



**FIRST REPORT  
OF THE  
STANDING COMMITTEE  
ON LAW AMENDMENTS**

First Session  
Sixtieth Legislative Assembly  
of the  
Province of New Brunswick

May 31, 2022

**MEMBERS OF THE COMMITTEE**

Hon. Mr. Flemming, Q.C., Chair	Ms. Conroy
Ms. Anderson-Mason, Q.C., Vice-Chair	Mr. D'Amours
Hon. Mr. Hogan	Mr. Legacy
Ms. Bockus	Mr. McKee
Ms. S. Wilson	Mr. Coon
Mr. Cullins	

May 31, 2022

To The Honourable  
The Legislative Assembly of  
The Province of New Brunswick

Mr. Speaker:

I have the pleasure to present herewith the First Report of the Standing Committee on Law Amendments for the session.

The report is the result of your Committee's deliberations on Bill 61, *An Act to Amend the Human Tissue Gift Act*, the subject matter of which was referred to your Committee for consideration.

On behalf of the Committee, I wish to thank those who appeared before the Committee. In addition, I would like to express my appreciation to the members of the Committee for their contribution in carrying out our mandate.

Your Committee begs leave to make a further report.

Respectfully submitted,

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Hon. Hugh J. Flemming, Q.C., M.L.A.  
Chair

May 31, 2022

To The Honourable  
The Legislative Assembly of  
The Province of New Brunswick

Mr. Speaker:

Your Standing Committee on Law Amendments begs leave to submit their First Report of the session.

On May 11, 2021, Bill 61, *An Act to Amend the Human Tissue Gift Act*, was introduced in the Legislative Assembly.

The purpose of Bill 61 is to provide for presumed consent (also known as “deemed consent”) to organ and tissue donation after death. The proposed legislation establishes a registry in which individuals may express their consent or refusal to donate all, or specified, organs and tissues after death. It provides that in the absence of an express consent or refusal recorded in the registry, an individual is presumed by law to have consented to donate organs and tissues after death for therapeutic purposes. Exceptions to presumed consent include minors, individuals lacking capacity for a significant time before death, those not ordinarily resident in the Province, and where a substitute decision-maker provides information that the individual would have made a different decision. The Bill also requires medical practitioners to check the registry before undertaking transplantation activities.

On May 13, 2021, by resolution of the House, consideration of the subject matter of Bill 61 was referred to the Standing Committee on Law Amendments.

On October 5, 2021, your Committee heard from the Department of Health, including a representative from the New Brunswick Organ and Tissue Program (NBOTP); the New Brunswick Medical Society; and an individual organ transplant recipient. Following these presentations, the Committee met to consider the input received and to formulate recommendations to the House.

The following is a summary of the input received on the issues raised by Bill 61, with recommendations to the House.

### **Department of Health**

The Department of Health supports the intent of Bill 61. Officials provided information on the status of the current organ and tissue donation program in New Brunswick, and recommendations on additional matters that should be addressed in legislation.

#### *New Brunswick's Current Model*

The Department advised that New Brunswick currently has an opt-*in* model for post-mortem organ and tissue donation, requiring individuals' express consent. Under the current model, as of June 2021, 82% of New Brunswickers have already registered their intention regarding organ and tissue donation after death, whether yes (46%) or no (36%). Only 18% of New Brunswickers have not

registered their intention: these are the additional potential donors who would be added to the pool under a presumed consent (*opt-out*) model.

There is a need for more organ donors to help New Brunswickers waiting for an organ transplant receive one sooner. There are currently 125-150 New Brunswickers waiting for a transplant. For example, there is currently a 3.6-year wait time to receive a kidney transplant from a deceased donor, and a 2-year wait time to receive a kidney transplant from a living donor.

The Department views presumed consent legislation as one key element that, in combination with others, could contribute to a higher-performing system for deceased donation. However, to be effective in increasing donation rates, the legislation must be accompanied by appropriate public awareness and logistical support.

#### *Nova Scotia's Role and its Experience with Presumed Consent*

The Department advised that the NBOTP works closely with the Province of Nova Scotia. A team of Halifax-based professionals with the Multi-Organ Transplant Program (MOTP) travels to New Brunswick to retrieve organs and performs most organ transplants for New Brunswickers. Lung transplants are performed in Ontario and Quebec. There is no New Brunswick-based organ retrieval or transplant team. The NBOTP does have nurses on call based in New Brunswick who work with health care teams and approach family members regarding potential donations. Harvesting of tissues, such as corneas, bones, and tendons, is performed in New Brunswick by New Brunswick-based practitioners.

The Province of Nova Scotia enacted a presumed consent model for organ and tissue donation effective in January 2021. It was the first jurisdiction in North America to do so. This was achieved by a new Act that entirely replaced Nova Scotia's previous organ donation legislation, and which governs both living donation and donation after death. While Nova Scotia is supportive of New Brunswick's implementing a presumed consent model, the MOTP would need time to prepare for the increased referrals expected to result.

Based on preliminary data from Nova Scotia, after less than one year under the presumed consent model, the NBOTP expects referrals of potential donors could double if the model is implemented in New Brunswick.

In sharing its experience with the Department, Nova Scotia recommended that sufficient time – perhaps two to three years – be allowed to prepare implementation of a presumed consent model before the legislation is brought into force. This would include educating the public and preparing health care providers for bedside engagement with family members.

#### *Role of Family Members*

The Department emphasized how important it is that New Brunswickers discuss their wishes regarding organ and tissue donation with family members. Even under a presumed consent model such as Nova Scotia's, family members of the potential donor may consent or refuse consent even if the potential donor expressly indicated otherwise in a registry or was presumed to consent.

### *Department's Recommendations*

The Department noted that if the *Human Tissue Gift Act* is amended in relation to presumed consent for donation after death, legislators should consider taking the opportunity to clarify certain other matters in the existing Act common to donation after death and living donation. As public support for organ donation is critical to increasing rates, clarity and transparency regarding the process is key.

The Department made several recommendations as to additional matters that should be addressed in legislation on this subject matter, which may be summarized as follows:

1. Add definitions, similar to those contained in Nova Scotia's legislation, to add clarity to New Brunswick's current *Human Tissue Gift Act* and the proposed changes.
2. Clarify which organs and tissues the *Human Tissue Gift Act* does not apply to (similar to Nova Scotia: blood or blood constituents, zygotes, oocytes, embryos, sperm, semen, or ova).
3. Rearrange the existing legislation and repeal certain sections to remove redundancies and make the legislation internally consistent.
4. Add to the proposed cascading list of substitute decision-makers "an enduring power of attorney under the *Enduring Powers of Attorney Act*", which provides for health care directives, similar to Nova Scotia's legislation.
5. Ensure that a consent to donation after death may be restricted to the donation of specified organs and tissues. This is similar to Nova Scotia's practice for its registry. New Brunswickers could specify which organ and/or tissue would be subject to donation.
6. Address the need to make changes to determination of death to also encompass donation after cardiocirculatory death since organ donation after death in New Brunswick is no longer restricted to neurological death.
7. Add a section about required referrals since mandatory referral of all potential donors is the provision that will have the greatest impact on increasing the organ donation rate. Mandatory referral means all hospital deaths or imminent deaths are reported for consideration for organ and/or tissue donation (for the NBOTP to determine whether the organs and tissues of the individual may be medically suitable).
8. For ethical reasons, add a section similar to Nova Scotia's legislation pertaining to pre-death transplantation optimizing interventions. These interventions are actions intended either to enhance planned donations or preserve the opportunity of donation (which would not be administered if donation was not considered). This will require independent, informed consent that is separate from consent for donation. It is generally accepted that such interventions require this separate, differentiated form of consent.
9. Add that only individuals with capacity to do so may consent or refuse consent.

## **New Brunswick Medical Society**

The New Brunswick Medical Society also expressed its support for the intent of Bill 61. It explained that the number of life-saving organ transplants needed vastly exceeds the donations received each year. The Society reported that 142 New Brunswickers are waiting for an organ transplant. Approximately 280 Canadians die each year waiting for a transplant.

The Society referred to Nova Scotia's presumed consent model, which ensures every individual is a potential donor unless they opt out. Studies have shown that in jurisdictions with similar opt-out models, and where there is also a robust transplant infrastructure, donation rates are much higher than in jurisdictions employing an opt-in model. It pointed out that the current opt-in process in New Brunswick creates a barrier to citizens, as they must contact Service New Brunswick to indicate on their Medicare card that they are interested in becoming an organ donor.

The Society believes that a presumed consent model, coupled with strengthening the health system's transplant program, will help reduce the wait time for New Brunswickers who need a transplant. This change would save lives. When combined with patient education, presumed consent could convert into potential donors the 18% of New Brunswickers who have not indicated an intention regarding organ donation, as well as the 36% who have to date indicated "no". This would represent approximately 419,000 more potential donors. A single donor can save or improve the lives of 80 people.

## **Transplant Recipient**

The Committee also heard from an individual New Brunswicker who is a recipient of multiple organ transplants. He, too, supports the intent of Bill 61. He welcomed the public discussion of organ and tissue donation created by the introduction of the Bill.

He described his experience on the waiting list for a heart and double-lung transplant after being told he had only 18 months to live. As lung transplants are not performed in the Atlantic region, he had to relocate to Toronto to be on the waiting list. He was not given a high likelihood of finding a match. However, in 2002, he received a set of heart and lungs that became available due to a donation. Since then, he has advocated for measures to increase donation rates.

He pointed out that presumed consent legislation is part of an overall solution, but it will not fix the problem on its own. A holistic approach should include more resources for logistical support for transplantation, as there are potential donors whose organs are not able to be used because retrieval does not occur in time. It should also include public education about the need for organ donation. While only a small fraction of hospital deaths are suitable candidates for organ donation, every single donation has a ripple effect which can save and improve multiple lives.

## **RECOMMENDATIONS**

The Committee strongly supports the intent of Bill 61, which is to increase organ and tissue donation rates in New Brunswick by instituting presumed consent to donation after death, with an option for individuals to opt out. The Committee also supports and adopts as its own the recommendations provided by the Department of Health regarding additional matters that should

be addressed in legislation to effectively achieve this policy objective. Accordingly, the Committee makes the following recommendations:

1. THAT Bill 61, *An Act to Amend the Human Tissue Gift Act*, not be proceeded with in its current form.
2. THAT the government consider the recommendations of the Department of Health, as outlined in the Committee's report, in developing proposed legislation for presumed consent to organ and tissue donation for the Legislative Assembly's consideration.