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In Support of a New Alberta Act for Fiduciary Access to Digital Assets

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More and more Canadians are engaged in 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. Given all this online activity, there's a real question about who should be able to access these electronic records – known as digital assets – when the original account holder dies or becomes incapacitated.

To help answer this question, the Alberta Law Reform Institute (ALRI) considered whether the *Uniform Access to Digital Assets by Fiduciaries Act* (the *Uniform Act*) ought to be enacted in Alberta. Other provinces and territories that have already adopted the *Uniform Act* include Saskatchewan, Prince Edward Island, New Brunswick, and the Yukon.

I wrote about the history and development of the *Uniform Act* and the access problems it is intended to solve in my previous ABlawg post. In this article, I will talk about some of the research and consultation results that informed the recommendations in ALRI's final report on Access to Digital Assets by Fiduciaries (Final Report 121), including our overall recommendation to enact new provincial legislation based on the *Uniform Act*. You can find our full list of recommendations and the underlying research supporting those recommendations in Final Report 121. You can also find a brief overview of ALRI's project on our YouTube channel.

Why Fiduciary Access to Digital Assets Matters

Imagine that a loved one has recently passed away and you are the personal representative with the responsibility of dealing with their estate. One of your tasks as a personal representative is to take an inventory of assets, which means that you need to find out what they owned and where it can be located. Taking an inventory of estate assets can often involve a little detective work: for example, going through your loved one's home to look for any receipts, papers, or documents related to their assets, or monitoring their mailbox for bank statements, bills, insurance policies, tax assessments, and loyalty membership information. If you can access the physical contents of your loved one's home and mailbox, you could likely piece together an inventory of estate assets and where to find them, which in turn would help you fulfil your legal obligations as the personal representative for the estate.

Now imagine that your loved one stored all that much-needed information in electronic form only. Instead of going through closets and drawers, you will need to go through computers and smart phones. Instead of monitoring a physical mailbox, you will need to monitor email accounts.

As the personal representative, you have the legal authority to access these digital assets to effectively and efficiently administer the estate. Yet it is possible that the custodian of the digital asset – which includes online service providers as well as any other person who holds, maintains, processes, receives, or stores electronic data of the account holder – will refuse to provide you with the login and password information to these assets because of restrictive service agreements that limit third-party access.

Even if your loved one wrote down their passwords and login credentials in a place you could easily find, many service agreements restrict account holders from sharing their access information with anyone else. If the custodian discovers that someone other than the account holder is using the login information without the custodian's permission, they might block access to the account entirely. When access is blocked, how can a personal representative fulfil their fiduciary obligations to properly deal with the estate?

ALRI's recommendations in Final Report 121 are intended to address the difficulties that might arise when a fiduciary tries to access the digital assets of a person who has died or is incapacitated. Specifically, ALRI recommends enacting a new Alberta Act that confirms the fiduciary's authority to deal with the digital assets even in the face of restrictive service agreements.

How a New Alberta Act Would Facilitate Access

A new Alberta Act would confirm that the fiduciary can essentially "step into the shoes" of the original account holder – meaning that the fiduciary is treated as an authorized user of the digital asset for the purposes of estate administration. The fiduciary's access rights to the digital asset must be consistent with the source of the fiduciary's authority, which can be set out in a formal instrument such as a will or power of attorney, by legislation such as the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 (CanLII), or by court order. Fiduciaries can access digital assets on behalf of a person who has died, or on behalf of a living person who does not have legal capacity to make their own decisions.

The scope of a fiduciary's access rights to a person's digital assets will depend on different factors. For example, guardians of represented adults and agents appointed under a personal directive would have access rights only to those digital assets that would help them make decisions about an incapacitated person's personal matters. In contrast, an attorney appointed under a power of attorney would have access rights to digital assets of a financial nature. Trustees will only have access rights to digital assets that form part of the trust property. The Public Guardian and Trustee would have broad access rights consistent with their role as the "office of last resort" when it comes to handling the estates of deceased or incapacitated persons.

By confirming that a fiduciary is an authorized user, a new Alberta Act would effectively override any clauses in service agreements that would restrict or limit the fiduciary's authority to access the digital asset. Once a fiduciary provides the custodian with proof of their identity and proof of their

authority, the legislation requires the custodian to provide access to the digital asset within 30 days (for custodians located within Canada) or 60 days (for custodians located outside Canada). The underlying intention of the new legislation is to make it easier for fiduciaries to gain access to the digital assets of a person who lived in Alberta at the time of their death or incapacity without adding the costly and time-consuming hurdle of applying for court orders in other jurisdictions.

Dealing with Extra-Jurisdictional Custodians

One of the common questions we heard during our consultation events with lawyers and estate professionals was whether custodians in other jurisdictions would be required to comply with an Alberta Act. For example, three of the biggest tech companies in the world – Apple, Google, and Meta – are all based in California. Whenever someone opens a new Gmail account, the service agreement provides that California law will govern all disputes relating to the service agreement, and that all disputes will be resolved exclusively in the courts of Santa Clara County, California. Given these contractual terms – known as choice of law and forum selection clauses – can a potential fiduciary realistically expect an Alberta Act to help them gain access to the digital asset of an account holder who has died or is incapacitated?

There is a legal principle known as the presumption against extraterritoriality – meaning that unless it says otherwise, legislation is presumed to apply only within the territorial boundaries of its own jurisdiction. In simple terms, legislation enacted in Alberta is typically expected to apply only to those matters that take place within the geographic limits of the province of Alberta. However, the presumption against extraterritoriality can be displaced if the legislation makes it clear that it is intended to apply beyond provincial borders. Based on authority from the 2017 decision of the Supreme Court of Canada in *Douez v Facebook, Inc*, 2017 SCC 33 (CanLII), an Alberta Act which includes clear and specific language that it is intended to apply to custodians located outside Alberta if the account holder lived in Alberta at the time of their death or incapacity would likely be sufficient to override the presumption against extraterritoriality. However, even if an Alberta Act includes specific provisions confirming that choice of law and forum selection clauses are unenforceable if they have the effect of limiting fiduciary access to the digital asset, there may still be a legal challenge to the new legislation brought by a custodian located outside Alberta, similar to what was seen in *Douez.*

It is also worth noting that some custodians – particularly those located in the United States – are already subject to uniform legislation that aims to facilitate fiduciary access to digital assets. In fact, the *Uniform Act* was developed in response to American legislation. An Alberta Act that is largely consistent with legislation in other jurisdictions helps promote harmonization and contributes to growing international consensus regarding the need to regulate the digital space.

The Special Case of Non-Custodial Digital Assets

Some lawyers and estate professionals participating in our consultation process were curious about how an Alberta Act would apply to cryptocurrencies and other decentralized digital assets. There have been many media stories about people who have lost access to their cryptocurrency wallets because of forgotten passwords, leading to a growth of private wallet recovery services. Given that a 2023 study suggests that 10% of Canadians own cryptocurrency, many lawyers and estate

professionals are turning their minds to these types of digital assets when advising their clients during the planning process.

The recommended new Alberta Act would not provide for access to decentralized digital assets if the account holder did not plan before their death or incapacity to pass on the access information to their fiduciary. The new legislation is intended to apply to digital assets that are held by an identifiable and compellable custodian – meaning that 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. No custodian, no legislated fiduciary access rights.

The reason why an Alberta Act would not apply to non-custodial digital assets is because of the underlying technology. 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. In these circumstances, a court order to compel access would not be enforceable because no one person or entity has control over the entire blockchain to grant access in the first place.

To further complicate matters, some people hold their cryptocurrency investments directly, while others hold them in custodial digital wallets. Custodial wallets involve a third party who stores access information on behalf of an account holder. If there is an identifiable and compellable third-party custodian, then it would be possible to use an Alberta Act to gain access to the custodial wallet of a deceased or incapacitated account holder.

While the issues raised by non-custodial digital assets may seem complicated, it may be helpful to think of them as being similar to cash. You do not require a third-party intermediary to access and use the cash in your own wallet. But if you deposit the cash into your bank account, then you will need to go through a third party – the bank – to access and use the money. If we extend this example to cryptocurrency, a person holding Bitcoin directly in a non-custodial wallet eliminates the need for a third-party intermediary. If they lose access to their non-custodial wallet, there is virtually no way to recover it. It would be the same as losing the cash in your wallet – the money still exists somewhere, but you likely won't be able to retrieve it.

Although it might initially seem like a knotty problem, it is a relatively simple process to determine whether you are dealing with a custodial or non-custodial digital asset. First, ask whether the digital asset is held by the account holder directly, or by a third party on the account holder's behalf. If the digital asset is held by the account holder directly, then a fiduciary cannot rely on an Alberta Act to gain access because there is no custodian. If the digital asset is held by an identifiable third party, then the second question to ask is whether the third party has control over who can access the digital asset. If the third party does not have control over access, then they cannot be compelled by a court order or other instrument to provide access to the fiduciary. The absence of an identifiable and compellable third party means that you are dealing with a non-custodial digital asset, which would fall outside the scope of an Alberta Act.

Towards an Alberta Act

A new Alberta Act confirming fiduciary access to digital assets would help clarify the law, produce predictable results, improve recognition by extra-jurisdictional custodians, and promote the efficient and effective administration of estates. More importantly, new legislation would help make it easier for fiduciaries including personal representatives, trustees, guardians, agents, and attorneys, to manage the estates of their loved ones. If you would like to learn about our other recommendations, please read Final Report 121 available for download on the ALRI website.

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