online: <[www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Act-to-Implement-the-2005-Convention-on-Choice-Agrrements-\(2020\).pdf](http://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Act-to-Implement-the-2005-Convention-on-Choice-Agrrements-(2020).pdf)> [perma.cc/VY5Y-28HW]. Ontario, British Columbia, and Saskatchewan have enacted a previous version of this Uniform Act.

²⁶⁷ See Genevieve Saumier, “Has the CJPTA readied Canada for the Hague Choice of Court Convention?” (2018) 55:1 Osgoode Hall LJ 141.

²⁶⁸ Alberta could choose to implement the Uniform Act to Implement the 2005 Convention on Choice of Court Agreements even if Canada is not a signatory to the Choice of Court Convention. However, Saumier notes that “provincial legislatures may... wish to exclude the application of the [Convention]... where provincial legislation prohibits or circumscribes the operation of forum selection clauses”: Genevieve

[333] ALRI recognizes that in the absence of an international treaty or convention that specifically deals with fiduciary access to digital assets, an Alberta Act will have some inherent limitations based on territoriality. Simply put, an Alberta Act cannot bind a custodian located in a different jurisdiction. However, it is worth acknowledging that many jurisdictions in Canada, the US, Australia, and Europe have recognized the need to enact legislation to facilitate fiduciary access to digital assets. An Alberta Act would contribute to this growing international consensus which may, in turn, result in broader support for developing a formal treaty or convention.

G. Ancillary Jurisdictional Issues

1. DATA STORED OUTSIDE THE JURISDICTION

[334] The New South Wales Law Reform Commission noted that potential problems may arise when it comes to data stored overseas:²⁶⁹

Another potential difficulty with any NSW legislation is whether it can be applied to reach data stored outside the jurisdiction by electronic communication service providers, such as email, or remote computing services, including cloud computing.

[335] To address this problem, New South Wales suggested that proposed legislation “could make it clear that it applies to the data of New South Wales residents regardless of where it is stored.”²⁷⁰ A similar approach could be taken in Alberta by including a provision in the Uniform Act confirming that the location of the digital asset has no effect on jurisdiction. While the specific language of such a provision is best left to legislative drafters, the provision is intended to work in concert with other provisions dealing with residence, choice of law, and forum selection clauses.

Saumier, “Has the CJPTA readied Canada for the Hague Choice of Court Convention?” (2018) 55:1 Osgoode Hall LJ 141 at 157, fn 75.

²⁶⁹ New South Wales Law Reform Commission, *Access to digital records upon death or incapacity*, Consultation Paper 20 (2018) at 5.20.

²⁷⁰ New South Wales Law Reform Commission, *Access to digital records upon death or incapacity*, Consultation Paper 20 (2018) at 5.21.

RECOMMENDATION 18

An Alberta Act should include a provision that the location of a digital asset has no effect on whether an Alberta court can take jurisdiction to confirm a fiduciary's right to access the digital asset.

CHAPTER 7

Non-Custodial Digital Assets

A. Introduction

[336] The recommendations in this report are intended to apply to digital assets held by a custodian. The Uniform Act, section 1 defines a “custodian” as “a person who holds, maintains, processes, receives or stores a digital asset of an account holder.” The custodian must be identifiable and compellable. In other words, there must be a specific person or entity who may be ordered by a court to provide a fiduciary with access to the digital asset.

[337] It is possible, however, that certain types of digital assets do not have an identifiable or compellable custodian. These “non-custodial” digital assets fall outside the scope of the Uniform Act. As such, a fiduciary cannot use the Uniform Act to gain access to non-custodial digital assets.

B. Custodian Must Be Identifiable and Compellable

[338] To determine whether a digital asset is governed by the Uniform Act, the fiduciary must first consider whether there is an identifiable and compellable custodian. It may be tempting to rely on the specific class of digital asset to make this determination – for example, to say that all cryptocurrency falls outside the Uniform Act. However, the focus of this inquiry should be on whether there is an identifiable and compellable custodian who “holds, maintains, processes, receives or stores a digital asset of an account holder,” regardless of the specific asset class.

1. IS THE DIGITAL ASSET HELD BY A THIRD PARTY?

[339] The first question to ask is whether the digital asset is held by the account holder directly, or by a third party on the account holder’s behalf. In many cases, it will be relatively easy to determine whether the digital asset is held by a third party. Social media accounts, for example, usually involve service agreements that set out the relationship between an account holder and the online service provider. The terms of the service agreement will disclose whether the digital asset – in this example, the social media account – is being held, maintained, processed, received, or stored by someone other than the account holder.

[340] Some digital assets are held directly by the account holder. These types of digital assets are called “bearer” assets, meaning that they do not require a third party intermediary to hold.²⁷¹ To understand these types of assets, it may be helpful to consider them as being similar to cash. For example, Joanna does not require a third party intermediary to access and use the cash in her own wallet. However, if Joanna deposits the cash into her bank account, then she will need to go through a third party – the bank – to access and use the cash.

[341] Many crypto assets such as cryptocurrency and non-fungible tokens [NFTs] are considered bearer assets because they are held directly by the account holder. However, some crypto assets may be held in what is known as a “custodial wallet”. The differences between custodial and non-custodial wallets will be discussed below.

2. DOES THE THIRD PARTY HAVE CONTROL OVER WHO CAN ACCESS THE DIGITAL ASSET?

[342] If the fiduciary has identified a third party as holding the digital asset, then the second question considers whether the third party has control over who can access the digital asset. If the third party does not have control over who can access the digital asset, then they cannot be compelled by a court order or other instrument to provide access to a fiduciary.

[343] The primary way of determining whether the third party has control over who can access the digital asset is to look at the service agreement between the third party and the account holder. Another way is by considering whether the digital asset is stored using a decentralized or centralized database system. For example, Bitcoin uses a decentralized blockchain database system, which means that information is not stored by a single identifiable custodian or group of custodians that has control over the entire database. Instead, the database is shared by thousands of individuals all over the world who are essentially operating on their own.²⁷² Bitcoin is considered highly secure due to its encryption, which means that unless the account holder has provided the key to their digital wallet, it would be virtually impossible for the fiduciary to access the

²⁷¹ Section 2 of the *Bills of Exchange Act*, RSC 1985, c B-4, defines “bearer” as “the person in possession of a bill or note that is payable to bearer”.

²⁷² See Adam Hayes, “Blockchain Facts: What Is It, How It Works, and How it Can Be Used” (updated 15 Dec 2023), online: Investopedia <www.investopedia.com/terms/b/blockchain.asp#bitcoin-vs-blockchain> [perma.cc/6NWC-9PWF].

digital asset in any other way.²⁷³ Other cryptocurrencies use a decentralized blockchain model as well, so this potential challenge is not limited to Bitcoin.

[344] Non-fungible tokens (NFTs) also frequently use a decentralized blockchain model.²⁷⁴ NFTs are collectible "one-of-a-kind" assets in the digital world that can be bought and sold like any other piece of property, but they have no tangible form of their own.²⁷⁵ NFTs became popularized in the art and collectible market. Using NFTs, digital artwork can be "tokenised" to create a certificate of ownership. While the digital image itself might be endlessly copied or reproduced, the token authenticates ownership of the original. In some ways this is similar to the physical world, in which there may be countless copies and reproductions of the Mona Lisa in circulation while the authenticated original painting resides in the Louvre. As the use of blockchain technology expands, some predict that NFTs will be used to confirm authenticity in other sectors such as health care.²⁷⁶

[345] It may be tempting to consider the question of whether a third party has control over a digital asset by pointing to blockchain technology as a complete answer – namely, that all blockchain-based digital assets will automatically fall outside the Uniform Act. This conclusion is incorrect. Centralized database systems can also use blockchain technology – for example, a company may store information about its customers using blockchain within an internal network of multiple computers. Answering the question of who has control over the digital asset is central to determining whether there is a third party custodian who can be compelled to provide access to a fiduciary.

3. CUSTODIAL AND NON-CUSTODIAL DIGITAL WALLETS

[346] The primary challenge of digital assets stored using a decentralized database system is that they are virtually impossible to access without the password information provided by the original account holder. In these cases,

²⁷³ See "What happens to your digital bitcoins when you die?" (8 January 2018), online: CBS News <www.cbsnews.com/news/what-happens-to-your-digital-bitcoins-if-you-die/> [perma.cc/C39L-G34B].

²⁷⁴ See Robyn Conti, "What is an NFT? Non-Fungible Tokens Explained" (17 Mar 2023), online: Forbes <www.forbes.com/advisor/investing/nft-non-fungible-token/> [perma.cc/6VTR-SZ3Q].

²⁷⁵ See BBC News, "What are NFTs and why are some worth millions?" (12 March 2021), online: BBC News <www.bbc.com/news/technology-56371912> [perma.cc/25PB-8E4X].

²⁷⁶ See Aaron Tan, "How non-fungible tokens can be used to manage health data" (25 April 2023), online: ComputerWeekly.Com <www.computerweekly.com/news/365535659/How-non-fungible-tokens-can-be-used-to-manage-health-data?_gl=1*ngtyp9*_ga*MTgwNzM5NTk3OC4xNjk1MjMxMTY4*_ga_TQKE4GS5P9*MTY5NTIzMTI2OC4xLjEuMTY5NTIzMTM0NS4wLjAuMA..&_ga=2.43814629.1188136003.1695231168-1807395978.1695231168> [perma.cc/9UYH-RTND].

the absence of an identifiable and compellable custodian means that the fiduciary cannot use the Uniform Act to gain access to the digital asset. If the account holder does not take steps to ensure that their password information is made available to their fiduciary, then access to the digital asset will likely be lost forever after the account holder's death or incapacity. It would be as if the account holder buried a chest of gold in the ground but failed to leave behind a map to tell their fiduciary exactly where to dig.

[347] It is important to have a basic understanding of how digital wallets work to understand the inherent challenges of gaining access to non-custodial digital assets. Wallets consist of two main components: a public key and a private key. The public key functions as the wallet's address. When a crypto asset is purchased, it is delivered to this address and into the account holder's custody. The private key is an alphanumeric code that allows the account holder to access the crypto asset itself. The private key is essential for accessing the crypto asset – without it, access to the crypto asset is lost even though the crypto asset itself continues to exist on the public blockchain.

[348] When dealing with crypto assets, fiduciaries should first determine whether the assets are held in custodial or non-custodial wallets.²⁷⁷ Custodial wallets involve a third party who takes custody of the private key on behalf of an account holder. For example, web-based trading platforms and cryptocurrency exchanges such as Coinbase may offer custodial wallets that allow account holders to store their private keys either online or on an app. If the private key is held in a custodial wallet, it may be possible for a fiduciary to use the Uniform Act to gain access from an identifiable and compellable third-party custodian.

[349] In contrast, non-custodial wallets do not typically involve any third parties outside of the account holder. As a result, account holders are solely and entirely responsible for securing their private keys. If an account holder has not taken additional steps to ensure that their private key information is transferred to their fiduciary upon their death or incapacity – for example, by writing down

²⁷⁷ Jackson Wood, "Custodial Wallets vs. Non-Custodial Crypto Wallets" (11 May 2023), online: *CoinDesk* <www.coindesk.com/learn/custodial-wallets-vs-non-custodial-crypto-wallets/> [perma.cc/V4DV-HCEQ]. See also Crypto.com, "What Is a Crypto Wallet? A Beginner's Guide" (26 April 2022), online: *Crypto.com* <crypto.com/university/crypto-wallets> [perma.cc/N3CP-PDQP]. Custodial and non-custodial wallets can either be "hot" or "cold" – "hot" wallets are stored online, while "cold" wallets are kept offline, usually in a physical device that is disconnected from the internet. Only "hot" wallets can directly access the blockchain, which makes them potentially vulnerable to hacking attacks. Many crypto users prefer to keep their private keys in offline "cold" wallets for added security when they are not actively engaged in trading or purchasing crypto assets.

the alphanumeric code or storing the private key on a flash drive – then the non-custodial wallet cannot be accessed. In this way, digital assets held in non-custodial wallets fall outside the scope of the Uniform Act because there is no identifiable and compellable third-party that can be ordered to provide access.²⁷⁸

[350] Whether an account holder chooses to hold crypto assets using a custodial or non-custodial wallet seems to be a matter of personal preference. An online survey conducted by the Ontario Securities Commission in 2022 provides some insight as to the most popular methods for storing crypto assets by Canadian investors:²⁷⁹

- 49% store their crypto assets on the exchange or trading platform they originally purchased them from (eg, custodial wallet).
- 32% store their crypto assets in a crypto wallet online where they access their crypto assets via a digital private key only they can access (eg, non-custodial “hot” wallet).
- 9% store their crypto assets offline in a hardware wallet where they have a private key that only they can access (eg non-custodial “cold” wallet).
- 4% store their private key on a piece of paper that is kept in a safe place.²⁸⁰
- 3% store their crypto assets using other means.
- 4% did not know how they stored their crypto assets.

[351] From a fiduciary’s perspective, knowing whether crypto assets are held in custodial or non-custodial wallets is essential for the proper administration of a person’s estate. The Uniform Act cannot be used to obtain access to non-

²⁷⁸ The differences between custodial and non-custodial wallets have recently come up in a different context from fiduciary access to digital assets. In early 2022, the federal government invoked the *Emergencies Act* in response to the occupation of downtown Ottawa by people affiliated with the “Freedom Convoy.” As part of the measures, the federal government attempted to freeze the assets – including cryptocurrency accounts – of convoy organizers. While accounts held in custodial wallets by third party cryptocurrency exchanges were subject to the freezing orders, the same could not be said about non-custodial wallets. See Craig Lord, “Freezing ‘freedom convoy’ crypto possible, but faces roadblocks, experts say” (23 February 2022), online: *Global News* <globalnews.ca/news/8640652/freedom-convoy-crypto-crackdown-tech-hurdles/> [perma.cc/64HW-2U59].

²⁷⁹ Ontario Securities Commission, “Crypto Asset Survey” (26 September 2022) at 19, online (pdf): *Ontario Securities Commission* <www.osc.ca/sites/default/files/2022-10/inv_research_20220928_crypto-asset-survey_EN.pdf> [perma.cc/57BH-PNTM].

²⁸⁰ Writing down the private key on a piece of paper is similar to holding the private key in a non-custodial “cold” wallet but in a non-digital format.

custodial digital assets. Account holders must ensure that they are taking the necessary steps to transfer vital access information – such as private keys – to their fiduciary after death or incapacity. Failing to do so means that their beneficiaries will be deprived of potentially valuable estate assets.

4. SUMMARY

[352] The Uniform Act is intended to deal with digital assets held by a custodian. However, many types of crypto assets – such as cryptocurrency and NFTs – are held as non-custodial digital assets. The absence of an identifiable and compellable custodian means that these types of digital assets will fall outside the scope of the Uniform Act.

[353] The Ontario Securities Commission Survey indicates that over 13% of Canadians own or invest in crypto assets.²⁸¹ As the crypto asset market continues to grow, accounting for non-custodial digital assets such as cryptocurrency will become a necessary part of estate planning.²⁸² If an account holder wishes to give their fiduciary access to a non-custodial digital asset after death or incapacity, they should ensure that there is a process in place to share the necessary access information with the fiduciary.

[354] While the Uniform Act can be helpful in providing fiduciaries with a mechanism for gaining access to custodial digital assets, it is important to recognize its inherent limitations when it comes to non-custodial digital assets. The challenge lies in the technology itself, not the proposed legislation. Decentralized databases simply lack a central authority that can be compelled by court order or other instrument to provide access to anyone, including fiduciaries. Therefore, ALRI's recommendations to enact the Uniform Act in Alberta are limited to custodial digital assets only.

²⁸¹ Ontario Securities Commission, "Crypto Asset Survey" (26 September 2022) at 5, online (pdf): *Ontario Securities Commission* <www.osc.ca/sites/default/files/2022-10/inv_research_20220928_crypto-asset-survey_EN.pdf> [perma.cc/57BH-PNTM].

²⁸² Future market developments in the crypto asset sector include the continued growth of decentralized finance systems – also known as DeFi – which replace traditional intermediaries such as banks, stock exchanges, and other financial institutions with direct peer to peer transactions using blockchain technology: See Kevin Roose, "What is DeFi?" (last accessed 7 July 2023), online: *The New York Times* <www.nytimes.com/interactive/2022/03/18/technology/what-is-defi-cryptocurrency.html> [perma.cc/U2Z5-39TL]; E Napoletano, "What is DeFi? Understanding Decentralized Finance" (28 April 2023), *Forbes*, online: www.forbes.com/advisor/investing/cryptocurrency/defi-decentralized-finance/ > [perma.cc/98L4-JVJV]. DeFi systems are specifically designed to remove intermediaries from most financial transactions, which suggests the absence of an identifiable and compellable custodian as contemplated under the Uniform Act.

C. Password Managers and Other Online Planning Tools

[355] There have been two significant developments in the digital marketplace to assist people in managing their digital assets. The first development is the creation of third-party online planning tools that are specifically intended to deal with a person's digital assets after death ("after-death planning tools"). The second, and arguably more significant, development is the increased use of online tools that create, capture, or manage a person's account passwords ("password managers").

[356] In the ALRI Survey, 42% of respondents who own cryptocurrency indicated that they use a password manager or vault.²⁸³ Of these respondents, only 13% have given someone permission to access their password manager or vault if something happens to them. During consultation, one lawyer suggested that password managers and other online planning tools that allow an account holder to store their passwords for various online accounts are a good idea and should be encouraged. This lawyer reasoned that if the fiduciary can access the password manager, then they would have everything they need to deal with all the account holder's digital assets.

[357] While after-death planning tools and password managers can be helpful in many ways, there are also many potential limitations in how they might be used by fiduciaries seeking to access a person's digital assets after death or incapacity. For the reasons discussed below, the use of after-death planning tools and password managers should not be considered effective replacements for fiduciary access as confirmed by the Uniform Act. The risks identified below also apply to non-custodial digital assets that fall outside the Uniform Act.

1. AFTER-DEATH PLANNING TOOLS

[358] An example of an after-death planning tool is Lantern, which allows account holders to either plan for their own death or to manage the death of another person.²⁸⁴ Lantern – which offers both a free and a paid version of its services – seems to operate as a type of digital repository for information and documents related to a person's estate. For example, an account holder may use Lantern to provide instructions on where to find their will or to upload a copy of their will directly to their Lantern account. Lantern users can also provide

²⁸³ Password managers or vaults are usually third-party applications that store passwords and login information for multiple online accounts. They are discussed in greater detail later in this chapter.

²⁸⁴ See Lantern, online: <lantern.co/> [perma.cc/Z6H4-7VYC].

instructions regarding where to find financial information, how to access social media accounts, and funeral wishes. Lantern does seem to include many different categories of digital assets, including online bank accounts and password managers.²⁸⁵ Perhaps most importantly, Lantern invites account holders to designate an individual who will be able to access the digital repository after the account holder's death.

[359] There are many potential challenges with using after-death planning tools in estate planning. One of the major challenges is digital longevity. While Lantern currently is an active, it is still a relatively new tool. Similarly, Trust & Will²⁸⁶ and Lexikin²⁸⁷ are two other currently active after-death planning tools. However, other after-death planning tools – such as SafeBeyond and AfterVault – which appear to have been fully functional as recently as 2020, are no longer being supported in 2023. Individuals wishing to use after-death planning tools should approach such tools with some caution, particularly if the tool is new and digital longevity has not been established.²⁸⁸

[360] Another potential challenge is that after-death planning tools developed in other jurisdictions may have limited relevance for Alberta users. For example, US-based services such as Lantern reflect US laws and terminology. While such tools might provide a helpful starting point in thinking about what should happen to a person's digital assets after death, Alberta users would benefit more from a domestic legislative regime that confirms fiduciary access.

[361] Finally, after-death planning tools may introduce some uncertainty when it comes to who should have the right to access a person's digital assets. Consider the following example. Shonda creates an account on After-Death, a fictional after-death planning tool, and uses it to designate Sidney as the person who has the right to access her digital assets after Shonda dies. When Shonda dies

²⁸⁵ This information was obtained by making a free Lantern account and navigating what options are available to account holders. For this purpose, the website itself has been cited.; "Lantern Dashboard" (Accessed 28 June 2023), online: *Lantern* <www.lantern.co/app/dashboard> [perma.cc/4CSZ-Z4S4]. However, the free service offered by Lantern does not seem to include an "other" category where individuals could input how to access digital assets that they wish to be accessed after their death but that fall outside the pre-made categories offered by the service.

²⁸⁶ "Trust & Will" (Accessed 27 June 2023), online: *Trust & Wills* <[\trustandwill.com/](http://trustandwill.com/)> [perma.cc/9UXH-U5FT].

²⁸⁷ "Lexikin" (Accessed 27 June 2023), online: *Lexikin* <www.lexikin.com/> [perma.cc/U73P-JMA].

²⁸⁸ There is some suggestion that after-death planning tools became more popular during the early months of the COVID-19 pandemic: see for example, Jennifer Miller, "Boom Time for Death Planning" (16 June 2020), online: *New York Times* <www.nytimes.com/2020/07/16/business/boom-time-for-death-planning.html> [perma.cc/76FY-YQQ8]; Margot Boyer-Dry, "Online Funeral Businesses Take Off Amid Coronavirus" (9 May 2020), online: *The Wall Street Journal* <www.wsj.com/articles/online-funeral-businesses-take-off-amid-coronavirus-11588966480?mod=business_lead_pos11> [perma.cc/V5RQ-YXBZ].

without a will, her sibling Jordan applies to the court to be appointed as the administrator of Shonda’s estate. Meanwhile, Sidney receives a notification from After-Death with access information to Shonda’s digital assets. In this case, who should be able to access Shonda’s digital assets – particularly while the grant of administration is still pending? Should instructions stored in an after-death planning tool be viewed as persuasive evidence by a court in determining who has priority to access a digital asset?

2. PASSWORD MANAGERS

[362] Password managers are tools that allow users to create, manage, and store passwords to online accounts. Password managers are usually third-party applications that work across multiple platforms – for example, 1Password and LastPass. Many web browsers – including Google Chrome, Apple Safari, and Microsoft Edge – also include a feature that allows users to store their passwords to different online accounts and will offer to “auto-fill” the password when the user visits the website. The use of password managers appears to be increasing, particularly among users with multiple online accounts, due to their convenience and security.²⁸⁹

[363] Password managers serve a different purpose than after-death planning tools. While after-death planning tools are specifically intended to provide access information to a designated person upon the account holder’s death, password managers do not seem to include this feature. For example, the terms of service for 1Password expressly prohibit account holders from disclosing passwords to third parties.²⁹⁰ However, 1Password does seem to offer other options, including family accounts where family members can share passwords and account information with one another.²⁹¹ An account holder can also create an “Emergency Kit”, which is a PDF document that records the user’s account

²⁸⁹ See for example, United Kingdom, National Cyber Security Centre, Password managers: using browsers and apps to safely store your passwords (21 December 2021), online: <www.ncsc.gov.uk/collection/top-tips-for-staying-secure-online/password-managers> [perma.cc/2JR5-NKNF]. According to Security.Org, approximately 45 million Americans use password managers. See Security.Org, “Password Manager Annual Report 2022” (Accessed 28 June 2023), online: Security.Org <www.security.org/digital-safety/password-manager-annual-report/#:~:text=Key%20Findings,memorization%20or%20hand%2Dwritten%20notes> [perma.cc/SQL3-NL2D].

²⁹⁰ 1Password, “Terms of Service: Service Agreement for 1Password users and customers” (23 September 2021), online: *1Password* <1password.com/legal/terms-of-service/> [perma.cc/VKR4-QBFC].

²⁹¹ 1Password, “1Password Families”, online: *1Password* <support.1password.com/explore/families/> [perma.cc/UWT6-8CJ7].

details, along with a secret de-encryption key, so that other individuals may access it.²⁹² Another popular password manager, LastPass, also prohibits sharing password information to a third party.²⁹³ LastPass does offer an “Emergency Access” option for third parties, which must first be set up by the original account holder.²⁹⁴ If the account holder then dies or becomes incapacitated, the third-party can be granted access to the account.²⁹⁵

[364] Password managers have similar risks to after-death planning tools. Although password managers seem to have wider adoption and a much larger user base than after-death planning tools, the digital longevity of many third-party applications is still being established. Service agreements may preclude sharing access information with another person, including fiduciaries. If the service agreement does allow an account holder to designate another person to access the password manager upon death or incapacity, it can introduce uncertainty when the designated person is not also the fiduciary.

3. SUMMARY

[365] Account holders may be planning to rely primarily on after-death planning tools and password managers to store and transfer access information to their fiduciaries after death or incapacity. It is worth remembering that such third-party applications may have limited utility for fiduciaries seeking access to a person’s digital assets. Account holders must ensure that the password information stored in third party applications is kept up to date. Many of these applications and online tools are relatively new and have yet to demonstrate digital longevity. Account holders who rely on third party applications to store their password information would likely need to use a back-up method in case the application is no longer supported in the future.

[366] Account holders who use third party applications to manage their password and access information may be taking significant risks, particularly

²⁹² Specifically, 1Password recommends printing off the PDF, manually writing in the password, and keeping it in a safe place or with a trusted individual: see 1Password, “Get to Know Your Emergency Kit” (8 June 2023), online: *1Password* <support.1password.com/emergency-kit/> [perma.cc/N7LW-RD65].

²⁹³ See article 4.3, LastPass, “Terms of Service” (August 2022), online: *Last Pass* <www.lastpass.com/legal-center/terms-of-service/personal> [perma.cc/8K4C-WH7V].

²⁹⁴ LastPass, “Emergency Access” (2023), online: *LastPass* <www.lastpass.com/features/emergency-access#:~:text=After%20they%20have%20passed%20away,end%2Dof%2Dlife%20affairs> [perma.cc/JLC8-7V4V].

²⁹⁵ LastPass, “Emergency Access” (2023), online: *LastPass* <www.lastpass.com/features/emergency-access#:~:text=After%20they%20have%20passed%20away,end%2Dof%2Dlife%20affairs>> [perma.cc/JLC8-7V4V].

when non-custodial digital assets form part of their estate. If these online tools fail to transfer the necessary access information, then the fiduciary has no other means to obtain access to the non-custodial digital asset. In the absence of an identifiable and compellable custodian, the Uniform Act cannot be used to regain lost access.

Appendix A – Uniform Access to Digital Assets by Fiduciaries Act

Introduction

The *Uniform Access to Digital Assets by Fiduciaries Act* addresses four types of fiduciaries: a personal representative of a deceased's estate, a guardian appointed for an account holder, an attorney acting under a power of attorney and a trustee. The Uniform Act confirms that the usual powers of fiduciaries extend to digital assets, with whatever practical implications that extension may have. The Uniform Act does not deal with any other efforts to access digital assets. Family members, friends or other interested persons may seek access, but, unless those persons are fiduciaries, their efforts will be subject to other laws and will not be covered by the Uniform Act.

Digital assets held by individuals are increasing in number and value. A digital asset may be defined as anything that is stored in a binary format or more simply an electronic record. When a person dies or becomes incapacitated, a fiduciary such as a personal representative, guardian, attorney or trustee needs access to these electronic records in order to properly administer the property of the deceased or incapacitated person.

At present, the law does not deal adequately with how fiduciaries may gain access to these digital assets. Neither the right of fiduciaries to deal with digital assets, nor the duty of custodians of digital assets to provide fiduciaries with access to digital assets, is clear to everyone in the digital world. This is becoming more important as we experience the greying of our population and as digital assets held by all individuals in our society increase.

The general goal of the Act is to facilitate fiduciary access while respecting the privacy and intention of the account holder. The Act adheres to the traditional approach of trusts and estates law, which respects the intention of the account holder. The Act also promotes the fiduciary's ability to administer the account holder's property in accord with legally binding fiduciary duties.

The scope of the Act is inherently limited by the definition of "digital assets." The Act applies only to electronic records. The application of the Act does not extend to the underlying tangible asset or liability unless it is itself an electronic record.

The Act is divided into 10 sections.

Section 1 defines terms used in the Act.

Section 2 governs applicability, clarifying the scope of the Act, which fiduciaries have access to digital assets under the Act and the application of the Act to custodians. The Act addresses only the rights of the four types of fiduciaries, and it is designed to provide access without changing the ownership of the digital asset.

Sections 3 to 5 establish the rights of personal representatives, guardians, attorneys acting in accordance with a power of attorney, and trustees to access digital assets. A

personal representative has access to all of the deceased's digital assets unless the deceased has expressly indicated otherwise in a will or other document. A guardian may access digital assets in accordance with a court order. An attorney acting in accordance with a power of attorney has access to all of a donor's digital assets not subject to the protections of other applicable law unless the donor expressly indicated otherwise; if another law protects the asset, then the power of attorney must explicitly grant access to the asset. A trustee may access any digital asset held by the trust unless that access is contrary to the terms of the trust or to other applicable law. The duties imposed by law on fiduciaries that apply to tangible assets also apply to digital assets.

Section 6 provides that a provision in a service agreement is unenforceable if the provision limits access contrary to this Act.

Section 7 addresses the obligation of a custodian to provide access to a fiduciary of an account holder and other compliance matters.

Section 8 allows a fiduciary to apply to the court for directions.

Section 9 provides custodians with protection from liability.

Section 10 allows for regulations.

UNIFORM ACCESS TO DIGITAL ASSETS BY FIDUCIARIES ACT

Contents

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- 11 Commencement

Definitions

1 In this Act:

“account holder” means an individual who has entered into a service agreement with a custodian;

Comment: An “account holder” includes a deceased individual who entered into the agreement during the individual’s lifetime.

“court” means the *[superior court of the enacting jurisdiction]*;

“custodian” means a person who holds, maintains, processes, receives or stores a digital asset of an account holder;

Comment: A “custodian” includes any online service provider as well as any other person that holds, maintains, processes, receives or stores electronic data of an account holder. A custodian does not include most employers because an employer typically does not have a service agreement with an employee.

“digital asset” means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

Comment: As records may exist in both electronic and non-electronic formats, the definition of “digital asset” clarifies the scope of the Act and the limitation on the type of records to which the Act applies. The term includes products currently in existence and those yet to be invented that are available only electronically. It refers to any type of electronically stored information, such as

- 1) any information stored on a computer and other digital devices,
- 2) content uploaded onto websites, ranging from photos to documents, and
- 3) rights in digital property, such as domain names or digital entitlements associated with online games and material created online.

The fiduciary’s access to a record defined as a digital asset does not entitle the fiduciary to own the asset or otherwise engage in transactions with the asset. Consider, for example, funds in a bank account or securities held with a broker or other custodian, regardless of whether the bank, broker or custodian has a brick-and-mortar presence. This Act affects records concerning the bank account or securities, but does not affect the authority to engage in transfers of title or other commercial transactions in the funds or securities, even though such transfers or other transactions might occur electronically. This Act simply reinforces the right of the fiduciary to access all relevant electronic communications and the online account that provides evidence of ownership or similar rights. An entity may not refuse to provide a

fiduciary with access to online records any more than the entity may refuse to provide the fiduciary with access to hard copy records.

“fiduciary”, in relation to an account holder, means

- (a) a personal representative for a deceased account holder,
- (b) a guardian appointed for an account holder,
- (c) an attorney appointed for an account holder who is the donor of the power of attorney, or
- (d) a trustee appointed to hold in trust a digital asset or other property of an account holder;

Comment: A “fiduciary” refers to the four types of fiduciaries to whom the Act is intended to apply. However, jurisdictions may wish to include separate definitions for each type of fiduciary depending on their *Interpretation Act* or the meaning given to various terms. A fiduciary is defined as a person. A fiduciary under this Act occupies a status recognized by the law in each jurisdiction, and a fiduciary’s powers under this Act are subject to the relevant limits established by other laws within each jurisdiction.

Jurisdictions should insert the appropriate term for a person named in a fiduciary capacity to manage another’s property (for example, in Quebec the term “liquidator” may be used) and the appropriate term for the individual that would be subject to a guardianship order or comparable proceeding (such as a guardian or curator).

In the definition of “fiduciary”, the term “guardian” is not intended to apply to guardians of a minor who is not deceased and should be defined as it is intended to apply in each jurisdiction. As well, depending on the jurisdiction, this Act is intended to apply to the Public Guardian and Trustee when that office is acting as a trustee or personal representative. Finally, the term “trustee” is not intended to apply to a trustee in bankruptcy.

“record” includes [to be defined by the jurisdiction if not defined in the general *Interpretation Act* for the jurisdiction];

Comment: The term “record” should be defined by the jurisdiction if not defined in the *Interpretation Act* for the jurisdiction.

The term “information” is not defined. However, a jurisdiction may determine that it wishes to define the term to clarify what information the Act applies to.

“service agreement” means an agreement between an account holder and a custodian.

Comment: The definition of “service agreement” refers to any agreement that controls the relationship between an account holder and a custodian, even though it might be called a terms-of-use agreement, a click-wrap agreement, a click-through licence, or other term. Jurisdictional choice of law rules determine capacity to enter into a binding service agreement. Such an agreement may be entered into through stated terms of use of a website or other online service, whether agreed to by the account holder by express language (e.g., clicking on “I agree” or “OK” after reading a list of terms) or by implication from using a site after the terms of the agreement have been brought to the user’s attention.

Application of Act

- 2 (1) This Act applies in relation to the following:
- (a) a personal representative for a deceased account holder who died before, on or after the date this Act comes into force;
 - (b) a guardian appointed for an account holder, whether appointed before, on or after the date this Act comes into force;
 - (c) an attorney appointed under a power of attorney made before, on or after the date this Act comes into force;

- (d) a trustee acting under a trust created before, on or after the date this Act comes into force;
 - (e) a custodian of, or a person who may be a custodian of, a digital asset created, recorded, transmitted or stored before, on or after the date this Act comes into force.
- (2) For certainty, this Act does not apply to an employer's digital asset that is used by an employee in the ordinary course of the employer's business.

Comment: This Act applies to fiduciaries who are appointed or instruments that take effect before, on or after the Act comes into force. The Act also applies to custodians and persons who may be custodians of digital assets created, recorded, transmitted or stored before, on or after the Act comes into force. This Act does not change the substantive rules of other law, such as agency, banking, guardianship, contract, copyright, criminal, fiduciary, privacy, probate, property, security, trust, or other applicable law, except to vest fiduciaries with authority, according to the provisions of this Act.

Section 2 (2) clarifies that the Act does not apply to an employer's digital assets that are used by an employee in the ordinary course of the employer's business. The Act does not apply to a fiduciary's access to an employer's internal email system.

Fiduciary's right to access digital assets

- 3**
- (1) Subject to subsections (2) to (4), the fiduciary of an account holder has the right to access a digital asset of the account holder.
 - (2) Subject to subsection (4), the fiduciary's right of access under subsection (1) is subject to the terms of the following, as applicable, that give instructions in relation to the right of access:
 - (a) the will of the deceased account holder;
 - (b) *[a grant of administration of estate as referred to in the enacting jurisdiction]*;
 - (c) a guardianship order;
 - (d) the power of attorney;
 - (e) the trust;
 - (f) an order of the court.
 - (3) Subject to subsection (4), the fiduciary's right of access under subsection (1) is subject to instructions in a provision in the service agreement that limits a fiduciary's access to a digital asset of the account holder if the account holder assents to the provision
 - (a) on or after the date this Act comes into force, and
 - (b) by an affirmative act separate from the account holder's assent to other provisions of the service agreement.
 - (4) If more than one instruction in relation to the fiduciary's right to access a digital asset has been given in an order or other document referred to in subsection (2) or given by assent described in subsection (3), the fiduciary's right to access the digital asset is subject to the most recent instruction.
 - (5) For the purposes of this section, instructions under a provision of a service agreement may not be given or inferred to have been given by an account holder merely by accessing a digital asset or using an account.

Comment: A fiduciary's right to access digital assets is subject to the terms of the instrument empowering the fiduciary, such as the will, guardianship order, power of attorney, trust or an order of the court. Each jurisdiction should determine the appropriate term for the instrument it allows to appoint a fiduciary.

Section 3 (4) provides that the "last-in-time" instrument or order takes precedence over any earlier instrument, order or online instructions of an account holder.

Fiduciary's duties in relation to digital assets

- 4 The duties imposed by law on a fiduciary in relation to tangible personal property, including requirements on the performance of those duties, also apply to the fiduciary in relation to the digital assets of the account holder.

Comment: Section 4 clarifies that the legal duties imposed on a fiduciary for tangible property also apply to digital assets. A fiduciary's powers under this Act are subject to the relevant limits established by other laws within each jurisdiction.

Fiduciary authority

- 5 (1) A fiduciary who has the right under this Act to access a digital asset of an account holder
- (a) may, subject to any applicable law, take any action concerning the digital asset that could have been taken by the account holder if the account holder were alive and of full capacity,
 - (b) is deemed to have the consent of the account holder for the custodian to divulge the content of the digital asset to the fiduciary, and
 - (c) is deemed to be an authorized user of the digital asset.
- (2) Unless an account holder assents, on or after the date this Act comes into force and by an affirmative act separate from the account holder's assent to other provisions of the service agreement, to a provision in the service agreement that limits a fiduciary's access to a digital asset of the account holder,
- (a) any provision in the service agreement that limits the fiduciary's access to the digital asset of the account holder is void, and
 - (b) the fiduciary's access under this Act to a digital asset, despite the service agreement, does not require the consent of any party to the service agreement and is not a breach of any provision of the service agreement.
- (3) If a fiduciary has authority over an account holder's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital asset, the fiduciary
- (a) has the right to access the property and any digital asset stored in it, and
 - (b) is deemed to be an authorized user of the property.

Comment: This section establishes that a fiduciary may take any action concerning a digital asset to the extent of the authority of the account holder and the power of the fiduciary under the law of the applicable jurisdiction. Generally, the right of access includes accessing the asset, controlling the asset, and copying the asset to the extent permitted by copyright law. As well, the fiduciary is deemed to have the consent of the account holder for the custodian to divulge the content of an electronic communication. Finally, section 5 (1) (c) states a fiduciary is deemed to be an authorized user of the digital asset.

It should be noted that section 342.1 of Canada's *Criminal Code* makes the unauthorized use of a computer a crime only if the computer is accessed fraudulently and without "colour of right". Section 342.1 reads:

Unauthorized use of computer

- 342.1** (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary conviction who, fraudulently and without colour of right,
- (a) obtains, directly or indirectly, any computer service;
 - (b) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system;
 - (c) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (a) or (b) or under section 430 in relation to computer data or a computer system; or
 - (d) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (a), (b) or (c).

This means that a fiduciary exercising their duties is not in violation of Canadian law.

For further clarification, when a fiduciary obtains information of a digital asset, it is not a disclosure of personal information that affects the account holder's right to privacy. No privacy legislation is affected. The fiduciary is obligated to obtain the information to fulfill their duties.

In order to limit fiduciary access to a digital asset in a service agreement, an affirmative act separate from the account holder's agreement to other provisions of the agreement is required. Further, any provision in a service agreement that limits the fiduciary's access to a digital asset of the account holder is void. The section clarifies that fiduciary access under this Act is not a violation or breach of a service agreement.

Agreement unenforceable if access limited

- 6** Despite any other applicable law or a choice of law provision in a service agreement, a provision in a service agreement is unenforceable against a fiduciary to the extent that the provision limits, contrary to this Act, a fiduciary's access to a digital asset.

Comment: Despite any other law or a choice of law provision in a service agreement, a provision in a service agreement that limits a fiduciary's access to a digital asset is unenforceable against a fiduciary acting under the Act.

Access to digital asset

- 7** (1) A fiduciary with a right under this Act to access a digital asset of an account holder may request access from the custodian of the digital asset by making the request in writing and by including with the request *[authenticated copies of the documents relevant for the enacting jurisdiction]*.
- (2) A custodian must provide the fiduciary with access to the digital asset of the account holder within 30 days after receipt of the request made under subsection (1) and the applicable document.

Comment: Section 7 imposes on a custodian the obligation to provide access to a fiduciary with a right of access under this Act. It further sets out the documentation that must accompany the fiduciary's request to access a digital asset of an account holder. For example, if there is a will providing that an individual is a personal representative, a notarized copy of the death certificate and will setting out that the individual is authorized to administer the estate may be required. If there is no will (intestacy), a fiduciary may be required to provide a notarized copy of the death certificate and documents setting out that the fiduciary is the individual authorized to apply for administration of the estate.

The general electronic commerce legislation of each enacting jurisdiction should allow for the writing requirement to be satisfied electronically. Each jurisdiction should refer to its relevant legislation. An "authenticated" copy may include whatever process confirms that the document is a true copy of the original.

Fiduciary may apply to court for directions

- 8** (1) A fiduciary may apply to the court for directions in relation to the fiduciary's right to access a digital asset of the account holder.
- (2) A fiduciary who follows the directions of the court is discharged with respect to the subject matter of the directions unless the fiduciary is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

Comment: Section 8 allows a fiduciary to apply to the court for directions. A fiduciary who follows the directions of the court is protected from liability.

Custodian liability protection

- 9** A custodian who complies with this Act, the regulations or any order of the court made under this Act is not liable for a loss arising from anything done or omitted from being done, unless it was done or omitted from being done in bad faith.

Comment: Section 9 provides a custodian with liability protection. However, a jurisdiction may address what form of liability protection is consistent with its legislation.

Regulations

- 10** The *[regulation-making authority for the jurisdiction]* may make regulations as follows:
- (a) respecting the provision of information by a person, on the request of a fiduciary, as to whether the person is a custodian of a digital asset of another person for whom the fiduciary is acting;
 - (b) respecting fees that may be charged by a custodian for the provision of access to a digital asset of an account holder by a fiduciary or by a person referred to in paragraph (a) who is responding to a request for information.

Comment: Section 10 allows for regulations. Regulations may relate to information on whether a person is a custodian of a digital asset of an account holder or to fees charged by a custodian for providing access.

Commencement

- 11** *[in accordance with the practices of the jurisdiction]*

Comment: The manner by which the Act is brought into force will be in accordance with the legislative practices of the enacting jurisdiction.

Appendix B – Comparing Canadian Responses to the Uniform Act

SASKATCHEWAN <i>The Fiduciaries Access to Digital Information Act, SS 2020, c 6 (in force June 29, 2020)</i>	PEI <i>Access to Digital Assets Act, SPEI 2021, c A-1.1 (in force January 1, 2022)</i>	NEW BRUNSWICK <i>Fiduciaries Access to Digital Assets Act, SNB 2022, c 59 (in force December 16, 2022)</i>
Short title 1 This Act may be cited as <i>The Fiduciaries Access to Digital Information Act</i> .		His Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:
Definitions 2 In this Act, “account holder” means a person who has entered into a service agreement with a custodian; “court” means the Court of King’s Bench; “custodian” means a person who holds, maintains, processes, receives or stores a digital asset of an account holder; “digital asset” means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by other similar means; “fiduciary” means, in relation to an account holder: <ul style="list-style-type: none"> (a) an executor or administrator for a deceased account holder; (b) a property guardian; (c) a property attorney; or 	PART 1 – INTERPRETATION AND APPLICATION 1. Definitions In this Act, <ul style="list-style-type: none"> (a) “account holder” means a person who has entered into a service agreement with a custodian; (b) “court” means the Supreme Court; (c) “custodian” means a person who holds, maintains, processes, receives or stores a digital asset of an account holder; (d) “digital asset” means a record that is created, recorded, transmitted or stored by digital or other intangible form by electronic, magnetic or optical means or by other similar means; 	Definitions 1. The following definitions apply in this Act, “account holder” means an individual who has entered into a service agreement with a custodian. (<i>titulaire de compte</i>) “court” means The Court of King’s Bench of New Brunswick and includes a judge of that court. (<i>cour</i>) “custodian” means a persons who holds, maintains, processes, receives or stores a digital asset of an account holder. (<i>gardien</i>) “digital asset” means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic, optical or other similar means. (<i>bien nume’rique</i>) “fiduciary” , in relation to an account holder, means (<i>fiducial</i>) <ul style="list-style-type: none"> (a) a representative appointed for the account holder,

<p style="text-align: center;">SASKATCHEWAN <i>The Fiduciaries Access to Digital Information Act, SS 2020, c 6 (in force June 29, 2020)</i></p>	<p style="text-align: center;">PEI <i>Access to Digital Assets Act, SPEI 2021, c A-1.1 (in force January 1, 2022)</i></p>	<p style="text-align: center;">NEW BRUNSWICK <i>Fiduciaries Access to Digital Assets Act, SNB 2022, c 59 (in force December 16, 2022)</i></p>
<p>(d) a trustee appointed to hold in trust a digital asset or other property of an account holder; and includes the Public Guardian and Trustee when acting in one of those capacities; “property attorney” means a property attorney appointed by the account holder pursuant to <i>The Powers of Attorney Act, 2002</i>; “property guardian” means a property guardian appointed pursuant to <i>The Adult Guardianship and Co-decision-making Act</i>; “record” means a record of information in any form; “service agreement” means an agreement between an account holder and a custodian.</p>	<p>(e) “fiduciary”, in relation to an account holder, means</p> <ul style="list-style-type: none"> (i) a personal representative for a deceased account holder, (ii) a trustee, other than a trustee in bankruptcy, for an account holder, appointed in accordance with an enactment, (iii) an attorney appointed under a power of attorney made by an account holder, (iv) a trustee appointed to hold in trust a digital asset or other property of an account holder, or (v) a committee of the estate of an account holder; <p>(f) “personal representative” means a personal representative as defined in the <i>Probate Act, RSPEI 1988, Cap P-21</i>;</p> <p>(g) “record” means a record of information in any form;</p> <p>(h) “service agreement” means an agreement between an account</p>	<ul style="list-style-type: none"> (b) an attorney for property appointed by the account holder under the <i>Enduring Powers of Attorney Act</i>, (c) a personal representative, in the case of an account holder who is deceased, (d) a trustee, other than a trustee in bankruptcy, appointed to hold a digital asset or other property of the account holder in trust, or (e) any other person or class of person prescribed by regulation. <p>“personal representative” means an executor of an administrator of an estate. (<i>repré’sentant personnel</i>)</p> <p>“record” means a record of information in any form. (<i>document</i>)</p> <p>“representative” means (<i>repré’sentant</i>)</p> <ul style="list-style-type: none"> (a) a person appointed as a committee of the estate under the <i>Infirm Persons Act</i> or appointed under paragraph 39(3)(a) of that Act to perform acts or make decisions related to property, (b) a person who becomes a committee of the estate under the <i>Mental Health Act</i>, or

<p style="text-align: center;">SASKATCHEWAN <i>The Fiduciaries Access to Digital Information Act, SS 2020, c 6 (in force June 29, 2020)</i></p>	<p style="text-align: center;">PEI <i>Access to Digital Assets Act, SPEI 2021, c A-1.1 (in force January 1, 2022)</i></p>	<p style="text-align: center;">NEW BRUNSWICK <i>Fiduciaries Access to Digital Assets Act, SNB 2022, c 59 (in force December 16, 2022)</i></p>
	<p style="text-align: center;">holder and a custodian that relates to or deals with a digital asset of the account holder.</p>	<p style="text-align: center;">(c) a person appointed as a committee of the estate of an absentee under the <i>Presumption of Death Act</i>.</p>
<p>Application 3(1) This Act applies in relation to the following:</p> <ul style="list-style-type: none"> (a) an executor or administrator for a deceased account holder who died before, on or after the date on which this Act comes into force; (b) a property guardian, whether appointed before, on or after the date on which this Act comes into force; (c) a property attorney, whether appointed before, on or after the date on which this Act comes into force; (d) a trustee acting under a trust created before, on or after the date on which this Act comes into force; (e) a custodian of, or a person who may be a custodian of, a digital asset created, recorded or transmitted or stored before, on 	<p>2. Application of Act (1) This Act applies in relation to the following:</p> <ul style="list-style-type: none"> (a) a personal representative for a deceased account holder who died before, on or after the date this Act comes into force; (b) a trustee, other than a trustee in bankruptcy, appointed for an account holder in accordance with an enactment, whether appointed before, on or after the date this Act comes into force; (c) an attorney appointed under a power of attorney made before, on or after the date this Act comes into force; (d) a trustee acting under a trust created before, on or after the date this Act comes into force; (e) a committee of the estate of an account holder, whether appointed before, on or after the date this Act comes into force; 	<p>Application 2(1) This Act applies to</p> <ul style="list-style-type: none"> (a) a person who was a fiduciary before the commencement of this section or who becomes a fiduciary on or after the commencement of this section, and (b) a person who is or who may be a custodian of a digital asset created, recorded, transmitted or stored before, on, or after the commencement of this section. <p>2(2) This Act does not apply to a digital asset of an employer that is used by an employee in the ordinary course of the employer’s business.</p>

SASKATCHEWAN <i>The Fiduciaries Access to Digital Information Act, SS 2020, c 6 (in force June 29, 2020)</i>	PEI <i>Access to Digital Assets Act, SPEI 2021, c A-1.1 (in force January 1, 2022)</i>	NEW BRUNSWICK <i>Fiduciaries Access to Digital Assets Act, SNB 2022, c 59 (in force December 16, 2022)</i>
<p>or after the date on which this Act comes into force.</p> <p>(2) This Act does not apply to an employer’s digital asset that is used by an employee in the ordinary course of the employer’s business.</p>	<p>(f) a custodian of, or a person who may be a custodian of, a digital asset created, recorded or transmitted or stored before, on or after the date this Act comes into force.</p> <p>Exception (2) For greater certainty, this Act does not apply to an employer’s digital asset that is used by an employee in the ordinary course of the employer’s business.</p>	
		<p>This Act binds the Crown in Right of the Province 3. This Act binds the Crown in Right of the Province.</p>
<p>Fiduciary’s right to access digital assets 4(1) Subject to subsections (2) and (4), the fiduciary of an account holder has the right to access a digital asset of the account holder.</p> <p>(2) Subject to subsection (4), the fiduciary’s right to access under subsection (1) is subject to and must be consistent with the terms of the following, as applicable, that give instructions in relation to the right of access:</p>	<p>PART 2 – ACCESS TO DIGITAL ASSETS 3. Fiduciary’s right to access digital assets (1) Subject to subsections (2) and (4) and consistent with the source of authority in subsection 2(1), the fiduciary of an account holder has the right to access a digital asset of the account holder.</p> <p>Right subject to will, etc (2) Subject to subsection (4), the fiduciary’s right to access under subsection (1) is subject</p>	<p>Fiduciary’s right to access digital assets 4(1) Subject to subsection (2) to (4) and consistent with the fiduciary’s authority, the fiduciary of an account holder has the right to access a digital asset of the account holder.</p> <p>(2) A fiduciary’s right of access to a digital asset is subject to any instructions in relation to the fiduciary’s right of access in</p> <p>(a) the will of the deceased account holder,</p>

<p style="text-align: center;">SASKATCHEWAN <i>The Fiduciaries Access to Digital Information Act, SS 2020, c 6 (in force June 29, 2020)</i></p>	<p style="text-align: center;">PEI <i>Access to Digital Assets Act, SPEI 2021, c A-1.1 (in force January 1, 2022)</i></p>	<p style="text-align: center;">NEW BRUNSWICK <i>Fiduciaries Access to Digital Assets Act, SNB 2022, c 59 (in force December 16, 2022)</i></p>
<p>(a) the will of the deceased account holder;</p> <p>(b) letters of administration as provided for in <i>The Administration of Estates Act</i>;</p> <p>(c) a guardianship order pursuant to <i>The Adult Guardianship and Co-decision-making Act</i>;</p> <p>(d) a power of attorney pursuant to <i>The Powers of Attorney Act, 2002</i>;</p> <p>(e) a trust;</p> <p>(f) an order of the court.</p> <p>(3) Subject to subsection (4), the fiduciary’s right of access under subsection (1) is subject to instructions in a provision in the service agreement that limits a fiduciary’s access to a digital asset of the account holder if the account holder assents to the provision:</p> <p>(a) on or after the date this Act comes into force; and</p> <p>(b) by an affirmative act separate from the account holder’s agreeing to other provisions of the service agreement.</p>	<p>to the terms of the following, as applicable, that give instructions in relation to the right of access:</p> <p>(a) the will of the deceased account holder;</p> <p>(b) a grant of administration of estate of the deceased account holder;</p> <p>(c) a trusteeship order;</p> <p>(d) the power of attorney;</p> <p>(e) the trust;</p> <p>(f) an order of the court.</p> <p>Right subject to service agreement</p> <p>(3) Subject to subsection (4), the fiduciary’s right of access under subsection (1) is subject to instructions in a provision in the service agreement that limits a fiduciary’s access to a digital asset of the account holder if the account holder assents to the provision</p> <p>(a) on or after the date this Act comes into force; and</p> <p>(b) by an affirmative act separate from the account holder’s assent to other provisions of the service agreement.</p>	<p>(b) the letters of administration for the estate of the account holder,</p> <p>(c) the order appointing a representative for the account holder,</p> <p>(d) the enduring power of attorney of the account holder,</p> <p>(e) the trust instrument, or</p> <p>(f) a court order.</p> <p>4(3) A fiduciary’s right of access to a digital asset is subject to any instructions in relation to the fiduciary’s right of access in a provision of the service agreement between the account holder and a custodian if, on or after the commencement of this section, the account holder agrees to the provision by an affirmative acct separate from the account holder’s agreement to the other provisions of the service agreement.</p> <p>(4) If more than one instruction in relation to a fiduciary’s right of access to a digital asset has been given, the fiduciary’s right of access is subject to the most recent instruction.</p> <p>(5) For the purpose of subsections (3) and (4), an account holder is not considered to have given</p>

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<p>(4) If more than one instruction in relation to the fiduciary's right to access a digital asset has been given in an order or other document referred to in subsection (2) or given by agreement described in subsection (3), the fiduciary's right to access the digital asset is subject to the most recent instruction.</p> <p>(5) For the purposes of this section, an account holder is not considered to have given instructions under a provision of a service agreement merely by accessing the digital asset or using the account.</p>	<p>Right subject to most recent instruction</p> <p>(4) Where more than one instruction in relation to the fiduciary's right to access a digital asset has been given in an order or other document referred to in subsection (2) or given by assent described in subsection (3), the fiduciary's right to access the digital asset is subject to the most recent instruction.</p> <p>Effect of access or use</p> <p>(5) For the purposes of this section, instructions under a provision of a service agreement may not be given or inferred to have been given by an account holder merely by reason of the account holder having accessed a digital asset or used an account.</p>	<p>instructions in relation to a fiduciary's right of access to a digital asset in a provision of a service agreement merely by accessing a digital asset or using the account.</p>
<p>Fiduciary's duties in relation to digital assets</p> <p>5 The duties imposed by law on a fiduciary in relation to tangible personal property, including requirements on the performance of those duties, also apply to the fiduciary in relation to the digital assets of the account holder.</p>	<p>4. Fiduciary's duties in relation to digital assets</p> <p>The duties imposed by law on a fiduciary in relation to tangible personal property, including requirements on the performance of those duties, also apply to the fiduciary in relation to the digital assets of the account holder.</p>	<p>Fiduciary's duties in relation to digital assets</p> <p>5 The duties imposed by law on a fiduciary in relation to tangible personal property also apply to the fiduciary in relation to digital assets of the account holder.</p>

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<p>Fiduciary authority</p> <p>6(1) A fiduciary who has the right under this Act to access a digital asset of an account holder:</p> <ul style="list-style-type: none"> (a) may, subject to any applicable law, take any action concerning the digital asset that could have been taken by the account holder if the account holder were alive and of full capacity; (b) is deemed to have the consent of the account holder for the custodian to divulge the content of the digital asset to the fiduciary; and (c) is deemed to be an authorized user of the digital asset. <p>(2) Unless an account holder agrees, in accordance with subsection 4(3), to a provision in the service agreement that limits a fiduciary's access to a digital asset of the account holder:</p> <ul style="list-style-type: none"> (a) any provision in the service agreement that limits the fiduciary's access to the digital asset of the account holder is void; and 	<p>5. Fiduciary authority</p> <p>(1) A fiduciary who has the right under this Act to access a digital asset of an account holder</p> <ul style="list-style-type: none"> (a) may, subject to any applicable law, take any action concerning the digital asset that could have been taken by the account holder if the account holder were alive and of full capacity; (b) is deemed to have the consent of the account holder for the custodian to divulge the content of the digital asset to the fiduciary; and (c) is deemed to be an authorized user of the digital asset. <p>Effect of service agreement</p> <p>(2) Unless an account holder assents, on or after the date this Act comes into force and by an affirmative act separate from the account holder's assent to other provisions of the service agreement, to a provision in the service agreement that limits a fiduciary's access to a digital asset of the account holder,</p>	<p>Fiduciary's authority</p> <p>6(1) A fiduciary who has the right to access a digital asset of an account holder</p> <ul style="list-style-type: none"> (a) is deemed to have the consent of the account holder for the custodian to disclose the content of the digital asset to the fiduciary, (b) is deemed to be an authorized user of the digital asset, and (c) may take any action concerning the digital asset that could have been taken by the account holder if the account holder were alive and of full capacity, subject to any applicable law. <p>(2) Unless an account holder agrees, on or after the commencement of this section, to a provision in a service agreement that limits a fiduciary's access to a digital asset of the account holder by an affirmative act separate from the account holder's agreement to the other provisions of the service agreement,</p> <ul style="list-style-type: none"> (a) a provision in the service agreement that limits the fiduciary's right to access a digital asset of the account holder is void, and

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<p>(b) the fiduciary's access pursuant to this Act to a digital asset, notwithstanding the service agreement, does not require the consent of any party to the service agreement and is not a breach of any provision in the service agreement.</p> <p>(3) If a fiduciary has authority over an account holder's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital asset, the fiduciary:</p> <p>(a) has the right to access the property and any digital asset stored in it; and</p> <p>(b) is deemed to be an authorized user of the property.</p>	<p>(a) any provision in the service agreement that limits the fiduciary's access to the digital asset of the account holder is void; and</p> <p>(b) the fiduciary's access under this Act to a digital asset, despite the service agreement, does not require the consent of any party to the service agreement and is not a breach of any provision in the service agreement.</p> <p>Authority over tangible personal property</p> <p>(3) Where a fiduciary has authority over an account holder's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital asset, the fiduciary</p> <p>(a) has the right to access the property and any digital asset stored in it; and</p> <p>(b) is deemed to be an authorized user of the property.</p>	<p>(b) the fiduciary's access to the digital asset does not require the consent of any party to the service agreement and is not a breach of any provision of the service agreement.</p> <p>(3) If a fiduciary has authority over an account holder's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital asset, the fiduciary</p> <p>(a) has the right to access the property and any digital asset stored in it, and</p> <p>(b) is deemed to be an authorized user of the property.</p>

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<p>Agreement unenforceable if access limited 7 Notwithstanding any other applicable law or a choice of law provision in a service agreement, a provision in a service agreement is unenforceable against a fiduciary to the extent that the provision limits, contrary to this Act, a fiduciary's access to a digital asset.</p>	<p>6. Provision unenforceable if access limited Despite any other applicable law or a choice of law provision in a service agreement, a provision in a service agreement is unenforceable against a fiduciary to the extent that the provision limits, contrary to this Act, a fiduciary's access to a digital asset.</p>	<p>Provisions in service agreements unenforceable 7(1) Despite any other law or any choice of law provision in a service agreement, a provision in a service agreement is unenforceable against a fiduciary to the extent that it limits, contrary to this Act, the fiduciary's access to a digital asset of an account holder.</p> <p>(2) A provision in a service agreement that purports to restrict jurisdiction or venue to a forum outside of New Brunswick is void with respect to a dispute in relation to a fiduciary's right o access a digital asset of an account holder under this Act.</p>
<p>Access to digital asset 8(1) A fiduciary who has the right pursuant to this Act to access a digital asset of an account holder may request, in writing, access from the custodian of the digital asset and must include in the request:</p> <ul style="list-style-type: none"> (a) the original order of the court or other document granting authority to the fiduciary; or (b) a certified copy of the original order or other document granting authority to the fiduciary. 	<p>7. Request for access to a digital asset (1) A fiduciary with a right under this Act to access a digital asset of an account holder may request access from the custodian of the digital asset by making the request in writing and by including with the request</p> <ul style="list-style-type: none"> (a) the original order of the court or other document granting authority to the fiduciary; or (b) a certified copy of the original order or other document granting authority to the fiduciary. 	<p>Request for access to digital asset 8(1) A fiduciary who has a right to access a digital asset of an account holder may request access from the custodian by making a request in writing accompanied by proof of the fiduciary's identity and the following documents:</p> <ul style="list-style-type: none"> (a) if the account holder is deceased, <ul style="list-style-type: none"> (i) if letters probate of a will or letters of administration have been granted to the fiduciary under the <i>Probate Court Act</i>, the original or a certified copy of the letters, or

SASKATCHEWAN <i>The Fiduciaries Access to Digital Information Act, SS 2020, c 6 (in force June 29, 2020)</i>	PEI <i>Access to Digital Assets Act, SPEI 2021, c A-1.1 (in force January 1, 2022)</i>	NEW BRUNSWICK <i>Fiduciaries Access to Digital Assets Act, SNB 2022, c 59 (in force December 16, 2022)</i>
<p>(2) A custodian must provide the fiduciary with access to the digital asset of the account holder within 30 days after receipt of the request made under subsection (1).</p> <p>(3) Subject to the regulations, a custodian may charge a reasonable fee for providing access to the digital asset.</p>	<p>Duty of custodian</p> <p>(2) A custodian shall provide the fiduciary with access to the digital asset of the account holder within 30 days after receipt of the request made under subsection (1) and the applicable document.</p>	<p>(ii) the original or certified copy of the account holder’s will and death certificate or other document that provides proof of the account holder’s death; or</p> <p>(b) if the account holder is alive, the original or a certified copy of</p> <p>(i) the court order, enduring power of attorney or trust instrument that grants authority to the fiduciary, or</p> <p>(ii) a document prescribed by regulation that grants authority to the fiduciary.</p> <p>(2) A custodian that receives a request under subsection (1) shall provide the fiduciary with access to the digital asset within 30 days after receiving the request and the relevant accompanying documents.</p> <p>(3) Subject to the regulations, a custodian may charge a reasonable fee for providing access to a digital asset.</p>
<p>Fiduciary may apply to court for directions</p> <p>9(1) A fiduciary may apply to the court for directions in relation to the fiduciary’s right</p>	<p>8. Fiduciary may apply to court for direction</p> <p>(1) A fiduciary may apply to the court for direction in relation to the fiduciary’s right to access a digital asset of the account holder.</p>	<p>Directions of the court</p> <p>9(1) A fiduciary may apply to the court for directions in relation to the fiduciary’s right to access a digital asset of an account holder.</p>

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<p>to access a digital asset of the account holder.</p> <p>(2) A fiduciary who follows the directions of the court is discharged with respect to the subject-matter of the directions unless the fiduciary is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.</p>	<p>Effect of following direction of the court</p> <p>(2) A fiduciary who follows the direction of the court is discharged with respect to the subject matter of the direction unless the fiduciary is guilty of fraud, wilful concealment or misrepresentation in obtaining the direction.</p>	<p>(2) A fiduciary who follows the directions of the court is discharged with respect to the subject matter of the directions unless the fiduciary obtained the directions through fraud, wilful concealment, or misrepresentation.</p>
<p>Custodian protected from liability</p> <p>10 A custodian is not liable for any loss incurred with respect to a digital asset of an account holder if the custodian complies with this Act, the regulations, an order or other document mentioned in subsection 4(2) or an agreement described in subsection 4(3), unless the loss is due to that custodian's own: dishonesty; or wilful conduct that the custodian knows or ought to know is inconsistent with this Act, the regulations, an order or other document mentioned in subsection 4(2) or an agreement described in subsection 4(3).</p>	<p>9. Liability protection for custodian</p> <p>A custodian who complies with this Act, the regulations or any order of the court made under this Act is not liable for a loss arising from anything done or omitted from being done, unless it was done or omitted from being done in bad faith.</p>	<p>Immunity</p> <p>10 No action or other proceeding lies or shall be instituted against a custodian for anything done or purported to be done in good faith or in relation to anything omitted in good faith by the custodian under this Act or the regulations.</p>
<p>Regulations</p> <p>11 The Lieutenant Governor in Council may make regulations:</p>	<p>PART 3 – REGULATIONS, COMMENCEMENT</p> <p>10. Regulations</p> <p>The Lieutenant Governor in Council may make regulations</p>	<p>Regulations</p> <p>11 The Lieutenant-Governor in Council may make regulations</p>

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<ul style="list-style-type: none"> (a) defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act; (b) respecting the provision of information by a person, on the request of a fiduciary, as to whether a person is a custodian of a digital asset of another person for whom the fiduciary is acting; (c) respecting fees that may be charged: <ul style="list-style-type: none"> (i) for the purposes of subsection 8(3), by a custodian for the provision of access to a digital asset of an account holder by a fiduciary; or (ii) by a person mentioned in clause (b) who is responding to the request for information; (d) with respect to any matter governed by this Act: <ul style="list-style-type: none"> (i) adopting, as amended from time to time or otherwise, all 	<ul style="list-style-type: none"> (a) respecting the provision of information by a person, on the request of a fiduciary, as to whether a person is a custodian of a digital asset of another person for whom the fiduciary is acting; (b) respecting fees that may be charged by a custodian for the provision of access to a digital asset of an account holder by a fiduciary or by a person referred to in clause (a) who is responding to the request for information; (c) defining any term used but not defined in this Act; (d) prescribing anything referred to in this Act as being prescribed; and (e) respecting any matter the Lieutenant Governor in Council considers necessary or advisable to carry out the intent and purposes of this Act. 	<ul style="list-style-type: none"> (a) prescribing persons or classes of persons for the purposes of the definition “fiduciary” in section 1; (b) prescribing documents for the purposes of subparagraph 8(1)(b)(ii); (c) respecting requests for information by fiduciaries to determine whether a person is a custodian; (d) respecting the provision of information referred to in paragraph (c); (e) respecting fees that may be charged <ul style="list-style-type: none"> (i) by a custodian for providing access to a digital asset, or (ii) by a person for providing information referred to in paragraph (c); (f) defining words and expressions used in this Act but not defined in this Act for the purposes of this Act, the regulations, or both.

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<p>or any part of any relevant code, standard or guideline;</p> <p>(ii) amending for the purposes of this Act or the regulations any code, standard or guideline adopted pursuant to subclause (i);</p> <p>(iii) requiring compliance with a code, standard or guideline adopted pursuant to subclause (i);</p> <p>(e) prescribing any matter or thing required or authorized by this Act to be prescribed;</p> <p>(f) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent and purposes of this Act.</p>		
<p>Coming into force</p> <p>12 This Act comes into force by order of the Lieutenant Governor in Council.</p>		

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