

April 20, 2022

Access to Digital Assets by Fiduciaries

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Matter Commented On: the [*Uniform Access to Digital Assets by Fiduciaries Act*](#)

The email from your brother about spring break. Photos from prospective online dates stored on your phone. Restaurant reviews posted on your WordPress blog. Your Airmiles travel points. Your Venmo payment account. Your Bitcoin wallet.

You may own more digital assets than you realize. In fact, estimates suggest that the average Canadian has digital assets with a stored electronic value of approximately \$10,000 (See [Noor Ibrahim, “Does your social media profile belong in your will? Why Canadians should plan their ‘digital inheritance’ now”](#) (26 Nov 2021)). But what happens to your digital assets if you die or become incapacitated? Who has the right to access your digital assets? And what can be done if an online service provider in another jurisdiction denies access?

The Alberta Law Reform Institute (ALRI) is exploring these questions in its “Access to Digital Assets by Fiduciaries” project. ALRI’s project relies on the work completed by the Uniform Law Conference of Canada [ULCC], which adopted the [*Uniform Access to Digital Assets by Fiduciaries Act*](#) [the *Uniform Act*]. Our project involves reviewing the *Uniform Act* to determine whether it should be implemented in Alberta as is, or with some revisions.

Background to the *Uniform Act*

In 2014, [the ULCC established a Working Group](#) to look at the issues relating to access to digital assets by fiduciaries. The goal of the Working Group was to consider legislative options to allow fiduciaries easier access to a person’s digital assets after death or incapacity. It was meant to address problems that arise when online service providers – known as ‘custodians’ – limit access rights to the original account holder based on restrictive service agreements.

It appears that the ULCC Working Group was established in response to recent 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* [American Act]. [The American Act was revised in July 2015](#), and has since been [enacted in 47 states](#). The ULCC Working Group concluded that uniform legislation in Canada ought to be informed by and consistent with the *American Act* to encourage US-based custodians to comply. While the *Uniform Act* is not identical to the

American Act, it is arguably consistent enough to meet the goal of cross-jurisdictional harmonization.

The ULCC adopted the *Uniform Act* in August 2016. In response, Saskatchewan enacted the Fiduciaries Access to Digital Information Act, [SS 2020, c 6](#), which came into force on June 29, 2020. Prince Edward Island has also recently adopted the Access to Digital Assets Act, [SPEI, c A-1.1](#), which was proclaimed on January 1, 2022. It appears that the *Uniform Act* has not yet been introduced in any other Canadian jurisdiction ([New Brunswick is currently considering whether to adopt the Uniform Act](#)).

In other jurisdictions, [the New South Wales Law Reform Commission \(NSWLRC\) published a report on digital assets in December 2019](#). New South Wales expressly considered both the Canadian *Uniform Act* and the revised *American Act*, and ultimately landed on a legislative scheme that looks very similar to the Canadian *Uniform Act*. The NSWLRC Report was tabled in the Parliament of New South Wales on March 5, 2020. At the November 12, 2021, meeting of the [Australian Attorneys-General](#), participants agreed that “[a]ccess scheme for digital records after death or incapacity (NSW)” would be one of three national priorities for 2022.

In March 2019, the [European Law Institute \(ELI\) approved a project on digital assets](#). The ELI project team considered the American and Canadian *Uniform Acts* as potential models, but expressed concerns that uniformity across European member states couldn’t be achieved through a model act. The ELI project team recognized that harmonization is still an important goal and is working towards guiding principles to facilitate the work of legal practitioners when dealing with digital assets. Work on the project appears to be ongoing.

What Problem is the *Uniform Act* Trying to Solve?

Every time you create an online account, you are asked to agree to the online service provider’s terms of service, data, and privacy policies. These service agreements tend to be restrictive when it comes to allowing a person other than the original account holder to access the account. If a fiduciary – such as a personal representative or person appointed under a power of attorney - tries to gain access to a person’s digital assets after the account holder dies or becomes incapacitated, they may be prevented from doing so by the terms of the service agreements. In one Canadian example, [Apple refused to allow a British Columbia widow to access her deceased husband’s Apple ID without a court order](#). In another case also involving Apple, [an Ontario widow spent four years unsuccessfully trying to access an account that was jointly held with her deceased husband, despite the fact that she was the executor appointed under his will](#).

In Alberta, section 20(2) of the Estate Administration Act, [SA 2014, c E-12.5](#) allows a personal representative to effectively ‘step into the shoes of the deceased.’ However, even if a

fiduciary has the legal authority to deal with digital assets through a will or power of attorney, that 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 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.

How Does the *Uniform Act* Solve the Problem?

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” (at section 1). 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’s online banking activity is a digital asset even though the record itself does not have any financial value. In contrast, cryptocurrency is a digital asset where the financial value is in the electronic record. Digital assets include any information stored on a computer or other digital devices, content uploaded onto websites, and rights to digital property such as domain names.

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. In Alberta, fiduciaries get their authority in one of three main ways: by instrument (such as a will or power of attorney), by court order, or by statutory authority. Fiduciaries under the *Uniform Act* include personal representatives, guardians, attorneys, and trustees.

The *Uniform Act* 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.](#)” 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](#)” (at para 29). Under the *Uniform Act*, a fiduciary is deemed to be an authorized user of the digital asset. It would apply to fiduciaries who are appointed or instruments that take effect before, on, or after the legislation comes into force.

The *Uniform Act* operates as a set of default rules (although account holders may choose to opt-out). 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. 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.

Many service agreements include choice of law provisions. The *Uniform Act* prohibits custodians from opting out of the legislative regime if a service agreement's choice of law provision limits fiduciary access to a digital asset.

Does the *Uniform Act* Apply to Cryptocurrency and NFTs?

Certain kinds of digital assets – such as cryptocurrency – may fall outside the *Uniform Act*. For example, the *Uniform Act* is intended to bind a “custodian”, which is defined as “a person who holds, maintains, processes, receives or stores a digital asset of an account holder” (at section 1). This definition is intended to include online service providers, such as Facebook or Google. It is possible, however, that certain types of digital assets may not have a custodian outside of the original account holder. 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 (see [Luke Conway, “Blockchain Explained”](#) (updated 17 Nov 2020)). 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 digital asset in any other way (see “[What happens to your digital bitcoins when you die?](#)” (8 January 2018)). Other cryptocurrencies use a decentralized blockchain model as well, so this potential challenge is not limited to Bitcoin. The NSWLRC Report recognized this challenge and noted that its legislative scheme “has no practical application in relation to digital records without custodians.” Since the *Uniform Act* does not provide an effective solution for these types of situations, account holders must make adequate provisions to avoid losing access to these assets ([even the living may have trouble accessing their digital assets](#)).

There may be an exception to the cryptocurrency exception. Digital wallets usually come in two forms: custodial and non-custodial. For example, an account holder who purchases Bitcoin through a centralized cryptocurrency exchange – such as Coinbase – [might hold the digital asset in a custodial wallet](#). In this case, Coinbase.com would be the custodian holding the digital assets on behalf of the account holder. Alternatively, an account holder might purchase Bitcoin by directly accessing the blockchain. In this case, [the digital assets would be held in a non-custodial wallet](#). If a person has a custodial wallet, then the *Uniform Act* could apply to allow a fiduciary to access cryptocurrency held within that wallet. But the application of the *Uniform Act* would not extend to cryptocurrency held in non-custodial wallets simply because there is no “custodian” as defined by the *Act* who could be compelled to provide access.

Non-fungible tokens (NFTs), which also tend to use a decentralized blockchain model, would also likely be outside the scope of the project unless there is an identifiable custodian (see Robyn Conti & John Schmidt, “[What You Need To Know About Non-Fungible Tokens \(NFTs\)](#)” (12 May 2021)). 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 (see “[What are NFTs and why are some worth millions?](#)” (12 March 2021)). Consider the effect that NFTs have on the art market. Using NFTs, digital artwork can be ‘tokenized’ 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, but the authenticated original painting resides in the Louvre. Given the recent explosive growth of NFTs – [including a digital-only artwork sold by Christie’s in March 2021 that fetched a record-setting price of \\$69.3 million](#) – this is a significant exclusion.

Should Alberta Adopt the *Uniform Act*?

ALRI is currently considering the broad question of whether the *Uniform Act* should be adopted in Alberta, either as is or with some modifications. The answer is not yet clear. Certainly there appear to be some benefits to adopting the *Uniform Act*, which does not propose any significant or substantive changes to the law of fiduciaries. Instead, the *Uniform Act* focuses more on the procedural and recognition aspects of a fiduciary exercising its authority rather than on the creation of new rights or obligations.

As discussed above, 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 the online service provider. While there is some suggestion that service agreements are becoming somewhat less restrictive in response to recent US cases, the digital industry seems to favour service agreements that confine access rights to the original account holder only. In the absence of legislation, it is unlikely that the marketplace will respond on its own to allow access by fiduciaries.

Even if estate practitioners are regularly including digital assets in estate planning, an instrument that confirms a fiduciary’s authority may not be enough to take precedence over a restrictive online service agreement. An online service provider may refuse to recognize the instrument or the fiduciary’s authority under it, which may require expensive – and potentially multi-jurisdictional – litigation to resolve. A legislative solution based on harmonization and uniformity would be much more difficult for an online service provider to ignore.

Legislative reform can help address these issues. The goal of the *Uniform Act* is to compel custodians to provide the fiduciary with access to the digital asset, regardless of the terms and

conditions of a service agreement. An account holder would be able to decide what they wish to do with their digital assets, and know that those wishes will be respected by the online service provider after their incapacity or death.

However, the *Uniform Act* does not solve every access problem. Cryptocurrency, NFTs, and any other digital assets based on a decentralized model where there is no clearly identifiable custodian would be exempt from the legislative regime as there is no one who can be compelled to provide access. This limitation is inherent in the technology and may defy effective regulation. Given the growth in both the acquisition and valuation of these assets, loss of access will be a significant concern if it's not adequately dealt with by the account holder while they're still alive.

This post may be cited as: Stella Varvis, "Access to Digital Assets by Fiduciaries" (April 20, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/04/Blog_SV_Access_Digital_Assets.pdf

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