



# FAST FACTS: CONSENT

## INTRODUCTION

The legal framework for organ donation is composed of human tissue gift acts that are unique to each province, and a criminal code provision. These acts outline:

- what a person can consent to regarding organ donation;
- who has the legal authority to consent to organ donation, living or deceased;
- the criteria a person must meet in order to consent;
- how to formalize consent; and
- the legal obligations of physicians and donation societies to seek consent from potential donors

Canadian case law imposes additional requirements in order for consent to be valid, including that consent be informed, voluntary, and provided by a person who has the capacity to consent.

The aim of this document is to briefly explain the law around organ donation. The information in this document is not exhaustive. There are slight variations among the legal frameworks in each province, meaning that one must consider the law in a specific province in order to understand what is legal in that province.

## WHAT ACTIVITIES DOES A PERSON CONSENT TO WHEN THEY CONSENT TO ORGAN DONATION?

Each provincial human tissue donation act states that people can donate their organs and tissues for one of three purposes when they die:

1. for treatment (therapeutic) purposes
2. for medical education
3. for scientific/medical research purposes.

The individual's consent gives physicians the authority to conduct any examinations needed in order to assess whether the tissues are medically suitable, and to remove such tissues from the individual for the purpose(s) specified in the consent. Individuals can also consent to live donation for treatment (therapeutic) purposes<sup>1</sup>.

## WHO HAS THE LEGAL AUTHORITY TO GIVE CONSENT?

A person must first achieve either the provincially defined age of majority (e.g., 18 in Alberta<sup>2</sup>, 18 in Saskatchewan<sup>3</sup>), or an age specified in the relevant provincial human tissue legislation (e.g., 19 in BC<sup>4</sup>, 16 in Ontario<sup>5</sup>) before they can consent to the donation of their organs. Some provinces also explicitly require that donors are mentally competent and capable of making free and informed decisions in order to consent to organ donation<sup>6</sup>. The common law reads in a presumption of mental competence and the capacity to make free and informed decisions for those who have achieved the age of majority.

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## **LEGAL EXCEPTION FOR PHYSICIANS WHO REMOVE ORGANS FROM PEOPLE WHO DO NOT MEET CONSENT CRITERIA**

If a person has stated an intention to donate organs but has not met the criteria for valid consent, the doctor who acts on the consent will not be liable unless they had some reason to think that the donor did not meet the consent criteria<sup>7</sup>. This applies in all provinces except Alberta and Quebec.

## **IF CONSENT HAS BEEN PREVIOUSLY GIVEN BY THE DONOR**

If the donor has consented to donation before death, and as long as there is nothing to indicate that

- the donor has withdrawn their consent,
- was coerced into donating,
- or that the consent is invalid for any other reason

then the consent is valid and the law does not require that consent be obtained from any other person.

## **IF CONSENT HAS NOT BEEN PREVIOUSLY GIVEN BY THE DONOR**

If a potential organ donor has not given consent prior to his/her death, or if the potential donor is incapable of giving consent and death is imminent, the law allows consent to be given by one of the following people:

- the person's spouse,
- either one of the person's parents,
- any other of the person's adult next of kin,
- any one of the person's adult children,
- any one of the person's brothers or sisters,
- the person lawfully in possession of the body (e.g. executor of the will or administrator of the estate) with the exception of persons such as a funeral director or the administrative head of the hospital<sup>8</sup>

No province allows consent to be given by anyone other than the donor if there is any reason to believe the donor would not have consented on their own behalf<sup>9</sup>.

## **CHILDREN UNDER THE AGE OF MAJORITY OR AGE SPECIFIED IN THE LEGISLATION**

No province allows minors, or those below the age specified in the legislation, to consent to organ donation. The decision will go to the next of kin (in the same order described above). This is a controversial aspect of organ donation laws, as it potentially conflicts with the "mature minor" doctrine. The mature minor doctrine allows minors to consent to medical procedures as long as they are sufficiently mature to make such decisions.

## **HOW TO FORMALIZE CONSENT**

In most provinces, there are two ways to formalize your consent to donate your organs: 1) in writing, or 2) verbally in the presence of 2 witnesses. Once consent is formalized it is considered binding in every province. However, consent can be revoked at any point. Most provinces only require that there be some evidence of the revocation of consent for consent to be legally revoked. In Alberta, consent must be formally revoked either in writing or verbally in the presence of two witnesses<sup>10</sup>.



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## THE LEGAL OBLIGATIONS OF PHYSICIANS AND DONATION SOCIETIES TO SEEK CONSENT

Some provinces have “mandatory consideration” provisions in their organ and tissue donation laws. The details vary, but, for example, Alberta’s “mandatory consideration” provisions require that whenever a person dies in hospital, the physician who makes the determination of death must consider the patient’s medical suitability for tissue and organ donation. If the organs are suitable for transplant, the physician must notify the appropriate organ procurement agency. The agency must then seek consent for donation from the deceased person’s next of kin. The duty to seek consent does not apply in all circumstances. For example there is no duty to seek consent if the medical practitioner has knowledge that the deceased would have refused consent, has already sought consent, or consent has already been given, along with other medical factors that vary from province to province<sup>11</sup>.

## LIVING DONORS

### Adult

In every province, people who have achieved the age of majority can consent to the removal of tissues and organs for therapeutic, medical education, or scientific research purposes.

### Minor

As was mentioned earlier, children cannot consent on their own behalf to donate organs. However in some provinces, provisions in the human tissue donation acts allow children under 16 to consent to the donation of regenerative tissue should they meet certain criteria<sup>12</sup>.

## POLICY AND ETHICS CHALLENGES: MISCONCEPTIONS ABOUT THE LAW

While consent by a donor and written registration to donate organs should be legally sufficient, physicians often give the final decision to next of kin, even if consent has been given. In part, this tendency reflects the challenge of balancing the wishes of the family against the autonomy of the deceased donor.

Government websites and resources state that the family of the donor will be given final decision-making authority regarding deceased organ donation, regardless of the donor’s intent<sup>13</sup>. Additionally, there is a perception expressed in organ donation policy documents and physician resources that the law needs to clarify who has decision making authority in the event of a conflict between the donor’s intention and their family’s intention<sup>14</sup>.

But regardless of these statements and the ethical tensions, the law is clear. If the donor’s intent to donate is known and is expressed in a manner that meets the requirements set out in the legislation, it is valid and legally binding. There is no legal obligation to ask the family to reaffirm the consent. There is nothing in the legislation that indicates that the family will retain decision-making authority once a potential donor has given legally valid consent<sup>15</sup>.

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The Canadian National Transplant Research Program (CNTRP) is a national research initiative designed to increase organ and tissue donation in Canada and enhance the survival and quality of life of Canadians who receive transplants. [www.cntrp.ca](http://www.cntrp.ca)

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