



**Manitoba Law  
Reform Commission**

# **PRESUMED CONSENT ORGAN DONATION**

**CONSULTATION PAPER**

**May 2021**

## **Presumed Consent Organ Donation**

Consultation Paper

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The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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## CONSULTATION PAPER

Comments on this Consultation Paper should reach the Manitoba Law Reform Commission (“the Commission”) by **July 30, 2021**.

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba’s law. Please refer to the issues for discussion identified in this Paper, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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The Commission welcomes comments on all of its publications.

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## CHAPTER 1: INTRODUCTION

As of December 31, 2019, over 4000 Canadians found themselves on waitlists to receive donations of vital organs, including kidneys, livers, hearts, lungs, pancreases, etc.<sup>1</sup> Of these thousands of patients, many of whom remain on the waitlist, 249 did not survive the wait.<sup>2</sup>

Unfortunately, this gap between the number of organs available for transplantation and the number of organs needed by Canadians has been a persistent trend over the last several years, with over 700 Canadians dying while waiting for an organ between 2017 and 2020.<sup>3</sup> In order to narrow this gap, governments continue to explore ways in which to maximize the availability of organs and tissues for transplantation.<sup>4</sup> In other words, there is a continued effort to increase organ and tissue donor rates to ensure the loss of fewer Canadians to a donation system that is unable to support them. One such option, which has recently gained traction in Canada, is a legislative system of “presumed consent” or “opt-out” organ donation, which differs from Manitoba’s current system, governed by *The Human Tissue Gift Act*.<sup>5</sup> Under Manitoba’s current system, Manitobans may indicate their intent to become an organ and/or tissue donor by registering their consent with the online Sign Up For Life Registry. Without this express indication of consent, Manitobans will not become organ or tissue donors after death.

Until January 2021, each Canadian province and territory maintained “express consent” or “opt-in” systems of organ donation consistent with Manitoba’s, under which legislation required the explicit consent of donors for the use of any parts of their bodies after death for therapeutic purposes, medical education or scientific research.<sup>6</sup> However, in January of this year, Nova

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<sup>1</sup> Canadian Institute for Health Information [CIHI], “Annual Statistics on Organ Replacement in Canada: Dialysis, Transplantation and Donation, 2010-2019” (2020) at 2, online (pdf): *Canadian Institute for Health Information* <[www.cihi.ca/sites/default/files/document/corr-dialysis-transplantation-donation-2010-2019-snapshot-en.pdf](http://www.cihi.ca/sites/default/files/document/corr-dialysis-transplantation-donation-2010-2019-snapshot-en.pdf)> [CIHI Snapshot].

<sup>2</sup> *Ibid.*

<sup>3</sup> Canada, Library of Parliament, *Organ Donation and Transplantation in Canada: Statistics, Trends and International Comparisons* (Background Paper), Sonya Norris, Publication No. 2020-28-E (Ottawa: Library of Parliament, 1 April 2020) at 10 [*Organ Donation and Transplantation in Canada*].

<sup>4</sup> Canada, Library of Parliament, *Strategies to Optimize Organ and Tissue Donation and Transplantation* (Background Paper), Sonya Norris, Publication No. 2020-29-E (Ottawa: Library of Parliament, 1 April 2020) at I [*Strategies to Optimize Organ and Tissue Donation and Transplantation*].

<sup>5</sup> *The Human Tissue Gift Act*, SM 1987-88, c 39 [*The Human Tissue Gift Act*] (see Appendix A).

<sup>6</sup> *Ibid.* at s 2(1); *Trillium Gift of Life Network Act*, RSO 1990, c H.20, s 4(1) [*Trillium Gift of Life Network Act*]; *Human Tissue Gift Act*, RSBC 1996, c 211, s 4(1) [*Human Tissue Gift Act*]; *Human Tissue and Organ Donation Act*, RSA 2006, c H-14.5, s 4(1) [*Human Tissue and Organ Donation Act*]; *The Human Tissue Gift Act*, 2015, SS 2015 c H-15.1, s 7(1) [*The Human Tissue Gift Act*]; *Civil Code of Quebec* CCQ (1991), s 43 [*Civil Code of Quebec*]; *Human Tissue Gift Act*, RSNB 2014, c 113, s 4(1) [*Human Tissue Gift Act*]; *Human Tissue Gift Act*, R.S., c. 215, s. 4(1) [*Human Tissue Gift Act*]; *Human Tissue Donation Act*, c H-12.1, s 3 [*Human Tissue Donation Act*]; *Human Tissue Act*, RSNL 1990, c H-15, s 6(1) [*Human Tissue Act*]; *Human Tissue Donation Act*, SNWT 2014, c 30, s 4(1) [*Human Tissue Donation Act*]; *Consolidation of Human Tissue Act*, RSNWT 1988, c H-6, s 1(1) [*Consolidation of Human Tissue Gift Act*]; *Human Tissue Gift Act*, RSY 2002, c 117, s 4(1) [*Human Tissue Gift Act*].

Scotia became the first jurisdiction not only in Canada but within North America to break this mold.

Under Nova Scotia's new *Human Organ and Tissue Donation Act*,<sup>7</sup> when there is no record of a person's decision on organ and tissue donation, their consent will now be considered, under law, to have been given.<sup>8</sup> This legislative overhaul, the Government of Nova Scotia has explained, is intended to "help Nova Scotians waiting for a transplant get one sooner by increasing organ and tissue donation."<sup>9</sup> Similar presumed consent legislation is also currently being contemplated by the legislatures of Ontario, Alberta, and Quebec.

Given the hundreds of Manitobans currently on transplantation waitlists, and the reform efforts in other Canadian jurisdictions, the Commission asks the question: *If Manitoba were to amend The Human Tissue Gift Act to implement a system of presumed consent organ donation, how should it amend this legislation?*

This Consultation Paper invites readers to provide their comments on ten issues for discussion. The issues identified in this Paper require input from interested organizations and individuals so that the Commission can craft recommendations that will be practical and meaningful to those affected by any contemplated changes to the legislation.

Chapter 2 provides background on the legal landscape of organ and tissue donation in Canada and describes the current law and procedure in Manitoba. Chapter 3 explores recent legislative changes and reform efforts in other jurisdictions. Chapter 4 discusses possible areas of reform to Manitoba's legal framework for organ and tissue donation, touching on important considerations should the government wish to amend *The Human Tissue and Gift Act* to introduce a regime of presumed consent. Chapter 5 provides a summary of the issues for discussion identified throughout the Consultation Paper.

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<sup>7</sup> *Human Organ and Tissue Donation Act*, RNS 2019, c 6 (see Appendix B).

<sup>8</sup> Nova Scotia Department of Health and Wellness, "Human Organ and Tissue Donation Act Information Guide" (June 2020) at 4, online (pdf): *Government of Nova Scotia* <[beta.novascotia.ca/sites/default/files/documents/1-2403/human-organ-and-tissue-donation-act-information-guide-en.pdf#:~:text=The%20Human%20Organ%20and%20Tissue%20Donation%20Act%28%E2%80%9CHOTDA%E2%80%9D%20or,changing%20the%20way%20donation%20works%20in%20Nova%20Scotia](https://beta.novascotia.ca/sites/default/files/documents/1-2403/human-organ-and-tissue-donation-act-information-guide-en.pdf#:~:text=The%20Human%20Organ%20and%20Tissue%20Donation%20Act%28%E2%80%9CHOTDA%E2%80%9D%20or,changing%20the%20way%20donation%20works%20in%20Nova%20Scotia)> [NSDHW Information Guide].

<sup>9</sup> "Changes to organ and tissue donation", online: *Nova Scotia* <[novascotia.ca/organ-and-tissue-donation-changes/](https://novascotia.ca/organ-and-tissue-donation-changes/)> [Changes to organ and tissue donation].



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## CHAPTER 2: BACKGROUND

In accordance with Canadian legislation, organ and tissue donation is defined as the removal of any tissue, organ, or parts of an individual's body after death for therapeutic purposes (i.e. transplantation), purposes of medical education, or for scientific research.<sup>10</sup> While in practice, there are several different types of donors, this Paper will focus exclusively on deceased donors, defined as "an individual who becomes a donor following death, either brain death or cardiac death."<sup>11</sup>

In Canada, organ donation and transplantation is governed in part by the federal government and in part by provincial and territorial governments, with support from local organ donation organizations and programs, as well as Canadian Blood Services ("CBS")<sup>12</sup>, an independent, non-profit national organization that provides lifesaving products and services surrounding transfusion and transplantation.<sup>13</sup>

### A. Federal Governance of Organ and Tissue Donation

Under the *Safety of Human Cells, Tissues and Organs for Transplantation Regulations*,<sup>14</sup> a regulation of the *Food and Drugs Act*,<sup>15</sup> the federal government is responsible for ensuring the general safety of organs and tissues that are distributed for transplantation.<sup>16</sup> Among other things, these federal regulations require health care facilities to properly assess donor suitability and to maintain certain standards in the retrieval, testing, storage and distribution of cells, tissues and organs for transplantation.<sup>17</sup> These regulations also ensure that all Canadian establishments that distribute cells, tissues or organs operate in accordance with standardized quality assurance programs.<sup>18</sup> Moreover, under the *Canada Health Act*,<sup>19</sup> the federal government is responsible for

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<sup>10</sup> *The Human Tissue Gift Act*, *supra* note 5.

<sup>11</sup> *Organ Donation and Transplantation in Canada*, *supra* note 3 at 2. According to the Canadian Institute for Health Information, most provinces require that at least 2 physicians determine brain death based on a standard list of neurological criteria before donation after brain death can occur. Donation after cardiocirculatory death ("DCD") involves patients with a severe brain injury or other terminal condition who do not meet the criteria for brain death but who have no chance of recovery and are removed from life-sustaining therapy with the consent of family. Cardiocirculatory death is declared 5 minutes after the heart stops beating (see Canadian Institute for Health Information, "Deceased Organ Donor Potential in Canada" (December 2014) at 5, online (pdf): <[secure.cihi.ca/free\\_products/OrganDonorReport\\_ENweb.pdf](https://secure.cihi.ca/free_products/OrganDonorReport_ENweb.pdf)>).

<sup>12</sup> Canada, House of Commons, *Organ Donation in Canada: Report of the Standing Committee on Health*, 42nd Parl, 1st Sess, September 2018 at 7 [*Report of the Standing Committee on Health*].

<sup>13</sup> Canadian Blood Services, "About us", online: <[www.blood.ca/en/about-us](http://www.blood.ca/en/about-us)>.

<sup>14</sup> *Safety of Human Cells, Tissues and Organs for Transplantation Regulations*, SOR/2007-118 [*Safety of Human Cells Regulations*].

<sup>15</sup> *Food and Drugs Act*, RSC 1985, c F-27.

<sup>16</sup> *Report of the Standing Committee on Health*, *supra* note 12 at 7.

<sup>17</sup> *Safety of Human Cells Regulations*, *supra* note 14.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Canada Health Act*, RSC, 1985, c C-6.

providing financial support to the provinces and territories so that they may administer and provide health care services such as organ donation and transplantation.

In addition to this financial assistance from the federal government, the provinces and territories are supported by CBS, which plays an important role in the delivery of tissue and organ donation in Canada. Specifically, CBS supports the provinces and territories through:

- a) its efforts to promote interprovincial organ donation and transplantation;<sup>20</sup>
- b) its creation, in concert with the Canadian Council for Donation and Transplantation (“CCDT”), of national leading practice standardized guidelines with respect to organ donation and transplantation;<sup>21</sup> and
- c) its data collection and national performance reporting related to organ donation and transplantation in Canada.<sup>22</sup>

Moreover, CBS is responsible for prompting national discussion on Canada’s organ and tissue donation, through documents like its 2011 *Call to Action*, which prompted the House of Commons Standing Committee on Health to agree to study the status of Canada’s organ and tissue donation procurement system in 2018.<sup>23</sup>

## **B. Provincial/Territorial Governance of Organ and Tissue Donation**

All other aspects of organ and tissue donation in Canada are governed by provincial and territorial legislative schemes, which, aside from Quebec’s and Nova Scotia’s, are based largely on the *Uniform Human Tissue Donation Act* (the “Uniform Act”) proposed by the Uniform Law Conference of Canada in 1990.<sup>24</sup> Quebec’s scheme differs mainly in that it is incorporated into its Civil Code as opposed to standalone organ donation legislation, as in the other provinces and territories. Nova Scotia’s new legislation differs in many respects, and will be discussed in Chapter 3.

Among other things, the Uniform Act:

- sets the requirements for consent to donate from both living and deceased donors, adults as well as minors;

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<sup>20</sup> For example, CBS is responsible for initiatives such as the Kidney Paired Donation Program, which “helps match patients with donors across the country and has resulted in 1,000 kidney transplants over the past 10 years.” See *Report of the Standing Committee on Health*, *supra* note 12 at 9.

<sup>21</sup> The CCDT was an advisory body to the Conference of Deputy Ministers of Health created in 2001. Its functions were transferred to CBS in 2008, which then took charge of Canada’s organ and tissue donation and transplantation system. See *Organ Donation and Transplantation in Canada*, *supra* note 3 at 1.

<sup>22</sup> *Report of the Standing Committee on Health*, *supra* note 12 at 10.

<sup>23</sup> *Ibid* at 1.

<sup>24</sup> Uniform Law Conference of Canada [ULCC], *Uniform Human Tissue Donation Act* (1990), online: <[www.ulcc.ca/en/uniform-acts-new-order/440-josetta-1-en-gb/uniform-actsa/human-tissue-donation-act/284-human-tissue-donation-act-1990-draft](http://www.ulcc.ca/en/uniform-acts-new-order/440-josetta-1-en-gb/uniform-actsa/human-tissue-donation-act/284-human-tissue-donation-act-1990-draft)> [ULCC Act].

- requires the protection of private information;
- sets requirements for the determination of death;
- prohibits the commercialization (buying and selling) of organs and tissues for transplantation, research and medical education; and
- imposes penalties for contravening the Act.<sup>25</sup>

Importantly, the Uniform Act sets out an opt-*in* system of organ donation which requires consent in order to remove tissues or organs from an individual's body after death for the purpose of implanting the tissue in a living human body.<sup>26</sup>

In Manitoba, organ and tissue donation is governed by *The Human Tissue Gift Act*, which, in keeping with the Uniform Act, requires Manitobans to expressly consent to organ donation if they wish to become donors after death.<sup>27</sup> This opt-in framework is established by sections 2(1) and 2(2) of that Act, which state:

**Direction by adult before death**

2(1) A person who is 18 years of age or over may direct that the whole body of the person, or any tissue or specified tissue from the body, may be used after the person's death for therapeutic purposes or for purposes of medical education or scientific research.

**Direction by minor before death**

2(2) A direction mentioned in subsection (1) may be given by a person who is under 18 but not under 16 years of age,

- (a) where a parent or legal guardian of the person consents to the direction; or
- (b) without the consent required under clause (a), where the parent or parents or the legal guardian or legal guardians of the person is or are unavailable.<sup>28</sup>

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<sup>25</sup> *Report of the Standing Committee on Health*, *supra* note 12 at 9.

<sup>26</sup> *ULCC Act*, *supra* note 24 at s 3(1).

<sup>27</sup> On three occasions, the Honourable Mr. Steven Fletcher proposed Private Member's Bills intended to amend *The Human Tissue Gift Act* so as to implement a presumed consent, as opposed to express consent, organ and tissue donation framework in the province (see Bill 213, *The Gift of Life Act (Human Tissue Gift Act Amended)*, 2nd Sess, 41st Parl, Manitoba, 2017 [Bill 213], Bill 209, *The Gift of Life Act (Human Tissue Gift Act Amended)*, 3rd Sess, 41st Parl, Manitoba, 2017 [Bill 209], and Bill 212, *The Gift of Life Act (Human Tissue Gift Act Amended)*, 4th Sess, 41st Parl, Manitoba, 2018 [Bill 212]). None of these Bills proceeded past second reading.

<sup>28</sup> *The Human Tissue Gift Act*, *supra* note 5 at ss 2(1), 2(2).

According to section 2(3) of the Act, direction given under these sections provides full authority for obtaining possession of the body, for using the body or for removing and using any tissue from the body for the purposes specified in the direction.<sup>29</sup> However, pursuant to this section, a direction ought not to be followed where the person proposing to act upon the direction has reason to believe:

- (a) that the person who gave the direction subsequently withdrew it; or
- (b) that the person who gave the direction was not capable of understanding the nature and effect thereof; or
- (c) that an inquiry or investigation under *The Fatality Inquiries Act* may be required to be held respecting the cause and manner of death, unless a medical examiner or the chief medical examiner appointed under that Act has no objection to the use of the body or the removal and use of the tissue.<sup>30</sup>

Section 3 of the Act governs instances in which directions for organ donation may be made on someone else's behalf. Specifically, it governs directions for organ donation on behalf of deceased persons (s. 3(1)), on behalf of dying persons (s. 3(3)), and on behalf of persons under the age of 16 (s. 3(4)).

In accordance with section 3(1.1), where a person who dies has not made a direction regarding organ donation after death, where they *have* made such a direction but said direction cannot be acted upon because the individual was not capable of understanding the nature and effect of said direction, or where the individual was under the age of 16 at the time of death, a direction may be provided on that person's behalf:

- (a) by the deceased person's proxy, if the deceased person was 18 years of age or over at the time of death;
- (b) if there is no proxy authorized to act or the proxy is unavailable, by the deceased person's nearest relative; or
- (c) if there is no nearest relative or the nearest relative is unavailable, by the person lawfully in possession of the body or the Inspector of Anatomy, as the case may be.<sup>31</sup>

A person lawfully in possession of the body does not include a medical examiner in possession of a body for the purpose of inquiry or investigation, or an embalmer or funeral director in possession of a body for the purpose of its burial, cremation or other disposal.<sup>32</sup>

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<sup>29</sup> *Ibid* at s 2(3).

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* at s 3(1.1).

<sup>32</sup> *Ibid* at s 3(2).

In accordance with section 3(3), where a physician is of the opinion that a person's death is imminent and inevitable, and that person has either not made a direction regarding organ donation after death and is incapable of doing so, or *has* made such a direction but said direction cannot be acted upon because the individual was not capable of understanding the nature and effect of said direction, a direction may be provided on that person's behalf:

- (a) by the dying person's proxy, if the dying person is 18 years of age or over; or
- (b) if there is no proxy authorized to act or the proxy is unavailable, by the dying person's nearest relative.<sup>33</sup>

Finally, pursuant to section 3(4), where a person is under 16 years of age and a physician is of the opinion that their death is imminent and inevitable, the person's nearest relative may direct that their whole body or any tissue or specified tissue from the body, may be used after that person's death.<sup>34</sup>

Like a consent provided by an individual, directions made by the aforementioned substitute decision makers on the individual's behalf provides full authority for obtaining possession of the body, the use of the body or the removal and use of any tissue for the purposes specified in the direction.<sup>35</sup> This is the case except where the use of the body or the removal and use of tissue from the body after death would be contrary to the religious beliefs of the deceased person, where the deceased person, if living, would have objected thereto, or where an inquiry or investigation under *The Fatality Inquiries Act* may be required to be held respecting the cause and manner of death.<sup>36</sup>

Designated facilities are required to notify a human tissue gift agency when a patient at a facility dies, when a physician at the facility advises that the death of a person at the facility is imminent and inevitable, or when the facility receives a dead body.<sup>37</sup> Upon being notified, the agency must ensure that reasonable efforts are made to determine whether the deceased or dying person made a direction for donation under section 2 of the Act.<sup>38</sup> If the agency cannot find a direction promptly, the agency must decide whether the circumstances are appropriate to make a request for such direction.<sup>39</sup>

Where a request is deemed appropriate in the case of a dying person, the agency must ask the dying person whether he or she wishes to make a direction under section 2 or, alternatively, must ask his or her proxy or nearest relative whether they wish to make a

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<sup>33</sup> *Ibid* at s 3(3.1).

<sup>34</sup> *Ibid* at s 3(4).

<sup>35</sup> *Ibid* at s 3(5).

<sup>36</sup> *Ibid* at s 3(5).

<sup>37</sup> *Ibid* at s 4(1).

<sup>38</sup> *Ibid* at s 4(2).

<sup>39</sup> *Ibid* at s 4(3).

direction under subsection 3(3).<sup>40</sup> Where a request is deemed appropriate in the case of a deceased person, the agency must ask the person's proxy or nearest relative, or the person lawfully in possession of the body or the Inspector of Anatomy, whether they wish to make a direction under section 3.<sup>41</sup>

A request by an agency will not be appropriate if the agency has reason to believe:

- (a) the person actually objected — and the objection was not withdrawn — while living, to the use of his or her body or the removal and use of tissue from his or her body after death;
- (b) the person would have objected, if living, to the use of his or her body or the removal and use of tissue from his or her body after death; or
- (c) the use of the person's body or the removal and use of tissue from the person's body after death would be contrary to the person's religious beliefs.<sup>42</sup>

In Manitoba, individuals may indicate their intent to become an organ and/or tissue donor by registering their consent with the online Sign Up For Life Registry, which was launched in April 2011 by Transplant Manitoba.<sup>43</sup> By registering a consent to donate through this online Registry, “the information is recorded and stored in a Manitoba eHealth database and will be made available to [an individual’s] family at the right time, only for the purpose of ensuring that [their] donation decision is known and respected.”<sup>44</sup> Where consent for donation is granted, designated health care facilities work with human tissue gift agencies such as the Transplant Manitoba Gift of Life program, the Tissue Bank of Manitoba, and the Misericordia Eye Bank to facilitate donation and transplantation.<sup>45</sup>

However, according to the 2018 Report of the Manitoba Organ and Tissue Donation Task Force (“Task Force”), a “non-partisan task force that was appointed to conduct an inquiry and make recommendations with respect to improving the rate of organ and tissue donation in Manitoba,” only 2% of Manitobans had actually registered on this donor registry at that time.<sup>46</sup> The Task Force reported that there is a critical need in Manitoba to increase the number of registered

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<sup>40</sup> *Ibid* at s 4(4)(a).

<sup>41</sup> *Ibid* at s 4(4)(b).

<sup>42</sup> *Ibid* at s 4(5).

<sup>43</sup> Manitoba Organ and Tissue Donation Task Force, *Inquiry into Organ and Tissue Donation, June 2018* at 7, online (pdf): <[pcmbcaucus.com/wp-content/uploads/2018/06/Organ-Donor-Taskforce-Report-Final.pdf](http://pcmbcaucus.com/wp-content/uploads/2018/06/Organ-Donor-Taskforce-Report-Final.pdf)> [*Inquiry into Organ and Tissue Donation*].

<sup>44</sup> Sign Up for Life, “Frequently Asked Questions: About the Sign up for Life Registry”, online: <[www.signupforlife.ca/faq.html](http://www.signupforlife.ca/faq.html)>.

<sup>45</sup> Health, Seniors and Active Living, Manitoba, “Organ and Tissue Donation”, online: *Government of Manitoba* <[www.gov.mb.ca/health/donor.html](http://www.gov.mb.ca/health/donor.html)>.

<sup>46</sup> *Inquiry into Organ and Tissue Donation*, *supra* note 43 at 7.

donors in order to decrease the number of people waiting for transplants, as even just a single donor can save up to eight lives and benefit 75 others through tissue donation.<sup>47</sup>

Ultimately, one of the Task Force’s five recommendations with respect to improving donation rates in Manitoba was to engage in a continual review of the results of organ donation rates in Manitoba and the effectiveness of presumed consent in international jurisdictions, to see whether other steps such as the implementation of a presumed consent regime are warranted.<sup>48</sup> Other recommendations included the development and implementation of an organ and tissue donation topic into the compulsory health/science curriculum of all grade 9 students in Manitoba, the development and implementation of public awareness campaigns to increase the number of potential donors on the online registry, and an assessment of the feasibility of legislative or policy changes to clarify who may consent to organ donation on behalf of a donor.<sup>49</sup>

Like Manitoba, every Canadian province other than Nova Scotia currently has a legislative framework for tissue and organ donation reflective of the Uniform Act, which requires that individuals opt *in* to tissue and organ donation after death, as opposed to opting out.<sup>50</sup> While these legislative schemes have made Canada an “express consent” jurisdiction for organ and tissue donation and transplantation, movements to improve organ and tissue donation performance for Canadians in recent years have begun to call this consent regime into question. Specifically, these calls to action have raised the question of whether presumed consent, or opt-*out* systems of organ donation might maximize the availability of organs and tissues for transplantation, thus reducing wait times for donations, and ensuring the loss of fewer Canadians. Accordingly, Canada is now witnessing a legislative shift towards opt-out organ donation, with Nova Scotia having successfully implemented the country’s first presumed consent regime, and with Ontario, Alberta and Quebec attempting to follow suit.<sup>51</sup> The following chapter will explore these legislative reforms, as well as reforms in jurisdictions outside of Canada.

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* at 23. Importantly, Nova Scotia’s presumed consent regime was not in effect at the time of the publication of this report.

<sup>49</sup> *Ibid.*

<sup>50</sup> See Appendix F.

<sup>51</sup> Bill 205, *Human Tissue and Organ Donation (Presumed Consent) Amendment Act*, 1st Sess, 38th Leg, Alberta, 2019; Bill 399, *An Act to establish a presumption of consent to organ or tissue donation after death*, 1st Sess, 42nd Leg, Quebec, 2019; and Bill 91, *Peter Kormos Memorial Act (Trillium Gift of Life Network Amendment)*, 1st Sess, 42nd Leg, Ontario, 2019.

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## CHAPTER 3: REFORM IN OTHER JURISDICTIONS

This section describes legislation and recent legislative reform in other jurisdictions regarding organ and tissue donation.

### **A. Nova Scotia's *Human Organ and Tissue Donation Act***

On April 12, 2019, the Nova Scotia government passed the *Human Organ and Tissue Donation Act*<sup>52</sup> (the “NS Act”), which establishes a regime of presumed consent organ donation in Nova Scotia, making it the first jurisdiction in North America to implement such a policy.<sup>53</sup> This framework is established by virtue of sections 7- 15 of the Act, which state:

- 7** The Minister shall establish or designate a Registry to record consents and refusals respecting donation after death for transplantation made under this Act.
- 8 (1)** An individual may consent to or refuse donation after death for transplantation by providing information respecting the consent or refusal to the Registry in the manner specified by the Minister.
- (2)** A consent to donation after death under subsection (1) may be restricted to the donation of specified organs and tissues.
- 9 (1)** Subject to Section 15, a consent under Section 8 is full authority for transplantation activities to the extent of the consent.
- (2)** Subject to Section 15, where an individual has refused donation after death for transplantation under Section 8, the individual's organs and tissues may not be used for transplantation activities.
- 10** A physician or the Chief Medical Examiner shall, before undertaking transplantation activities, check the Registry to determine whether a decision made under Section 8 is on record in the Registry.
- 11 (1)** Subject to Sections 12 to 15, where an individual has not made a consent or refusal under Section 8, the individual is deemed to consent to the individual's organs and tissues being used for transplantation activities.
- (2)** A deemed consent under subsection (1) is full authority for transplantation activities.
- 12 (1)** An individual is not deemed to consent under Section 11 if the individual has died and for a significant period before dying lacked the capacity to make a decision respecting donation after death.

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<sup>52</sup> *Human Organ and Tissue Donation Act*, *supra* note 7.

<sup>53</sup> “Bill 133, An Act Respecting Human Organ and Tissue Donation”, 1st reading, *House of Assembly Debates and Proceedings*, 19-37 (2 April 2019) at 2681 (Hon Stephen McNeil).



(2) For the purpose of subsection (1), a significant period means a sufficiently long period as would lead a reasonable person to conclude that it would be inappropriate for consent to be deemed to have been given.

(3) Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**13 (1)** An individual is not deemed to consent under Section 11 if the individual has died and the individual was not ordinarily resident in the Province for a period of at least 12 months immediately before dying.

(2) Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**14 (1)** An individual is not deemed to consent under Section 11 if the individual was under the age of majority at the time of death.

(2) Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**15 (1)** Where a substitute decision-maker provides information that would lead a reasonable person to conclude that an individual would have made a different decision respecting donation after death than the decision recorded in the Registry or deemed under Section 11, the substitute decision-maker may consent or refuse on behalf of the individual in accordance with that information.

(2) A consent under subsection (1) is full authority for transplantation activities to the extent of the consent.<sup>54</sup>

Interestingly, deemed consent only applies to donation after death for the purposes of *transplantation*.<sup>55</sup> According to section 21, a deemed consent under section 11 of the NS Act does not include consent to donation after death for scientific research or educational purposes. Consent to donation for such purposes must be given by express personal consent or by consent given by a substitute decision maker.<sup>56</sup>

The Nova Scotia Department of Health and Wellness (“NSDHW”), in its Human Organ and Tissue Donation Act Information Guide (“Information Guide”), explains the new regime in clear and simple terms. With respect to the Registry created by virtue of section 7, it explains:

4.1. The Minister of Health and Wellness has designated the Nova Scotia Health Card Registry as the Registry to record consents and refusals respecting donation after death for transplantation under Section 7 of the Act.

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<sup>54</sup> *Human Organ and Tissue Donation Act*, *supra* note 7 at ss 7-15.

<sup>55</sup> *Ibid* at s 11.

<sup>56</sup> *Ibid* at s 21(1).

- 4.2. A person may record a consent or a refusal in the Registry. Recording a consent to donate is considered ‘express consent’. Refusing to donate is also sometimes referred to as “opting out” of donation.
- 4.3. A consent may be registered for all organs and tissues or may specify which organs and tissues a person consents to donate. (Section 8(2) of the Act).
- 4.4. Nova Scotia Health Cards will indicate whether a person has consented to donate all organs and tissues (**Donor 1**), consented to donate specific organs and tissues (**Donor 2**) or has refused to consent (**opt out**).<sup>57</sup>

Since the implementation of the NS Act in January of this year, individuals may provide their decision to refuse to consent to organ donation, or to “opt out” of organ donation to the Registry by completing a Nova Scotia Health Card application or renewal, by contacting the Nova Scotia Health Card Registry by telephone, or online on the Nova Scotia government website.<sup>58</sup> According to the NSDHW, within the first ten days of the Act’s implementation, 11,800 Nova Scotians (roughly one per cent of the province’s population) had registered to opt out.<sup>59</sup>

With respect to express consent under the new regime, the NSDHW explains that pursuant to section 10 of the NS Act, transplantation activities must not be undertaken until the Registry is checked to determine whether a person made a decision regarding donation during their life (either express consent or refusal).<sup>60</sup> Where express consent is recorded in the Registry, deemed consent will not apply, and transplantation activities will proceed on the basis of that express consent to donate.<sup>61</sup> Where a refusal is recorded in the Registry, deemed consent will not apply and transplantation activities may not proceed unless family or a substitute decision maker provides information to show that the person had changed their mind.<sup>62</sup> On this point, the NSDHW explains:

- 5.2.1. If a consent or refusal is recorded in the Registry, and a substitute decision maker provides information that a reasonable person would conclude that the person would have made a different decision than what is recorded in the Registry, then the substitute decision maker may give consent (express consent) or refuse on behalf of the person, in accordance with that information. (Section 15 of the Act)

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<sup>57</sup> NSDHW *Information Guide*, *supra* note 8 at 2.

<sup>58</sup> *Ibid.*

<sup>59</sup> Carolyn Ray, “Nova Scotia’s opt-out organ donation registry sees a fraction of expected names” *CBC News* (28 January 2021), online: <[www.cbc.ca/news/canada/nova-scotia/opt-out-organ-tissue-donation-program-1.5891237#:~:text=Nova%20Scotia%20became%20the%20first%20place%20in%20North,11%2C800%20Nova%20Scotians%20have%20registered%20to%20opt%20out.>](http://www.cbc.ca/news/canada/nova-scotia/opt-out-organ-tissue-donation-program-1.5891237#:~:text=Nova%20Scotia%20became%20the%20first%20place%20in%20North,11%2C800%20Nova%20Scotians%20have%20registered%20to%20opt%20out.>)>.

<sup>60</sup> NSDHW *Information Guide*, *supra* note 8 at 3.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

- 5.2.2. A substitute decision maker must provide the evidence they believe proves the person changed their mind.<sup>63</sup>

Most importantly, the NSDHW, in its Information Guide, explains the deemed consent component of this new legislation in depth:

#### 6. Deemed Consent

When there is no record of a person's decision on organ and tissue donation their consent will be considered, under law, to have been given.

- 6.1. In the absence of express consent, transplantation activities are lawful if carried out by deemed consent unless one of the following exceptions applies:

1. **Children** – deemed consent will not apply to persons under the age of majority (19). (Section 14 of the Act).
2. **Not Ordinarily Resident in Nova Scotia** – deemed consent will not apply to persons not ordinarily resident in Nova Scotia for 12 months immediately prior to dying. (Section 13 of the Act).
3. **Lack of Capacity** – deemed consent will not apply to a person who does not have the capacity to make a decision respecting donation after death for a significant period before dying. (Section 12 of the Act).

- 6.2. If a person is not within an excluded category above, then consent may be deemed unless:

- (i) the person recorded a decision about donation in the Registry (express consent or opt out), or
- (ii) a substitute decision maker provides information that would lead a reasonable person to conclude that the person would have objected to consent being deemed (refusal).<sup>64</sup>

Ultimately, the NSDHW explains that the goal of these changes is to help increase organ and tissue donation in Nova Scotia; a goal which is most likely shared by the rest of the Canadian provinces. As the first jurisdiction in Canada to pursue this goal through the implementation of presumed consent legislation, there is no doubt that the other Canadian provinces and territories will be paying close attention to Nova Scotia's donation and transplantation performance in the coming years, with an eye to determining whether they too should consider systems of presumed, as opposed to express consent organ donation.

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid* at 4.

## B. Proposed Legislation in other Canadian Jurisdictions

Ontario, Alberta and Quebec may also become role models in this regard in the coming years, based on similar legislative schemes which are currently before their legislatures. These Bills are briefly summarized below.

### 1. Ontario

Under Bill 91, the *Peter Kormos Memorial Act (Trillium Gift of Life Network Amendment)* (the “ON Bill”) <sup>65</sup>, which is currently before the Ontario legislature, “consent [will] no longer [be] required [before tissue can be removed from a human body], but a person may object to the removal of the tissue prior to his or her death or a substitute may object on his or her behalf after the death has occurred.” Among other things, the ON Bill would repeal section 4 of the current *Trillium Gift of Life Network Act*<sup>66</sup>, and replace it with the following:

Current Act	Proposed Legislation
<p><b>Consent by person for use of his or her body after death</b></p> <p>4(1) Any person who has attained the age of sixteen years may consent,</p> <p>(a) in a writing signed by the person at any time; or</p> <p>(b) orally in the presence of a least two witnesses during the person’s last illness,</p> <p>that the person’s body or the part or parts thereof specified in the consent be used after the person’s death for therapeutic purposes, medical education or scientific research.</p>	<p><b>Post mortem use of tissue</b></p> <p>4(1) Subject to subsection (2), if a person dies, tissue from his or her body may be removed and used after his or her death for medical education, scientific research or therapeutic purposes, including transplant.</p> <p><b>Exception</b></p> <p>(2) Subsection (1) does not apply to a person,</p> <p>(a) who is a believer, a follower or a member of a prescribed religion, cult, association or group; or</p> <p>(b) who has objected in the manner specified in subsection (3) to tissue from his or her body being removed and used after his or her death or on whose behalf such an objection has been made under subsection 5 (1).</p> <p><b>Objection</b></p> <p>(3) Any person who is 16 years of age or more may object to tissue from his or her body</p>

<sup>65</sup> Bill 91, *An Act to amend the Trillium Gift of Life Network Act*, 1st Sess, 42nd Leg, Ontario, 2019, Explanatory Note [ON, Bill 91] (see Appendix C).

<sup>66</sup> *Trillium Gift of Life Network Act*, *supra* note 6.

	<p>being removed and used after his or her death by,</p> <ul style="list-style-type: none"> <li>(a) stating the objection in writing in a document signed by the person and, at any time prior to the person's death, <ul style="list-style-type: none"> <li>i. delivering the document to an attending physician, or</li> <li>ii. sending the document to the Network; or</li> </ul> </li> <li>(b) stating the objection orally in the presence of at least two witnesses during the person's last illness.</li> </ul> <p><b>Minors</b></p> <p>(4) At any time before the death of a child who is under 16 years of age, the parent or guardian of the child may, in a manner specified in subsection (3), object on the child's behalf to tissue from the child's body being removed and used after the child's death.</p>
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## 2. Alberta

Pursuant to Bill 205, the *Human Tissue and Organ Donation (Presumed Consent) Amendment Act* (the "AB Bill")<sup>67</sup>, which is currently before the Alberta legislature, "[if] at the time of a person's death no decision has been made with respect to... [whether they consent or refuse to donate their tissues, organs or body for use upon their death], the person is considered to have, before their death, made the decision to donate their organs and tissues for the purpose of transplantation only." Among other things, the AB Bill would repeal sections 4 and 4.1 of the current *Human Tissue and Organ Donation Act*,<sup>68</sup> and replace them with the following:

Current Act	Proposed Legislation
<p><b>Deceased donor</b></p> <p><b>4(1)</b> A person's tissue, organs or body may be donated for transplantation, medical education or scientific research from his or her deceased body if a consent is given</p> <ul style="list-style-type: none"> <li>(a) where that person is an adult, by the adult, or</li> </ul>	<p><b>Deceased donor</b></p> <p><b>4(1)</b> For the purpose of transplantation, medical education or scientific research, an adult person may decide to</p> <ul style="list-style-type: none"> <li>(a) consent to donate their tissues, organs or body for use upon their death by</li> </ul>

<sup>67</sup> Bill 205, *The Human Tissue and Organ Donation (Presumed Consent) Amendment Act*, 1st Sess, 30th Leg, Alberta, 2019, Explanatory Notes [AB, Bill 205] (see Appendix D).

<sup>68</sup> *Human Tissue and Organ Donation Act*, *supra* note 6.

<p>(b) by a person in accordance with subsection (2)</p> <p>(2) When a person dies or his or her death is imminent, if the person is an adult who has not given a consent and, in the opinion of a medical practitioner, the person is incapable of doing so by reason of injury or disease, or if the person is a minor, a person in one of the following classes and in the following order of priority may give a consent:</p> <ul style="list-style-type: none"> <li>(a) the spouse or adult interdependent partner of the person if they are not estranged;</li> <li>(b) an adult child of the person;</li> <li>(c) a parent or guardian of the person;</li> <li>(d) an adult sibling of the person;</li> <li>(e) any other adult next of kin of the person.</li> </ul> <p>(3) A person shall not seek or give a consent under subsection (2) if he or she has personal knowledge of the following:</p> <ul style="list-style-type: none"> <li>(a) a person in a higher priority class is readily available to provide a consent;</li> <li>(b) a person in the same class would refuse to give a consent;</li> <li>(c) the donor would have refused to give a consent.</li> </ul>	<p>indicating their consent in accordance with section 9, or</p> <p>(b) refuse to donate their tissue, organs or body for use upon their death by indicating their refusal in accordance with section 9.</p> <p>(2) A person's tissue, organs and body must only be used upon their death in accordance with the decision given under subsection (1).</p> <p>(3) Subject to subsections (4) and (5), a person in one of the classes described in subsection (4) may make a decision under subsection (1) on behalf of another person</p> <ul style="list-style-type: none"> <li>(a) who had not made a decision under subsection (1) at the time of their death,</li> <li>(b) whose death is imminent and <ul style="list-style-type: none"> <li>i. who, in the opinion of a medical practitioner, is incapable of making a decision due to injury or disease, and</li> <li>ii. has not made a decision under subsection (1),</li> </ul> </li> </ul> <p>or</p> <p>(c) who is a minor at the time of their death.</p> <p>(4) A person who is in one of the following classes of persons may, in the order of priority set out in clauses (a) to (e), make a decision on behalf of another person:</p> <ul style="list-style-type: none"> <li>(a) firstly, if they are not estranged at the time of making the decision, the spouse or adult interdependent partner of the person;</li> <li>(b) secondly, an adult child of the person;</li> <li>(c) thirdly, a parent or guardian of the person;</li> </ul>
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	<p>(d) fourthly, an adult sibling of the person;</p> <p>(e) any other adult that is the next of kin of that person.</p> <p>(5) A person may not make a decision under subsection (1) on behalf of another person if they have personal knowledge of any of the following:</p> <ul style="list-style-type: none"> <li>(a) a person in a higher priority class described in subsection (4) is reasonably available to make the decision;</li> <li>(b) in the case of a decision to consent to donate, another person who is in the same class or a higher class described in subsection (4) would decide to refuse to donate;</li> <li>(c) the person on whose behalf they are making a decision would have made a different decision.</li> </ul> <p><b>Presumed consent</b></p> <p>4.01(1) If at the time of a person's death no decision has been made with respect to that person under section 4, the person is considered to have, before their death, made the decision to donate their organs and tissues for the purpose of transplantation only.</p> <p>(2) A person is not considered to have made the decision referred to in subsection (1) if</p> <ul style="list-style-type: none"> <li>(a) at the time of their death, <ul style="list-style-type: none"> <li>i. they were a minor, or</li> <li>ii. they did not reside in Alberta for the 12-month period immediately preceding the day on which they died,</li> </ul> </li> <li>(b) for a significant period before the day on which they died, they were, in the opinion of a medical practitioner, incapable of making a decision described in section 4(1),</li> </ul>
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	<p>or</p> <p>(c) a person in one of the classes described in section 4(4) provides information that would lead a reasonable person to conclude that, if the deceased person had made a decision, they would have decided to refuse to donate in accordance with section 4(1)(b).</p> <p>(3) For greater certainty, subsection (1) applies only if a person whose consent to donate is presumed has died.</p>
<p><b>Online registry</b></p> <p><b>4.1</b> The Minister shall establish an online registry to facilitate registration of the consent of adults to the donation of their tissue or organs in accordance with section 4(1)(a).</p>	<p><b>Online registry</b></p> <p><b>4.1(1)</b> The Minister must establish an online registry to facilitate the registration and submission of every decision to donate made under section 4(1).</p> <p>(2) A decision to donate submitted to the online registry must meet the requirements set out in section 9 and in the regulations, if any.</p> <p>(3) Despite section 12, a consent to donate a person's whole body for the purpose of medical education or scientific research that is registered under subsection (1) may, in accordance with the regulations, if any, be electronically transmitted to a university.</p>

### 3. Quebec

Under Bill 399, *An Act to establish a presumption of consent to organ or tissue donation after death* (the “QC Bill”)<sup>69</sup>, which is currently before the Quebec legislature, the *Quebec Civil Code* would be amended “so that persons of full age are presumed to authorize the removal of organs or tissues after death.” Among other things, the QC Bill would repeal sections 43 and 44 of the current *Civil Code*,<sup>70</sup> and replace them with the following:

<sup>69</sup> Bill 399, *An Act to establish a presumption of consent to organ or tissue donation after death*, 1st Sess, 42nd Leg, Quebec, 2019, Explanatory Notes [QC, Bill 399] (see Appendix E).

<sup>70</sup> *Civil Code of Quebec*, *supra* note 6.



Current Code	Proposed Legislation
<p><b>43.</b> A person of full age or a minor 14 years of age or over may, for medical or scientific purposes, give his body or authorize the removal of organs or tissues therefrom. A minor under 14 years of age may also do so with the consent of the person having parental authority or of his tutor.</p> <p>These wishes are expressed verbally before two witnesses, or in writing, and may be revoked in the same manner. The wishes expressed shall be followed, unless there is a compelling reason not to do so.</p>	<p><b>43.</b> A person may, for medical or scientific purposes, give his body or authorize the removal of organs or tissues therefrom. However, for a minor under 14 years of age, the consent of the person having parental authority or of his tutor is required. The authorization or refusal is expressed verbally before two witnesses, or in writing, and may be revoked in the same manner. The authorization or approval expressed shall be followed, unless there is a compelling reason not to do so.”</p>
<p><b>44.</b> A part of the body of a deceased person may be removed, if the wishes of the deceased are not known or cannot be presumed, with the consent of the person who was or would have been qualified to give consent to care.</p>	<p><b>44.</b> A person of full age is presumed to authorize the removal of organs or tissues from his body.</p> <p>A part of the body of a deceased minor may be removed, if the wishes of the deceased are not known, with the consent of the person who was or would have been qualified to give consent to care.</p> <p>The person who requests the removal must take reasonable measures with the persons close to the deceased to ensure that the deceased had not, by any means, refused consent.</p> <p>The measures provided for in the third paragraph are not required where two physicians attest in writing to the urgency of the operation and the serious hope of saving a human life or improving its quality to an appreciable degree.</p>

### C. United States

All 50 U.S. states and the District of Columbia have adopted some form of human tissue and organ donation legislation based almost entirely on the U.S. 1968 draft *Uniform Anatomical Gift Act*, which was “predicated on the principles of consent and voluntary donation.”<sup>71</sup> This Act, which was revised in 2006 and adopted again by the vast majority of U.S. states, is based on a voluntary or express consent approach as opposed to a presumed consent approach to organ donation, making the United States an express consent jurisdiction.

### D. Australia and New Zealand

Likewise, Australia and New Zealand each have opt-in or “express consent” systems of organ donation as opposed to systems of presumed consent.<sup>72</sup> The Committee on Death and Organ Donation of the Australian and New Zealand Intensive Care Society (“ANZICS”)<sup>73</sup>, which states unequivocally that organ donation is an option to consider, and not an obligation,<sup>74</sup> explains that it does not support a presumed consent system for organ donation. Rather, “[it] believes the focus should remain on providing compassionate communication, adequate information about donation and the highest quality of care so that every family can make an informed and enduring decision that is right for them and their family member.

### E. United Kingdom

Until 2015, the United Kingdom was an express consent jurisdiction for organ donation like the United States, Australia and New Zealand. However, in 2015 Wales became the first country in the United Kingdom to introduce an “opt-out” or presumed system for consent to deceased organ and tissue donation through the *Human Transplantation (Wales) Act 2013*.<sup>75</sup> Under this statutory regime, which came into force in December 2015, all residents of Wales who are over 18 years of age with mental capacity and who have been ordinarily resident in Wales for a period of at least 12 months immediately before dying, are presumed to have given their consent to deceased organ donation unless they have explicitly registered or expressed their decision to “opt-out” of

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<sup>71</sup> Blair L. Sadler & Alfred M. Sadler, “Organ Transplantation and the Uniform Anatomical Gift Act: A Fifty-Year Perspective” (2018) 48:2 *The Hastings Center Report*, 14.

<sup>72</sup> See e.g. *Human Tissue Act 1982* (Vic) 1982/9680, s 26; *Human Tissue Act 1983* (NSW) 1983/164, Part 4; *Human Tissue Act 2008* (NZ) 2008/28, s 19. See also “The Statement on Death and Organ Donation” (2019) at 27, online (pdf): ANZICS <[www.anzics.com.au/wp-content/uploads/2020/07/ANZICS-Statement-on-Death-and-Organ-Donation-Edition-4.pdf](http://www.anzics.com.au/wp-content/uploads/2020/07/ANZICS-Statement-on-Death-and-Organ-Donation-Edition-4.pdf)> [ANZICS].

<sup>73</sup> ANZICS is Australia and New Zealand’s “leading advocate on intensive care related matters”, offering “ongoing professional education, the provision of leadership in medical settings, clinical research and analysis of critical care resources” in Australia and New Zealand. The ANZICS Committee on Death and Organ Donation “provides advice on strategies to improve organ and tissue donation processes [in Australia and New Zealand], as well as the educational needs of Intensive Care Doctors with regards to brain death and organ and tissue donation.” This Committee is also responsible for “liaising with other organisations, groups, and Government on issues related to organ and tissue donation.” See ANZICS, “organization and vision”, online: <[www.anzics.com.au/organisation-vision/](http://www.anzics.com.au/organisation-vision/)> and ANZICS, “death and organ donation”, online: <[www.anzics.com.au/death-and-organ-donation/](http://www.anzics.com.au/death-and-organ-donation/)>.

<sup>74</sup> *Ibid*, ANZICS at 43.

<sup>75</sup> *Human Transplantation (Wales) Act 2013* (Wales) NAWM 5.

being an organ donor during their lifetime.<sup>76</sup> However, this regime has been described as a “soft-opt out system” in that “family members are involved and asked to support the deceased persons decision made in life, whether it was registered on the organ donor register, expressed verbally or deemed (as opposed to a “hard opt-out” where families are not consulted).”<sup>77</sup>

## **F. Spain**

Spain, which is the world leader in organ donation, is also a presumed consent jurisdiction. In addition to the fact that it has more intensive-care unit beds and doctors per 1000 people compared with other nations, universal access to health care for Spanish citizens, and specialized training for medical professionals on the maximization of organ donation, Spain’s organ donation success has been credited to “its legal approach and a comprehensive programme of education, communication, public relations, hospital reimbursement, and quality improvement.”<sup>78</sup> These are all factors which are believed to promote trust in the healthcare system and positive attitudes toward organ donation, and ultimately, higher rates of organ and tissue donations, generally.<sup>79</sup>

Spain’s organ and tissue donation system is marked by its model of presumed consent. Under this model, which was introduced in Spanish law in 1979, absence of explicit refusal to become an organ donor automatically makes the patient a potential donor.<sup>80</sup> However, the law still requires that a patient’s possible refusal to donate be sought by consulting with proxy decision makers.<sup>81</sup> In light of this, the fact that Spain does not have a national registry for refusal, and the fact that most patients have not actively registered as donors, a patient’s wishes must still be taken into account by discussing his or her intentions with the family.<sup>82</sup> As a result, in practice, organ procurement is not undertaken if the family refuses the donation, despite the opt-out system.<sup>83</sup>

In addition to this presumed consent legal approach to donation, Spain’s organ and tissue donation success is credited to its use of individuals known as “transplant coordinators”, who are present in every Spanish hospital that is authorised to procure organs and tissues.<sup>84</sup> These individuals, who are said to be a cornerstone of the successful Spanish transplantation model, are responsible for:

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<sup>76</sup> *Ibid* at ss 4, 5.

<sup>77</sup> David J. Dallimore et al, “Media content analysis of the introduction of a “soft opt-out” system of organ donation in Wales 2015-17” (June 2019) 22:3 *Health Expectations* 485 at 486.

<sup>78</sup> David Rodriguez-Arias et al, “Success factors and ethical challenges of the Spanish Model of organ donation” (2010) 376 *Lancet* 1109 [Rodriguez-Arias].

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid* at 1110.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* at 1109.

[I]dentification and evaluation of donors, support for the maintenance of potential donors in ICU, and interviewing of donor families. Unlike external coordinators from Organ Procurement Organizations in countries such as the USA or Canada, Spanish professionals are mostly ICU doctors or anaesthesiologists who work part-time as in-hospital transplant coordinators. Their access, familiarity, and authority in the ICU prevent loss of donors due to non-detection or lack of staff motivation. When transplant coordinators are also ICU doctors who have participated in treatment of the patient, their contact with the family provides an opportunity to promote family satisfaction with treatment received and trust in the doctor, factors that facilitate the request for donation.<sup>85</sup>

Additionally, since 1998, all Spanish hospitals authorized to procure organs now participate in the quality assessment programme in organ donor detection under the Organización Nacional de Trasplantes (“ONT”).<sup>86</sup> Among other things, this program aims to identify missed donation opportunities so as to avoid them in the future, and improve the system overall.<sup>87</sup> The program includes:

[P]revious assessment of the theoretical capacity for donation in every hospital, self-evaluation by the coordinator team of the number of potential organ donors who did not become donors (indicating the causes of non-donation), and an external retrospective audit of factors contributing to loss of potential donors. This assessment allows comparisons between centres and identification of hospitals with the lowest rates of organ donation.<sup>88</sup>

Other factors which have been attributed to Spain’s success is its practice, in some hospitals, of providing medical professionals with paid incentive bonuses for the organ donations that they undertake, and its practice of undertaking *uncontrolled* donation after cardiac death.<sup>89</sup> *Controlled* donation after cardiac death, which is undertaken in countries like Canada, the U.S., and the U.K. is carried out on patients who are not brain dead, but who have no chance of recovery and are removed from life-sustaining therapy with the consent of family.<sup>90</sup> For this type of organ donation, a decision is typically made by family to discontinue respiratory assistance, and organs are removed 2-10 minutes after circulatory arrest has been activated.<sup>91</sup> *Uncontrolled* donation after cardiac death, on the other hand, is carried out on patients who have unexpected cardiac arrest.<sup>92</sup> After resuscitation attempts are judged futile and the patient is declared dead, interventions are restarted to preserve the patient’s organs until consent for donation is obtained.<sup>93</sup> This additional form of organ donation, which is not performed in all jurisdictions, may contribute to Spain’s overall success.

Some of these additional factors associated with Spain’s organ and tissue donation success will be considered in Chapter 4 as possible areas of reform.

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<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 1110.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

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## CHAPTER 4: POTENTIAL REFORM IN MANITOBA

Considering the paradigm shift underlying Nova Scotia's new presumed consent donation regime, and the proposed legislation of Ontario, Alberta and Quebec, the Commission is seeking input from the public regarding the considerations or issues that ought to be addressed in any contemplated presumed consent regime in Manitoba. Accordingly, this chapter will discuss potential reform in Manitoba and consider the question: *if Manitoba were to amend The Human Tissue Gift Act to implement a presumed consent organ donation system, how should it amend this legislation?* Rather than make recommendations at this time, the Commission seeks input into the Issues for Discussion posed in this chapter.

### A. Establishing a Presumed Consent Regime

The key elements of presumed consent organ donation legislation are:

- The scope of presumed consent;
- The mechanism of indicating consents and refusals to donate human tissue after death;
- The exceptions to presumed consent; and
- The role of substitute decision makers.

This section will consider the elements that make up presumed consent organ donation legislation by canvassing Nova Scotia's legislation, and the legislation proposed in Ontario, Alberta and Quebec.

#### 1. Scope of Presumed Consent Framework

The scope of a presumed consent regime refers to the particular types of after-death organ and tissue donation captured by the presumed consent framework (i.e. donation for medical purposes, donation for medical education or donation for scientific research). While the legislation in Nova Scotia, and the proposed legislation in Ontario, Alberta and Quebec each establishes similar systems of presumed consent organ and tissue donation after death, they differ in the scope of organ and tissue donation which is captured by these frameworks. Whereas the NS Act<sup>94</sup> and AB Bill<sup>95</sup> restrict presumed consent to the use of tissues and organs after death for transplantation purposes only, the ON Bill<sup>96</sup> and QC Bill<sup>97</sup> contemplate a broader scope, also capturing donation after death for medical education or scientific research purposes. The Commission seeks input from relevant institutions and entities to reach a determination on this issue.

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<sup>94</sup> *Human Organ and Tissue Donation Act*, *supra* note 7 at s 11.

<sup>95</sup> *AB, Bill 205*, *supra* note 67 at s 3.

<sup>96</sup> *ON, Bill 91*, *supra* note 65 at s 3.

<sup>97</sup> *QC, Bill 399*, *supra* note 69 at s 1.

<b>ISSUE FOR DISCUSSION 1: Should presumed consent apply to donation after death for transplantation purposes, medical education purposes, scientific research purposes, or a combination thereof?</b>
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## **2. Mechanism for Indicating Consents and Refusals**

Underlying any presumed consent organ and tissue donation regime is the principle that individuals have the right, during their lifetime, to either consent or refuse to donate their tissues after death. Accordingly, one of the most critical components of a presumed consent regime is the mechanism or mechanisms by which individuals may, during their lifetime, indicate their intentions regarding organ and tissue donation after death. These intentions may ultimately dictate what can and cannot be done with an individual's body when they die with respect to organ and tissue donation. This section will describe the provisions in the NS Act respecting the mechanism for indicating consents and refusals and the requirements to consult these indications prior to donation activities, as well as those proposed by Ontario, Alberta and Quebec in their respective presumed consent Bills.

### **2.1 Nova Scotia**

Section 7 of the NS Act establishes the Health Card Registry (the "Registry") upon which individuals may record consents and refusals respecting donation after death.<sup>98</sup> Section 8(1) of the Act indicates that such consent and refusals may be recorded on the Registry by providing information respecting the consent or refusal to the Registry in the manner specified by the Minister.<sup>99</sup> Further, section 8(2) indicates that consents may be restricted to the donation of specified organs and tissues.<sup>100</sup> Elaborating on section 8 of the Act, the Government of Nova Scotia website explains:

#### **Registering your donation decision**

You can register your decision to donate your organs and tissues after death if you have a Health Card and are 16 or older. If you're 15 or younger, your parent or legal guardian needs to complete the registration for you.

Your registration options include:

- registering to be a donor and donate all organs and tissues
- registering to be a donor and only donate some organs and tissues
- registering to not be a donor (opt out) and not donate organs and tissues
- not registering a decision...

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<sup>98</sup> *Human Organ and Tissue Donation Act*, *supra* note 7 at s 7.

<sup>99</sup> *Ibid* at s 8(1).

<sup>100</sup> *Ibid* at s 8(2).

## **Record of consent**

After you register, your donation decision is recorded in the Health Card Registry and displayed on the front of your Health Card.

Your Health Card shows if you consent to donate all organs and tissues (DONOR 1) or some organs and tissues (DONOR 2). Cards also show if you don't consent to donate organs and tissues (OPT OUT).

The Health Card Registry keeps a record of your donation decision, including if you didn't register a decision...

## **Changing your donation decision**

It's your choice. You can change your donation decision at any time.<sup>101</sup>

Individuals who wish to register to donate all or some of their organs and tissues after death or who wish to opt out of being a donor after death may access the necessary forms to do so online on the Government of Nova Scotia's website or by contacting the Nova Scotia Health Card Registry by telephone.<sup>102</sup>

Individuals wishing to register their intent to donate after death and who need to renew their health cards are directed to register their decisions using the "Health Card Renewal Form", while individuals who are not yet required to renew their health cards are to use the "Organ and Tissue Donation Form."<sup>103</sup>

Likewise, individuals wishing to register their intent to refuse to donate after death (opt out) and who need to renew their health cards are directed to register their decisions using the "Health Card Renewal Form", while individuals who are not yet required to renew their health cards are to use the "Organ and Tissue Donation Form."<sup>104</sup> Alternatively, individuals who wish to opt out of donation after death may do so online on the Government of Nova Scotia's website by filling out the electronic "Request to opt out of organ and tissue donation."<sup>105</sup>

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<sup>101</sup> "Organ and tissue donation", online: *Government of Nova Scotia* <[beta.novascotia.ca/organ-and-tissue-donation](http://beta.novascotia.ca/organ-and-tissue-donation)>.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

Members of the Canadian Armed Forces (“CAF”) and Royal Canadian Mounted Police (“RCMP”) follow a slightly different protocol. This is because they receive federal health coverage as opposed to provincial coverage through Nova Scotia Medical Service Insurance (“MSI”), and thus do not have access to a Nova Scotia Health Card. Accordingly, CAF members are directed to contact MSI Registration and Enquiry to request an Organ and Tissue Donation Form for CAF specifically, and RCMP members are directed to contact MSI Registration and Enquiry to register their decision.<sup>106</sup>

Similarly, individuals who wish to change their registered donation decisions and who need to renew their health cards are directed to make such change using the “Health Card Renewal Form”, while individuals who are not yet required to renew their health cards are directed to contact MSI Registration and Enquiry.<sup>107</sup>

In accordance with section 10 of the Act, no transplantation activities may be undertaken by a physician or the Chief Medical Examiner until they have checked the Registry to determine whether a decision is on record in the Registry.<sup>108</sup> For greater certainty, section 19(3) explains further,

(3) Where the organ-donation program or the tissue bank determines that the organs or tissue of the individual may be medically suitable for use in another person, the hospital or the Chief Medical Examiner shall, as soon as possible, provide the individual’s name and health-card number to the organ-donation program and the tissue bank for the purpose of determining whether the individual has provided a consent or refusal in the Registry and whether deemed consent applies.<sup>109</sup>

The only circumstance under which these steps need not be taken is where the individual “clearly meets criteria established by the tissue bank and the organ-donation program that set out circumstances in which an individual’s organs or tissues would not be medically suitable for use in another person.”<sup>110</sup> Where this is the case, section 19(5) requires that the hospital or Chief Medical Examiner records the reasons for their decision in the patients’ record.<sup>111</sup>

## 2.2 Ontario

The ON Bill differs in that it contemplates a Registry pertaining only to objections to donate, among other mechanisms for indicating intentions to opt *out* of organ donation after death. Specifically, sections 4(3) and 4(4) of the Proposed ON Act state:

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<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Human Organ and Tissue Donation Act*, *supra* note 7 at s 10.

<sup>109</sup> *Ibid* at s 19(3).

<sup>110</sup> *Ibid* at s 19(4).

<sup>111</sup> *Ibid* at s 19(5).



(3) Any person who is 16 years of age or more may object to tissue from his or her body being removed and used after his or her death by,

(a) stating the objection in writing in a document signed by the person and, at any time prior to the person's death,

(i) delivering the document to an attending physician, or

(ii) sending the document to the [Trillium Gift of Life] Network; or

(b) stating the objection orally in the presence of at least two witnesses during the person's last illness.

(4) At any time before the death of a child who is under 16 years of age, the parent or guardian of the child may, in a manner specified in subsection (3), object on the child's behalf to tissue from the child's body being removed and used after the child's death.<sup>112</sup>

Names of individuals who have either sent or had written objections sent on their behalves to the Trillium Gift of Life Network (the "Network") in accordance with proposed section 4(3)(ii) would then be added by the Network to a Registry of names of individuals who wish to opt out of the presumed consent regime.<sup>113</sup> The Network, which is established under Part II.2 of Ontario's current *Trillium Gift of Life Network Act*, and which is tasked with co-ordinating activities relating to the donation of tissue for transplant, managing the procurement, distribution and delivery of tissue, and managing transplant waitlists<sup>114</sup>, among other things, would now also be responsible for administering and maintaining this Registry of objections.<sup>115</sup> According to section 8.9.1 of the Proposed ON Act,

The registry shall indicate the name of the person in respect of whom the objection is made and, if indicated by the person making the objection, whether the objection applies to all tissue or parts of the body or only to specified tissue or parts.<sup>116</sup>

Therefore, unlike in Nova Scotia, Ontario's proposed presumed consent regime does not contemplate a registration system which accounts for consents to donate after death. Rather, Ontario's proposed Registry would be just one mechanism by which citizens of Ontario could indicate their intention to opt *out* of the presumed consent regime, in addition to simply delivering a written and signed document outlining the objection to an attending physician, or stating the objection orally in the presence of at least two witnesses during the person's last illness.<sup>117</sup>

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<sup>112</sup> *ON, Bill 91*, *supra* note 65 at s 3.

<sup>113</sup> *Ibid* at s 9.

<sup>114</sup> *Trillium Gift of Life Network Act*, *supra* note 6 at s 8.8(4).

<sup>115</sup> *ON, Bill 91*, *supra* note 65 at s 7.

<sup>116</sup> *Ibid* at s 9.

<sup>117</sup> *Ibid* at s 3.

Accordingly, pursuant to the ON Bill, where the Network is notified by a designated health facility that a patient at the facility has died or a physician is of the opinion that the death of a patient at the facility is imminent, the Network is to determine, in consultation with the health facility, “whether the facility is required to contact the patient or the patient’s substitute concerning the right of the patient or the substitute, as the case may be, to *object* to the removal and use of tissue from the body of the patient for transplant.”<sup>118</sup> In other words, before donation activities may take place, the Network must determine whether the patient has indicated an intention to object to donation after death in accordance with section 3 of the Proposed ON Act.

It appears that where the Network has no proof that a patient has objected to donation after death, it must then ensure that the designated health facility contacts the patient or his or her substitute to determine whether he or she objects to tissue being removed from the body after death, and providing them an opportunity to object if they so choose.<sup>119</sup>

In summary, in Ontario, where the focus would be mainly on objections or refusals to donate after death, individuals may indicate this decision in three different ways:

- 1) By stating the objection in writing in a document signed by the person and, at any time prior to the person’s death, delivering the document to an attending physician;
- 2) By stating the objection in writing in a document signed by the person and, at any time prior to the person’s death, sending the document to the Trillium Gift of Life Network, which will then add that objection to a registry of objections; or
- 3) By stating the objection orally in the presence of at least two witnesses during the person’s last illness.<sup>120</sup>

Where no exceptions to presumed consent exist, generally, the Trillium Gift of Life Network must not only determine whether an individual has objected to the use of their tissues or organs after their death, but where it determines that no such objection has been made, it must ensure both that the individual is canvassed about whether they object to the use of their tissues after death, and that they have the opportunity to do so if they choose.<sup>121</sup>

## **2.3 Alberta**

Like Ontario’s proposed legislation, the AB Bill contemplates both a Registry and other mechanisms by which individuals can indicate their decisions regarding organ and tissue donation. However, unlike Ontario’s proposed scheme, Alberta’s would consider both refusals *and* consents to donate.

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<sup>118</sup> *Ibid* at s 7 [emphasis added].

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid* at s 3.

<sup>121</sup> *Ibid* at s 7.

Whereas Alberta's current *Human Tissue and Organ Donation Act* only outlines the ways in which *consents* to donate are to be indicated, its proposed amendments would alter the Act to address the ways in which both consents *and* refusals must be indicated prior to death. Specifically, under section 9 of the Proposed AB Act, consents or refusals to donate organs or tissues after death must be indicated in the following ways:

**Consent and refusal requirements**

**9(1)** A consent to donate or a refusal to donate under this Act must be

- (a) in writing or electronic form,
- (b) dated, and
- (c) signed
  - (i) by the person consenting to donate or refusing to donate and a witness, or
  - (ii) subject to subsection (6), if the person consenting to donate or refusing to donate is unable to sign for any reason, by 2 adult persons who witnessed that person's oral instructions that they decided to, as applicable, consent to donate or refuse to donate and that they asked to have those instructions documented.

**(2)** A consent to donate or a refusal to donate signed under subsection (1)(c)(ii) must

- (a) indicate that each adult person directly witnessed the person's oral instructions giving consent or refusing consent referred to in that subsection,
- (b) identify the manner in which the instructions of the person were received by each witness, and
- (c) if a consent to donate is given, in accordance with section 4(3), indicate that 1 witness was knowledgeable about the donation process and advised the person consenting to donate of the nature and consequences of providing their consent.

**(3)** For the purpose of section 4(1)(a), a consent to donate must specify the following:

- (a) whether the consent applies to the donor's whole body or to specific tissues, organs or groups of tissues and organs and, if so, specify those tissues, organs, or groups of tissues and organs;
- (b) any of the following purposes for which the donor's whole body, or specified tissues, organs or groups of tissues and organs, as applicable, may be used:

- (i) medical education;
- (ii) scientific research;
- (iii) transplantation.

(4) A consent to donate on the form provided on a certification of registration issued under the *Health Insurance Premiums Act* is valid despite it not being dated.

(5) Despite subsection (1)(c)(ii), a consent to donate or refusal to donate provided through the online registry is valid despite it not being signed by a witness.

(6) The following persons are not eligible to witness a consent to donate:

- (a) the physician who will remove the tissue or organ, or perform a transplantation of those tissues or organs, to which the consent applies;
- (b) the recipient of the transplant referred to in clause (a) or any of their immediate family;
- (c) a person who is required to give a consent to donate in respect of the same donation.

(7) A person may, in accordance with the regulations, if any, revoke a consent to donate or a refusal to donate by providing a written revocation that

- (a) meets the requirements in subsection (1), and
- (b) any additional prescribed requirements.<sup>122</sup>

Further, whereas the current *Human Tissue and Organ Donation Act* establishes an online registry intended to facilitate registration of only the *consent* of adults to the donation of their tissue, organs or body, Alberta's proposed legislation will establish an online registry intended to address all such decisions whether they are consents or refusals. Said Registry would be established by virtue of section 4.1 of the proposed legislation, which states:

**Online registry**

**4.1(1)** The Minister must establish an online registry to facilitate the registration and submission of every decision to donate made under section 4(1).

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<sup>122</sup> *AB, Bill 205, supra* note 67 at s 9.

(2) A decision to donate submitted to the online registry must meet the requirements set out in section 9 and in the regulations, if any [...]<sup>123</sup>

Moreover, in accordance with the proposed legislation, when an adult applies for the issuance or renewal of an operator's licence under the *Traffic Safety Act*, or for a voluntary identification card under the *Government Organization Act*, section 4.2(1) will require that the Registrar of Motor Vehicle Services (the "Registrar") or the Minister responsible for the issuance of voluntary identification cards (the "Minister"), respectively, provide the adult with an opportunity to make a decision regarding donation after death. The Registrar and/or Minister must also inform the adult that if he or she does not make a decision before their death, he or she may be presumed to have consented to donate their tissues and organs for the purpose of transplantation.<sup>124</sup> If the adult then makes a decision regarding donation in accordance with section 4(1) of the Act, the Registrar and/or the Minister is required to transmit that decision to the online registry, and print a code or symbol on the operator's licence or identification card indicating whether the adult has consented or refused to donate.<sup>125</sup>

With all of this in mind, section 7 of Alberta's current legislation would also be amended to ensure that a donation organization confirms whether a decision to donate has been made by the deceased person under section 4 before donation activities may be undertaken. This will be the case unless (1) the organization determines the person's tissue or organs are medically unsuitable for transplantation; (2) the medical practitioner who has determined the death of the patient advises the donation organization that he or she has personal knowledge that the deceased person would have made the decision to refuse to donate; or (3) the donation organization is already aware the deceased person made a decision to consent to donate or refuse to donate when they were alive that has not been revoked.<sup>126</sup> Ultimately, however, an individual's decision to consent or refuse to donate their tissues after death must be consulted prior to donation.

In summary, in Alberta, where the focus is on both refusals to donate and consents to donate, individuals may indicate their decision in six different ways:

- 1) By stating the consent or refusal to donate in writing or in electronic form, dating it, personally signing it, and having it signed by a witness;
  - a. Where the decision is a consent to donate, this document must specify:
    - i. Whether the consent applies to the donor's whole body or to specific tissues, organs or groups of tissues and organs; and

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<sup>123</sup> *Ibid* at s 4.

<sup>124</sup> *Ibid* at s 5.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid* at s 7.

- ii. For what purposes the body or specific tissues, organ or groups of tissues and organs may be used (medical education, scientific research, and/or transplantation)
- 2) Where an individual cannot personally sign a written document themselves, by stating the consent or refusal to donate in writing or in electronic form, dating it, having it signed by 2 adults who witnessed the person orally instruct on their decision and ask to have those instructions documented, and having the witnesses indicate the following:
  - a. That each adult person directly witnessed the person's oral instructions giving consent or refusing consent referred to in that subsection;
  - b. The manner in which the instructions of the person were received by each witness; and
  - c. Where the decision is a consent, indicating that one witness was knowledgeable about the donation process and advised the person consenting to donate of the nature and consequences of providing their consent.
- 3) By stating the consent or refusal to donate on the form provided on a certification of registration issued under the *Health Insurance Premiums Act* (without the requirement that it be dated);
- 4) By indicating the consent or refusal to donate to the Registrar of Motor Vehicle Services when applying for the issuance or renewal of an operator's licence under the *Traffic Safety Act*;
- 5) By indicating the consent or refusal to donate when applying for a voluntary identification card under the *Government Organization Act*; and/or
- 6) By indicating the consent or refusal to donate through the online registry (without the requirement of the signature of a witness).<sup>127</sup>

Generally speaking, similarly to Nova Scotia, where no exceptions to deemed consent exist, donation organizations must only confirm whether a decision to donate has been made by the person with respect to post mortem donation. Unlike in Ontario, donation organizations in Alberta will not be required to consult further with the individual or their substitute decision maker regarding the individual's decision where no decision has been indicated in accordance with the Act. However, unlike in Nova Scotia, where the only exception to consulting an individual's decision is where the individual's tissues or organs are deemed to be medically unsuitable for transplantation, in Alberta, donation organizations will not be required to confirm whether a decision to donate has been made if:

- (a) the medical practitioner who has determined the death of the patient advises the donation organization that he or she has personal knowledge that the deceased person would have made the decision to refuse to donate; or

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<sup>127</sup> *Ibid* at s 9.

- (b) the donation organization is already aware the deceased person made a decision to consent to donate or refuse to donate when they were alive that has not been revoked.<sup>128</sup>

## 2.4 Quebec

Under the QC Bill, Article 43 of the *Civil Code* of Quebec would be amended so that an individual may authorize or refuse to authorize the removal of organs or tissues from their body, or revoke such a decision by merely expressing the authorization verbally in the presence of two witnesses, or by indicating the decision in writing.<sup>129</sup>

Moreover, this Bill would also amend the *Act respecting the Régie de l'assurance maladie du Québec*, which is a legislative scheme dealing with Quebec's health insurance authority. It would amend this Act by transforming the Registry which currently exists under it to record consents for the post-mortem removal of organs and tissues to a Registry which records both consents *and refusals*.<sup>130</sup> The Bill would accomplish this by amending the seventh paragraph of section 2 of that Act to state:

The Board shall establish and update a consent **and refusal of consent** registry for the post-mortem removal of organs and tissues, for use by organizations that coordinate organ or tissue donations and are designated by the Minister of Health and Social Services under section 2.0.11.<sup>131</sup> (Emphasis added).

Additionally, section 2.0.8 of that Act would be amended to state:

**2.0.8.** For the purposes of the seventh paragraph of section 2, at any time after applying to be registered with the Board under section 9 of the *Health Insurance Act* (chapter A-29)<sup>132</sup>, a person may, in writing on a form provided by the Board for that purpose, **authorize or refuse consent** to the post-mortem removal of the person's organs or tissues for transplant, as permitted under article 43 of the *Civil Code*.

These wishes may be changed at any time, in writing, using the form provided by the Board for that purpose.<sup>133</sup> (Emphasis added).

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<sup>128</sup> *Ibid* at s 7.

<sup>129</sup> *QC, Bill 399, supra* note 69 at s 1.

<sup>130</sup> *Ibid* at s 3.

<sup>131</sup> *Ibid* at s 3.

<sup>132</sup> Under section 9 of the *Health Insurance Act*, all residents or temporary residents of Québec must register with the Board in order to receive a health insurance card.

<sup>133</sup> *QC, Bill 399, supra* note 69 at s 4.

Under section 2 of the QC Bill, Article 43 of Quebec's amended *Civil Code* would ensure that prior to any donation activities taking place, "[the] person who requests the removal [of organs or tissues...takes] reasonable measures with the persons close to the deceased to ensure that the deceased had not, by any means, refused consent."<sup>134</sup> However, this is subject to an interesting exception which does not appear in any of the other jurisdictions. Under amended Article 44, such measures would not need to take place "where two physicians attest in writing to the urgency of the operation and the serious hope of saving a human life or improving its quality to an appreciable degree."<sup>135</sup>

In summary, in Quebec, individuals may indicate their decision regarding the use of their body or the removal of organs or tissues therefrom in three ways:

- 1) By expressing the decision verbally in the presence of two witnesses<sup>136</sup>;
- 2) By indicating the decision in writing<sup>137</sup>; or
- 3) When registering for a health card with the Board of the Régie de l'assurance maladie du Québec, by indicating the decision in writing on the form provided by the Board to register for the health card.<sup>138</sup>

Under the QC Bill, the party requesting removal of an individual's organs or tissues must only take "reasonable measures" to consult individuals who are close to the deceased person to ensure that that person had not refused consent.<sup>139</sup> Interestingly, however, they would not need to take such measures if "two physicians attest in writing to the urgency of the operation and the serious hope of saving a human life or improving its quality to an appreciable degree."<sup>140</sup>

## 2.5 Summary

Nova Scotia, Ontario, Alberta and Quebec each contemplate a registration system through which individuals may indicate their intentions regarding organ donation after death. However, Ontario, Alberta and Quebec's proposed legislative schemes also contemplate systems under which individuals can indicate their decisions through other less formal mechanisms, such as by stating the consent or refusal to donate in writing, by providing written, signed objections to donate to attending physicians or to designated organ donation networks, by stating an objection or consent to donate orally in the presence of a specified number of witnesses, or by indicating consent or

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<sup>134</sup> *Ibid* at s 2.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid* at s 1.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* at s 4.

<sup>139</sup> *Ibid* at s 2.

<sup>140</sup> *Ibid.*



refusal to donate when applying for things like an operator's license or a voluntary identification card.

While each jurisdiction has slightly different requirements, in all four jurisdictions, regardless of the mechanism or mechanisms in place for individuals to indicate their decisions regarding after-death donation, the decision must be consulted prior to donation activities taking place, subject to certain exceptions. These exceptions range from where the individual clearly meets criteria demonstrating that his or her organs or tissues would not be medically suitable for use in another person (Nova Scotia), to where the medical practitioner who has determined the death of the patient has personal knowledge that the deceased person would have made the decision to refuse to donate (Alberta), to where physicians attest in writing to the urgency of the operation and the serious hope of saving a human life or improving its quality to an appreciable degree (Quebec).

Generally speaking, in Nova Scotia and Alberta, where no exceptions to presumed consent exist, physicians, Medical Examiners and donation organizations must only confirm whether a decision to donate has been made by the person with respect to post mortem donation, and thus, whether presumed consent applies. Ontario and Quebec differ in this regard in that Ontario contemplates stricter requirements, while Quebec's contemplated requirements are more lax. Specifically, in Ontario, where no exceptions to presumed consent exist, generally, the Trillium Gift of Life Network must not only determine whether an individual has objected to the use of their tissues or organs after their death, but where it determines that no such objection has been made, it must ensure both that the individual is canvassed about whether they object to the use of their tissues after death, and that they have the opportunity to do so if they choose.<sup>141</sup> Under the QC bill, on the other hand, the party requesting removal of an individual's organs or tissues must only take "reasonable measures" to consult individuals who are close to the deceased person to ensure that that person had not refused consent.<sup>142</sup>

**ISSUE FOR DISCUSSION 2: How should individuals be able to indicate their intentions regarding organ and tissue donation after death?**

- (a) By submitting their decision to be entered on a Registry of consents and/or refusals?**
- (b) By stating their decision in writing?**
- (c) By stating their decision orally in the presence of witnesses?**
- (d) In some other way?**

**ISSUE FOR DISCUSSION 3: If individuals should be able to indicate their intentions regarding organ and tissue donation after death by stating their decision in writing, what formalities should this written document comply with, if any? (I.e. personal signature, witness signature(s), date, delivery of document to attending physician, etc.)**

<sup>141</sup> *ON, Bill 91, supra* note 65 at s 7.

<sup>142</sup> *QC, Bill 399, supra* note 69 at s 2.

**ISSUE FOR DISCUSSION 4:** If individuals should be able to indicate their intentions regarding organ and tissue donation after death by stating their decision orally in the presence of witnesses, how many witnesses should be required, and what formalities should these witnesses be required to comply with, if any? (I.e. requirement that the witness *directly* witnessed the person's oral instructions, requirement that the witness witnessed the person's oral instructions within a specified time period prior to death, etc.)

**ISSUE FOR DISCUSSION 5:**

- (a) Who should be responsible for maintaining the record of intentions regarding organ and tissue donation, and for facilitating after-death organ and tissue donation? (I.e. existing human tissue gift agencies, the Department of Health, a standalone centralized network, etc.)
- (b) What steps should the body responsible for facilitating after-death organ and tissue donation be required to take before organ and tissue donation activities may commence?
- (c) In what circumstances should these steps *not* be required?

### **3. Exceptions to Presumed Consent**

An enacting jurisdiction must consider circumstances in which presumed consent will be inappropriate. Such circumstances tend to include where an individual is a youth, where they are not ordinarily resident in the jurisdiction, and where they lack capacity to make an informed decision. However, each jurisdiction addresses these exceptions in varying ways.

#### **3.1 Nova Scotia**

Under the NS Act, presumed consent will not apply to individuals who lacked capacity to make a decision respecting donation after death, to individuals who were not ordinarily resident in Nova Scotia for at least 12 months before death, to individuals who were under the age of majority at the time of death, and where substitute decision-makers have evidence to show that the individual would have refused to donate. These exceptions<sup>143</sup> are addressed in sections 12-15, which state:

- 12 (1)** An individual is not deemed to consent under Section 11 if the individual has died and for a significant period before dying lacked the capacity to make a decision respecting donation after death.
- (2)** For the purpose of subsection (1), a significant period means a sufficiently long period as would lead a reasonable person to conclude that it would be inappropriate for consent to be deemed to have been given.
- (3)** Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

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<sup>143</sup> *Human Organ and Tissue Donation Act*, *supra* note 7 at ss 12-15.

**13 (1)** An individual is not deemed to consent under Section 11 if the individual has died and the individual was not ordinarily resident in the Province for a period of at least 12 months immediately before dying.

**(2)** Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**14 (1)** An individual is not deemed to consent under Section 11 if the individual was under the age of majority at the time of death.

**(2)** Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**15 (1)** Where a substitute decision-maker provides information that would lead a reasonable person to conclude that an individual would have made a different decision respecting donation after death than the decision recorded in the Registry or deemed under Section 11, the substitute decision-maker may consent or refuse on behalf of the individual in accordance with that information.

**(2)** A consent under subsection (1) is full authority for transplantation activities to the extent of the consent.<sup>144</sup>

The Nova Scotia Department of Health and Wellness (“NSDHW”), in its Human Organ and Tissue Donation Act Information Guide (“Information Guide”), describes these exceptions in great details. It explains:

#### 7.1 Children

7.1.1. Deemed consent does not apply to persons under the age of majority. The age of majority in Nova Scotia is 19.

7.1.2. Deemed consent may apply to a person from 00:00 on the day of their 19th birthday.

7.1.3. As a general principle, if it is not possible to establish that a person is age 19 or older, the express consent process should be followed.

7.1.4. For persons under the age of 19, donation is still possible but it must be by express consent. A child may provide express consent if they have the capacity to make a decision respecting donation after death. Persons aged 16 and up can provide their express consent through the NS Health Card processes described in Section 4.5 of this guide. Otherwise, a substitute decision maker may provide express consent on their behalf.

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<sup>144</sup> *Ibid.*

## 7.2 Ordinarily Resident

- 7.2.1. For deemed consent to apply, a person must have lived in Nova Scotia for 12 consecutive calendar months immediately prior to their death.
- 7.2.2. As a general principle, if it is unknown or uncertain whether the person has lived in Nova Scotia for 12 calendar months, deemed consent should not apply and the express consent process should be followed.
- 7.2.3. If a person has lived in Nova Scotia less than 12 months, deemed consent does not apply and the express consent process should be followed.
- 7.2.4. If a person has lived in Nova Scotia for 12 months or longer, then it must be determined that they were ordinarily resident in Nova Scotia for deemed consent to apply.
- 7.2.5. Determining whether a person is ordinarily resident in Nova Scotia requires looking at the nature of their residency. This will be assessed on a case by case basis.
- 7.2.6. What will be considered when assessing the nature of a person's residency in Nova Scotia includes whether their residency was both voluntary and supported by the regular order of their life for the time being. A person's residency status will be assessed at the time of their death by the donation program.
- 7.2.7. As a general principle, if there is doubt about whether the person was ordinarily resident in Nova Scotia for the 12 months prior to their death, the express consent process should be followed.
- 7.2.8. Examples of certain types of residency to which deemed consent will generally NOT apply include:
  - (1) Students studying in Nova Scotia who come from out of province
  - (2) International students
  - (3) Persons who come from out of province to work in Nova Scotia on a temporary basis (including foreign temporary workers)
  - (4) Persons incarcerated in Nova Scotia
  - (5) Armed Forces members posted to Nova Scotia and their families
  - (6) RCMP members posted to Nova Scotia and their families

7.2.9. If a person falls into a category above and deemed consent does not apply, they may still be a donor. The express consent process will be followed.

### 7.3 Mental Capacity

7.3.1. Capacity is defined in Section 2(b) of the Act. “Capacity” means the ability to understand the information that is relevant to a decision to be made and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

7.3.2. Deemed consent does not apply to a person who, for a significant period before dying, lacked the capacity to understand that consent to transplantation activities can be deemed.

7.3.3. If a person is found to have lacked capacity, then the express consent process will be followed.

7.3.4. If, at the point a person lost capacity, deemed consent did not apply (for example they were a child or did not live in Nova Scotia) then consent cannot be deemed.

7.3.5. What is a significant period?

7.3.5.1. The exact duration is not specified in the Act.

7.3.5.2. The period must be significant.

7.3.5.3. Significant means a sufficiently long period as to lead a reasonable person to conclude that it would be inappropriate for consent to be deemed.

7.3.5.4. It will be assessed on a case by case basis.

7.3.5.5. This requirement only impacts deemed consent. An express decision to consent or refuse remains in effect after a loss of capacity.<sup>145</sup>

## 3.2 Ontario

Section 4(2) of the Proposed ON Act indicates that the presumed consent to the post-mortem use of tissue established in section 4(1) does not apply to any person:

- (a) who is a believer, a follower or a member of a prescribed religion, cult, association or group; or

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<sup>145</sup> NSDHW *Information Guide*, *supra* note 8 at 5-7.

- (b) who has objected in the manner specified in subsection (3) to tissue from his or her body being removed and used after his or her death or on whose behalf such an objection has been made under subsection 5 (1).<sup>146</sup>

As indicated in section 2.2 of this Paper, any person 16 years of age or more may object to tissue from his or her body being removed and used after his or her death in accordance with section 4(3) of the Proposed ON Act, and the parent or guardian of a child who is under the age of 16 may object on that child's behalf before their death in the same way.<sup>147</sup> Accordingly, unlike in Nova Scotia, minors are not automatically excluded from the presumed consent framework contemplated by Ontario. Rather, they *may* be excluded under the more general exception established in section 4(2)(b) of the Proposed ON Act if their parent or guardian objects, during their lifetime, to donation after death on their behalf.

### 3.3 Alberta

Alberta's exceptions to presumed consent would mirror Nova Scotia's quite closely. Under section 4.01(2) of the Proposed AB Act, a person will not be considered to have made the decision to donate their organs and tissues for the purpose of transplantation after death if:

- (a) at the time of their death,
    - (i) they were a minor, or
    - (ii) they did not reside in Alberta for the 12-month period immediately preceding the day on which they died,
  - (b) for a significant period before the day on which they died, they were, in the opinion of a medical practitioner, incapable of making a decision described in section 4(1),
- or
- (c) a person in one of the classes described in section 4(4) provides information that would lead a reasonable person to conclude that, if the deceased person had made a decision, they would have decided to refuse to donate in accordance with section 4(1)(b).<sup>148</sup>

### 3.4 Quebec

In accordance with the proposed amendments to Quebec's *Civil Code*, presumed consent would not apply to minors under the age of 14.<sup>149</sup> This exception would be outlined in sections 43 and 44 of the amended Code, which would state:

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<sup>146</sup> ON, Bill 91, *supra* note 65 at s 3.

<sup>147</sup> *Ibid.*

<sup>148</sup> AB, Bill 205, *supra* note 67 at s 3.

<sup>149</sup> QC, Bill 399, *supra* note 69 at s 1-2.

43. A person may, for medical or scientific purposes, give his body or authorize the removal of organs or tissues therefrom. However, for a minor under 14 years of age, the consent of the person having parental authority or of his tutor is required.

[...]

44. A person of full age is presumed to authorize the removal of organs or tissues from his body.<sup>150</sup>

### 3.5 Summary

While Nova Scotia, Alberta and Quebec each exclude minors from their respective presumed consent regimes, this is the only exception indicated in the QC Bill, and no such exception exists in Ontario's proposed framework. Nova Scotia and Alberta each exclude from their presumed consent regimes children, individuals not ordinarily resident in the province for a period of 12 months immediately preceding death, and individuals who lack mental capacity to make a decision regarding donation after death. They also each provide exceptions to presumed consent where a substitute decision maker presents information to demonstrate that the individual would have decided to refuse to donate if they had made any decision at all.

Ontario is unique both in that it does not automatically exclude children from its presumed consent regime, and in that it excludes from this framework any person who is "a believer, a follower or a member of a prescribed religion, cult, association or group."<sup>151</sup>

**ISSUE FOR DISCUSSION 6: Should there be exceptions to the presumed consent framework? If so, what should these exceptions be?**

### 4. Substitute Decision Makers

Substitute decision makers, in the context of presumed consent tissue and organ donation legislation, refer to individuals who may, under certain circumstances, consent or refuse to the use of someone's tissues or organs on their behalf. This section will describe the provisions contained in the NS Act and in the legislation proposed by Ontario, Alberta and Quebec with respect to such substitute decision makers. It will outline who may act as a substitute decision maker in each jurisdiction, under what circumstances they may make decisions regarding post-mortem organ donation on the behalf of others, and any particular requirements of or exceptions to this substitute decision making.

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<sup>150</sup> *Ibid.*

<sup>151</sup> *ON, Bill 91, supra* note 65 at s 3.

## 4.1 Nova Scotia

Section 6(1) of the NS Act lists the following individuals, in the following order of priority, as substitute decision makers capable of making decisions regarding organ donation on another person's behalf:

- (a) a person authorized to give consent under the *Medical Consent Act* or the *Personal Directives Act*, unless the authorization excludes decisions about organ or tissue donation and, where there is more than one delegate authorized pursuant to the *Personal Directives Act*, the delegate authorized to make health-care decisions;
- (b) a guardian or representative under the *Adult Capacity and Decisionmaking Act* with the appropriate authority to deal with organ donation decisions;
- (c) a spouse;
- (d) a child who has reached the age of majority;
- (e) a parent;
- (f) a person standing in loco parentis;
- (g) a sibling;
- (h) a grandparent;
- (i) a grandchild;
- (j) an aunt or uncle;
- (k) a niece or nephew;
- (l) another relative; or
- (m) the person lawfully in possession of the individual's body.<sup>152</sup>

A "person lawfully in possession of the individual's body" under section 6(1)(m) does not include:

- (a) the Chief Medical Examiner or medical examiner in possession of the body for the purpose of the *Fatality Investigations Act*,
- (b) where the person died in hospital, the administrative head of the hospital;
- (c) where the person died in a continuing-care home, the administrative head of the continuing-care home;

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<sup>152</sup> *Human Organ and Tissue Donation Act*, supra note 7 at s 6(1).



- (e) the Public Trustee in possession of the body for the purpose of its burial under the *Public Trustee Act*;
- (f) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or
- (g) the superintendent of a crematorium in possession of the body for the purpose of its cremation.<sup>153</sup>

In accordance with section 6(4), the individuals listed in subsection (1) are not empowered to act as substitute decision makers under this Act unless they meet the following criteria:

- (a) excepting a spouse, [they have] been in personal contact with the person over the preceding 12-month period or [have] been granted a court order to shorten or waive the 12-month period;
- (b) [they are] willing to assume the responsibility for making the decision;
- (c) [they know] of no person of a higher order of priority who is able and willing to make the decision; and
- (d) [they make] a statement in writing certifying the relationship to the person and the facts and beliefs set out in clauses (a) to (c).<sup>154</sup>

Under the NS Act, there are three main circumstances in which these substitute decision makers may consent or reject to tissue and organ donation on someone else's behalf. These include:

1. Where an individual has recorded their decision regarding donation after death in the Registry, but the substitute decision maker has information that would lead a reasonable person to conclude that the individual would have made a different decision;<sup>155</sup>
2. Where an individual has not recorded a decision regarding donation after death in the Registry, resulting in deemed consent, but the substitute decision maker has information that would lead a reasonable person to conclude that the individual would not have consented to donation after death;<sup>156</sup> and
3. Where an individual has not recorded a decision regarding donation after death in the Registry and deemed consent does not apply because of an exception (i.e. they were a child, they were not ordinarily resident in Nova Scotia, or they lacked capacity).<sup>157</sup>

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<sup>153</sup> *Ibid* at s 6(2).

<sup>154</sup> *Ibid* at s 6(4).

<sup>155</sup> *Ibid* at s 15(1).

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid* at ss 12-14.

With respect to the first two circumstances, the NSDHW, in its Information Guide, explains:

- 5.2.2. A substitute decision maker must provide the evidence they believe proves the person changed their mind.
- 5.2.3. The strength of various types of evidence ranges from the strongest evidence (a witnessed written document) to the least strong (oral, uncorroborated).
- 5.2.4. The information provided will be assessed to determine if a reasonable person would be satisfied with the evidence presented.
- 5.2.5. Factors which may be considered in assessing the information include:
  - (a) Is the evidence of the person's view as opposed to the family's view?
  - (b) Is there corroborating evidence?
  - (c) How recent is the evidence?
  - (d) How well does the person providing the evidence know the person?<sup>158</sup>

With respect to the third circumstance, where no decision has been recorded and an exception applies, the NSDHW explains that a substitute decision maker “will be asked about what information they have about the person's own wishes and will be expected to give or refuse consent on the basis of those wishes.”<sup>159</sup>

## **4.2 Ontario**

As Ontario's proposed legislation focuses on objections to donate tissues and organs after death as opposed to decisions regarding post-mortem donation generally, it outlines other persons who may object on an individual's behalf as opposed to substitute decision makers. In accordance with section 5(2) of the Proposed ON Act, these persons would include:

1. The person's spouse.
2. If the person has no spouse or if the person's spouse is not available, any one of the person's children.
3. If the person has no spouse or children or if none are available, either one of the person's parents.
4. If the person does not have any of the relatives mentioned in paragraph 1, 2 or 3 or if none of them are available, any one of the person's brothers or sisters.
5. If the person does not have any of the relatives mentioned in paragraph 1, 2, 3 or 4 or if none of them are available, any other of the person's next of kin.

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<sup>158</sup> NSDHW *Information Guide*, *supra* note 8 at 3-4.

<sup>159</sup> *Ibid* at 8.

6. If the person does not have any of the relatives mentioned in paragraph 1, 2, 3, 4 or 5 or if none of them are available, the person lawfully in possession of the body other than a person referred to in subsection (4).<sup>160</sup>

“Spouse” is defined in section 5(3) as a person

- (a) to whom the person is married, or
- (b) with whom the person is living or, immediately before the person’s death, was living in a conjugal relationship outside marriage, if the two persons,
  - (i) have cohabitated for at least one year,
  - (ii) are together the parents of a child, or
  - (iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*.<sup>161</sup>

For purposes of section 5(2)(6), a “person lawfully in possession of the body” does not include any of the following:

1. The administrative head of the hospital where the person has died.
2. The Chief Coroner or a coroner in possession of the body for the purposes of the *Coroners Act*.
3. The Public Guardian and Trustee in possession of the body for the purpose of its burial under the *Crown Administration of Estates Act*.
4. An embalmer or funeral director in possession of the body for the purposes of its burial, cremation or other disposition.
5. The superintendent of a crematorium in possession of the body for the purposes of its cremation.<sup>162</sup>

Under the Proposed ON Act, there are three main circumstances in which a person may object to organ and tissue donation on someone else’s behalf. These include:

1. Where the individual is a minor under the age of 16 (in which case, the parent or guardian of the child may object on their behalf);<sup>163</sup>
2. Where the individual dies without making an objection in accordance with subsection 4(3);<sup>164</sup> and

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<sup>160</sup> *ON, Bill 91, supra* note 65 at s 3.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

3. Where the individual's death is imminent and, in the opinion of a physician, the individual is incapable by reason of injury or disease of making an objection in accordance with subsection 4(3).<sup>165</sup>

In all of these circumstances, section 5(5) of the Proposed ON Act dictates that the individual objecting on another's behalf must do so in one of the following ways:

- (a) in writing, and the person shall sign the objection;
- (b) orally, in the presence of at least two witnesses; or
- (c) by e-mail, recorded telephonic message or other recorded message.<sup>166</sup>

Moreover, section 5(6) of the proposed Act prohibits individuals from objecting to tissue being removed from another person's body and being used after their death if "he or she has reason to believe that the person who died or whose death is imminent would not have objected to the removal or use."<sup>167</sup>

### 4.3 Alberta

In Alberta, substitute decision makers capable of consenting or refusing to organ donation after death on another person's behalf are outlined in section 4(4) of the Proposed AB Act. This list, which is set out in order of priority, includes:

- (a) firstly, if they are not estranged at the time of making the decision, the spouse or adult interdependent partner of the person;
- (b) secondly, an adult child of the person;
- (c) thirdly, a parent or guardian of the person;
- (d) fourthly, an adult sibling of the person;
- (e) any other adult that is the next of kin of that person.<sup>168</sup>

However, in accordance with section 4(5) of the proposed legislation, these individuals may not make a decision on behalf of another person if they have personal knowledge of any of the following:

- (a) a person in a higher priority class described in subsection (4) is reasonably available to make the decision;
- (b) in the case of a decision to consent to donate, another person who is in the same class or a higher class described in subsection (4) would decide to refuse to donate;

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<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> AB, Bill 205, *supra* note 67 at s 3.

(c) the person on whose behalf they are making a decision would have made a different decision.<sup>169</sup>

Under the proposed legislative scheme, there would be three main circumstances in which a person could consent or refuse to organ and tissue donation on someone else's behalf. These include:

1. Where the individual has not made a decision regarding donation after death at the time of their death;
2. Where the individual has not made a decision regarding donation after death, death is imminent, and, in the opinion of a medical practitioner, the individual is incapable of making a decision due to injury or disease; and
3. Where the individual is a minor at the time of their death.<sup>170</sup>

As in Nova Scotia, section 4.01(2)(c) of the Proposed AB Act dictates that where a person has not made a decision regarding donation prior to their death, thus triggering presumed consent, a substitute decision maker may refuse donation on that person's behalf if they can provide information that would lead a reasonable person to conclude that the deceased person would have decided to refuse to donate if they had made a decision.<sup>171</sup>

#### 4.4 Quebec

As is the case for many aspects of Quebec's proposed amendments, the language with respect to substitute decision makers is vague in comparison to the other jurisdictions. Article 44 of the amended *Civil Code* would simply state:

A part of the body of a deceased minor may be removed, if the wishes of the deceased are not known, with the consent of the person who was or would have been qualified to give consent to care.<sup>172</sup>

In this sense, it appears that a decision may only be made on someone else's behalf when that individual is a minor, and that the only person capable of making that decision is the person who was, or would have been qualified to give consent to care. According to Article 14 of Quebec's current *Civil Code*, "[consent] to care required by the state of health of a minor is given by the person having parental authority or by his [legal guardian]."<sup>173</sup>

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<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *QC, Bill 399, supra note 69 at s 2.*

<sup>173</sup> *Civil Code of Quebec, supra note 6 at art 14.*

However, paragraph 2 of Article 43, as it appears in the proposed legislation, seems to indicate that as in the other jurisdictions, an individual's decision regarding donation after death may be changed under certain circumstances. Specifically, Article 43 states that "[the] authorization or approval expressed [regarding donation after death] shall be followed, unless there is a compelling reason not to do so."<sup>174</sup> While it does not elaborate on this further, this paragraph could be interpreted to mean that as in Nova Scotia or Alberta, if an individual in Quebec has information that would prove to a reasonable person that a deceased person would not have authorized the removal of his or her tissues after death, then the deceased's decision might not be followed. While it is not entirely clear from the language provided in this proposed amendment, this type of evidence might be viewed as a compelling reason not to follow an individual's authorization.

#### 4.5 Summary

Other than Quebec, each of the jurisdictions provide an explicit list of individuals who may act as substitute decision makers empowered to consent or refuse to organ and tissue donation after death on someone else's behalf. The following table provides a summary of these substitute decision makers in each jurisdiction:

**Table 1 –Substitute Decision Makers in Presumed Consent Organ/Tissue Donation Legislation in Canada**

<b>Substitute Decision Maker</b>	<b>Nova Scotia</b>	<b>Ontario</b>	<b>Alberta</b>	<b>Quebec</b>
<b>A person authorized to give consent under legislation pertaining to medical or health-care decisions</b>	Yes	Silent	Silent	Silent
<b>A guardian or representative under substitute decision making legislation</b>	Yes	Silent	Silent	Silent
<b>A spouse/adult interdependent partner</b>	Yes	Yes	Yes	Silent
<b>A child</b>	Yes <sup>175</sup>	Yes	Yes <sup>176</sup>	Silent
<b>A parent or guardian</b>	Yes	Yes	Yes	Yes <sup>177</sup>
<b>A person standing in loco parentis</b>	Yes	Silent	Silent	Silent

<sup>174</sup> *QC, Bill 399, supra* note 69 at s 2.

<sup>175</sup> Nova Scotia's legislation requires that the child has reached the age of majority (see *Human Organ and Tissue Donation Act, supra* note 7 at s 6(1)).

<sup>176</sup> Alberta's proposed legislation will require that the child is an adult (see *AB, Bill 205, supra* note 67 at s 3).

<sup>177</sup> As opposed to the terms "parent" and "guardian", Quebec's proposed legislation specifies that the individual must be someone with "parental authority" or "tutorship" (see *QC, Bill 399, supra* note 69 at s 1).

<b>Substitute Decision Maker</b>	<b>Nova Scotia</b>	<b>Ontario</b>	<b>Alberta</b>	<b>Quebec</b>
<b>A sibling</b>	Yes	Yes	Yes <sup>178</sup>	Silent
<b>A grandparent</b>	Yes	Silent	Silent	Silent
<b>A grandchild</b>	Yes	Silent	Silent	Silent
<b>An aunt or uncle</b>	Yes	Silent	Silent	Silent
<b>A niece or nephew</b>	Yes	Silent	Silent	Silent
<b>Another relative/next of kin</b>	Yes	Yes	Yes	Silent
<b>The person lawfully in possession of the individual's body</b>	Yes	Yes	Silent	Silent

Other than Quebec, each of the jurisdictions outlines clear circumstances under which these substitute decision makers may and may not make decisions on another person's behalf.

In Nova Scotia, these circumstances include:

1. Where an individual has recorded their decision regarding donation after death in the Registry, but the substitute decision maker has information that would lead a reasonable person to conclude that the individual would have made a different decision;<sup>179</sup>
2. Where an individual has not recorded a decision regarding donation after death in the Registry, resulting in deemed consent, but the substitute decision maker has information that would lead a reasonable person to conclude that the individual would not have consented to donation after death;<sup>180</sup> and
3. Where an individual has not recorded a decision regarding donation after death in the Registry and deemed consent does not apply because of an exception (i.e. they were a child, they were not ordinarily resident in Nova Scotia, or they lacked capacity).<sup>181</sup>

The listed individuals may only act as substitute decision makers where:

- a) Excepting a spouse, they have been in personal contact with the person over the preceding 12-month period or have been granted a court order to shorten or waive the 12-month period;
- b) They are willing to assume the responsibility for making the decision;

<sup>178</sup> Alberta's proposed legislation will require that the sibling is an adult (see AB, Bill 205, *supra* note 67 at s 3).

<sup>179</sup> *Human Organ and Tissue Donation Act*, *supra* note 7 at s 15(1).

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid* at ss 12-14.

- c) They know of no person of a higher order of priority who is able and willing to make the decision; and
- d) They make a statement in writing certifying the relationship to the person and the facts and beliefs set out in three preceding conditions.<sup>182</sup>

In Ontario, the circumstances under which substitute decision makers may make decisions on another person's behalf include:

- 1. Where the individual is a minor under the age of 16 (in which case, the parent or guardian of the child may object on their behalf);
- 2. Where the individual dies without making an objection in accordance with subsection 4(3); and
- 3. Where the individual's death is imminent and, in the opinion of a physician, the individual is incapable by reason of injury or disease of making an objection in accordance with subsection 4(3).<sup>183</sup>

These individuals may only object to organ donation on another person's behalf if they do so in writing, with a signature provided, orally, in the presence of at least two witnesses, or by email, recorded telephonic message or other recorded message.<sup>184</sup> Moreover, they may not object on another person's behalf if they have "reason to believe that the person who died or whose death is imminent would not have objected to the removal or use."<sup>185</sup>

Similar to Ontario, in Alberta, the circumstances under which substitute decision makers may make decisions on another person's behalf include:

- 1. Where the individual has not made a decision regarding donation after death at the time of their death;
- 2. Where the individual has not made a decision regarding donation after death, death is imminent, and, in the opinion of a medical practitioner, the individual is incapable of making a decision due to injury or disease; and
- 3. Where the individual is a minor at the time of their death.<sup>186</sup>

The listed individuals may not act as substitute decision makers where they have personal knowledge that:

- a) a person in a higher priority class described in subsection (4) is reasonably available to make the decision;

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<sup>182</sup> *Ibid* at s 6(4).

<sup>183</sup> *ON, Bill 91, supra* note 65 at s 3.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> *AB, Bill 205, supra* note 67 at s 3.



- b) in the case of a decision to consent to donate, another person who is in the same class or a higher class described in subsection (4) would decide to refuse to donate; or
- c) the person on whose behalf they are making a decision would have made a different decision.<sup>187</sup>

Finally, while under the QC Bill, the circumstances may not be spelled out as clearly, it appears that the circumstances under which substitute decision makers may make decisions on another person's behalf include:

- 1. Where the wishes of a deceased minor are not known at the time of death (in which case a person who was or would have been qualified to give consent to care to the minor may consent on the minor's behalf); and
- 2. Where there is a compelling reason not to follow an individual's authorization.<sup>188</sup>

**ISSUE FOR DISCUSSION 7: Who should be empowered to act as a substitute decision maker and in what order of priority?**

**ISSUE FOR DISCUSSION 8: If persons lawfully in possession of the body should be able to act as substitute decision makers, should there be any exceptions to this category of substitute decision maker? If so, who should be excluded?**

**ISSUE FOR DISCUSSION 9: Under what circumstances should substitute decision makers be able to consent or refuse to organ or tissue donation after death on someone else's behalf?**

## **B. Other Possible Areas of Reform**

### **1. Transplant Coordinator Teams**

As discussed in Chapter 3, Spain, which is the world leader in organ donation, is said to have found its success not only as a result of its presumed consent donation framework, but from other factors such as its implementation of "transplant coordinator" teams which are present in every Spanish hospital that is authorised to procure organs and tissues.<sup>189</sup> These teams, which are recognized as a cornerstone of the successful Spanish transplantation model, are responsible for identifying and evaluating donors, supporting the maintenance of potential donors in ICU, and interviewing donor families, among other things.<sup>190</sup>

<sup>187</sup> *Ibid.*

<sup>188</sup> *QC, Bill 399, supra* note 69 at ss 1-2.

<sup>189</sup> *Rodriguez-Arias, supra* note 78 at 1109.

<sup>190</sup> *Ibid.*

Unlike in Manitoba, where external human tissue gift agencies are responsible for coordinating and supporting organ donation in the province, Spanish transplant coordinators are generally ICU doctors or anaesthesiologists who work directly in hospitals with the individuals and families who will ultimately become candidates for donation.<sup>191</sup> Their access, familiarity and authority in the ICU is said to “prevent loss of donors due to non-detection or lack of staff motivation.”<sup>192</sup> Moreover, given that these individuals play an active role in the treatment of the patient and build a relationship with the patient’s family often before any discussions of organ donation are had, these individuals may have greater opportunities to promote family satisfaction with treatment and trust in the medical process, leading to more of a willingness on the patient’s or family’s part to consider donation.<sup>193</sup>

<b>ISSUE FOR DISCUSSION 10: Should Manitoba consider the implementation of transplant coordination teams directly in hospitals?</b>
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<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

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## CHAPTER 5: SUMMARY OF THE ISSUES FOR DISCUSSION

The following list provides a summary of all issues for discussion contained in this Consultation Paper.

**ISSUE FOR DISCUSSION 1:** Should presumed consent apply to donation after death for transplantation purposes, medical education purposes, scientific research purposes, or a combination thereof? (p. 24)

**ISSUE FOR DISCUSSION 2:** How should individuals be able to indicate their intentions regarding organ and tissue donation after death?

- (a) By submitting their decision to be entered on a Registry of consents and refusals?
- (b) By stating their decision in writing?
- (c) By stating their decision orally in the presence of witnesses?
- (d) In some other way? (p. 35).

**ISSUE FOR DISCUSSION 3:** If individuals should be able to indicate their intentions regarding organ and tissue donation after death by stating their decision in writing, what formalities should this written document comply with, if any? (I.e. personal signature, witness signature(s), date, delivery of document to attending physician, etc.) (p. 35)

**ISSUE FOR DISCUSSION 4:** If individuals should be able to indicate their intentions regarding organ and tissue donation after death by stating their decision orally in the presence of witnesses, how many witnesses should be required, and what formalities should these witnesses be required to comply with, if any? (I.e. requirement that the witness directly witnessed the person's oral instructions, requirement that the witness witnessed the person's oral instructions within a specified time period prior to death, etc.) (p. 36)

**ISSUE FOR DISCUSSION 5:**

- (a) Who should be responsible for maintaining the record of intentions regarding organ and tissue donation, and for facilitating after-death organ and tissue donation? (I.e. existing human tissue gift agencies, the Department of Health, a standalone centralized network, etc.)
- (b) What steps should the body responsible for facilitating after-death organ and tissue donation be required to take before organ and tissue donation activities may commence?
- (c) In what circumstances should these steps not be required? (p. 36)

**ISSUE FOR DISCUSSION 6:** Should there be exceptions to the presumed consent framework? If so, what should these exceptions be? (p. 41)

**ISSUE FOR DISCUSSION 7:** Who should be empowered to act as a substitute decision maker and in what order of priority? (p. 51)

**ISSUE FOR DISCUSSION 8:** If persons lawfully in possession of the body should be able to act as substitute decision makers, should there be any exceptions to this category of substitute decision maker? If so, who should be excluded? (p. 51)

**ISSUE FOR DISCUSSION 9:** Under what circumstances should substitute decision makers be able to consent or refuse to organ or tissue donation after death on someone else's behalf? (p. 51)

**ISSUE FOR DISCUSSION 10:** Should Manitoba consider the implementation of transplant coordination teams directly in hospitals? (p. 52)

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## APPENDIX A: THE HUMAN TISSUE GIFT ACT

C.C.S.M. c. H180

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

### Definitions

1 In this Act,

**"common-law partner"** of a deceased or dying person means

- (a) a person who, with the deceased or dying person, registered a common-law relationship under section 13.1 of The Vital Statistics Act, and who is cohabiting or has cohabited with the deceased or dying person immediately before a direction is acted upon under section 3 or death occurs, or
- (b) a person who, not being married to the deceased or dying person, is cohabiting or has cohabited with him or her in a conjugal relationship
  - (i) for a period of at least one year immediately before a direction is acted upon under section 3 or death occurs, or
  - (ii) for a period of less than one year immediately before a direction is acted upon under section 3 or death occurs, and they are together the parents of a child;

**"designated facility"** means

- (a) a hospital defined in The Health Services Insurance Act, and
- (b) a health care facility that has been designated by regulation;

**"human tissue gift agency"** means

- (a) the Lions Eye Bank of Manitoba and Northwest Ontario Inc.,
- (b) the Winnipeg Regional Health Authority Tissue Bank Program,
- (c) the Winnipeg Regional Health Authority Organ Donation Program, and
- (d) any other entity that is designated by regulation as a human tissue gift agency;

**"Inspector of Anatomy"** means the Inspector of Anatomy appointed under The Anatomy Act;

**"minister"** means the minister appointed by the Lieutenant Governor in Council to administer this Act;

**"nearest relative"** means

- (a) a spouse, unless there is a common-law partner,
  - (a.1) a common-law partner, or
- (b) if there is no spouse or common-law partner, or if the spouse or common-law partner is unavailable, a son or daughter at least 18 years of age; or
- (c) if there is no son or daughter at least 18 years of age, or if any sons or daughters at least 18 years of age are unavailable, a parent or legal guardian; or
- (d) if there is no parent or legal guardian, or if the parent or parents or the legal guardian or legal guardians is or are unavailable, a brother or sister at least 18 years of age who is not unavailable;

**"non-regenerative tissue"** means tissue other than regenerative tissue;

**"physician"** means a duly qualified medical practitioner;

**"proxy"** means a proxy appointed in a health care directive made in accordance with The Health Care Directives Act, but does not include a proxy to the extent he or she is restricted, by the terms of the directive, from making decisions that fall within the scope of this Act;

**"regenerative tissue"** means tissue that, after injury within or removal from the body of a living person, is replaced in the person's body by natural processes;

**"spouse"** means a person to whom the person is married;

**"therapeutic purposes"** includes transplant purposes;

**"tissue"** includes an organ, a part of a human body and a substance extracted from the human body or from a part of the human body, but does not include

- (a) spermatozoa or ova, or
- (b) an embryo or a fetus or a part of an embryo or a fetus, or
- (c) blood or blood constituent, or
- (d) a placenta;

**"transplant"** means the removal of tissue from a human body, whether living or dead, and its implantation in another human body;

**"unavailable"** means unable to act because of death, physical or mental illness or incapacity, absence or other cause.

### **Direction by adult before death**

2(1) A person who is 18 years of age or over may direct that the whole body of the person, or any tissue or specified tissue from the body, may be used after the person's death for therapeutic purposes or for purposes of medical education or scientific research.

### **Direction by minor before death**

2(2) A direction mentioned in subsection (1) may be given by a person who is under 18 but not under 16 years of age,

- (a) where a parent or legal guardian of the person consents to the direction; or
- (b) without the consent required under clause (a), where the parent or parents or the legal guardian or legal guardians of the person is or are unavailable.

### **Effect of direction**

2(3) Upon the death of a person who has given a direction under subsection (1) or (2), the direction is full authority for obtaining possession of the body, and the use of the body or the removal and use of any tissue or specified tissue from the body, as the case may be, for the purposes specified in the direction, but a person shall not act upon the direction where the person proposing to act has reason to believe

- (a) that the person who gave the direction subsequently withdrew it; or

(b) that the person who gave the direction was not capable of understanding the nature and effect thereof; or

(c) that an inquiry or investigation under The Fatality Inquiries Act may be required to be held respecting the cause and manner of death, unless a medical examiner or the chief medical examiner appointed under that Act has no objection to the use of the body or the removal and use of the tissue.

### **Incorrect age**

2(4) A direction given

(a) under subsection (1) by a person who is under 18 years of age; or

(b) under subsection (2) by a person who is under 16 years of age;

that has been acted upon is deemed to be valid for the purposes of this section if the person who acted upon it had no reason to believe that the person who gave the direction was in fact under 18 years of age or under 16 years of age, as the case may be, at the time of giving the direction.

### **Direction on behalf of deceased person**

3(1) Where a person who dies

(a) has not made a direction under section 2;

(b) has made a direction under section 2 that by virtue of clause 2(3)(b) cannot be acted upon; or

(c) is under 16 years of age;

a person described in subsection (1.1) may direct that the deceased person's whole body, or any tissue or specified tissue from the deceased person's body, may be used for therapeutic purposes or for purposes of medical education or scientific research.

### **Direction by proxy or nearest relative**

3(1.1) A direction may be given under subsection (1)

(a) by the deceased person's proxy, if the deceased person was 18 years of age or over at the time of death;

(b) if there is no proxy authorized to act or the proxy is unavailable, by the deceased person's nearest relative; or

(c) if there is no nearest relative or the nearest relative is unavailable, by the person lawfully in possession of the body or the Inspector of Anatomy, as the case may be.

### **Exceptions**

3(2) In subsection (1), the expression "person lawfully in possession of the body" does not include

(a) a medical examiner in possession of a body for the purpose of inquiry or investigation; or

(b) an embalmer or funeral director in possession of a body for the purpose of its burial, cremation or other disposal.

### **Direction on behalf of dying person**

3(3) Where a physician is of the opinion that a person

(a) who has not made a direction under section 2; or

(b) who has made a direction under section 2 that by virtue of clause 2(3)(b) cannot be acted upon;

is incapable of making a direction under section 2 and that the person's death is imminent and inevitable, a person described in subsection (3.1) may direct that the dying person's whole body, or any tissue or specified tissue from the dying person's body, may be used after death for therapeutic purposes or for purposes of medical education or scientific research.

### **Direction by proxy or nearest relative**

3(3.1) A direction may be given under subsection (3)

(a) by the dying person's proxy, if the dying person is 18 years of age or over; or

(b) if there is no proxy authorized to act or the proxy is unavailable, by the dying person's nearest relative.

### **Direction where person under 16**

3(4) Where a person is under 16 years of age and a physician is of the opinion that the person's death is imminent and inevitable, the person's nearest relative may direct that the whole body of the person, or any tissue or specified tissue from the body, may be used after the person's death for therapeutic purposes or for purposes of medical education or scientific research.

### **Effect of direction**

3(5) Upon the death of a person in respect of whom a direction is given under this section, the direction is full authority for obtaining possession of the body, and the use of the body or the removal and use of any tissue or specified tissue from the body, as the case may be, for the purposes specified in the direction, but a person shall not act upon the direction where the person proposing to act has reason to believe

(a) that the use of the body or the removal and use of tissue from the body after death would be contrary to the religious beliefs of the deceased person or that the deceased person, if living, would have objected thereto; or

(b) that an inquiry or investigation under The Fatality Inquiries Act may be required to be held respecting the cause and manner of death, unless a medical examiner or the chief medical examiner appointed under that Act has no objection to the use of the body or the removal and use of the tissue.

### **Human tissue gift agency to be notified**

4(1) Subject to the requirements and circumstances established under subsection 4.2(1), a designated facility must notify the required human tissue gift agency when

(a) a patient at the facility dies;

(b) a physician at the facility advises that the death of a person at the facility is imminent and inevitable; or

(c) the facility receives a dead body.



**Agency to determine if direction was made**

4(2) Upon receiving a notice described in subsection (1), the human tissue gift agency must ensure that reasonable efforts are made to determine whether the deceased or dying person made a direction under section 2.

**If no direction found**

4(3) If a direction cannot be found promptly, the agency must decide whether the circumstances are appropriate to make a request under subsection (4). In doing so, it must consider, in consultation with the designated facility,

(a) the emotional and physical condition of

(i) the person to be asked, and

(ii) in the case of a deceased person, his or her survivors; and

(b) the suitability of the body or its tissues, and the therapeutic purposes or medical education or scientific research purposes for which they may be used.

**Request re direction**

4(4) If circumstances are appropriate, the agency must,

(a) in the case of a dying person, ask

(i) the person whether he or she wishes to make a direction under section 2, or

(ii) his or her proxy or nearest relative whether he or she wishes to make a direction under subsection 3(3); or

(b) in the case of a deceased person, ask the person's proxy or nearest relative, or the person lawfully in possession of the body or the Inspector of Anatomy, whether he or she wishes to make a direction under section 3.

**When request not to be made**

4(5) A request must not be made under subsection (4) if the agency has reason to believe that

(a) the person actually objected — and the objection was not withdrawn — while living, to the use of his or her body or the removal and use of tissue from his or her body after death;

(b) the person would have objected, if living, to the use of his or her body or the removal and use of tissue from his or her body after death; or

(c) the use of the person's body or the removal and use of tissue from the person's body after death would be contrary to the person's religious beliefs.

**Agency may request assistance of facility**

4.1 A human tissue gift agency may request the designated facility to ask for a direction on its behalf. In that case, the facility must make reasonable efforts to ask for a direction in accordance with section 4.

### **Requirements established by human tissue gift agencies**

4.2(1) The human tissue gift agencies may jointly establish

(a) requirements relating to a notice under subsection 4(1), including

(i) which human tissue gift agency is required to be notified,

(ii) the time period in which notification must be given, and

(iii) information, including personal information and personal health information, that is to be provided in respect of a deceased or dying person,

and a designated facility must comply with those requirements; and

(b) circumstances in which notification is not required and, despite subsection 4(1), a designated facility is not required to notify a human tissue gift agency in those circumstances.

### **Consultations**

4.2(2) In the course of preparing requirements under subsection (1), the human tissue gift agencies must consult with the operators of the designated facilities, and may consult with other persons and entities that the agencies consider appropriate.

### **Where body or tissue not required**

5(1) Where a direction has been given under this Act for the use of a whole body, or the removal after death and use of any tissue or specified tissue from a body, for therapeutic purposes or for purposes of medical education or scientific research, and at the time of or immediately after the death there is no known request or knowledge of a reasonable possibility of a request for the body or tissue for the purposes set out in the direction, the body shall be dealt with as though no direction under this Act had been given.

### **Disposal of body after removal of tissue**

5(2) Where a direction is given under this Act for the removal of tissue from the body of a person, but not for the use of the whole body, after death, the body shall, forthwith after the removal of the tissue, be delivered to the custody and control of the person who would have had the custody and control if no direction had been given under this Act.

### **Custody of Inspector of Anatomy**

5(3) Where a direction is given under this Act for the use of the whole body of a person after death for medical education or scientific research, the body shall be delivered after death to the custody and control of the Inspector of Anatomy who shall deal with the body in accordance with the provisions of The Anatomy Act but subject always to the provisions of this Act and of the direction.

### **Removal of pituitary gland**

6(1) Notwithstanding that no direction has been given under this or any other Act of the Legislature with respect to the use of the body after death or the removal of tissue from the body after death, any person lawfully performing a post mortem examination of a body may remove the pituitary gland from the body and cause it to be delivered to any person or agency designated by the Inspector of Anatomy for use in the treatment of persons with a growth hormone deficiency.

**Where section does not apply**

6(2) This section does not apply where the person performing a post mortem examination of a body has reason to believe that

- (a) the deceased, if living, would have objected; or
- (b) the deceased's nearest relative objects;

to the removal of the pituitary gland from the body after death for the purpose mentioned in subsection (1).

7 Repealed.

**Determination of death**

8(1) Any determination of the occurrence of brain death within the meaning of The Vital Statistics Act, with circulation still intact, that may be necessary for the purposes of a successful transplant of tissue pursuant to this Act shall be made by at least two physicians and subject to subsections (2) and (3).

**Independence of physicians**

8(2) A physician who has or has had an association with a proposed recipient of tissue by way of transplant pursuant to this Act, where the association is or was of such a nature that it is likely to influence the judgment of the physician, shall not participate in the making of a determination under subsection (1) of the death of the person from whose body the tissue is to be removed.

**Participation in transplant prohibited**

8(3) A physician who participates in

- (a) a determination of death under subsection (1); or
- (b) the withdrawal or withholding of life-prolonging medical treatment in accordance with a health care directive made under The Health Care Directives Act;

in respect of a person from whose body tissue is to be removed for a proposed transplant shall not participate in the transplant operation.

**Donations by living persons**

9(1) A person who is

- (a) 18 years of age or over; and
- (b) able to make a free and informed decision;

may, subject to subsections (2), (3) and (4), consent to the removal of tissue specified in the consent, from the person's own body while living, for therapeutic purposes or for purposes of medical education or scientific research, as the consent may specify.

**Regenerative and non-regenerative tissue**

9(2) A consent under subsection (1) for the removal and use of tissue for therapeutic purposes may be given in the case of both regenerative and non-regenerative tissue.

**Regenerative tissue only**

9(3) A consent under subsection (1) for the removal and use of tissue for medical education or scientific research may be given only in the case of regenerative tissue.

**Certification of physician**

9(4) A consent given under this section is not valid unless a physician who does not have and has never had an association with any person benefiting or likely to benefit from the consent certifies in writing that the person giving the consent has been advised of and understands the nature and effect of the procedure authorized by the consent.

**Participation prohibited**

9(5) A physician who gives a certification under subsection (4) shall not participate in the removal or subsequent use of the tissue to which the certification relates.

**Donations by living minors**

10(1) A person who is under the age of 18 years but not under the age of 16 years may, subject to subsection (2), consent to the transplant of tissue specified in the consent from the person's own body while living to the body of another living person.

**Conditions precedent**

10(2) A consent for the transplant of tissue under subsection (1) is not valid unless

(a) a physician who does not have and has never had an association with the proposed recipient of the tissue certifies in writing that the person giving the consent is, in the physician's opinion, capable of understanding and in fact understands the nature and effect of the procedure authorized by the consent;

(b) the person giving the consent is a member of the immediate family of the proposed recipient of the tissue; and

(c) a parent or legal guardian of the person giving the consent consents to the transplant of the tissue.

**Participation in transplant prohibited**

10(3) A physician who under subsection (2) gives a certification in respect of a proposed transplant of tissue shall not participate in the transplant operation.

**"Member of immediate family" defined**

10(4) For the purposes of subsection (2), the mother or father, or the step-mother or step-father, or the brother or sister, or the step-brother or step-sister, or the half-brother or half-sister, of a proposed recipient of tissue is a "member of the immediate family" of the proposed recipient.

### **Donations by living minors under 16**

11(1) In the case of a person who is under the age of 16 years, tissue from the body of the person while living may be transplanted to the body of another living person where, but only where,

- (a) the person from whose body the tissue is to be removed consents thereto;
- (b) the tissue is regenerative tissue;
- (c) the proposed recipient of the tissue would likely die without the transplant;
- (d) the risk to the life and health of the person giving the consent is relatively insubstantial;
- (e) the person giving the consent is a member of the immediate family of the proposed recipient of the tissue;
- (f) a parent or legal guardian of the person giving the consent consents to the transplant of the tissue;
- (g) the transplant is recommended by a physician who does not have and has never had an association with the proposed recipient of the tissue; and
- (h) the transplant is approved by the Court of Queen's Bench upon an application therefor.

### **Participation in transplant prohibited**

11(2) A physician who recommends a transplant of tissue under subsection (1) shall not participate in the transplant operation.

### **"Member of immediate family" defined**

11(3) For the purposes of subsection (1), the mother or father, or the step-mother or step-father, or the brother or sister, or the step-brother or step-sister, or the half-brother or half-sister, of a proposed recipient of tissue is a "member of the immediate family" of the proposed recipient.

### **Form of direction or consent**

12 A direction or consent for the purposes of this Act respecting the use of the body of a deceased person or respecting the removal, before or after death, and the use of tissue from the body of a person, whether given by the person to whose body or tissue the direction or consent relates or by another person, may be given

- (a) in writing; or
- (b) by means of any type of recorded message; or
- (c) orally in the presence of at least two witnesses; or
- (d) by telephone to at least two witnesses.

13 Repealed.

### **Information**

13.1(1) A human tissue gift agency may require a designated facility, or a physician who provides services in the facility, to provide it with information, including personal information and personal health

information, in respect of a deceased or dying person that the agency considers reasonably necessary to permit it to determine the appropriateness of making a request under section 4.

### **Duty to provide information**

13.1(2) Anyone required to provide information under subsection (1) must do so.

### **Sharing of information**

13.1(3) A human tissue gift agency may share information it receives under this Act, including personal information and personal health information, with a person or another human tissue gift agency if doing so is reasonably necessary to facilitate the process whereby a transplant of human tissue is effected, or a human body or part or parts of a human body are prepared for use for therapeutic purposes.

### **Protection from liability**

14 No person shall be held liable for damages for anything done or omitted to be done, in good faith and without negligence, in the exercise or intended exercise of any power or authority conferred under this Act.

### **Sale etc. prohibited**

15(1) No person shall buy, sell, or otherwise deal in, directly or indirectly, for valuable consideration, any tissue for a transplant, or any body or parts of it other than blood or a blood constituent, for therapeutic purposes or for purposes of medical education or scientific research, and any such dealing is invalid as being contrary to public policy.

### **Exception for therapeutic purposes, medical and scientific research**

15(2) No person contravenes subsection (1) if the person receives reimbursement for reasonable expenses incurred in, or remuneration for, participating in or performing a service necessarily incidental to the process whereby a transplant of human tissue is effected, or a human body or part or parts of a human body are prepared for use for therapeutic purposes or for purposes of medical education or scientific research.

### **Offence and penalty**

15(3) A person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a fine of not more than \$10,000. or imprisonment for a term of not more than one year, or both.

### **Anatomy Act not affected**

15(3.1) Nothing in this Act affects the operation of The Anatomy Act or any other law.

### **Exception as to expenses**

15(4) Nothing in this section prohibits reimbursement, to the donor or recipient of a body or tissue from a body, or to the family or survivors of such a donor or recipient, or to any government or private medical or hospital plan, as the case may require, of reasonable expenses incurred in carrying out a direction or complying with a consent under this Act.

15(5) Repealed, S.M. 2004, c. 40, s. 9.

### **Regulations**

15.1 The minister may make regulations

- (a) for the purpose of the definition "designated facility" in section 1,
  - (i) defining the term "health care facility",
  - (ii) designating a health care facility as a designated facility,
  - (iii) establishing classes of health care facilities and designating one or more of those classes as designated facilities,
  - (iv) exempting a health care facility from a class of health care facilities designated under subclause (iii);
- (b) designating an entity as a human tissue gift agency.

### **Reference in Continuing Consolidation**

16 This Act may be referred to as chapter H180 of the Continuing Consolidation of the Statutes of Manitoba.

### **Repeal**

17 *The Human Tissue Act*, being chapter H180 of the Continuing Consolidation of the Statutes of Manitoba, is repealed.

### **Commencement of Act**

18 This Act comes into force on the day it receives the royal assent.

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## APPENDIX B: HUMAN ORGAN AND TISSUE DONATION ACT, NS

Be it enacted by the Governor and Assembly as follows:

**1** This Act may be cited as the *Human Organ and Tissue Donation Act*.

**2** In this Act,

(a) “best interests” includes consideration of the physical, psychological, emotional and social well-being of the living potential donor;

(b) “capacity” means the ability to understand the information that is relevant to a decision to be made and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision;

(c) “Chief Medical Examiner” means the Chief Medical Examiner appointed pursuant to the *Fatality Investigations Act*;

(d) “continuing-care home” means any facility licensed under the *Homes for Special Care Act*, any facility for which a resident may be approved for admission by the Department of Health and Wellness or the Department of Community Services and any facility prescribed by the regulations;

(e) “court” means the Supreme Court of Nova Scotia;

(f) “critical functions” means

(i) respiration,

(ii) circulation, and

(iii) consciousness;

(g) “death” means the irreversible cessation of the functioning of the organism as a whole as determined by the irreversible loss of the brain’s ability to control and co-ordinate the organism’s critical functions;

(h) “donation after death” means a donation of any human organ, tissue or body after death in accordance with this Act;

(i) “donor” means an individual who has consented, is deemed to have consented or in respect of whom a consent has been given to donate the individual’s organs, tissue or body for transplantation, scientific research or education;

(j) “guardian” means a person appointed as the guardian of the person of a child under the *Guardianship Act* or a person who is a guardian under the *Children and Family Services Act*;

(k) “health authority” means the provincial health authority or the IWK Health Centre;



(l) “health-card number” means a unique identification number assigned by the Department of Health and Wellness to individuals insured under the *Health Services and Insurance Act* and reflected on the Nova Scotia health card;

(m) “irreversible” means not physically possible to reverse without violating consent law;

(n) “living donation” means a donation of organs or tissues in accordance with this Act while the donor is living;

(o) “Minister” means the Minister of Health and Wellness;

(p) “organ” means an organ, whether whole or in sections, lobes or parts;

(q) “organ-donation program” means an organ donation program operated by the provincial health authority or another prescribed entity;

(r) “physician” means a duly qualified medical practitioner;

(s) “pre-death transplantation optimizing interventions” means interventions that are performed on a person before the person’s death for the purpose of optimizing the chances of a successful transplantation;

(t) “Registry” means the Registry established or designated under Section 7;

(u) “spouse” of an individual means

(i) another individual who is cohabiting with that individual in a conjugal relationship as a married spouse,

(ii) a registered domestic partner of the individual, or

(iii) an individual who is cohabiting with the individual in a conjugal relationship for a period of at least one year as common-law partners;

(v) “substitute decision-maker” means a substitute decision-maker as determined under Section 6;

(w) “tissue” means a functional group of human cells, excluding organs;

(x) “tissue bank” means a regional tissue bank operated by the provincial health authority or another prescribed entity;

(y) “transplantation” means the operation of transferring organs or tissues from a donor, whether living or dead, to a living human recipient;

(z) “transplantation activities” means

(i) the storage or transportation of the body of a deceased person for use in transplantation,

(ii) the removal from the body of a deceased person, for use for the purpose of transplantation, of organs and tissues of which the body consists or that it contains,

(iii) the storage or transportation for the purpose of transplantation of organs and tissues that have come from a human body, or

(iv) the use for the purpose of transplantation of organs and tissues that have come from a human body.

**3 (1)** This Act does not apply to

(a) blood or blood constituents; or

(b) zygotes, oocytes, embryos, sperm, semen or ova.

**(2)** This Act applies only to a donation made on or after the date this Act comes into force.

**4** A donation after death or a living donation may be done only in accordance with this Act.

**5** Only individuals with the capacity to do so may consent or refuse consent.

**6 (1)** A substitute decision-maker is, with respect to an individual, a person determined in the following order of priority:

(a) a person authorized to give consent under the *Medical Consent Act* or the *Personal Directives Act*, unless the authorization excludes decisions about organ or tissue donation and, where there is more than one delegate authorized pursuant to the *Personal Directives Act*, the delegate authorized to make health-care decisions;

(b) a guardian or representative under the *Adult Capacity and Decisionmaking Act* with the appropriate authority to deal with organ donation decisions;

(c) a spouse;

(d) a child who has reached the age of majority;

(e) a parent;

(f) a person standing in *loco parentis*;

(g) a sibling;

(h) a grandparent;

(i) a grandchild;

(j) an aunt or uncle;

(k) a niece or nephew;

(l) another relative; or

(m) the person lawfully in possession of the individual's body.

(2) For the purpose of subsection (1), “person lawfully in possession of the body” does not include

(a) the Chief Medical Examiner or medical examiner in possession of the body for the purpose of the *Fatality Investigations Act*;

(b) where the person died in hospital, the administrative head of the hospital;

(c) where the person died in a continuing-care home, the administrative head of the continuing-care home;

(d) the Public Trustee in possession of the body for the purpose of its burial under the *Public Trustee Act*;

(e) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or

(f) the superintendent of a crematorium in possession of the body for the purpose of its cremation.

(3) For greater certainty, where two or more persons who are not described in the same clause of subsection (1) claim the authority to give or refuse consent under that subsection, the one under the clause occurring first in that subsection prevails.

(4) A person referred to in subsection (1) may not act as a substitute decisionmaker unless the person

(a) excepting a spouse, has been in personal contact with the person over the preceding 12-month period or has been granted a court order to shorten or waive the 12-month period;

(b) is willing to assume the responsibility for making the decision;

(c) knows of no person of a higher order of priority who is able and willing to make the decision; and

(d) makes a statement in writing certifying the relationship to the person and the facts and beliefs set out in clauses (a) to (c).

#### DONATION AFTER DEATH

**7** The Minister shall establish or designate a Registry to record consents and refusals respecting donation after death for transplantation made under this Act.

**8 (1)** An individual may consent to or refuse donation after death for transplantation by providing information respecting the consent or refusal to the Registry in the manner specified by the Minister.

**(2)** A consent to donation after death under subsection (1) may be restricted to the donation of specified organs and tissues.

**9 (1)** Subject to Section 15, a consent under Section 8 is full authority for transplantation activities to the extent of the consent.

**(2)** Subject to Section 15, where an individual has refused donation after death for transplantation under Section 8, the individual's organs and tissues may not be used for transplantation activities.

**10** A physician or the Chief Medical Examiner shall, before undertaking transplantation activities, check the Registry to determine whether a decision made under Section 8 is on record in the Registry.

**11 (1)** Subject to Sections 12 to 15, where an individual has not made a consent or refusal under Section 8, the individual is deemed to consent to the individual's organs and tissues being used for transplantation activities.

**(2)** A deemed consent under subsection (1) is full authority for transplantation activities.

**12 (1)** An individual is not deemed to consent under Section 11 if the individual has died and for a significant period before dying lacked the capacity to make a decision respecting donation after death.

**(2)** For the purpose of subsection (1), a significant period means a sufficiently long period as would lead a reasonable person to conclude that it would be inappropriate for consent to be deemed to have been given.

**(3)** Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**13 (1)** An individual is not deemed to consent under Section 11 if the individual has died and the individual was not ordinarily resident in the Province for a period of at least 12 months immediately before dying.

**(2)** Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**14 (1)** An individual is not deemed to consent under Section 11 if the individual was under the age of majority at the time of death.

**(2)** Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.

**15 (1)** Where a substitute decision-maker provides information that would lead a reasonable person to conclude that an individual would have made a different decision respecting donation after death than the decision recorded in the Registry or deemed under Section 11, the substitute decision-maker may consent or refuse on behalf of the individual in accordance with that information.

**(2)** A consent under subsection (1) is full authority for transplantation activities to the extent of the consent.

**16** The medical tests to demonstrate that death has occurred are those established by the medical profession from time to time.

**17 (1)** For the purpose of organ donation after death for transplantation, death must be determined by at least two physicians who have skill and knowledge in conducting the specific medical tests established by the medical profession for determining death.

**(2)** A physician who has had an association with a proposed organ recipient that might influence the physician's judgement may not take part in the determination of the death of an organ donor.

**(3)** No physician who took any part in the determination of death of the organ donor may participate in the organ transplant procedures.

**18** Where

(a) in the opinion of a physician the death of an individual is imminent by reason of injury or disease;

(b) the physician has reason to believe that Sections 9 to 12 of the *Fatality Investigations Act* may apply when death does occur; and

(c) a consent under this Act has been obtained for donation after death, the Chief Medical Examiner may allow the removal of organs or tissue after the death of the person notwithstanding that death has not yet occurred.

**19 (1)** Where an individual dies, or in the opinion of a physician death is imminent, in a hospital or in circumstances set out in Sections 9 to 12 of the *Fatality Investigations Act*, the hospital or the Chief Medical Examiner shall, as soon as possible, provide to the organ-donation program and the tissue bank

(a) the age of the individual;

(b) the cause, or expected cause, of the death of the individual;

(c) the time of death of the individual, if death has occurred; and

(d) any available past and current personal information, including medical and social history, that is relevant to organ or tissue transplantation.

**(2)** The organ-donation program and the tissue bank, shall make a determination as to whether the organs and tissue of the individual may be medically suitable for use in another person by assessing the information provided under subsection (1).

**(3)** Where the organ-donation program or the tissue bank determines that the organs or tissue of the individual may be medically suitable for use in another person, the hospital or the Chief Medical Examiner shall, as soon as possible, provide the individual's name and health-card number to the organ-donation program and the tissue bank for the purpose of determining whether the individual has provided a consent or refusal in the Registry and whether deemed consent applies.

**(4)** Notwithstanding subsection (1), the hospital or the Chief Medical Examiner shall not provide the information referred to in subsection (1) to the tissue bank and the organ donation program if the individual clearly meets criteria established by the tissue bank and the organ-donation program that

set out circumstances in which an individual's organs or tissues would not be medically suitable for use in another person.

(5) Where the hospital or Chief Medical Examiner does not provide the information referred to in subsection (1), the reasons for the decision must be placed in the record of the person.

(6) Where the organ-donation program or the tissue bank determines that a medical or other condition exists that may make the organs or tissue of the individual medically unsuitable for use in another person, the reason for the determination must be placed in the record of the individual.

**20 (1)** The chief executive officers of a health authority and the Chief Medical Examiner shall submit a report annually to the Minister.

(2) The report referred to in subsection (1) must include

(a) the number of deceased persons who were medically suitable to be a donor, based upon criteria established by the tissue bank and the organ-donation program, but were not referred to the tissue bank and the organ-donation program;

(b) any actions undertaken or proposed to address issues related to missed referrals and their effectiveness; and

(c) any information prescribed by the regulations.

**21 (1)** A person may consent to donation after death for scientific research or education purposes by express personal consent or by consent given by a substitute decision-maker.

(2) For greater certainty, a deemed consent under Section 11 does not include consent to donation after death for scientific research or educational purposes.

**22 (1)** Consent to donate organs does not imply consent to pre-death transplantation optimizing interventions.

(2) An individual with the capacity to give voluntary and informed consent may consent to the use of pre-death transplantation optimizing interventions on the individual's body

(a) in writing signed by the individual; or

(b) orally in the presence of at least two witnesses with documentation of the consent signed by the witnesses at the time the consent or refusal was made.

(3) Where an individual has not provided consent, the individual lacks capacity to consent and in the opinion of a physician the individual's death is imminent, a substitute decisionmaker shall

(a) follow any instructions in a personal directive made pursuant to the *Personal Directives Act*, unless

(i) there are expressions of a contrary wish made subsequently by the individual while the individual had the capacity to do so,

(ii) technological changes or medical advances make the instruction inappropriate in a way that is contrary to the intentions of the individual, or

(iii) circumstances exist that would have caused the individual to set out different instructions had the circumstances been known based on what is known of the values and beliefs of the individual and from any other written or oral instructions; or

(b) in the absence of instructions, act according to what the substitute decision-maker believes the wishes of the individual would be based on what the substitute decision-maker knows of the values and beliefs of the individual and from any other written or oral instructions.

**(4)** The consent of a substitute decision-maker must be given

(a) in writing, signed by the substitute decision-maker;

(b) orally, in person or otherwise, by the substitute decision-maker in the presence of at least two witnesses with documentation of the consent signed by the witnesses at the time the consent or refusal was made; or

(c) by telegraphic, recorded telephonic or other recorded message of the substitute decision-maker.

**(5)** Consent to pre-death transplantation optimizing interventions given under this Act is full authority for a physician or hospital to perform such interventions

(a) when it is made; or

(b) where it is contained in a personal directive made pursuant to the *Personal Directives Act* or other lawful advance directive, when the personal directive or advance directive is activated.

## LIVING DONATION

**23 (1)** Any individual with the capacity to do so may, in writing signed by the individual, consent to donate specific organs or tissues from the individual's living body.

**(2)** The consent must be

(a) voluntary and informed; and

(b) given by a person with the legal authority to give, refuse or withdraw consent.

**24 (1)** Where an individual lacks the capacity to give a valid consent and the individual has a valid personal directive setting out clear instructions or expressions of wishes that the individual would want to consent to a living donation, a person authorized to give consent pursuant to clause 6(1)(b) or Section 14 of the *Personal Directives Act* who gives voluntary and informed consent may, in writing signed by that person, consent to the living donation of organs for transplantation on behalf of the individual.

(2) When a person authorized pursuant to subsection (1) is making a decision about a living donation by an individual, the person shall follow any instructions of the individual in a personal directive made pursuant to the *Personal Directives Act* unless

(a) there are expressions of a contrary wish made subsequently by the individual while the individual had the capacity;

(b) technological changes or medical advances make the instruction inappropriate in a way that is contrary to the intentions of the individual; or

(c) circumstances exist that would have caused the individual to set out different instructions had the circumstances been known based on what is known of the values and beliefs of the individual and from any other written or oral instructions.

**25 (1)** Where an individual lacks the capacity to give a valid consent, and the criteria set out in Section 24 are not met, the individual's organs may not be donated from the individual's living body for transplantation without court authorization.

(2) When the court is deciding whether to authorize a donation for transplantation pursuant to subsection (1), the court shall consider

(a) whether the proposed recipient has a close personal relationship with the individual;

(b) a written report by a physician stating that the donation by the individual who lacks capacity is the best option for a successful transplant for the recipient;

(c) a written report by the ethics program associated with the hospital where the transplant will be performed that has reviewed the case;

(d) a written psychosocial report about the donor by an independent psychologist or psychiatrist who has experience working with

(i) adults without capacity if the donor is an adult, or

(ii) minors without capacity if the donor is a minor;

(e) a written statement by the substitute decision-maker who has the authority to make health-care decisions in respect of the individual consenting to the donation;

(f) whether the donation

(i) where the individual is an adult, is consistent with the known prior wishes of the individual while the individual had the capacity or, where such wishes are not known, is in the best interests of the individual, or

(ii) where the individual is a minor, is in the best interests of the individual; and

(g) the current wishes of the individual.



**(3)** When a substitute decision-maker referred to in clause (2)(e) is making a decision about a living donation by an individual, the substitute decision-maker shall

(a) where the individual is an adult,

(i) act according to what the substitute decision-maker believes the wishes of the individual would be based on what the substitute decision-maker knows of the values and beliefs of the individual and from any other written or oral instructions, or

(ii) where the substitute decision-maker does not know the wishes, values and beliefs of the individual, make a decision that the substitute decisionmaker believes would be in the best interests of the individual; or

(b) where the individual is a minor, make a decision that the substitute decision-maker believes would be in the best interests of the individual.

**(4)** Where there is more than one substitute decision-maker who has equal authorization to make health-care decisions, the court may authorize the donation if there is consent from one of those persons.

**(5)** Upon application of a party or on its own motion, the court may order that a guardian *ad litem* be appointed for an individual who lacks capacity.

**26 (1)** A consent given pursuant to Sections 23 and 24 or a court authorization pursuant to Section 25 is full authority for any physician to

(a) make any examination of the donor that is necessary to assure medical suitability of the organ specified therein; and

(b) remove the specified organ from the body of the donor.

**(2)** Where for any reason the organ specified in the consent is not removed in the circumstances to which the consent relates, the consent is void.

#### GENERAL

**27 (1)** Subject to subsection (3), no person shall buy, sell or otherwise deal in, directly or indirectly, for valuable consideration, any human organ, tissue or body for use in transplantation, education or scientific research.

**(2)** For the purpose of subsection (1), valuable consideration does not include

(a) reimbursement for reasonable expenses associated with the removal, transplantation, implantation, processing, preservation and quality control, and storage of organs or tissue;

(b) remuneration received for participating in or performing a service necessarily incidental to the process whereby a transplant of human tissue is effected or a human body or part of the body is prepared for use for therapeutic purposes or for the purpose of education or scientific research; or

(c) the buying and selling of tissues by the tissue bank as approved by a health authority or the Minister.

**(3)** Parties who conduct, fund or participate in research involving human organs or tissues donated under this Act may receive payments for products or processes developed for therapeutic purposes as a result of such research.

**28 (1)** Subject to subsections (2) and (3), no person shall disclose or give to any other person, other than the health-care professionals involved in the person's care and in the transplantation process, any information or document that identifies any person, living or dead, including a substitute decision-maker,

(a) who has given or refused to give a consent to donation;

(b) with respect to whom a consent to donation has been given or refused; or

(c) into whose body organs or tissue has been, is being or may be transplanted.

**(2)** Subsection (1) does not apply if the disclosure

(a) is permitted or required by an enactment or by an order of the court; or

(b) has been agreed to in writing by the person whose identity would be disclosed.

**(3)** Subsection (1) does not apply as between the donor and the recipient if

(a) an organ, a heart valve or a tissue of a type prescribed by the regulations was donated;

(b) both the recipient of an organ, heart valve or tissue of a type prescribed by the regulations or the recipient's substitute decision-maker and the donor or the donor's substitute decision-maker voluntarily agree in writing to the exchange of identifying information or to a meeting; and

(c) those agreeing under clause (b) have been informed of the reasonably foreseeable risks of such a meeting or identifying information exchange before they give their consent.

**29** No action or other proceeding for damages lies against any person in respect of anything done or omitted to be done in good faith and without negligence in the exercise or intended exercise of any authority under this Act.

**30** No person shall give false information under this Act.

**31** No person shall act on a consent given or deemed to be given under this Act if the person has knowledge

(a) that the donor subsequently withdrew the consent; or

(b) of an objection by the donor.

**32** No person shall give a consent or refusal under this Act if the person has personal knowledge that the individual for whom the consent or refusal is given would have made a different decision.

**33** Every person who knowingly contravenes this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than six months, or to both a fine and imprisonment.

**34** Except as provided in Sections 18 and 19, nothing in this Act affects the operation of the *Fatality Investigations Act*.

**35** Nothing in this Act invalidates an authorization made under the *Human Tissue Gift Act* before the coming into force of this Act.

**36 (1)** The Governor in Council may make regulations

- (a) prescribing a facility as a continuing-care home for the purpose of clause 2(d);
- (b) prescribing an entity or entities that are organ-donation programs within the meaning of clause 2(q);
- (c) prescribing an entity or entities that are tissue banks within the meaning of clause 2(w);
- (d) respecting the Registry, including
  - (i) the process for recording information in the Registry, and
  - (ii) who may access or edit information recorded in the Registry;
- (e) respecting the manner by which individuals may provide information respecting consents or refusals to donation after death to the Registry;
- (f) prescribing information that must be provided in a report from a hospital or the Chief Medical Examiner;
- (g) prescribing additional reports that hospitals, the Chief Medical Examiner, the organ-donation program or the tissue bank must provide;
- (h) excluding or including certain practices from the meaning of valuable consideration;
- (i) setting rates of reimbursement that are not considered valuable consideration;
- (j) respecting the products or processes for which parties who conduct, fund or participate in research are permitted to receive payments;
- (k) prescribing types of tissues for the purpose of clause 28(3)(a);
- (l) defining any word or expression used but not defined in this Act;
- (m) further defining any word or expression defined in this Act; or
- (n) respecting any matter or thing the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is a regulation within the meaning of the *Regulations Act*.

**37 Section 5 of Chapter 13 of the Revised Statutes, 1989, the *Anatomy Act*, is repealed.**

**38 Subsection 9(1) of Chapter 13 is amended by striking out “*Tissue Gift*” in the fourth line and substituting “*Organ and Tissue Donation*”.**

**39 Subsection 11(2) of Chapter 13 is amended by striking out “*Tissue Gift*” in the fifth line and substituting “*Organ and Tissue Donation*”.**

**40 (1) Subsection 14(1) of Chapter 31 of the Acts of 2001, the *Fatality Investigations Act*, is amended by striking out “*Tissue Gift*” in the fourth line and substituting “*Organ and Tissue Donation*”.**

**(2) Subsection 14(2) of Chapter 31 is amended by striking out “*Tissue Gift*” in the fourth line and substituting “*Organ and Tissue Donation*”.**

**41 Chapter 36 of the Acts of 2010, the *Human Organ and Tissue Donation Act*, is repealed.**

**42 Chapter 215 of the Revised Statutes, 1989, *Human Tissue Gift Act*, is repealed.**

**43 Section 26 of Chapter 379 of the Revised Statutes, 1989, the *Public Trustee Act*, is amended by striking out “*Tissue Gift*” in the last line and substituting “*Organ and Tissue Donation*”.**

**44 This Act comes into force on such day the Governor in Council orders and declares by proclamation.**

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## **APPENDIX C: BILL 91, AN ACT TO AMEND THE TRILLIUM GIFT OF LIFE NETWORK ACT, ON**

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

**1 (1) The definition of “consent” in section 1 of the *Trillium Gift of Life Network Act* is repealed.**

**(2) The definition of “substitute” in section 1 of the Act is amended by striking out “clause 5 (2) (a), (b), (c), (d), (e) or (f)” and substituting “paragraph 1, 2, 3, 4, 5 or 6 of subsection 5 (2)”.**

**(3) The definition of “writing” in section 1 of the Act is repealed.**

**2 The heading to Part II of the Act is repealed and the following substituted:**

### **PART II POST MORTEM TRANSPLANTS AND OTHER USES OF TISSUE**

**3 Sections 4 and 5 of the Act are repealed and the following substituted:**

#### **Post mortem use of tissue**

**4 (1)** Subject to subsection (2), if a person dies, tissue from his or her body may be removed and used after his or her death for medical education, scientific research or therapeutic purposes, including transplant.

#### **Exception**

**(2)** Subsection (1) does not apply to a person,

- (a) who is a believer, a follower or a member of a prescribed religion, cult, association or group; or
- (b) who has objected in the manner specified in subsection (3) to tissue from his or her body being removed and used after his or her death or on whose behalf such an objection has been made under subsection 5 (1).

#### **Objection**

**(3)** Any person who is 16 years of age or more may object to tissue from his or her body being removed and used after his or her death by,

- (a) stating the objection in writing in a document signed by the person and, at any time prior to the person’s death,
  - (i) delivering the document to an attending physician, or
  - (ii) sending the document to the Network; or
- (b) stating the objection orally in the presence of at least two witnesses during the person’s last illness.

## **Minors**

(4) At any time before the death of a child who is under 16 years of age, the parent or guardian of the child may, in a manner specified in subsection (3), object on the child's behalf to tissue from the child's body being removed and used after the child's death.

## **Objection by other persons**

5 (1) A person listed in subsection (2) may object to tissue from another person's body being removed and used after that person's death if,

- (a) the other person dies without making an objection in accordance with subsection 4 (3); or
- (b) the other person's death is imminent and, in the opinion of a physician, the person is incapable by reason of injury or disease of making an objection in accordance with subsection 4 (3).

## **Who may object**

(2) Subject to subsection (6), the following persons may object to tissue from another person's body being removed and used after the other person's death:

1. The person's spouse.
2. If the person has no spouse or if the person's spouse is not available, any one of the person's children.
3. If the person has no spouse or children or if none are available, either one of the person's parents.
4. If the person does not have any of the relatives mentioned in paragraph 1, 2 or 3 or if none of them are available, any one of the person's brothers or sisters.
5. If the person does not have any of the relatives mentioned in paragraph 1, 2, 3 or 4 or if none of them are available, any other of the person's next of kin.
6. If the person does not have any of the relatives mentioned in paragraph 1, 2, 3, 4 or 5 or if none of them are available, the person lawfully in possession of the body other than a person referred to in subsection (4).

## **Definition**

(3) In this subsection (2),

“spouse” means a person,

- (a) to whom the person is married, or
- (b) with whom the person is living or, immediately before the person's death, was living in a conjugal relationship outside marriage, if the two persons,

- (i) have cohabitated for at least one year,
- (ii) are together the parents of a child, or
- (iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*.

**Person lawfully in possession of body, exception**

(4) The following are the persons mentioned in paragraph 6 of subsection (2):

- 1. The administrative head of the hospital where the person has died.
- 2. The Chief Coroner or a coroner in possession of the body for the purposes of the *Coroners Act*.
- 3. The Public Guardian and Trustee in possession of the body for the purpose of its burial under the *Crown Administration of Estates Act*.
- 4. An embalmer or funeral director in possession of the body for the purposes of its burial, cremation or other disposition.
- 5. The superintendent of a crematorium in possession of the body for the purposes of its cremation.

**Form of objection**

(5) A person making an objection under this section shall make the objection,

- (a) in writing, and the person shall sign the objection;
- (b) orally, in the presence of at least two witnesses; or
- (c) by e-mail, recorded telephonic message or other recorded message.

**Prohibition**

(6) No person shall object to tissue from another person's body being removed and used after that person's death if he or she has reason to believe that the person who died or whose death is imminent would not have objected to the removal or use.

**4 Section 6 of the Act is amended by striking out “and a consent under this Part has been obtained for a post mortem transplant of tissue from the body” and substituting “and no objection to a post mortem removal and use of tissue from the body has been made under this Part”.**

**5 Section 8 of the Act is repealed.**

**6 The heading to Part II.1 of the Act is repealed and the following substituted:**

**PART II.1  
OBLIGATIONS OF DESIGNATED FACILITIES**

**7 Subsections 8.1 (4) and (5) of the Act are repealed and the following substituted:**

## **Determination**

(4) When the designated facility gives notice to the Network, the Network shall determine whether the facility is required to contact the patient or the patient's substitute concerning the right of the patient or the substitute, as the case may be, to object to the removal and use of tissue from the body of the patient for transplant.

## **Same**

(5) The Network shall make the determination under subsection (4) in consultation with the designated facility.

## **Query about objection**

(5.1) If the Network advises the designated facility that it is required to contact the patient or the patient's substitute, the facility shall make reasonable efforts to ensure that,

(a) the patient or the patient's substitute is contacted to determine whether he or she objects to tissue being removed from the body of the patient after death for transplant; and

(b) the contact is made in a manner that meets the requirements of the Network and by a person who meets such requirements as may be prescribed by the Minister.

## **8 (1) Paragraphs 1 and 2 of section 8.8 of the Act are repealed and the following substituted:**

1. To plan, promote, co-ordinate and support activities relating to the donation of tissue for transplant under Part I.

2. To plan, promote, co-ordinate and support activities relating to the removal of tissue from a human body for transplant or activities relating to education or research under Part II.

2.1 To co-ordinate and support the work of designated facilities in connection with the removal of tissue from a human body for transplant under Part II.

2.2 To establish and maintain a registry of names in respect of persons who have sent to the Network an objection to tissue from their body being removed and used after their death or on whose behalf such an objection has been sent to the Network.

**(2) Paragraph 5 of section 8.8 of the Act is amended by striking out “whether to consent to the donation of tissue” and substituting “whether to object to tissue from a body being removed and used after the person’s death”.**

**(3) Paragraph 6 of section 8.8 of the Act is amended by striking out “donation and use of tissue” and substituting “donation, removal and use of tissue”.**

**(4) Paragraph 7 of section 8.8 of the Act is amended by striking out “donation and use of tissue” at the end and substituting “donation, removal and use of tissue”.**



**(5) Paragraph 8 of section 8.8 of the Act is amended by striking out “the donation of tissue” at the end and substituting “the donation, removal and use of tissue”.**

**9 The Act is amended by adding the following section:**

**Registry**

**8.9.1** (1) The Network shall establish a registry of names of persons who have sent to the Network an objection to tissue from their body being removed and used after their death or on whose behalf such an objection has been sent to the Network.

**Same**

(2) The Network shall enter a name in the registry established under subsection (1) promptly on receiving an objection under subsection 4 (3) or 5 (1).

**Same**

(3) The registry shall indicate the name of the person in respect of whom the objection is made and, if indicated by the person making the objection, whether the objection applies to all tissue or parts of the body or only to specified tissue or parts.

**10 Clauses 11 (1) (a) and (b) of the Act are repealed and the following substituted:**

(a) who has given or refused to give a consent under Part I or who has objected to tissue being removed and used from a human body under Part II;

(b) with respect to whom a consent has been given or an objection has been made; or

**11 Subsection 15 (4) of the Act is repealed.**

**Commencement**

**12 This Act comes into force on the day it receives Royal Assent.**

**Short title**

**13 The short title of this Act is the *Peter Kormos Memorial Act (Trillium Gift of Life Network Amendment)*, 2019.**

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## **APPENDIX D: BILL 205, HUMAN TISSUE AND ORGAN DONATION (PRESUMED CONSENT) AMENDMENT ACT, 2019, AB**

WHEREAS the donation of a person's organs, tissue or body for the purpose of transplantation can save lives;

WHEREAS action must be taken to increase the rates of tissue and organ donation in Alberta; and

WHEREAS the process for deciding to make a donation of a person's tissue, organs or body should be made easier;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

**Amends SA 2006 cH-14.5**

**1 The *Human Tissue and Organ Donation Act* is amended by this Act.**

**2 Section 1 is amended**

**(a) by adding the following after clause (b):**

(b.1) "Chief Medical Officer" means the Chief Medical Officer appointed under the *Public Health Act*;

**(b) by repealing clause (c) and substituting the following:**

(c) "consent" means a consent to donate that meets the requirements of section 9;

**(c) in clause (e) by striking out "section 4 or 5" and substituting "section 4, 4.01 or 5", and**

**(d) by adding the following after clause (I):**

(I.01) "refuse" means a refusal to donate that meets the requirements of section 9;

**3 Section 4 is repealed and the following is substituted:**

**Deceased donor**

**4(1)** For the purpose of transplantation, medical education or scientific research, an adult person may decide to

(a) consent to donate their tissues, organs or body for use upon their death by indicating their consent in accordance with section 9, or

(b) refuse to donate their tissue, organs or body for use upon their death by indicating their refusal in accordance with section 9.

**(2)** A person's tissue, organs and body must only be used upon their death in accordance with the decision given under subsection (1).

**(3)** Subject to subsections (4) and (5), a person in one of the classes described in subsection (4) may make a decision under subsection (1) on behalf of another person

(a) who had not made a decision under subsection (1) at the time of their death,

(b) whose death is imminent and

(i) who, in the opinion of a medical practitioner, is incapable of making a decision due to injury or disease, and

(ii) has not made a decision under subsection (1),

or

(c) who is a minor at the time of their death.

**(4)** A person who is in one of the following classes of persons may, in the order of priority set out in clauses (a) to (e), make a decision on behalf of another person:

(a) firstly, if they are not estranged at the time of making the decision, the spouse or adult interdependent partner of the person;

(b) secondly, an adult child of the person;

(c) thirdly, a parent or guardian of the person;

(d) fourthly, an adult sibling of the person;

(e) any other adult that is the next of kin of that person.

**(5)** A person may not make a decision under subsection (1) on behalf of another person if they have personal knowledge of any of the following:

(a) a person in a higher priority class described in subsection (4) is reasonably available to make the decision;

(b) in the case of a decision to consent to donate, another person who is in the same class or a higher class described in subsection (4) would decide to refuse to donate;

(c) the person on whose behalf they are making a decision would have made a different decision.

### **Presumed consent**

**4.01(1)** If at the time of a person's death no decision has been made with respect to that person under section 4, the person is considered to have, before their death, made the decision to donate their organs and tissues for the purpose of transplantation only.

**(2)** A person is not considered to have made the decision referred to in subsection (1) if

(a) at the time of their death,

(i) they were a minor, or

(ii) they did not reside in Alberta for the 12-month period immediately preceding the day on which they died,

(b) for a significant period before the day on which they died, they were, in the opinion of a medical practitioner, incapable of making a decision described in section 4(1),

or

(c) a person in one of the classes described in section 4(4) provides information that would lead a reasonable person to conclude that, if the deceased person had made a decision, they would have decided to refuse to donate in accordance with section 4(1)(b).

(3) For greater certainty, subsection (1) applies only if a person whose consent to donate is presumed has died.

**4 Section 4.1 is repealed and the following is substituted:**

**Online registry**

**4.1(1)** The Minister must establish an online registry to facilitate the registration and submission of every decision to donate made under section 4(1).

(2) A decision to donate submitted to the online registry must meet the requirements set out in section 9 and in the regulations, if any.

(3) Despite section 12, a consent to donate a person's whole body for the purpose of medical education or scientific research that is registered under subsection (1) may, in accordance with the regulations, if any, be electronically transmitted to a university.

**5 Section 4.2 is amended**

**(a) in subsection (1) by striking out** “that adult shall be asked whether he or she consents to the donation of his or her tissue, organs or body in accordance with section 4(1)(a)” **and substituting** “that adult must be provided an opportunity to make a decision in accordance with section 4(1) and must be informed that if they do not make a decision before their death, they may be presumed to have consented to donate their tissues and organs for the purpose of transplantation in accordance with section 4.01”;

**(b) in subsection (2)**

**(i) by striking out** “If an adult gives his or her consent under subsection (1)” **and substituting** “If, on being informed in accordance with subsection (1), an adult decides to consent to donate or to refuse to donate in accordance with section 4(1)”,

**(ii) in clause (a) by striking out** “information” **and substituting** “decision”, **and**

**(iii) in clause (b) by striking out “the consent of the adult has been given” and substituting “whether the adult has consented to donate or refused to donate”.**

**6 Section 4.3 is amended by striking out “information respecting an adult’s consent under section 4(1)(a)” and substituting “decisions respecting an adult’s consent to donate or refusal to donate in accordance with section 4(1)”.**

**7 Section 7 is repealed and the following is substituted:**

**Mandatory referral**

**7(1)** When a person dies or their death is imminent, the medical practitioner making the determination of death must provide a donation organization, in the circumstances prescribed in the regulations, with the following information:

- (a) the age of the person;
- (b) the cause, or expected cause, of the person’s death;
- (c) the time of death of the person, if death has occurred;
- (d) any available past and current personal information of the person, including medical and social history, that is relevant to their medical suitability for tissue or organ transplantation.

**(2)** A donation organization must consider the medical suitability of the person’s tissue or organs for transplantation by assessing the information provided under subsection (1).

**(3)** A donation organization must confirm whether a decision to donate has been made by the deceased person under section 4, unless it determines the person’s tissue or organs are medically unsuitable for transplantation.

**(4)** Despite subsection (3), a donation organization is not required to confirm whether a decision to donate has been made under section 4 if

- (a) the medical practitioner referred to in subsection (1) advises the donation organization that the medical practitioner has personal knowledge that the deceased person would have made the decision to refuse to donate, or
- (b) the donation organization is already aware the deceased person made a decision to consent to donate or refuse to donate when they were alive that has not been revoked.

**8 Section 8 is amended**

**(a) in subsection (1) by striking out “and” at the end of clause (a), by adding “and” at the end of clause (b) and by adding the following after clause (b):**

- (c) notification to a university of the donation of a body for the purpose of medical education or scientific research in accordance with the regulations, if any.

**(b) in subsection (2) by striking out “section 4(1)(a) that has not been revoked pursuant to section 9(5)” and substituting “section 4(1) that has not been revoked pursuant to section 9(7)”;**

**(c) by repealing subsection (3) and substituting the following:**

**(3)** Despite subsection (1), a person shall not act on a consent to donate if

(a) the person has personal knowledge that the person to whom the donation relates revoked their consent to donate or otherwise objected to the donation proceeding, or

(b) in the case of a consent to donate made in accordance with section 4(3), the person has personal knowledge that a person in the same class or a higher class, as described in section 4(4), other than the person who made the decision to consent to donate, would object to the making of that decision.

**9 Section 9 is repealed and the following is substituted:**

#### **Consent and refusal requirements**

**9(1)** A consent to donate or a refusal to donate under this Act must be

(a) in writing or electronic form,

(b) dated, and

(c) signed

(i) by the person consenting to donate or refusing to donate and a witness, or

(ii) subject to subsection (6), if the person consenting to donate or refusing to donate is unable to sign for any reason, by 2 adult persons who witnessed that person’s oral instructions that they decided to, as applicable, consent to donate or refuse to donate and that they asked to have those instructions documented.

**(2)** A consent to donate or a refusal to donate signed under subsection (1)(c)(ii) must

(a) indicate that each adult person directly witnessed the person’s oral instructions giving consent or refusing consent referred to in that subsection,

(b) identify the manner in which the instructions of the person were received by each witness, and

(c) if a consent to donate is given, in accordance with section 4(3), indicate that 1 witness was knowledgeable about the donation process and advised the person consenting to donate of the nature and consequences of providing their consent.

**(3)** For the purpose of section 4(1)(a), a consent to donate must specify the following:

(a) whether the consent applies to the donor's whole body or to specific tissues, organs or groups of tissues and organs and, if so, specify those tissues, organs, or groups of tissues and organs;

(b) any of the following purposes for which the donor's whole body, or specified tissues, organs or groups of tissues and organs, as applicable, may be used:

(i) medical education;

(ii) scientific research;

(iii) transplantation.

(4) A consent to donate on the form provided on a certification of registration issued under the *Health Insurance Premiums Act* is valid despite it not being dated.

(5) Despite subsection (1)(c)(ii), a consent to donate or refusal to donate provided through the online registry is valid despite it not being signed by a witness.

(6) The following persons are not eligible to witness a consent to donate:

(a) the physician who will remove the tissue or organ, or perform a transplantation of those tissues or organs, to which the consent applies;

(b) the recipient of the transplant referred to in clause (a) or any of their immediate family;

(c) a person who is required to give a consent to donate in respect of the same donation.

(7) A person may, in accordance with the regulations, if any, revoke a consent to donate or a refusal to donate by providing a written revocation that

(a) meets the requirements in subsection (1), and

(b) any additional prescribed requirements.

#### **10 Section 12 is amended**

(a) in subsection (1)(b) by striking out "section 4 or 5" and substituting "section 4, 4.01 or 5";

(b) in subsection (3)(b)(ii) by striking out "section 4(1)(b)" and substituting "section 4(3)".

#### **11 The following is added after section 12.2:**

##### **Quarterly reports**

**12.3(1)** The Chief Medical Officer shall, as soon as practicable after the end of each quarter of every year, prepare and provide the Minister with a report that includes the following information:

(a) the number of deceased persons with tissue or organs that were medically suitable for transplantation, but for which information was not provided to a donation organization under section 7(1) with sufficient time to co-ordinate a donation;

(b) any actions undertaken or proposed to address issues related to the provision of information by a medical practitioner to a donation organization for the purpose of facilitating a donation;

(c) any additional information prescribed by the regulations.

(2) The Chief Medical Officer has the same powers and duties as outlined in the *Public Health Act* for the purpose of carrying out this section.

**12 Section 14 is amended by repealing clause (c).**

**13 Section 14.1 is amended**

**(a) by adding the following after clause (c):**

(c.1) respecting the manner in which a person may submit for registration a consent to donate or refusal to donate to the online registry under section 4.1(2);

(c.2) respecting the electronic transmission of decisions to a university for the purpose of a donation for medical education or scientific research;

(c.3) for the purpose of section 7(1), prescribing the circumstances in which a medical practitioner must provide a donation organization with information when a person dies or their death is imminent;

(c.4) respecting the notification of a university for the purpose of section 8(1)(c);

**(b) in clause (d) by striking out “respecting a request regarding consent to donation” and substituting “respecting a request regarding consent to donate or refusal to donate”;**

**(c) by adding the following after clause (d):**

(d.1) for the purpose of section 9(7), prescribing any additional requirements for the revocation of a consent to donate or a refusal to donate;

**(d) by adding the following after clause (h):**

(i) for the purpose of section 12.3(1)(c), prescribing any additional information to be included in the Chief Medical Officer’s quarterly report.

**14 This Act comes into force on January 1, 2022.**



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## **APPENDIX E: BILL 399, AN ACT TO ESTABLISH A PRESUMPTION OF CONSENT TO ORGAN OR TISSUE DONATION AFTER DEATH, QC**

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

CIVIL CODE OF QUÉBEC

**1.** Article 43 of the Civil Code of Québec is replaced by the following article:

**“43.** A person may, for medical or scientific purposes, give his body or authorize the removal of organs or tissues therefrom. However, for a minor under 14 years of age, the consent of the person having parental authority or of his tutor is required.

The authorization or refusal is expressed verbally before two witnesses, or in writing, and may be revoked in the same manner. The authorization or approval expressed shall be followed, unless there is a compelling reason not to do so.”

**2.** Article 44 of the Code is replaced by the following article:

**“44.** A person of full age is presumed to authorize the removal of organs or tissues from his body.

A part of the body of a deceased minor may be removed, if the wishes of the deceased are not known, with the consent of the person who was or would have been qualified to give consent to care.

The person who requests the removal must take reasonable measures with the persons close to the deceased to ensure that the deceased had not, by any means, refused consent.

The measures provided for in the third paragraph are not required where two physicians attest in writing to the urgency of the operation and the serious hope of saving a human life or improving its quality to an appreciable degree.”

ACT RESPECTING THE RÉGIE DE L’ASSURANCE MALADIE DU QUÉBEC

**3.** Section 2 of the Act respecting the Régie de l’assurance maladie du Québec (chapter R-5) is amended by inserting “and refusal of consent” after “consent” in the seventh paragraph.

**4.** Section 2.0.8 of the Act is amended

(1) by replacing “a person may, at any time after applying to be registered with the Board under section 9 of the Health Insurance Act (chapter A-29), authorize in writing on a consent form provided by the Board for that purpose,” in the first paragraph by “at any time after applying to be registered with the Board under section 9 of the Health Insurance Act (chapter A-29), a person may, in writing on a form provided by the Board for that purpose, authorize or refuse consent to”;

(2) by replacing “Consent may be revoked” in the second paragraph by “These wishes may be changed”.

**5.** Section 2.0.9 of the Act is replaced by the following section:

**“2.0.9.** The form for consenting or refusing consent to the removal of organs or tissues, or the accompanying notice, must inform the person concerned

(1) that, unless the person expressly refuses consent, a person of full age is presumed to authorize the post-mortem removal of organs or tissues;

(2) that the identification information obtained for the carrying out of the Health Insurance Act (chapter A-29) and the information appearing on the form for consenting or refusing consent to the removal of organs or tissues may be sent, on request, to a body that coordinates organ or tissue donations and is designated on the list drawn up by the Minister and published on the Board’s website;

(3) that the person may, at any time, in writing using the form provided by the Board for that purpose, withdraw the decision to authorize or refuse to consent to the removal of organs or tissues; and

(4) that the Board will not solicit the person’s consent again if the person has already given it.”

**6.** Section 2.0.10 of the Act is amended

(1) by inserting “or refusal of consent” after “the consent” in the introductory clause of the first paragraph;

(2) by replacing “consent to” in subparagraph 1 of the first paragraph by “authorization of or refusal of consent to”;

(3) by inserting “and refusal of consent” after “consent” in subparagraph 4 of the first paragraph;

(4) by replacing “the consent form” in the second paragraph by “the form for consenting or refusing consent”.

**7.** Section 2.0.11 of the Act is amended by inserting “or refusal of consent” after “consent”.

**8.** Section 2.0.12 of the Act is amended by inserting “or refusal of consent” after “consent”.

## **ACT RESPECTING HEALTH SERVICES AND SOCIAL SERVICES**

**9.** Section 204.1 of the Act respecting health services and social services (chapter S-4.2) is amended

(1) by replacing “consent for” in subparagraph 1 of the first paragraph by “consent to or refusal of consent to”;

(2) by inserting “and refusal of consent” after “in the consent” in subparagraph 1 of the first paragraph;

(3) by inserting “or if it has been presumed” after “if the consent has been given” in subparagraph 2 of the first paragraph.

## **NOTARIES ACT**

**10.** Section 93 of the Notaries Act (chapter N-3) is amended by replacing “consents to” by “consent to or refusal of consent to”.

**11.** Section 94 of the Act is amended by inserting “consent to or refusal of consent for” after “register of”.

## RÈGLEMENT SUR LES REGISTRES DE LA CHAMBRE DES NOTAIRES DU QUÉBEC

**12.** Section 1 of the Règlement sur les registres de la Chambre des notaires du Québec (chapter N-3, r. 13, French only) is amended

(1) by inserting “et des refus” after “consentements” in the first paragraph;

(2) by replacing “dans le cas d’un donneur” in subparagraph 1 of the second paragraph by “s’il y a consentement ou refus au don d’organes et de tissus”;

(3) by inserting “ou du refus” after “consentement” in subparagraph 2 of the second paragraph.

**13.** Section 2 of the Regulation is amended by replacing “ou consentement” by “, consentement ou refus”.

**14.** Section 5 of the Regulation is amended by inserting “et des refus” after “consentements” in the last paragraph.

**15.** Section 6 of the Regulation is amended by replacing “ou de consentement” in the first paragraph by “, de consentement ou de refus”.

**16.** Section 7 of the Regulation is amended by inserting “ou d’un refus” after “consentement” in the last paragraph.

**17.** Section 8 of the Regulation is amended by inserting “ou de refus” after both occurrences of “consentements” in the last paragraph.

## FINAL PROVISIONS

**18.** The Minister of Health and Social Services must, not later than *(insert the date that is five years after the date of coming into force of this Act)*, report to the Government on the implementation of this Act and subsequently every five years, report to the Government on the carrying out of this Act.

The Minister must table the report in the National Assembly within 30 days or, if the Assembly is not sitting, within 30 days of resumption. The competent committee of the National Assembly shall examine the report.

**19.** This Act comes into force on the date to be set by the Government.

## APPENDIX F: SUMMARY OF CONSENT/DIRECTION IN CANADIAN LEGISLATION

What follows is a table outlining the current requirements for consent/direction for organ donation in each Canadian jurisdiction (other than Manitoba and Nova Scotia):

Province	Legislation	Section	Content
<b>BC</b>	<i>Human Tissue Gift Act</i> , RSBC 1996, c 211	4(1)	<p><b>Consent by person for use of body after death</b></p> <p><b>4 (1)</b> A person who has reached age 19 may consent,</p> <ul style="list-style-type: none"> <li>(a) in writing signed by the person at any time, or</li> <li>(b) orally in the presence of at least 2 witnesses during the person's last illness,</li> </ul> <p>that the person's body or parts of it specified in the consent be used after the person's death for therapeutic purposes, medical education or scientific research.</p>
<b>AB</b>	<i>Human Tissue and Organ Donation Act</i> , RSA 2006, c H-14.5	4(1)	<p><b>Deceased donor</b></p> <p><b>4(1)</b> A person's tissue, organs or body may be donated for transplantation, medical education or scientific research from his or her deceased body if a consent is given</p> <ul style="list-style-type: none"> <li>(a) where that person is an adult, by the adult, or</li> <li>(b) by a person in accordance with subsection (2)</li> </ul>
<b>SK</b>	<i>The Human Tissue Gift Act</i> , 2015, SS 2015 c H-15.1	7	<p><b>Consent by person for use of body after death</b></p> <p><b>7(1)</b> Any adult who has the capacity to consent and who is able to make a free and informed decision may consent, in any of the following manners, to his or her body or the part of his or her body specified in the consent being used after his or her death for the purposes of transplant, medical education or scientific research:</p>

			<p>(a) in writing signed and dated by him or her at any time;</p> <p>(b) orally in the presence of at least two witnesses during his or her last illness;</p> <p>(c) in a manner prescribed in the regulations.</p>
<b>ON</b>	<i>Trillium Gift of Life Network Act</i> , RSO 1990, c H.20	4(1)	<p><b>Consent by person for use of his or her body after death</b></p> <p><b>4 (1)</b> Any person who has attained the age of sixteen years may consent,</p> <p>(a) in a writing signed by the person at any time; or</p> <p>(b) orally in the presence of a least two witnesses during the person's last illness,</p> <p>that the person's body or the part or parts thereof specified in the consent be used after the person's death for therapeutic purposes, medical education or scientific research.</p>
<b>QC</b>	<i>Civil Code of Quebec</i>	43 and 44	<p><b>43.</b> A person of full age or a minor 14 years of age or over may, for medical or scientific purposes, give his body or authorize the removal of organs or tissues therefrom. A minor under 14 years of age may also do so with the consent of the person having parental authority or of his tutor.</p> <p>These wishes are expressed verbally before two witnesses, or in writing, and may be revoked in the same manner. The wishes expressed shall be followed, unless there is a compelling reason not to do so.</p> <p><b>44.</b> A part of the body of a deceased person may be removed, if the wishes of the deceased are not known or cannot be presumed, with the consent of the person who was or would have been qualified to give consent to care.</p>

<b>NB</b>	<i>Human Tissue Gift Act</i> , RSNB 2014, c 113	4(1)	<p><b>Consent by person for use of body after death</b></p> <p><b>4(1)</b> A person who has attained the age of 19 years may consent that his or her body or a specified part or parts of his or her body be used after his or her death for therapeutic purposes, or for the purposes of medical education or scientific research, either</p> <ul style="list-style-type: none"> <li>(a) in writing at any time, or</li> <li>(b) orally in the presence of at least two witnesses during his or her last illness.</li> </ul>
<b>PEI</b>	<i>Human Tissue Donation Act</i> , c H-12.1	3(1)	<p><b>3. Consent to transplant after death</b></p> <p>(1) A person who is sixteen years of age or over and understands the nature and consequences of transplanting tissue from his or her body after death may consent to the removal of tissue or such tissue as may be specified in the consent from his or her body after death for the purpose of implanting the tissue in a living human body.</p>
<b>NL</b>	<i>Human Tissue Act</i> , RSNL 1990, c H-15	6(1)	<p><b>Use of body after death</b></p> <p><b>6.</b> (1) A person who has reached the age of 19 years may consent</p> <ul style="list-style-type: none"> <li>(a) in a writing signed by him or her at any time; or</li> <li>(b) orally in the presence of at least 2 witnesses during his or her last illness</li> </ul> <p>that his or her body or the part of the body specified in the consent be used after his or her death for therapeutic purposes, medical education or scientific research.</p>
<b>YU</b>	<i>Human Tissue Gift Act</i> , RSY 2002, c 117	4(1)	<p><b>Consent</b></p> <p><b>4(1)</b> Any person who has reached the age of majority may consent</p>

			<p>(a) in a writing signed by them at any time; or</p> <p>(b) orally in the presence of at least two witnesses during the person's last illness</p> <p>that the person's body or the part or parts thereof specified in the consent be used after their death for therapeutic purposes, medical education, or scientific research.</p>
<b>NWT</b>	<i>Human Tissue Donation Act</i> , SJWT 2014, c 30	4(1)	<p><b>Consent to transplant after death</b></p> <p><b>4.</b> (1) A person who is at least 16 years of age and understands the nature and consequences of transplanting tissue from his or her body after death may consent to the removal of specified tissue from his or her body after death for the purpose of transplantation.</p>
<b>NU</b>	<i>Consolidation of Human Tissue Act</i> , RSNWT 1988, c H-6	1	<p>Direction for use of body for medical purposes</p> <p><b>1.</b> (1) A person who is 19 years of age or over may</p> <p>(a) in writing at any time, or</p> <p>(b) orally in the presence of at least two witnesses during his or her last illness,</p> <p>direct that his or her body or any specified part or parts of it be used after his or her death for</p> <p>(c) therapeutic purposes,</p> <p>(d) purposes of medical education, or</p> <p>(e) purposes of medical research.</p>