

# IMPROVING ACCESS TO DIGITAL ASSETS AFTER DEATH OR INCAPACITY

## Frequently Asked Questions



# What is this law reform project about?

The Alberta Law Reform Institute (ALRI) is recommending legislation that would make it easier for fiduciaries to access a person's digital assets after their death or incapacity.

People are living much of their lives online and are storing their important personal information, documents and other digital records within the servers of large online service providers such as Google, Facebook, and Apple. These "digital assets" can be anything from email and social media accounts to family photos, loyalty programs and sensitive financial records. Some of these digital assets may have monetary value, such as cryptocurrency, income generating websites or original artworks or media.



After a person dies or is incapacitated, the fiduciary authorized to access the digital assets may need to deal with restrictive service agreements that prevent access. Making matters worse, recent history has shown that even after a fiduciary provides court orders establishing their authority to access digital assets, there is still no guarantee that access will be granted by international service providers.

ALRI is recommending that Alberta should enact a law based on the *Uniform Access to Digital Assets by Fiduciaries Act*. This law would establish a fiduciary's authority to deal with all of the assets of a deceased or incapacitated person, including their digital assets. Similar laws have been adopted by several other Canadian and international jurisdictions. Uniform legislation across Canada would produce more certainty when compelling international online service providers to grant access to fiduciaries.

# What is a digital asset?

You can think of digital assets as electronic records that are generated from online activities like sending and receiving emails and texts, storing photos and videos, posting on social media sites, collecting points through various loyalty programs, and trading in cryptocurrency.

In ALRI's project, "digital assets" are defined 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". The definition is intentionally broad to include digital assets already in existence as well as those that might be developed in the future.



It also includes any information stored on a computer, smartphone, tablet or other digital devices, content uploaded onto websites and online databases, and rights to digital property such as domain names.



# What is the problem we are trying to solve?

Whenever you create a digital asset – for example, opening a new email account – you usually have to agree to certain terms and conditions set out by an online service provider or other custodian in order to use the digital asset. Service agreements often restrict access to the digital asset to the original account holder – meaning the person who first opened the account.



While these kinds of access restrictions make sense when the original account holder is alive and has legal capacity, problems can arise if something happens to the account holder and they are no longer able to access the digital asset on their own. Legal representatives known as fiduciaries are often appointed to act on behalf of a person who has died or becomes incapacitated. Restrictive services agreements can prevent fiduciaries from accessing the person's digital assets even though they have the legal authority to deal with the digital assets as part of the person's estate.

ALRI's project aims to reduce the barriers faced by fiduciaries when trying to access a person's digital assets by adopting new legislation that can override restrictive service agreements in certain cases.

# Doesn't Alberta already have other laws that can apply to accessing digital assets?

Alberta has many existing laws that set out the source of a fiduciary's authority to act on behalf of a person who has died or is incapacitated. For example, a personal representative – meaning an executor, administrator, or judicial trustee – has legal authority to deal with a deceased person's estate property including online accounts under the *Estate Administration Act*. An attorney appointed under the *Powers of Attorney Act* has broad powers to deal with the estate of a person who no longer has legal capacity to act on their own behalf. A trustee who has been appointed to deal with property for the benefit of another person may be governed by the *Trustee Act*, the *Adult Guardianship and Trusteeship Act*, or the *Public Trustee Act*.



In this way, existing legislation sets out many different legal frameworks which confirm the general powers and authority of fiduciaries to deal with the estate of a deceased or incapacitated person.



While existing Alberta laws may confirm a fiduciary's legal authority to access a person's digital assets, they do not provide a complete answer to the problem of restrictive service agreements. Because of this, ALRI recommends adopting new legislation that provides a roadmap for confirming and securing a fiduciary's authority to access a digital asset even in the face of restrictive service agreements.

# How would new legislation address the problem we're trying to solve?



ALRI proposes adopting new legislation in Alberta based on the [Uniform Access to Digital Assets by Fiduciaries Act](#) which was developed by the [Uniform Law Conference of Canada](#) to address the access problem created by restrictive service agreements.

A new Alberta Act would confirm a fiduciary's authority to deal with digital assets as part of a person's overall estate. Once a fiduciary has provided the necessary documentation to the custodian as required by the new legislation, the custodian must provide access to the digital asset within 30 days (if the custodian is located within Canada) or 60 days (if the custodian is located outside Canada).

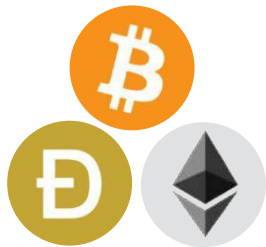
The new legislation would also confirm that any term in a service agreement that limits a fiduciary's access to the digital asset is void and unenforceable unless the account holder expressly and separately agrees to that term after the legislation comes into effect.

The new legislation would also prevent custodians from relying on choice of law and foreign selection clauses – for example, saying that the service agreement is governed by another country or state's laws and courts – to limit a fiduciary's access to the digital asset.



# Does the proposed legislation cover all types of digital assets?

The proposed legislation covers custodial digital assets – meaning digital assets that are held or managed by someone other than the original account holder. A custodian can include online service providers as well as any other person, organization, or company who holds, maintains, processes, receives or stores the electronic data of an account holder. For the proposed legislation to apply to a digital asset, 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.



Some digital assets – like many types of cryptocurrency - are held directly by the account holder. Some digital assets are not controlled by a specific person or entity. Non-custodial digital assets – meaning digital assets that do not have an identifiable or compellable custodian – fall outside the scope of the proposed legislation. A fiduciary cannot use the proposed legislation to get access to non-custodial digital assets if the account holder did not make plans to transfer the access information to them in some other way.

# Have any other places adopted similar legislation?



The *Uniform Access to Digital Assets by Fiduciaries Act* was developed in response to similar legislation that has been adopted by 48 states in the United States.



Since the Uniform Law Conference of Canada approved the Uniform Act in 2016, it has been adopted in Saskatchewan, Prince Edward Island, New Brunswick, and the Yukon.



The New South Wales Law Reform Commission has also recommended implementing similar legislation in Australia.



An Alberta Act that is mostly consistent with similar legislation in other jurisdictions would help make it easier for fiduciaries to access a person's digital assets, especially when the custodian of the digital asset is located in a place that already has similar legislation in place.



# Would an Alberta Act apply to online service providers and other custodians located outside of Alberta?

Given the expanding 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 governed by similar legislation that makes it easier for fiduciaries to gain access to the digital assets of a person who has died or is incapacitated.

Many service agreements include choice of law and forum selection clauses. A “choice of law” clause is a contract term that specifies that the service agreement is governed by the law of a particular place. A “forum selection” clause means that any disputes are to be determined by a court in a particular jurisdiction. For example, Google’s service agreement provides that California law will govern the contract and that any disputes will be resolved in a Santa Clara County court. In this example, a fiduciary located in Alberta would likely have to apply to a court in California if they need to get access to the Gmail account of someone who has died.



An Alberta Act would provide that these types of choice of law and forum selection clauses are void and unenforceable if they have the effect of restricting the access rights of a fiduciary to a digital asset. An Alberta Act would also confirm that it would apply to custodians located outside of Alberta as long as the original account holder resides in Alberta at the time of their death or incapacity. It is very possible that out-of-province custodians would challenge the authority of an Alberta Act to bind them, which will require a court to resolve.

# Where can I learn more about the proposed changes to the law?

The full report, *Access to Digital Assets*, Final Report 121 can be downloaded from the Alberta Law Reform Institute website at [bit.ly/FR121](https://bit.ly/FR121).

You can also learn more by checking out our YouTube video at [bit.ly/DigitalAssetsYT](https://bit.ly/DigitalAssetsYT).

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