Manitoba Law Reform Commission

PRESUMED CONSENT ORGAN AND TISSUE DONATION

FINAL REPORT

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Please note that the information provided in this Report does not necessarily represent the views of those who have so generously assisted the Commission in this project.

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EXECUTIVE SUMMARY

Each year, thousands of Canadians find themselves on waitlists to receive donations of vital organs, including kidneys, livers, hearts, lungs, and pancreases. However, there is a gap between the number of organs and tissues needed by Canadians and the number of organs and tissues available for donation and transplantation. Accordingly, governments continue to explore ways in which to maximize the availability of organs and tissues for transplantation, to ensure the loss of fewer Canadians to donation systems that are unable to support them.

One such method, which has already gained traction in a number of jurisdictions outside of Canada, and which, as of January 2021, has been introduced in Nova Scotia, is the implementation of a legislative system of "presumed consent" or "opt-*out*" organ and tissue donation. Under such a system, 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. This type of system differs from all other current Canadian organ and tissue donation systems, including Manitoba's, which maintain "express consent" or "opt-in" systems of organ and tissue donation. Under these "express consent" or "opt-in" systems, legislation requires the explicit consent of donors for the use of any parts of their bodies after death for therapeutic purposes, medical education or scientific research. Under *The Human Tissue Gift Act* ("*HTGA*"), Manitoba's current organ and tissue donation legislation, as under all analogous Canadian legislation aside from Nova Scotia's, individuals will not be candidates for after-death organ or tissue donation without this express consent.

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 rates for Canadians in recent years have begun to call this consent regime into question. 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 Quebec, New Brunswick, Prince Edward Island and, until recently, Ontario and Alberta, in the process of following suit.[1]

The Manitoba Law Reform Commission (the "Commission") has considered how the *HTGA* should be amended if the government were to decide to switch from an express consent to a presumed consent statutory organ and tissue donation framework. Accordingly, the Commission takes no position in this Report on whether or not to recommend the enactment of such legislation, but on what elements ought to be included in such legislation if it were to be implemented, and how these elements should be crafted.

[1]Since the publication of the Consultation Paper, the first session of the 42nd Parliament of Ontario and the first session of the 30th Legislature of Alberta were prorogued, killing both Ontario's and Alberta's Bills on the respective Order Papers.

Ultimately, the Commission outlines nineteen recommendations in respect of the mechanisms for indicating consents and refusals to organ and tissue donation under such a framework, the exceptions to presumed consent under said framework, and the role of proxies or individuals who may consent or refuse to organ and tissue donation on someone else's behalf. The key recommendations are summarized below.

In terms of mechanisms for indicating consents and refusals, the Commission recommends the implementation of a central registry in which consents and refusals respecting organ and tissue donation can be registered. The Commission recommends that Manitobans be able to register their consents and refusals in said registry in a number of different ways, including (1) by indicating the consent or refusal in whatever standardized written or electronic forms are created for this purpose; (2) by indicating the consent or refusal to a Manitoba Health and Seniors Care representative or Manitoba Public Insurance representative when updating or applying for the issuance of a Manitoba Health Card or when applying for the issuance or renewal of a Manitoba driver's license or Manitoba Identification Card, respectively; (3) by indicating the consent or refusal in a signed, dated, and witnessed written document that is delivered to the body that is responsible for maintaining the registry; and (4) by indicating the consent or refusal orally in the presence of witnesses, and detailing this oral instruction in a signed, dated, and witnessed written document that is delivered to the body that is responsible for maintaining the registry.

The Commission recommends that reasonable efforts must be made to determine whether an individual consents or refuses to organ and tissue donation prior to determining that deemed consent has been triggered and that donation and transplantation activities can commence. Reasonable efforts would include checking the registry for a consent or refusal, and where no consent or refusal has been registered, and where it is deemed appropriate, asking the individual or their alternate decision maker whether they wish to make a direction regarding organ and tissue donation. If after taking these steps, neither a consent nor refusal is obtained, the Commission recommends that consent should be presumed and that organ donation activities may commence.

With respect to exceptions to a presumed consent framework, the Commission recommends that an individual should not be deemed to consent to organ and tissue donation in the ordinary course where: (1) they have died and for a significant period before dying they lacked the capacity to make a decision respecting donation after death; (2) they have died and were not ordinarily resident in the province for a period of at least 12 months immediately before dying; and (3) they were under the age of majority at the time of death.

The Commission also recommends that under certain circumstances, certain individuals should be able to consent or refuse to organ and tissue donation on another individual's behalf. Specifically, the Commission recommends that where an individual has died, either their proxy (where they are over the age of 18), their nearest relative (where a proxy is not authorized to act or is unavailable), or the person lawfully in possession of their body or the Inspector of Anatomy (where there is no nearest relative or the nearest relative is unavailable) may make such a decision on their behalf.

More specifically, these individuals may make such a decision on a deceased person's behalf where: (1) they provide information that would lead a reasonable person to conclude that the deceased person would have made a different decision respecting donation after death than the decision recorded in the registry or presumed, in accordance with the presumed consent regime; or (2) the deceased person has not given a direction regarding donation after death but deemed consent does not apply because of an exception to the presumed consent framework (i.e. they lacked capacity, they were not ordinarily resident in Manitoba, or they were a child).

Where an individual is an adult and has not yet died but death is deemed to be imminent and inevitable, the Commission recommends that either their proxy (where they are over the age of 18), or their nearest relative (where a proxy is not authorized to act or is unavailable), may consent or refuse to organ and tissue donation on their behalf. More specifically, these individuals may make such a decision on the dying adult's behalf where: (1) they provide information that would lead a reasonable person to conclude that the dying person would have made a different decision respecting donation after death than the decision recorded in the registry or that will be presumed upon their death, in accordance with the presumed consent regime; or (2) the dying person has not given a direction regarding donation after death but deemed consent will not apply because of an exception to the presumed consent framework (i.e. they lacked capacity, they were not ordinarily resident in Manitoba, or they were a child).

Lastly, the Commission recommends that 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 dying minor's nearest relative should be empowered to make decisions regarding organ and tissue donation on their behalf.

Of the Commission's other incidental recommendations in terms of who may make decisions on another individual's behalf is a recommendation to expand the definition of "nearest relative" that currently exists in the *HTGA*. This expansion would include the addition of less traditionally recognized family members like a person standing in *loco parentis*, and more distantly related family members such as grandparents, grandchildren, aunts and uncles, and nieces and nephews.

Finally, and of particular importance, is the Commission's recommendation that in crafting any presumed consent organ and tissue donation legislation, Manitoba ought to consult with Indigenous communities in the province to consider and address how Indigenous laws, culture, and experiences will impact the ways that Indigenous people will be affected by such legislation. Additionally, Manitoba ought to consult with advocates working with the homeless and under-housed populations to understand how potential legislative changes in this area may impact those populations. The Commission notes that without the benefit of such consultation at its disposal today, it makes the recommendations in this Final Report tentatively, recognizing that additional and alternative changes will likely need to be implemented.

RÉSUMÉ

Chaque année, des milliers de Canadiens se retrouvent sur des listes d'attentes pour recevoir des dons d'organes vitaux, notamment des reins, des foies, des cœurs, des poumons et des pancréas. Cependant, il y a un écart entre le nombre d'organes et de tissus dont les Canadiens ont besoin et la quantité disponible à des fins de dons et de transplantation. En conséquence, les gouvernements continuent d'explorer des façons de maximiser le nombre d'organes et de tissus pouvant être prélevés, afin de perdre le moins de Canadiens possible du fait de systèmes de dons incapables de les aider.

L'une de ces méthodes, qui connaît déjà de l'engouement à l'extérieur du Canada, et que la Nouvelle-Écosse a introduite en janvier 2021, est la mise en œuvre d'un mécanisme législatif de « consentement présumé », ou de « retrait de consentement », au don d'organes et de tissus. Dans le cadre de ce mécanisme, lorsqu'il n'existe aucun document attestant la décision d'une personne quant au don d'organes et de tissus, son consentement sera considéré avoir été donné en vertu de la législation. Cette approche diffère de tous les autres mécanismes canadiens actuels en matière de dons d'organes et de tissus, y compris celui du Manitoba, lesquels utilisent des principes de « contentement exprès » au don ou d'« inscription ». Ces mécanismes s'articulent sur l'exigence par la législation du consentement explicite des donneurs à l'utilisation après leur décès d'une quelconque partie de leur corps à des fins thérapeutiques, d'enseignement dans le domaine médical ou de recherche scientifique. En vertu de la loi actuelle du Manitoba en matière de dons d'organes et de tissus (la Loi sur les dons de tissus humains), et de toutes les lois canadiennes semblables à part celle de la Nouvelle-Écosse, une personne ne peut être candidate au don d'organes ou de tissus sans avoir donné son consentement exprès.

Ces dispositions ont fait du Canada un territoire où il est nécessaire de donner explicitement son consentement pour qu'il soit possible de procéder au don d'organes et de tissus et à leur transplantation. Des voix se sont cependant élevées dans les dernières années pour remettre en question ce régime afin de faciliter les dons d'organes et de tissus pour les Canadiens.

En conséquence, le Canada est en train de connaître une évolution législative vers le principe du consentement présumé aux dons, la Nouvelle-Écosse ayant été la première province à mettre en œuvre ce régime, et le Québec, le Nouveau-Brunswick, l'Île-du-Prince-Édouard et, jusqu'à tout récemment, l'Ontario et l'Alberta, étant en voie de l'adopter[2].

La Commission de réforme du droit du Manitoba (la « Commission ») a choisi d'examiner les modifications qui devraient être apportées à la Loi sur les dons de tissus humains si le gouvernement décidait de faire passer le cadre législatif des dons d'organes et de tissus du consentement exprès au consentement présumé. Ainsi, la Commission n'exprime aucune opinion

[2] Depuis la publication du Document de consultation, la première session de la 42e législature de l'Ontario et la première session de la 30e législature de l'Alberta ont été prorogées, faisant ainsi mourir les projets de loi de l'Ontario et de l'Alberta aux Feuilletons concernés.

dans le présent rapport quant à la question de recommander ou non une telle législation, mais aborde les éléments que celle-ci devrait comprendre si elle était mise en œuvre, et la façon de rédiger les dispositions concernées.

En fin de compte, la Commission émet 19 recommandations concernant, dans un tel cadre, les mécanismes d'indication du consentement et du refus visant le don d'organes et de tissus, les exceptions à la présomption de consentement et le rôle des mandataires ou des personnes pouvant consentir aux dons d'organes et de tissus ou les refuser pour le compte d'une autre personne. Les principales recommandations sont résumées ci-dessous.

En termes de mécanismes d'indication du consentement et du refus visant le don d'organes et de tissus, la Commission recommande la mise en œuvre d'un registre central permettant d'enregistrer les intentions à cet égard. La Commission recommande que les Manitobains soient en mesure d'enregistrer leurs consentements et leurs refus dans un tel registre de différentes façons, notamment : (1) en indiquant leur consentement ou leur refus au moyen d'un formulaire papier ou électronique normalisé, créé à cette fin; (2) en exprimant leur consentement ou leur refus à un représentant de Santé et Soins aux personnes âgées Manitoba ou à un représentant de la Société d'assurance publique du Manitoba lorsqu'ils mettent à jour ou demandent l'émission de leur carte de santé du Manitoba ou lorsqu'ils demandent l'émission ou le renouvellement de leur permis de conduire ou de leur carte d'identité du Manitoba; (3) en indiquant leur consentement ou leur refus dans un document signé, daté et attesté par témoin transmis à l'organisme chargé de gérer le registre; (4) en exprimant oralement leur consentement ou leur refus en présence de témoins et en détaillant cette directive dans un document signé, daté et attesté par témoin remis à l'organisme chargé de gérer le registre.

La Commission recommande que des efforts raisonnables soient consacrés à établir si une personne a consenti au don d'organes et de tissus ou l'a refusé avant de décider du consentement implicite et d'amorcer les activités de don et de prélèvement.

Ces efforts raisonnables devraient comprendre la vérification de la présence ou de l'absence d'un consentement ou d'un refus dans le registre, ainsi que, en l'absence d'un consentement ou d'un refus et dans les cas jugés appropriés, la demande à la personne concernée ou à son mandataire s'ils souhaitent donner une directive concernant le don d'organes et de tissus. Si aucun consentement ni refus n'est obtenu après ces étapes, la Commission recommande la présomption du consentement et le début des activités de don d'organes.

En ce qui concerne les exceptions à un cadre législatif de consentement présumé, la Commission recommande qu'une personne décédée ne soit pas présumée avoir consenti au don d'organes et de tissus dans les cas normaux suivants : (1) pendant une période importante avant son décès, elle n'était pas capable de prendre une décision à l'égard de ce don après son décès; (2) elle n'était pas une résidente habituelle du Manitoba pendant au moins les 12 mois précédant immédiatement son décès; (3) elle n'avait pas atteint l'âge de la majorité au moment de son décès; (4) à son décès, elle

avait sur soi une indication écrite de consentement au don d’organes et de tissus ou de refus de celui-ci, sous la forme d’un document signé, daté et attesté par un témoin majeur compétent.

La Commission recommande également que dans des circonstances particulières, certaines personnes puissent avoir le droit de consentir au don d’organes et de tissus pour le compte d’une autre personne, ou de le refuser.

La Commission recommande précisément que lorsqu’une personne décède, son mandataire (si elle avait au moins 18 ans), son plus proche parent (si un mandataire n’est pas autorisé à agir ou est indisponible) ou la personne légalement en possession de son corps ou l’inspecteur de l’Anatomie (lorsqu’il n’y a pas de plus proche parent ou que celui-ci est indisponible) puisse prendre une telle décision pour son compte. Plus particulièrement, ces personnes peuvent prendre cette décision au nom du défunt dans les cas suivants : (1) le défunt a enregistré une décision concernant le don après sa mort, mais l’autre décideur a des renseignements qui pourraient mener une personne raisonnable à conclure que le défunt aurait pris une autre décision; (2) le défunt n’a pas enregistré de décision concernant le don après sa mort, ce qui entraîne un consentement implicite, mais l’autre décideur a des renseignements qui pourraient entraîner une personne raisonnable à conclure que le défunt n’aurait pas consenti au don après sa mort; (3) le défunt a enregistré une décision concernant le don après sa mort, mais cette décision ne peut pas être appliquée, car il n’était pas capable d’en comprendre la nature et les effets au moment où il l’a prise; (4) le défunt n’a pas enregistré de décision concernant le don après sa mort, mais le consentement implicite ne peut s’appliquer en raison d’une exception au cadre de la présomption de consentement.

Lorsqu’une personne est majeure et n’est pas encore décédée, mais que son décès est imminent et inévitable, la Commission recommande que son mandataire (si elle a au moins 18 ans) ou son plus proche parent (lorsqu’un mandataire n’est pas autorisé à agir ou est indisponible) puisse consentir au don d’organes et de tissus pour son compte, ou le refuser. Plus particulièrement, ces personnes peuvent prendre cette décision au nom de la personne mourante dans les cas suivants : (1) le mourant n’a pas enregistré de décision concernant le don après sa mort, et un médecin est d’avis qu’il est incapable de prendre une décision en raison de sa blessure ou de sa maladie; (2) le mourant a enregistré une décision concernant le don après sa mort, mais cette décision ne peut pas être appliquée, car il n’était pas capable d’en comprendre la nature et les effets quand il l’a prise, et un médecin est d’avis que le mourant est incapable de prendre une décision en raison de sa blessure ou de sa maladie.

Enfin, la Commission recommande que si une personne a moins de 16 ans et qu’un médecin est d’avis que son décès est imminent et inévitable, son plus proche parent soit en droit de prendre des décisions concernant le don d’organes et de tissus pour son compte.

Parmi les autres recommandations accessoires de la Commission relatives aux personnes pouvant prendre des décisions pour le compte d’une autre personne, une recommandation vise à élargir la définition de « plus proche parent » existant actuellement dans la Loi sur les dons de tissus humains. Cet élargissement comprendrait l’ajout de membres de la famille moins

traditionnellement reconnus, comme une personne tenant lieu de parent, ainsi que de membres de la famille plus éloignés comme les grands-parents, les petits-enfants, les tantes et les oncles, les nièces et les neveux.

Finalement, la Commission émet une recommandation d'une importance particulière en suggérant que dans sa rédaction d'un texte législatif relatif au consentement présumé au don d'organes et de tissus, le Manitoba devrait consulter les collectivités autochtones de la province afin d'examiner et de traiter l'incidence d'une telle législation sur les Autochtones en fonction de leurs lois, leur culture et leurs expériences.

De plus, le Manitoba devrait consulter des défenseurs des personnes sans abri et mal logées afin de comprendre l'incidence des changements législatifs potentiels dans ce domaine sur ces personnes. La Commission remarque que, en l'absence aujourd'hui du résultat de telles consultations, les recommandations de ce rapport final n'ont qu'une valeur suggestive et elle reconnaît que des modifications additionnelles ou différentes devront probablement être apportées.

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, and pancreases.[3] Of these thousands of patients, many of whom remain on the waitlist, 249 did not survive the wait.[4] 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.[5] This gap is evident in Manitoba both in respect of organ and tissue donation[6], with "the demand for organ and tissue [exceeding] the availability of potential donors."[7]

In order to narrow this gap, governments continue to explore ways in which to maximize the availability of organs and tissues for transplantation.[8] 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 and tissue donation, which differs from Manitoba's current system, governed by *The Human Tissue Gift Act*.[9] 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

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[3] 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>.
[4] *Ibid*.
[5] 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 [*Statistics, Trends and Comparisons*].
[6] Tissue Bank Manitoba explains that organ donation "is when an organ (for example, heart, lung or kidney) is removed from a person who has died and is transplanted into a living person," whereas tissue donation "is when tissues in the body (for example, skin, corneas or bone) are removed from a person who has died and is transplanted into a living person." See "Donating Tissues and Organs", online: *Shared Health Manitoba* <https://sharedhealthmb.ca/services/tissue-bank-manitoba/donating-tissues-and-organs/> [Donating Tissues and Organs].
[7] 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> [MB Task Force].
[8] 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.
[9] *The Human Tissue Gift Act*, SM 1987-88, c 39 [*HTGA*] (see Appendix A).

purposes, medical education or scientific research.[10] However, in January of 2021, Nova 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,*[11] 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.[12] 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."[13] Similar presumed consent legislation is also currently being considered by the legislatures of Quebec, New Brunswick, and Prince Edward Island. Until recently, similar legislation was also being considered in Ontario and Alberta.

In light of the hundreds of Manitobans currently on transplantation waitlists, and the reform efforts in other Canadian jurisdictions, the Commission released a Consultation Paper in May 2021 that asked the question: *If Manitoba were to amend The Human Tissue Gift Act to implement a system of presumed consent organ and tissue donation, how should it amend this legislation?*

This Consultation Paper invited readers to provide their comments on ten issues for discussion. An online survey was also created to canvass the public on these ten issues. The feedback received through this consultation process assisted the Commission in crafting the recommendations for legislative change contained in this Final Report.

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 sets out the recommended reforms to Manitoba's legal framework for organ and tissue donation should the government decide to amend the *HTGA* to introduce a regime of presumed consent. Chapter 5 provides a summary of the recommendations contained throughout the Final Report.

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

[11] *Human Organ and Tissue Donation Act*, RNS 2019, c 6 [NS, *HOTDA*] (see Appendix B).

[12] 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> [NSDHW Information Guide].

[13] "Changes to organ and tissue donation", online: *Government of Nova Scotia* <novascotia.ca/organ-and-tissue-donation-changes/>.

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.[14] While in practice, there are several different types of donors, this Report will focus exclusively on deceased donors, defined as "an individual who becomes a donor following death, either brain death or cardiac death."[15] The reason that the focus is on deceased donors in particular is because consent can only be presumed under a presumed consent framework after an individual has died.

In Canada, organ and tissue donation and transplantation is governed in part by provincial and territorial governments, and in part by the federal government, with support from local organ and tissue donation organizations and programs, as well as Canadian Blood Services ("CBS")[16], an independent, non-profit national organization that provides lifesaving products and services surrounding transfusion and transplantation.[17]

A. Provincial/Territorial Governance of Organ and Tissue Donation

Organ and tissue donation in Canada is mainly 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.[18] 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;
- requires the protection of private information;
- sets requirements for the determination of death;

[14] *HTGA*, *supra* note 8.
[15] *Statistics, Trends and Comparisons*, *supra* note 4 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 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 "Deceased Organ Donor Potential in Canada" (December 2014) at 5, online (pdf): *Canadian Institute for Health Information* <secure.cihi.ca/free_products/OrganDonorReport_ENweb.pdf>.
[16] Canada, House of Commons, *Organ Donation in Canada: Report of the Standing Committee on Health,* 42nd Parl, 1st Sess, September 2018 at 7 [Standing Committee on Health].
[17] "About us", online: *Canadian Blood Services* <www.blood.ca/en/about-us>.
[18] 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> [*ULCC Act*].

• prohibits the commercialization (buying and selling) of organs and tissues for transplantation, research and medical education; and
• imposes penalties for contravening the Act.[19]

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.[20]

i. Manitoba

In Manitoba, organ and tissue donation is governed by the *HTGA*, which, in keeping with the Uniform Act, requires Manitobans to expressly consent to organ and tissue donation if they wish to become donors after death.[21] 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.[22]

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

[19] Standing Committee on Health*, supra* note 15 at 9.
[20] *ULCC Act, supra* note 17, s 3(1).
[21] On three occasions, the Honourable Mr. Steven Fletcher proposed Private Member's Bills intended to amend the *HTGA* of Manitoba 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.
[22] *HTGA, supra* note 8, ss 2(1), 2(2).

the body for the purposes specified in the direction.[23] 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.[24]

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 dying persons under the age of 16 (s. 3(4)).

In accordance with s. 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.[25]

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.[26]

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

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[23] *Ibid,* s 2(3).
[24] *Ibid.*
[25] *Ibid,* s 3(1.1).
[26] *Ibid,* s 3(2).

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.[27]

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.[28]

Like a consent provided by an individual, directions made by these other individuals on behalf of a deceased or dying person provide 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.[29] In accordance with the *HTGA,* this is the case except where the person proposing to act upon the direction has reason to believe 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, that the deceased person, if living, would have objected thereto, or that an inquiry or investigation under *The Fatality Inquiries Act*[30] may be required to be held respecting the cause and manner of death.[31]

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.[32] 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 s. 2 of the *HTGA*.[33] If the agency cannot find a direction promptly, the agency must decide whether the circumstances are appropriate to make a request for such direction.[34]

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 s. 2 or, alternatively, must ask his or her proxy or nearest relative whether they wish to make a direction under s. 3(3).[35]

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[27] *Ibid,* s 3(3.1).
[28] *Ibid*, s 3(4).
[29] *Ibid,* s 3(5).
[30] SM 1989-90, c 30.
[31] *HTGA, supra* note 8, s 3(5).
[32] *Ibid,* s 4(1).
[33] *Ibid,* s 4(2).
[34] *Ibid,* s 4(3).
[35] *Ibid,* s 4(4)(a).

Where a request is deemed appropriate in the case of a deceased person, the agency must ask the deceased 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 s. 3.[36]

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.[37]

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.[38] 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."[39] Where consent for donation is granted, designated health care facilities work with human tissue gift agencies such as Transplant Manitoba and the Tissue Bank of Manitoba to facilitate donation and transplantation.[40]

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.[41] The Task Force reported that there is a critical need in Manitoba to increase the number of registered 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.[42]

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

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[36] *Ibid,* s 4(4)(b).
[37] *Ibid,* s 4(5).
[38] MB Task Force, *supra* note 6 at 7.
[39] "Frequently Asked Questions: About the Sign up for Life Registry", online: *Sign Up for Life* <www.signupforlife.ca/faq.html>.
[40] "Organ and Tissue Donation", online: *Government of Manitoba* <www.gov.mb.ca/health/donor.html>.
[41] MB Task Force, *supra* note 6 at 7.
[42] *Ibid*.

other steps such as the implementation of a presumed consent regime are warranted.[43] 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.[44]

ii. Other Canadian Provinces and Territories

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. The current requirements for consent/direction are outlined in the following provisions of the respective provincial and territorial statutes:

Province	Legislation	Section	Content
BC	*Human Tissue Gift Act,* RSBC 1996, c 211	4(1)	**Consent by person for use of body after death** **4** (1) A person who has reached age 19 may consent, (a) in writing signed by the person at any time, or (b) orally in the presence of at least 2 witnesses during the person's last illness, 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.
AB	*Human Tissue and Organ Donation Act,* RSA 2006, c H-14.5	4(1)	**Deceased donor** **4(1)** 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 (a) where that person is an adult, by the adult, or (b) by a person in accordance with subsection (2)

[43] *Ibid* at 23. Importantly, Nova Scotia's presumed consent regime was not in effect at the time of the publication of this report.
[44] *Ibid*.

SK	*The Human Tissue Gift Act,* 2015, SS 2015 c H-15.1	7	**Consent by person for use of body after death** **7(1)** 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: (a) in writing signed and dated by him or her at any time; (b) orally in the presence of at least two witnesses during his or her last illness; (c) in a manner prescribed in the regulations.
ON	*Trillium Gift of Life Network Act,* RSO 1990, c H.20	4(1)	**Consent by person for use of his or her body after death** **4 (1)** Any person who has attained the age of sixteen years may consent, (a) in a writing signed by the person at any time; or (b) orally in the presence of a least two witnesses during the person's last illness, 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.
QC	*Civil Code of Quebec,* CCQ-1991	43	**43.** 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. 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.
NB	*Human Tissue Gift Act*, RSNB 2014, c 113	4(1)	**Consent by person for use of body after death** **4(1)** 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 (a) in writing at any time, or (b) orally in the presence of at least two witnesses during his or her last illness.
PEI	*Human Tissue Donation Act,* c H-12.1	3(1)	**3. Consent to transplant after death** (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.
NL	*Human Tissue Act,* RSNL 1990, c H-15	6(1)	**Use of body after death** **6.** (1) A person who has reached the age of 19 years may consent (a) in a writing signed by him or her at any time; or (b) orally in the presence of at least 2 witnesses during his or her last illness 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.
YU	*Human Tissue Gift Act,* RSY 2002, c 117	4(1)	**Consent** **4(1)** Any person who has reached the age of majority may consent (a) in a writing signed by them at any time; or (b) orally in the presence of at least two witnesses during the person's last illness 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.
NWT	*Human Tissue Donation Act,* SNWT 2014, c 30	4(1)	**Consent to transplant after death** **4.** (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.

NU	*Consolidation of Human Tissue Act,* RSNWT 1988, c H-6	1	Direction for use of body for medical purposes **1.** (1) A person who is 19 years of age or over may (a) in writing at any time, or (b) orally in the presence of at least two witnesses during his or her last illness, direct that his or her body or any specified part or parts of it be used after his or her death for (c) therapeutic purposes, (d) purposes of medical education, or (e) purposes of medical research.

B. Federal Governance of Organ and Tissue Donation

The federal government is responsible for ensuring the general safety of organs and tissues that are distributed for transplantation[45] under the *Safety of Human Cells, Tissues and Organs for Transplantation Regulations*,[46] a regulation of the *Food and Drugs Act.*[47] 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.[48] These regulations also ensure that all Canadian establishments that distribute cells, tissues or organs operate in accordance with standardized quality assurance programs.[49] Moreover, under the *Canada Health Act*,[50] the federal government is responsible for providing financial support to the provinces and territories so that they may administer and provide health care services such as organ and tissue 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:

- its efforts to promote interprovincial organ donation and transplantation;[51]

[45] Standing Committee on Health*, supra* note 15 at 7.
[46] *Safety of Human Cells, Tissues and Organs for Transplantation Regulations*, SOR/2007-118 [*Safety of Human Cells Regulations*].
[47] RSC 1985, c F-27.
[48] *Safety of Human Cells Regulations, supra* note 44.
[49] *Ibid.*
[50] *Canada Health Act,* RSC, 1985, c C-6.
[51] 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 Standing Committee on Health*, supra* note 15 at 9.

- 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;[52] and
- its data collection and national performance reporting related to organ donation and transplantation in Canada.[53]

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.[54]

While Canada has been recognized as an "express consent" jurisdiction for organ and tissue donation and transplantation, movements to improve organ and tissue donation rates 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 and tissue 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 Quebec, New Brunswick, Prince Edward Island, and until recently, Ontario and Alberta, attempting to follow suit.[55] Representatives of the health care sectors in other Canadian jurisdictions such as British Columbia and Newfoundland and Labrador have indicated that they will be monitoring the situation in Nova Scotia closely to evaluate the effects of its presumed consent legislation before making any decisions about implementing such a framework in their own jurisdiction.[56]

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[52] The CCDT was an advisory body to the Conference of Deputy Minister 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 *Statistics, Trends and Comparisons, supra* note 4 at 1.
[53] Standing Committee on Health*, supra* note 15 at 10.
[54] *Ibid* at 1.
[55]Bill 399, *An Act to establish a presumption of consent to organ or tissue donation after death*, 1st Sess, 42nd Leg, Quebec, 2019 [QC, Bill 399] (see Appendix C); Bill 61, *An Act to Amend the Human Tissue Gift Act*, 1st Sess, 60th Leg, New Brunswick, 2021 (second reading 13 May 2021), online (pdf): <www.gnb.ca/legis/bill/pdf/60/1/Bill-61.pdf> [perma.cc/755Q-8DLW] [NB, Bill 61] (See Appendix D); Bill 117, *Human Organ and Tissue Donation Act*, 2nd Sess, 66th Leg, Prince Edward Island, 2021 (first reading 20 Oct 2021), online (pdf): <https://docs.assembly.pe.ca/download/dms?objectId=7c3164ff-1d4b-446e-9c75-8d4314a1d874&fileName=bill-117.pdf> [PEI, Bill 117] (See Appendix E); Bill 91, *Peter Kormos Memorial Act (Trillium Gift of Life Network Amendment)*, 1st Sess, 42nd Leg, Ontario, 2019 [ON, Bill 91] (See Appendix F); Bill 205, *Human Tissue and Organ Donation (Presumed Consent) Amendment Act*, 1st Sess, 38th Leg, Alberta, 2019 [AB, Bill 205] (See Appendix G).
[56] See Angela Jung, "B.C. transplant recipient encouraged by Nova Scotia's new opt-out program", *CTV News* (22 January 2021), online: <bc.ctvnews.ca/b-c-transplant-recipient-encouraged-by-nova-scotia-s-new-opt-out-program-1.5279167> [perma.cc/69MX-2ESB]; "P.E.I. watching 'very closely' as Nova Scotia enacts new organ donation system", *CBC News* (8 February 2021), online: <www.cbc.ca/news/canada/prince-edward-island/pei-organ-donations-nova-scotia-presumed-consent-1.5906265> [perma.cc/8YVS-5PDC]; "N.L. needs organ donor education before an opt-out program, experts say", *CBC News* (9 April 2019), online:

The following chapter will explore the legislative reform efforts taking place in Canada, as well as reforms in jurisdictions outside of Canada.

<www.cbc.ca/news/canada/newfoundland-labrador/organ-donation-nl-education-needed-1.5090161> [perma.cc/3RMZ-97PS].

CHAPTER 3: REFORM IN OTHER JURISDICTIONS

This chapter describes legislation and recent legislative reform efforts 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*[57] (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.[58] 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.

[57] NS *HOTDA*, *supra* note 9.

[58] "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.[59]

Interestingly, deemed consent only applies to donation after death for the purposes of *transplantation*.[60] According to s. 21 of the NS Act, a deemed consent under s. 11 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.[61]

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.

[59] NS, *HOTDA supra* note 10, ss 7-15.
[60] *Ibid,* s 11.
[61] *Ibid*, 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**).[62]

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.[63] 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.[64]

With respect to express consent under the new regime, the NSDHW explains that pursuant to s. 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).[65] 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.[66] 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.[67] 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)

5.2.2. A substitute decision maker must provide the evidence they believe proves the person changed their mind.[68]

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[62] NSDHW Information Guide, *supra* note 11 at 2.
[63] *Ibid.*
[64] 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.>.
[65] NSDHW Information Guide, *supra* note 11 at 3.
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid*.

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).[69]

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.

[69] *Ibid* at 4.

B. Proposed Legislation in other Canadian Jurisdictions

With similar legislative schemes currently before their legislatures, Quebec, New Brunswick, and Prince Edward Island may also witness a shift to presumed consent in the coming years. Comparable legislation was also before Ontario's and Alberta's legislatures until just recently, when the first session of the 42nd Parliament of Ontario and the first session of the 30th Legislature of Alberta were prorogued, killing both Bills on the respective Order Papers.[70] Quebec's, New Brunswick's and Prince Edward Island's Bills, and each of the former Bills from Ontario and Alberta are briefly summarized below.

1. Quebec

Under Bill 399, *An Act to establish a presumption of consent to organ or tissue donation after death* (the "QC Bill")[71], 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 ss. 43 and 44 of the current *Civil Code*[72] and replace them with the following:

Current Code	Proposed Legislation
43. 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. 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.	**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."
44. 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.	**44.** A person of full age is presumed to authorize the removal of organs or tissues from his body.

[70] It is unknown at this time if either of these Bills will be re-introduced into the respective legislatures.
[71] QC, Bill 399, *supra* note 54, Explanatory Notes.
[72] CCQ, *supra* note 9.

	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.

2. New Brunswick

Under Bill 61, *An Act to Amend the Human Tissue Gift Act* (the "NB Bill")[73], which is currently before the New Brunswick legislature, the *Human Tissue Gift Act*[74] would be amended so that if a person has not consented or refused to the use of their body after death for organ or tissue donation, they will be deemed to have consented to such use.[75] Among other things, the NB Bill would repeal s. 4 of the current Act and replace it with the following:

Current Code	**Proposed Legislation**
Consent by person for use of body after death **4**(1) 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 (a) in writing at any time, or	**Registry established or designated** **4** The Minister shall establish or designate a Registry to record consents and refusals made under this Act respecting the use of a person's body or a specified part or parts of a person's body after death for therapeutic purposes.

[73] NB, Bill 61, *supra* note 54.
[74] NB, *HTGA, supra* note 9.
[75] NB, Bill 61, *supra* note 54, s 9.

(b) orally in the presence of at least two witnesses during his or her last illness. […] **4**(3) On the death of a person who has given consent under this section, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts of the body for the purposes specified, except that no person shall act on a consent given under this section (a) if the person has reason to believe that the consent was subsequently withdrawn, or (b) if the person has reason to believe that an inquest may be required to be held into the death of the deceased person, unless a coroner gives a direction under section 6.	**Consent or refusal may be provided to Registry** **5** A person may consent or refuse that the person's body or a specified part or parts of the person's body be used after death for therapeutic purposes by providing information respecting the consent or refusal to the Registry in the manner prescribed by regulation. […] **Deemed consent for use after death for therapeutic purposes** **5.3**(1) Subject to sections 5.4 to 5.7, if a person has not made a consent or refusal under section 5, the person shall be deemed to consent to the use of the person's body or the removal and use of any part or parts of the person's body after death for therapeutic purposes. **5.3**(2) A deemed consent under subsection (1) is full authority for the use of the person's body or the removal and use of any part or parts of the person's body after death for therapeutic purposes.

3. Prince Edward Island

Bill 117, the *Human Organ and Tissue Donation Act* (the "PEI Bill"),[76] which has been tabled in the Prince Edward Island legislature, would repeal the Province's current *Human Tissue Donation Act*[77] and replace it with a presumed consent organ donation model that is virtually identical to the legislation enacted in Nova Scotia. In accordance with s. 10(1) of the proposed legislation, where an individual has not made a consent or refusal before their death, they will be deemed to have consented to the use of their organs and tissues for transplantation activities.[78]

[76] PEI, Bill 117, *supra* note 54.
[77] PEI, *HTDA, supra* note 9.
[78] PEI, Bill 117, *supra* note 54, s 10(1).

4. Ontario

At the time that the Commission's Consultation Paper was released, Bill 91, the *Peter Kormos Memorial Act (Trillium Gift of Life Network Amendment)* (the "ON Bill"),[79] was before the Ontario Legislature. However, before Bill 91 could pass into law, the government decided to prorogue the legislature, ending the first session of the 42nd Parliament, and resulting in all Bills in progress, including Bill 91, dying on the Order Paper.[80] Having said that, this Bill is another example of a Canadian jurisdiction moving towards a presumed consent organ and tissue donation framework. It is still worth mentioning in that it demonstrates the ways in which another Canadian jurisdiction has approached the various key components of presumed consent legislation.

Under the ON Bill, "consent [would] no longer [have been] required [before tissue could be removed from a human body], but a person [could have objected] to the removal of the tissue prior to his or her death or a substitute may [have objected] on his or her behalf after the death [had] occurred."[81] Among other things, the ON Bill would have repealed section 4 of the current *Trillium Gift of Life Network Act*[82], replacing it with the following:

Current Act	**Proposed Legislation**
Consent by person for use of his or her body after death 4(1) Any person who has attained the age of sixteen years may consent, (a) in a writing signed by the person at any time; or (b) orally in the presence of a least two witnesses during the person's last illness, 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.	**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. […] **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,

[79] ON, Bill 91, *supra* note 54.
[80] Janet French, "Private member's bills on conscience rights, organ donation die as government prorogues", *Edmonton Journal* (28 January 2020), online: <edmontonjournal.com/news/politics/private-members-bills-on-conscience-rights-organ-donation-die-as-government-prorogues> [perma.cc/QA2X-5SA8].
[81] ON, Bill 91, *supra* note 54 at Explanatory Note.
[82] *TGLNA, supra* note 9.

	(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.

5. Alberta

Similarly, before Bill 205, the *Human Tissue and Organ Donation (Presumed Consent) Amendment Act* (the "AB Bill")[83] could pass into law, the government prorogued the legislature, ending the first session of the 30th legislature, and resulting in all Bills in progress, including Bill 205, dying on the Order Paper.[84] While it is no longer alive, this Bill is another useful example of how a Canadian jurisdiction intended to address the various key components of a presumed consent framework. Under s. 4.01(1) of the proposed legislation, "[if] at the time of a person's death no decision [had] been made with respect to… [whether they consented or refused to donate their tissues, organs or body for use upon their death], the person [would have been] 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 have repealed sections 4 and 4.1 of the current *Human Tissue and Organ Donation Act*,[85] and replaced them with the following:

[83] AB, Bill 205, *supra* note 54.
[84] French, *supra* note 79.
[85] AB, *HOTDA, supra* note 9.

<table>
<tr><th>Current Act</th><th>Proposed Legislation</th></tr>
<tr><td>Deceased donor
4(1) 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
(a) where that person is an adult, by the adult, or
(b) by a person in accordance with subsection (2)

[…]</td><td>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).

[…]

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</td></tr>
<tr><td>Online registry
4.1 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).</td><td>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).</td></tr>
</table>

C. United States

All fifty 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."[86] 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.[87] The Committee on Death and Organ Donation of the Australian and New Zealand Intensive Care Society ("ANZICS")[88], which states unequivocally that organ donation is an option to consider, and not an obligation,[89] 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*.[90] 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 being an

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[86] 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.
[87] 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> [ANZICS].
[88] 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 "Organization and vision", online: *ANZICS* <www.anzics.com.au/organisation-vision/> and "Death and organ donation", online: *ANZICS* <www.anzics.com.au/death-and-organ-donation/>.
[89] ANZICS, *supra* note 86 at 43.
[90] *Human Transplantation (Wales) Act 2013* (Wales), NAWM 5.

organ donor during their lifetime.[91] 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)."[92]

Following the implementation of this new presumed consent framework in Wales, the English Department of Health and Social Care conducted consultations to determine whether English citizens would accept the adoption of the Welsh framework in England.[93] Ultimately, these consultations resulted in the English Parliament passing the *Organ Donation (Deemed Consent) Act 2019*,[94] which amends *The Human Tissue Act* 2004.[95] These amendments introduce provisions that institute "deemed consent" for adult organ donors before their death unless they expressly indicate their wish not to be a donor or if they fall into an exceptional category.[96]

Shortly after the implementation of the *Organ Donation (Deemed Consent) Act 2019* in England, the Scottish Parliament passed the *Human Tissue (Authorisation) (Scotland) Act 2019* ("*HTASA*"), which permits the removal and use of organs and tissue from deceased Scottish residents for purposes of transplantation, storage, and other connected purposes.[97] Scotland's new statute was passed on June 11, 2019 and received royal assent on July 18, 2019. The new presumed consent system created by the *HTASA* came into force on March 26, 2021,[98] making Scotland a presumed consent jurisdiction like England and Wales.

Similarly, the Northern Ireland Assembly recently proposed Bill 30/17-22, which passed second reading on September 20, 2021. This Bill intends to amend the *Human Tissue Act* 2004[99] to create an opt-out system of organ and tissue donation in Northern Ireland, as in Wales, England and Scotland. Under this new law, all residents would be presumed to agree to donate their organs or

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[91] *Ibid,* ss 4, 5.
[92] 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.
[93] Department of Health and Social Care, "Consultation Outcome: Introducing 'opt-out' consent for organ and tissue donation in England" (5 August 2018), online: *UK Government* <www.gov.uk/government/consultations/introducing-opt-out-consent-for-organ-and-tissue-donation-in-england>; Department of Health and Social Care, "Consultation Outcome: Quick Read: organ and tissue donation consultation" (5 August 2018), online: *UK Government* <www.gov.uk/government/consultations/introducing-opt-out-consent-for-organ-and-tissue-donation-in-england/quick-read-organ-and-tissue-donation-consultation>.
[94] *Organ Donation (Deemed Consent) Act 2019* (UK), c 7, "Explanatory Note", online: *legislation.gov.uk* <www.legislation.gov.uk/ukpga/2019/7/introduction/enacted> [UK, *ODA 2019*].
[95] *The Human Tissue Act 2004* (UK), c 30, online: *legislation.gov.uk* <www.legislation.gov.uk/ukpga/2004/30/contents> [UK, *HTA 2004*].
[96] UK, *ODA 2019*, *supra* note 93 at "Explanatory Note."
[97] *Human Tissue (Authorisation) (Scotland) Act 2019* (Scot) ASP 11, online: *UK Legislation* <https://www.legislation.gov.uk/asp/2019/11/contents> [*HTAS*].
[98] *The Human Tissue (Authorisation) (Scotland) Act 2019 Commencement No. 2 Regulations 2021* (Scot), SI 2021/108, reg 2, online: *UK Legislation* <https://www.legislation.gov.uk/ssi/2021/108/contents/made>.
[99] UK, *HTA 2004, supra* note 94.

tissues when they die unless they register a decision not to, or unless they are a member of a statutorily defined excluded group.[100]

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."[101] 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.[102]

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.[103] However, the law still requires that a patient's possible refusal to donate be sought by consulting with proxy decision makers.[104] Given this requirement, even where a patient has not explicitly refused to become an order donor, their wishes are generally still taken into account by discussing their intentions with the family.[105] As a result, in practice, organ procurement is not undertaken if the family refuses the donation, despite the opt-out system.[106]

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.[107] These individuals, who are said to be a cornerstone of the successful Spanish transplantation model, are responsible for:

> [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

[100] National Health Service Blood and Transplant Branch, "Northern Ireland pass milestone vote on proposed new organ donation law" (20 September 2021), online: *News* <https://www.organdonation.nhs.uk/get-involved/news/northern-ireland-pass-milestone-vote-on-proposed-new-organ-donation-law/>; National Health Service Blood and Transplant Branch, "Organ donation law in Northern Ireland" (Accessed 9 October 2021), online: *NHSBT News* <https://www.organdonation.nhs.uk/uk-laws/organ-donation-law-in-northern-ireland/>.
[101] David Rodriguez-Arias et al, "Success factors and ethical challenges of the Spanish Model of organ donation" (2010) 376 Lancet 1109.
[102] *Ibid*.
[103] *Ibid* at 1110.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid* at 1109.

> 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.[108]

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").[109] Among other things, this program aims to identify missed donation opportunities so as to avoid them in the future, and improve the system overall.[110] 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.[111]

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.[112] *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.[113] 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.[114] *Uncontrolled* donation after cardiac death, on the other hand, is carried out on patients who have unexpected cardiac arrest.[115] 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.[116] 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 in Manitoba.

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[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid* at 1110.
[113] *Ibid*.
[114] *Ibid*.
[115] *Ibid*.
[116] *Ibid*.

CHAPTER 4: POTENTIAL REFORM IN MANITOBA

Having described the current express consent organ and tissue donation legislation and process in Manitoba and the presumed consent legislation which exists and which is being contemplated across Canadian and international jurisdictions, this Chapter will consider how *The Human Tissue Gift Act* of Manitoba ("*HTGA*") ought to be amended if the government were to decide to switch from an express consent to a presumed consent statutory organ and tissue donation framework. Each recommendation in this Chapter is to be read as if Manitoba were to have made that decision, recognizing, of course, that it has not and may not ever decide to make that change.

I. The Consultation Process

On May 13, 2021, the Commission released a Consultation Paper titled *Presumed Consent Organ Donation.*[117] The purpose of the consultation process was to gather a wide range of perspectives regarding what a potential statutory presumed consent organ and tissue donation framework ought to look like in Manitoba if the government were to switch from an express consent to presumed consent regime. Accordingly, the Commission's focus in this Consultation Paper was not on whether or not to recommend the enactment of such legislation, but on what elements ought to be included in such legislation if it were to be implemented, and how these elements should be crafted.

The Consultation Paper was posted on the Commission's website, circulated to the Commission's mailing list, and sent directly to certain individuals and organizations. Additionally, an online survey was created to canvass the public on the issues for discussion presented in the Consultation Paper.[118] This survey was posted on the Commission's website and to the Commission's Twitter page. The Commission received several written submissions and informal responses to its issues for discussion and a number of responses to its online survey. Additionally, the Commission had the opportunity to speak with some respondents about their feedback over the telephone and in videoconference meetings. The feedback received through this consultation process assisted the Commission in crafting the recommendations for legislative change contained in this Final Report.

II. Recommendations for Reform

A. Elements of a Presumed Consent Regime

The key elements of presumed consent organ and tissue donation legislation include:

- The scope of presumed consent;
- The mechanism of indicating consents and refusals to donate human tissue after death;

[117] Manitoba Law Reform Commission, *Presumed Consent Organ Donation,* (May 2021).
[118] See Appendix I.

- The exceptions to presumed consent; and
- The role of individuals who may consent or refuse to organ or tissue donation on someone's behalf.

This section will outline the Commission's recommendations regarding the elements to be included in any statutory presumed consent framework contemplated by the Government of Manitoba. These recommendations are guided by the presumed consent organ donation legislation which currently exists in Nova Scotia, by the legislation proposed in Quebec, New Brunswick and Prince Edward Island, and by the legislation which was previously contemplated by Ontario and Alberta. It is also informed by the jurisdictions outside of Canada and by feedback received in response to the Consultation Paper.

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, the proposed legislation in Quebec, New Brunswick, and Prince Edward Island, and Ontario's and Alberta's contemplated legislation each establish 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[119], the NB Bill,[120] the PEI Bill[121] and the AB Bill[122] restrict presumed consent to the use of tissues and organs after death for transplantation purposes only, the QC Bill[123] and the ON Bill[124] contemplate a broader scope, also capturing donation after death for medical education or scientific research purposes.

Feedback received in response to the Consultation Paper largely favours a presumed consent framework which applies only to donation after death for transplantation purposes and not to donation after death for medical education or scientific research purposes, as contemplated in the NS Act, the NB Bill, the PEI Bill, and the AB Bill. In fact, 97.22% of survey respondents stated that they believed a presumed consent framework should apply to donation after death for transplantation purposes, whereas only 33.33% thought it should apply for medical education purposes, and only 36.11% thought it should apply for scientific research purposes.[125] These findings are consistent with the major reason typically given for enacting presumed consent

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[119] NS, *HOTDA, supra* note 10, s 11.
[120] NB, Bill 61*, supra* note 54, s 9.
[121] PEI, Bill 117, *supra* note 54, s 10(1).
[122] AB, Bill 205, *supra* note 54, s 3.
[123] QC, Bill 399, *supra* note 54, s 1.
[124] ON, Bill 91, *supra* note 54, s 3.
[125] Survey respondents were asked: If Manitoba were to implement presumed consent organ donation legislation, what purposes should presumed consent apply to? Transplantation? Medical education? Scientific research? Other? Respondents were encouraged to select all options that applied.

legislation: to address the shortage of organs and tissues needed for *transplantation*. However, the feedback also indicated a desire for Manitobans to maintain the option to consent to donate their organs or tissues for purposes of education or scientific research. It was suggested that if Manitoba's Act were to be amended to enact a presumed consent regime, the amended legislation ought to indicate that nothing in the Act should affect the right of individuals to donate their body for purposes other than transplantation.[126]

The Commission has concluded that this issue is one of policy which is best left to the Legislature to determine in the event that it decides to move towards a presumed consent framework.

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 Quebec, New Brunswick and Prince Edward Island in their respective presumed consent Bills, and those proposed by Ontario and Alberta in their previously contemplated Bills.

2.1 Nova Scotia

Section 7 of the NS Act establishes the Health Card Registry (the "NS Registry") upon which individuals may record consents and refusals respecting donation after death for transplantation.[127] Section 8(1) of the Act indicates that such consent and refusals may be recorded on the NS Registry by providing information respecting the consent or refusal to the NS Registry in the manner specified by the Minister.[128] Further, s. 8(2) indicates that consents may be restricted to the donation of specified organs and tissues.[129] Elaborating on s. 8 of the Act, the Government of Nova Scotia website explains:

[126] For instance, in response to the Consultation Paper, Justice Gerald Jewers stated: "Given that the main issue driving the need for reform in this area is the shortage of organs and tissues for the purposes of transplantation, presumed consent should be confined to therapeutic purposes. However, amendments to the Act could contain a clause stating that nothing in the Act should affect the right of individuals to donate one's body for other purposes (medical education/scientific research purposes)."
[127] NS, *HOTDA, supra* note 10, s 7.
[128] *Ibid,* s 8(1).
[129] *Ibid*, s 8(2).

> **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…
>
> **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.[130]

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 NS Registry by telephone.[131]

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."[132]

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

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[130] "Organ and tissue donation", online: *Government of Nova Scotia* <beta.novascotia.ca/organ-and-tissue-donation>.
[131] *Ibid.*
[132] *Ibid.*

"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."[133] 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."[134]

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.[135]

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.[136]

In accordance with s. 10 of the Act, no transplantation activities may be undertaken by a physician or the Chief Medical Examiner until they have taken the steps necessary to check the NS Registry to determine whether a decision is on record.[137] In order to check the NS Registry, the hospital or the Chief Medical Examiner must first provide information to the organ-donation program and the tissue bank regarding the individual and the circumstances of their death.[138] With this information, the organ-donation program and 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.[139] If it is determined that the organs or tissues are suitable, the hospital or the Chief Medical Examiner must 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 NS Registry and whether deemed consent applies.[140]

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

[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] NS, *HOTDA, supra* note 10, s 10.
[138] *Ibid,* s 19(1).
[139] *Ibid,* s 19(2).
[140] *Ibid,* s 19(3).

for use in another person."[141] Where this is the case, s. 19(5) requires that the hospital or Chief Medical Examiner records the reasons for their decision in the patients' record.[142]

2.2 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 orally in the presence of two witnesses, or by indicating the decision in writing.[143]

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* (the "QC Registry").[144] The QC Bill would accomplish this by amending the seventh paragraph of s. 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.[145]

Additionally, s. 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)[146], 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.[147]

[141] *Ibid,* s 19(4).
[142] *Ibid,* s 19(5).
[143] QC, Bill 399, *supra* note 54, s 1.
[144] *Ibid,* s 3.
[145] *Ibid*, s 3 [emphasis added].
[146] Under s 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.
[147] QC, Bill 399, *supra* note 54, s 4 [emphasis added].

An amended s. 2.0.9 of that Act would also indicate,

> **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 [...][148]

Under s. 2 of the QC Bill, Article 44 of Quebec's *Civil Code* would be amended to 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."[149] 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."[150]

In summary, in Quebec, individuals would be able to indicate their decision regarding the use of their body or the removal of organs or tissues therefrom in four ways:

1) By expressing the decision orally in the presence of two witnesses[151];
2) By indicating the decision in writing[152];
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, which decision would then be entered on the QC Registry, for use by organizations that coordinate organ or tissue donations;[153] or
4) When indicating a decision in writing to the Board of the Régie de l'assurance maladie du Québec, by requesting that the information appearing on the form for consenting or refusing consent to the removal of organs or tissues be sent to a body that coordinates organ

[148] *Ibid,* s 5 [emphasis added].
[149] *Ibid,* s 2.
[150] *Ibid.*
[151] *Ibid*, s 1.
[152] *Ibid.*
[153] *Ibid,* s 4.

> or tissue donations and is designated on the list drawn up by the Minister and published on the Board's website.[154]

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.[155] Interestingly, 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."[156]

2.3 New Brunswick

Like Nova Scotia's legislation, the NB Bill contemplates a registry upon which individuals can indicate their decisions regarding after-death organ and tissue donation for therapeutic purposes (the "NB Registry").[157] The NB Bill would repeal ss. 4 and 5 of New Brunswick's current *Human Tissue Gift Act* and replace them with new sections outlining the NB Registry. Specifically, ss. 4 and 5 of the proposed amended Act would state:

> **Registry established or designated**
>
> **4** The Minister shall establish or designate a Registry to record consents and refusals made under this Act respecting the use of a person's body or a specified part or parts of a person's body after death for therapeutic purposes.
>
> **Consent or refusal may be provided to Registry**
>
> **5** A person may consent or refuse that the person's body or a specified part or parts of the person's body be used after death for therapeutic purposes by providing information respecting the consent or refusal to the Registry in the manner prescribed by regulation.[158]

Unlike the QC Bill, the NB Bill does not contemplate any other less formal mechanisms for individuals to indicate their intentions regarding after-death organ or tissue donation for therapeutic or transplantation purposes, such as indicating the consent in a written document to be delivered to some designated body, or by indicating the consent orally in the presence of witnesses. Interestingly, however, where an individual in New Brunswick wishes to consent to the use of their body after death for educational or research purposes, which would bring the decision outside

[154] *Ibid,* s 5.
[155] *Ibid*, s 2.
[156] *Ibid.*
[157] NB, Bill 61, *supra* note 54, s 6.
[158] *Ibid,* ss 5-8.

of the scope of the presumed consent framework, they may do so at any time in writing, or orally in the presence of at least two witnesses during the person's last illness.[159]

In accordance with s. 5.2 of New Brunswick's proposed amended Act,

> A medical practitioner shall, before removing or using any part of the body of a deceased person for therapeutic purposes, check the Registry to determine whether a decision made under section 5 is on record in the Registry.

As is the case in Nova Scotia, it appears that this is the only step required of medical practitioners before commencing transplantation activities. However, unlike Nova Scotia's legislation, which states that this step need not be taken to check the NS Registry where the individual clearly meets criteria that shows that their organs or tissues are not medically suitable for use in another person, the NB Bill does not contemplate any circumstances under which this step need not be taken.

2.4 Prince Edward Island

Like the abovementioned jurisdictions, the PEI Bill contemplates a registry upon which individuals can indicate their decisions regarding after-death organ and tissue donation for transplantation purposes (the "PEI Registry").[160] The PEI Registry would be established via s. 6 of the proposed legislation, which states:

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

Section 7(1) of the proposed Act indicates that such consents and refusals may be recorded on the PEI Registry by providing information respecting the consent or refusal to the PEI Registry in the manner specified by the Minister.[161] Further, s. 7(2) indicates that consents may be restricted to the donation of specified organs and tissues.[162]

In accordance with s. 9 of the proposed Act, no transplantation activities may be undertaken by a physician or the chief coroner until they have taken the steps necessary to determine whether a decision is on record in the PEI Registry.[163] As in Nova Scotia, in order for the PEI Registry to be checked, the hospital or the chief coroner must first provide information to the organ-donation program and the tissue bank regarding the individual and the circumstances of their death.[164] With this information, the organ-donation program and tissue bank shall make a determination as to

[159] *Ibid*, s 9.
[160] PEI, Bill 117, *supra* note 54, s 6.
[161] *Ibid,* s 7(1).
[162] *Ibid*, s 7(2).
[163] *Ibid,* s 9.
[164] *Ibid,* s 18(1).

whether the organs and tissue of the individual may be medically suitable for use in another person.[165] If it is determined that the organs or tissues are suitable, the hospital or the chief coroner must 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 PEI Registry and whether deemed consent applies.[166]

As in Nova Scotia, 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."[167] Where this is the case, s. 18(5) requires that the hospital or chief coroner records the reasons for their decision in the patients' record.[168]

2.5 Ontario

The Registry under the ON Bill would have differed from the legislation in Nova Scotia, Quebec, New Brunswick and Prince Edward Island in that it contemplated a registry pertaining only to objections to donate (the "ON Registry"). It also would have differed from the NS Act, NB Bill and PEI Bill in that the ON Registry was among other mechanisms for indicating intentions to opt out of organ donation after death. Specifically, ss. 4(3) and 4(4) of the proposed amended Ontario Act would have stated:

> (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.[169]

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[165] *Ibid,* s 18(2).
[166] *Ibid,* s 18(3).
[167] *Ibid,* s 18(4).
[168] *Ibid,* s 18(5).
[169] ON, Bill 91, *supra* note 54, s 3.

Names of individuals who had either sent or had written objections sent on their behalves to the Trillium Gift of Life Network (the "Network") in accordance with proposed s. 4(3)(ii) would then have been added by the Network to the ON Registry.[170] 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[171], among other things, would have also become responsible for administrating and maintaining the ON Registry.[172] Under s. 8.9.1 of the proposed amended Act,

> The registry [would have indicated] the name of the person in respect of whom the objection [was] made and, if indicated by the person making the objection, whether the objection [applied] to all tissue or parts of the body or only to specified tissue or parts.[173]

Therefore, unlike in Nova Scotia, Quebec, New Brunswick and Prince Edward Island, Ontario's previously proposed presumed consent regime did not contemplate a registration system which would have accounted for consents to donate after death. Rather, the ON Registry would have been just one mechanism by which citizens of Ontario could have indicated 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.[174]

Accordingly, pursuant to the ON Bill, where the Network was notified by a designated health facility that a patient at the facility had died or a physician was of the opinion that the death of a patient at the facility was imminent, the Network would have been required to determine, in consultation with the health facility, "whether the facility [was] 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."[175] In other words, before donation activities could have taken place, the Network would have been required to determine whether the patient had indicated an objection to donation after death in accordance with s. 3 of the proposed amended Act. It appears that where the Network had no proof that a patient had objected to donation after death, it would have then been required to ensure that the designated health facility contacted the patient or his or her substitute to determine whether he or she objected to tissue being removed from the body after death, and then provided them an opportunity to object if they so chose.[176]

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[170] *Ibid*, s 9.
[171] *TGLNA*, *supra* note 9, s 8.8(4).
[172] ON, Bill 91, *supra* note 54, s 7.
[173] *Ibid*, s 9.
[174] *Ibid*, s 3.
[175] *Ibid*, s 7 [emphasis added].
[176] *Ibid*.

In summary, in Ontario, where the focus would have been mainly on objections or refusals to donate after death, individuals would have been able to 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 Network, which would then add that objection to the ON Registry; or
3) By stating the objection orally in the presence of at least two witnesses during the person's last illness.[177]

Where no exceptions to presumed consent existed, generally, the Network would not only have been required to determine whether an individual had objected to the use of their tissues or organs after their death, but where it determined that no such objection had been made, it would have then been required to ensure both that the individual was canvassed about whether they objected to the use of their tissues after death, and that they had the opportunity to do so if they chose.[178]

2.6 Alberta

Like the QC Bill and Ontario's previously considered legislation, the AB Bill contemplated both a registry (the "AB Registry") and other mechanisms by which individuals could have indicated their decisions regarding organ and tissue donation. However, unlike Ontario's proposed scheme, Alberta's would have considered both refusals *and* consents to donate.

Whereas Alberta's current *Human Tissue and Organ Donation Act* only outlines the ways in which *consents* to donate are to be indicated, its previously contemplated amendments would have altered the Act to address the ways in which both consents *and* refusals may be indicated prior to death. Specifically, under ss. 4 and 9 of the proposed amended Act in Alberta, consents or refusals to donate organs or tissues after death would have been indicated in the following ways:

> **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.
>
> […]

[177] *Ibid,* s 3.
[178] *Ibid,* s 7.

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.[179]

Moreover, in accordance with the proposed legislation, when an adult applied for the issuance or renewal of an operator's licence under the *Traffic Safety Act*[180], or for a voluntary identification card under the *Government Organization Act*[181], s. 4.2(1) would have required 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 would have also been required to inform the adult that if they did 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.[182] If the adult then made a decision regarding donation in accordance with s. 4(1) of the proposed amended Act, the Registrar and/or the Minister would have been required to transmit that decision to the AB Registry, and print a code or symbol on the operator's licence or identification card indicating whether the adult had consented or refused to donate.[183]

With all of this in mind, s. 7 of Alberta's current legislation would have also been amended to ensure that a donation organization confirmed whether a decision to donate had been made by the deceased person under s. 4 before donation activities could be undertaken. This would have been the case unless: (1) the organization determined that the person's tissue or organs were medically unsuitable for transplantation; (2) the medical practitioner who had determined the death of the patient advised the donation organization that they had personal knowledge that the deceased

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[179] AB, Bill 205, *supra* note 54, ss 4, 9.
[180] RSA 2000, c T-6.
[181] RSA 2000, c G-10.
[182] AB, Bill 205, *supra* note 54, s 5.
[183] *Ibid.*

person would have made the decision to refuse to donate; or (3) the donation organization was already aware the deceased person made a decision to consent to donate or refuse to donate when they were alive that had not been revoked.[184]

In summary, in Alberta, where the focus would have been on both refusals to donate and consents to donate, individuals would have been able to 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 was a consent to donate, this document would have needed to specify:
        i. Whether the consent applied to the donor's whole body or to specific tissues, organs or groups of tissues and organs; and
        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 could not 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;
    b. The manner in which the instructions of the person were received by each witness; and
    c. Where the decision was a consent, indicating that one witness was knowledgeable about the donation process and that they 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

[184] *Ibid,* s 7.

6) By indicating the consent or refusal to donate through the online AB Registry (without the requirement of the signature of a witness).[185]

Generally speaking, similar to Nova Scotia, New Brunswick, and Prince Edward Island, where no exceptions to deemed consent existed, donation organizations in Alberta would have only been required to confirm whether a decision to donate had been made by the person with respect to post mortem donation. Unlike in Ontario, donation organizations in Alberta would not have been required to consult further with the individual or their substitute decision maker regarding the individual's decision where no decision had been indicated in accordance with the Act. However, unlike in Nova Scotia and Prince Edward Island, 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 would not have been required to confirm whether a decision to donate had been made if:

(a) the organization determined that the person's tissue or organs were medically unsuitable for transplantation;
(b) the medical practitioner who had determined the death of the patient advised the donation organization that he or she had personal knowledge that the deceased person would have made the decision to refuse to donate; or
(c) the donation organization was already aware the deceased person made a decision to consent to donate or refuse to donate when they were alive that had not been revoked.[186]

2.7 Summary

Nova Scotia, Quebec, New Brunswick, and Prince Edward Island each contemplate systems in which individuals may indicate their intentions regarding organ and tissue donation after death by registering said decision with those province's respective registries. Ontario's and Alberta's Bills did as well. However, whereas the legislation in Nova Scotia, New Brunswick and Prince Edward Island each only enable individuals to indicate their intentions by formally registering their decision with their respective registries, Quebec's proposed legislative scheme and Ontario's and Alberta's previously considered Bills contemplate various ways in which individuals can indicate their decisions to these registries through less formal mechanisms. These less formal mechanisms include 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 refusal to donate when applying for an operator's license or a voluntary identification card.

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[185] *Ibid*, s 9.
[186] *Ibid,* s 7.

Consistent with the presumed consent organ and tissue donation systems contemplated by the jurisdictions discussed in this Report, the Commission is of the opinion that any contemplated presumed consent regime in Manitoba should involve the implementation of a central registry upon which consents and refusals to after-death organ and tissue donation may be recorded. While the Commission recognizes that Manitoba already has a registry in place on which Manitobans may register their *consent to become* an organ or tissue donor, the registry contemplated by the Commission in this project would allow Manitobans to register both consents *and* refusals.

Moreover, consistent with the regimes proposed by Quebec, Ontario and Alberta, and the feedback provided in response to the Consultation Paper[187], the Commission is of the opinion that Manitoba should provide several ways for Manitobans to submit their consents or refusals to the registry, ranging from registering those decisions directly with the registry online or through whatever standardized form might be created for that purpose, to expressing those decisions verbally in the presence of competent witnesses, and having that direction documented and submitted to the registry.

Providing multiple ways for individuals to submit their organ donation decisions to a central registry, the Commission believes, may help to increase the number of people who provide directions, one way or another, as it will enable individuals who may not be capable of expressing their intentions in one particular manner to express them in a number of other ways. The need to ensure that a registry is easily accessible to Manitobans so that all Manitobans have equal opportunities to participate in this new system was of particular concern to respondents to the Consultation Paper.[188] For instance, Manitobans who lack digital literacy or who do not have access to a computer or to adequate internet connectivity to enable them to register a decision online ought to be able to register their decision by other means. Likewise, Manitobans with health conditions that might limit their ability to personally produce a written document indicating their intentions ought to be able to express those intentions orally or in some other way.

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[187] Survey respondents were asked to indicate how individuals should be able to indicate their intentions regarding organ and tissue donation if Manitoba were to implement presumed consent organ donation legislation. Respondents were encouraged to check all boxes that applied. 91.89% of survey respondents indicated that individuals should be able to submit their intentions to a central registry; 54.05% of survey respondents indicated that individuals should be able to state their decision orally or in writing to a health care professional or designated organ donation network; and 54.05% of survey respondents indicated that individuals should be able to state their intention orally or in writing in the presence of a specified number of witnesses.

[188] For instance, in response to the Consultation Paper, the Public Guardian and Trustee noted that "it may be preferable to have different options available for the expression of intentions, given that there may be some instances where an individual is not capable of expressing their wishes in a particular manner."

Recommendation 1: If Manitoba were to amend the *HTGA* to implement a system of presumed consent organ and tissue donation, Manitoba should establish a registry upon which consents and refusals respecting organ and tissue donation can be registered in accordance with this framework (the "MB Registry").

The Commission is of the opinion that if such a system were to be implemented and if the MB Registry were to be created in accordance with Recommendation 1, the matter of who should be responsible for maintaining the MB Registry and for facilitating after-death organ and tissue donation (the "Responsible Body") is one that is best left to the legislature to decide. However, with respect to the ways in which individuals ought to be able to have their decisions recorded on the MB Registry, the Commission draws on the statutory amendments proposed in the other Canadian jurisdictions which have contemplated presumed consent, and which are outlined above.

Recommendation 2: Manitobans should be able to register their consents and refusals respecting organ and tissue donation on the MB Registry in the following ways:

(a) By indicating the consent or refusal in whatever standardized written or electronic forms are created by the Responsible Body for this purpose;

(b) By indicating the consent or refusal to a Manitoba Health and Seniors Care ("MB Health") representative when applying for the issuance of a Manitoba Health Card or when updating a Manitoba Health Card;

(c) By indicating the consent or refusal to a Manitoba Public Insurance ("MPI") representative when applying for the issuance or renewal of a Manitoba driver's license or Manitoba Identification Card;

(d) By indicating the consent or refusal in a written document that is signed and dated by the individual in the presence of one competent adult witness who also signs and dates the document, and delivering the document to the Responsible Body (either in hard-copy or electronic form, depending on the mechanisms to be created by the Responsible Body for this purpose);

(e) Where an individual cannot personally sign a written document themselves, by indicating the consent or refusal orally in the presence of two competent adult witnesses who shall record the consent or refusal in a written document that they both shall sign and date, and delivering the document to the Responsible Body (either in hard-copy or electronic form, depending on the mechanisms to be created by the Responsible Body for this purpose).

Drawing inspiration from the QC Bill and AB Bill, which each contemplate opportunities for individuals to register their intentions regarding organ and tissue donation when applying for various types of government-issued identification cards, the Commission recommends that Manitobans be given similar opportunities when interacting with representatives of MB Health and MPI. After all, this is not a new concept for MPI, which used to offer donor cards as attachments to Manitoba driver's licenses that would indicate an individual's intentions regarding organ and tissue donation. While these cards are no longer an option, MPI still provides links on its website to Manitoba's current online organ and tissue registry.[189]

As in Quebec and Alberta, the Commission also recommends that representatives of MB Health and MPI be required to inform applicants that if they do not make such a decision before their death, they may be presumed to have consented to donate their tissues and organs under a presumed consent framework.

Recommendation 3: If Manitoba were to amend the *HTGA* to implement a system of presumed consent organ and tissue donation, MB Health and MPI representatives should be required to take the following steps when issuing or updating Manitoba Health Cards, and issuing and renewing Manitoba driver's licenses and Identification Cards, respectively:

(a) Provide the applicant with an opportunity to consent or refuse to after-death organ and tissue donation;

(b) Inform the applicant that if they do not make this decision before their death, they may be presumed to have consented to donate their tissues and organs for the purpose of transplantation after death;

(c) If the applicant decides to indicate a consent or refusal, transmit the individual's decision to the MB Registry; and

(d) If the applicant decides to indicate a consent or refusal, ensure that the individual's decision is displayed on whichever card the individual has come to receive (Manitoba Health Card, Manitoba driver's license, or Identification Card).

Not only would these recommendations help to spread awareness and to educate Manitobans about a new presumed consent framework, but they would create additional opportunities for Manitobans to be able to register a decision about after-death organ and tissue donation, one way or another. The idea is that applicants would be able to indicate whether they consent or refuse to become

[189] "Your driver's licence card features", online: *Manitoba Public Insurance* <www.mpi.mb.ca/Pages/licence-card-features.aspx>.

organ and tissue donors after death, and that the MB Health and MPI representatives would then transmit this decision to the MB Registry on their behalf. These decisions could also then be displayed in some way on that individual's Manitoba Health Card, Driver's License, or Manitoba identification card, making it even easier for health care professionals to ascertain whether someone is a donor or not at the time of their death.

While each jurisdiction has slightly different requirements, in all six Canadian jurisdictions discussed in this Report, regardless of the mechanisms in place for individuals to indicate their decisions regarding after-death donation, the decision must be consulted prior to transplantation activities taking place, subject to certain exceptions. Generally speaking, in Nova Scotia, 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. The same is true of New Brunswick's and Prince Edward Island's proposed legislation, and the same would have been true for Alberta's legislation. In other words, in each of these jurisdictions, where no exceptions to presumed consent exist, and where the respective registry has been checked and no organ donation decision registered, an individual will be deemed to have consented to organ and tissue donation, and this presumed consent will be valid authorization for donation activities to commence.

Ontario and Quebec differ in this regard in that Ontario contemplated stricter requirements in order for presumed consent to be triggered, while Quebec's contemplated requirements are more lax. Specifically, in Ontario, generally, the Network would not only have been required to determine whether an individual had objected to the use of their tissues or organs after their death, but where it determined that no such objection had been made, the Network would have been required to take further steps to ensure both that the individual was canvassed about whether they objected to the use of their tissues after death, and that they had the opportunity to do so if they chose.[190] 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.[191]

Following the release of the Consultation Paper for this project, the Commission had the opportunity to meet with representatives of the new Northern health entity known as Keewatinohk Inniniw Minoayawin Inc. ("KIM"), to discuss the Consultation Paper and the prospect of a presumed consent organ and tissue donation regime in Manitoba. It was in this meeting that the Commission came to truly appreciate the importance of this statutory "triggering event" for presumed consent and the impacts that it could have on Manitobans.

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[190] ON, Bill 91, *supra* note 54, s 7.
[191] QC, Bill 399, *supra* note 54, s 2.

KIM was established in January 2020 to "support the health and wellness priorities identified by First Nations in Northern Manitoba"[192] and to "achieve meaningful health transformation for First Nations peoples."[193] KIM is an offshoot of Manitoba Keewatinowi Okimakanak Inc. ("MKO"), "a non-profit, political advocacy organization that provides a collective voice on issues of inherent, Treaty, Aboriginal and human rights for the citizens of the sovereign First Nations [it] represent[s]."[194] The meeting between the Commission and representatives of KIM revealed a number of significant issues and concerns for Indigenous communities surrounding the implementation of a presumed consent organ and tissue donation framework in Manitoba, which must inform the Commission's recommendations. In particular, it revealed important considerations surrounding the triggering event for presumed consent that would enable physicians and other relevant actors to undertake donation and transplantation activities under a statutory presumed consent framework.

First and foremost, this meeting made it clear to the Commission that it must be cognizant of the fact that the history of racist treatment of Indigenous peoples by the Canadian government, and the modern-day racism experienced by many Indigenous peoples navigating the healthcare system has caused many Indigenous peoples to have a serious distrust of both the Government and the healthcare system generally. This may prevent Indigenous peoples from taking the steps required under a presumed consent framework to register a consent or refusal regarding organ and tissue donation with the relevant body that is in charge of this system, as many Indigenous peoples may avoid coming into contact with the healthcare system altogether if they can. Accordingly, a concern that was raised with the Commission is that fewer Indigenous people may register refusals, despite their wishes to refuse to become donors.

Further, representatives of KIM explained that it could be quite challenging to communicate with certain Indigenous communities and peoples in order to make them aware of a new system of presumed consent. Representatives of KIM pointed out that many Northern and remote Indigenous communities lack the internet or broadband signals that would be required to facilitate online communication, which would likely be a popular method through which to inform Manitobans about a new system of organ and tissue donation. Without adequate internet access, or access to a computer generally, it might also be more challenging for individuals living in these communities to register a decision regarding organ and tissue donation. Whereas others who have access to a computer and to adequate internet connectivity might be able to register their decision regarding organ and tissue donation with the click of a few buttons, individuals living in these communities

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192 Manitoba Keewatinowi Okimakanak Inc., Media Release, "MKO Chiefs Establish Keewatinohk Inniniw Minoayawin Inc. as a First Nations Aggregate Entity to Support Health Transformation for The North" (23 January 2020), online: <https://mkonation.com/mko-chiefs-establish-keewatinohk-inniniw-minoayawin-inc-as-a-first-nations-aggregate-entity-to-support-health-transformation-for-the-north/>.

193 "The KIM Story", online (pdf): *Manitoba Keewatinowi Okimakanak Inc*. <https://kiminoayawin.com/wp-content/uploads/2020/11/The-KIM-Story.pdf>

194 "MKO Mission Statement", online: *Manitoba Keewatinowi Okimakanak Inc*. <https://mkonation.com/about-mko/>.

might be forced to travel significant distances or take additional steps that others would not be required to take to ensure that their after-death organ donation wishes are heard. The concern is that people will not be willing to take these additional steps, resulting in fewer Indigenous peoples registering their organ and tissue donation decisions under a new system of presumed consent, and thus, more Indigenous peoples being deemed to have consented to the use of their tissues or organs after death, despite their actual wishes.

Another consideration brought to the Commission's attention in this meeting is the impact that a presumed consent system might have on the homeless and under-housed population (the "homeless population"). Not only will these people be less likely to have access to a telephone or computer which could enable them to both learn about the new system of presumed consent and to register a decision under the new system, but given their transient lifestyles, they may also be less likely to learn of the new system of presumed consent through other avenues. For instance, the homeless individuals might be less likely to have regular contact with a family physician who could inform individuals of a new system of presumed consent organ and tissue donation. Moreover, if the government were to decide that Manitobans should be informed by MPI representatives of a new presumed consent system when registering for or renewing a driver's license or identification card, it is less likely that a homeless individual will come to learn of the new system in this way given that it is less likely that they will come in contact with MPI for these reasons.

With all of these concerns in mind, the Commission feels that it would be neither appropriate nor fair to adopt the language of Nova Scotia's, New Brunswick's, or Prince Edward Island's legislation in terms of the steps that trigger presumed consent. The Commission is concerned that if, as under the NS Act, the NB Bill and the PEI Bill, the Responsible Body were only required to check the MB Registry to see whether a consent or refusal was registered before undertaking donation activities, allowing them to commence these activities where an individual has simply failed to register a decision, a disproportionate number of Indigenous peoples and homeless people may become organ or tissue donors against their wishes for all of the reasons set out above. This would not only deprive these people of an equal opportunity to meaningfully participate in the type of presumed consent framework contemplated by the Commission in this project generally, but it would likely perpetuate the fear and distrust felt by many Indigenous peoples of our healthcare system.

Accordingly, the Commission is of the opinion that like the legislation previously contemplated by Ontario, any presumed consent legislation implemented in Manitoba ought to require additional steps to be taken by the Responsible Body beyond simply checking the MB Registry before presumed consent can be triggered. Based on the Commission's consultations with the representatives of KIM, and on additional feedback received in response to the Consultation

Paper[195], the Commission is also of the opinion that in crafting any presumed consent organ and tissue donation legislation, Manitoba must engage in extensive consultations with Indigenous communities in the Province to consider how Indigenous laws, culture, and experiences will impact the ways that Indigenous people will be affected by such legislation. Similarly, Manitoba must engage in consultations with advocates for the homeless population in Manitoba. The Commission feels that these consultations would help to clarify the best way to approach the issue of the steps that need to be taken by the Responsible Body under a presumed consent organ and tissue donation framework in order to trigger presumed consent.

Recommendation 4: In crafting any presumed consent organ and tissue donation legislation, Manitoba should consult with Indigenous communities in the Province to consider and address how Indigenous laws, culture, and experiences will impact the ways that Indigenous people will be affected by such legislation. Manitoba should conduct similar consultations with advocates for the homeless population in Manitoba.

In light of this recommendation, the Commission also recommends that for the time being, the matter of the triggering event for presumed consent be addressed in a manner similar to the way that it is currently addressed in the *HTGA*, recognizing that this recommendation (and all other recommendations made in this Final Report) ought to be subject to the type of extensive consultations described above.

Recommendation 5: If Manitoba were to amend the *HTGA* to implement a system of presumed consent organ and tissue donation, the Responsible Body and its actors should be required to take the following steps before organ and tissue donation activities may commence:

(a) Ensure that reasonable efforts are made to determine whether the deceased or dying person registered a consent or refusal on the MB Registry, in accordance with s. 4(2) of the *HTGA*.

(b.1) If no consent or refusal was registered on the MB Registry, and the person is still alive but in the process of dying, decide whether the circumstances are appropriate[196] to ask the person, or their proxy or nearest relative, whether they wish to make a direction regarding

[195] One respondent, a senior employee of Tissue Bank Manitoba, suggested that the Commission make sure to consider the unique health concerns and perspectives of Indigenous peoples in the realm of healthcare in its future Reports. This respondent spoke to the Commission in a personal capacity and not on behalf of Tissue Bank Manitoba. Her comments reflect her own personal views and not those of the organization.

[196] Section 4(3) of the current *HTGA* indicates that in determining whether the circumstances are appropriate to ask the dying person or their proxy or nearest relative whether they wish to make a direction regarding organ and tissue donation (either on their own behalf or, for the proxy or nearest relative, on behalf of the dying person), a human tissue gift agency must consider the emotional and physical condition of the person to be asked, and 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.

organ and tissue donation on the dying person's behalf, in accordance with ss. 4(3) and 4(4) of the *HTGA*; or

(b.2) If no consent or refusal was registered on the MB Registry, and the person is deceased, decide whether the circumstances are appropriate[197] to 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 regarding organ and tissue donation on the deceased person's behalf, in accordance with ss. 4(3) and 4(4) of the *HTGA*.

(c) If after taking these steps, the Responsible Body and/or its actors have still not obtained a consent or refusal from the person or from someone on the person's behalf, then consent should be presumed and organ donation activities may commence.

While each jurisdiction contemplating a presumed consent framework generally requires that steps must be taken to determine an individual's decision regarding post-mortem organ and tissue donation prior to commencing transplantation activities, some of these jurisdictions set out exceptions to this rule. 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 and Prince Edward Island), 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).

Manitoba law recognizes that mentally capable individuals have the right to either consent or refuse to consent to medical treatment, and that this right ought to be respected.[198] In light of this and the serious implications of presuming consent to organ and tissue donation on someone's behalf, the Commission's position is that a statutory presumed consent framework ought not to consider any circumstances under which transplantation activities may be commenced without first having taken steps to ascertain an individual's choice in the matter, as is possible in Quebec. To do so, the Commission believes, would be to undermine the integrity of the presumed consent framework, which is based on the fundamental principle that individuals should be empowered, during their lifetime, to choose how their bodies will be dealt with after their death. While the Commission appreciates that Quebec's exception is intended to enable doctors to save or improve the quality of lives in urgent circumstances, it is concerned that an exception of this nature would give doctor's carte blanche to ignore patients' organ and tissue donation decisions, given that most

[197] Section 4(3) of the current *HTGA* indicates that in determining whether the circumstances are appropriate to ask a deceased person's proxy or nearest relative whether they wish to make a direction regarding organ and tissue donation on the deceased person's behalf, a human tissue gift agency must consider the emotional and physical condition of the person to be asked, and 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.

[198] *The Health Care Directives Act*, SM 1992, c. 33.

circumstances in which organ or tissue donation is required could likely be considered urgent. Moreover, in most circumstances in which organ or tissue donation becomes a possibility, doctors could likely succeed in arguing that transplantation *could* either save or improve another human life.

However, the Commission believes that a statutory presumed consent framework could consider circumstances under which relevant actors could declare that transplantation activities will *not* commence without first having taken steps to ascertain whether an individual has consented or refused to organ or tissue donation, as is the case in Nova Scotia and Prince Edward Island. The Commission is comfortable with this given that it would not run the risk of enabling health care professionals to go against a patient's wishes, and therefore it respects the rights afforded to individuals either to consent or refuse to medical treatment.

Recommendation 6: The Responsible Body should *not* be required to follow the steps set out in Recommendation 5 in the following circumstances:

(a) Where the individual clearly meets criteria for demonstrating that their organs or tissues would not be medically suitable for use in another person; and

(b) Where an inquiry or investigation under *The Fatality Inquiries Act*, S.M. 1989-90, c. 30 is required to be held respecting the cause and manner of death.

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 minor, where they have not been ordinarily resident in the jurisdiction for a specified period of time before death, 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[199] are addressed in sections 12-15 of the NS Act, which state:

[199] NS, *HOTDA*, *supra* note 10, ss 12-15.

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.[200]

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 detail. 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.

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[200] *Ibid*.

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.

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.[201]

3.2 Quebec

In accordance with the proposed amendments to Quebec's *Civil Code*, presumed consent would not apply to minors under the age of 14.[202] This exception would be outlined in sections 43 and 44 of the amended Code, which would state:

> **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.[203]

3.3 New Brunswick

Similar to Nova Scotia, presumed consent for organ and tissue donation under the NB Bill will not apply to individuals who lacked the capacity to make a decision respecting the use of their body after death, to individuals who were not ordinarily resident in New Brunswick for a period of at least 12 months immediately before dying, to individuals under the age of 19 years at the time of death, and where substitute decision-makers have evidence to show that the individual would have refused to donate.[204] These exceptions are addressed in ss. 5.4-5.7 of the proposed amended Act, which state:

> **Consent not deemed if person lacked capacity**
>
> **5.4** (1) A person is not deemed to consent under section 5.3 if the person has died and for a significant period before dying lacked the capacity to make a decision respecting the use of the person's body after death.
>
> **5.4** (2) For the purposes of subsection (1), "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.
>
> **5.4** (3) Nothing in this section affects the ability of a substitute decision-maker to give consent on behalf of the person.

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[201] NSDHW Information Guide, *supra* note 11 at 5-7.
[202] QC, Bill 399, *supra* note 54, ss 1-2.
[203] *Ibid.*
[204] NB, Bill 61, *supra* note 54, s 9.

Consent not deemed if person not ordinarily resident

5.5 (1) A person is not deemed to consent under section 5.3 if the person has died and the person was not ordinarily resident in New Brunswick for a period of at least 12 months immediately before dying.

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

Consent not deemed if person under age of 19 years

5.6 (1) A person is not deemed to consent under section 5.3 if the person was under the age of 19 years at the time of death.

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

Consent or refusal by substitute decision-maker

5.7 (1) If a substitute decision-maker provides information that would lead a reasonable person to conclude that a person would have made a different decision respecting the use of the person's body or a specified part or parts of the person's body after death for therapeutic purposes than the decision recorded in the Registry or deemed under section 5.3, the substitute decision-maker may consent or refuse on behalf of the person in accordance with that information.

5.7 (2) A consent under subsection (1) is binding and is full authority for the use of the body or the removal and use of the specified part or parts of the body after death for therapeutic purposes, except that no person shall act on a consent given under this section if the person

a. has knowledge of an objection by the deceased person more recent than the information provided by the substitute decision-maker
b. has knowledge of an objection by a person of the same or closer relationship to the deceased person than the person who gave consent, or
c. has reason to believe that an inquest may be required to be held into the death of the deceased person, unless a coroner gives a direction under section 6.

3.4 Prince Edward Island

Under the PEI Bill, as under the NS Act and NB Bill, 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 Prince Edward Island 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[205] are addressed in sections 11-14 of the PEI Bill, which state:

> **11. No deemed consent where deceased lacked capacity**
>
> (1) An individual is not deemed to consent under section 10 if the individual has died and for a significant period before dying lacked the capacity to make a decision respecting donation after death.
>
> **Interpretation of "significant period"**
>
> (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.
>
> **Section does not affect substitute decision-maker**
>
> (3) Nothing in this section affects the ability of a substitute decision-maker to give consent on behalf of the individual.
>
> **12. No deemed consent without 12 months of ordinary residence**
>
> (1) An individual is not deemed to consent under section 10 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.
>
> **Section does not affect substitute decision-maker**
>
> (2) Nothing in this Section affects the ability of a substitute decision-maker to give consent on behalf of the individual.
>
> **13. No deemed consent if under age of majority**
>
> (1) An individual is not deemed to consent under section 10 if the individual was under the age of majority at the time of death.
>
> **Section does not affect substitute decision-maker**
>
> (2) Nothing in this section affects the ability of a substitute decision-maker to give consent on behalf of the individual.
>
> **14. Substitute decision-maker may make different decision**
>
> (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 10, the substitute decision-maker may consent or refuse on behalf of the individual in accordance with that information.

[205] PEI, Bill 117, *supra* note 54, ss 11-14.

Decision by substitute decision maker authorizes transplantation activities

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

3.5 Ontario

Section 4(2) of the proposed amended Act in Ontario would have indicated that the presumed consent to the post-mortem use of tissue established in s. 4(1) would not have applied to any 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).[206]

As indicated in section 2.5 of this Report, any person in Ontario who was 16 years of age or more would have been able to object to tissue from his or her body being removed and used after his or her death in accordance with s. 4(3) of the proposed amended Act, and the parent or guardian of a child who was under the age of 16 would have been able to object on that child's behalf before their death in the same way.[207] Accordingly, unlike in the other jurisdictions, minors would not have been automatically excluded from the presumed consent framework contemplated by Ontario. Rather, they *might* have been excluded under the more general exception established in s. 4(2)(b) of the proposed amended Act if their parent or guardian objected, during their lifetime, to donation after death on their behalf.

3.6 Alberta

Like New Brunswick and Prince Edward Island, Alberta's exceptions to presumed consent would have mirrored Nova Scotia's quite closely. Under s. 4.01(2) of the proposed amended Act, a person would not have been 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

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[206] ON, Bill 91, *supra* note 54, s 3.
[207] *Ibid*.

(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).[208]

3.7 Summary

Nova Scotia, Quebec, New Brunswick, Prince Edward Island and Alberta each exclude minors from their respective presumed consent regimes. This is the only exception indicated in the QC Bill, and no such exception would have existed in Ontario's previously contemplated framework. The NS Act, NB Bill, and PEI Bill 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. Alberta's contemplated amended legislation would have done the same. Ontario's legislation would have been unique both in that it would not have automatically excluded children from its presumed consent regime, and in that it would have excluded from this framework any person who was "a believer, a follower or a member of a prescribed religion, cult, association or group."[209]

More than half (62.16%) of the respondents to the Commission's online survey believe that individuals who lack mental capacity to make decisions regarding organ or tissue donation after death should be exempt from the presumed consent framework. Additionally, 48.65% of survey respondents believe that such an exemption should apply to individuals not ordinarily resident in the province for a period of 12 months immediately preceding death. 45.95% of respondents thought that this exception should apply to minors, while 43.24% believed this exception should apply to individuals who are followers or members of certain prescribed religions, associations or groups.[210] Outside of the survey responses, the majority of the consultation feedback indicated a

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[208] AB, Bill 205, *supra* note 54, s 3.
[209] ON, Bill 91, *supra* note 54, s 3.
[210] Survey respondents were asked: If Manitoba were to implement presumed consent organ donation legislation, should it contain any exceptions to the presumption of consent? Minors? Individuals not ordinarily resident in the province for a period of 12 months immediately preceding death? Individuals who are followers or members of certain prescribed religions, associations or groups? Individuals who lack mental capacity to make decisions regarding organ or tissue donation after death? None of the above? Other? Respondents were encouraged to select all options that applied.

desire to exclude minors, individuals who lack mental capacity, and individuals who have not been ordinarily resident in Manitoba preceding death from the presumed consent framework.

While there was not a particularly strong indication of a desire to exclude from this framework individuals belonging to certain religious or spiritual groups which do not believe in or support organ and tissue donation, some concerns were raised during the consultation period about the implications of a presumed consent framework on individuals with certain spiritual beliefs. Representatives of KIM, for instance, noted the various spiritual beliefs of Indigenous communities and the ways in which tissues and organs are to be treated in accordance with these beliefs. Representatives explained that there are a variety of Indigenous communities in Manitoba with very specific instructions about how tissues are to be treated upon death, and that it would be difficult, if not impossible, to come up with a "pan-Indigenous" approach under any new legislation that would adequately address the concerns of all of these different communities. Similarly, given that religious groups differ from each other in significant ways, and moreover, that members or followers of these groups and of their subsects practice and observe these religions in a variety of unique ways, with some members opposing organ and tissue donation and others allowing it, the Commission believes it would be difficult to articulate an exception that would adequately address the concerns of all of these different groups.

To address these concerns and the concerns raised by some Commissioners with respect to the ways that Manitobans should be able to indicate their consents and refusals under a presumed consent framework, the Commission contemplated certain exceptions to presumed consent that do not appear in any of the other jurisdictions analyzed in this project. Specifically, some Commissioners were concerned with the restrictiveness of Recommendation 1, which proposes a presumed consent framework under which Manitobans may only indicate their consents or refusals by registering those decisions in the MB Registry. While Recommendation 1 is consistent with the frameworks contemplated by the other Canadian jurisdictions, under which individuals may only indicate their organ and tissue donation intentions through a registry of some kind, these Commissioners believe that Manitobans should be able to consent or refuse to organ and tissue donation in some way other than registering their decision on the MB Registry, like, for instance, by indicating their intentions in a will or testamentary document, or in a document like the standardized organ and tissue donor card that used to be available through MPI as an accompaniment to a driver license. Such indications of consent or refusal, they argue, should not be invalidated just because they are not also communicated to the MB Registry.

In trying to address these concerns while also toeing the line of the other Canadian jurisdictions and fulfilling the underlying goals of presumed consent; namely, streamlining the donation process and increasing donation rates, the Commission contemplated an exception to the presumed consent framework which is not seen in any of the other jurisdictions. This was an exception for individuals who have failed to register a decision in the MB Registry, but who, at the time of death, have on

their person or in the personal effects that they are then carrying, a signed and witnessed written indication of refusal to organ and tissue donation. The thought was that an exception of this nature would create an easy way for individuals who, for whatever reason, would not or could not register their intentions on the MB Registry, to ensure that their organ and tissue donation intentions were still ultimately honored, while remaining restrictive enough to uphold the underlying purpose of presumed consent: to facilitate a speedier donation process and thus, increase donations overall.

Given that an exception of this nature would apply to all Manitobans, including members or followers of a prescribed religion or spiritual group, it was also argued that this exception could address some of the concerns raised with respect to the implications for religious or spiritual groups which do not believe in or support organ and tissue donation, without requiring legislators to attempt to draft a statutory exception to presumed consent that specifically addresses the complex nuances of religion and spirituality.

Ultimately, there was a difference of opinions between Commissioners with respect to this exception. Those who raised concerns with respect to the restrictiveness of Recommendation 1 also felt that this exception was too narrow. In particular, they felt that the requirement for the written document to be on the individual's person or in the personal effects that they were carrying at the time of death created too narrow of an exception, as it would not allow individuals to rely upon otherwise validly executed documents like wills, which might be located in their homes, at a lawyer's office, or elsewhere. As such, these Commissioners argued that the exception should instead be worded to state that if an individual has died and at the time of death, a written, signed and witnessed indication of consent or refusal to organ and tissue donation *is found*, they should be excluded from the framework.

Other Commissioners were concerned that such an exception would be too broad, essentially allowing individuals to circumvent the presumed consent process and undermining the purposes underlying a presumed consent framework. Specifically, they argued that the presumed consent model is intended to enable a Responsible Body to undertake time-sensitive donation and transplantation activities more easily and quickly by avoiding the steps required to ascertain an individual's organ donation intentions where they are not known. This alternative exception proposed by Commissioners, they argued, would require the Responsible Body in every instance to undertake the steps required to ascertain an individual's organ donation intentions, thus delaying donation and transplantation activities and potentially resulting in missed donation opportunities. This, they argue, is the exact outcome that a presumed consent framework intends to avoid.

These Commissioners also argued that some of the concerns respecting Recommendation 1 and the proposed exception for individuals with written indications on their person at the time of death are alleviated by additional recommendations made by the Commission (and outlined in the following section of this Report) that would allow certain individuals like nearest relatives to make

decisions regarding organ and tissue donation on another person's behalf in a number of circumstances. One such circumstance, which will be elaborated on in the following section, is where the nearest relative has information that would lead a reasonable person to conclude that the deceased person would not have consented to donation after death.

Given the stark differences in opinion amongst Commissioners in respect of this exception, the Commission ultimately determined that it could not recommend the inclusion of any such exception. It did, however, agree on a number of other exceptions to the presumed consent framework which are present in the frameworks of the other Canadian jurisdictions.

Recommendation 7: In any presumed consent framework that might be implemented in Manitoba, an individual should not be presumed to consent under the following circumstances:

(a) If the individual has died and for a significant period before dying lacked the capacity to make a decision respecting donation after death.

For purposes of this first exception, a significant period should mean 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. What constitutes a significant period should be assessed on a case by case basis.

(b) If the individual has died and the individual was not ordinarily resident in Manitoba for a period of at least 12 months immediately before dying.

(c) If the individual was under the age of majority at the time of death.

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 after their death on their behalf. Given that in Manitoba, "substitute decision maker" has a unique meaning under *The Vulnerable Persons Living with a Mental Disability Act* ("*VPA*")[211], the Commission has determined that in any presumed consent legislation that might be implemented in Manitoba, these individuals ought to be referred to by some other name in order to avoid confusion.

[211] Under *The Vulnerable Persons Living with a Mental Disability Act,* SM 1993, c 29 [*VPA*], a substitute decision is someone appointed to under that Act to make decisions on a vulnerable person's behalf in respect of either their personal care or their property.

This section will describe the provisions contained in the NS Act, in the legislation proposed by Quebec, New Brunswick and Prince Edward Island, and in the legislation previously before the Alberta and Ontario governments 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 after-death organ donation on behalf of others, and any particular requirements of or exceptions to this substitute decision making.

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 and tissue 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;
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> (g) a sibling;
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> (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.[212]

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

[212] NS, *HOTDA, supra* note 10, s 6(1).

> (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;
>
> (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.[213]

In accordance with s. 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).[214]

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 NS 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;[215]

2. Where an individual has not recorded a decision regarding donation after death in the NS 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

[213] *Ibid,* s 6(2).
[214] *Ibid,* s 6(4).
[215] *Ibid,* s 15(1).

consented to donation after death;[216] and

3. Where an individual has not recorded a decision regarding donation after death in the NS 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).[217]

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?[218]

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."[219]

4.2 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.[220]

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[216] *Ibid.*
[217] *Ibid,* ss 12-14.
[218] NSDHW Information Guide*, supra* note 11 at 3-4.
[219] *Ibid* at 8.
[220] QC, Bill 399, *supra* note 54, s 2.

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]."[221]

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."[222] While it does not elaborate on this further, this paragraph could be interpreted to mean that as in Nova Scotia, 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.

4.3 New Brunswick

New Brunswick's proposed legislation is very similar to Nova Scotia's with respect to substitute decision makers capable of making decisions regarding organ and tissue donation on another person's behalf. Under s. 1.1(1) of the proposed amended Act, a substitute decision maker will be, in relation to a person, a person determined in the following order of priority:

a) the person's spouse or common-law partner;

b) if there is no spouse or common-law partner, or if the spouse or common-law partner is not readily available, any one of the person's children who has attained the age of 19 years;

c) if there are no children, or if none of the children is readily available, either one of the person's parents;

d) if there are no parents, or if no parent is readily available, any one of the person's brothers or sisters;

e) if there are no brothers or sisters, or none of the brothers or sisters is readily available, any other of the person's next of kin who has attained the age of 19 years; or

f) if there is no next of kin, or if no next of kin is readily available, the person lawfully in possession of the body other than, if the person died in hospital, the regional health

[221] CCQ, *supra* note 9, art 14.
[222] QC, Bill 399, *supra* note 54, s 2.

authority.

Section 1.1(2) of the proposed amended Act clarifies that if two or more of these people (described in separate paragraphs) claim the authority to give or refuse consent under subsection (1), the person under the paragraph occurring first in that subsection prevails. Moreover, like s. 6(4) of the NS Act, the individuals listed in s. 1.1(1) of the proposed amended Act in New Brunswick will not be empowered to act as substitute decision makers under the Act unless they:

> a) excepting a spouse [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) [are] willing to assume the responsibility for making the decision;
>
> c) [know] of no person of a higher order of priority who is able and willing to make the decision; and
>
> d) [make] a statement in writing certifying the relationship to the person and the facts and beliefs set out in paragraphs (a) to (c).[223]

As in Nova Scotia, under the NB Bill, there are three main circumstances in which these substitute decision makers may consent or refuse 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 NB 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 respecting the use of the person's body or a specified part or parts of the person's body after death for therapeutic purposes;[224]

2. Where an individual has not recorded a decision regarding donation after death in the NB 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;[225] and

3. Where an individual has not recorded a decision regarding donation after death in the NB Registry and deemed consent does not apply because of an exception (i.e. they lacked capacity, they were under the age of 19 at the time of death, or they were not ordinarily resident in New Brunswick).[226]

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[223] NB, Bill 61, *supra* note 54, s 3.
[224] *Ibid,* s 9.
[225] *Ibid.*
[226] *Ibid.*

4.4 Prince Edward Island

Section 5(1) of the PEI Bill lists the following individuals, in the following order of priority, as substitute decision makers capable of making decisions regarding organ and tissue donation on another person's behalf:

> (a) a person authorized to give consent under the *Consent to Treatment and Health Care Directives Act,* R.S.P.E.I. 1988, Cap C-17.2, unless the authorization excludes decisions about organ or tissue donation;
>
> (b) a guardian or representative under the *Adult Protection Act*, R.S.P.E.I. 1988, Cap. A-5, or the *Mental Health Care Act,* R.S.P.E.I. 1988, Cap. M-6.l 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.[227]

A "person lawfully in possession of the individual's body" under section 5(1)(m) does not include:

> (a) the chief coroner or a coroner in possession of the body for the purpose of the *Coroners 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;

[227] PEI, Bill 117, *supra* note 54, s 5(1).

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

(e) the superintendent of a crematorium in possession of the body for the purpose of its cremation.[228]

In accordance with s. 5(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 [they 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).[229]

Like the legislation in Nova Scotia and New Brunswick, under the PEI Bill, 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 PEI 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;[230]

2. Where an individual has not recorded a decision regarding donation after death in the PEI 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;[231] and

3. Where an individual has not recorded a decision regarding donation after death in the PEI 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).[232]

[228] *Ibid,* s 5(2).
[229] *Ibid,* s 5(4).
[230] *Ibid,* s 14(1).
[231] *Ibid.*
[232] *Ibid,* ss 11-13.

4.5 Ontario

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

> 1. The person's spouse.
>
> 2. If the person [had] no spouse or if the person's spouse [was] not available, any one of the person's children.
>
> 3. If the person [had] no spouse or children or if none [were] available, either one of the person's parents.
>
> 4. If the person [did] not have any of the relatives mentioned in paragraph 1, 2 or 3 or if none of them [were] available, any one of the person's brothers or sisters.
>
> 5. If the person [did] not have any of the relatives mentioned in paragraph 1, 2, 3 or 4 or if none of them [were] available, any other of the person's next of kin.
>
> 6. If the person [did] not have any of the relatives mentioned in paragraph 1, 2, 3, 4 or 5 or if none of them [were] available, the person lawfully in possession of the body other than a person referred to in subsection (4).[233]

"Spouse" would have been defined in s. 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.*[234]

For purposes of s. 5(2)(6), a "person lawfully in possession of the body" would not have included any of the following:

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[233] ON, Bill 91, *supra* note 54, s 3.
[234] *Ibid.*

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.[235]

Under the proposed amended Act in Ontario, there would have been three main circumstances in which a person may have objected to organ and tissue donation on someone else's behalf. These included:

1. Where the individual was a minor under the age of 16 (in which case, the parent or guardian of the child could have objected on their behalf);[236]

2. Where the individual died without making an objection in accordance with subsection 4(3);[237] and

3. Where the individual's death was imminent and, in the opinion of a physician, the individual would have been incapable by reason of injury or disease of making an objection in accordance with subsection 4(3).[238]

In all of these circumstances, s. 5(5) of the proposed amended Act would have dictated that the individual objecting on another's behalf had to have done 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.[239]

Moreover, s. 5(6) of the proposed Act would have prohibited individuals from objecting to tissue being removed from another person's body and being used after their death if "he or she [had]

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[235] *Ibid.*
[236] *Ibid.*
[237] *Ibid.*
[238] *Ibid.*
[239] *Ibid.*

reason to believe that the person who died or whose death [was] imminent would not have objected to the removal or use."[240]

4.6 Alberta

In Alberta, substitute decision makers capable of consenting or refusing to organ donation after death on another person's behalf would have been outlined in s. 4(4) of the proposed amended Act. This list, which was set out in order of priority, included:

> (a) firstly, if they [were] 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 [was] the next of kin of that person.[241]

However, in accordance with s. 4(5) of the proposed legislation, these individuals would not have been able to make a decision on behalf of another person if they had personal knowledge of any of the following:

> (a) a person in a higher priority class described in subsection (4) [was] 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 [have decided] to refuse to donate;
>
> (c) the person on whose behalf they [were] making a decision would have made a different decision.[242]

Under the proposed legislative scheme, there would have been three main circumstances in which a person could have consented or refused to organ and tissue donation on someone else's behalf. These included:

1. Where the individual had not made a decision regarding donation after death at the time of their death;

2. Where the individual had not made a decision regarding donation after death, death was imminent, and, in the opinion of a medical practitioner, the individual was incapable of

[240] *Ibid.*
[241] AB, Bill 205, *supra* note 54, s 3.
[242] *Ibid.*

making a decision due to injury or disease; and

3. Where the individual was a minor at the time of their death.[243]

As in Nova Scotia, New Brunswick, and Prince Edward Island, s. 4.01(2)(c) of the proposed amended Act would have dictated that where a person had not made a decision regarding donation prior to their death, thus triggering presumed consent, a substitute decision maker could have refused donation on that person's behalf if they could 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.[244]

4.7 Summary

4.7(1) *Who May Consent or Refuse to Donation on Another's Behalf?*

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

Substitute Decision Maker	Nova Scotia	Quebec	New Brunswick	Prince Edward Island	Ontario	Alberta
A person authorized to give consent under legislation pertaining to medical or health-care decisions	Yes	Silent	Silent	Yes	Silent	Silent
A guardian	Yes	Yes[245]	Silent	Yes	Silent	Yes
A representative under substitute decision making legislation	Yes	Silent	Silent	Yes	Silent	Silent
A spouse/adult interdependent partner	Yes	Silent	Yes	Yes	Yes	Yes

[243] *Ibid.*
[244] *Ibid.*
[245] As opposed to the term "guardian", Quebec's proposed legislation specifies that the individual must be someone with "parental authority" or "tutorship" (see QC, Bill 399, *supra* note 54, s 1).

Substitute Decision Maker	Nova Scotia	Quebec	New Brunswick	Prince Edward Island	Ontario	Alberta
A child	Yes[246]	Silent	Yes[247]	Yes[248]	Yes	Yes[249]
A parent	Yes	Yes[250]	Yes	Yes	Yes	Yes
A person standing in loco parentis	Yes	Silent	Silent	Yes	Silent	Silent
A sibling	Yes	Silent	Yes	Yes	Yes	Yes[251]
A grandparent	Yes	Silent	Silent	Yes	Silent	Silent
A grandchild	Yes	Silent	Silent	Yes	Silent	Silent
An aunt or uncle	Yes	Silent	Silent	Yes	Silent	Silent
A niece or nephew	Yes	Silent	Silent	Yes	Silent	Silent
Another relative/next of kin	Yes	Silent	Yes[252]	Yes	Yes	Yes
The person lawfully in possession of the individual's body	Yes	Silent	Yes	Yes	Yes	Silent

Currently, in Manitoba, ss. 1, 3(1.1), 3(2), 3(3.1) and 3(4) of the *HTGA* outline who may make decisions regarding organ and tissue donation on another person's behalf. These sections are separated into two categories: directions on behalf of deceased persons (ss. 3(1.1) and 3(2)) and directions on behalf of persons whose death is imminent and inevitable ("dying persons") (ss. 3(3.1) and 3(4)). Generally speaking, the individuals outlined in these sections include the person's

[246] Nova Scotia's legislation requires that the child has reached the age of majority (see NS, *HOTDA*, *supra* note 10, s 6(1)).
[247] New Brunswick's proposed legislation will require that the child has attained the age of 19 years (see NB, Bill 61, *supra* note 54, s 3).
[248] Prince Edward Island's proposed legislation would require that the child has reached the age of majority (see PEI, Bill 117, *supra* note 54, s 5(1)).
[249] Alberta's proposed legislation would have required that the child was an adult (see AB, Bill 205, *supra* note 54, s 3).
[250] As opposed to the term "parent", Quebec's proposed legislation specifies that the individual must be someone with "parental authority" or "tutorship" (see QC, Bill 399, *supra* note 54, s 1).
[251] Alberta's proposed legislation would have required that the sibling was an adult (see AB, Bill 205, *supra* note 54, s 3).
[252] New Brunswick's proposed legislation will require that the next of kin has attained the age of 19 years (see NB, Bill 61, supra note 54, s 3).

proxy, where they are at least 18 years of age, their nearest relative, the person lawfully in possession of the body, and the Inspector of Anatomy. Which of these individuals may consent or refuse on another's behalf differs depending on if the person is deceased or dying.

Where the individual is deceased, the following individuals may consent or refuse on their behalf:

> (a) […] 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, […] the deceased person's nearest relative; or
>
> (c) if there is no nearest relative or the nearest relative is unavailable, […] the person lawfully in possession of the body or the Inspector of Anatomy, as the case may be.[253]

Where the individual is a dying person, the following individuals may consent or refuse on their behalf:

> (a) […] 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, […] the dying person's nearest relative.[254]

For greater certainty, s. 3(4) of the Act indicates that where the individual is a dying person under the age of 16, only their nearest relative may make a direction regarding organ and tissue donation on their behalf.

A "proxy," who, under Manitoba's current legislation is given the highest priority to consent or refuse to organ and tissue donation on an adult person's behalf, is defined in s. 1(1) of the Act as a person appointed in a health care directive made in accordance with *The Health Care Directives Act*.[255] In accordance with that Act, proxies may make health care decisions on behalf of the maker of a health care directive in accordance with that directive.[256] These individuals are equivalent to those listed first in both Nova Scotia's and Prince Edward Island's hierarchical definition of "substitute decision maker": persons authorized to give consent under medical and health-care decision-related legislation in those respective jurisdictions.

"Nearest relative", the next in the general list of priority, is defined as:

> (a) a spouse, unless there is a common-law partner,

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[253] *HTGA, supra* note 8, s 3(1.1).
[254] *Ibid,* s 3(3.1).
[255] *The Health Care Directives Act*, *supra* note 197.
[256] *Ibid,* s 1.

(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.

Finally, there is a "person lawfully in possession of the body" and the Inspector of Anatomy, the last individuals who are able to consent or refuse to organ and tissue donation on a deceased person's behalf under Manitoba's current legislation. While the term "person lawfully in possession of the body" is not positively defined in the Act, s. 3(2) explains who is *not* to be included in this group of people:

(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.

The Inspector of Anatomy is an individual appointed under *The Anatomy Act*[257] by the Lieutenant Governor in Council who will gain control of the body of a deceased person that is unclaimed by specified individuals named under that Act.

Manitoba's current legislation differs from most of the other jurisdictions outlined in this Report in the way that it addresses the individuals capable of consenting or refusing to organ and tissue donation on another person's behalf. First, it differs in that it addresses decisions made on behalf of deceased persons and dying persons separately, with the only real difference between the two groups being that persons lawfully in possession of a body and the Inspector of Anatomy are capable of making a decision on behalf of a deceased person as a last resort, whereas, logically, these individuals would not be an available option where the person is still living, albeit in the process of dying. Second, it differs in that it does not contain one standalone definition for this group of people, but multiple provisions and definitions which must be read together in order to ascertain who may make a decision on another's behalf.

However, despite these organizational differences, the provisions of Manitoba's current legislation operate in much the same way as the equivalent sections in Nova Scotia's and Prince Edward

[257] RSM 1987, c A80.

Island's legislation, which both also prioritize proxies, and then nearest relatives and then persons lawfully in possession of an individual's body as potential substitute decision makers. Given that Manitoba's current legislative scheme appears to be in line with current and contemplated Canadian presumed consent legislation in this regard, the Commission feels that any presumed consent legislation implemented in Manitoba need not stray too far from what is already contained in the *HTGA*.

Recommendation 8: In accordance with ss. 3(1.1) and 3(2) of the *HTGA,* the following individuals should be empowered to consent or refuse to organ and tissue donation on a ***deceased person's*** behalf:

(a) 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, the deceased person's nearest relative; or

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

Recommendation 9: For purposes of Recommendation 8, the expression "person lawfully in possession of the body" should not include:

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

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

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

Feedback received in response to the Consultation Paper revealed a potential discrepancy created by the current wording of ss. 3(1.1)(c) and 3(2) of the *HTGA* with respect to who may be able to make an organ or tissue donation decision on someone else's behalf. Specifically, a respondent noted that s. 3(1.1)(c) enables the Inspector of Anatomy to make a direction on behalf of a deceased person where no proxy or nearest relative exists or is available, while s. 3(2)(a) excludes medical examiners in possession of a body for purposes of inquiry or investigation from the definition of persons lawfully in possession of the body. The issue here is that in Manitoba, our Chief Medical

Examiner may also be our Inspector of Anatomy. As such, s. 3(1.1)(c) and 3(2)(a) are somewhat at odds. They are at odds in that a doctor who fills both of these roles would be qualified to make a direction in their capacity as the Inspector of Anatomy, but restricted from making such a direction in their capacity as a medical examiner, in a case where no proxy or nearest relative exists or where they are unavailable, and where, as the Chief Medical Examiner, they are in possession of the body for purposes of inquiry or investigation.

However, s. 3(1.1)(c) specifically states that if there is no nearest relative or the nearest relative is unavailable, "the person lawfully in possession of the body **or** the Inspector of Anatomy [may make a direction on the deceased person's behalf], **as the case may be**."[258] The use of "or" and "as the case may be" indicates that there will be times where there is a person lawfully in possession of a body, and other times when the body will be in the control of the Inspector of Anatomy. It seems that both cannot occur simultaneously.

The Anatomy Act reveals that the Inspector of Anatomy will come into control of a dead body when the body is not required for purposes of inquiry or investigation under *The Fatality Inquiries Act*, and where it is otherwise unclaimed by a "preferred claimant, other relative or bona fide friend of the deceased" for a specified period of time. Preferred claimants, other relatives and bona fide friends are explicitly entitled to claim the body of a dead person at any time after it has come into the possession or under the control of the inspector or a sub-inspector of anatomy under s. 5(1) of *The Anatomy Act*. In these cases, where the body is not needed for inquiry or investigation, where the body is not otherwise claimed by someone entitled to claim it, and therefore, the Inspector of Anatomy gains control of the dead body, it appears that the Inspector of Anatomy will be the person under s. 3(1.1)(c) of the *HTGA* to be able to make the organ donation decision on the deceased person's behalf.

Conversely, if the body is needed for inquiry or investigation under *The Fatality Inquiries Act*, or if a preferred claimant, other relative, bona fide friend or other person entitled to claim the body under *The Anatomy Act* claims and lawfully acquires the body of a deceased person, then a medical examiner in charge of an investigation or entitled person would be in lawful control of the body. However, section 3(2)(a) of the *HTGA* makes clear that even though a medical examiner in these circumstances is technically a person lawfully in possession of the body, they will not have the power under s. 3(1.1)(c) to make a decision on a deceased person's behalf. On the other hand, preferred claimants, other relatives or bona fide friends who come into lawful possession of a deceased body *can* make such decisions, given that they are not excluded from the definition of "person lawfully in possession of the body" under the *HTGA*.

If the Commission's interpretation of these sections is correct, and there are two distinct situations set out in s. 3(1.1)(c), one involving persons lawfully in possession of the body (but not medical

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[258] *HTGA, supra* note 8, s 3(1.1)(c) [emphasis added].

examiners in possession of a body for the purpose of inquiry or investigation), and one involving the Inspector of Anatomy, the Commission questions how much of an issue is really created by the supposed discrepancy between ss. 3(1.1)(c) and 3(2)(a). Based on this interpretation, it should be clear that the Inspector of Anatomy will be entitled to make a decision under s. 3(1.1)(c) where a deceased body is not needed for inquiry or investigation under *The Fatality Inquiries Act* and where it is unclaimed by someone entitled to claim it under *The Anatomy Act*. Further, it should be clear that a medical examiner, including the Chief Medical Examiner, will *never* be able to make such a decision in their capacity as a medical examiner, by virtue of s. 3(2)(a). Accordingly, even though Manitoba's Inspector of Anatomy may also be its Chief Medical Examiner, this person's capacity as medical examiner will not effect their authority as Inspector of Anatomy under s. 3(1.1)(c) to make a decision on a deceased person's behalf.

Having said all of this, this interpretation is not obvious based on a plain reading of the *HTGA*. In light of this, and given the possibility that the current wording in the *HTGA* could cause confusion surrounding the Inspector of Anatomy's authority to make a decision under s. 3(1.1)(c) that could cause unnecessary delays in the organ and tissue donation process, the Commission believes that any changes made to the *HTGA* with respect to these sections ought to address this issue.

Recommendation 10: Any presumed consent legislation that might be implemented in Manitoba should include a provision which explains that an Inspector of Anatomy will not be prevented from consenting or refusing to organ and tissue donation on a deceased person's behalf in accordance with s. 3(1.1)(c) of the *HTGA* by virtue of the fact that they may also be a medical examiner under the *Fatality Inquiries Act.*

Recommendation 11: In accordance with s. 3(3.1) of the *HTGA,* the following individuals should be empowered to consent or refuse to organ and tissue donation on behalf of an adult whose death is imminent and inevitable (a "***dying adult***"):

(a) the dying adult'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.

Recommendation 12: In accordance with s. 3(4) of the *HTGA,* 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 (a "***dying minor***"), the dying minor's nearest relative should be empowered to make decisions regarding organ and tissue donation on their behalf.

Manitoba's current scheme does differ from Nova Scotia's and Prince Edward Island's schemes in certain substantive respects. Mainly, its definition of "nearest relative" is much more restrictive than the list of nearest relatives outlined in the definition of "substitute decision maker" found both in Nova Scotia's and Prince Edward Island's respective legislation, which each list two times the number of possible relatives as are listed in Manitoba's Act. While all three jurisdictions list spouses, children who have reached the age of majority, parents, legal guardians, and siblings[259] as examples of nearest relatives, this is where Manitoba's list ends. Nova Scotia and Prince Edward Island, on the other hand, also list persons standing in *loco parentis*, grandparents, grandchildren, aunts and uncles, nieces and nephews, and other relatives as potential nearest relatives, providing for a more comprehensive, diverse and modern representation of familial relationships.

Manitoba's relatively restrictive list of nearest relatives was raised with the Commission in feedback to the Consultation Paper as a significant shortcoming in the legislation that may be impeding the donation process.[260] This, it was explained, is because the relative who is actually the nearest relative to an individual, and who is available and best placed to make decisions on the person's behalf (i.e. an aunt, uncle, grandparent, etc.) could be excluded from participating in the process simply because they do not fit within the narrow definition. For example, if a person is under 16 years of age and a physician is of the opinion that their death is imminent and inevitable, and the only family this minor has is a grandmother who informally cares for the child (i.e. she does not have legal guardianship of the child), the grandmother would not be authorized to consent to post-mortem organ and tissue donation on the child's behalf because a grandparent is not included in the list of nearest relatives. The result would be that the child would die without any decision being made on their behalf with respect to organ and tissue donation, thus reducing the chances of the child's organs and tissues being harvested for transplantation. Considering this potential impediment, the Commission is of the opinion that the list of nearest relatives ought to be updated and expanded.

In making any recommendations with respect to nearest relatives and their powers under the Act to consent or refuse to organ and tissue donation on another person's behalf, the Commission must consider its consultations with KIM, which, as previously mentioned, revealed a number of significant issues and concerns for Indigenous communities surrounding the implementation of a presumed consent organ and tissue donation framework in Manitoba. In addition to the concerns discussed earlier in this Report with respect to the unique obstacles faced by Indigenous peoples that could deter or prevent them from registering a decision regarding organ and tissue donation under a presumed consent framework, the Commission's consultation meeting with KIM

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[259]Manitoba's legislation requires that a brother or sister be at least 18 years of age whereas Nova Scotia's and Prince Edward Island's legislation does not make this qualification.

[260] This issue was brought to the Commission's attention by a senior employee working for Tissue Bank Manitoba, one of Manitoba's two human tissue gift agencies. This respondent spoke to the Commission in a personal capacity and not on behalf of Tissue Bank Manitoba.

highlighted concerns regarding the treatment of Indigenous children under any new presumed consent legislation.

Specifically, representatives of KIM stressed the importance of taking certain steps under presumed consent legislation to address the many Indigenous children in the Child and Family Services system ("CFS"), in foster care, and in the youth centre. Serious doubts were raised about the appropriateness of a "legal guardian" of an Indigenous child in CFS, foster care or the youth centre making a decision on behalf of that child with respect to organ or tissue donation. In these circumstances, representatives of KIM feel that it would be critical to involve that child's Indigenous community in any decisions made on their behalf regarding organ or tissue donation.

Echoing the statements made earlier in this Final Report, the Commission again stresses the need for Manitoba to engage in extensive consultations with Indigenous communities in the Province to consider how Indigenous laws, culture, and experiences will impact the ways that Indigenous people will be affected by any presumed consent organ and tissue donation legislation that might be enacted in the Province. Without the benefit of such consultation at the Commission's disposal, it again feels that it cannot make a fully informed recommendation as to whom to include in a definition of "nearest relative," that would adequately address the important concerns for Indigenous children mentioned above. As such, while the Commission feels that certain changes can be made to improve the definition that currently exists in the Act, it makes these recommendations tentatively, recognizing that additional and alternative changes would likely need to be implemented following in-depth consultation with Indigenous communities in the Province.

Recommendation 13: The definition of nearest relative contained in s. 1 of the *HTGA* should be amended to state the following:

"nearest relative" means, with respect to any person, the relative of that person first listed in the following subclauses:

(a) a guardian;

(b) a spouse;

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

(d) a parent;

(e) a person standing in loco parentis;

(f) a sibling;

(g) a grandparent;

(h) a grandchild;

(i)	an aunt or uncle;
(j)	a niece or nephew; or
(k)	another relative.

While the Commission contemplated recommending a particular definition for the term "guardian" as it appears in Recommendation 13, it determined that greater consideration should be given to how the term is used and defined in all Manitoba statutes and that such a review is outside the scope of this project. The Commission does recognize, however, that such a definition would need to be addressed in connection with Recommendation 13, if Manitoba were to accept it.

The Commission notes that the legislation in both Nova Scotia and Prince Edward Island enables representatives under their respective substitute decision making legislation to consent or refuse to organ and tissue donation on another person's behalf when they have the appropriate authority to deal with organ donation decisions under those Acts. The Public Guardian and Trustee, in its feedback to the Commission in response to the Consultation Paper, pointed out that equivalent representatives in Manitoba are not given this right under the *HTGA*, given that the *VPA* and *The Mental Health Act* ("*MHA*")[261], Manitoba's equivalent substitute decision making legislation, explicitly excludes substitute decision makers and committees from consenting to the removal of tissue for transplant or medical education or medical research.[262]

The Public Guardian and Trustee raised an interesting point for the Commission's consideration in this regard; that is, the interaction between the abovementioned provisions of the *VPA* and the *MHA* and of those pertaining to nearest relatives in the *HTGA*. Given that an individual's nearest relative may also be their substitute decision maker or committee under the *VPA* or *MHA*, and that the *HTGA* empowers nearest relatives to make decisions regarding organ or tissue donation on behalf of others, what would happen in a situation where a nearest relative who was also an individual's substitute decision maker for personal care under the *VPA* or their committee under the *MHA*, found themselves in a position where they had to consent or refuse to organ or tissue donation on the individual's behalf as their nearest relative? Would the *HTGA* or these other substitute decision making Acts prevail? The feedback of the Public Guardian and Trustee seems to suggest that currently, the *VPA* and *MHA* would prevail, resulting in a nearest relative who also serves as a substitute decision maker or committee under the *VPA* or *MHA* being prohibited from making an organ or tissue donation decision on their relative's behalf. This is reflected in the Public Guardian and Trustee's suggestion that these three Acts be amended to allow such a person to make those decisions under the *HTGA*.

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[261] SM 1998, c 36.
[262] *Ibid,* s 93; *VPA, supra* note 210, s 61.

Given that the confusion that might arise from the discrepancy between these three Acts could result in unnecessary delays in the organ and tissue donation process, and even missed opportunities for donation, the Commission agrees with the Public Guardian and Trustee that this issue must be addressed.

Recommendation 14: *The Vulnerable Persons Living with a Mental Disability Act* and *The Mental Health Act* should be amended to allow substitute decision makers and committees appointed under either piece of legislation to consent to the removal of organs or tissues on an individual's behalf if the substitute decision maker or committee also qualifies as the nearest relative of the person under the *HTGA*.

4.7(2) *When May Someone Consent or Refuse to Donation on Another's Behalf?*

Other than Quebec, each of the Canadian jurisdictions addressed in this Final Report outline clear circumstances under which substitute decision makers may and may not make decisions on another person's behalf.

In Nova Scotia and Prince Edward Island, these circumstances include:

1. Where an individual has recorded their decision regarding donation after death in the respective 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;[263]
2. Where an individual has not recorded a decision regarding donation after death in the respective 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;[264] and
3. Where an individual has not recorded a decision regarding donation after death in the respective 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).[265]

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

[263] NS, *HOTDA, supra* note 10, s 15(1); PEI, Bill 117, *supra* note 54, s 14(1).
[264] *Ibid.*
[265] NS, *HOTDA, supra* note 10, ss 12-14; PEI, Bill 117, *supra* note 54, ss 11-13.

d) They make a statement in writing certifying the relationship to the person and the facts and beliefs set out in three preceding conditions.[266]

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.[267]

In New Brunswick, these circumstances include:

1. Where an individual has recorded their decision regarding donation after death in the NB 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 respecting the use of the person's body or a specified part or parts of the person's body after death for therapeutic purposes;[268]
2. Where an individual has not recorded a decision regarding donation after death in the NB 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;[269] and
3. Where an individual has not recorded a decision regarding donation after death in the NB Registry and deemed consent does not apply because of an exception (i.e. they lacked capacity, they were under the age of 19 at the time of death, or they were not ordinarily resident in New Brunswick).[270]

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

a) excepting a spouse [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) [are] willing to assume the responsibility for making the decision;
c) [know] of no person of a higher order of priority who is able and willing to make the decision; and
d) [make] a statement in writing certifying the relationship to the person and the facts and beliefs set out in paragraphs (a) to (c).[271]

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[266] NS, *HOTDA, supra* note 10, s 6(4); PEI, Bill 117, *supra* note 54, s 5(4).
[267] QC, Bill 399, *supra* note 54, ss 1-2.
[268] *Ibid,* s 9.
[269] *Ibid.*
[270] *Ibid.*
[271] NB, Bill 61, *supra* note 54, s 3.

In Ontario, the circumstances under which substitute decision makers would have been able to make decisions on another person's behalf included:

1. Where the individual was a minor under the age of 16 (in which case, the parent or guardian of the child may have objected on their behalf);
2. Where the individual died without making an objection in accordance with subsection 4(3); and
3. Where the individual's death was imminent and, in the opinion of a physician, the individual was incapable by reason of injury or disease of making an objection in accordance with subsection 4(3).[272]

These individuals would have only been able to object to organ donation on another person's behalf if they had done 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.[273] Moreover, they would not have been able to object on another person's behalf if they had "reason to believe that the person who died or whose death [was] imminent would not have objected to the removal or use."[274]

Similar to Ontario, in Alberta, the circumstances under which substitute decision makers would have been able to make decisions on another person's behalf included:

1. Where the individual had not made a decision regarding donation after death at the time of their death;
2. Where the individual had not made a decision regarding donation after death, death was imminent, and, in the opinion of a medical practitioner, the individual was incapable of making a decision due to injury or disease; and
3. Where the individual was a minor at the time of their death.[275]

The listed individuals would not have been able to act as substitute decision makers where they had personal knowledge that:

a) a person in a higher priority class described in subsection (4) [was] reasonably available to make the decision;
b) in the case of a decision to consent to donate, another person who [was] in the same class or a higher class described in subsection (4) would [have decided] to refuse to donate; or
c) the person on whose behalf they [were] making a decision would have made a different decision.[276]

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[272] ON, Bill 91, *supra* note 54, s 3.
[273] *Ibid*.
[274] *Ibid*.
[275] AB, Bill 205, *supra* note 54, s 3.
[276] *Ibid*.

Under Manitoba's current legislation, proxies, nearest relatives, persons lawfully in possession of the body or the Inspector of Anatomy may make decisions on behalf of deceased persons in the following circumstances:

1. Where they died having made no direction regarding the after-death use of their organs and tissues;
2. Where they have died and they *had* made such a direction, but this direction cannot be acted upon because they were not capable of understanding the nature and effect of their decision when they made it, or
3. Where they were a minor when they died.[277]

Similarly, proxies and nearest relatives may make decisions on behalf of dying adults in the following circumstances:

1. Where a dying adult has not made a direction regarding the after-death use of their organs and tissues; or
2. Where they *have* made such a direction, but this direction cannot be acted upon because they were not capable of understanding the nature and effect of their decision when they made it; and
3. A physician is of the opinion that the dying adult cannot make such a direction before death.[278]

Finally, a nearest relative may make a direction regarding organ and tissue donation on behalf of a dying person who is under the age of 16, simply where a physician is of the opinion that the person's death is imminent and inevitable.[279]

Given that these provisions appear to be in line with the equivalent provisions in some of the other contemplated presumed consent frameworks in Canadian jurisdictions, such as those that were previously envisioned in Ontario and Alberta, the Commission feels that any presumed consent legislation implemented in Manitoba need not stray too far from what is already contained in the *HTGA* with respect to the circumstances under which individuals may make decisions on another person's behalf. However, given that neither Ontario's nor Alberta's Bills are still before their legislatures, and given that additional circumstances are delineated in Nova Scotia's, New Brunswick's and Prince Edward Island's legislation, the Commission does recognize the need to account for some of these additional circumstances.

Recommendation 15: The individuals listed in Recommendation 8 should be able to consent or refuse to organ and tissue donation on a ***deceased person's*** behalf in the following circumstances:

[277] *HTGA, supra* note 8, s. 3(1).
[278] *Ibid,* s. 3(3).
[279] *Ibid,* s. 3(4).

(a) where the appropriate person listed in Recommendation 8 provides information that would lead a reasonable person to conclude that the deceased person would have made a different decision respecting donation after death than the decision recorded in the MB Registry or presumed, in accordance with the presumed consent regime; or

(b) where the deceased person has *not* given a direction regarding donation after death but deemed consent does not apply because of an exception to the presumed consent framework (i.e. they lacked capacity, they were not ordinarily resident in Manitoba, or they were a child).

For recommendation 15(a), the appropriate person listed in Recommendation 8 should be required to provide the evidence that they believe proves that the deceased person would have made a different decision than what was recorded in the MB Registry or presumed under the presumed consent framework, with the strongest evidence being a witnessed written document, and the weakest evidence being oral and uncorroborated.

In assessing the evidence to determine whether a reasonable person would be satisfied with the evidence presented, the following factors could be considered: (i) whether the evidence is of the deceased person's view as opposed to the family's view; (ii) whether there is corroborating evidence; (iii) how recent the evidence is; and (iv) how well the person providing the evidence knows the deceased person.

Recommendation 16: The individuals listed in Recommendation 11 should be able to consent or refuse to organ and tissue donation on a ***dying adult's*** behalf in the following circumstances:

(a) where a physician is of the opinion that the dying person's death is imminent and inevitable and that they are incapable of making a direction; and

(i) the appropriate person listed in Recommendation 11 provides information that would lead a reasonable person to conclude that the dying person would have made a different decision respecting donation after death than the decision recorded in the MB Registry or that will be presumed upon their death, in accordance with the presumed consent regime; or

(ii) the dying person has *not* given a direction regarding donation after death but deemed consent will not apply because of an exception to the presumed consent framework (i.e. they lacked capacity, they were not ordinarily resident in Manitoba, or they were a child).

For recommendation 16(a)(i), the appropriate person listed in Recommendation 11 should be required to provide the evidence that they believe proves that the dying person would have made a different decision than what was recorded in the MB Registry or deemed under the presumed

consent framework, with the strongest evidence being a witnessed written document, and the weakest evidence being oral and uncorroborated.

In assessing the evidence to determine whether a reasonable person would be satisfied with the evidence presented, the following factors could be considered: (i) whether the evidence is of the dying person's view as opposed to the family's view; (ii) whether there is corroborating evidence; (iii) how recent the evidence is; and (iv) how well the person providing the evidence knows the dying person.

Additionally, the Commission notes that the majority of the other Canadian jurisdictions, including Nova Scotia, New Brunswick, Prince Edward Island, and Alberta, incorporate additional provisions in their legislation which indicate circumstances under which substitute decision makers should *not* be able to make decisions on another's behalf. These provisions, which apply mainly to nearest relatives who would be acting as substitute decision makers, underscore the seriousness of the decision to consent or refuse to organ and tissue donation on someone else's behalf. They appear to add extra layers of protection for individuals on whose behalf decisions will be made, by ensuring that only the most appropriate person will have the right to do so on their behalf. This extra protection would be a welcome addition to any presumed consent legislation to be enacted in Manitoba.

Recommendation 17: A person should not be empowered to consent or refuse to organ and tissue donation on another person's behalf 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 signed statement in writing certifying the relationship to the person and the facts and beliefs set out in clauses (a) to (c).

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 in Spanish hospitals that are

authorised to procure organs and tissues.[280] These teams, which are recognized as a cornerstone of the successful Spanish donation model, are responsible for identifying and evaluating donors, supporting the maintenance of potential donors in ICU, and interviewing donor families, among other things.[281] Like Spanish transplant coordinator teams, Transplant Manitoba- Gift of Life, the human tissue gift agency responsible for coordinating and supporting organ donation in the province, is physically located in Winnipeg's Health Sciences Centre, a major Manitoba hospital. However, the success of Spanish transplant coordination teams is marked by more than just their physical presence in various officially authorized procurement hospitals across Spain.

Coordination of deceased organ donation activities in Spain is comprised of three interlinked levels: national, regional, and hospital.[282] Whereas the first two levels, represented by the Spanish National Transplant Organization (ONT) and 17 regional coordinators, "act as an interface between the technical and the political strata and act in support of the process of deceased donation", the hospital level of coordination "is represented by a network of officially authorized procurement hospitals that are directly in charge of effectively developing the deceased donation process."[283]

Each of these procurement hospitals is equipped with a transplant coordinator, an in-house professional and member of staff of the procurement hospital who is nominated by and who reports to the medical direction of the hospital as opposed to any transplantation team.[284] These coordinators, who are typically critical care physicians, are often involved in donation activities on a part-time basis, allowing them to carry out their other daily work "precisely in those units where 11–12% of deaths occur in persons with a clinical condition compatible with a brain death diagnosis."[285]

As such, these coordinators come to work directly with the individuals and families who will ultimately become candidates for donation, before organ donation ever becomes an issue.[286] Their access, familiarity and authority in the ICU is said to "prevent loss of donors due to non-detection or lack of staff motivation." [287] 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

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[280] Rodriguez-Arias, *supra* note 100 at 1109.
[281] *Ibid.*
[282] Rafael Matesanz et al, "Spanish experience as a leading country: what kind of measures were taken?" (2011) 24 Transplant International 333 at 334, online (pdf): <https://onlinelibrary.wiley.com/doi/pdfdirect/10.1111/j.1432-2277.2010.01204.x>.
[283] *Ibid.*
[284] *Ibid* at 335.
[285] *Ibid.*
[286] Rodriguez-Arias*, supra* note 100 at 1109.
[287] *Ibid.*

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.[288]

While this system appears to have contributed to Spain's consistently high rates of deceased donation, and while the feedback received in response to this issue in the Consultation Paper demonstrates a generally positive attitude towards the implementation of transplant coordination teams in Manitoba[289], the Commission recognizes that it is an issue of administration of the health care system and that it is therefore best left to policymakers to decide.

2. Updating Definitions

During the course of the consultation period, certain inaccuracies were brought to the Commission's attention with respect to the definitions under the *HTGA*. For instance, issues were highlighted in respect of the definition of "human tissue gift agency", which is defined in s. 1 of the Act as follows:

> "**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

The definition of "human tissue gift agency" was added to the *HTGA* in 2004 by virtue of *The Human Tissue Amendment Act,*[290] and has remained untouched despite changes having been made to Manitoba's organ and tissue donation services over the seventeen years that have since passed. For instance, in that time, the Lions Eye Bank of Manitoba and Northwest Ontario Inc. was replaced by the Misericordia Eye Bank as the tissue donation service responsible for cornea donation in the Province. Moreover, as of January 2021, the Misericordia Eye Bank no longer exists, as it has been amalgamated with Tissue Bank Manitoba, which has expanded its work providing tissue donation services to now include cornea donation. Accordingly, the *HTGA* fails to accurately reflect the two human tissue gift agencies that operate in Manitoba currently: Transplant Manitoba-Gift of Life and Tissue Bank Manitoba.

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[288] *Ibid.*

[289] For instance, one respondent indicated that Manitoba should consider the implementation of transplant coordinator teams directly in hospitals because they could reassure hesitant family members, explain the reasons for the law, and outline their options as spelled out in the legislation.

[290] SM 2004, c 40, s 3.

<u>Recommendation 18</u>: The definition of "human tissue gift agency" in s. 1 of the *HTGA* should be amended to remove clauses (a) – (c), and replace them with Transplant Manitoba-Gift of Life and Tissue Bank Manitoba.

Another issue pointed out to the Commission is the explicit exclusion in the *HTGA* of a placenta from the definition of tissue:

> "**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.

This exclusion is at odds with Shared Health's policies regarding tissue donation, which clearly indicate that birth tissues such as placentas and umbilical cords are capable of being donated and transplanted to aid in healing wounds.[291]

<u>Recommendation 19:</u> The definition of "tissue" in s. 1 of the *HTGA* should be amended to remove "a placenta" from the list of human body parts excluded from the definition of tissue.

[291] Donating Tissues and Organs, *supra* note 5.

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 11th day of January, 2022.

"Original Signed by"

Cameron Harvey, President

"Original Signed by"

Myrna Phillips, Commissioner

"Original Signed by"

Dr. Michelle Gallant, Commissioner

"Original Signed by"

Jacqueline Collins, Commissioner

"Original Signed by"

Sacha Paul, Commissioner

CHAPTER 5: SUMMARY OF RECOMMENDATIONS

Recommendation 1: If Manitoba were to amend the *HTGA* to implement a system of presumed consent organ and tissue donation, Manitoba should establish a registry upon which consents and refusals respecting organ and tissue donation can be registered in accordance with this framework (the "MB Registry")(p.45).

Recommendation 2: Manitobans should be able to register their consents and refusals respecting organ and tissue donation on the MB Registry in the following ways:

(a) By indicating the consent or refusal in whatever standardized written or electronic forms are created by the Responsible Body for this purpose;
(b) By indicating the consent or refusal to a Manitoba Health and Seniors Care ("MB Health") representative when applying for the issuance of a Manitoba Health Card or when updating a Manitoba Health Card;
(c) By indicating the consent or refusal to a Manitoba Public Insurance ("MPI") representative when applying for the issuance or renewal of a Manitoba driver's license or Manitoba Identification Card;
(d) By indicating the consent or refusal in a written document that is signed and dated by the individual in the presence of one competent adult witness who also signs and dates the document, and delivering the document to the Responsible Body (either in hard-copy or electronic form, depending on the mechanisms to be created by the Responsible Body for this purpose);
(e) Where an individual cannot personally sign a written document themselves, by indicating the consent or refusal orally in the presence of two competent adult witnesses who shall record the consent or refusal in a written document that they both shall sign and date, and delivering the document to the Responsible Body (either in hard-copy or electronic form, depending on the mechanisms to be created by the Responsible Body for this purpose)(p.45).

Recommendation 3: If Manitoba were to amend the *HTGA* to implement a system of presumed consent organ and tissue donation, MB Health and MPI representatives should be required to take the following steps when issuing or updating Manitoba Health Cards, and issuing and renewing Manitoba driver's licenses and Identification Cards, respectively:

(a) Provide the applicant with an opportunity to consent or refuse to after-death organ and tissue donation;
(b) Inform the applicant that if they do not make this decision before their death, they may be presumed to have consented to donate their tissues and organs for the purpose of transplantation after death;
(c) If the applicant decides to indicate a consent or refusal, transmit the individual's decision to the MB Registry; and

(d) If the applicant decides to indicate a consent or refusal, ensure that the individual's decision is displayed on whichever card the individual has come to receive (Manitoba Health Card, Manitoba driver's license, or Identification Card)(p.46).

Recommendation 4: In crafting any presumed consent organ and tissue donation legislation, Manitoba should consult with Indigenous communities in the Province to consider and address how Indigenous laws, culture, and experiences will impact the ways that Indigenous people will be affected by such legislation. Manitoba should conduct similar consultations with advocates for the homeless population in Manitoba(p.50).

Recommendation 5: If Manitoba were to amend the *HTGA* to implement a system of presumed consent organ and tissue donation, the Responsible Body and its actors should be required to take the following steps before organ and tissue donation activities may commence:

(a) Ensure that reasonable efforts are made to determine whether the deceased or dying person registered a consent or refusal on the MB Registry, in accordance with s. 4(2) of the *HTGA*.

(b.1) If no consent or refusal was registered on the MB Registry, and the person is still alive but in the process of dying, decide whether the circumstances are appropriate to ask the person, or their proxy or nearest relative, whether they wish to make a direction regarding organ and tissue donation on the dying person's behalf, in accordance with ss. 4(3) and 4(4) of the *HTGA*.

(b.2) If no consent or refusal was registered on the MB Registry, and the person is deceased, decide whether the circumstances are appropriate to 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 regarding organ and tissue donation on the deceased person's behalf, in accordance with ss. 4(3) and 4(4) of the *HTGA*.

(c) If after taking these steps, the Responsible Body and/or its actors have still not obtained a consent or refusal from the person or from someone on the person's behalf, then consent should be presumed and organ donation activities may commence. (p.50).

Recommendation 6: The Responsible Body should *not* be required to follow the steps set out in Recommendation 5 in the following circumstances:

(a) Where the individual clearly meets criteria for demonstrating that their organs or tissues would not be medically suitable for use in another person ; and

(b) Where an inquiry or investigation under *The Fatality Inquiries Act*, S.M. 1989-90, c. 30 is required to be held respecting the cause and manner of death (p.52).

Recommendation 7: In any presumed consent framework that might be implemented in Manitoba, an individual should not be deemed to consent under the following circumstances:

(a) If the individual has died and for a significant period before dying lacked the capacity to make a decision respecting donation after death.

For purposes of this first exception, a significant period should mean 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. What constitutes a significant period should be assessed on a case by case basis.

(b) If the individual has died and the individual was not ordinarily resident in Manitoba for a period of at least 12 months immediately before dying.

(c) If the individual was under the age of majority at the time of death (p.63).

Recommendation 8: In accordance with ss. 3(1.1) and 3(2) of the *HTGA,* the following individuals should be empowered to consent or refuse to organ and tissue donation on a ***deceased person's*** behalf:

(a) 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, the deceased person's nearest relative; or

(c) if there is no nearest relative or the nearest relative is unavailable, the person lawfully in possession of the body or the Inspector of Anatomy, as the case may be (p.78).

Recommendation 9: For purposes of Recommendation 8, the expression "persons lawfully in possession of the body" should not include:

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

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

(e) the superintendent of a crematorium in possession of the body for the purpose of its cremation (p. 78).

Recommendation 10: Any presumed consent legislation that might be implemented in Manitoba should include a provision which explains that an Inspector of Anatomy will not be prevented from consenting or refusing to organ and tissue donation on a deceased person's behalf in accordance with s. 3(1.1)(c) of the *HTGA* by virtue of the fact that they may also be a medical examiner under the *Fatality Inquiries Act* (p.80).

Recommendation 11: In accordance with s. 3(3.1) of the *HTGA,* the following individuals should be empowered to consent or refuse to organ and tissue donation on behalf of an adult whose death is imminent and inevitable (a "***dying adult***"):

(a) the dying adult'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 (p. 80).

<u>Recommendation 12</u>: In accordance with s. 3(4) of the *HTGA,* 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 (a "***dying minor***"), the dying minor's nearest relative should be empowered to make decisions regarding organ and tissue donation on their behalf (p.80).

<u>Recommendation 13</u>: The definition of nearest relative contained in s. 1 of the *HTGA* should be amended to state the following:

"nearest relative" means, with respect to any person, the relative of that person first listed in the following subclauses:

(a) a guardian;
(b) a spouse;
(c) a child who has reached the age of majority;
(d) a parent;
(e) a person standing in loco parentis;
(f) a sibling;
(g) a grandparent;
(h) a grandchild;
(i) an aunt or uncle;
(j) a niece or nephew; or
(k) another relative (p. 82).

<u>Recommendation 14</u>: *The Vulnerable Persons Living with a Mental Disability Act* and *The Mental Health Act* should be amended to allow substitute decision makers and committees appointed under either piece of legislation to consent to the removal of organs or tissues on an individual's behalf if the substitute decision maker or committee also qualifies as the nearest relative of the person under the *HTGA* (p. 84).

<u>Recommendation 15</u>: The individuals listed in Recommendation 8 should be able to consent or refuse to organ and tissue donation on a *deceased person's* behalf in the following circumstances:

> (a) where the appropriate person listed in Recommendation 8 provides information that would lead a reasonable person to conclude that the deceased person would have made a different decision respecting donation after death than the decision recorded in the MB Registry or presumed, in accordance with the presumed consent regime; or
>
> (b) where the deceased person has *not* given a direction regarding donation after death but deemed consent does not apply because of an exception to the presumed consent framework (i.e. they lacked capacity, they were not ordinarily resident in Manitoba, or they were a child).

For recommendation 15(a), the appropriate person listed in Recommendation 8 should be required to provide the evidence that they believe proves that the deceased person would have made a

different decision than what was recorded in the MB Registry or deemed under the presumed consent framework, with the strongest evidence being a witnessed written document, and the weakest evidence being oral and uncorroborated.

In assessing the evidence to determine whether a reasonable person would be satisfied with the evidence presented, the following factors could be considered: (i) whether the evidence is of the deceased person's view as opposed to the family's view; (ii) whether there is corroborating evidence; (iii) how recent the evidence is; and (iv) how well the person providing the evidence knows the deceased person (p.87).

<u>Recommendation 16:</u> The individuals listed in Recommendation 11 should be able to consent or refuse to organ and tissue donation on a ***dying adult's*** behalf in the following circumstances:

> (a) where a physician is of the opinion that the dying person's death is imminent and inevitable and that they are incapable of making a direction; and
>
> > (i) the appropriate person listed in Recommendation 11 provides information that would lead a reasonable person to conclude that the dying person would have made a different decision respecting donation after death than the decision recorded in the MB Registry or that will be presumed upon their death, in accordance with the presumed consent regime; or
> >
> > (ii) the dying person has *not* given a direction regarding donation after death but deemed consent will not apply because of an exception to the presumed consent framework (i.e. they lacked capacity, they were not ordinarily resident in Manitoba, or they were a child).

For recommendation 16(a)(i), the appropriate person listed in Recommendation 11 should be required to provide the evidence that they believe proves that the dying person would have made a different decision than what was recorded in the MB Registry or deemed under the presumed consent framework, with the strongest evidence being a witnessed written document, and the weakest evidence being oral and uncorroborated.

In assessing the evidence to determine whether a reasonable person would be satisfied with the evidence presented, the following factors could be considered: (i) whether the evidence is of the dying person's view as opposed to the family's view; (ii) whether there is corroborating evidence; (iii) how recent the evidence is; and (iv) how well the person providing the evidence knows the dying person (p.88).

<u>Recommendation 17</u>: A person should not be empowered to consent or refuse to organ and tissue donation on another person's behalf 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 signed statement in writing certifying the relationship to the person and the facts and beliefs set out in clauses (a) to (c) (p.89).

Recommendation 18: The definition of "human tissue gift agency" in s. 1 of the *HTGA* should be amended to remove clauses (a) – (c), and replace them with Transplant Manitoba-Gift of Life and Tissue Bank Manitoba (p.92).

Recommendation 19: The definition of "tissue" in s. 1 of the *HTGA* should be amended to remove "a placenta" from the list of human body parts excluded from the definition of tissue (p.92).

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.

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.

APPENDIX C: 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 D: BILL 61, AN ACT TO AMEND THE HUMAN TISSUE GIFT ACT, NB

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

Short title

1 ***This Act may be cited as Avery's Law.***

2 ***Section 1 of the Human Tissue Gift Act, chapter 113 of the Revised Statutes, 2014, is amended by adding the following definitions in alphabetical order:***

"Minister" means the Minister of Health and includes any person designated by the Minister to act on the Minister's behalf. (ministre)

"Registry" means the Registry established or designated under section 4. (registre)

"substitute decision-maker", in relation to a person, means a person who is authorized under section 1.1 to consent or refuse consent on behalf of the person. (mandataire spécial)

3 ***The Act is amended by adding after section 1 the following:***

Substitute decision-maker

1.1 (1) A substitute decision-maker is, in relation to a person, a person determined in the following order of priority:

> *a* the person's spouse or common-law partner;
>
> *b* if there is no spouse or common-law partner, or if the spouse or common-law partner is not readily available, any one of the person's children who has attained the age of 19 years;
>
> *c* if there are no children, or if none of the children is readily available, either one of the person's parents;
>
> *d* if there are no parents, or if no parent is readily available, any one of the person's brothers or sisters;
>
> *e* if there are no brothers or sisters, or none of the brothers or sisters is readily available, any other of the person's next of kin who has attained the age of 19 years; or
>
> *f* if there is no next of kin, or if no next of kin is readily available, the person lawfully in possession of the body other than, if the person died in hospital, the regional health authority.

1.1 (2) For greater certainty, if two or more persons who are not described in the same paragraph of subsection (1) claim the authority to give or refuse consent under that subsection, the person under the paragraph occurring first in that subsection prevails.

1.1 (3) A person referred to in subsection (1) may not act as a substitute decision-maker 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 paragraphs (a) to (c).

4 ***The Act is amended by adding the heading* "DONATION AFTER DEATH" *before section 4.***

5 ***The heading "Consent by person for use of body after death" preceding section 4 of the Act is repealed and the following is substituted:***

Registry established or designated

6 ***Section 4 of the Act is repealed and the following is substituted:***

4 The Minister shall establish or designate a Registry to record consents and refusals made under this Act respecting the use of a person's body or a specified part or parts of a person's body after death for therapeutic purposes.

7 ***The heading "Consent by others for use of body after death" preceding section 5 of the Act is repealed and the following is substituted:***

Consent or refusal may be provided to Registry

8 ***Section 5 of the Act is repealed and the following is substituted:***

5 A person may consent or refuse that the person's body or a specified part or parts of the person's body be used after death for therapeutic purposes by providing information respecting the consent or refusal to the Registry in the manner prescribed by regulation.

9 ***The Act is amended by adding after section 5 the following:***

Effect of consent or refusal recorded in Registry

5.1 (1) Subject to section 5.7, on the death of a person who has given consent under section 5, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts of the body for therapeutic purposes, except that no person shall act on a consent given under section 5

a if the person has reason to believe that the consent was subsequently withdrawn, or

b if the person has reason to believe that an inquest may be required to be held into the death of the deceased person, unless a coroner gives a direction under section 6.

5.1 (2) Subject to section 5.7, if a person has refused that the person's body or a specified part or parts of the person's body be used after death for therapeutic purposes under section 5, the person's body or the specified part or parts of the body shall not be used for therapeutic purposes.

5.1 (3) A consent given under this Act before the coming into force of this section may be acted upon in accordance with this Act as it existed immediately before the coming into force of this section.

Medical practitioner to check Registry

5.2 A medical practitioner shall, before removing or using any part of the body of a deceased person for therapeutic purposes, check the Registry to determine whether a decision made under section 5 is on record in the Registry.

Deemed consent for use after death for therapeutic purposes

5.3 (1) Subject to sections 5.4 to 5.7, if a person has not made a consent or refusal under section 5, the person shall be deemed to consent to the use of the person's body or the removal and use of any part or parts of the person's body after death for therapeutic purposes.

5.3 (2) A deemed consent under subsection (1) is full authority for the use of the person's body or the removal and use of any part or parts of the person's body after death for therapeutic purposes.

Consent not deemed if person lacked capacity

5.4 (1) A person is not deemed to consent under section 5.3 if the person has died and for a significant period before dying lacked the capacity to make a decision respecting the use of the person's body after death.

5.4 (2) For the purposes of subsection (1), “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.

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

Consent not deemed if person not ordinarily resident

5.5 (1) A person is not deemed to consent under section 5.3 if the person has died and the person was not ordinarily resident in New Brunswick for a period of at least 12 months immediately before dying.

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

Consent not deemed if person under age of 19 years

5.6 (1) A person is not deemed to consent under section 5.3 if the person was under the age of 19 years at the time of death.

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

Consent or refusal by substitute decision-maker

5.7 (1) If a substitute decision-maker provides information that would lead a reasonable person to conclude that a person would have made a different decision respecting the use of the person’s body or a specified part or parts of the person’s body after death for therapeutic purposes than the decision recorded in the Registry or deemed under section 5.3, the substitute decision-maker may consent or refuse on behalf of the person in accordance with that information.

5.7 (2) A consent under subsection (1) is binding and is full authority for the use of the body or the removal and use of the specified part or parts of the body after death for therapeutic purposes, except that no person shall act on a consent given under this section if the person

a has knowledge of an objection by the deceased person more recent than the information provided by the substitute decision-maker,

b has knowledge of an objection by a person of the same or closer relationship to the deceased person than the person who gave consent, or

c has reason to believe that an inquest may be required to be held into the death of the deceased person, unless a coroner gives a direction under section 6.

Consent for use after death for medical education or scientific research

5.8 (1) A person may consent that the person's body or a specified part or parts of the person's body be used after death for the purposes of medical education or scientific research

a by express personal consent, either

(i) in writing at any time, or

(ii) orally in the presence of at least two witnesses during the person's last illness; or

b by consent given by a substitute decision-maker.

5.8 (2) For greater certainty, a deemed consent under section 5.3 does not include consent for the purposes of medical education or scientific research.

10 ***Section 6 of the Act is amended by adding*** "or deemed under section 5.3" ***after "obtained".***

11 ***Section 8 of the Act is amended***

a **in subsection (1) by striking out "for therapeutic purposes or";**

b **in subsection (2)**

(i) in paragraph (a) by striking out "for therapeutic purposes or";

(ii) in paragraph (b) by striking out "for therapeutic purposes or";

c **in subsection (4) by striking out "Minister of Health" and substituting** "Minister".

12 ***Section 9 of the Act is repealed and the following is substituted:***

9 If a gift after death under this Act cannot for any reason be used for any of the purposes specified in the consent or the deemed consent, the subject matter of the gift and the body to which it belongs shall be dealt with and disposed of as if no consent had been given or deemed to have been given.

13 ***The Act is amended by adding the heading*** **"GENERAL"** ***before section 10.***

14 ***The Act is amended by adding after section 11 the following:***

Regulations

12 The Lieutenant-Governor in Council may make regulations

a respecting the Registry, including

(i) the process for recording information in the Registry, and

(ii) who may access or edit information in the Registry;

b respecting the manner by which persons may provide information respecting consents or refusals to the Registry for the purposes of section 5.

Commencement

15 ***This Act or any provision of it comes into force on a day or days to be fixed by proclamation.***

APPENDIX E: BILL 117, HUMAN ORGAN AND TISSUE DONATION ACT, PEI

BE IT ENACTED by the Lieutenant Governor and the Legislative Assembly of the Province of Prince Edward Island as follows:

PART I - INTERPRETATION AND APPLICATION

1. Definitions

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 coroner" means the chief coroner appointed pursuant to the *Coroners Act* R.S.P.E.L 1988, Cap.C-25.1;

(d) "continuing-care home" means any facility licensed under the *Community Care Facilities and Nursing Homes Act* R.S.P.E.I. 1988, Cap. C-13, any facility for which a resident may be approved for admission by a department or agency of government and any facility prescribed by the regulations;

(e) "court" means the Supreme Court of Prince Edward Island;

(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 coordinate 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 guardian of the person of a child, or a person who has guardianship of a child under the *Child Protection Act* R.S.P.E.I 1988, Cap. C-5.1;

(k) "Health PEI" means the crown corporation established under subsection 6(1) of the *Health Services Act* R.S.P.E.I. 1988, Cap. H-1.6;

(1) "health-card number" means a unique identification number assigned to an individual under the *Provincial Health Number Act* R.S.P.E.I. 1988, Cap. P-27.01, and reflected on that individual's PEI 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 Health PEI in partnership with entities in Nova Scotia and New Brunswick, or by 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, or

(ii) 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 Health PEI in partnership with entities in Nova Scotia and New Brunswick, or by 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

2. Act does not apply

(1) This Act does not apply to

(a) blood or blood constituents; or

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

Application of Act to donations

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

3. Donations may only be done in accordance with Act

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

4. Capacity to consent or refuse consent required

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

5. Priority of substitute decision-makers

(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 *Consent to Treatment and Health Care Directives Act* R.S.P.E.I. 1988, Cap C-17.2, unless the authorization excludes decisions about organ or tissue donation and, where there is more than one delegate authorized pursuant to the that Act, the delegate authorized to make health-care decisions;

(b) a guardian or representative under the *Adult Protection Act* R.S.P.E.I. 1988, Cap. A-5, or the *Mental Health Care Act* R.S.P.E.I. 1988, Cap. M-6.l 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;

(1) another relative; or

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

Person lawfully in possession of body does not include

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

(a) the chief coroner or a coroner in possession of the body for the purpose of the *Coroners 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) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or

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

Determining priority

(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.

Restrictions on substitute decision-makers

(4) A person referred to in subsection (1) may not act as a substitute decision-maker 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 ce1tifying the relationship to the person and the facts and beliefs set out in clauses (a) to (c).

PART II - DONATION AFTER DEATH

6. Registry

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

7. Consent or refusal to donate

(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.

Consent may be restricted

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

8. Registered consent authorizes transplantation activities

(1) Subject to section 14, a consent under section 7 is full authority for transplantation activities to the extent of the consent.

Registered refusal prohibits transplantation activities

(2) Subject to section 14, where an individual has refused donation after death for transplantation under section 7, the individual's organs and tissues may not be used for transplantation activities.

9. Physician or chief coroner to check Registry

A physician or the chief coroner shall, before undertaking transplantation activities, check the Registry to determine whether a decision made under section 7 is on record in the Registry.

10. Deemed consent

(1) Subject to sections 11 to 14, where an individual has not made a consent or refusal under section 7, the individual is deemed to consent to the individual's organs and tissues being used for transplantation activities.

Deemed consent authorizes transplantation activities

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

11. No deemed consent where deceased lacked capacity

(1) An individual is not deemed to consent under section 10 if the individual has died and for a significant period before dying lacked the capacity to make a decision respecting donation after death.

Interpretation of "significant period"

(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.

Section does not affect substitute decision-maker

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

12. No deemed consent without 12 months of ordinary residence

(1) An individual is not deemed to consent under section 10 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.

Section does not affect substitute decision-maker

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

13. No deemed consent if under age of majority

(1) An individual is not deemed to consent under section 10 if the individual was under the age of majority at the time of death.

Section does not affect substitute decision-maker

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

14. Substitute decision-maker may make different decision

(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 10, the substitute decision-maker may consent or refuse on behalf of the individual in accordance with that information.

Decision by substitute decision maker authorizes transplantation activities

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

15. Medical tests to demonstrate death

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

16. Death determined by at least two physicians

(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.

Restriction on physician associated with proposed organ recipient

(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.

Physician who determined death may not transplant

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

17. Removal of organs where death is imminent

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 subsection 5(1) of the *Coroners Act* may apply when death does occur; and

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

18. Information to organ-donation program

(1) Where an individual dies, or in the opinion of a physician death is imminent, in a hospital or in circumstances set out in subsection 5(1) of the *Coroners Act*, the hospital or the chief coroner 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.

Determination whether organs or tissue are suitable

(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).

Further information to organ-donation program

(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 coroner 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.

Where organs and tissue would not be suitable

(4) Notwithstanding subsection (1), the hospital or the chief coroner 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.

Where information has not been provided, record

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

Determination by organ-donation program or tissue bank, record

(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.

19. Annual report

(1) The chief executive officer of a Health PEI and the chief coroner shall submit a report annually to the Minister.

Content of annual report

(2) The report referred to in subsection (1) shall 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 unde1iaken or proposed to address issues related to missed referrals and their effectiveness; and

(c) any information prescribed by the regulations.

20. Donation for scientific research or education purposes

(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.

Deemed consent does not authorize use for scientific research or educational purposes

(2) For greater certainty, a deemed consent under section 10 does not include consent to donation after death for scientific research or educational purposes.

21. Pre-death transplantation optimizing interventions, consent not implied

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

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.

Consent by substitute decision-maker

(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 decision-maker shall

(a) follow any instructions in a directive made pursuant to the *Consent to Treatment and Health Care 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.

Manner of consent

(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.

Consent is authority for interventions, effective time

(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 directive made pursuant to the *Consent to Treatment and Health Care Directives Act* or other lawful advance directive, when the directive or advance directive is activated.

PART Ill - LIVING DONATION

22. Consent to living donation

(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.

Manner of consent

(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.

23. Where individual lacks capacity

(1) Where an individual lacks the capacity to give a valid consent and the individual has a valid 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 11 of the *Consent to Treatment and Health Care 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.

Exceptions to following instructions in a directive

(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 directive made pursuant to the *Consent to Treatment and Health Care 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.

24. Court authorization for living donation where no capacity

(1) Where an individual lacks the capacity to give a valid consent, and the criteria set out in section 23 are not met, the individual's organs may not be donated from the individual's living body for transplantation without court authorization.

Matters to be considered by court

(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.

Duties of substitute decision-maker

(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 decision-maker 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.

Where more than one substitute decision maker

(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.

Guardian *ad litem*

(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.

25. Consent or court order authorize physician

(1) A consent given pursuant to sections 22 and 23 or a court authorization pursuant to Section 24 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.

Consent void where organ not removed

(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.

PART IV - GENERAL

26. Buying and selling of organs, tissues, bodies prohibited

(1) Subject to subsection (3) and (4), 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.

Valuable consideration does not include

(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; or

(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.

Tissue bank exempted

(3) Subsection (1) does not apply to the buying and selling of tissues by the tissue bank as approved by Health PEI or the Minister.

Exception for products developed through research

(4) 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.

27. Non-disclosure of information or documents

(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.

Exceptions respecting disclosure

(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.

Disclosure between donor and recipient, conditions

(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.

28. No action lies

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.

29. False information prohibited

No person shall give false information under this Act.

30. No action where consent withdrawn or donor objects

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:

31. No consent or refusal if knowledge that individual would have decided otherwise

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.

32. Offence and penalty

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.

33. Coroners Act not affected

Except as provided in sections 17 and 18, nothing in this Act affects the operation of the *Coroners Act*.

34. Previous authorizations not invalidated by Act

Nothing in this Act invalidates an authorization made under the *Human Tissue Donation Act* R.S.P.E.I. 1988, Cap.H-12.1, before the coming into force of this Act.

35. Regulations

(1) The Lieutenant 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 may operate 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 coroner;

(g) prescribing additional reports that hospitals, the chief coroner, 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 27(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 Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

36. Repeal

The Human Tissue Donation Act R.S.P.E.I. 1988, Cap.H-12.1, is repealed.

37. Commencement

This Act comes into force on a date that may be fixed by proclamation of the Lieutenant Governor in Council.

APPENDIX F: 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*.

APPENDIX G: 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):

(l.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):

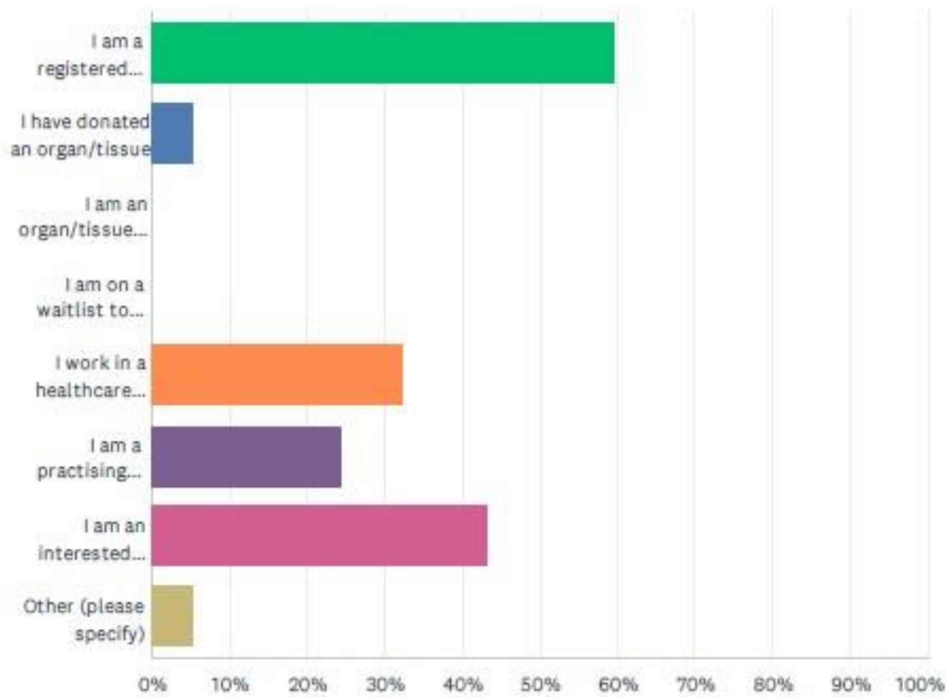
(i) for the purpose of section 12.3(1)(c), prescribing any additional information to be included in the Chief Medical Officer’s quarterly report.

14 This Act comes into force on January 1, 2022.

APPENDIX I: RESULTS OF ONLINE SURVEY

Q1 Please check all that apply:

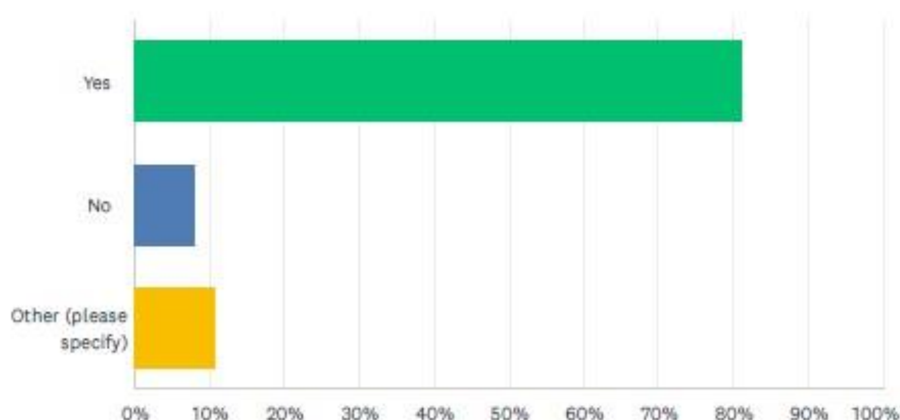
Answered: 37 Skipped: 0



ANSWER CHOICES	RESPONSES	
I am a registered organ donor in Manitoba	59.46%	22
I have donated an organ/tissue	5.41%	2
I am an organ/tissue recipient	0.00%	0
I am on a waitlist to receive an organ/tissue	0.00%	0
I work in a healthcare field	32.43%	12
I am a practising lawyer	24.32%	9
I am an interested member of the public	43.24%	16
Other (please specify)	5.41%	2
Total Respondents: 37		

Q2 Currently, Manitobans may indicate their intent to become an organ/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. Some other jurisdictions are moving toward a "presumed consent" model, where a person's consent to donate is considered under law to have been given unless they have indicated their intention not to consent to having their organs/tissues donated after death.Are you in favour of a presumed consent framework for organ donation?

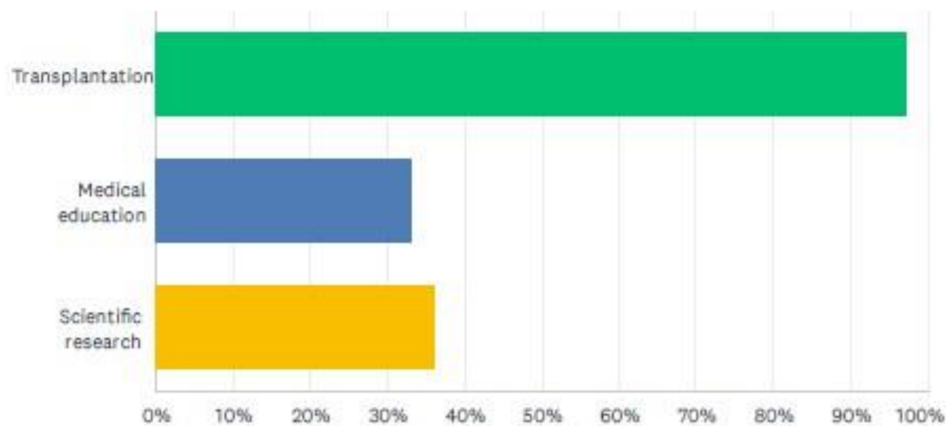
Answered: 37 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	81.08%	30
No	8.11%	3
Other (please specify)	10.81%	4
TOTAL		37

Q3 Under Nova Scotia's new presumed consent legislation, consent is presumed for the use of organs and tissues for transplantation purposes only. Consent will not be presumed for the use of organs/tissues for any other purpose such as medical education or scientific research.If Manitoba were to implement presumed consent legislation, what purposes should presumed consent apply to? Check all that apply.

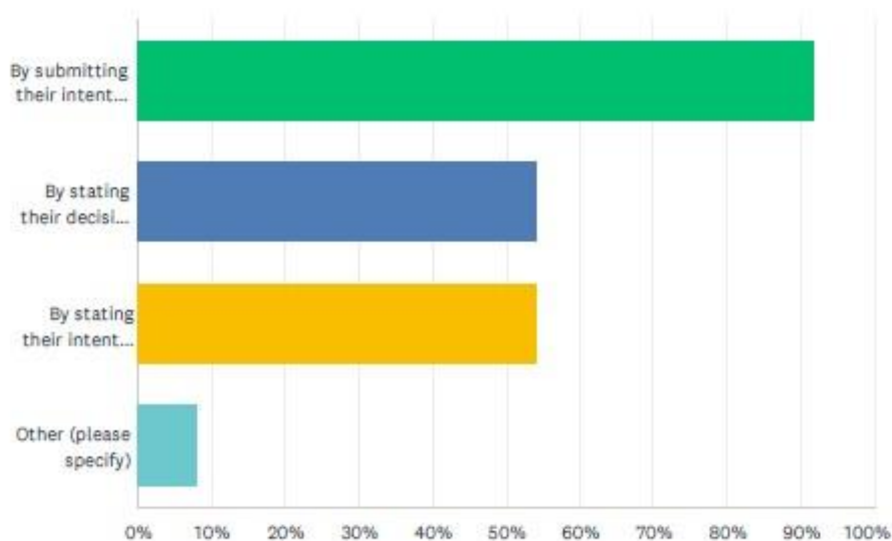
Answered: 36 Skipped: 1



ANSWER CHOICES	RESPONSES	
Transplantation	97.22%	35
Medical education	33.33%	12
Scientific research	36.11%	13
Total Respondents: 36		

Q4 Underlying any presumed organ and tissue donation regime is the principle that individuals have the right, during their lifetime, to refuse to donate their organs/tissues after death. In other jurisdictions, the method by which individuals may indicate their consent or refusal varies from entering their refusal in a central registry to less formal methods such as stating their objection to donate in writing or orally in front of witnesses.If Manitoba were to implement presumed consent organ donation legislation, how should individuals be able to indicate their intention to refuse to donate? Check all that apply.

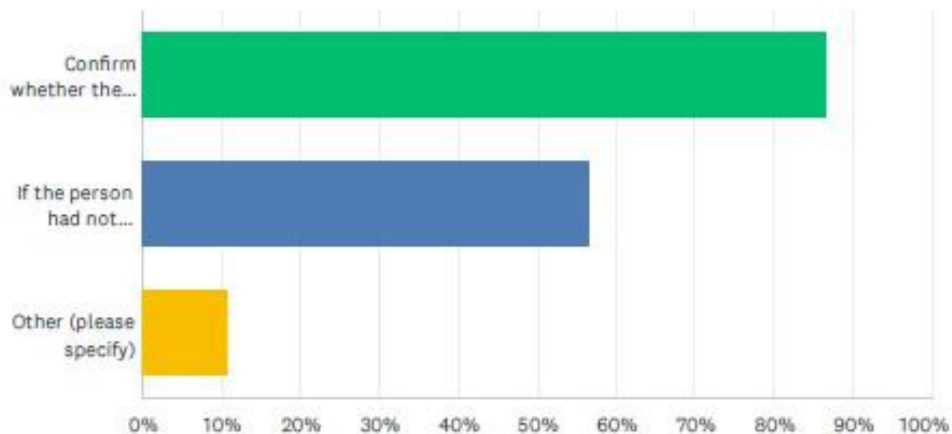
Answered: 37 Skipped: 0



ANSWER CHOICES	RESPONSES	
By submitting their intention to refuse in a central registry	91.89%	34
By stating their decision orally or in writing to a health care professional or designated organ donation network	54.05%	20
By stating their intention orally or in writing in the presence of a specified number of witnesses	54.05%	20
Other (please specify)	8.11%	3
Total Respondents: 37		

Q5 If Manitoba were to implement presumed consent organ donation legislation, what steps should the body responsible for facilitating organ and tissue donation be required to take before organ and tissue donation activities may commence?Check all that apply.

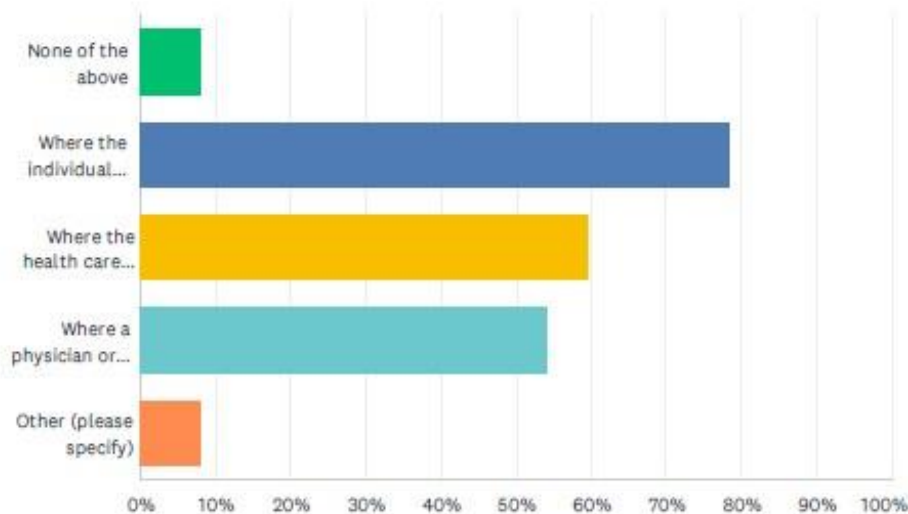
Answered: 37 Skipped: 0



ANSWER CHOICES	RESPONSES	
Confirm whether the person had indicated their consent or refusal to donate	86.49%	32
If the person had not indicated their consent or refusal, consult the individual's family members or others close to the individual to inquire into the individual's wishes	56.76%	21
Other (please specify)	10.81%	4
Total Respondents: 37		

Q6 In some other jurisdictions that have presumed consent organ donation legislation, there are certain circumstances in which intentions regarding after-death organ or tissue donation do not need to be consulted prior to transplantation. If Manitoba were to implement presumed consent organ donation legislation, in what circumstances should the body responsible for facilitating after-death organ and tissue donation not be required to consult an individual's intentions regarding organ/tissue donation?Check all that apply.

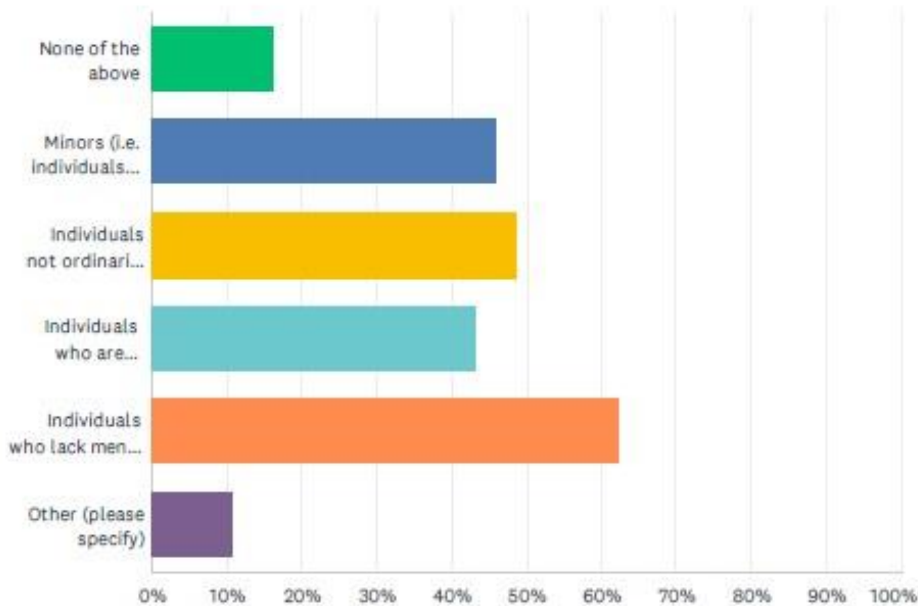
Answered: 37 Skipped: 0



ANSWER CHOICES	RESPONSES	
None of the above	8.11%	3
Where the individual clearly meets criteria for demonstrating that their organs or tissues would not be medically suitable for use in another person	78.38%	29
Where the health care professional who has determined the death of the patient has personal knowledge that the deceased individual would have made the decision to refuse to donate	59.46%	22
Where a physician or physicians attest in writing to the urgency of the transplantation and the serious hope of saving a human life or improving its quality to an appreciable degree	54.05%	20
Other (please specify)	8.11%	3
Total Respondents: 37		

Q7 Nova Scotia's new legislation sets out certain circumstances in which presumed consent will be inappropriate and thus will not apply.If Manitoba were to implement presumed consent organ donation legislation, should it contain any exceptions to the presumption of consent?Check all that apply.

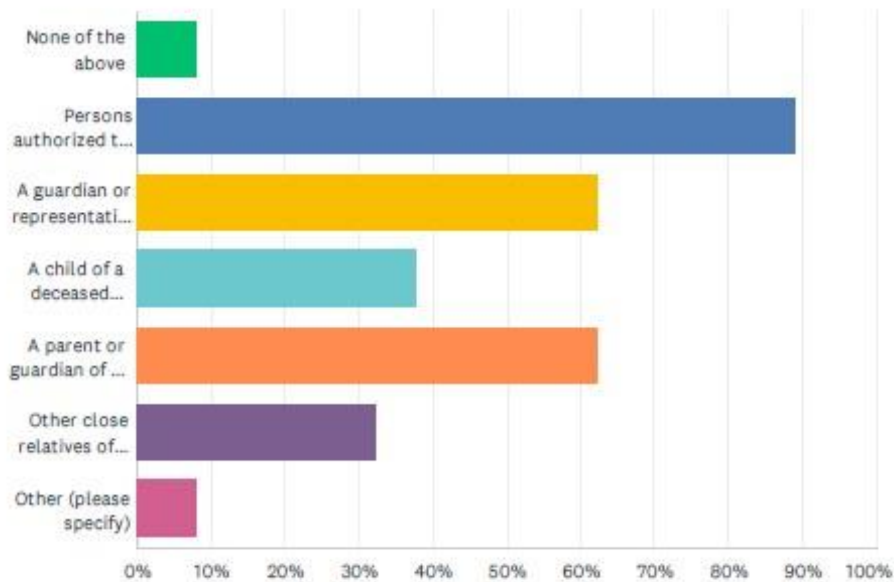
Answered: 37   Skipped: 0



ANSWER CHOICES	RESPONSES	
None of the above	16.22%	6
Minors (i.e. individuals under a certain prescribed age)	45.95%	17
Individuals not ordinarily resident in the province for a period of 12 months immediately preceding death	48.65%	18
Individuals who are followers or members of certain prescribed religions, associations or groups	43.24%	16
Individuals who lack mental capacity to make decisions regarding organ or tissue donation after death	62.16%	23
Other (please specify)	10.81%	4
Total Respondents: 37		

Q8 Under presumed consent organ donation frameworks, certain individuals, known as "substitute decision makers", may, under certain circumstances, consent or refuse to the use of another person's organs or tissues on their behalf.If Manitoba were to implement presumed organ donation legislation, who should be empowered to act as a substitute decision maker in this capacity?Check all that apply.

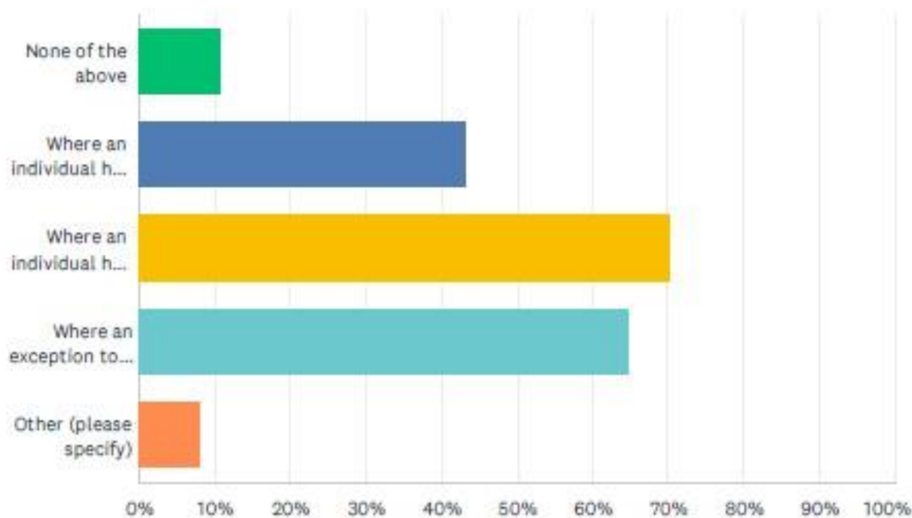
Answered: 37 Skipped: 0



ANSWER CHOICES	RESPONSES	
None of the above	8.11%	3
Persons authorized to give consent under legislation pertaining to healthcare decisions (such as a Power of Attorney)	89.19%	33
A guardian or representative under substitute decision making legislation (e.g. a Committee)	62.16%	23
A child of a deceased individual	37.84%	14
A parent or guardian of a deceased individual	62.16%	23
Other close relatives of a deceased individual	32.43%	12
Other (please specify)	8.11%	3
Total Respondents: 37		

Q9 If Manitoba were to implement presumed consent organ donation legislation, under what circumstances should substitute decision makers be able to consent or refuse to organ/tissue donation after death on someone's behalf?Check all that apply.

Answered: 37 Skipped: 0



ANSWER CHOICES	RESPONSES	
None of the above	10.81%	4
Where an individual has recorded their intentions regarding donation in a centralized 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	43.24%	16
Where an individual has not recorded a decision regarding organ donation in a centralized 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	70.27%	26
Where an exception to presumed consent applies (for example, if the presumption of consent did not apply because the person lacked the mental capacity)	64.86%	24
Other (please specify)	8.11%	3
Total Respondents: 37		

Q10 The MLRC would like to hear about other issues related to The Human Tissue Gift Act and laws regarding organ donation. Please let us know if you think there are other issues the MLRC should consider.If you prefer, you can also send us an email at mail@manitobalawreform.ca to provide your comments.

Answered: 6 Skipped: 31