

From: Gregory, John D. (MAG)
Sent: Monday, March 17, 2014 2:17 PM
To: Walsh, Suzanne; Cahn, Naomi
Cc: Christina Kunz
Subject: ULC FADA additional comments

Hi Suzy and Naomi

Here are additional comments on two aspects of the FADA project that Chris Kunz and I would like to see circulated to the group.

1. **'Retroactivity':** We are concerned that the Chair's memo on article 14 of the March draft suggested that the Act would apply 'retroactively'. (The draft Act itself does not use that term. It says it applies to fiduciaries whose powers arise before or after the Act comes into force.)

We do not agree that the Act as drafted has a retroactive effect, and we would not want Drafting Committee members to be worried about infringing on the usual legal principle that legislation should not be retroactive.

The draft Act does not change anything that has been done before it comes into force. It does not undo anything that has been done, or change the legal status of any actions taken before its in-force date.

It applies prospectively only, to determine the authority that a fiduciary has after the Act comes into force, with respect to assets for which the fiduciary is responsible. The fiduciary's responsibility may have arisen before the Act comes into force, but the extent of that responsibility - its coverage of digital assets - is confirmed only for future purposes.

It is arguable, perhaps, that the Act would validate, after it comes into force, any decisions that fiduciaries made before that time that presumed media neutrality in fiduciaries' rights over relevant assets. Whether it has that effect will be a matter of statutory interpretation, and such interpretation will be guided by the usual principles against retroactivity.

We should keep in mind, however, that the purpose of FADA is to make the law on fiduciary authority media-neutral, as between traditional assets and digital assets. We are not creating 'new law' about the nature of assets generally or fiduciary powers generally. FADA will clarify a legal issue that could have been (and has been) argued either way until now. If it helps tip the balance toward an inclusive interpretation of actions taken by fiduciaries before it is passed, this is a good thing, consistent with our principles – but it does not require such an interpretation, much less 'change the law' before it is made.

It may I suppose be helpful to say this expressly, perhaps in the commentary, to emphasize that the Act is not trying to change the law, just state the media neutrality principle for greater certainty.

In short, we support the principle of draft article 14 as it appears in the March version of the Act. Concerns about 'retroactivity' would in our view be misplaced.

2. **The Alberta bill:** Donna Molzan, senior counsel to the Alberta Department of Justice and one of the two Liaison people to this project from the Uniform Law Conference of Canada (I am the other), had recently worked on a new Estate Administration Act for her province. It was introduced into the Legislature at the beginning of this month. She has submitted a copy of it to the Drafting Committee. It has been drafted deliberately to ensure that the duties of personal representatives with respect to estates will apply to digital assets.

It may be helpful to Committee members to focus on the three provisions of the bill that support this effect. Most of the bill, while interesting, does not affect the issues that are on the table for FADA.

The three provisions are these: the definition of 'property' in s. 1 (which is intentionally broad enough to cover digital assets, without mentioning them by name), s. 20 (the general duty of administrators, again broad enough to cover digital assets but not naming them), and the Schedule (which lists 'online accounts' - not defined - as one of the assets to be brought in by administrators.)

In short, the bill is media-neutral, with an effort to ensure that its language permits inclusion of digital assets wherever required.

Regards

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