Federation of Ontario Law Associations
Fédération des associations de barreau de l'Ontario

"The Voice of the Practising Lawyer in Ontario"

731 9th Street West,
Owen Sound, ON
N4K 3P5

(519) 270-4001

www.fola.ca

September 11, 2026

Ministry of the Attorney General
Policy Division

Via Email: (MAGPolicy@Ontario.ca)

Re: Consultation – Implementing the Uniform Access to Digital Assets by Fiduciaries Act in Ontario

Thank you for the opportunity to provide submissions on this very important topic. I write on behalf of the Estates Committee at the Federation of Ontario Law Associations ("**FOLA**"). FOLA represents 46 county and district law associations across Ontario, and through them, over 12,000 lawyer members. FOLA is the voice of the practicing lawyer in Ontario and understands firsthand the challenges of day-to-day legal practice, particularly outside of Toronto. Our Estates Committee is comprised of solicitors and litigators from almost every judicial region, including Toronto.

Please accept this as our commentary on the Ministry's "Consultation Paper: Implementing the Uniform Access to Digital Assets by Fiduciaries Act in Ontario". We understand that the Toronto Law Association ("**TLA**") has submitted its commentary, which we have reviewed and with which we are largely aligned. We have opted not to address each enumerated question outlined in the consultation paper but to approach the subject matter by section.

Implementation and Concerns

Broadly speaking, FOLA recognizes that legislation empowering fiduciaries to access digital assets and records *in the execution of their fiduciary duties* is advisable and necessary in the Province of Ontario. Further, implementation of legislation mirroring the Uniform Access to Digital Assets by Fiduciaries Act ("**UADAFA**") proposed by the Uniform Law Conference of Canada in 2016 makes sense. It has already been implemented in four Canadian provinces and has been recommended in Alberta, with changes, by the Alberta Law Reform Institute. In all likelihood, Alberta will implement the UADAFA with unique amendments. Remaining provinces will likely follow suit.

Additionally, while the comparable legislation in the United States, as the Consultation Paper points out, prioritizes an account holder's privacy, the American legislation nonetheless appears to achieve the same results on problems that the UADAFA seeks to address. The UADAFA's intent to facilitate access by fiduciaries to information and records in the execution and within the confines of their duties, is arguably less complicated in that the effect is to give access to digital assets by default (at least initially), and nonetheless resembles the American legislation and its overall intent. Implementation of the UADAFA in Ontario, with amendments, is logical in a commercial sense, given our relationship with the other provinces and our American neighbours. As the submission by the TLA points out, custodians of digital assets are nationally and internationally based. Legislation that approaches uniformity is logical.

While there may be concerns that privacy or expectations of privacy by account holders may be affected, the proposed legislation provides a mechanism by which an account holder may assert restrictions on their fiduciary's access to electronic assets after implementation. FOLA suggests that public education about the effect of the proposed section 3 will be important should Ontario's legislation grant access to existing fiduciaries.

This is also a concern unique to powers of attorney. FOLA suggests that there is an important difference between attorneys appointed pursuant to powers of attorney on the one hand and personal representatives of an estate or guardians appointed pursuant to court order on the other. In the case of the estate of a deceased individual or a guardianship that flows from an order of the Superior Court which can and should specify controls or limits on access, there is less concern of abuse by the fiduciary. Yet, in the case of an attorney appointed pursuant to a general continuing power of attorney which may operate also when the grantor is capable, there is potential for abuse.

An attorney appointed pursuant to such a power of attorney, if the Ontario legislation under section 2 of the UADAFA applies to "an attorney appointed under a power of attorney made *before, on* or after the date this Act comes into force" (emphasis added), would be theoretically able to surreptitiously access digital assets of the grantor (albeit in breach of duty), *without the grantor having contemplated such risk at the time that the power was executed*. FOLA raises this as a serious concern worthy of more consideration. An argument could be advanced that such powers of attorney may be invalid, if the grantor did not understand or appreciate that "property" as contemplated by the *Substitute Decisions Act, 1992*, and in particular section 8 thereof, included, or may include digital assets.

Nonetheless, FOLA supports legislation modelled on UADAFA being implemented in our province, with necessary changes to bring it in line with prevailing fiduciary law and duties in Ontario.

Defined Terms and Application

In general, FOLA largely agrees with TLA's submissions regarding the various proposed definitions. "Account holders", their "digital assets", the "custodians" of them and the relevant "service agreements" are already diverse and difficult to contain. Changes will continue with the pace of technology and ingenuity. Broad and plain language must be adopted. While FOLA also does not possess sufficient knowledge or clairvoyant foresight as to how digital assets may be held or managed, FOLA makes the following commentary on various definitions in the proposed legislation:

- **"Account holder" -** We suggest that the broader term "person" be used in place of "individual". In normal circumstances, "person" includes a corporation[1]. Additionally, in normal circumstances, it is individuals who enter into service agreements with respect to digital assets. However, FOLA submits that circumstances could arise where individuals hold digital assets through corporations, and in so doing, service agreements are executed by corporate officers. While perhaps remote, the need for fiduciaries to access digital assets held by "persons", including corporations, on behalf of a deceased or incapable individual may very well arise, especially in the context of a power of attorney.

- **"Service agreement" -** FOLA supports a definition that is in line with PEI's *Access to Digital Assets Act* as "an agreement between an account holder and a *custodian that relates to or deals with a digital asset of the account holder*".

- "Record" should "include a record of information in any form".

- "Court" should be defined as "Superior Court of Justice".

Regarding the inquiry as to whether attorneys and guardians for personal care should be included in the definition of "fiduciary", FOLA repeats the commentary made by the TLA on this point:

> *In Ontario, substitute decision making is divided into two realms: 1) property and 2) personal care in which personal care decisions concern the health care, nutrition, shelter, clothing, hygiene or safety of the person. Given the Act's focus on "assets" and the contractual agreements that were entered into prior to the involvement of the fiduciary, it would make sense to provide full access to attorneys and guardians of property while allowing these fiduciaries to exercise their own judgment with respect to the unique needs and circumstances of the person whose property is under their carriage and whose personal care is under the carriage of another.*

We agree that consideration should be given to providing attorneys for property and guardians of property with discretion and authority to allow attorneys for personal care and guardians of the person access to digital assets. However, we point out that in the case of guardians, the Superior Court will and should have the opportunity, in every case, to set out the scope of the guardianship order, including whether or not a guardian of the person should and will have access to digital assets.

Under its current form, UADAFA contemplates that grantors of powers of attorney for personal care, if captured within the definition of "fiduciary" can subsequently limit access to attorneys for personal care pursuant to the contemplated subsection 3(2).

Regarding the use of terms "personal representative", "guardian" and "attorney", FOLA is in agreement with the TLA that their meaning mirror definitions as set out in other Ontario statutes

[1] *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, as amended, at section 87.

such as the *Estates Administration Act*, the *Trustee Act*, the *Estates Act* and the *Substitute Decisions Act, 1992*. Further, "fiduciary" ought to exclude guardians of minors and trustees in bankruptcy, but FOLA also agrees that there may be circumstances in which other categories of fiduciaries should be permitted to apply to the Superior Court for access.

Finally, with respect to subsection 2(1) of the proposed Act, FOLA suggests that clauses (c) and (d) mirror the language in (a) and (b), such that they read as follows:

(c) an attorney appointed under a power of attorney made **by the account holder** before, on or after the date this Act comes into force;

(d) a trustee acting under a trust created **for the benefit of the account holder** before, on or after the date this Act comes into force;

The addition of this qualifying language provides clarity and consistency with respect to the application of the legislation.

Fiduciaries Rights, Duties and Authority

As recognized by the Consultation Paper, UADAFA contemplates limitations on fiduciary authority by way of testamentary document, power of attorney, court order or trust language. FOLA suggests that the Ontario legislation mirror UADAFA in respect of these matters and recognizes the codification of fiduciary obligations in UADAFA's section 4 as an important element.

With respect to timing of instructions or limitations by an account holder over access to digital assets (through subsequent "assent" to a service agreement or otherwise), we agree with the TLA that any preference must be consistent with prevailing common law and legislation governing fiduciary duties and obligations (in both the estate and substitute decision making contexts), and the ability of a capable account holder to revoke a prior instruction.

FOLA is also supportive of legislation that voids provisions in service agreements requiring disputes to be determined outside of Ontario. We suggest that the Ministry consider additional language that would allow determinations of requests or inquiries regarding access to digital assets to be determined in Ontario, either with reference to the location of the account holder, the fiduciary or the custodian.

Access to Digital Assets

FOLA supports a requirement that a fiduciary provide to the custodian documentation proving the fiduciary's status as such and proof of identity.

However, it is FOLA's recommendation that the statute or regulations should set out what proof is sufficient in each case. For example:

- The statute should specify that in the case of a deceased's estate, a notarized certificate of appointment of estate trustee or a notarized last will and testament be provided.

- In the case of an attorney, a notarized copy of the power of attorney should be provided.

- In the case of a guardianship, a notarized copy of the guardianship order should be required.

Care should be taken to prevent any scenario in which a custodian can arbitrarily demand a court order or some other documentation, the cost of obtaining which may be prohibitive or the import of which may be irrelevant. In any case, identification must be provided.

FOLA agrees with the timeline proposed by the Alberta Law Reform Institute, that being 60 days.

Court Direction, Liability and Regulations

The Ontario legislation should include provisions allowing *fiduciaries* to apply to the Superior Court for directions, and urges Ontario to adopt the wording of section 8(1) of UADAFA. However, consideration should be given to providing *account holders and custodians* the ability to apply for directions as well.

FOLA is in line with the TLA on the proposed section 8(2) in that the wording of the existing *Trustee Act*, and in particular, certain language of section 60(2) should be adopted with respect to fiduciary liability:

> 8 (2) A fiduciary **acting upon the opinion, advice or directions** of the court is discharged with respect to the subject matter of the directions unless the fiduciary **has been** guilty of fraud, wilful concealment or misrepresentation in obtaining the **opinion, advice or directions.**

Finally, FOLA sees nothing problematic with regulations prescribing, or more appropriately, limiting fees to be charged by custodians in providing access to digital assets.

Conclusion

FOLA recognizes the utility and importance of the Province of Ontario adopting uniform legislation akin to the UADAFA. We agree that broad and clear language is required in our statute given the subject matter of the legislation.

We again thank you for the opportunity to provide this submission. Should you have any questions or require any additional commentary, please contact Ian Hu, Director of Policy & Advocacy, at ian.hu@fola.ca.

We recognize that this work is in the early stages; accordingly, we welcome any opportunity to make further submissions in the future as this matter develops.

Yours truly,

Andrew L. Keesmaat

Chair, FOLA Estates Committee
akeesmaat@anclaw.com