

**SUBMISSION FROM THE HEALTH LAW SECTION OF THE  
ONTARIO BAR ASSOCIATION ON BILLS 33, 61, 67 AND 79  
PERTAINING TO ORGAN DONATION**

**March, 2007**

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## 1 INTRODUCTION

There are currently four Bills (“Bills”) before the Legislature dealing with organ donation. These are:

- Bill 33 - *Education Amendment Act (Organ Donation Education)*, 2005, a Private Member’s bill introduced by Dave Levac, Liberal M.P.P for Brant;
- Bill 61, *An Act to amend the Trillium Gift of Life Network Act*, a Private Member’s bill introduced by Peter Kormos, N.D.P. M.P.P. for Niagara Centre;
- Bill 67, *An Act to amend various Acts to require a declaration with respect to the donation of organs and tissue on death*, a Private Member’s bill introduced by Frank Klees, P.C. M.P.P. for Oak Ridges; and
- Bill 79, *An Act to amend the Trillium Gift of Life Network Act, the Health Insurance Act and the Highway Traffic Act*, a Private Member’s bill introduced by Jean-Marc Lalonde, Liberal M.P.P for Glengarry-Prescott-Russell.

As well, on November 24, 2006, the Minister of Health and Long-Term Care (“Minister”) announced the Citizens Panel on Increasing Organ Donations (“Citizen’s Panel”), which will consult with Ontarians on how to increase organ donations in the province. Meetings are being held throughout Ontario and the panel is to report back to the Minister in early 2007.

We are members of the Health Law Section (“HLS”) of the Ontario Bar Association and would like to take this opportunity to put forward for members of the Legislature and the Citizen’s Panel our assessment of the legal and related issues/considerations raised by the Bills. We have also taken the opportunity to provide an Overview of the current provincial organ donation legislation and to highlight two issues of relevance to the Bill, namely 1) the absence of legislation dealing with consent for procedures done prior to death to facilitate organ/tissue donation; and 2) the ability of family members to override a deceased’s wishes. These issues are discussed in this Submission to facilitate a coordinated and comprehensive approach to organ/tissue donation. Instead of advocating for one Bill over others, we highlight the practical and legal considerations associated with each Bill.

By way of background about the HLS, as at January 2007 the HLS has 314 members, practicing in all areas of health law, including litigation, corporate commercial matters, advocacy before tribunals, risk management, regulatory compliance, organ donation issues and research issues. Our members practice in diverse settings, including: private practice, in-house counsel, pharmaceutical companies, health care organizations, government, health professional colleges and associations, and legal aid clinics. Hence we have had the benefit of a variety of perspectives from a number of different practitioners in developing our Submission.

## 2 OVERVIEW OF PROVINCIAL ORGAN DONATION LEGISLATION

### 2.1 *Uniform Human Tissue Donation Act*

In Canada, health care (and consequently organ and tissue donation and transplantation) comes under provincial (rather than federal) jurisdiction. Therefore, each province has a statute that governs organ and tissue donation. In all provinces (including, to a lesser extent, Quebec), this legislation is based on a uniform statute that was created by the Uniform Law Conference of Canada (the “ULCC”). The ULCC is a joint federal-provincial body founded in 1918 to harmonize the laws of the provinces and territories of Canada; to accomplish this, it drafts uniform provincial legislation that the provinces have the option of adopting.

In 1965, the ULCC created the *Uniform Human Tissue Gift Act*, which provided for post-mortem organ donation. That uniform Act was amended in 1971 to include gifts by living donors (*inter vivos* donations).

Today, the uniform Act is the *Uniform Human Tissue Donation Act* (the “*Uniform Act*”), the most recent version of which is April 1990.

In Canada, the post-mortem donation consent regime is very clear. Under the *Uniform Act*, the basis for all donation legislation in Canada, there are two types of post-mortem consent: by the donor, and by a proxy for the donor in the absence of donor consent.

### 2.2 *Post-Mortem Consent Regime under the Uniform Act*

In order for the donor to consent to post-mortem removal of his or her organs for transplantation purposes, the donor must be at least 16 years of age and must understand “the nature and consequences of transplanting tissue from his or her body after death”. Hence, this is an informed consent organ donation regime, because the donor must understand the consequences of this decision.

If the potential donor has not given such a consent (or could not give consent because he or she had not reached the age of consent), there is a hierarchy of proxies who may give consent on his or her behalf based on the proxy’s relationship with the deceased donor before death, being:

- guardian of the deceased before death;
- spouse of the deceased;
- child of the deceased;
- parent of the deceased;
- brother or sister of the deceased;
- any other relative of the deceased;
- a person other than a spouse who shared a residence with the deceased and has knowledge of his/her wishes.

The proxy giving consent must be at least 16 years of age, understand the nature and consequences of transplanting tissue from the body of the deceased after death, and have

no reason to believe that the deceased would have objected to the consent. Again, informed consent is required. The decision of the highest ranking proxy in the hierarchy prevails over other proxies' decisions, if any. If no proxy can be found after reasonable efforts, the coroner may give consent.

The proxy is entitled to give consent only “after the death” of the person who has not given consent.

Also, it is important to keep in mind that the organ and tissue donation legislation is intended to be a complete, self-contained consent regime, excluding other consent legislation. The *Uniform Act* states, in section 2, that “A consent to the removal of tissue may be given in accordance with this Act, but not otherwise.” That section essentially ousts the application of any other consent regime in the context of organ and tissue donation.

### ***2.3 Post-Mortem Consent Regime under the Trillium Gift of Life Network Act (Ontario) (“TGLN Act”)***

The TGLN Act is currently the governing legislation in Ontario for organ and tissue donation. The post-mortem consent regime for organ donation under the TGLN Act is based largely on the scheme in the Uniform Act, but with some important distinctions:

First, there is no express requirement in the *TGLN Act* that the donor must understand the nature and consequences of his or her decision to donate tissue from his or her body after death.

Second, the hierarchy of proxies who may provide consent to post-mortem organ donation, in the absence of the donor's consent or ability to consent, is slightly different, being:

- the deceased's spouse (which, under Ontario law, includes same-sex spouses and common law spouses);
- a child of the deceased;
- parent of the deceased;
- brother or sister of the deceased;
- any other next of kin of the deceased; or
- the person lawfully in possession of the body, other than the administrative head of the hospital where the deceased died (i.e., the executor or administrator of the estate).

Third, there is no age requirement for the proxy, unlike the *Uniform Act* where the proxy must be at least 16 years of age.

Fourth, there is also no express requirement that the proxy provide informed consent to the post-mortem donation.

## **2.4 Key Deviations in Other Provincial Organ Donation Legislation Across Canada**

There are key deviations in provincial organ donation legislation across the country, including differences between the provinces themselves and significant deviations from the *Uniform Act* itself.

**1. Informed consent for post-mortem donation.** Notably, the informed consent regime expressly required under the *Uniform Act* is not reflected in the vast majority of donation statutes in Canada. In fact, only Prince Edward Island's *Human Tissue Donation Act* expressly requires informed consent by the donor (section 3(1)) and by the donor's proxy (section 5(5)), consistent with the *Uniform Act*. Also, Manitoba's *Human Tissue Gift Act* requires a donor's consent not to be honoured where the donor was not capable of understanding the nature and effect of the consent. However, there is no similar requirement that the proxy give informed consent in Manitoba. No other jurisdiction in Canada expressly requires either the donor or the proxy to give informed consent.

**2. Age of donor.** In order for a donor to consent to post-mortem organ or tissue retrieval, the donor generally must be the age of majority, as that concept is defined in the province (either 18 or 19 years of age). Manitoba allows for a child who is 16 or 17 to provide consent, with the added consent of a parent or legal guardian (if available). In Quebec, a minor over 14 may consent. In Ontario the age of consent is 16.

Where the donor is a minor, the proxy is able to consent to post-mortem donation on the minor's behalf in all organ donation legislation across the country.

**3. Age of proxy.** Generally, provinces expect that the proxy should be the age of majority also. Nevertheless, spouses and parents generally need not meet any age threshold (based on the theory that a person old enough to be a spouse or a parent is old enough to make the decisions under organ donation legislation). In New Brunswick, a proxy who is a child of the deceased must be the age of majority, but there is no age requirement for the other proxies.

**4. Public officials.** While the *Uniform Act* contemplates that the coroner may consent to donation, as a last resort where no proxy in the defined hierarchy can reasonably be located, most jurisdictions have not adopted this rule. Generally, the proxy of last resort is the person with legal possession of the body, excluding various officials (such as hospital administrators, public trustee, etc.). Under common law, the person with legal possession of the body is the executor of the deceased's estate as appointed in the deceased's will or the administrator of the estate appointed by the court where there is no will. However, in Manitoba the Inspector of Anatomy has the ability to consent, in the last resort, with respect to a donor under the age of 16, a donor who has not given a consent, or a donor who has given a consent but did not understand the nature and consequences of such consent.

**5. Pituitary gland.** Manitoba and Newfoundland permit the removal of the pituitary gland, without consent, by any person lawfully performing a post-mortem examination of the deceased, provided there is not a known objection by the donor or next of kin.

**6. Quebec.** Quebec is unique in that it does not have a piece of legislation dedicated to organ donation; its consent and donation provisions are contained in its all-encompassing Civil Code. Post-mortem donations are addressed in Chapter IV of the Civil Code, entitled “Respect for the Body After Death.” Section 43 provides that a person of full age (meaning 18 years, per the Civil Code) or a minor over the age of 14 may consent to give his or her body or authorize the removal of tissues or organs therefrom, for medical or scientific purposes. Section 44 indicates that, in the absence of knowledge or presumed knowledge of the deceased’s wishes, the person who could give consent to care, or could have done so, may consent to the removal of a part of the deceased’s body. However, section 44 goes on to provide that consent is not required where two physicians attest in writing to the “impossibility of obtaining it in due time, the urgency of the operation and the serious hope of saving a human life or of improving its quality to an appreciable degree.” This section confers a broad power to waive the requirement for donor or proxy consent, unique in Canada.

### **2.5 Routine Notification and Request under the TGLN Act**

In late 2005, the “Routine Notification and Request” (“RNR”) provisions of the *TGLN Act* were proclaimed into force. This is a strategy to improve organ and tissue donor rates to save and enhance more lives in Ontario. These provisions of the legislation require 13 type “A” designated hospitals to report every death to the Trillium Gift of Life Network (“TGLN”). Section 2.1. of Ontario Regulation 179/05 under the *TGLN Act* designates any hospital that provides neuro-surgical or trauma services as a Class A hospital. Reporting of every death ensures that accurate identification can be made of a potential donor and that eligible families are provided the opportunity to decide to donate organs. TGLN reported in March 2006 that, in the 10 weeks following the proclamation of the RNR provisions in the *TGLN Act*, referrals from hospitals tripled, leading to increases in organ and tissue donation.

## **3 DISCUSSION OF BILLS**

### **3.1 Bill 33**

#### **3.1.1 Description of Bill**

Bill 33, the *Education Amendment Act (Organ Donation Education), 2005*, is a Private Member’s bill introduced by Dave Levac, Liberal M.P.P for Brant

Bill 33 amends the *Education Act* by permitting the Minister of Education and Training to establish an organ donation education policy framework and to make education regarding the importance of organ donation a mandatory part of the curriculum of senior secondary students. The goal is that, subject to certain exceptions for exemption of students from this type of education on the basis of religious, cultural or personal beliefs, every student in Ontario will receive education on organ donation.

### 3.1.2 Status of Bill

Bill 33 received first reading on November 21, 2005, second reading on April 27, 2006 at which time Bill 33 was referred to the Standing Committee on Regulations and Private Bills. To date no hearings have been scheduled on this Bill

### 3.1.3 Legal Considerations

- Canada has a commitment and obligation to respect diversity and individual rights (religion, culture, liberty, security of the person etc.) as reflected in the *Canadian Charter of Rights and Freedoms*. The concept of brain death and organ donation are legal and are widely accepted and practiced in Western health systems, although this may not necessarily be the case in other cultures. Questions concerning the boundary between life and death have cultural roots in many societies. For example, the Japanese believe a dead person goes to the next world as a soul and the dead body must remain whole for the soul to remain happy in the next world.<sup>1</sup> Healthcare workers and educators, among others, must respect cultural differences in attitudes under the provisions of the *Charter*.<sup>2</sup>
- On a practical level, although organ donor cards have legal standing as a statement of the donor's wishes, doctors primarily rely on the wishes of the next of kin for fear of a future negligence claim.<sup>3</sup>

### 3.1.4 Other Considerations

- Studies have shown that only 50% of potential organ donors actually become donors. The major factor limiting the number of donors is the low percentage of families who consent to donation. Epidemiologic data collected in a study by Siminoff<sup>4</sup> suggest that minorities, families from lower socio-economic strata, and individuals with less formal education are less likely to donate - but do not explain why. Family and patient characteristics, including attitudes and beliefs were significantly associated with the decision to donate organs. In addition, it may be argued that families with prior knowledge of the patient's wishes are more likely to consent to donation. The same Siminoff study showed that families who were surprised to be asked about organ donation or felt harassed or pressured were less likely to donate. Some families reported confusion as to when the moment of death occurred. Other topics correlated with consent included: costs of donation, impact on funeral arrangements, disfigurement of the body, and assurances that the family had a choice about which organs to donate. The study noted that most families have some knowledge and preconceived notions of organ

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<sup>1</sup> Kerry W. Bowman & Shawn A. Richard, "Cultural considerations for Canadians in the diagnosis of brain death." 51:3 *Can. J. Anesth.* (2004) pp. 273-275 (Bowman & Richard).

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

<sup>3</sup> William DeJong et. al. "Options for Increasing Organ Donation: The Potential Role of Financial Incentives, Standardized Hospital Procedures, and Public Education to Promote Family Discussion" 73:3 *The Milbank Quarterly* (1995) 463-479 (DeJong et al.).

<sup>4</sup> Laura A. Siminoff, PhD et al., "Factors Influencing Families' Consent for Donation of Solid Organs for Transplantation" 286:1 *JAMA* (2001) pp. 71-77 (Siminoff et al.).

donation; therefore, characteristics and beliefs that individuals bring with them to the decision (whether informed or not) play a significant role in the consent decision.<sup>5</sup> Little public education has centered on the donation process itself that could prepare individuals in advance for this potential event. Prior education may be the best mechanism to inform the public and prepare families for an organ donation request.

- Organ donation requests in advance of sickness or death ask people to speculate on behaviour for which they have no experiential basis - few could predict their behaviour in such a situation. Public education can help the organ donation request process be successful by disposing families favourably toward donation making them more likely to grant consent at the time the request is made. Education would provide background knowledge and allow families to discuss the possibilities and their wishes together in advance of this unlikely event.<sup>6</sup> Any education program should focus on discussion about organ donation between family members who will in effect, make the final decision.<sup>7</sup> Discussion of organ donation should be encouraged within families, but without any coercion.<sup>8</sup>
- Studies on the subject of organ donation education show that education decreases discomfort with organ donation<sup>9</sup> and encourages communication between family members.
- A small study that explored a cross-section of the Asian population in Luton, England found that culture and religion play a much less prohibitive part in determining level of organ donation than generally thought.<sup>10</sup> However, many people were hesitant about organ donation because they do not know the position of their religion on the subject (i.e. whether their religion prohibits donation). To make an informed decision, the people interviewed in the study desired education about the stances of their religion on the topic of organ donation. As such, an education program that provided information about the views of various religions on the topic of organ donation, as well as encouraged students to discuss the tenets of their culture and religion with their family and community could be helpful.

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

<sup>6</sup> DeJong et al., *supra* note 2.

<sup>7</sup> Ann C. Klassen, PhD, & David K. Klassen, MD, "Who are the Donors in Organ Donation? The Family's Perspective in Mandated Choice" 125(1) *Annals of Internal Medicine* (1996) pp. 70-73 (Klassen & Klassen).

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

<sup>9</sup> Gurch Randhawa, "An exploratory study examining the influence of religion on attitudes towards organ donation among the Asian population in Luton, UK" 13 *Nephrol Dial. Transplant* (1998) pp. 1949-1954. See also Robin Prendergast et al., "Understanding the Issues of Organ and Tissue Donation, Allocation and Payment" 19 *Whittier L. Rev.* 29 (1997-1998).

<sup>10</sup> **Ibid.** See note 4 as well.

- Another article suggests that the most successful education programs tend to be locally driven. In that regard, a provincially tailored education curriculum could be beneficial.<sup>11</sup>
- Studies in the United States, Sweden and the Netherlands testing the effect of pilot organ donation education programs on students have produced positive results in terms of awareness about organ donation and intention to donate. The American study may be a more useful comparison to the Canadian context given the similarly multi-cultural populations. The Swedish and Dutch studies, on the other hand, may have a more limited use given the more homogenous populations in those countries.
- The American study involved a pilot classroom health education program to improve knowledge about organ donation and transplantation among a diverse student body at an urban high school.<sup>12</sup> The goal of the health education program was to provide accurate information to enable students to make an informed personal choice about organ donation when obtaining a drivers license. In a public school setting where participants were minors, students were not asked to make binding decisions regarding donation or to sign organ donor cards. The classroom health education program significantly improved knowledge about organ donation and pinpointed some disparities in knowledge. There was an increase in positive opinions about organ donation among students of colour, but not among white students. Students with higher scores on knowledge questions were significantly more likely to have positive opinions about organ donation. This evaluation was the first research to report a significant correlation between talking with family members about donation and positive opinions about donation. The authors recommend that public programs focus on discussions with family members rather than donor cards.
- In Sweden the organ donation level is low and education programs in secondary schools have been introduced to quell some of the discomfort expressed around organ donation. The Swedish study recorded negative reactions including discomfort about a body being cut up, disrespect to the deceased person and organ transplants as 'unnatural'. Girls were more often in favour of donating organs as were students born in Sweden with parents who were also native Swedes. Students who were not native Swedes expressed higher rates of discomfort. The multiplicity of the field of organ transplantation brings a number of questions to a head: views on life and death, identity, nature and culture, mortality and altruism. With education, the students are more informed and generally comfortable with the topic. The teachers who would guide students through a curriculum section on organ donation would have to possess a good knowledge of potential student

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<sup>11</sup> Greg A. Knoll & John E. Mahoney, "Non-heart-beating organ donation in Canada: Time to proceed?" 169(4) CMAJ/JAMC (2003) pp. 302-303.

<sup>12</sup> Weaver M. Spigner et al., "Knowledge and opinions about organ donation among urban high school students: pilot test of a health education program" 14 Clinical Transplantation (2000) pp. 292-303.

reactions and should have worked through their own views so as not to confound their reactions with those of their students.<sup>13</sup>

- Despite these findings, other studies have found that the concept of brain death and organ donation may not be received positively by students or teachers of all cultures.<sup>14</sup> Similarly, since many different perspectives exist regarding organ donation, any education program would require sensitivity to differing views on life and death. Death is often very important as a social and cultural phenomenon rather than simply a scientific fact. As such, it is important that education on organ donation pay particular attention to the interests and beliefs of the diverse members of Canadian society.<sup>15</sup>
- The language of an organ donation education program must also be carefully selected to respect all cultures. The decision to donate is often described as “generosity” or “preservation of life”. Such language is value-loaded and sets the stage for the mistrust that many feel about the current transplantation and donation process. For example, to many people whose beliefs are not compatible with organ donation, hearing their decision to choose whole-body burial described as “wasteful” or two lives lost may be extremely upsetting - especially during a vulnerable time. Any education program should be value neutral and emphasis personal choice rather than promotion of organ donation.<sup>16</sup>

## **3.2 Bill 61**

### **3.2.1 Description of Bill**

Bill 61, *An Act to amend the Trillium Gift of Life Network Act* is a Private Member’s Bill introduced by Peter Kormos, MPP (Niagara Centre). The Bill’s purpose is to change the consent regime in Ontario for post-mortem organ donation to a presumed consent regime, with the ability to register an objection. Currently, the TGLN Act requires that the donor consent, or, failing donor consent, the donor’s proxy consent (either orally or in writing) to the donation of tissue and organs after death.

Bill 61 provides that, upon the death of a person, tissue from the person’s body may be removed and made available for transplant (or for medical education or scientific research), unless the person or the person’s substitute has objected to tissue being removed after the person’s death. A person can make an objection in several ways: by putting the objection in writing and delivering it to an attending physician or to TGLN or by stating the objection orally in the presence of two witnesses during the person’s last illness. For a child under 16 years of age, the objection can be made by the parent or guardian of the child. The proxy can make an objection only if the person dies without

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<sup>13</sup> Margareta A. Sanner, “A Swedish survey of young people’s views on organ donation and transplantation” 15 *Transpl Int.* (2002) pp. 641-648.

<sup>14</sup> Bowman & Richard, *supra*.

<sup>15</sup> Trillium Gift of Life Network website, “Cultural and Religious Perspectives on Donation”, online: <<http://www.giftoflife.on.ca/page.cfm?id=7D37BE22-0BC5-4F8D-AA9A-5F3BAA6BDF5F>> (date accessed: 14 August 2006).

<sup>16</sup> Klassen & Klassen, *supra* note 6.

making an objection him- or herself or if the person's death is imminent and the person is incapable of making an objection.

The hierarchy of proxies is the same as under the current legislation. The proxy can make an objection in writing; orally, in the presence of two witnesses; or by a recorded message (the same methods for giving proxy consent under the current legislation). The proxy is prohibited from making an objection if he or she has reason to believe that the deceased would *not* have objected to the removal of his or her tissue/organs.

In addition to allowing individuals and their proxies to "opt out" of the transplant process after death, the Bill also provides that believers or members of certain prescribed religions, cults, associations or groups may be exempted (by regulation) from the post mortem use of tissue without consent. However, how will it be known whether a potential donor is a believer of his or her religion or whether the person is in fact a member of an exempted religious group?

The Bill also creates a process whereby TGLN may require certain designated facilities (to be prescribed) to contact the patient or the patient's proxy concerning whether there is an objection to the removal and use of tissue from the body of the patient for transplant.

TGLN is also required to establish a registry of the names of persons who have sent them an objection.

### **3.2.2 Status of Bill**

Bill 61 received first reading on February 16, 2006. There has been no other development to date.

### **3.2.3 Legal Considerations**

- The ability to prescribe certain religions, cults, associations or groups as being exempted from the presumption of consent is problematic, because there is no ability within the Bill for a member of a prescribed exempted religion (for example) to choose to "opt back in" and consent to be an organ donor, if they wish. It presumes that a member of a religion subscribes to that religion's positions on organ donation. Unless the Bill is amended to provide for a process whereby a member of a prescribed exempted class can grant consent to organ donation, the Bill may be unnecessarily eliminating people who may want to be organ donors from being able to donate.
- There is no positive obligation in the Bill for TGLN or the donor coordinators to attempt to determine whether an objection has been made, before proceeding with tissue removal. There ought to be a positive duty to attempt to determine, from searching the registry, questioning the attending physician, etc., whether an objection has been made. While section 4(1) (g) of Regulation 965 (Hospital Management) under the *Public Hospitals Act* requires each hospital to have procedures in place to identify potential donors, it makes sense in a negative option scenario to require that there be procedures in place to identify individuals who have opted not to be a donor.

- It is possible that a *Charter* challenge could be made to a presumed consent regime based upon a breach of “security of the person”.<sup>17</sup>
- A person may object by delivering a written objection to “an attending physician”. There should be a further obligation for the attending physician to forward such written objection to TGLN, in order that the registry may reflect the objection.

### 3.2.4 Other Considerations

- In an October 2004 article examining the impact of presumed consent legislation on organ donation (“The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross Country Study”), Alberto Abadie and Sebastien Gay conducted a comprehensive review of the consent legislation in numerous jurisdictions and concluded that, after controlling for other factors, evidence suggests that presumed consent legislation has a positive effect on organ donation rates. Presumed consent may very well increase the organ donor pool, which is a priority for Ontario.
- A presumed consent regime might send the message that organ donation is both a societal good and a societal expectation and change attitudes by changing expectations.
- Under the current regime, although a signed donor card is sufficient legal authority for physicians to rely and act on, in practice the donor coordinator and physicians will not act on a signed donor card. We understand that the current practice in health care facilities is for health care professionals to ensure that the family is on-side before proceeding with organ donation. If the current legal consent regime is not being followed, out of respect for family during a very difficult time, it is difficult to imagine that a different legal consent regime will result in a different outcome. Donor coordinators and health care professionals would most likely consider proceeding with organ donation in the face of family opposition or reluctance as unseemly under a presumed (“opt out”) consent regime as under the current “opt in” consent regime.
- The “opt out” regime is a significant (arguably radical) change from the current “opt in” consent regime. It may be too drastic a change to garner political or public support. It sends an arguably disrespectful message that our autonomy after death is state-determined rather than determined by the individual or family and loved ones. Also, there may be other, less drastic ways to achieve the Bill’s purpose (i.e., to increase the pool of donor organs in Ontario), such as through methods proposed in other Bills, including public awareness and education and reminding Ontarians to make a decision when obtaining health cards or driver’s licences.

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<sup>17</sup> Section 7 of the *Charter* states that: “7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

- Will the Bill disproportionately impact the poor or uneducated? Uneducated, illiterate, or non-English or non-French speaking Ontarians who do not want to become organ donors may fail to make an objection because they and their proxies are not sufficiently made aware of the impact of the legislation.

### **3.3 Bill 67**

#### **3.3.1 Description of Bill**

Bill 67 (the *Organ and Tissue Donation Mandatory Declaration Act, 2006*) is a Private Member's Bill introduced by Mr. Frank Klees (Oak Ridges, PC).

Bill 67 amends the *Health Insurance Act* and the *Highway Traffic Act* to require that a health card or a driver's licence not be issued or renewed for a person 16 years of age or older unless the person has completed a declaration that specifies what uses are to be made of the person's organs or tissue after death or that specifies that the person is undecided about specifying such uses.

Under the *TGLN Act*, if a person 16 years of age or older has given one or more of a consent under that Act or a declaration in a health card or a driver's licence, the latest such valid instrument prevails over the others.

#### **3.3.2 Status of Bill**

Bill 67 received first reading on February 22, 2006 and second reading on March 30, 2006. The Bill has been referred to the Standing Committee on Social Policy.

#### **3.3.3 Legal Considerations**

- The Bill will need to clarify under what circumstances it is clear that a person has withdrawn their declaration. It will also need to address the evidentiary burden to establish this.

#### **3.3.4 Other Considerations**

- The initiatives contemplated by this Bill will likely increase organ donation, because every resident of Ontario is eligible for a health card (all ages) and many people drive and will have to obtain or renew their driver's license. This will bring the issue of organ donation to their attention.
- A registry system and process which keeps track of all registrations/declarations under various programs (i.e. driver's license declaration, health card declaration and any declaration made directly to the TGLN) will need to be established. Such a registry must track the most recent declaration of every person and be kept constantly up to date, in order to ensure that there is no ambiguity as to a person's latest wishes.
- People should have the right to choose not to donate their organs and tissue and the declaration should not be worded in such a way as to imply that this is morally bad or to coerce donation.

### **3.4 Bill 79**

#### **3.4.1 Description of Bill**

Bill 79, An Act to amend the *TGLN Act*, the *Health Insurance Act* and the *Highway Traffic Act* is a Private Member's Bill introduced by Jean-Marc Lalonde, Liberal M.P.P. for Brant.

The Bill's purpose is to amend the *TGLN Act* to require that a consent form be distributed every time an individual applies for or renews his or her health card or driver's licence. This would allow an individual to consent to the use of his or her body, or specific body parts, after death or in writing to the donation of tissue and organs after death for the purpose of tissue transplant. If passed, the Bill would create a binding consent and would shift the onus to the individual who has signed the consent to withdraw it either in writing, or verbally in the presence of two witnesses.

The Bill would amend the *Health Insurance Act* (HIA) to authorize the General Manager under the HIA to create a numerical system to track these consents; similarly, the *Highway Traffic Act* would be amended to permit the Minister of Transportation to show the consent on the individual's driver's licence by numerical marking. The Bill contains regulation-making authority pertaining to the development, introduction and use of the numerical system for the driver's licence.

Bill 79 also authorizes the TGLN to obtain from the General Manager and from the Minister of Transportation information from their records that would form the basis of the Network's consent registry.

#### **3.4.2 Status of Bill**

Bill 79 was introduced for first reading on March 2, 2006 and second reading was carried on May 4, 2006. The Bill was referred to the Standing Committee on Social Policy but to date no hearings or public consultations have been scheduled.

#### **3.4.3 Considerations**

- The approach in Bill 79 may be less objectionable than a presumed consent model, since it puts a positive onus on the individual to make a decision about organ/tissue donation.
- Both the health card and the driver's licence are commonly held documents, and the tracking of consents could be done within an existing regulatory framework, albeit with certain administrative supports required.
- The Bill enshrines a strong message about individual choice, and a mechanism to support the tracking of consents.
- This consent model may provide some assurance to health care providers that the regulatory scheme will support their proceeding based on the individual's wishes. Bill 79 appears to address problems that have been recounted over the years in the existing framework for organ donation, where it is reported that clinicians are reluctant to override the wishes of a grieving family even in the face of a signed organ donation card.

- The results (e.g. an increase in the number of organ donors in Ontario) would not be as immediate as with a presumed consent model, given that consent would be obtained only upon application for or renewal of an OHIP card or driver's licence. A driver's licence is valid in Ontario for five years; the same timeframe applies to the new photo health cards.
- While it may protect some individuals, the requirement that the consent be withdrawn in writing or verbally in the presence of two witnesses may make it more onerous for some individuals to record it if they change their minds.
- The fact that donor coordinators and physicians currently will not act on a signed donor card against the wishes of the grieving family may not change even if Bill 79 is adopted.

## 4 OTHER RELEVANT ISSUES TO ORGAN DONATION

### 4.1.1 Donation after Cardiac Death ("DCDD") - Consent Vacuum for Procedures done prior to death to facilitate organ/tissue donation

In Canada, there is a legislative vacuum that impacts on the ability to proceed with DCDD:

- Tissue donation statutes do not allow the donor or the donor's proxy to consent to *pre-mortem* medical interventions to facilitate post-mortem transplantation. The consent to post-mortem donation given by the donor or the proxy is limited to use of the body or parts *after death* and is effective only after the determination of the donor's death. There is nothing in current tissue donation legislation that allows a proxy to provide consent to medical interventions for donation purposes that are required prior to death.
- The *inter vivos* consent regime in tissue donation statutes has no applicability in the context of DCDD, which is clearly a post-mortem tissue donation. Also, even if the context was analogous, there is, generally speaking, no legal authority in Canada for a proxy to consent to living donation on behalf of an incapable adult, with the exceptions of Alberta (an agent under the *Personal Directives Act* may consent, depending on wording of personal directive), Quebec (court authorization required, and donation limited to regenerative tissue), and PEI (independent assessment required).
- Consent to treatment legislation across the country is unsuitable for providing consent to pre-mortem medical interventions to facilitate post-mortem transplantation because:
  - these interventions are not "treatment" or "health care" for the patient/potential donor; and
  - the legislation presumes that the decisions being made by the SDM are for the benefit of (and in the best interests of) the patient.

- Common law does not identify a SDM for decisions where a patient is incapable, and contains the same restrictions as statutes contain: a requirement to consent to “treatment” only and to act in the patient’s “best interests”.

If no one is legally entitled to consent to pre-mortem interventions in the case of DCDD, there are risks of potential liability in proceeding without consent. Legislation dealing with organ donation needs to address the consent requirements for pre-mortem interventions in the case of DCDD, so that there is clarity and health care professionals and others do not face liability because of a consent vacuum.

#### **4.1.2 Override of Deceased’s Wishes**

One of the issues which emerges in the current organ donation scheme is that health care providers are uncomfortable removing organs even if there is a valid consent from the deceased, if the family objects.

In order to ensure that individual wishes are respected and not ignored or overridden by others, a legislative regime should take into account this complex situation, including to provide for situations of conflict between individual wishes and the wishes of others such as family members and to clarify the steps to be followed in the event of conflicts (as is provided for in the consent scheme in the *Health Care Consent Act, 1996* (section 20). Any educational program about organ donation should take into account a discussion of differing beliefs among family members and what the legislation provides for.

## **5 CONCLUSION**

The foregoing represents our concerns and considerations, as health law counsel, with respect to the use of organ and tissue donation and the four Bills being considered by the Legislature. We hope this is of assistance to the members who introduced the Bills, members of the Legislature, the Citizen’s Advisory Group and any persons interested in a comprehensive and effective approach to increasing organ and tissue donation in Canada. We would be pleased to answer any questions or to assist further in any way we can.

Respectfully Submitted

Health Law Section  
Ontario Bar Association