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# **Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada's Proposed Uniform Act and Comparable American Model Legislation**

Faye L. Woodman\*

## *Abstract*

*No jurisdiction in Canada has yet enacted comprehensive legislation regarding fiduciary access to the digital assets of an individual who has died, become incapacitated, or has appointed an attorney or other representative. In August, 2016, the Uniform Law Conference of Canada (ULCC) adopted a uniform Act on fiduciary access to digital assets (ULCC Uniform Act). This paper discusses why there may be a need for legislation, and then examines the most important elements of the ULCC Uniform Act. The Act, which tends to favour fiduciary access and media neutrality, is compared throughout the paper with the two American Acts prepared by the American Uniform Law Commission. The first American Act was adopted in 2014 and then withdrawn due to concerns voiced by internet service providers and civil liberty groups regarding privacy issues, and the other, a revised version, was subsequently adopted in 2015.*

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## INTRODUCTION

In August 2016, the Uniform Law Conference of Canada (ULCC) adopted model legislation on access to the digital assets of individuals by persons standing in a fiduciary relationship with them.<sup>1</sup> The model legislation represents the first attempt in Canada to comprehensively deal with the legal issues raised by the need for fiduciaries to access digital assets when an individual is incapacitated, appoints a legal representative or is dead. Only Alberta has passed legislation that directly addresses some of the issues regarding fiduciary access to digital assets, and even then, only when those issues arise due to an individual’s death.<sup>2</sup>

For the purpose of discussion, the definition of digital assets in the *ULCC Uniform Act* is apposite. Section 1 of the *Act* defines “digital asset” 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.<sup>3</sup>

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<sup>1</sup> Uniform Law Commission, *Uniform Access to Digital Assets by Fiduciaries Act (2016)*, (Uniform Law Conference of Canada, 2016), online: < <http://www.ulcc.ca> > [*ULCC Uniform Act*].

<sup>2</sup> *Estate Administration Act*, S.A. 2014, c. E-12.5 [*AB Estate Act*]. See also *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*].

<sup>3</sup> *ULCC Uniform Act*, *supra* note 1, s. 1. The notes to s. 1 of the *ULCC Uniform Act* further state that “record” is to be defined by the particular jurisdiction if not defined in its *Interpretation Act*. British Columbia is an example of a province in which the term “record” is defined in section 29 of its *Interpretation Act*, R.S.B.C. 1996, c. 238: “record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and

The notes to the definition of “digital assets” in the *ULCC Uniform Act* specifically provide that:

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.<sup>4</sup>

The notes to s. 1 of the *ULCC Uniform Act* state that the proposed legislation is limited to those records that are stored or transmitted in electronic form and not to any underlying assets of a tangible nature.<sup>5</sup>

Digital assets include information stored on a computer and other digital devices, content uploaded to websites or to the cloud (such as photos and documents), domain names, and more ephemeral, or virtual, “rights” to digital property including “digital entitlements associated with online games and material created online.”<sup>6</sup>

In its prefatory notes to the *ULCC Uniform Act*, the ULCC alludes to both the increasing prevalence of digital assets and their value.<sup>7</sup> Canadians are some of the most connected people in the world. Over 83% of households have access to the internet at home, with that figure increasing to 94% among those households in the top 50 percentile of incomes.<sup>8</sup> Moreover, Canadians are the most intensive users on the planet, accessing an average of over 3700 web pages per month.<sup>9</sup> One consequence is that more and more of people’s lives are lived on the internet

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any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise. The notes to “record” in the *ULCC Uniform Act*, *supra*, note 1, s. 1 also provide that, “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.” See also the notes to “digital assets” in the *ULCC Uniform Act*, *supra* note 1, s. 1, which provide that, “The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”

<sup>4</sup> *Ibid*, s. 1.

<sup>5</sup> *Ibid*.

<sup>6</sup> See notes to s. 1 (“fiduciary”) in the *ULCC Uniform Act*, *supra* note 1.

<sup>7</sup> See prefatory notes to *ULCC Uniform Act*, *supra* note 1.

<sup>8</sup> For statistics on household internet access, see Statistics Canada, *Canadian Internet Use Survey 2012* (Ottawa: Statistics Canada, 26 November 2013), online: <www.statcan.gc.ca/daily-quotidien/131126/dq131126d-eng.htm> [*Canadian Internet Use Survey*]. For statistics on internet use by age group, see Statistics Canada, *Canadian Internet use survey, Internet use at home, by age group and frequency of use*, CANSIM Table 358-0129 (Ottawa: Statistics Canada, 2010), online: <www.statcan.gc.ca>. These figures are likely even higher today.

<sup>9</sup> *Canadian Internet Use Survey*, *supra* note 8.

where they may be engaged in any number of the following activities including, among other things, online banking, investing, e-mail and social media, dating profiles, games, music, shopping accounts, or various reward schemes.

Some years ago these “digital” assets were valued at about \$55,000 USD per individual.<sup>10</sup> To the extent, however, that “access” is not “ownership,” the number may be misleadingly high. Some digital assets may be owned, but others may constitute mere licenses or subscriptions with a limited life, often ceasing on the death of the licensee or subscriber, or after a period of inactivity in the account. One question is whether the laws of property and succession should be amended to ensure their inheritability.<sup>11</sup> It is a question that is, for the foreseeable future, highly speculative, and will only be tangentially addressed in this paper, if, for no other reason than the notes to the definition of digital asset state that a fiduciary’s access to a record does not entitle “the fiduciary to own the asset [(j)or otherwise engage in transactions with the asset].”<sup>12</sup>

The focus of this paper will be on how present federal and provincial law assists or impedes fiduciary access and on the extent to which the proposed *ULCC Uniform Act* provides solutions to access problems.

Many of the issues considered in this paper have been examined by the both the popular press<sup>13</sup> and by academics,<sup>14</sup> although relatively little has been written about the legal position in Canada.

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<sup>10</sup> Kelly Greene, “Passing Down Digital Assets”, *Wall Street Journal* (31 August 2012), online: <wsj.com>.

<sup>11</sup> Jonathan J. Darrow & Gerald R. Ferrera, “Who Owns a Decedent’s E-Mails: Inheritable Probate Assets or Property of the Network?” (2007) 10 NYUJ Legis & Pub Pol’y 281 [Darrow].

<sup>12</sup> See notes to “digital asset” in the *ULCC Uniform Act*, *supra* note 1, s. 1.

<sup>13</sup> Bob Rankin, “[RIP] Digital Estate Planning” (24 February 2016), *Ask Bob Rankin* (blog), online: <www.askbobrankin.com/rip-digital-estate-planning.html>; Rosa Marchitelli, “Go Public — Apple demands widow get court order to access dead husband’s password: Digital property after death a murky issue, says estate lawyer” (18 January 2016), online: CBC News <www.cbc.ca>; Richard Weiland, “Planning for and Administering Digital Assets” (2014), online: <www.cwilson.com>

<sup>14</sup> For consideration of these issues in Canada, see John Gregory, “Fiduciaries’ Access to Digital Assets” (9 January 2014), online: <www.slaw.ca> [Gregory, “Fiduciaries’ Access”]; John Gregory, “The Digital Consequences of Death (or Disability)” (24 February 2012), online: <www.slaw.ca>; Robert Hester, “Whose Life is It Anyway? Managing the Life and Death of Online User Accounts” (2012) 32:1 Est Tr & Pensions J 5; Daniel A. Nelson, “The Challenge of Digital Estate Administration for Executors” (2012) 32:1 Est Tr & Pensions J 11; Joanna Vatau, “The Importance of Planning Your Digital Estate” (2012) 32:1 Est Tr & Pensions J 1; PJ Wells, “Digital Assets: Advising the Testator” (2012) 32:1 Est Tr & Pensions J 28. For consideration of these issues in foreign journals, see Natalie M. Banta, “Death and Privacy in the Digital Age” (2016) 94 NCL Rev 927; Natalie M. Banta, “Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death” (2014) 83:2 Fordham L Rev 799; Naomi R. Cahn, “Probate Law Meets the Digital Age” (2014) 67 Vand L Rev 1697 [Cahn]; Naomi R. Cahn, Christina Kunz & Suzanne Brown Walsh, “Digital Assets and Fiduciaries” (2016) in John A. Rothschild, ed., *Research Handbook on Electronic Law*

This paper is divided into three parts. Part I addresses the present law on fiduciary access to digital assets. It looks at possible impediments in the present law to fiduciary access and at the attempt in Alberta to address the issue for fiduciaries who are personal representatives. In the absence of legislation in other provinces, possible approaches to fiduciary access are suggested but found inadequate. Part II shows how the type of fiduciary and the characteristics of a digital asset impact fiduciary access under the various legislative models. The relatively simple Canadian rule of default access is compared to the more complex regimes in the American Acts. Finally, Part III describes some of the issues arising from the access conferred under the Canadian and American legislative models.

## I. IMPEDIMENTS TO FIDUCIARY ACCESS

The American Acts purport to be nothing more than an “overlay statute designed to work with a state’s laws”<sup>15</sup> and to ensure fiduciary access. This is the also the position in the *ULCC Uniform Act*,<sup>16</sup> but to the extent that both the

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(2016), online: < [www.ssrn.com/abstract=2603398](http://www.ssrn.com/abstract=2603398) > ; Elizabeth Holland Capel, “Conflict and Solution in Delaware’s Fiduciary Access to Digital Assets and Digital Accounts Act” (2015) 30 Berkeley Tech LJ 1211; Jennifer A. Davis, “Counseling Clients for #Digital Death” (2015) 32:12 The Computer and Internet Lawyer 1; Rachael E. Ferrante, “The Relationship Between Digital Assets and Their Transference at Death: ‘It’s Complicated’” (2013) 15 Loy J Pub Int L 37; Samantha D. Haworth, “Note: Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act” (2014) 68 U Miami L Rev 535; Leslie A. Gordon, “Online Heirs: Delaware leads the way in adopting legislation on executors’ digital assets” (2015) 101:7 ABA Journal 10; James D. Lamm et al, “The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property” (2013-14) 68 U Miami L Rev 385; Jeehyeon (Jenny) Lee, “Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets” (2016) Colum Bus L Rev 654; Laura McCarthy, “Digital Assets and Intestacy” (2015) 21:2 BU J Sci & Tech L 384; Jena L. Levin, “Trust Administration in the Digital Age” (2015) 154:5 Trusts & Estates 43; Juliana M. Spaeth, Mark J. Plotkin & Sandra C. Sheets, “Privacy, Eh!: The Impact of Canada’s Personal Information Protection and Electronic Documents Act on Transnational Business” (2002) 4 Vand J Ent L & Prac 28; Molly Wilkens, “Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?” (2011) 62 Hastings LJ 1037; Tyler G. Tarney, “A Call for Legislation to Permit the Transfer of Digital Assets at Death” (2012) 40:3 Cap U L Rev 773.

<sup>15</sup> The Uniform Law Commission of the United States has produced two model Acts, one in 2014 and a revised model Act in 2015: *Uniform Fiduciary Access to Digital Assets Act*, Uniform Law Commission (approved July 2014), online: < [www.uniformlaws.org](http://www.uniformlaws.org) > [2014 FADAA]; *Revised Uniform Fiduciary Access to Digital Assets Act (2015)*, Uniform Law Commission, (approved July, 2015), online: < [www.uniformlaws.org](http://www.uniformlaws.org) > [Revised FADAA].

<sup>16</sup> Uniform Law Conference of Canada, *Progress Report, Uniform Access to Digital Assets by Fiduciaries Act*, by Donna L. Molzan (Yellowknife: ULCC, August 2015) at para. 25 [Molzan, *Progress Report*].

Canadian and American Acts have added caveats “respecting the privacy and intention of the account holder,”<sup>17</sup> some new law and policy is inevitably made.

### 1. Fiduciary powers and property aspects of digital assets

To quote John Gregory, a Canadian liaison<sup>18</sup> to the drafting committee for the US model Acts:

One may ask, then, why Canadian jurisdictions might need legislation on this topic [access to digital assets]. Is it not clear that someone acting on someone else’s behalf has all the powers necessary so to act, really all the powers him- or herself at least for the purpose of administering the person’s affairs? Who doubts it? Can a program of education suffice, to alert people that they need to ensure that their fiduciaries are capable of accessing their digital assets-have a list of accounts and passwords, for example.<sup>19</sup>

The *ULCC Uniform Act* governs four types of fiduciaries: personal representatives 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.<sup>20</sup> An “account holder” is defined as “an individual who has entered into a service agreement<sup>21</sup> with a custodian.”<sup>22</sup> A “custodian” is “a person who holds, maintains, processes, receives or stores a digital asset of an account holder.”<sup>23</sup>

The notes to the *ULCC Uniform Act* also state that the term “guardian” is not intended to apply to guardians of a minor who is not deceased and that the term “trustee” is not intended to apply to a trustee in bankruptcy.<sup>24</sup> The Act also does not apply to an employer’s digital asset “that is used by an employee in the ordinary course of the employer’s business,”<sup>25</sup> nor does it appear to apply to the personal digital assets of employees held in employers’ internal e-mail systems.<sup>26</sup>

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<sup>17</sup> See notes to s. 1 of the *ULCC Uniform Act*, *supra* note 1; “News”, *2014 FADAA*, *supra* note 15.

<sup>18</sup> John Gregory, Former General Counsel in the Justice Policy Development Branch, Ministry of the Attorney General (Ontario), and Donna L. Molzan, Q.C., Legislative Reform, Alberta Justice & Solicitor General were Canadian liaisons from the ULCC to the ULC in the drafting of the *2014 FADAA*.

<sup>19</sup> See Gregory, “Fiduciaries’ Access”, *supra* note 14.

<sup>20</sup> *ULCC Uniform Act*, *supra* note 1, ss. 1-2.

<sup>21</sup> *Ibid*, at s. 1 defines “service agreement” as “an agreement between an account holder and a custodian.”

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> See *ULCC Uniform Act*, *ibid*, at notes to s. 1.

<sup>25</sup> See *ibid*, at notes to s. 2(2).

<sup>26</sup> *Ibid*.

Employees are not generally account holders, since employers do not hold the personal digital assets of employees pursuant to a service agreement.<sup>27</sup>

*a. Personal representatives in Alberta and British Columbia*

Alberta is the only jurisdiction in Canada that has introduced specific legislation to ensure that the personal representative of a deceased individual has access to, and hence is able to administer, digital assets.<sup>28</sup> Both John D. Gregory and Donna L. Molzan drew the Alberta bill to the attention of the chair of the US drafting committee, Suzanne Walsh.<sup>29</sup> Gregory characterized the Alberta legislation as general enough in scope to confer authority and to be “media neutral.”<sup>30</sup> It is noteworthy, however, that the Act applies only to fiduciaries who are personal representatives.

A personal representative of a deceased is the executor or administrator of the deceased’s estate. Where there is a will, one or more executors are normally appointed under its terms. If there is no will, or no executor is able or willing to act, the court appoints an administrator of the estate. A personal representative is required, under the common law and legislation, to administer the estate as a fiduciary, with the attendant responsibilities.<sup>31</sup>

Under the common law, a personal representative, to use a well-worn phrase, steps into the shoes of the deceased.<sup>32</sup> In addition, estates legislation in most provinces includes references to management of “property,” or an extended definition of property or, in some provinces to “assets” or “estate.”<sup>33</sup> The personal representative has the duty to:

- gather in property,

<sup>27</sup> *Ibid*, s. 1, definitions of “account holder” and “custodian”.

<sup>28</sup> *AB Estate Act*, *supra* note 2.

<sup>29</sup> See letter from Donna L. Molzan, Q.C. to Suzanne Walsh (7 March 2014), Uniform Law Commission, online: < [www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014mar7\\_FADA\\_Molzan%20msg%20and%20Admin%20Act\\_Bill%20004.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014mar7_FADA_Molzan%20msg%20and%20Admin%20Act_Bill%20004.pdf) >; Letter from John D. Gregory to Suzanne Walsh & Naomi Cahn (17 March 2014), Uniform Law Commission, online: < [www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014mar17\\_FADA\\_Comments\\_Gregory.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014mar17_FADA_Comments_Gregory.pdf) > [Gregory, “Letter”].

<sup>30</sup> Gregory, “Letter”, *ibid*.

<sup>31</sup> See James MacKenzie, *Feeney’s Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2000) at § 8.13.

<sup>32</sup> Donovan W.M. Waters, Mark Gillen & Lionel Smith, *Waters’ Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 48.

<sup>33</sup> The definition of personal estate includes [emphasis added regarding “property” in this footnote]:

British Columbia, *WESA*, *supra* note 2, s. 142 confers broad powers on the personal representative but, s. 1 states:  
 “**property**” means land and personal property, and “personal **property**” means every kind of **property** other than land;  
 Saskatchewan, *Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 1 states:



- pay the deceased’s creditors, and
- transfer what is left or the value thereof to the deceased’s heirs either under the terms of the will of the deceased individual, or if there is no will, under intestate succession legislation of the provinces.<sup>34</sup>

To the extent that digital assets are not considered to be property or a “thing” mentioned in the applicable statute, it could be argued, that probate and estates legislation provide that the personal representative has no responsibility, or right, to manage those assets.

The drafting committee of the *ULCC Uniform Act* were in favour of “a statutory rule to confirm the implied authority of a fiduciary over all digital assets”, although the point appeared to be to make the power to exercise that

“letters of administration” means all letters of administration of the **property** of a deceased person, with or without the will annexed and whether granted for general, special or limited purposes; There is no definition of “letters probate.”

s. 32 further states:

On an application to pass the accounts of an executor or administrator, a judge may conduct a full inquiry concerning, and a full accounting of, all **property** that the deceased was possessed of or entitled to and the administration and disbursement of that property.

Manitoba, *The Trustee Act*, C.C.S.M. 2015, c. T160, s. 1 states:

“personal estate” includes leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other **property**, except real estate, that by law devolves upon the executor or administrator, and any share or interest therein;

See also *The Court of Queen’s Bench Surrogate Practice Act*, C.C.S.M. 2014, c. C290.

Ontario: *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 2(1) states:

All real and personal **property** that is vested in a person without a right in any other person to take by survivorship, on the person’s death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person’s debts and so far as such **property** is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

Newfoundland and Labrador: *Trustee Act*, R.S.N.L. 1990, c. T-10, s. 2 states:

(i) “**property**” includes real and personal chattels and an estate and interest in property, and a debt, and a thing in action, and other rights or interests, whether in possession or not;

(n) “trustee” includes executor or administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee.

See also *Judicature Act*, S.N.L. 1990, c. J-4, Part VI, ss. 108-132.

New Brunswick, *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 1: “administration” includes all letters of administration of the **property** of deceased persons, whether with or without the will annexed, and whether granted for general, special or limited purposes; “probate” includes all letters probate relating to the **property** of a deceased person whether granted for general, special or limited purposes; Section 38 also provides: Except as otherwise provided . . . the Court, in granting probate or administration shall be governed by the principles of the common law;

PEI, *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 1 states:

(l) “personal estate” or “personal **property**” means leasehold estate and other chattels real, and also moneys, shares, stocks, debentures, bonds, securities for money, (not being real estate), debts, choses in action, rights, credits, goods, and all other **property** which prior to October 2, 1939, devolved upon the executor or administrator, and any share or interest therein;

Nova Scotia, *Probate Act*, S.N.S. 2000, c. 31, s. 1 states: (k) “property” means real or personal property and includes, for greater certainty, a chose in action.

<sup>34</sup> See *AB Estate Act*, *supra* note 2, s. 7(1)(c); *WESA*, *supra* note 2, s. 162(3)(d).

authority clear to custodians and the courts, rather than to specifically address the property argument.<sup>35</sup>

Section 20 of the Alberta *Estate Administration Act* includes the authority “to do all things concerning the property that are necessary to give effect to any authority or powers vested in the personal representative.”<sup>36</sup> The Alberta Act also contains a broad definition of property — a term not defined in its predecessor Act.<sup>37</sup> The definition of property in the new Alberta Act provides:

- (i) real and personal property, *as well as rights or interests in them*,
- (ii) anything regarded in law or equity as property or as an interest in property,
- (iii) *any right or interest that can be transferred for value from one person to another*,  
and
- (iv) any right, including a contingent or future right, to be paid money or receive any other type of money, and
- (v) any cause of action, to the extent that it relates to property or could result in a judgment regarding a person to pay money.<sup>38</sup>

Finally, s. 20(1)(b) of the new Alberta Act lists one of the core tasks of a personal representative to be the identification of estate assets and liabilities including “compiling a list, [of] . . . the value of all land and buildings, a summary of outstanding mortgages, leases and other encumbrances, and *online accounts . . .*”<sup>39</sup>

Although British Columbia legislation regarding estates adheres to a more traditional definition of property, it does define “personal property” to mean “every kind of property other than land.”<sup>40</sup> Section 142 of the Act, which describes the general authority of a personal representative, is broadly drawn, and specifically provides that a personal representative has “the same authority over the estate in respect of which the personal representative is appointed as the deceased person would have if living.”<sup>41</sup>

#### *b. Other provinces and other approaches*

The Alberta and British Columbia legislation is limited to personal representatives and thus falls short of complete provincial regimes to govern fiduciary access to digital assets. For all other jurisdictions, there is no legislation dealing specifically with digital assets.

In the absence of legislation, a number of approaches have been suggested for the treatment of digital assets and access to them by fiduciaries. Two early American commentators, Jonathan J. Darrow and Gerald R. Ferrero,<sup>42</sup>

<sup>35</sup> Molzan, *Progress Report*, *supra* note 16.

<sup>36</sup> *AB Estate Act*, *supra* note 2, s. 20(1).

<sup>37</sup> *Administration of Estates Act*, R.S.A. 2000, c. A-2, as repealed by *AB Estate Act*, *ibid*.

<sup>38</sup> *AB Estate Act*, *ibid*, s. 20(1)(b) [emphasis added].

<sup>39</sup> *Ibid* [emphasis added].

<sup>40</sup> *WESA*, *supra* note 2, s. 1.

<sup>41</sup> *Ibid*.

<sup>42</sup> Darrow, *supra* note 11 at 281.

proposed recasting the relationship between the account holder and custodian, as one of bailor and bailee.<sup>43</sup> In that case, the bailor/owner, and thus his or her fiduciary, would be able to get the digital asset back pursuant to generally understood and extant bailment law. Under Canadian law, however, bailment is reserved for tangible personal property with certain limited exceptions for negotiable instruments and warehouse receipts. These torts are not conventionally applicable to intangible property (unlike in the United States<sup>44</sup>). But even Darrow and Ferrero admit that, in any case, legislation would have to be introduced to override the service agreements between account holders and custodians, although they do suggest that from a broader perspective, “public policy considerations might allow a court . . . [to render] boilerplate termination clauses ineffective in the face of society’s increasing dependence on electronic communication and the significant disruption that might result if heirs were denied access to accounts.”<sup>45</sup>

An alternative approach is based on the property or property-like attributes of digital assets. The argument is that if a thing is property, then the owner or her representative has (or perhaps, should have) a right of access. This is an argument that extends beyond fiduciary access and speaks to the inheritability of digital assets.

It is a debatable point whether digital assets are property. To quote Binnie J. in the leading Canadian case of *Saulnier (Receiver of) v. Saulnier*<sup>46</sup> (on whether an annual fishing license is property), “property,” is a “term of some elasticity that takes its meaning from the context.”<sup>47</sup> He also noted that “many things that have commercial value do not constitute property, while the value of some property may be minimal.”<sup>48</sup> In many cases digital assets will exist simply as information. Whether information is property, not surprisingly, depends on the context<sup>49</sup>.

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<sup>43</sup> *Ibid*, at 301-308.

<sup>44</sup> *Ibid*, at 306.

<sup>45</sup> *Ibid*, at 308.

<sup>46</sup> 2008 SCC 58, 2008 CarswellNS 569, 2008 CarswellNS 570 (S.C.C.) [*Saulnier*].

<sup>47</sup> *Ibid*, at para. 16.

<sup>48</sup> *Ibid*, at para. 42.

<sup>49</sup> In the leading English case of *Phipps v. Boardman*, [1965] 3 All E.R. 721 (U.K. H.L.) aff’g [1965] 1 All E.R. 849 (C.A.) aff’g [1964] 2 All E.R. 187 (H.C.), the majority of judges at all three levels of decision found that the information acquired by the fiduciary while acting for a trust was property of the trust. In *Stewart v. The Queen*, 1988 CarswellOnt 110, 1988 CarswellOnt 960, [1988] 1 S.C.R. 963 (S.C.C.) [*Stewart*], the Supreme Court of Canada also considered whether information is property and held it was not for the purposes of the interpretation of s. 283 of the *Criminal Code*, R.S.C. 1970, c. C-34 [*Criminal Code* 1970]. The Court cited a lack of precedent and was evidently concerned that if confidential information was property for the purposes of s. 288 (theft) (see *Criminal Code* 1970, supra note 49), other sections of the *Criminal Code* would apply with uncertain consequences. The Court in *Stewart* does suggest that information may be property for the purposes of the civil law but states at para. 23 (see *Stewart* supra note 49)

This approach is unlikely to succeed. There is no doctrine in the common law that gives a general right to access one's property. An example, well known to property students, is "landlocked" real property to which access by the owner is denied. Relief is granted only in exceptional circumstances.<sup>50</sup> Where the property is personal, not real property, the right of access seems even more unlikely, although the English High Court in *Moffatt v. Kazana*,<sup>51</sup> expressed some doubts on the matter. In *Moffatt*, the court had to consider the rights of the true owner of a money box hidden in an upstairs attic of a house the owner had sold. The box was ostensibly forgotten by the owner. In his judgment, Wrangham J. posed a hypothetical in which the new homeowner found the box but, while not claiming ownership, denied its true owner the right to cross his land in order to claim it.<sup>52</sup> But as Wrangham J. observed, these difficulties remained to be addressed in a case in which they actually arise.<sup>53</sup>

It is nevertheless the case that some service agreements provide that the account holder's intellectual property remains her property (that of the account holder),<sup>54</sup> and for most account holders the predominant type of intellectual property will be copyright. The *Copyright Act* provides that copyright shall subsist in Canada "in every original literary, dramatic, musical and artistic work."<sup>55</sup> Copyright is not, of course, limited to high art or literature. It is quite

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that "the cases demonstrate English and Canadian civil law protect confidential information. However, the legal basis for doing so has not been clearly established by the cases." See also the comments regarding "information" to s. 1 ("digital assets") of the *ULCC Uniform Act*, supra note 1.

<sup>50</sup> An easement of necessity will arise for land that is landlocked at the time of transfer, but only if there is some land retained by the grantor over which access can be exercised. See *B.O.J. Properties Ltd. v. Allen's Ltd.*, 1979 CarswellNS 82, 108 DLR (3d) 305 (N.S. C.A.). In *Sweet v. Sommer*, [2004] E.W.H.C. 1504 (Ch.), 4 All E.R. 288 (Ch. Div.) (U.K. H.C.), the Court held that the owner would be denied access if the only option for access was for the grantor to tear down a building the grantor owned.

<sup>51</sup> [1969] 2 Q.B. 152, [1968] 3 All E.R. 271 (U.K. H.C.) [cited to All E.R.] [*Moffatt*].

<sup>52</sup> *Moffatt*, *ibid* at 275.

<sup>53</sup> *Ibid*. Rights and access to chattels, not real property, are also divided under the limitations Acts of most provinces under which the right to recovery in court is time limited, but the right to the thing is not specifically extinguished (recaption). See Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell: 2014) at 150.

<sup>54</sup> See e.g. Google, "Terms of Service", online: <<https://google.com>> :

"Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours";

Dropbox, "Terms of Service, Your Stuff & Your Permissions", online: <<https://www.dropbox.com>> :

"When you use our Services, you provide us with things like your files, content, email messages, contacts and so on ("Your Stuff"). Your Stuff is yours. These terms don't give us any rights to Your Stuff except for the limited rights that enable us to offer the Services" [*Dropbox*].

<sup>55</sup> R.S.C. 1985, c. C-42, s. 5(1).

possible that copyright arises even in quotidian emails. (And doubtless, there is sometimes a high level of “originality” in dating profiles.)<sup>56</sup> Originality has been interpreted to imply skill and judgment: “[m]ere industry or ‘sweat of the brow’ is not enough; nor is creativity necessary.”<sup>57</sup> In other words, copyright is a form of property that can apply to some digital assets, even relatively banal ones.

While a provision in the terms of the service agreement that guarantees the account holder’s right to “your stuff”<sup>58</sup> will generally serve to prevent its appropriation by the custodian, it does not guarantee the right of the copyright owner or her representative to access it. An analogy can be made to the owner of the copyright in the contents of a tangible asset such as a letter. It is trite law that the sender/copyright owner does not have any rights to access the letter (or obtain copies), and the recipient has no obligation to preserve the letter.<sup>59</sup> On the other hand, there is a conveyance or giving up of the contents of a letter, which may not truly be comparable to copyrighted digital assets retained by an internet service provider.

## 2. The terms of service agreements

The interposition of a new type of third party between a fiduciary and the beneficiary’s assets, the Internet Service Provider, or custodian, has raised additional obstacles to fiduciary access. The custodian may choose not cooperate with the fiduciary to provide access, because of the custodian’s view of itself as a protector of the account holder’s privacy and because of its fear that it may incur liability for breaching that privacy.<sup>60</sup> The custodian may also be protective of its bottom line and be concerned with the costs of complying with individualized access. Thus, in many service agreements between a custodian and an account holder, the custodian may impose contractual terms that effectively deny access to the fiduciary.

Service agreements are contracts of adhesion which generally fall into several categories, including browse wrap agreements and click wrap agreements. Under the latter type of agreement, the user/buyer indicates her assent to its terms by clicking the box “I agree”. The legal efficacy of click-wrap agreements was recognized in *Rudder v. Microsoft Corp.*:

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<sup>56</sup> See e.g. Ashley Madison, “Terms of Service”, online: < [www.ashleymadison.com/app/public/tandc.p?c=2](http://www.ashleymadison.com/app/public/tandc.p?c=2) > .

<sup>57</sup> David Waver, *Intellectual Property Law* (Toronto: Irwin Law, 2011) at 100. See also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, 2004 CarswellNat 446, 2004 CarswellNat 447 (S.C.C.) at 48.

<sup>58</sup> *Dropbox*, *supra* note 54.

<sup>59</sup> But see “Property Rights in Letters (1937) 46:3 Yale LJ 493 (interest in physical document at 493, legal interest of writer at 496).

<sup>60</sup> See Section I.3, “Canadian privacy laws” in this article, below.

On the present facts, the Membership Agreement [click wrap agreement] must be afforded the sanctity that must be given to any agreement in writing.<sup>61</sup>

A browse wrap agreement is like a click wrap agreement, except that there is no “I accept” box, and the continued use of the website or website products will generally indicate acceptance of the terms of use set out at the first of the website.<sup>62</sup>

Currently, many, if not most, service agreements, except for those of certain large social media platforms, do not include any references to fiduciaries. In the absence of specific provisions in the service agreement, the practice of custodians has ranged from refusal to recognize legal representatives, if any are appointed, to extending access to family and friends with no legal standing, through an array of non-traditional and ad hoc arrangements.<sup>63</sup>

Where an account holder has died intestate, there may be no administrator appointed for the estate. Intestates are disproportionately young and without substantial assets.<sup>64</sup> Further, friends and family may not seek appointment of an administrator because many jurisdictions require the posting of a bond.<sup>65</sup> In those cases, unless the custodian provides informal access, there will be no one to deal with the digital assets of the intestate, even though the intestate may have had an online life worthy of preservation.<sup>66</sup>

Some service agreements may not provide for death or incapacity directly, but contain provisions that provide for the deactivation of the account after a period of inactivity.<sup>67</sup> The service agreement may also prohibit the account

<sup>61</sup> (1999) 1999 CarswellOnt 3195, [1999] O.J. No. 3778, 47 C.C.L.T. (2d.) 168, 40 C.P.C. (4th) 394 (Ont. S.C.J.), at para. 18.

<sup>62</sup> *Century 21 Canada Ltd. Partnership v Rogers Communications Inc.*, 2011 BCSC 1196, 2011 CarswellBC 2348, [2011] B.C.J. No. 1679 (B.C. S.C.), but see *North American Systemshops Ltd. v King*, 1989 CarswellAlta 111, [1989] A.J. No. 512, 68 Alta. L.R. (2d.) 145 (Alta. Q.B.) (regarding notice).

<sup>63</sup> See Michael D. Roy, “Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?” (2011) 24:4 Quinipiac Probate Law Journal 376 at 386.

For example, Yahoo initially declined a request made by the parents of a deceased US Marine to access their son’s email account. The company was subsequently forced to provide access through a court order. See Stefanie Olsen, “Yahoo releases e-mail of deceased Marine”, *CNET* (22 April 2005), online: < www.cnet.com >. Another example occurred when Facebook denied account access to the parents of a model who died in questionable circumstances. Their decision not to grant access was upheld by a California court. See Jeff Roberts, “Dead model’s parents can’t get Facebook messages, judge says”, *Gigaom* (27 September 2012), online: < www.gigaom.com >.

<sup>64</sup> Canadian Legal Wills, online: < https://www.legalwills.ca/> .

<sup>65</sup> See e.g. *Probate Act*, S.N.S. 2000, c. 31, s. 40. Some provinces provide for the expedited administration of small estates. See e.g. *Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 9. Section 9 applies to estates not exceeding \$25,000 that contain no real property. The fee is \$30 and s. 9(1) provides that the “the personal property of a deceased person be paid or delivered to a person named by the judge to be disposed of by that person . . . .”

<sup>66</sup> Molzan, *Progress Report*, supra note 16 at para. 47.

holder from transferring the account or sharing her password.<sup>68</sup> In either case, a fiduciary of a deceased or incapacitated account holder may effectively be denied access. Even if the fiduciary can obtain the password to the account, the service agreement may invalidate the account if a person other than the account holder obtains access (although admittedly this may be hard to police).<sup>69</sup> By shutting down accounts at death or after a period of inactivity, custodians may eliminate value or property, make it inaccessible, damage ongoing business and eliminate the ability of an individual's heirs to inherit property of sentimental value or even of historical interest. From the custodians' perspective, they are simply fulfilling their users' expectations of privacy and, by chance, eliminating cumbersome administrative obligations.<sup>70</sup>

Facebook is one of the providers which now allows limited access to an account of a deceased individual.<sup>71</sup> However, the access is entirely mediated by contract and circumvents considerations of fiduciary access and obligations. Facebook allows an account holder to provide in advance through her security settings whether, on death, her account is either to be deleted or "memorialized."<sup>72</sup>

If an account is memorialized, no one can log into the account and its contents may be shared only among the friends it was originally shared with. The contents also cannot be changed. Depending on the privacy settings of the account, friends can share memories of the deceased on the Timeline.

An "immediate" family member of a deceased, not clothed in any legal authority, or an executor, may request that an account be deleted. In both cases, there must be proof of death such as an obituary or memorial card and proof of authority to act. The authority to act derives, it appears, from the possession of a power of attorney, birth certificate, will, or estate letter.

It is also possible for an account holder before her death to designate, in the security settings of her account, a "legacy contact." A legacy contact must be a member of Facebook and age 19 years or older. A legacy contact has limited powers to update the profile and biography, respond to new friend requests, and provide a post regarding the deceased or the deceased's memorial service. The legacy contact cannot log into the account, read the account holder's messages, or remove friends.

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<sup>67</sup> See e.g. *Dropbox*, *supra* note 54.

<sup>68</sup> See e.g. Yahoo, "Terms of Service", online: < [policies.yahoo.com/ca/en/yahoo/terms/utos](http://policies.yahoo.com/ca/en/yahoo/terms/utos) > .

<sup>69</sup> See e.g. Amazon, "Kindle Store Terms of Use", online: < [www.amazon.ca/gp/help/customer/display.html?nodeId=201014950](http://www.amazon.ca/gp/help/customer/display.html?nodeId=201014950) > , s. 3 (dealing with termination).

<sup>70</sup> See e.g. Netchoice, online: < [netchoice.org/](http://netchoice.org/) > .

<sup>71</sup> See Nate Russell, "Of Digital Legacies and Changes to Facebook's Memorial Pages", *Slaw* (16 February 2015), online: < [www.slaw.ca](http://www.slaw.ca) > .

<sup>72</sup> Facebook, "Help", online: < [www.http://facebook.com/help](http://www.http://facebook.com/help) > .

### 3. Canadian privacy laws

The position of the drafters of the *ULCC Uniform Act* is that no Canadian privacy legislation will hinder the operation of the Act and, implicitly that under current law, fiduciary access is not barred by privacy legislation.<sup>73</sup> They have stated that the privacy Acts do not prevent the disclosure of personal information of an individual to a fiduciary because “the fiduciary is obliged to obtain the information to fulfill their duties.”<sup>74</sup>

While privacy legislation may not greatly impede fiduciary access, custodians are governed by privacy legislation, and some limitations may be imposed on fiduciary access. In addition, where the privacy rights of third parties are concerned, the legislation may be engaged. This is particularly a concern where the digital asset is e-mail or social media.<sup>75</sup>

There are two types of general privacy legislation in Canada governing non-governmental actors.<sup>76</sup> The federal Government enacted the *Personal Information Protection and Electronic Documents Act*<sup>77</sup> (PIPEDA) in 2000 and three provinces have elected to enact their own legislation, to be applied in lieu of the federal legislation: British Columbia,<sup>78</sup> Alberta<sup>79</sup> and Quebec.<sup>80</sup> These Acts generally govern the collection, use and disclosure of personal information<sup>81</sup> by organizations,<sup>82</sup> and, in the case of the federal Act, to organizations carrying on

<sup>73</sup> *ULCC Uniform Act*, *supra* note 1, notes to s. 5.

<sup>74</sup> *Ibid.*

<sup>75</sup> If a communication is public then the privacy Acts will not apply.

<sup>76</sup> Also, the federal government and the provinces each have legislation regarding government information collection and storage. The federal legislation is called the *Privacy Act*, R.S.C. 1985, c. P-21. The provincial legislation is generally described by the acronym “FIPO,” Freedom of Information and Protection of Privacy Act. See e.g. *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

<sup>77</sup> *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [PIPEDA].

<sup>78</sup> *Personal Information Protection Act*, S.B.C. 2003, c. 63 [BC PIPA].

<sup>79</sup> *Personal Information Protection Act*, S.A. 2003, c. P-6.5 [AB PIPA].

<sup>80</sup> *Protection of Personal Information in the Private Sector*, C.Q.L.R. c. P-39.1. This paper will not deal with the non-common law jurisdiction of Quebec.

<sup>81</sup> *PIPEDA*, *supra* note 77, s. 2(1):

- personal information means information about an identifiable individual;

*BC PIPA*, *supra* note 78, s. 1:

- “personal information” means information about an identifiable individual and includes employee personal information but does not include

(a) contact information, or

(b) work product information;

*AB PIPA*, *supra* note 79, s. 1(k):

- “personal information” means information about an identifiable individual.

<sup>82</sup> *PIPEDA*, *supra* note 77, s. 2(1):

- “organization” includes an association, a partnership, a person and a trade union;

*BC PIPA*, *supra* note 78, s. 1:



commercial activities.<sup>83</sup> Custodians will fall within the definitions and the Acts will apply.<sup>84</sup> In addition there is sector specific legislation enacted by the federal government and provinces related to, for example, the privacy of health information. This paper will not deal directly with those types of legislation.

The other type of privacy legislation makes it a tort to violate the privacy of another. Four common law jurisdictions in Canada have enacted legislation: British Columbia,<sup>85</sup> Saskatchewan,<sup>86</sup> Manitoba,<sup>87</sup> and Newfoundland and Labrador.<sup>88</sup> The legislation was enacted before the current prevalence of social media and e-mail, and not with those means of communication in mind, but both custodians and fiduciaries qualify as “persons.”<sup>89</sup> The cases decided so far on the application of the Acts have not dealt with fiduciary access.<sup>90</sup>

#### a. *Privacy torts*

All of the provincial legislation regarding privacy torts, except Manitoba, provides that a right of action is extinguished by the death of the person whose

- “organization” includes a person or an unincorporated association, a trade union, a trust or not for profit corporation, but does not include

(a) an individual acting in a personal or domestic capacity or acting as an employee,

(b) a public body,

(c) the Provincial Court, the Supreme Court or the Court of Appeal,

(d) the Nisga’a Government, as defined in the Nisga’a Final Agreement, or

(e) the private trust for the benefit of the one or more designated individuals who are friends or members of the family of the settlor;

*AB PIPA*, *supra* note 79, s. 1(1)(i):

- “organization” includes

(i) a corporation,

(ii) an unincorporated association,

(iii) a trade union as defined in the *Labour Relations Code*,

(iv) a partnership as defined in the *Partnership Act*, and

(v) an individual acting in a commercial capacity,

but does not include an individual acting in a personal or domestic capacity.

<sup>83</sup> *PIPEDA*, *supra* note 77, ss. 1, 4: “commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.”

<sup>84</sup> Fiduciaries will, in many cases, also fall within the definitions of “organizations” and in the case of the federal Act, “carrying on commercial activities.” Therefore, the transfer of information from fiduciary to beneficiaries also could be subject to the legislation. This paper will focus on the transfer of information from custodian to fiduciary.

<sup>85</sup> *Privacy Act*, R.S.B.C. 1996, c. 273 [*BC Privacy Act*].

<sup>86</sup> *The Privacy Act*, R.S.S. 1978, c. P-24 [*SK Privacy Act*].

<sup>87</sup> *The Privacy Act*, R.S.M. 1987, c. P125, C.C.S.M. c. P125 [*MB Privacy Act*].

<sup>88</sup> *Privacy Act*, R.S.N.L. 1990, c. P-22 [*NL Privacy Act*].

<sup>89</sup> See e.g. *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29: “‘person’ includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law”.

<sup>90</sup> See Barbara McIsaac, Rick Shields, & Kris Klein, *The Law of Privacy in Canada*, (Toronto: Carswell, 2004) (looseleaf consulted on 9 May 2017), para. 2.4.5 ff.

privacy is alleged to have been violated, so personal representatives are exempted from their purview, although the rights of third parties may still be violated by the release of material to a fiduciary or where the fiduciary passes on the material to heirs.<sup>91</sup> Otherwise, all the statutes provide for the defense:

(d) that the defendant acted under authority conferred upon him by a law in force in the province or by a court or any process of a court<sup>92</sup>

None of the Acts specifically define what the tort comprises, except to provide that a person must “willfully *without claim of right* violate the privacy of another person.”<sup>93</sup> The Newfoundland Act provides that the nature and degree of privacy to which an individual is entitled is that “which is reasonable in the circumstances, regard being given to the lawful interests of others. . . .”<sup>94</sup> This theme of reasonableness, which supports fiduciary access to digital assets, is repeated in the other Acts.<sup>95</sup>

When the Alberta, Saskatchewan and Newfoundland statutes reference examples of violations of privacy, they refer to the “use” of certain materials (which could include digital assets) such as “letters, diaries and other personal documents” without consent as a *prima facie* violation of privacy.<sup>96</sup>

*b. Federal and provincial legislation regarding the disclosure of personal information by organizations*

The federal Act provides that an organization may disclose personal information without the knowledge or consent of the individual only in certain enumerated situations.<sup>97</sup> One exception is if the disclosure is made after the

<sup>91</sup> *BC Privacy Act*, *supra* note 85, s. 5; *SK Privacy Act*, *supra* note 86, s. 9; *NL Privacy Act*, *supra* note 88, s. 11. (Although this contradicts the generally broad powers of fiduciaries.)

<sup>92</sup> *MB Privacy Act*, *supra*, note 87, s. 5(d); see also *BC Privacy Act*, *supra* note 85, s. 2(2)(c); *SK Privacy Act*, *supra* note 86, s. 4(1)(c); *NL Privacy Act*, *supra* note 88, s. 5(c).

<sup>93</sup> *SK Privacy Act*, *supra* note 86, s. 2. All the Acts include this formulation: *BC Privacy Act*, *supra* note 85, s. 1(1); *MB Privacy Act*, *supra* note 87, s. 2(1); *NL Privacy Act*, *supra* note 88, s. 3(1) [emphasis added].

<sup>94</sup> *NL Privacy Act*, *supra* note 88, s. 3(2).

<sup>95</sup> *BC Privacy Act*, *supra* note 85, s. 1(2); *SK Privacy Act*, *supra* note 86, s. 6(1); *MB Privacy Act*, *supra* note 87, s. 2(1).

<sup>96</sup> *SK Privacy Act*, *supra* note 86, s. 3(d); *MB Privacy Act*, *supra* note 87, s. 3(d); *NL Privacy Act*, *supra* note 88, s. 4(d). There is also a developing common law tort of invasion of privacy which has been primarily a construction of the Ontario courts. That province has no legislation comparable to the privacy legislation described above. In *Jones v. Tsige*, 2012 ONCA 32, 2012 CarswellOnt 274 (Ont. C.A.), the Ontario Court of Appeal held there was a tort of invasion of privacy in that province, specifically an action for intrusion on the seclusion of an individual. The decision echoed many criteria already established in the legislation. It held that liability would ensue if the defendant’s conduct was intentional; the defendant’s conduct invaded the private affairs or concerns of the plaintiff without lawful justification, and a reasonable person would regard the invasion as highly offensive.

<sup>97</sup> *PIPEDA*, *supra* note 77, s. 7(3).

earlier of “one hundred years after the record containing the information was created,”<sup>98</sup> or “twenty years after the death of the individual whom the information is about.”<sup>99</sup> Therefore protection under the Act will be extended to deceased account holders for any lesser period.

PIPEDA does not refer directly to the rights and responsibilities of a fiduciary, although it implicitly recognizes them. Thus Principle 4.3.6 on Consent states that “consent [for disclosure] can also be given by an authorized representative (such as a legal guardian or a person having power of attorney).”<sup>100</sup>

Disclosure without consent is also permitted pursuant to an order of “the court, person or body with jurisdiction to compel the production of information”<sup>101</sup> and where required “by law.”<sup>102</sup> Given the responsibilities imposed on a fiduciary under probate Acts, other legislation, and the common law, fiduciary access might be subsumed under either of those provisions (i.e. a court order or a legal requirement). British Columbia provides for disclosure if “the disclosure is required or authorized by law,”<sup>103</sup> but Alberta’s list of reasons for disclosure without consent simply refers to disclosure required by statutes, regulations and bylaws and to disclosure of information that is reasonable for the purposes of a legal proceeding.<sup>104</sup>

Clause 4.9 of Schedule 1 of PIPEDA sets forth “Principle 9 - Individual Access” which permits an individual access to her own personal information. This principle also refers to the individual’s ability to challenge the accuracy and completeness of the information, but does not explicitly provide that access will be limited to that circumstance.<sup>105</sup> If the fiduciary steps into the shoes of the beneficiary, the principle of individual access might permit the fiduciary to access an individual’s digital assets held by a custodian. Access, however, is prohibited,

[i]f doing so would likely reveal personal information *about a third party*. However, if the information about the third party is severable from the record containing the information about the individual, the organization shall sever the information about the third party before giving the individual access.<sup>106</sup>

<sup>98</sup> *Ibid*, s. 7(3)(h)(i).

<sup>99</sup> *Ibid*, s. 7(3)(h)(ii). See also *AB PIPA*, *supra* note 79, ss. 4(1)(h)-(i).

<sup>100</sup> *Ibid*, Schedule I. In addition, s. 7(3)(d.3), *PIPEDA*, *ibid*, specifically permits (but does not require) an organization to make a disclosure on the initiative of a government institution, the next of kin or an “authorized representative” of an individual in certain cases where the individual has been a victim of financial abuse.

<sup>101</sup> *Ibid*, s. 7(3)(c).

<sup>102</sup> *Ibid*, s. 7(3)(i).

<sup>103</sup> *BC PIPA*, *supra* note 78, s. 18(1)(o).

<sup>104</sup> *AB PIPA*, *supra* note 79, s. 20(b)(m).

<sup>105</sup> *PIPEDA*, *supra* note 77, Schedule I.

<sup>106</sup> *PIPEDA*, *ibid* [emphasis added].

The regulations to the British Columbia Act, and the Alberta Act, confer explicit authority on certain fiduciaries to access information.

The BC regulations recognize a “representative” of an individual as:

- (a) a committee under the *Patients Property Act*,
- (b) an attorney acting under an enduring power of attorney,
- (c) a litigation guardian, and
- (d) a representative under the *Representation Agreement Act*.<sup>107</sup>

A representative may access the individual’s information and make a request for a correction and more generally give consent to the collection, use and disclosure of the individual’s personal information.<sup>108</sup> If the individual is deceased, those rights are conferred on the individual’s personal representative, and if there is no personal representative (e.g. where there is no executor willing or able to act, or no administrator is appointed for an intestate), on the nearest relative of the individual.<sup>109</sup> The nearest relative of an individual is defined to be the first person who is a spouse, adult child, parent, adult brother or sister or other adult relation by birth or adoption.<sup>110</sup>

The Alberta Act confers explicit rights on fiduciaries but the rights are limited to those that relate to the rights and powers of their particular office. Although the access rights conferred by the *ULCC Uniform Act* are not explicitly limited, a fiduciary must act within the parameters of her fiduciary duties under the general law. Thus, the Alberta Act provides that any right or power conferred on an individual may be exercised by a guardian, but only if the exercise relates to the powers and duties of the guardian,<sup>111</sup> or by an attorney, but only if the exercise relates to the powers and duties conferred by the power of attorney.<sup>112</sup> Where the individual is deceased, the personal representative holds any right or power conferred by the Act on the deceased individual, if the right or power relates to the administration of the estate.<sup>113</sup> No disclosure to an individual or fiduciary is permitted if the disclosure would reveal personal information about another individual.<sup>114</sup> This provision has the potential to unreasonably interfere or prevent the due administration of an individual’s estate.

The Alberta Act and B.C. regulations also permit disclosure to persons who are not among the categories of traditional fiduciaries. This may remove an impediment to custodian disclosure where authorization as a legal representative is absent. British Columbia permits disclosure (and gives other rights) to “the

<sup>107</sup> B.C. Reg. 473/2003, ss. 2(1)(a)-(d) [*BC Reg*].

<sup>108</sup> *Ibid*, ss. 2(3)(a)-(c).

<sup>109</sup> *Ibid*, s. 3.

<sup>110</sup> *Ibid*, s. 1; *ibid*, s. 4 (definition of “nearest relative”).

<sup>111</sup> *AB PIPA*, *supra* note 79, s. 61(1)(e).

<sup>112</sup> *Ibid*, s. 61(1)(g).

<sup>113</sup> *Ibid*, s. 61(1)(d)(i).

<sup>114</sup> *BC PIPA*, *supra* note 78, s. 23(4)(c).

nearest relative”<sup>115</sup> if there is no personal representative. Alberta permits disclosure “to the surviving spouse or adult interdependent partner or to a relative of a deceased individual if, in the opinion of the organization, the disclosure is reasonable.”<sup>116</sup>

## II. FIDUCIARY ACCESS UNDER THE PROPOSED MODEL CANADIAN AND AMERICAN ACTS

### 1. The Canadian position: default access

Section 3(1) of the *ULCC Uniform Act* sets down the basic rule that “the fiduciary of an account holder has the right to access a digital asset of the account holder.”<sup>117</sup> The *ULCC Uniform Act* does not distinguish among different types of fiduciaries,<sup>118</sup> whether they are attorneys, guardians or legal representatives. 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.<sup>119</sup>

A service agreement that limits fiduciary access is void<sup>120</sup> unless the account holder accepts its terms by “an affirmative act separate from the account holder’s assent to other provisions of the service agreement.”<sup>121</sup>

The notes to the *ULCC Uniform Act* state that the Act is intended to “facilitate access while respecting the privacy and intention of the account holder.”<sup>122</sup> Whether the proposed legislation strikes a proper balance is a

<sup>115</sup> *BC Reg*, *supra* note 107, s. 1, definition of

[N]earest relative means the first person in the following order of priority:

- (a) spouse;
- (b) adult child;
- (c) parent;
- (d) adult brother or sister;
- (e) other adult relation by birth or adoption.

<sup>116</sup> *AB PIPA*, *supra* note 79, s. 20(k).

<sup>117</sup> *Ibid*.

<sup>118</sup> *ULCC Uniform Act*, *supra* note 1, s. 1: “fiduciary” in relation to an account holder, means (a) a personal representative for a deceased account holder, (b) a guardian appointed for the account holder, (c) an attorney appointed for an account holder who is the donor of the power of attorney, (d) a trustee appointed to hold in trust a digital asset or other property of an account holder. The notes accompanying the Act provide that jurisdictions can provide separate definitions for each type of fiduciary. A fiduciary under the *ULCC Uniform Act* does not include a guardian of minor children who are not deceased, or trustees in bankruptcy. It also does not apply to “an employer’s digital asset used by an employee in the ordinary course of business.” See text accompanying notes 20-27.

<sup>119</sup> *Ibid*, s. 3(2).

<sup>120</sup> *Ibid*, s. 5(2).

<sup>121</sup> *Ibid*.

<sup>122</sup> Prefatory notes to *ULCC Uniform Act*, *supra* note 1.

debatable point insofar as the *ULCC Uniform Act* generally treats fiduciary access to digital assets like fiduciary access to other types of property and hence is media neutral. It tends, moreover, to favour access (compared to the American Acts), over privacy.

This approach contrasts with that in the two versions of the American model Act developed by the Uniform Law Commission regarding fiduciary access to digital assets.<sup>123</sup>

## **2. The American position: access depending on both the characteristics of the digital asset and the type of fiduciary**

### *a. Access depending on the characteristics of the particular digital asset: the envelope/content distinction in the American uniform Acts*

Early on in its mandate, the Canadian drafting committee for the *ULCC Uniform Act* agreed to track the *2014 FADAA*<sup>124</sup> as closely as possible to facilitate cooperation and compliance across borders.<sup>125</sup> The Canadian committee did not, however, adopt a key element of the American Acts, namely, the content/envelope distinction. The distinction reflects the one adopted in the American federal *Stored Communications Act* (SCA).<sup>126</sup> That Act, which was enacted in 1986, was intended to help preserve the privacy of internet users, especially against the United States Government, by prohibiting service providers from divulging the contents of stored electronic communications.<sup>127</sup>

<sup>123</sup> *Revised FADAA*, *supra* note 15; *2014 FADAA*, *supra* note 15.

<sup>124</sup> *Ibid.*

<sup>125</sup> Molzan, *Progress Report*, *supra* note 16 at para. 7.

<sup>126</sup> *Stored Communications Act*, 18 USC §§ 2701-2711 (1986).

<sup>127</sup> 18 USC §2702(a):Prohibitions.—Except as provided in subsection (b) or (c)—(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

This excludes material stored on computers, tablets and other personal electronic devices and opened e-mails even if stored by the service provider because they are not being stored for “backup.” “Electronic storage” is defined in 18 USC §2510 (17) (incorporated by 18 US §2711(1)):

It also criminalized anyone who intentionally accessed “without authorization” a facility through which an electronic service is provided.<sup>128</sup> Because there is no reference to fiduciaries in the SCA, the SCA (theoretically at least) in the words of one expert “present[s] a seemingly nasty glitch for fiduciaries attempting to marshal a decedent’s digital assets.”<sup>129</sup> It should be noted, however that many scholars have disputed this interpretation, especially the application of the SCA to fiduciaries and opened e-mails. Notwithstanding this commentary, the *Revised FADAA* (as did the *2014 FADAA* to a large extent) tracks the distinction found in the SCA.<sup>130</sup> Further, because the SCA is a federal statute and the *Revised FADAA* is designed only for state enactment, some people have argued that the *Revised FADAA*, if enacted, cannot exempt fiduciaries from the SCA’s strict rules.

While service providers are generally prohibited from divulging the contents of electronic communications,<sup>131</sup> they may “voluntarily” disclose the contents of a communication (to anyone other than the government) with the “lawful consent” of the originator or an addressee or intended recipient of such communication.<sup>132</sup> Hence, even if a fiduciary can successfully claim “lawful consent,” she may nevertheless be denied access *at the discretion of* the custodian.

The *SCA* does not provide the same protection to metadata, such as the identities of others with whom an account holder has communicated and other

(A)

Any temporary, immediate storage of a wire or electronic communication incidental to the electronic transmission thereof;

(B)

Any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

See also See David Horton, “The Stored Communications Act and Digital Assets,” (2014) 67 Vand L Rev 1729 at 1734 [Horton].

<sup>128</sup> 18 USC § 2701:(a) Offense.—Except as provided in subsection (c) of this section whoever—(1) intentionally accesses **without authorization** a facility through which an electronic communication service is provided; or(2) intentionally exceeds an authorization to access that facility;and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section [emphasis added].

<sup>129</sup> Horton, *supra* note 127 at 1734, but see that scholars have disagreed on whether fiduciary access is “unauthorized.” See Cahn, *supra* note 14. See also James D. Lamm et al., *supra* note 14.

<sup>130</sup> Notes to s. 2, *Revised FADAA*, *supra* note 15.

<sup>131</sup> 18 USC § 2702(1). See *infra*, note 132.

<sup>132</sup> 18 USC § 2702(1):(b)Exceptions for disclosure of communications.—A provider described in subsection (a) may divulge the contents of a communication—(1) to an **addressee or intended recipient** of such communication or an agent of such addressee or intended recipient;(2) as otherwise authorized in section 2517, > 2511(2)(a), or 2703 of this title;(3) with the **lawful consent** of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service; [emphasis added].

details of those communications. This information is the “envelope” which the American Acts characterize as the “catalogue” of communications, defined as:

[I]nformation that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.<sup>133</sup>

Because of the distinctions developed in the SCA, the American Acts separate digital assets into three categories: two categories of communications — *catalogues* of electronic communications and the *contents* of electronic communications — and the large category of *all other digital assets* that are not electronic communications.

Default access is permitted only to the catalogue and all other digital assets *except* electronic communications. In contrast, s. 5(1)(b) of the *ULCC Uniform Act* provides that a fiduciary who has a right under the Act to access a digital asset of an account holder “is deemed to have the consent of the account holder for the custodian to divulge the content of the digital asset to the fiduciary”<sup>134</sup> and is deemed “to be an authorized user of the digital asset.”<sup>135</sup> The section also ensures, *inter alia*, that fiduciary access does not contravene s. 342.1 of the Canadian *Criminal Code*, which deals with the unauthorized use of a computer or computer service.<sup>136</sup>

*b. Access depending on the type of fiduciary*

*i. Personal representatives*

Under the *Revised FADAA*, the personal representative of a deceased individual has default access to digital assets, including the catalogue of electronic communications, but not to the contents of electronic communications.<sup>137</sup> Default access is subject to specific directions by the account holder in an online tool or by instructions in the will or other record. The instructions in an online tool have priority over instructions in the will even when the online instructions predate the will.<sup>138</sup>

<sup>133</sup> *Revised FADAA*, *supra* note 15, s. 2, definition of “catalogue of electronic communications.”

<sup>134</sup> *ULCC Uniform Act*, *supra* note 1.

<sup>135</sup> *Ibid*, s. 5(1)(c).

<sup>136</sup> Notes to s. 5, *ibid*; *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*]. This result follows from the Act’s authorization (or confirmation) of fiduciaries’ right of access, since the Code prohibits access “without colour of right”. The Act does not purport to apply directly to the federal legislation, nor is the federal government invited to enact it. Canadian law does not require a specific ‘consent’ by the fiduciary to come to this result.

<sup>137</sup> *ULCC Uniform Act*, *ibid*, s. 8. The *2014 FADAA*, *supra* note 15, s. 3, permits default fiduciary access, subject to the deceased’s will or a court order, for other than the contents of electronic communications.

<sup>138</sup> *Revised FADAA*, *supra* note 15, s. 4(a). The *2014 FADAA*, *supra* note 15, s. 3 does not incorporate the concept of an online tool.



Access for a personal representative to the contents of electronic communications is available only if the deceased account holder consented in her will, an online tool, or by court order.<sup>139</sup> There was some debate by the American drafters whether consent given under a state statute could constitute consent for the purpose of a federal statute. The best view was that it would.

An online tool is defined as an electronic service provided by the custodian that allows the user “in an agreement distinct from the terms-of-service agreement . . . to provide directions for disclosure or nondisclosure of digital assets to a third person.”<sup>140</sup> The third person is a “designated recipient” who is defined as a person “chosen by an online tool to administer digital assets of the user.”<sup>141</sup> A user can also allow or prohibit fiduciary access in a will or other record, but the online tool will have precedence, as long as the online tool allows the user to modify or delete a direction at all times.<sup>142</sup>

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. Not every province has a mechanism to deal efficiently with small estates.<sup>143</sup> The designated recipient is empowered to deal with the digital assets of the intestate, which in the case of many younger persons may be their major or only asset. The Canadian Act does not provide for an online tool and thus explicitly ensures access only for fiduciaries appointed under instruments or by court order.<sup>144</sup> It has been suggested by one of the Canadian drafters that they were reluctant to insert a mechanism like the online tool because it might undermine the real intentions of the individual. Consider that under the American scheme an online tool (drawn in the exuberance of youth) would prevail over a later will ostensibly drawn in maturity. One way to resolve this matter in Canada would be for any online tool legislation introduced to give priority to later-drawn instruments. Even in the absence of legislation, it is possible that online tools will be recognized in Canada, if Canadian account holders simply purport to designate a recipient as allowed by the (US-based) custodian.<sup>145</sup> Some commentators have suggested (due to some uncertainty over the status of “click through” agreements) that online tools would not be

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<sup>139</sup> *Revised FADAA*, *supra* note 15, s. 8. The *2014 FADAA*, *supra* note 15, s. 3(1) permits access only if the custodian is permitted to disclose the content under the Electronic Communications Privacy Act (18 USC § 2702(b)).

<sup>140</sup> *Revised FADAA*, *ibid*, s. 2, definition of “online tool” and s 4. The *2014 FADAA*, *ibid*, does not contain the concept of online tool.

<sup>141</sup> *Revised FADAA*, *ibid*, s. 2, definition of “designated person.”

<sup>142</sup> *Ibid*, s. 4(a).

<sup>143</sup> See generally Law Commission of Ontario, *Simplified Procedures for Small Estates, Final Report* (Law Commission of Ontario, August, 2015), online: <<http://www.lco-cdo.org>>.

<sup>144</sup> *ULCC Uniform Act*, *supra* note 1, s. 3(1).

<sup>145</sup> See *Perez v. Galambos*, 2009 SCC 48, 2009 CarswellBC 2787, 2009 CarswellBC 2788 (S.C.C.), which emphasizes that the putative fiduciary must explicitly, or impliedly,

recognized by the courts if they were the product of a “click through” agreement.<sup>146</sup>

The notes to s. 2 of the *Revised FADAA* state that “[a] designated recipient may perform many of the same tasks as a fiduciary, but is not held to the same standard of conduct.”<sup>147</sup> No authority is given for that statement, although there is a reference in the definition of online tool to “directions” for disclosure or non-disclosure that may indicate a limited discretion on the part of the designated recipient.<sup>148</sup>

## ii. Attorneys

The attorney holding a power of attorney has, under the *ULCC Uniform Act*, default access.<sup>149</sup> Under the *Revised FADAA*, an attorney holding a power of attorney, who has specific authority over digital assets or general authority to act on behalf of a principal, has default access to the digital assets of the donor, other than the contents of electronic communications.<sup>150</sup> Access under the American Acts may be restricted by court order, directions by the principal, or by provisions in the power of attorney.<sup>151</sup> The Canadian Act refers to a court order or provisions in the power of attorney, but not to directions by the principal, although these would prevail under the general law if the principal is competent.<sup>152</sup>

The American *Revised FADAA* permits an attorney access to digital assets that are contents of electronic communications only if the power of attorney expressly permits access.<sup>153</sup> It is likely that a significant percentage of existing powers of attorney do not contain a specific reference to electronic communications.<sup>154</sup>

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assume fiduciary obligations. It is interesting to speculate the legal effect on a designation of a designated recipient by a Canadian.

<sup>146</sup> See note 60 above and accompanying text in this article.

<sup>147</sup> *Revised FADAA*, *supra* note 15.

<sup>148</sup> *Ibid*, s. 2(16).

<sup>149</sup> *ULCC Uniform Act*, *supra* note 1, ss. 3.

<sup>150</sup> *Revised FADAA*, *supra* note 15, s. 10. The *2014 FADAA*, *supra* note 15, s. 5 also provides default access.

<sup>151</sup> *ULCC Uniform Act*, *supra* note 1, s. 3(2). *Revised FADAA*, *supra* note 15, s. 10. The *2014 FADAA*, *supra* note 15, s. 5(b) provides for restrictions imposed by a court or the power of attorney.

<sup>152</sup> *ULCC Uniform Act*, *supra* note 1, s. 3(2).

<sup>153</sup> *Revised FADAA*, *supra* note 15, s. 9. The *2014 FADAA*, *supra* note 15, s. 5(a) contains a similar rule.

<sup>154</sup> See section 111, 7 of the paper regarding coming into force provisions.

### iii. Trustees

Unlike the *ULCC Uniform Act*, which gives default access to all trustees, the *Revised FADAA* distinguishes between trustees who are original account holders and those who are not.<sup>155</sup> The American Acts reasonably give trustees who are original account holders default access to all digital assets including the contents of electronic communications unless otherwise ordered by a court or provided in the trust.<sup>156</sup>

The *Revised FADAA* gives default access to trustees who are not original account holders, but only to the catalogue of communications and to digital assets, and not to the contents of electronic communications.<sup>157</sup> Access by a trustee who is not an original account holder to electronic communications requires that the trust include “consent to disclosure of the content of electronic communications to the trustee.”<sup>158</sup>

The *Revised FADAA* also provides procedures to ensure that if the trustee is not an original account holder, the trust exists: in the words of the Act “a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is currently acting trustee of the trust . . .”<sup>159</sup> If the trustee is not an original user, trustee access to digital assets is also subject to the directions of the user/account holder.<sup>160</sup>

### iv. Guardians

Where a fiduciary is a guardian/conservator, the *Revised FADAA* recognizes “that the protected person may still retain some right to privacy in their personal communications.”<sup>161</sup> Therefore it does not extend access by a guardian to any digital assets of a represented individual based on the conservatorship order alone. The conservator’s access to digital assets must be specifically authorized by the [guardianship] court and the court’s holding will presumably be informed by existing state law concerning guardianship.<sup>162</sup>

While the *Revised FADAA* does not provide for guardian access to digital assets without a court order,<sup>163</sup> it does permit guardians with “general authority” to manage the assets of a protected person to request the custodian “to suspend or terminate an account. . .for good cause.”<sup>164</sup>

<sup>155</sup> *ULCC Uniform Act*, *supra* note 1, s. 1 definition of “fiduciary”.

<sup>156</sup> *Revised FADAA*, *supra* note 15, s. 11. The *2014 FADAA*, *supra* note 15, s. 6(2) provides a similar rule.

<sup>157</sup> *Revised FADAA*, *ibid*, s. 13.

<sup>158</sup> *Ibid*, s. 12(2).

<sup>159</sup> *Ibid*, ss. 12(3), 13(3).

<sup>160</sup> *Ibid*, ss. 12, 13.

<sup>161</sup> Notes to s. 14, *Revised FADAA*, *ibid*.

<sup>162</sup> *Ibid*, s. 14(a).

<sup>163</sup> *Ibid*, s. 14(b).

<sup>164</sup> *Ibid*, s. 14(c). See section III.6.

The Canadian approach of default access seems to allow more access by a fiduciary to the digital assets of a represented person than the American approach, but practically the actions and access of the guardian will be circumscribed by mostly modern legislation adopted by the various provinces that explicitly attempts to preserve, whenever possible, the represented person's privacy and autonomy. In other words, even if the *ULCC Uniform Act* permits default access, the guardian's ability to access the represented person's digital (and other assets) may be constrained by the requirements of provincial guardianship legislation.<sup>165</sup> For example, in Alberta the *Adult Guardianship and Trusteeship Act*<sup>166</sup> limits the powers of the guardian where the represented person is able to make some decisions,<sup>167</sup> although it does not specifically refer to digital assets.

*c. Summary comparison*

The Canadian position is one of default access for fiduciaries. The American position is substantially different so that access under the *Revised FADAA* is more limited and less media neutral. The main differences between the Canadian and the American uniform Acts are that the American Acts:

- distinguish between the contents of electronic communications, catalogues of those communications, and other digital assets, *i.e.*, those that do not constitute communications within the meaning of the SCA;
- make access dependent on the type of fiduciary;
- recognize service agreements as being the ultimate arbiter of fiduciary access, if the account holder has not provided specific directions (not clear in the *2014 FADAA*); and
- recognize the right of an account holder to appoint a person (“designated recipient”)<sup>168</sup> in an online tool to manage digital assets (not in *2014 FADAA*) (other than a fiduciary).

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<sup>165</sup> *ULCC Uniform Act*, *supra* note 1, s. 1 definition of “fiduciary.” See generally *Adult Guardianship and Co-Decision Making Act*, S.S. 2000, c. A-5.3, s. 3; S. Burningham, “Developments in Canadian Adult Guardianship and Co-Decision-Making Law” (2009) 18:1 Dal JLS 119; Canadian Centre for Elder Studies and British Columbia Law Institute, “A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario”, CCELS report no. 4, BCLI report no. 46 (Vancouver: University of British Columbia, October 2006), online: < [www.bcli.org/sites/default/files/Comparative\\_Analysis\\_of\\_Adult\\_Guardianship\\_Laws.pdf](http://www.bcli.org/sites/default/files/Comparative_Analysis_of_Adult_Guardianship_Laws.pdf) > .

<sup>166</sup> SA, 2008, c. A-4.2.

<sup>167</sup> *Ibid*, s. 15(d).

<sup>168</sup> See *Revised FADAA*, *supra* note 15, s. 2, definition of “designated recipient”; s. 4(a).

### III. Access

#### 1. Transferable and Descendible

Under the *ULCC Uniform Act*, if the fiduciary has a right under the Act to access a digital asset of an account holder, the fiduciary may take any action regarding the digital asset that the account holder (assuming she were alive and of full capacity) could have taken.<sup>169</sup> This formulation does not create or imply additional property rights for the fiduciary or a deceased individual's heirs.<sup>170</sup> Thus in her progress report to the ULCC, Donna L. Molzan, Chair of the ULCC project, stated “[t]he Working Committee concluded that a fiduciary should have no greater property right to the digital asset than the deceased or incapacitated person had.”<sup>171</sup> In this regard, the Canadian Act follows the American lead, although in the early deliberations among the drafting group of the American Uniform Law Commission and others, there was some discussion that the fiduciary might be provided with “ownership” rights as well as access to digital assets.<sup>172</sup> In a memo dated 11 November 2012, Suzanne Brown Walsh, chair, and Naomi Cahn, reporter, asked whether the fiduciary authority should include the ability to *own*, manage, and distribute digital property.<sup>173</sup> Subsequently, the notes to the March 2014 draft of the *FADAA* provided that:

The Act does not permit the account holder's fiduciary to override the terms of the service agreement in order to make a digital asset or collection of digital assets “descendible,” although it does preserve the rights of “the fiduciary to make the same claims as the account holder . . . .”<sup>174</sup>

#### 2. The meaning of “access”

The notes to s. 5 of the *ULCC Uniform Act* refer to “accessing the asset,” “controlling the asset” and “copying assets” (to the extent permitted by copyright law).<sup>175</sup> While these seem very broad powers, the fiduciary's ability to act will be circumscribed by her fiduciary powers under the law of the applicable jurisdiction.<sup>176</sup> Thus, for example, if a fiduciary takes control of a digital asset

<sup>169</sup> *ULCC Uniform Act*, *supra* note 1, s. 5(1)(a).

<sup>170</sup> *Ibid*, s. 5(b).

<sup>171</sup> Molzan, *Progress Report*, *supra* note 16 at para. 21.

<sup>172</sup> See letter from Allison S. Bohm, Advocacy & Policy Strategist at the American Civil Liberties Union, to Suzanne Brown Walsh & Naomi Cahn, Chair and Reporter at the Uniform Law Commission (3 July 2013) Uniform Law Commission, online: <www.uniformlaws.org>.

<sup>173</sup> Memo from Suzanne Brown Walsh to Naomi Cahn (11 November 2012), online: <www.uniformlaws.org> [emphasis added].

<sup>174</sup> Notes to s. 7, *2014 FADAA*, *supra* note 15.

<sup>175</sup> Notes to s. 5, *ULCC Uniform Act*, *supra* note 1.

<sup>176</sup> *Ibid*, s. 5(1)(a).

such as a social media account, she will be subject to the same fiduciary duties as if she had taken control of a bank account or other tangible assets of a beneficiary. The control will be for the purposes of administration only and not for any other purposes. In some cases, the mandate of a personal representative or other fiduciary may extend to continuing an existing business, and the legal aspects of this relationship with the custodian may be impeded by limits on fiduciary access and the nature of digital assets.

The *ULCC Uniform Act* gives the fiduciary the option to apply to the court “for directions in relation to the fiduciary’s right to access a digital asset . . .”,<sup>177</sup> but does not provide explicit options for fiduciary access such as the ones found in the *Revised FADAA*.<sup>178</sup> The *Revised FADAA* gives the custodian the choice of either providing full access to the user’s account including, for example, the account holder’s password, partial access sufficient to perform the tasks with which the fiduciary is charged, or a copy of the digital assets (possibly by way of a data dump, i.e. a bulk transfer of all the data held for the account holder).<sup>179</sup> The custodian may assess a “reasonable administrative charge for the cost of disclosure.”<sup>180</sup>

Other provisions in s. 6 of the American Act clarify that a custodian need not disclose a digital asset deleted by a user,<sup>181</sup> and that a custodian may seek guidance from the court if a request for segregation<sup>182</sup> of digital assets is unduly burdensome.<sup>183</sup>

### 3. The terms of service

Under the *ULCC Uniform Act*, any provision in the terms of service that limits fiduciary access to digital assets is void<sup>184</sup> except if the account holder assents to it in a separate document from the one that otherwise governs the account holder.<sup>185</sup> This is a significant difference to the *Revised FADAA*, under

<sup>177</sup> *Ibid*, s. 8.

<sup>178</sup> *Revised FADAA*, *supra* note 15, s. 6. There is no comparable provision in *2014 FADAA*, *supra* note 15.

<sup>179</sup> *Revised FADAA*, *ibid*, s. 6(a).

<sup>180</sup> *Ibid*, s. 6(b). The cost will be likely be determined by the regulations to any Canadian Act modelled on the *ULCC Uniform Act*.

<sup>181</sup> *Ibid*, s. 6(c).

<sup>182</sup> “Segregation” is described in *ibid*, s. 6(d):

- (d) If a user directs or a fiduciary requests a custodian to disclose some, but not all, of the user’s digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian considers the direction or request to impose an undue burden, either the custodian or the fiduciary may petition the court for an order to
- (1) disclose a date delimited subset of the user’s digital assets;
  - (2) disclose all of the user’s digital assets to the fiduciary or designated recipient;
  - (3) disclose none of the user’s digital assets, or
  - (4) disclose all of the user’s digital assets to the court for review in chambers.

<sup>183</sup> *Ibid*, s. 6(d).

<sup>184</sup> *ULCC Uniform Act*, *supra* note 1, s. 5(2)(a).

which the terms of service govern, unless the account holder has provided directions otherwise in the online tool, or in the will, trust, power of attorney or other record.<sup>186</sup> The FADAA provision is likely to reduce fiduciary access to digital assets, since the custodians will generally have a default rule of no access, and individuals often do not change default settings.

#### 4. Tangible personal property that holds digital assets

Both the American and Canadian Acts establish that if a fiduciary has authority over tangible personal property, she also has the right to access any digital asset stored on it.<sup>187</sup> The SCA is not an obstacle for the American model Acts because the data in the device is not communicated, which is a condition for the application of the SCA. This is true even for e-mail in the device since the fiduciary does not depend on the custodian to provide access. As custodian of the physical medium where the digital assets are stored, the fiduciary is also the custodian of the digital assets.

The Canadian provision deems the fiduciary to be an “authorized user of the property” and hence clarifies that s. 342.1 of Canada’s *Criminal Code* does not apply.<sup>188</sup> Section 342.1 deals with unauthorized use of a computer and provides that anyone who “fraudulently and without colour of right” obtains computer services is guilty of an offence. Thus even if general fiduciary duties do not give “colour of right,” the *ULCC Uniform Act* does.

#### 5. Fiduciary duties

One substantial change from the *2014 FADAA* to the *Revised FADAA* was the insertion of a quite comprehensive description of the fiduciary duties of fiduciaries who have access to digital assets.<sup>189</sup> In the former enactment, there was mention only of the applicability of “other law.”<sup>190</sup> The result, according to the notes to s. 15 of the *Revised FADAA*, was “confusing” and “led to enactment difficulty.”<sup>191</sup>

The *ULCC Uniform Act* simply provides that the duties imposed by law on fiduciaries in relation to tangible property also apply in relation to digital

<sup>185</sup> *Ibid*, s. 5(2).

<sup>186</sup> *Revised FADAA*, *supra* note 15, s. 5(c). The *2014 FADAA*, *supra* note 15, s. 7(b) provides that a provision in the terms of the service agreement that limits fiduciary access is void unless the account holder “agreed to the provision by an affirmative act separate from the account holder’s assent to other provisions of the terms-of-service agreement.”

<sup>187</sup> *Revised FADAA*, *supra* note 15, s. 15(e); *2014 FADAA*, *supra* note 15, s. 7(e); *ULCC Uniform Act*, *supra* note 1, s. 5(3).

<sup>188</sup> *Criminal Code*, *supra* note 136, s. 342.1.

<sup>189</sup> *Revised FADAA*, *supra* note 15, s. 15. Section 15 also partially applies to the “designated recipient” defined in *Revised FADAA*, *supra* note 15, s. 2(9). See *2014 FADAA*, *supra* note 15.

<sup>190</sup> *2014 FADAA*, *supra* note 15, s. 7(a)(1).

<sup>191</sup> *Revised FADAA*, *supra* note 15.

assets.<sup>192</sup> An argument could be made that the Canadian model should follow the lead of the *Revised FADAA*. Provincial legislation in other areas of the law, such as that regarding powers of attorney or guardianship, has more recently tended to incorporate detailed descriptions of the fiduciary duties owed, in order to raise awareness, to educate the putative fiduciaries, and by their explicitness, to reinforce appropriate behavior.<sup>193</sup>

## 6. The right to destroy digital assets

Neither the Canadian nor American Acts explicitly recognize the right of the account holder, custodian or the fiduciary to destroy digital assets, though the *Revised FADAA* does provide that a guardian with general authority to manage the assets of a protected person “may request the custodian to suspend or terminate an account of the protected person for . . . good cause.”<sup>194</sup>

Generally, the right to destroy — if there is such a comprehensive right under the common law — would be that of the account holder.<sup>195</sup> Once the account holder is incapacitated or executes a power of attorney or dies, then the duties of the fiduciary may take precedence. As was discussed previously in this paper,<sup>196</sup> a personal representative, for example, has duties not only to the deceased, but also to creditors (including tax authorities) and beneficiaries. In some limited cases, the courts have prevented testators from destroying property, especially real property, on their death.<sup>197</sup>

The custodian is in a unique position. A refusal to permit access or the termination of an account effectively “destroys” the property. On the other hand, where legislation permits default access, the legislation, by providing default access, could be interfering with an account holder’s right, if it exists, to destroy her property (or the “right to be forgotten”).<sup>198</sup> These debates apply to all types of property, although the tripartite nature of digital property makes the allocation of responsibility complex.

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<sup>192</sup> *ULCC Uniform Act*, *supra* note 1, s. 4.

<sup>193</sup> See e.g. Law Reform Commission of Nova Scotia, *Powers of Attorney Act: Final Report 2015* (Halifax: LRCNS, August 2015) at s. 8.1.

<sup>194</sup> *Revised FADAA*, *supra* note 15, s. 14(c).

<sup>195</sup> See generally Lior Jacob Strahilevitz, “The Right to Destroy” (2005) 114 Yale LJ 781 [Strahilevitz].

<sup>196</sup> See Section I.1(a) “Personal representatives in Alberta and British Columbia” in this article.

<sup>197</sup> See Strahilevitz, *supra* note 195, at 796 and the leading case of *Eyermore v. Merchantile Trust Co.*, 524 SW (2d) 210 (Mo. Ct. App. 1975).

<sup>198</sup> Rebecca G. Cummings, “The Case Against Access to Decedents’ E-mail: Password Protection as an Exercise of the Right to Destroy” (2014) 15 Minn JL Sci & Tech 897.



## 7. Coming into force provisions

The *ULCC Uniform Act*, if adopted, will apply to fiduciaries who are appointed or instruments that take effect, “before, on or after the Act comes into Force.”<sup>199</sup> The Working Committee of the ULCC took the view that since the Act would be essentially declaratory of the existing law and existing powers of fiduciary access, and therefore did not create a new set of rights but facilitated the performance of existing duties, it should apply to ensure that fiduciaries have the power to access digital assets in all cases.

The Working Committee stated that the Act will provide immunity from civil or criminal consequences of “good faith” disclosure to fiduciaries. It will not penalize fiduciaries or custodians who did not obtain or provide access before the Act was passed.<sup>200</sup> It is noteworthy, however, that while the Act will not impose penalties for non-disclosure or too much disclosure, it is still possible that the general law might do so where, in particular, beneficiaries lose out.

The *2014 FADAA* follows “the same reasoning and applies the [the Act] in the same manner.”<sup>201</sup>

## 8. Private International Law

Many providers of internet services and goods familiar to Canadians, such as Facebook, Google, and Dropbox, primarily operate from the United States, although they may have Canadian subsidiaries.<sup>202</sup> Therefore even where an individual dies or becomes incapable in Canada, she may have some digital assets governed by a service agreement concluded with, for example, a custodian incorporated in Maryland, with its servers situated in Nevada and its management, offices, and employees located in California. As a result, fiduciary access to digital assets may be subject to either the courts or laws or both of an American state and possibly to those of the American federal government.<sup>203</sup>

It is not without reason that private international law has been called an area of law of some complexity and difficulty.<sup>204</sup> The *ULCC Uniform Act* simply provides that “[d]espite any other applicable law or a choice of law provision in a service agreement, a provision in a service agreement is unenforceable . . . to the extent that the provision limits, contrary to this Act, a fiduciary’s access to a

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<sup>199</sup> Notes to s. 2 of the *ULCC Uniform Act*, *supra* note 1.

<sup>200</sup> *Infra*, at para. 28.

<sup>201</sup> Molzan, *Progress Report*, *supra* note 16 at para. 30. See *2014 FADAA*, *supra* note 15, s. 14.

<sup>202</sup> See *Equustek Solutions Inc. v. Jack*, 2015 BCCA 265, 2015 CarswellBC 1590 (B.C. C.A.), *affd* 2017 SCC 34, 2017 CarswellBC 1727, 2017 CarswellBC 1728, (*sub nom. Google Inc. v. Equustek Solutions Inc.*) (S.C.C.).

<sup>203</sup> See generally Stephen G.A. Pitel & Nicholas S. Rafferty, *Conflicts of Law*, 2d ed. (Toronto: Irwin Law, 2016) [Pitel].

<sup>204</sup> Pitel, *ibid.*

digital asset.”<sup>205</sup> 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 Canadian courts in foreign jurisdictions are yet to be fully addressed by the courts with respect to digital asset management. Their resolution will ultimately impact the application and ultimate utility of the new model legislation. An effort to create cross-border uniformity by the Canadian draftsman was reduced by the attention paid to the SCA by the American draftsmen and the 2015 revisions to FADAA, which the Canadian Working Group did not find desirable.

## CONCLUSION

The prefatory notes to the *ULCC Uniform Act* state that the Act was necessary because

[a]t 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.<sup>206</sup>

Only one province in Canada, Alberta, has specifically addressed the issue of fiduciary access to digital assets. Even so, its legislation extends only to personal representatives of a deceased.

Without the legislation proposed by the ULCC, there are several possible impediments to fiduciary access, although none of them, except the terms of the agreement between the account holder and custodian, present insuperable obstacles. Impediments could include limits on the ambit of fiduciary duties and powers arising from legislation, the effect of current privacy laws, and the terms of agreements mentioned above.

Under the common law, the fiduciary “steps into the shoes” of the individual to whom she owes a duty, at least for the purposes of carrying out her fiduciary duties. Some existing governing legislation seems to narrow the scope of the fiduciary’s duties by referring specifically to the fiduciary’s duty to administer “property” or something similar such as “estate”. The legislation might engender a rather fruitless discussion of first, what property is, and secondly, whether all or some types of digital assets, such as “information” are property. In any case, the present probate and estate administration legislation, may be viewed as embedded in, but not limiting, the broader common law.

The ULCC drafters have asserted that Canadian privacy laws do not impede fiduciary access to digital assets. A survey of the relevant legislation and common law supports this position, although there may be some limits on access, where the privacy of third parties is involved.

<sup>205</sup> *ULCC Uniform Act*, *supra* note 1, s. 6.

<sup>206</sup> Prefatory notes to the *ULCC Uniform Act*, *ibid*.

Standard form service agreements between the account holder and the custodian have the most potential to limit fiduciary access. The agreements, drafted by the service providers, tend in one way or the other to limit fiduciary access. Thus, the *ULCC Uniform Act* provides that terms in service agreements which limit a fiduciary's access to digital assets are void unless an account holder assents by an affirmative act, separate from her assent to other provisions of the service agreement.

Both the ULCC and the American Uniform Law Commission have attempted to provide clarity and certainty to the issue of fiduciary access by proposing draft legislation. Through their efforts, the drafters have had to decide between default access to digital assets for fiduciaries and other schemes which require the explicit consent of the account holder for access.

The *ULCC Uniform Act* favours default fiduciary access to digital assets and, hence, media neutrality. In other words, the assumption underlying the *ULCC Uniform Act* is that digital assets should be treated the same way as other assets like tangible personal property. The brevity and simplicity of the proposed Canadian legislation contrasts with the two American Acts, the *2014 FADAA* and its successor, the *Revised FADAA*, which make fiduciary access dependent on both the type of fiduciary and the characteristics of the asset.

This difference between the Canadian and American legislation arises from the perceived legal requirement for American custodians to comply with their federal *Storage Communications Act*, which prohibits service providers from disclosing the contents of electronic communications without the lawful consent of the account holder. Therefore, fiduciary access to the contents of electronic communications, as described in the SCA, is generally denied unless consent is provided by the account holder in an appropriate instrument such as a will, or power of attorney. Default access (except for guardians and some trustees) is provided for a large group of other digital assets other than the contents of electronic communications. The American Acts also provide for a "catalogue of electronic communications" which records the name of each person with whom an account holder communicated, the time and date of the communication and the electronic address.<sup>207</sup> The catalogue is subject to the same disclosure rules as all other digital assets (default access), except the contents of electronic communications.

There are two other significant differences between the *ULCC Uniform Act* and the *Revised FADAA*. The first is that the *Revised FADAA* employs a device called an online tool that permits the account holder to designate a nominee to administer her digital assets and to direct disclosure or non-disclosure of them. The directions in an online tool have priority over consent extended in other legal instruments. The Canadian Act does not include an online tool. This may eliminate the ability of some account holders, especially if they die intestate, to designate a person to deal with their account.

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<sup>207</sup> *Revised FADAA*, *supra* note 10, s. 2(4).

The other significant difference between the *Revised FADAA* (but not the *2014 FADAA*) and the *ULCC Uniform Act* is that under the Canadian Act, the terms of a service agreement cannot preclude fiduciary access, unless there is an additional separate service agreement concluded to that effect. Under the *Revised FADAA* the terms of a service agreement will dictate fiduciary access, unless the account holder has specifically provided otherwise. Therefore, given account holder inertia, the custodian tendency to limit fiduciary access may prevail.

The *ULCC Uniform Act* provides that a choice of law provision in the terms of the agreement is void if it precludes fiduciary access. The effectiveness of the clause in the Canadian legislation and of the legislation itself will depend to a considerable extent on the application of the rules of private international law. The application of these rules to the *ULCC Uniform Act* is an area of complexity which deserves further exploration.