

FAST FACT: ORGAN DONATION AFTER MEDICAL ASSISTANCE IN DYING

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Canada has recently adopted laws allowing for medical aid in dying (MAID). One issue that has confronted other countries that allow MAID is whether a person who seeks help in dying may also donate organs and tissues if the person so wishes.¹ This issue has already arisen in Canada, where medical aid in dying is now allowed in specific cases and at least 26 patients have donated in Ontario alone (primarily tissue donation).²

Since MAID is new and remains controversial in Canada, the possibility of combining MAID with organ donation is likely to also be controversial. The purpose of this Fast Fact is to set out background information and to summarize some of the issues of potential controversy.

TERMINOLOGY

Voluntary euthanasia – Voluntary euthanasia is the administration of a substance to a person at their own request, to bring about their death. As discussed below, it is medically and legally possible to proceed with organ donation following death as a result of voluntary euthanasia.

Assisted Suicide – Assisted suicide is the prescription or provision of a substance to a person at their request so that they may self-administer the substance to bring about their death. Organ donation would not generally take place in this context.

Medical Assistance in Dying – This phrase is used in the federal law to refer to both voluntary euthanasia and assisted suicide. In practice, one or both methods may be available in a specific jurisdiction.

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The Canadian National Transplant Research Program (CNTRP) is a national research initiative designed to support research to increase organ and tissue donation in Canada and enhance the survival and quality of life of Canadians who receive transplants.

WHAT ARE THE APPLICABLE LAWS?

There are several laws that are relevant to this question. This is because the criminal law is a matter of federal jurisdiction in Canada, and Parliament's amendments to the Criminal Code set out an exemption from the criminal law for medical aid in dying in specific circumstances.³

At the same time, the regulation of health care is a matter of provincial and territorial jurisdiction, and one province – Quebec – has enacted a specific law regulating the provision of medical aid in dying.⁴ In addition, organ and tissue donation and transplantation are also regulated under specific provincial and territorial laws.

The federal and Quebec laws differ in several ways. While the federal law allows for MAID via voluntary euthanasia and assisted suicide (see Box 1 above), Quebec permits only voluntary euthanasia. However, they both restrict access to MAID to adults who are competent to make medical decisions, who have a serious and incurable condition, are in an advanced state of irreversible decline in capability, and are experiencing physical or psychological suffering that is intolerable to them and cannot be alleviated in a manner acceptable to the patient. In addition, the federal law restricts MAID to those whose death has become reasonably foreseeable, and the Quebec law restricts it to those who are “at the end of life.”

The Canadian law is currently under legal challenge on the basis that these eligibility criteria are too narrow.⁵ If the legal challenge is successful, a larger number of people may be eligible for MAID and for organ donation after MAID.

IS IT MEDICALLY POSSIBLE AND SAFE TO DONATE ORGANS AND TISSUES AFTER MAID?

In countries like the Netherlands, MAID, in the form of voluntary euthanasia, is brought about by a combination of drugs that induce unconsciousness and then that stop breathing.⁷ Death occurs due to cardio-respiratory arrest, and once death is declared, organs and tissues may be transplanted if they are removed before the lack of oxygen damages them irreparably. In cases of organ donation after MAID, the process should occur at the hospital in order to ensure proximity to an operating room so that damage due to lack of oxygen can be minimized by limiting the time between the declaration of death and the removal of the organs.

Another important issue, however, is whether the illnesses suffered by people seeking MAiD would preclude donation by posing too great a risk to transplant recipients. While it is too early to have statistics on who is seeking MAID in Canada, research from other jurisdictions indicates that the majority of people seeking MAID will have medical conditions that are usually incompatible with donation due to the risk of disease transmission (e.g. cancer).⁸

However, a minority of those who qualify for MAID may be medically able to donate organs and tissues. People with neurodegenerative illnesses like amyotrophic lateral sclerosis (ALS or Lou Gehrig's disease), Huntington's disease, or multiple sclerosis (MS) have donated after MAID in Belgium and the Netherlands.⁹ Some Canadians with these conditions will be eligible for MAID, and may also be able to donate organs.



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DO PROVINCIAL ORGAN DONATION LAWS ALLOW FOR DONATION AFTER MAID?

Deceased organ and tissue donation is governed by organ donation laws unique to each province and territory. The laws governing MAID are silent on organ donation and vice versa. From the legal perspective, it is possible to proceed with organ and tissue donation after MAID as long as the requirements of the organ donation laws are met. Three such requirements are:

Consent – Consent to organ and tissue donation must be given by the donor directly (or by a substitute decision-maker) in accordance with the laws' requirements. (Note that consent to MAID must be given by the donor directly and cannot be given by a substitute decision-maker, however.)

Determination of Death – Death must be determined in accordance with the relevant provincial or territorial law. For example, Ontario's law states that death must be determined "by at least two physicians in accordance with accepted medical practice."¹⁰

Separate teams – The physician(s) who declare death may not participate in the transplant procedures or have any association with the transplant recipient in order to avoid any conflict of interest.¹¹

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ETHICAL AND PRACTICAL CONSIDERATIONS IN ORGAN DONATION AFTER MAID

AUTONOMY AND CONSENT

Consent to MAID should be informed and voluntary. One of the key controversies over MAID in Canada has been the fear that vulnerable people will be induced, directly or by neglect, to seek MAID as a solution to their suffering. The addition of a possible societal benefit to the choice of MAID – in the form of increased organ donation – might add to the concern that vulnerable people may be encouraged to proceed with MAID by the sense that they should do so in order to benefit others.

People seeking MAID will be conscious and competent to give informed first person consent to organ donation. In fact, they are better able to give informed consent to organ donation than most people who often register to donate organs after their deaths with little detailed information about organ donation. However, care must be taken to ensure that the decisions to seek both MAID and to donate organs are voluntary.

One concern is that the opportunity to change one's mind about MAID should be preserved. It is possible that patients who are assessed for organ donation may feel compelled to continue with both MAID and donation due to the investment of time and resources in preparing for the donation and transplantation. Patients should be reassured that they may change their minds at any time about MAID, notwithstanding any preparations taken for organ donation after death.

Another concern is that a person who has struggled to find a physician willing to assist with MAID may agree to donate in order to secure access to MAID. This may occur if a person perceives that physicians and hospitals are more likely to assist them in accessing MAID if they agree to donate organs. In such a case, it is the voluntariness of the decision to donate that is in question rather than the decision to seek MAID. As discussed below, one way to avoid this is to ensure that any decision about MAID is taken before and independently of any discussion about organ donation. This issue is less likely to arise in Quebec, where the law imposes a responsibility on health care institutions to find a physician willing to provide MAID for an eligible patient who requests it.¹²

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CAN YOU DIRECT YOUR DONATION AFTER MAID?

It is possible to imagine situations in which a person may seek MAID in order to be able to donate to a relative waiting for a transplant. Some provincial organ donation organizations will allow a person to specify the recipients for their donated organs under some circumstances.¹³ If this is permitted in the context of MAID, is possible that a person may seek MAID in order to benefit a family member. This possibility may increase the concerns of those who already worry that societal and perhaps familial pressures may drive vulnerable people to seek MAID. On the other hand, a person whose condition makes them eligible for MAID may derive psychological benefit from saving a family member in this way. If the Canadian law is changed to expand the eligibility criteria, this issue about the possibility of external pressures that lead a patient to seek MAID will grow. Careful interviewing about a patient's motives for MAID could help to clarify the existence of external pressures related to organ donation that may be influencing the pursuit of MAID.

SEPARATION OF DECISIONS REGARDING MAID AND ORGAN DONATION

Donation is normally contemplated only after a person has been declared brain dead, or a decision has already been taken to withdraw life-sustaining therapies. This is to ensure that the possibility of organ donation does not influence the end of life care provided to the patient.

Similarly, the decision regarding MAID should be taken prior to and independently of the decision to donate organs. This will help to avoid the risk or the perception that people are being persuaded to consent to MAID in order to obtain organs for transplant. In addition, it will help to avoid situations in which a person agrees to donate organs in the hope of obtaining assistance in accessing MAID.¹⁴

IMPACT OF ORGAN DONATION ON DONOR'S END OF LIFE EXPERIENCE

Many people seeking MAID might prefer to die at home. It is unlikely that this will be possible for those who wish to donate organs, as death will need to occur in close proximity to an operating room so that organs may be removed swiftly before they are damaged due to lack of oxygen. In addition, additional testing required for organ and tissue donation may be needed and could delay the administration of MAID. These issues will affect both the patient and his or her family, and should be part of the informed consent discussion.

SHOULD THE RECIPIENT BE INFORMED THAT A DONATED ORGAN WAS OBTAINED AFTER MAID?

The concern with informing a recipient is that those who are strongly morally opposed to MAID would not wish to benefit from it, even at the potential cost of their own lives. Presently, only increased medical risks associated with a particular organ must be disclosed to recipients, while medically irrelevant factors, i.e. race, religion, or manner of death are not disclosed. A policy of not disclosing the reason for a donor's death would avoid distress for a recipient who may feel compelled to ask for the information if it is available. Also, given that some cases of MAID are covered by the media, informing recipients about a donor's cause of death could help them to find the identity of the donor. One possibility to address these issues would be to permit those waiting for a transplant to register their refusal of donations following MAID. In such cases, the next eligible person on the list could be offered the transplant.

SHOULD THE POSSIBILITY OF DONATION BE RAISED IF THE PATIENT DOES NOT RAISE IT?

On the one hand, the promotion of patient autonomy and the possibility that organ donation may provide comfort both justify informing patients of the option to donate. On the other hand, patients may feel pressure to consent to organ donation or may feel guilty if they refuse to donate because they wish to pass away at home, for example. The system of organ donation relies on public support, and so it will be important to determine whether the public perceives it to be appropriate to ask patients undergoing MAID to donate organs. Some members of the public would likely view this as a way to offer patients an opportunity to leave a legacy at a difficult time, while others might regard it as exploiting a vulnerable person. It would perhaps be less worrying to raise organ donation, after the decision regarding MAID is taken, with patients known to be registered as posthumous organ donors.

CONSCIENTIOUS OBJECTION BY PHYSICIANS

Some physicians are opposed to MAID, and are unwilling to participate in MAID or to refer a patient to another physician willing to provide MAID. Some provincial regulatory bodies such as Ontario's CPSO oblige physicians to refer patients to another physician in these cases.¹⁵ Similarly, some transplant surgeons may perceive the removal of organs for transplant after MAID to indirectly implicate them in the process of MAID. At the same time, the refusal to proceed with an otherwise medically suitable donation would deny the donor the psychological benefits of donation and would deny recipients life-saving transplantation. As stipulated in provincial regulations and in the CMA's directive, the physician's conscientious objection has to be honored. However, the physician has a duty of non-abandonment towards his patient. Since organ donation after MAID is a planned procedure, it is probably possible for the provincial organ donation organization to find another surgical team who agrees to recover the organs if the first surgeon refused to do so on the basis of a conscientious objection.

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