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REVIEW ARTICLE/BRIEF REVIEW

Legal considerations for the definition of death in the 2023 Canadian Brain-Based Definition of Death Clinical Practice Guideline

Considérations juridiques pour la définition du décès dans les Lignes directrices canadiennes de pratique clinique pour la détermination du décès cérébral de 2023

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Abstract

Purpose *The new 2023 Canadian Brain-Based Definition of Death Clinical Practice Guideline provides a new definition of death as well as clear procedures for the determination of death (i.e., when that definition is met). Since physicians must practice in accordance with existing laws, this legal analysis describes the existing legal definitions of death in Canada and considers whether the new Guideline is consistent with those definitions. It also considers how religious freedom and equality in the Canadian Charter of Rights and Freedoms might apply to the diagnosis of brain death.*

Method *We performed a legal analysis in accordance with standard procedures of legal research and analysis—including reviews of statutory law, case law, and secondary legal literature. The draft paper was discussed by the Legal-Ethical Working Subgroup and presented to the larger Guideline project team for comment.*

Results and conclusion *There are some differences between the wording of the new Guideline and existing legal definitions. To reduce confusion, these should be addressed through revising the legal definitions. In addition, future challenges to brain death based on the Charter of Rights and Freedoms can be anticipated. Facilities should consider and adopt policies that identify what types of accommodation of religious objection and what limits to accommodation are reasonable and well-justified.*

Résumé

Objectif *Les nouvelles Lignes directrices canadiennes de pratique clinique pour la détermination du décès cérébral de 2023 fournissent une nouvelle définition du décès ainsi que des procédures claires pour la détermination du décès (c.-à-d. lorsque cette définition est respectée). Étant donné que les médecins doivent exercer conformément aux lois en vigueur, la présente analyse juridique décrit les définitions juridiques existantes du décès au Canada et vise à déterminer si les nouvelles Lignes directrices sont conformes à ces définitions. Cette analyse examine également comment la liberté de religion et l'égalité dans la Charte canadienne des droits et libertés pourraient s'appliquer au diagnostic de mort cérébrale.*

Méthode *Nous avons effectué une analyse juridique conformément aux procédures habituelles de recherche et d'analyse juridiques, y compris l'examen du droit écrit, de la jurisprudence et de la littérature juridique secondaire. L'ébauche du document a été examinée par le sous-groupe de travail juridico-éthique et présentée à l'équipe élargie du projet des Lignes directrices pour commentaires.*

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Résultats et conclusions *Il existe certaines différences entre le libellé des nouvelles Lignes directrices et les définitions juridiques existantes. Pour réduire la confusion, il convient de remédier à ces problèmes en révisant les définitions juridiques. De plus, les défis futurs à la mort cérébrale fondés sur la Charte des droits et libertés peuvent être anticipés. Les établissements devraient envisager et adopter des politiques qui précisent quels types d'accommodement d'objection religieuse et quelles limites d'accommodement sont raisonnables et bien justifiés.*

Keywords brain death · freedom of religion · human rights · law · legal definition of death · legislation

The *2023 Clinical Practice Guideline on a Brain-Based Definition of Death and Criteria for Its Determination After Arrest of Circulation or Neurologic Function in Canada*,[1] featured as the centrepiece of this month's dedicated Special Issue of the *Journal*, defines death in terms of the permanent loss of brain function. For the purposes of this paper, we refer to this guideline as the BBDD Guideline. This paper offers an analysis of two principal questions:

- First, is the BBDD Guideline's definition of death consistent with existing legal definitions of death?
- Second, how might the Canadian *Charter of Rights and Freedoms* apply to the application of brain-based definitions of death (including the BBDD Guideline)?

The first question is important as inconsistency could create confusion and legal uncertainty. The second question is also important given recent Ontario cases challenging the application of a brain-based definition of death on the ground of freedom of religion, which is protected under the Canadian *Charter of Rights and Freedoms*. This paper outlines several potential *Charter*-based legal challenges that may be brought against the application of brain-based definitions of death. These challenges were possible before the BBDD Guideline, and similar challenges may be brought against it as well.

We offer our best analysis of the two legal issues addressed here, although it is for the courts to eventually provide authoritative legal answers. Our analysis leads us to two conclusions. First, it is advisable for provinces and territories to work toward a definition of death that is consistent with the BBDD Guideline. A harmonized legal approach would both avoid uncertainty on a matter of fundamental legal significance and align the law with the most up to date medical consensus. Second, and independent of the first conclusion, future challenges to brain-based definitions of death can be expected, and it would be helpful for the BBDD Guideline to anticipate this by considering what accommodation of religious objection is reasonably possible.

Other legal challenges to the BBDD Guideline are conceivable. These include both claims that consent to brain death testing is required and challenges to the accuracy of the diagnosis. These kinds of legal challenges have already been brought in relation to brain-based definitions of death and are discussed elsewhere in this issue.[2]

This article first considers in a general way why a legal definition of death is needed and the legal tool-kit available for doing so. Second, it summarizes the existing approaches to the legal definition of death in Canada and addresses whether the BBDD Guideline is consistent with those approaches. Third, it considers how the *Charter* applies to brain-based definitions of death, including the BBDD Guideline.

Why is a legal definition of death needed, and what are the legal options for defining death?

A legal definition of death is necessary for a multitude of legal reasons—including the criminal law, family law, and testamentary succession. It is also clearly needed for medical practice where legal requirements for treatment and posthumous organ donation depend upon whether a patient is alive or dead.

The legal definition of death is of fundamental importance since the status of being alive sets the boundaries of legal and moral concepts such as personhood. Nevertheless, the law is quite flexible and can tolerate varying approaches to the legal definition of death for different purposes. For example, in Japan there is societal resistance to the concept of brain death, and Japan has amended its law to allow individuals to declare their acceptance of brain death for the purposes of organ donation alone, although family may override this.[3]

Legal definitions of death are typically contained in statutes enacted by legislatures or in the common law (i.e., stated by judges in court cases). Elected legislatures may enact legislation within the scope of their jurisdiction, and they may displace common law rules developed by the courts. Legislatures, government actors and private actors performing government functions must, however, act within the constraints set by the Constitution including the *Charter of Rights and Freedoms*. Courts, in developing common law rules, are also supposed to do so in a way consistent with "*Charter* values."

Sometimes, legislatures delegate authority to another entity to make legal rules, but the ultimate legal status of those rules flows from the legislature. Authority may be

delegated to governmental departments or to bodies created by statute, such as the colleges of physicians and surgeons, which are granted regulatory authority by statute. Delegated legislation is widespread for reasons of efficiency, but can be controversial as it diminishes the democratic character of legislation by distancing elected representatives from policy choices.[4]

The issue of delegation of legal authority arose in the Ontario case of *McKitty v. Hayani*.[5] McKitty argued that the state had improperly delegated the definition of death to the medical profession when it declared that death should be determined in accordance with "accepted medical practice."

> "[T]his passive stance could allow the medical profession to liberalize the definition of death to include not only persons who have suffered total brain death, but also persons with functioning, but severely compromised brains (e.g., the minimally conscious). … [B]y deferring to current medical practice rather than making a definitive declaration of what constitutes death, courts have abdicated the responsibility to ensure that the benefit of the law extends to the most vulnerable" (paragraph 27).[5]

The Court of Appeal rejected this argument, clarifying that the law does not in fact delegate authority to the medical profession to define death. Instead, it is up to judges who develop the common law definition of death to evaluate whether to accept the definition offered by medical practice. The brain-based and cardiorespiratory-based definitions used by the medical profession had been accepted by judges, but this does not mean that judges are obliged to accept another definition should a different medical practice emerge (paragraph 28).[5]

Further, the Court of Appeal indicated that "who the common law ought to regard as a human being—a bearer of legal rights—is inescapably a question of justice, informed but not ultimately determined by current medical practice, bioethics, moral philosophy, and other disciplines" (paragraph 29).[5]

This reasoning answered the argument about the improper delegation of legal authority to medicine to define death. Nevertheless, it does not offer comfort to medical practitioners, who may be uncertain about whether changes in medical practice will be accepted by judges. The unpredictable pace of the common law method (in which judges develop law incrementally in cases over time) is one reason why the 1981 Law Reform Commission of Canada recommended a legislated definition of death.[6] We now turn to the existing legal definitions of death to assess whether they and the BBDD Guideline are consistent with one another.

What are the current legal definitions of death in Canada, and are they consistent with the BBDD Guideline?

The current legal definitions of death in Canada

Statutes that adopt brain-based legal definitions

Three Canadian provinces have adopted a solely brain-based statutory definition of death (Nova Scotia,[7] Manitoba,[8] Newfoundland and Labrador[9]). The definitions in Manitoba and Newfoundland and Labrador refer to the irreversible cessation of all of a person's brain functions, and the definition applies generally (i.e., not solely in the context of organ donation). The statutory definition in Nova Scotia is contained in organ donation legislation and should apply only in that context, while the common law definition of death, including brain death, should apply outside the organ donation context. Nova Scotia's organ donation statute defines death as 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 [which means] (i) respiration, (ii) circulation, and (iii) consciousness."

Statutes that accept brain-based and cardiorespiratory-based legal definitions

Three other provinces or territories have adopted statutory definitions of death that explicitly accept the definition of brain death, while also implying that the cardiorespiratory definition of death is also accepted (New Brunswick,[10] Northwest Territories,[11] Prince Edward Island[12]). All these definitions are located in organ donation legislation and, as with Nova Scotia's statutory definition, should apply only in that context.

Common law (nonstatutory) definitions of death

The Ontario Court of Appeal recently stated that "[t]he current state of the common law is that a person is considered dead where there is either the irreversible cessation of cardiorespiratory function or the irreversible cessation of all brain function" (paragraph 26).[5] Seven Canadian provinces or territories do not have a statutory definition of death, and so the legal definition is the one developed by judges in court decisions.

Five of these jurisdictions specify that the "the fact of death" is to be "determined in accordance with accepted medical practice" for the purposes of organ donation (Alberta,[13] British Columbia,[14] Ontario,[15] Saskatchewan,[16] Yukon[17]). As noted above, the Ontario Court of Appeal

made it clear that laws of this type do not completely leave the definition of death to medical practice. This suggests that statutes referring to "accepted medical practice" leave the tests and procedures to medical practice, while judges retain judicial control over developing the legal definition of death. Two provinces or territories neither specify a definition of death, nor do they refer to "accepted medical practice" in their statutes (Quebec,[18] Nunavut[19]).

Is the BBDD Guideline consistent with the current legal definitions of death?

The BBDD Guideline defines death as the permanent cessation of brain function. It goes on to explain that this state is characterized by the complete absence of any form of brain-based consciousness and the absence of brain stem reflexes, including the ability to breathe independently.

There are four possible divergences between existing legal definitions of death and the BBDD Guideline:

(1) One or two definitions: The common law and some provinces accept both brain-based and cardiorespiratory definitions of death, while the BBDD Guideline accepts only a brain-based definition.
(2) All or some brain function: The common law and some provinces define death in terms of the loss of "all brain function," while the BBDD Guideline refers to the loss of just "brain function."
(3) Identification of critical functions: Nova Scotia states that death refers to the loss of the brain's ability to co-ordinate critical functions (respiration, circulation, and consciousness), while the BBDD Guideline refers to the loss of brain function, characterized by lack of consciousness and brain stem reflexes (including breathing).
(4) Permanent or irreversible: The statutes defining death as well as the common law use the term irreversible cessation of all brain function. The BBDD Guideline refers to the permanent cessation of all brain function.

One or two definitions

On the first issue, the existing law in most Canadian jurisdictions accepts death defined in terms of the loss of cardiorespiratory function or brain function. None of these require that death be diagnosed pursuant to a cardiorespiratory definition. As a result, the BBDD Guideline—in directing clinicians to follow a solely brain-based definition of death—would seem to fit within legal structures that accept both. Thus, the continued legal acceptance of cardiorespiratory death would not seem to cause a problem for the BBDD Guideline.

All or some brain function

The second possible issue is that most of the current legal definitions require the loss of *all* brain function while the BBDD Guideline requires only the loss of brain function. At first glance, the BBDD Guideline appears to be a less demanding standard for death since it does not require loss of *all* brain function (i.e., someone could be declared dead under the BBDD Guideline but would not be dead under existing law because *all* brain function may not have ceased permanently).

Nevertheless, this turns on the meaning of the phrase "*all* brain function" within the legal definitions. Unfortunately, this phrase has not been explicitly defined legally. For example, several legal disputes in the USA have raised the question of whether the diagnostic tests commonly used to establish brain death can satisfy the legal test of loss of *all* brain function since they test only some brain functions.[20] In fact, some neuroendocrine function continues despite the diagnosis of brain death, an issue that is being raised as one of the reasons to revise the US Uniform Determination of Death Act (which requires the loss of "all functions of the entire brain, including the brainstem").[21]

The diagnostic tests used to detect the loss of "*all* brain function" have not been challenged as insufficient in Canada, as they have been in the USA. One could argue that this is because medical practice and law in Canada always understood the phrase "*all* brain function" to refer only to *key* functions of consciousness, brainstem reflexes, and respiratory effort. These are the functions whose absence is confirmed in the standard tests performed to establish brain death.[22] If we accept this argument, then the BBDD Guideline merely clarifies pre-existing practice and law by more precisely defining the specific brain functions that have always been intended by the phrase "*all* brain function."

A contrary argument is that the standard neurologic tests do not satisfy the existing Canadian law since they do not enable physicians to show loss of *all* brain functions. On this interpretation, the BBDD Guideline creates a bounded list of the functions that must be tested for, bringing the definition of death into line with the tests that are performed. But this would leave the problem that the standard neurologic tests and the BBDD Guideline do not satisfy the existing legal test, which requires that *all* brain functions be lost. This problem would exist until the law is modified to accept the BBDD Guideline's bounded list of functions that characterize brain death.

Identification of critical functions

A third possible divergence exists between the BBDD Guideline and the Nova Scotia definition used for the purpose of organ donation. The BBDD Guideline requires the loss of brain function, as characterized by loss of consciousness, brainstem reflexes, and respiratory drive. The Nova Scotia statute refers to the coordination of the critical functions of respiration, circulation, and consciousness. These do seem largely congruent, although the BBDD Guideline may be more demanding when it refers to the absence of brain stem reflexes in general, rather than just the ability to breathe independently.

Permanent or irreversible

The fourth possible divergence between the BBDD Guideline and existing legal definitions of death is in the use of the term permanent rather than irreversible to describe the loss of brain function. The term "irreversible" is ambiguous and could be taken to mean one or more possible things. First, it could mean that it is biologically or physiologically impossible to reverse the loss. It could be taken to refer to legal impossibility, as in the case of a valid refusal of medical interventions. It could also mean practically or logistically impossible if the necessary medical equipment or expertise are not available.

With respect to the second meaning, the law has long been very clear that legally valid refusal of treatment is to be respected; this reflects a strong legal commitment to the inviolability of bodily integrity. As for situations of practical impossibility of reversal, it would be nonsensical to treat a person who has lost all brain function as alive during the period when nonexistent medical interventions might have reversed the loss. In these two cases, the loss will not be reversed, even if an intervention could possibly have reversed the loss. Practice has long treated both of these situations as satisfying a definition of death phrased in terms of the irreversibility of the loss. Nevertheless, there seems to have been lingering confusion about whether the term irreversible captures situations where the loss can be but will not be reversed, e.g., for valid legal reasons. The shift to the word permanent rather than irreversible might help to address this confusion. In our view, the wording does not change actual practice, and is consistent with the way the existing law has been interpreted. Nevertheless, it is possible that someone might argue that the replacement of the term creates an inconsistency in the law, even if we regard that as a difficult argument to make.

In summary, there are some possible discrepancies between the BBDD Guideline and the existing legal definitions. It would be advisable for legislators and courts (when a case presents itself before them) to consider adjusting the law to bring it into line with the approach taken in the BBDD Guideline. This would arguably not constitute a change from pre-existing practice, which has long used diagnostic tests aimed at consciousness, brainstem reflexes, and respiratory drive to establish brain death as does the BBDD Guideline. Nevertheless, it would help to avoid confusion and future possible legal disputes if these four potential divergences were addressed. Ideally a harmonized approach would be taken across the country.

The Canadian *Charter of Rights and Freedoms* and brain-based definitions of death

The *Charter* enshrines a set of fundamental rights and freedoms, and it applies to legislation as well as to actions taken by government actors (including private parties engaging in government action or acting as government agents). The courts have also explained that the common law rules developed by judges must comply with *Charter* values—an indirect way in which arguments based on the *Charter* may be raised when there is no statute or government actor involved. It is important to recall that *Charter* rights are not absolute, and the approach is to first examine whether a particular right is infringed and then to evaluate whether that infringement is nonetheless justified.

In developing a new clinical practice guideline like the BBDD Guideline, it is important to consider how the *Charter* applies to brain-based definitions of death, as we can anticipate future *Charter*-based challenges. The recent Ontario case of *McKitty v. Hayani* involved an objection based on the *Charter* right to religious freedom, but this case did not answer the question because Taquisha McKitty's intervening death on cardiorespiratory criteria made the matter moot, and because the evidentiary record was incomplete. The Court of Appeal did go ahead to outline the proper legal analysis for future claims because it anticipated that the question would arise again, likely in urgent circumstances (paragraph 9).[4]

The analysis offered here builds upon the analysis in *McKitty v. Hayani*, and is divided into separate subquestions starting with question of the applicability of the *Charter,* and then proceeding to the *Charter* analysis itself.

Can someone who has been declared brain dead bring a legal challenge to that definition of death?

The trial judge in *McKitty v. Hayani* took the position that since McKitty was dead, she did not have legal personhood

and could not claim *Charter* rights (paragraph 205).[23] Therefore, she could not argue that the declaration of her death was contrary to her *Charter* rights. This reasoning was obviously a problem as it presupposed the very point in dispute—whether McKitty was dead or not. The Court of Appeal made it clear that for the purposes of litigation, one cannot conclude a person is legally dead before answering the question of whether the application of brain death criteria to that person was constitutional (paragraphs 39 and 47).[4] Therefore, a challenge to the brain-based definition of death can be brought on behalf of a person who has been declared brain dead.

Does the Charter apply to the existing legal definitions of death or to the physicians applying those definitions?

The *Charter* applies to government action, but not to purely private action. Therefore, it applies to the executive, to all legislation (statutes and regulations), and to bodies exercising statutory powers that they derive from legislation. Note that actors who are more remote from government may still be considered as "government" for the purpose of the *Charter* if their actions fall under the control of government or if they are implementing a particular government program or function.

Therefore, statutes that already declare the brain-based definition of death are clearly governed by the *Charter* because all statutes can be challenged for inconsistency with the *Charter*. This is the case in the provinces or territories that include brain-based definitions of death in their legislation.

In the other provinces that do not have a statutory definition of death, the common law definition of death applies. In those locations, it is open to a person to argue that the common law's acceptance of brain death is inconsistent with *Charter* values. The jurisprudence states that the courts are supposed to develop the common law in a manner that is consistent with "*Charter* values."[24] This is not the same thing as arguing that a specific *Charter* right has been infringed. Rather, *Charter* values are the deeper values that underlie the specific *Charter* rights (e.g., dignity, liberty, protection of life, equality, and respect for diversity) and courts are directed to consider these values alongside competing goods.[25,26]

Therefore, a claimant objecting to a brain death diagnosis may seek to invalidate it by challenging the statutory definition of death using the *Charter,* or by challenging the common law definition of death using the concept of *Charter* values. Justice Schulman stated that in the *Golubchuk* case, even if the *Charter* did not apply to the physicians proposing to withdraw treatment, "common law principles must develop in keeping with Charter values which include respect for religious freedom (s.2(a)) and respect for life and personal autonomy (s.7)."[27]

It is unclear whether the *Charter* applies to physicians and hospitals. As noted above, the *Charter* may apply to private parties if they are performing a specific government action or acting as a government agent (paragraph 48).[4] This makes sense because a government could otherwise avoid its responsibilities under the *Charter* by delegating the implementation of its policies and programs to a private entity (paragraph 42).[28]

Nevertheless, the case law is not very clear on when physicians and hospitals will be viewed as engaged in government action, although there are some legal precedents. For example, the Supreme Court of Canada found that a hospital's failure to provide sign language interpretation to hearing-impaired patients was unconstitutional under the *Charter* because "while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in [British Columbia's *Hospital Insurance Act*]."[28] On the other hand, an Ontario trial court recently found that the setting of eligibility criteria for transplant in a living organ donor program is not a government function subject to the *Charter* because its policies are shaped by medical criteria and clinical decision-making—unlike the setting of eligibility criteria for transplant in the deceased donor program, which was administered by a government body in Ontario.[29] The Ontario Court of Appeal in *McKitty v. Hayani* indicated that a physician diagnosing death while providing medical treatment was not a government actor for the purposes of the *Charter*. Nevertheless, the Court of Appeal declined to address an argument that a physician diagnosing death is bound by the *Charter* because the *Vital Statistics Act* imposes a statutory duty to complete the medical certificate of death. This leaves the situation uncertain, as it is hard to imagine that the different facets of the same act could be simultaneously exempt and subject to the *Charter.*

In conclusion, the *Charter* already directly applies to existing statutory definitions of death, which can be challenged under the *Charter*. It is less clear whether the *Charter* would apply directly to a physician who is diagnosing death. A challenge to the common law's acceptance of brain death is possible based on *Charter* values in the remaining jurisdictions where the definition of death is a matter of common law incorporation of medical practice.

The precise legal status of the BBDD Guideline is not presently clear. It could be viewed as an interpretation or clarification of a statute, as delegated legislation, as performance of a governmental function if the regulatory colleges adopt and mandate the BBDD Guideline, or as a

step in the evolution of the common law should judges so recognize it. Therefore, it is not possible to specify the nature of a potential *Charter* challenge emerging from its application.

Would the application of a brain-based definition of death infringe a person's Charter rights?

The three specific *Charter* rights invoked in *McKitty v. Hayani*[4] were: the freedom of religion under s.2(a); the right to life, liberty, and security of the person under s.7; and the right to equality and equal protection and benefit of law under s.15(1).

All *Charter* rights are subject to reasonable limits prescribed by law that can be demonstrably justified under s.1 of the *Charter*. The courts have developed a complex legal test to determine when this will be the case, and this analysis occurs once a *prima facie* infringement of a person's *Charter* rights is found to exist. We consider the possible justifications after a discussion of the three *Charter* rights raised in *McKitty v. Hayani.*

Freedom of religion

The right to freedom of religion can be invoked where there is: (1) a sincere belief having a nexus with religion and (2) state conduct that interferes with the ability to act in accordance with these religious beliefs in a manner that is more than trivial or insubstantial (paragraph 36).[4]

It is at the justification stage where claims are more likely to fail because it is not too difficult to establish a *prima facie* infringement of religious freedom,[30] and because "[m]uch of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief."[31] It is quite possible that, with adequate evidence about the sincerity of a person's religious belief that life endures until the heart stops, a court would find that a brain death diagnosis would *prima facie* infringe a person's *Charter* right to religious freedom, particularly since overriding religious beliefs about life or death would likely be viewed as more than trivial or insubstantial.

McKitty also invoked s.7 and s.15 *Charter* rights, but the Court of Appeal refused to rule on these claims, as it understood those to depend upon the success of the religious freedom claim (paragraph 83).[4] The Court of Appeal did not provide a very clear explanation why this was the case, but it may flow from the fact that the *McKitty* case was framed as a religious freedom case. We go on to consider s.7 and s.15 briefly because a person could raise nonreligiously based objections to brain death based on those two *Charter* rights.

The rights to life, liberty, and security of the person

Section 7 of the *Charter* protects the rights to life, liberty, and security of the person, and declares that these rights cannot be denied except in accordance with the "principles of fundamental justice." The complex case law interpreting this right cannot be described here for reasons of space. For our purposes, if one holds the view that death occurs when the heart stops, then one could argue that a law declaring one to be dead when the heart is beating would endanger life.

Prior s.7 cases involving the right to life have dealt with laws or state actions that involve a fatal physiologic change or that pose a risk of that change (e.g., the criminalization of assisted suicide might cause people at risk of losing physical capacity to bring about their own death prematurely while still able to do so).[32] The argument in this context is different, as the law declaring a person to be dead does not itself bring about a physiologic change. Rather it brings about a particular legal characterization of a person's state. A thought experiment illustrates this point further. Imagine that the law stated that life depends upon the capacity for consciousness; this position has in fact been argued in the literature debating brain death.[33] This would mean that people with unresponsive wakefulness syndrome (formerly permanent vegetative state) who were legally alive the day before the legal change would be legally dead the day afterward. The law thus brings about the legal death of the person by redefining the category even if it does not bring about a physiologic change.

In addition, if we accept the point in dispute—that a person declared brain dead is still alive and at risk of death—the declaration of death could be said to pose a risk of a fatal physiologic change because the declaration of death ends any obligation to provide ventilation or other ongoing support.

This discussion of possible s.7 arguments is speculative, and there are other hurdles to overcome, such as whether a brain-based definition of death would be consistent with the principles of fundamental justice, and further whether such a definition could be justified under s.1 of the *Charter* (discussed below).

Equality rights

Section 15 is the *Charter*'s guarantee of equality, and provides protection against discrimination on a range of grounds including religion and physical disability. As with the other *Charter* rights discussed here, a complex jurisprudence interprets the language of s.15. The Supreme Court of Canada recently explained that someone who wishes to invoke s.15(1) "must demonstrate that the impugned law or state action: [1] on

its face or in its impact, creates a distinction based on enumerated or analogous grounds; and [2] imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[34] Note that it is not necessary for a law to identify a particular group directly and explicitly for different treatment. The law may apply neutrally to all, but if its effects are disproportionately disadvantageous to a particular group it may still offend s.15(1).[34]

Would the brain-based definition of death offend s.15(1) of the *Charter*? It would appear to have different effects on those religious groups who reject the brain-based definition of death, although it is less clear if those effects have the "effect of reinforcing, perpetuating, or exacerbating disadvantage." In a recent challenge by religious health care providers to the College of Physicians and Surgeons of Ontario's policy requiring physicians to provide an effective referral for medical aid in dying, the court briefly considered the argument that the policy discriminated on the basis of religion. While it might have disparate effects on the group of religious physicians, this did not meet the second requirement of perpetuating disadvantage.[35]

Nevertheless, religion is not the only relevant s.15(1) ground that could be raised in relation to the brain-based definition of death. People with severe brain injuries have profound physical and mental disabilities; these are both enumerated grounds within s.15(1).

As noted above, some have argued that the irreversible loss of consciousness should be the criterion for death.[33] Others argue that the continuation of important bodily functions such as absorbing nutrients, excreting waste, maintaining body temperature, healing wounds, developing a fever in response to infections, and, in some cases, gestating a fetus and giving birth are sufficient criteria for life even if all brain function is irreversibly lost and the other functions persist only with medicotechnological support.[33] A broad consensus rejects both these positions and regards the irreversible cessation of whole brain function to be necessary and sufficient to constitute death.

But the point is that the brain-based definition of death would have the effect of dividing the group of people with severe brain injuries into those who will be treated as living and those who will be treated as dead, and this division is drawn on the basis of the particular functional disabilities. The question from the perspective of s.15(1) is whether this would constitute discrimination on the basis of disability. A claimant may argue that the law has the effect of distinguishing on the basis of disability, and that this "reinforces, perpetuates, or exacerbates disadvantage." The fact that a subset of those with brain injuries (i.e., those who have irreversibly lost brain function) are treated as dead while others (i.e., those with less serious brain injuries) are not so treated could be said to discriminate against them on the basis of disability. The courts have made it clear that a law may discriminate on the basis of disability contrary to s.15 even if it affects only a subset of people with disabilities.[35]

Would a *prima facie* infringement be justified?

Assuming that a claimant was able to succeed in a challenge under s.2(a), s.7, or s.15(1), this would not be the end of the discussion. The brain-based definition of death could still be defended under s.1 as a reasonable limit on *Charter* rights, if the application of that definition is "prescribed by law." This would be the case if a statute, regulation, or binding rule compels the application of that definition—as it does in some Canadian jurisdictions.

Here, for the sake of space, we address only the s.1 analysis that might apply in the context of a *prima facie* violation of the right to religious freedom. The first step of this analysis is to consider whether there is a "pressing and substantial" governmental objective behind the law. If so, then the court will engage in a three-step proportionality analysis that asks whether the brain-based definition of death is needed to achieve the governmental objective and whether the harms to *Charter* rights are grossly disproportionate to the benefits sought by pursuing that objective.

The landmark statement of brain death by the 1968 Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death explained the objectives of the new definition as follows:[37]

> 1) "Improvements in resuscitative and supportive measures have led to increased efforts to save those who are desperately injured. Sometimes these efforts have only partial success so that the result is an individual whose heart continues to beat but whose brain is irreversibly damaged. The burden is great on patients who suffer permanent loss of intellect, on their families, on the hospitals, and on those in need of hospital beds already occupied by these comatose patients."
> 2) "Obsolete criteria for the definition of death can lead to controversy in obtaining organs for transplantation."

Manitoba is one of the Canadian provinces that has enacted a general brain-based definition of death. This legislature was influenced by the 1974 report of the Manitoba Law Reform Commission proposing a brain-based statutory definition of death.[38] The Commission identified four reasons for a clear brain-based legal definition of death.

First, a more precise definition of death was required because modern methods of artificially sustaining respiration and heartbeat made the prior approach of defining death based on cardiorespiratory function inadequate. The Commission took the view that it would be hard to view a person without any brain function as alive, just as it would be hard to view a person with brain function but without respiration or heartbeat (e.g., as in the case of cardiac bypass technology) as dead. As a result, it wrote, the primary indicator of death is the absence of brain function.

Second, there is a need for precision on the time of death, recognizing that death is a process or continuum. Brain death is a clinically definable syndrome, with established and accepted medical practices to safely pronounce it.

Third, a precise statutory definition of death protects the right to life of gravely ill or disabled patients by reducing the pressure to "pull the plug" for whatever reason or desire on the part of others. By providing the clear time of death as the occurrence of brain death, the statute reduces the risk that one patient will be sacrificed to provide organs for another.

Finally, the Commission noted the reluctance to terminate human life of someone who could potentially recover, which leads to reluctance to pronounce death until there is virtually total failure of all systems and general tissue deterioration. Nevertheless, the prolonged dying process enabled by technologies results in trauma to families, consumption of resources, and "excessive physical and psychological demands on all medical staff."[38]

The Manitoba legislature did not engage in a lengthy discussion of its reasons for deciding to enact a brain-based definition of death in 1975. The brief discussion in the legislative committee considering the amendment of the *Vital Statistics Act* raised the issue of organ donation, the futility of indefinite maintenance after brain function had irreversibly ceased, and the need to adopt a legal definition despite lack of complete agreement on the definition of death. It was clearly influenced by the recommendations of the Commission as well as the fact that the Manitoba Medical Association was in support.

Based on the foregoing, we can sketch out four potential government objectives that might underlie a brain-based definition of death:

- Avoid the burden on patients, families, and health care personnel of prolonging the dying process.
- Avoid the burden on health care resources, and deprivation of those in need of health care resources being used to maintain brain dead patients.
- Need to clarify time of death in ventilated patients for purposes such as organ donation.
- Need to clarify the necessary functions to constitute death, to protect severely ill or disabled patients from the premature termination of life-sustaining therapies.

Proceeding with the next steps in s.1 analysis, a brain-based definition of death does seem to serve these potential objectives. The next question is whether the law "minimally impairs" *Charter* rights. Put another way, the issue is whether there is a less harmful means of achieving the objectives of the law. The Court of Appeal in *McKitty v. Hayani* noted that it would be at this stage that a court would consider whether a form of religious accommodation like those found in some American states would remedy an unjustified infringement of religious freedom.[4] Evidence that many physicians provide a brief delay prior to removing ventilation or other ongoing support suggests that this is usually a workable accommodation, and so could be viewed as a constitutionally required form of accommodation. Although a delay itself doesn't exempt a person from the application of the brain-based definition of death, it might serve to alter the consequences of that diagnosis. For example, the delay might allow families to arrange a transfer if there is a facility willing to receive and care for their relative.

The final part of the s.1 analysis is to consider whether the overall impact on the claimants is disproportionate to the beneficial objectives sought by the law. The effects of the brain-based definition of death are more harmful to religious objectors than laws that leave a choice, albeit one that is undesirable (e.g., a person must agree to a driver's licence photo contrary to religious beliefs or not drive). In the context of a death diagnosis, the element of choice, allowing a person to avoid the application of a policy contrary to religious belief by abstaining from a particular activity, is not present. The Supreme Court has suggested that the impact on a claimant is great in situations in which there is no meaningful choice.[36] Still, a court may still regard the impact on claimants as proportionate given the countervailing beneficial objectives underlying the brain-based definition of death.

If the Charter does not apply directly, would Charter values dictate a change to the common law?

If the *Charter* is inapplicable because a statute or government actor/function is not involved, a claimant may still argue that the common law definition of death is inconsistent with *Charter* values. In this way, *Charter* considerations can be used in litigation between private parties to modify the common law rules that apply to them.

The courts approach this exercise with caution because they do not want to indirectly expand the applicability of the *Charter* in a way that would evade the express limits on scope set by that text (i.e., application to government actors and functions).[25] They have also noted that "*Charter* values" are not clearly set out in the text like the *Charter* rights are, and the method of judicial reasoning to be employed to balance *Charter* values against competing considerations is not very clear.[4] Furthermore, courts are reluctant to make major changes to established rules of common law, preferring to leave major law reform to legislatures.[4] Rather, when *Charter* values are used to argue for changes to the common law, this must be done in a manner consistent with the common law, which involves modest incremental or interstitial changes rather than dramatic or "far-reaching" change.[4]

In *McKitty v. Hayani*, one of McKitty's arguments was that the common law's acceptance of brain death without providing an accommodation of religious objection was inconsistent with *Charter* values and that the common law should be changed. The Court of Appeal did not answer this point given that the case was moot, but it did make some brief comments on how the analysis might proceed. In the Court's view, there is not a "*Charter* value" of freedom of religion. Rather, a court considering how *Charter* values are affected by the brain-based definition of death would need to look at the core reasons underlying the *Charter* rights at issue, which might have to do with the human value of striving to understand truths about the world or the value of the inviolability of life.[4]

In summary, it is difficult to predict how a future challenge to the brain-based definition of death based on *Charter* values might fare. A challenge is certainly possible, but it would likely face substantial hurdles given that a court might view the creation of an accommodation requirement as a major legal change that is better done by the legislature than the courts.

Conclusion: What does the foregoing analysis mean for the BBDD Guideline?

The foregoing analysis suggests that the brain-based definition of death is already well-accepted across Canada in either statutes or the common law. Nevertheless, two aspects of the legal context raise questions for the BBDD Guideline.

First, the wording of the BBDD Guideline diverges somewhat from the existing statutory definitions of death, as well as the common law definition. To avoid confusion, it would be advisable for legislatures to adjust statutory definitions accordingly, and for judges to update the common law definition of death when a case is brought before them. Until this occurs, there is some room for claimants to argue that a diagnosis pursuant to the BBDD Guideline is inadequate—for example because it tests for the loss of specific brain functions rather than all brain functions. Nevertheless, the same challenge could have been made to the existing legal definitions and not just to the BBDD Guideline, given that prior practice was to test for specific brain functions in any event.

Some may take the position that a harmonized statutory approach across Canada would be advisable, and this was the position taken by the Law Reform Commission of Canada in its 1981 report. Others may view the effort as unnecessary, particularly given that Canada has managed reasonably well so far without one. Furthermore, there is always a risk that a poor legislated definition would create more confusion and be hard to change.

Second, it seems likely that there will be future *Charter*-based challenges to the brain death diagnosis. The application of the *Charter* will depend upon the legal foundation for the diagnosis (i.e., statute, common law, or obligation imposed by medical colleges in their role as regulators of the practice of medicine). It will also depend upon whether physicians are taken to be performing a government function in declaring death. Pending such a challenge, it would be helpful to adopt clear policies that carefully identify what reasonable accommodation of religious objection is possible, and identify justified countervailing considerations. This would help to bring clarity and consistency, and also to signal sensitivity to religious diversity in a pluralistic society.

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References

1. *Shemie SD, Wilson LC, Hornby L, et al.* A brain-based definition of death and criteria for its determination after arrest of circulation or neurologic function in Canada: a 2023 Clinical Practice Guideline. Can J Anesth 2023; https://doi.org/10.1007/s12630-023-02428-z.
2. *Pope TM, Chandler JA, Hartwick M.* Consent for death determination by neurologic criteria. Can J Anesth 2023; https://doi.org/10.1007/s12630-023-02430-5.
3. *Terunuma Y, Mathis BJ*. Cultural sensitivity in brain death determination: a necessity in end-of-life decisions in Japan. BMC Med Ethics 2021; 22: 58. https://doi.org/10.1186/s12910-021-00626-2
4. *Reid LM*. 2010. Oversight of regulations by parliamentarians, 2010. Available from URL: http://www.revparl.ca/33/4/33n4_10e_Reid.pdf (accessed December 2022).
5. *McKitty* v. *Hayani*, 2019 ONCA 805 (Ontario Court of Appeal). Available from URL: https://www.canlii.org/en/on/onca/doc/2019/2019onca805/2019onca805.html (accessed December 2022).
6. *Law Reform Commission of Canada*. Report 15: Criteria for the Determination of Death. Ottawa: Law Reform Commission of Canada; 1981.
7. *Human Organ and Tissue Donation Act*, SNS 2019 c.6 (Nova Scotia) Available from URL: https://www.canlii.org/en/ns/laws/stat/sns-2019-c-6/latest/sns-2019-c-6.html (accessed December 2022).
8. *Vital Statistics Act*, RSM 1987, c V60, s 2 (Manitoba). Available from URL: https://web2.gov.mb.ca/laws/statutes/ccsm/v060ei.php (accessed December 2022).
9. *Vital Statistics Act*, 2009 SNL 2009 c. V-6.01 (Newfoundland and Labrador). Available from URL: https://www.canlii.org/en/nl/laws/stat/snl-2009-c-v-6.01/latest/snl-2009-c-v-6.01.html (accessed December 2022).
10. *Human Tissue Gift Act*, RSNB 2014, c 113, s.7(1) (New Brunswick). Available from URL: https://www.canlii.org/en/nb/laws/stat/rsnb-2014-c-113/latest/rsnb-2014-c-113.html (accessed December 2022).
11. *Human Tissue Donation Act* SNWT 2014, c 30, s. 1, 14(1) (Northwest Territories). Available from URL: https://www.canlii.org/en/nt/laws/stat/snwt-2014-c-30/latest/snwt-2014-c-30.html (accessed December 2022).
12. *Human Tissue Donation Act*, SPEI 1992, c 34, s.1(b), 11(1) (Prince Edward Island). Available from URL: https://www.princeedwardisland.ca/sites/default/files/legislation/H-12-1-Human%20Tissue%20Donation%20Act.pdf (accessed December 2022).
13. *Human Tissue Gift Act*, RSA 2000, c H-15, s 7(1) (Alberta). Available from URL: https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-h-15/latest/rsa-2000-c-h-15.html (accessed December 2022).
14. *Human Tissue Gift Act*, RSBC 1996, c 211, s 7(1) (British Columbia). Available from URL: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96211_01 (accessed December 2022).
15. *Gift of Life Act*, RSO 1990, c H.20, s 7(1) (Ontario). Available from URL: https://www.ontario.ca/laws/statute/90h20 (accessed December 2022).
16. *The Human Tissue Gift Act*, SS 2015, c H-15.1, s.13 (Saskatchewan). Available from URL: https://www.canlii.org/en/sk/laws/stat/ss-2015-c-h-15.1/latest/ss-2015-c-h-15.1.html (accessed December 2022).
17. *Human Tissue Gift Act*, RSY 2002, c 117, s 7(1) (Yukon). Available from URL: https://www.canlii.org/en/yk/laws/stat/rsy-2002-c-117/latest/rsy-2002-c-117.html (accessed December 2022).
18. *Civil Code of Quebec*, 1991, c.64, chapter IV, s.45 (Quebec). Available from URL: https://www.legisquebec.gouv.qc.ca/en/document/cs/ccq-1991 (accessed December 2022).
19. *Human Tissue Act,* RSNWT (Nu) 1988 c.H-6 (Nunavut). Available from URL: https://www.canlii.org/en/nu/laws/stat/rsnwt-nu-1988-c-h-6/latest/rsnwt-nu-1988-c-h-6.html (accessed December 2022).
20. *Pope TM.* Brain death forsaken: growing conflict and new legal challenges. J Leg Med 2017; 37: 265–324. https://doi.org/10.1080/01947648.2017.1385041
21. *Lewis A, Bonnie RJ, Pope TM, et al.* Determination of death by neurologic criteria in the United States: the case for revising the Uniform Determination of Death Act. J Law Med Ethics 2019; 47: 9–24. https://doi.org/10.1177/1073110519898039
22. *Shemie SD, Ross H, Pagliarello J, et al*. Brain arrest: the neurological determination of death and organ donor management in Canada. CMAJ 2006; 174: S1–30. https://doi.org/10.1503/2Fcmaj.045131
23. *McKitty v. Hayani*, 2018 ONSC 4015 (Ontario Superior Court of Justice). Available from URL: https://www.canlii.org/en/on/onsc/doc/2018/2018onsc4015/2018onsc4015.html (accessed December 2022).
24. *RDSWU v. Dolphin Delivery Ltd*., [1986] 2 SCR 573 (Supreme Court of Canada). Available from URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/181/index.do (accessed December 2022).
25. *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 (Supreme Court of Canada). Available from URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1285/index.do (accessed December 2022).
26. *Horner M.* Charter values: the uncanny valley of Canadian constitutionalism. Supreme Court Law Rev 2014; 67: https://digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/11
27. *Golubchuk v. Salvation Army Grace General Hospital et al.,* 2008 MBQB 49 (Manitoba Court of Queen's Bench). Available from URL: https://www.canlii.org/en/mb/mbqb/doc/2008/2008mbqb49/2008mbqb49.html (accessed December 2022).
28. *Eldridge v. British Columbia (Attorney General),* [1997] 3 SCR 624 (Supreme Court of Canada). Available from URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1552/index.do (accessed December 2022).
29. *Selkirk et. al. v. Trillium Gift of Life Network et. al.,* 2021 ONSC 2355 (Ontario Superior Court of Justice). Available from URL: https://www.canlii.org/en/on/onsc/doc/2021/2021onsc2355/2021onsc2355.html (accessed December 2022).
30. *Berger BL.* Section 1, constitutional reasoning and cultural difference: assessing the impacts of Alberta v. Hutterian Brethren of Wilson Colony. SCLR 2010; 51: 25–7. https://digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/2
31. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (Supreme Court of Canada). Available from URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7808/index.do (accessed December 2022).

32. *Carter v. Canada (Attorney General),* 2015 SCC 5 (Supreme Court of Canada) Available from URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do (accessed December 2022).
33. *Veatch RM*. Controversies in defining death: a case for choice. Theor Med Bioeth 2019; 40: 381–401. https://doi.org/10.1007/s11017-019-09505-9
34. *Fraser v. Canada (Attorney General),* 2020 SCC 28 (Supreme Court of Canada). Available from URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18510/index.do (accessed December 2022).
35. *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario* 2018 ONSC 579 (Ontario Superior Court of Justice). Available from URL: https://www.canlii.org/en/on/onscdc/doc/2018/2018onsc579/2018onsc579.html (accessed December 2022).
36. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* 2003 SCC 54 (Supreme Court of Canada). Available from URL: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2088/index.do (accessed December 2022).
37. *Beecher HK.* A definition of irreversible coma: report of the ad hoc committee of the Harvard Medical School to examine the definition of brain death. JAMA 1968; 205: 337–40.
38. *Manitoba Law Reform Commission.* Report on a statutory definition of death, 1974. Available from URL: http://www.manitobalawreform.ca/pubs/pdf/archives/16-full_report.pdf (accessed December 2022).
39. *Legislative Assembly of Manitoba*. Hearings of the Standing Committee on Law Amendments, 1975. Available from URL: https://www.gov.mb.ca/legislature/hansard/30th_2nd/hansardpdf/la2.pdf (accessed December 2022).