

## **TAB 3**

# **The Body, Ashes and Exhumation – Who Has the Last Word?**

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## **The Six-Minute Estates Lawyer 2009**



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# THE BODY, ASHES & EXHUMATION – WHO HAS THE LAST WORD?

## The Six-Minute Estates Lawyer, LSUC

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### Introduction

Is there property in a human corpse, its body parts, or its DNA? Who decides how the remains will be disposed of? Do the wishes or the religion of the deceased play a role? The purpose of this paper is to examine whether there is a proprietary interest in a deceased's remains and what the duty is to dispose of the corpse. There will also be an examination of the historical significance of the “*no property*” rule (there can be no property in a human corpse); the application of the rule; and the relevant legislation. The focus will primarily be on Canadian common law jurisdictions, but will also examine the treatment of some of these issues in the United States, England and Australia.

### History of the “*No Property*” Rule

It is commonly held that there can be no property in a human corpse.<sup>1</sup> The “*no property*” rule was established in England by the Ecclesiastical Courts who had exclusive jurisdiction in matters relating to human corpses buried in consecrated ground (land on which the bishop of a diocese signed a document that separated an area of land and dedicated it to God).<sup>2</sup>

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<sup>1</sup> *Miner v. Canadian Pacific Railway* (1911), 18 W.L.R. 476 (Alta. S.C.).

<sup>2</sup> Rohan Hardcastle, *Law and the Human Body*, (Portland: Hart Publishing, 2007) 25 [*Hardcastle*]; *In re Blagdon Cemetery* [2002] 3 WLR 603 (Arches Ct of Cant) 607.

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In the recent English case, *Jonathan Yearworth and others v. North Bristol NHS Trust*,<sup>3</sup> the Court of Appeal described the three reasons for the development of the rule:

*There were at least three reasons for the rule that a corpse was incapable of being owned. First, in that there could be no ownership of a human body when alive, why should death trigger ownership of it? Second, as implied by Coke and Blackstone, the body was the temple of the Holy Ghost and it would be sacrilegious to do other than to bury it and let it remain buried...Third, it was strongly in the interest of public health not to allow persons to make cross-claims to the ownership of a corpse... ”*<sup>4</sup>

In the mid-nineteenth century, case law began to develop in the English common law courts because three types of issues began to arise regarding corpses buried in unconsecrated ground (not under the jurisdiction of the Ecclesiastical Courts), which issues were:<sup>5</sup>

- 1) widows and next-of-kin contested control of the body;
- 2) body snatching became common due to the needs of medical schools to experiment on bodies; and
- 3) alternate forms of disposal of the body, such as cremation, were being challenged by the families.<sup>6</sup>

In *R. v. Sharpe*,<sup>7</sup> the defendant dug open his mother's grave to remove her corpse without the consent of the owners of the burial ground. The defendant's father had recently died and the defendant took his mother's corpse to the churchyard where he intended to bury

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<sup>3</sup> [2009] EWCA Civ 37 [*Yearworth*].

<sup>4</sup> *Ibid.* at para 31.

<sup>5</sup> Daniel Sperling, *Posthumous Interests – Legal and Ethical Perspectives*, (New York: Cambridge University Press, 2008) 88 [*Sperling*]; *Hardcastle, supra*, note 2.

<sup>6</sup> *Sperling, supra*, note 5.

<sup>7</sup> 169 ER 959 (1856-7).

his father's body with the remains of his mother. The defendant was convicted of a misdemeanor. Although the court was sensitive to the defendant's motive, it stated that the law recognized no property in a corpse. The court further held that a child did not have a right to the corpse of his or her parent. The sentence was a nominal fee of one shilling.

### **Exceptions to the “*No Property*” Rule**

There are at least two common law principles that are exceptions to the “*no property*” rule:<sup>8</sup>

- 1) the right of possession or custody of the body for the purpose of disposing of it;<sup>9</sup>  
and
- 2) the “*work and skill*” principle<sup>10</sup> (defined below).

### **Possession of the Body for the Purpose of Disposing of It**

In the American case, *Pettigrew vs. Pettigrew*,<sup>11</sup> the Pennsylvania Supreme Court described why it was necessary to dispose of the body as follows:

*When a man dies, public policy and regard for public health, as well as the universal sense of propriety, require that his body shall be decently cared for and disposed of. The duty devolves upon some one, and must carry with it the right to perform.*<sup>12</sup>

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<sup>8</sup> *Sperling, supra*, note 5.

<sup>9</sup> *Ibid.*; *Williams v. Williams* (1882), 20 Ch. D. 659 (Eng. Ch. Div.) [*Williams*].

<sup>10</sup> *Sperling, supra*, note 5; *Doodeward v. Spence* (1908) 6 C.L.R. 406 [*Doodeward*].

<sup>11</sup> (1904) 56 A. 878.

<sup>12</sup> *Ibid.*, at 879.

In Canada, the duty to bury a corpse lies with the deceased's executor, administrator or personal representative.<sup>13</sup> This duty is protected by criminal law. The Canadian *Criminal Code*<sup>14</sup> states the following:

182. Every one who

(a) neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains; or

(b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

However, if there can be no property in a human corpse, how does the executor become responsible for disposing of the remains of the deceased?

Where there is a duty to dispose of a human corpse, there is a right of possession.<sup>15</sup> In *Williams v. Williams*,<sup>16</sup> one of the first cases to address the issue, the court stated:

*... the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.*<sup>17</sup>

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<sup>13</sup> *Sperling*, *supra*, note 5; *Saleh v. Reichert* (1993) 50 ETR 143, 104 DLR (4<sup>th</sup>) 384 (Ontario Ct Jus.) [*Saleh*]; *Abeziz v. Harris Estate* 3 WDCP (2d) 499, [1992] OJ No. 1271 (Ont. Gen. Div.) [*Abeziz*]; *Sopinka et al. v. Sopinka et al.* [2001] 55 OR (3d) 529 (Ont. Super. Ct. Jus.) [*Sopinka*]; *Hunter v. Hunter* (1930) 65 OLR 586, [1930] 4 DLR 255 (Ontario High Ct) [*Hunter*].

<sup>14</sup> R.S.C. 1985, c. C-46.

<sup>15</sup> *Hunter*, *supra*, note 13.

<sup>16</sup> *Williams*, *supra*, note 9.

<sup>17</sup> *Ibid.*, at 665.

The right of the executor's possession exists even as against the surviving spouse of a deceased<sup>18</sup> and continues after burial otherwise those who opposed the executor's decisions would disinter the body.<sup>19</sup>

The common law duties of the executor, as custodian of the dead body, include:

- a) disposing of the body in a dignified manner;<sup>20</sup>
- b) disposal in a manner befitting the deceased's station in life;<sup>21</sup> and
- c) providing particulars of the disposal to the next of kin.<sup>22</sup>

Each common law duty of the executor is described below.

#### **a) Executor Duty #1: The Duty to Dispose of the Body in a Dignified Manner**

It is the duty of the executor to dispose of the corpse in a dignified manner.<sup>23</sup> In Canada (except in British Columbia and Quebec as discussed later), the place and manner of the disposal is decided by the executor,<sup>24</sup> not the wishes expressed by the deceased while he or she was alive, or by his or her Will or precatory memorandum. In *Williams, supra*, the court stated the following:

*It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of.*<sup>25</sup>

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<sup>18</sup> *Hunter, supra*, note 13.

<sup>19</sup> *Waldman v. Melville (City)* [1990] S.J. No. 13 at 2 (Q.B.).

<sup>20</sup> *Abeziz, supra*, note 13.

<sup>21</sup> *Schara Tzedek v. Royal Trust Co.*, [1953] 1 S.C.R. 31, [1952] 4 D.L.R. 529 [*Schara Tzedek*].

<sup>22</sup> *Sopinka, supra*, note 13.

<sup>23</sup> *Abeziz, supra*, note 13.

<sup>24</sup> *Hunter, supra*, note 13.

<sup>25</sup> *Williams, supra*, note 9 at 665.

In this regard, a direction in a Will to deliver the body to someone other than the executor is void.<sup>26</sup>

Although the executor has the final word regarding the disposal of the remains and the final resting place<sup>27</sup> (except in British Columbia and Quebec), there has been much case law involving families who have contested the decision of the executor for various reasons including religion.

In Ontario, both burial and cremation are recognized as a dignified means of disposing of human remains.<sup>28</sup> Some religions, however, oppose cremation. For example, in the Jewish religion, cremation is considered an act of desecration and humiliation of the dead.<sup>29</sup> Ultimately, there is nothing to prevent an executor from carrying out the deceased's lawful wishes regarding his or her disposal.<sup>30</sup>

In *Saleh v. Reichart*,<sup>31</sup> the deceased was raised in the Muslim faith. She had expressed a wish to be cremated. The deceased's husband, the administrator of the estate, wanted to abide by her wishes. However, the deceased's father opposed the cremation because it was against fundamental Islamic tenets. The court held that it was the duty of the administrator to dispose of the remains in a dignified and proper manner, either by burial or cremation. The administrator was not obligated to follow the wishes of the deceased. Although the husband had converted to Islam at the time of his marriage to the deceased, he was not obligated to dispose of his wife's body in accordance with their faith.

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<sup>26</sup> *Hunter, supra*, note 13.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Abeziz, supra*, note 13.

<sup>29</sup> Rabbi Yitzchok Breitowitz, *The Desecration of Graves in Eretz Yisrael: The Struggle to Honor the Dead and Preserve Our Historical Legacy*, online: Jewish Law Articles <http://www.jlaw.com/Articles/heritage.html>.

<sup>30</sup> *Abeziz, supra*, note 13.

<sup>31</sup> *Saleh, supra*, note 13.

Similarly, in the case of *Abeziz v. Harris Estate*,<sup>32</sup> Ben, who was dying of terminal cancer, expressed a wish in his Will to be cremated. His executrix, Jane, a family friend, wanted to follow his wishes. The deceased's mother, who came from a strict Jewish Orthodox family, opposed the cremation. She wanted her son to have a traditional Jewish burial. Ben, however, was not an observing Orthodox Jew. Ben's mother challenged the will due to suspicious circumstances.

The court held that the test for suspicious circumstances was not met and Ben's Will was valid. In any event, even if the Will was not valid, the fundamental obligation was that the body be dealt with in a dignified and appropriate manner. This legal obligation was with the executor. In Ontario, both cremation and burial were recognized as an appropriate method of disposition. Hence, the mother's motion was dismissed.

An executor, in carrying out his or her duty, must not act capriciously.<sup>33</sup> In *Re Popp Estate*,<sup>34</sup> the deceased was cremated and the executor husband buried the ashes with the remains of his father in the plot that was designed for his mother and father. His plan was to remove his wife's remains when his father passed away. However, he did not have plans regarding the deceased's ultimate resting place. Five and one-half years after the death of the deceased, the deceased's sister applied to have the remains disinterred pursuant to section 59 of the *Cemetery and Funeral Services Act* and placed in a columbarium.

Section 59 of the said Act required the British Columbia Supreme Court to consider the rights of the deceased's husband and sister. The court held that the sister was entitled to certainty regarding the deceased's remains and that the husband had acted capriciously by not declaring his intention. The court stated that he was "entitled to control the disposition of the remains provided that he did not act capriciously."<sup>35</sup>

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<sup>32</sup> *Abeziz, supra*, note 13.

<sup>33</sup> *Popp Estate, Re*, 2001 BCSC 183, 37 E.T.R. (2d) 295.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at para 23.



In Ontario, a person is permitted to enter into a pre-paid contract with a funeral home pursuant to section 30 of the *Funeral Directors and Establishments Act*.<sup>36</sup> For contracts entered into before June 1, 1990, section 32 of this Act provides that the executor of the deceased is allowed to cancel the contract at any time after the deceased's death provided that there has been no delivery of services.<sup>37</sup>

### **British Columbia and Quebec**

In British Columbia, the executor is bound by the wishes of the deceased. Section 6 of the *Cremation, Interment and Funeral Services Act*<sup>38</sup> states the following:

6. A written preference by a deceased person respecting the disposition of his or her human remains or cremated remains is binding on the person who under section 5, has the right to control the disposition of those remains if
  - (a) the preference is stated in a will or preneed cemetery or funeral services contract,
  - (b) compliance with the preference is consistent with the *Human Tissue Gift Act*, and
  - (c) compliance with the preference would not be unreasonable or impracticable or cause hardship.

In British Columbia, therefore, it follows that a memorandum with funeral wishes that is incorporated into the Will by reference is binding.

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<sup>36</sup> R.S.O. 1990, c. F.36; Note: On a day to be named by proclamation of the Lieutenant Governor, the title of this Act is repealed by the Statutes of Ontario, 2002, chapter 33, section 138 and the following substituted: Board of Funeral Services Act; Also, on a day to be named by proclamation of the Lieutenant Governor, section 30 is repealed by the Statutes of Ontario, 2002, chapter 33, section 129. See: 2002, c. 33, ss. 129, 154. R.S.O. 1990, CHAPTER F.36; See also Explanatory Note in Appendix.

<sup>37</sup> Note: On a day to be named by proclamation of the Lieutenant Governor, section 32 is repealed by the Statutes of Ontario, 2002, chapter 33, section 129. See: 2002, c. 33, ss. 129, 154.

<sup>38</sup> [SBC 2004] CHAPTER 35.

## **In Quebec**

Similarly, Article 42 of the Civil Code<sup>39</sup> in Quebec allows a testator to direct in writing the nature of his or her funeral and the disposal of his or her remains. The Article states the following:

42. A person of full age may determine the nature of his funeral and the disposal of his body; a minor may also do so with the written consent of the person having parental authority or his tutor. Failing the expressed wishes of the deceased, the wishes of the heirs or successors prevail; in both cases, the heirs and successors are bound to act; the expenses are charged to the succession.

## **Who is Responsible for the Deceased's Remains if there is No Executor?**

If the deceased dies intestate or there is no executor, an administrator, or the person in priority to be the administrator, has the right to possession of the body for the purpose of disposing of the remains.<sup>40</sup>

In Ontario, section 29 of the *Estates Act*<sup>41</sup> enumerates who is entitled to become the deceased's administrator:

29. (1) Subject to subsection (3), where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Superior Court of Justice to,

(a) the person to whom the deceased was married immediately before the death of the deceased or person with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;

(b) the next of kin of the deceased; or

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<sup>39</sup> 1991, c. 64, a. 42.

<sup>40</sup> Donna C. Cappon and Robyn M. Hawkins, "Funeral" in *Widdifield on Executors and Trustees* (Toronto: Thomson Carswell, 2008) 1-1 [*Widdifield*]; *Mouaga v. Mouaga*, 50 E.T.R. (2d) 253 (Ont. S.C.J.).

<sup>41</sup> R.S.O. 1990, CHAPTER E.21.

(c) the person mentioned in clause (a) and the next of kin,

as in the discretion of the court seems best, and, where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next of kin where there are more persons than one of equal kindred, the administration may be committed to such one or more of such next of kin as the court thinks fit.

In British Columbia, there is a hierarchy enumerated in section 5(1) of the *Cremation, Interment and Funeral Services Act*,<sup>42</sup> with respect to who has control of the human remains.<sup>43</sup>

If the deceased's executor dies before completing his or her duty to dispose of the deceased's body, the duty is passed on to the personal representative of the executor.<sup>44</sup>

In Ontario, if a body has not been claimed, the *Anatomy Act*<sup>45</sup> stipulates that the local inspector may deliver the body to a teacher of anatomy or surgery in a school, for the purpose of anatomical dissection.<sup>46</sup> This Act also states that once the purpose of the body has been served, the school shall dispose of the body at its expense.<sup>47</sup>

## **b) Executor Duty #2: Disposal of the Body in a Manner Befitting Station in Life**

An executor may follow the wishes of the deceased regarding the style and character of the funeral as long as the expenses are not extravagant or unreasonable and do not unfairly affect the creditors of the estate.<sup>48</sup>

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<sup>42</sup> *Supra*, note 38.

<sup>43</sup> See Appendix.

<sup>44</sup> *Sopinka, supra*, note 13.

<sup>45</sup> R.S.O. 1990, Chapter A.21.

<sup>46</sup> *Ibid.*, section 4 (1).

<sup>47</sup> *Ibid.*, section 7.

<sup>48</sup> *Widdifield, supra*, note 40.

In *Re Decleva*<sup>49</sup>, the Ontario Superior Court of Justice held that if a deceased dies following an assignment into bankruptcy, section 136(1) of the *Bankruptcy & Insolvency Act*<sup>50</sup> does not apply and the funeral expenses are not paid in priority to creditors. However, if the deceased was alive when the assignment into bankruptcy occurred, the section would apply and the funeral expenses would take priority over creditors.

The Court also stated that pursuant to section 11 of the *Anatomy Act*,<sup>51</sup> the municipal corporation was obligated to bury any unclaimed body within its limits and that it could later recover the expenses from the deceased's estate. If the deceased was not claimed and he or she was an undischarged bankrupt, the city would be responsible for the burial costs.

Section 25 of the *Public Hospitals Act*,<sup>52</sup> states that the burial expenses of an indigent person shall be paid by the municipality in which the person resided at the time of his or her death.

In *Schara Tzedek v. Royal Trust Co.*,<sup>53</sup> the deceased appointed the defendant trust company as her executor and her Will directed as follows:

I DIRECT that I shall be buried in a Jewish cemetery in my own burial plot in a casket suitable to a person of my means and that a suitable headstone shall be placed on my grave and that the cost thereof shall be paid as part of my testamentary expenses.

The Board of the Schara Tzedek Cemetery, which was responsible for burial arrangements, set the burial fee in accordance with the Jewish custom. It did not contact the trust company until after the burial.

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<sup>49</sup> (2008) 42 C.B.R. (5th) 80, 40 E.T.R. (3d) 144.

<sup>50</sup> R.S.C. 1985, c. B-3; see section 136 (1) in Appendix.

<sup>51</sup> *Supra*, note 45.

<sup>52</sup> R.S.O. 1990, c. P. 40

<sup>53</sup> *Schara Tzedek*, *supra*, note 21.

The size of the deceased's estate was \$105,000.00. The Board fixed the amount to be paid at \$3,000.00. The trust company refused to pay that amount because the amount was not agreed upon and because the trust company thought it was exorbitant.

The Supreme Court of Canada stated that at common law, there is a duty upon an executor to bury the deceased in a manner that is fit for his or her station in life. Since there was no agreement with respect to how the fees would be calculated, and the method for determining the fees was uncertain, the Court upheld the amount that was given by the trial judge (\$450) because the amount was just and reasonable.

If the purchase of a gravestone has been arranged, there is also a duty on the executor to provide a gravestone consistent with the station in life of the deceased and the size of the estate. As well, the inscription must be accurate in content and dignified in tone.<sup>54</sup>

### **c) Executor Duty #3: The Duty to Provide Particulars to Next of Kin**

In *Sopinka (Litigation Guardian of) v. Sopinka*,<sup>55</sup> the defendant's son and husband both died of cancer within three months of each other. The son, Michael Jr., was divorced from his wife (Alicia) and had two children with her who were minors.

Michael Jr.'s executor was his father. However, since his father died while acting as executor, his father's executor (Michael Jr.'s mother), succeeded his role and became the personal representative.

At the funeral home, the children were permitted to view the deceased but not Alicia. The defendant's affidavit stated that it was Michael Jr.'s last wish that Alicia not be allowed to attend on his remains. The defendant also admitted that she was scared of

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<sup>54</sup> *Sopinka, supra*, note 13.

<sup>55</sup> *Ibid.*

Alicia because she had a history of violence. Before Michael Jr.'s death, there was a restraining order on her.

Michael Jr. was cremated and Alicia asked for the whereabouts of the ashes. She received a letter from the defendant's solicitor dated September 10, 1998, stating that she would be advised of the whereabouts of the ashes once the defendant made arrangements for the burial.

In October 1998, Michael Jr.'s ashes were placed in his father's coffin and buried, but the details were not provided to Alicia or the children until the fall of 1999. She sought damages on various grounds including the manner in which the body was disposed and the delay in disclosing the location of the ashes.

Quinn J. stated the following:

*Although I was not provided with any authority on point, I am prepared to hold that there is a duty on an estate trustee, upon request, to provide particulars to the next of kin of the deceased regarding his or her burial. I would define next of kin to generally include the mother, father, children, brothers, sisters, spouse and common law spouse of the deceased. Where next of kin happen to be minors, I think that the duty is owed to them through their custodial parent or guardian.*

*The specific request must be reasonable and the nature of the particulars provided must be appropriate in the circumstances.*<sup>56</sup>

The Court held that although the defendant did not disclose the whereabouts of the ashes to Alicia for over one year, there was no breach of duty. However, the letter sent to Alicia by the defendant's solicitor was an intentional misrepresentation because at the time the letter was sent, the burial arrangements were probably known. Thus, there was a breach of duty. However, the court held that no actionable wrong resulted.

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<sup>56</sup> *Ibid.* at para 35.

## Unlawful Treatment of Corpse

Since there is no property in a corpse, can a body be stolen? What if the body is defamed? How is the body protected?

On the website of the Ministry of Small Business and Consumer Services,<sup>57</sup> the following is written:

*The provisions of the Cemeteries Act (Revised)*<sup>58</sup> *protect consumers by:*

- *Ensuring human remains are treated with respect and dignity both in established cemeteries and when discovered outside a cemetery.*
- *Protecting purchasers of interment rights and cremation services with specific contract and trusting requirements.*
- *Setting out the process for establishing, altering and closing cemeteries. The act makes provision for a care and maintenance fund to be established and used for the maintenance and upkeep of a cemetery.*
- *Setting out the process to be followed when human remains are discovered outside of an established cemetery, including a process for when the remains are those of an aboriginal person.*

As stated earlier, there is also criminal protection provided under the *Criminal Code*.

A person may also have a claim in tort for nervous shock relating to the treatment of the deceased's corpse. In *Sopinka, supra*, the deceased's former wife alleged, *inter alia*, that the deceased's executor secretly disposed of the deceased's ashes in order to inflict mental suffering upon her and her children. Furthermore, by not being informed of the whereabouts of the deceased's remains, the deceased's former wife alleged that she and her children were unable to grieve properly.

Quinn J. stated the following:

*Although the statement of claim seeks damages for the intentional infliction of "mental suffering", I take this to be the tort more commonly known as the*

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<sup>57</sup> [www.gov.on.ca/mgs/en/ConsProt/STE02\\_173186.html](http://www.gov.on.ca/mgs/en/ConsProt/STE02_173186.html).

<sup>58</sup> R.S.O. 1990, CHAPTER C.4; on a day to be repealed (see explanatory note in Appendix).

*intentional infliction of “nervous shock”. This tort has three elements: (1) an overt act by the defendant; (2) intention to produce harm; and (3) resultant nervous shock sustained by the plaintiff and consequent injury. The gist of the authorities is that the overt act must be flagrant and extreme. Intention is proved by the express statement of such or by facts permitting intention to be imputed. Once intention is established, motive is irrelevant. Finally, the overt act must produce a visible and provable injury or illness.<sup>59</sup>*

Since there was no supporting evidence of mental suffering, no actionable wrong and no genuine issue for trial, the action was dismissed.

### **When an Executor is not Entitled to Possession of the Body**

Although the executor has the right to possess the corpse for the purpose of disposing of it, the right to possession is overridden when:

- a) the deceased has consented to post mortem donations;<sup>60</sup>
- b) a warrant is issued by the Coroner;<sup>61</sup> and
- c) disinterment/exhumation has been ordered.<sup>62</sup>

#### **a) Donation of Body or Body Parts**

The donation of the deceased’s body or body parts is governed by provincial legislation. In Ontario, the *Trillium Gift of Life Network Act*<sup>63</sup> stipulates that a person must be at least sixteen years of age to consent to his or her body parts being used for “therapeutic

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<sup>59</sup> *Sopinka, supra*, note 13 at para 41.

<sup>60</sup> *Trillium Gift of Life Network Act*, R.S.O. 1990, CHAPTER H.20.

<sup>61</sup> *Coroner’s Act*, R.S.O. 1990, CHAPTER C.37.

<sup>62</sup> *Supra*, note 58.

<sup>63</sup> *Supra*, note 60.



purposes, medical education or scientific research” upon that person’s death.<sup>64</sup> This Act also stipulates that the consent of the person is binding.<sup>65</sup>

The Ontario Trillium Gift of Life Network web site<sup>66</sup> stipulates that a person’s consent must now be registered with the Ministry of Health and Long-Term Care. This can be done when a person registers for or renews his or her health card in Ontario.

The website further states the following:

*A donor card is a paper card carried by the prospective donor. Your decision to donate is only known to the extent that you share this decision with your family and friends. However, when you register your consent to donate organs and tissue, this information is stored in a Ministry of Health and Long-Term Care database and made available for the purpose of ensuring your decision to donate is known and respected.*

*It is vitally important whether you decide to consent to donate or not, discuss your wishes with your family. By doing so, you relieve your family of the burden to decide whether to donate on your behalf during their time of grief.<sup>67</sup>*

If a person dies and has not consented to his or her body or body parts being donated for such use, subsection 5(2) of the *Trillium Gift of Life Network Act*<sup>68</sup> states that the deceased’s spouse can provide consent, provided that the spouse does not believe that the deceased would have objected. If the deceased did not have a spouse, subsection 5(2) provides a hierarchical list of people who can consent to the deceased’s body or body parts being donated. The “person lawfully in possession of the body”, i.e. the personal

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<sup>64</sup> *Ibid.*, section 4 (1).

<sup>65</sup> *Ibid.*, section 4(3).

<sup>66</sup> <http://www.giftoflife.on.ca>.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Supra*, note 60.

representative, is last on that list. Section 5(5) lists the exceptions to the persons lawfully in possession of the body.<sup>69</sup>

The hierarchical list for consent in the statute is enumerated as follows:

5 (2). Where a person who has not given or cannot give a consent under section 4 dies, or in the opinion of a physician is incapable of giving a consent by reason of injury or disease and the person's death is imminent,

- (a) the person's spouse; or
- (b) if none or if the spouse is not readily available, any one of the person's children; or
- (c) if none or if none is readily available, either one of the person's parents; or
- (d) if none or if neither is readily available, any one of the person's brothers or sisters; or
- (e) if none or if none is readily available, any other of the person's next of kin; or
- (f) if none or if none is readily available, the person lawfully in possession of the body other than, where the person died in hospital, the administrative head of the hospital, may consent,
- (g) in a writing signed by the spouse, relative or other person; or
- (h) orally by the spouse, relative or other person in the presence of at least two witnesses; or
- (i) by the telegraphic, recorded telephonic, or other recorded message of the spouse, relative or other person,

to the body or the part or parts thereof specified in the consent being used after death for therapeutic purposes, medical education or scientific research.

The consent of the spouse or other person listed is binding pursuant to subsection 5(4).

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<sup>69</sup> See Appendix.

## **b) Warrant Issued by Coroner**

In Ontario, the *Coroner's Act*,<sup>70</sup> stipulates that the coroner shall take possession of the deceased's body under certain circumstances:

15. (1) Where a coroner is informed that there is in his or her jurisdiction the body of a person and that there is reason to believe that the person died in any of the circumstances mentioned in section 10, the coroner shall issue a warrant to take possession of the body and shall view the body and make such further investigation as is required to enable the coroner to determine whether or not an inquest is necessary.

Section 10 of the *Coroner's Act*<sup>71</sup> lists the circumstances under which the deceased died.<sup>72</sup>

Under section 11 of the Act, if a person has died from any of the circumstances listed in section 10, a person shall not interfere with the body until the coroner so directs.<sup>73</sup>

Pursuant to section 28 (1), a coroner may issue a warrant for a post mortem examination (an autopsy) as the circumstances warrant.<sup>74</sup>

Section 29 of the Act permits the extraction of the pituitary gland of the deceased during an autopsy (for treating persons with growth hormone deficiency) unless the deceased had expressed an objection or if the next of kin object.<sup>75</sup>

## **c) Disinterment/Exhumation**

Disinterment must be in accordance with each province's applicable legislation. In Ontario, the *Cemeteries Act (Revised)*<sup>76</sup>, states the requirements of a disinterment:

51.1 (1) Subject to subsection (2), no person shall disinter any human remains without,

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<sup>70</sup> *Supra*, note 61.

<sup>71</sup> *Ibid.*

<sup>72</sup> See Appendix.

<sup>73</sup> See Appendix.

<sup>74</sup> See Appendix.

<sup>75</sup> See Appendix.

<sup>76</sup> *Supra*, note 58.

- (a) the prior consent of the interment rights holder; and
- (b) notifying the proper medical officer of health.
- (2) Subsection (1) does not apply to a disinterment ordered by,
  - (a) a court of competent jurisdiction;
  - (b) a coroner appointed under the *Coroners Act*;
  - (c) the Attorney General or Solicitor General for Ontario; or
  - (d) the Registrar under section 9.

The consent for the disinterment is required by the Registrar (the Registrar appointed under this Act) pursuant to section 52 (1) of this Act.

In Ontario, the *Funeral, Burial and Cremation Services Act*<sup>77</sup> is not yet in force but will address the circumstances of disinterment. It comes into force on a day to be named by proclamation of the Lieutenant Governor.<sup>78</sup>

In contrast, the *Cremation, Interment and Funeral Services Act* in British Columbia states the following:

16. (1) In this section, "health region" means a region designated under section 4 of the *Health Authorities Act*.
- (2) Subject to this Part, an operator of a cemetery or mausoleum must not exhume or disinter human remains from the cemetery or mausoleum until
- (a) the operator receives a written request to do so from the person who, under section 5 [*control of disposition of human remains and cremated remains*], has the right to control the disposition of the remains,
  - (b) a director approves the exhumation or disinterment, and
  - (c) if the human remains are those of a person who, at the time of death, was known to have had an infectious or contagious disease or other disease dangerous to public health,

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<sup>77</sup> S.O. 2002, CHAPTER 33.

<sup>78</sup> See: 2002, c. 33, s. 154 (see Appendix for provisions that will be added to legislation).

the operator gives written notice to and receives permission from a medical health officer for the area of the health region in which the cemetery or mausoleum is located.

Section 5 of this Act outlines the hierarchy of people who have control of the remains.<sup>79</sup>

It was stated earlier that in Ontario, the executor's right of possession of the deceased's remains continues after burial. However, the rights of the interment rights holder override the executor's right to the deceased's body.

In *Heafey v. McRae*,<sup>80</sup> the deceased was buried in one of the nine burial plots owned by the daughter of the deceased's common law wife in Ontario. The deceased had expressed a wish to be buried in the same plot that his common law wife would some day be buried. The deceased's executor, his sister, applied for disinterment of the body and reinterment in the deceased's family plot in Quebec. The sister claimed that she was grieving and did not properly exercise her duties regarding burial. The sister further argued that as executor, she had possession of the body and that right continued after burial. The application was dismissed. The court held that the executor's right to possession of the deceased's body was superseded by the rights of the interment rights holder pursuant to the *Cemeteries Act*.

The executor's right of possession is also subject to the *Coroner's Act*,<sup>81</sup> which allows the Minister to disinter a body if the Minister considers it to be proper.<sup>82</sup>

In *R. v. Polimac*,<sup>83</sup> the deceased fell to her death along the Niagara Escarpment. At the hospital, an autopsy was performed. The deceased was then buried in a cemetery plot in which the accused, Polimac, her common law spouse, held the interment rights.

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<sup>79</sup> See Appendix.

<sup>80</sup> (1999) 5 E.T.R. (3d) 121 (Ont. S.C.J.).

<sup>81</sup> *Supra*, note 61.

<sup>82</sup> *Ibid.*, section 24.

<sup>83</sup> (2006) 149 C.R.R. (2d) 161.

Polimac was charged with first degree murder. The Crown was granted an Order to disinter the body to conduct a second autopsy. Polimac sought to exclude the results of the second autopsy on the basis that they were obtained in violation of the *Charter of Rights and Freedoms*<sup>84</sup> since he was the interment rights holder. The Ontario Superior Court of Justice held that Polimac did not have an absolute proprietary right with respect to the deceased's body under the *Cemeteries Act*. Section 51(2) of the Act stated that any rights of the interment rights holder to approve disinterment were subject to orders issued by one of several authorities.

### **The “*Work and Skill*” Principle<sup>85</sup>**

Apart from an executor having possession of a human corpse for purposes of burying it, there is another common law principle that is the exception to the “*no property*” rule.<sup>86</sup> The exception comes from an Australian case, *Doodeward v. Spence*<sup>87</sup> wherein the court stated that “a human body, or a portion of a human body, is capable in law of becoming the subject of property.”<sup>88</sup>

In *Doodeward, supra*, a woman gave birth to a still-born two-headed baby forty years prior to the case. The doctor took the body and preserved it in a bottle with spirits. Upon the doctor's death, the body was sold at an auction to the appellant, Doodeward, who exhibited the body in public for gains. Doodeward was arrested and the defendant police officer, Spence, seized the body under warrant but returned the bottle and the spirits to Doodeward. Doodeward sued in trover for the return of the body.

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<sup>84</sup> Section 8, Part I Constitution Act, 1982.

<sup>85</sup> Sperling, *supra*, note 5.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Doodeward, supra*, note 10.

<sup>88</sup> *Ibid.* at page 414.

In arriving at its decision, Griffith C.J. stated for the High Court of Australia that neither public health nor public decency was endangered by the preservation of the specimen. He went on to say that under circumstances, there can be a continued rightful possession of an unburied human body. Griffith C.J. stated:

*...so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.*<sup>89</sup>

Griffith C.J. held that the doctor had exercised work and skill upon the body, although not much, and that it had acquired pecuniary value. Thus, there was an action available for interference with the right of possession.

But, how much work and skill must be exercised upon a body or body part for it to become property? In *Brenda Dobson and Andrew Dobson v. North Tyneside Health Authority and Newcastle Health Authority*,<sup>90</sup> the deceased died of two brain tumors. The coroner required a post mortem examination and an autopsy was carried out. A neuropathologist removed the brain and preserved it in paraffin. A histological exam of the tumors was not conducted because it was not requested. The brain was then delivered to the Newcastle General Hospital by the neuropathologist for storage. The plaintiff, the grandmother of the deceased, before becoming administrator of the estate, commenced proceedings against the first defendant in negligence for not having discovered the

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<sup>89</sup> *Ibid.*, at 414.

<sup>90</sup> [1996] 4 All ER 474.

tumours earlier. However, the extent of the damages would depend on whether the tumor was benign or malignant. Since a histology exam was not conducted during the autopsy, it was unknown.

The issue was whether the preserving of the brain in paraffin transformed the brain into an item, the right to possession of which belonged to the plaintiffs for interment. The England and Wales Court of Appeal held that it was not. The removal of the brain was lawfully performed in the course of the autopsy. Once the cause of death was determined, there was no continuing obligation to preserve the brain. Furthermore, the actual preservation of the brain in paraffin did not amount to work and skill, such as “stuffing or embalming a corpse or preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak such as a double-headed foetus that had some value for exhibition purposes.”<sup>91</sup> It was not practical or sensible to have the brain buried with the body. Therefore, the brain was not an item to possession for which the plaintiffs became entitled for interment or any other purpose.

In the English case, *R. v. Kelly and Lindsay*,<sup>92</sup> the appellant, Kelly, was an artist who had privileged access to the premises of the Royal College of Surgeons to draw anatomical specimens. Kelly asked Lindsay, a junior technician employed by the College, to remove some of the human body parts from the premises without permission. Lindsay took them to Kelly’s home where Kelly made casts of the parts, some of which were exhibited in an art gallery. At trial, Kelly and Lindsay were convicted of theft under the *Theft Act 1968*. The England and Wales Court of Appeal upheld the conviction. In its decision, it referred to *Doodeward, supra*, and stated that “parts of a corpse are capable of being property within section 4 of the *Theft Act*”<sup>93</sup> if they have acquired different attributes by

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<sup>91</sup> *Ibid.*, at 479.

<sup>92</sup> [1998] 3 All ER 741.

<sup>93</sup> Section 4(1) stated: “Property includes money and all other property, real or personal, including things in action and other intangible property”.



virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes.”<sup>94</sup>

In *Kelly*, the Court of Appeal left the door open for the possibility that body parts and DNA can be considered property. It stated the following:

*...the common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of section 4, even without the acquisition of different attributes, if they have a use of significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial. It is to be noted in Dobson, there was no legal or other requirement for the brain, which was then the subject of the litigation, to be preserved.*<sup>95</sup>

### **Is Human DNA Considered “Property”?**

Technological advances in genetics and reproductive technology will play a role in estate law issues that the court will need to address, such as the “ownership” of sperm, ova, and embryos.

Recent advances include freezing sperm cells and eggs. Surrogacy is also being offered in a number of Canadian fertility clinics. The following is stated regarding surrogacy in “Genetics and the Estate Claim: Life After Death”:<sup>96</sup>

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<sup>94</sup> *Kelly, supra*, note 92 at 749.

<sup>95</sup> *Kelly, supra*, note 92 at page 750.

<sup>96</sup> Whaley, Likwornik: “Genetics and the Estate Claim: Life After Death”, OBA Institute Publication, February 2008.

*There are different types of arrangements. The surrogate may either be artificially inseminated with the sperm of the commissioning father and will become the genetic mother (genetic surrogate), or she may have an embryo produced through IVF of the commissioning couple's gametes, in which case the surrogate provides only the womb for gestation and makes no genetic contribution (gestational surrogate). The surrogate arrangement may or may not involve the use of a broker, or lawyer, with accompanying fees.<sup>97</sup>*

Posthumous sperm retrieval is also a recent technology that involves extracting sperm from deceased males. The method involves removing the deceased's testicles, which contain large amounts of sperm, within 24 hours of the death. The sperm can then be used to impregnate the deceased's spouse.<sup>98</sup>

### **Genetic Material Deposited Pre Mortem**

Once a donor deposits sperm or ova and has it frozen or if an embryo is created, to whom does the material belong? Is there property in genetic material that has been deposited prior to a donor's death?

In Ontario, the *Assisted Human Reproduction Act*<sup>99</sup> does not answer the question. However, the use of the material relies on the consent of the donor. This Act states that the consent of the donor is required in order to use the material for the purpose of creating an embryo. Section 8 of this Act stipulates the following:

8. (1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

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<sup>97</sup> *Ibid.* at 5.

<sup>98</sup> Tom Blackwell, "Squalling life after death" *National Post* (March 2009) at A2. See copy of article in Appendix.

<sup>99</sup> 2004, c. 2, A-13.4

(2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

(3) No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.

Part I of the Regulation<sup>100</sup> of this Act enumerates the parameters regarding consent.

Genetic material was considered to be property in the Canadian case, *Caufield v. Wong*.<sup>101</sup> In that case, Ms. Caufield and Mr. Wong were in an intimate relationship that ended. Mr. Wong agreed to help Ms. Caufield become pregnant as an act of friendship. He donated sperm to be used for invitro fertilization. Ms. Caufield became pregnant using embryo that was fertilized by Mr. Wong's sperm and gave birth to twins. The four fertilized remaining embryos remained at the fertility clinic in both of their names.

The issue of access to the children was one of the issues the court had to consider. The other issue dealt with the use of the remaining four embryos. Mr. Wong wrote to the clinic and advised that he did not consent to Ms. Caufield using the remaining embryos.

The Alberta Court of Queen's Bench held that Mr. Wong was not Ms. Caufield's spouse and that he provided his sperm to her by way of an unqualified gift. He knew that she would use his sperm to conceive a child. The court ordered that the embryos be returned to Ms. Caufield since they were her property and could use them as she saw fit.

In the California case of *Hecht v. Superior Court*,<sup>102</sup> the deceased had deposited cryogenically preserved sperm at a sperm bank. He signed an agreement authorizing the sperm bank to release the specimens to his executor upon his death. Under his Will, he

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<sup>100</sup> SOR/2007-137; see Appendix.

<sup>101</sup> [2005] A.J. No. 428, 2005 ABQB 290 (Q.B.).

<sup>102</sup> 16 Cal. App. 4<sup>th</sup> 836 (1993); 59 Cal. Repr. 2d 222 (Cal. CT. App 1996).

appointed his girlfriend, Hecht, as executor of his estate and gifted his sperm to her. He also stated that it was his wish that the sperm continue to be stored at the sperm bank for Hecht's use, if she desired, for impregnation.

The deceased committed suicide. Upon his death, his children contested his Will and wanted the sperm destroyed. At trial, the Court ordered the destruction of the sperm and Hecht appealed.

The Court of Appeal directed that the trial court vacate its order. It referred to several sources, including an article<sup>103</sup> wherein the authors wrote that none of the artificial insemination statutes indicated who owned the sperm. If a donor wanted to remain anonymous, the sperm bank would generally require a signed written waiver of any rights to the deposit. If a donor wanted the sperm stored for his own future use, the donor would own his donation of sperm. Upon the death of the donor, the agreement would usually dictate that the sperm would be destroyed. Access to the sperm by a widow would be denied unless there were express directions in the deceased donor's Will or a court order.

At arriving at its decision in *Hecht*, the Court stated the following:

*We conclude that at the time of his death, decendant had an interest, in the nature of ownership, to the extent that he had decionmaking authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of Probate Code section 62. Accordintly, the probate court had jurisdiction with respect to the vials of sperm.*<sup>104</sup>

The Court did not address the validity or the enforceability of the contract or the Will.

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<sup>103</sup> Shapiro & Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination* (1986) 1 J. Law & Health 229, 243-244.

<sup>104</sup> *Hecht*, *supra*, note 102 at 950.

In the recent case of *Yearworth, supra*, the England and Wales Court of Appeal held that the sperm of the appellants was their property. In that case, six men were diagnosed with cancer. The hospital asked them if they wanted to produce sperm samples and have them frozen since their upcoming chemotherapy treatments could damage their fertility.

The men agreed and the semen was frozen. However, the hospital's automatic storage system failed and the semen thawed and was destroyed. There was no attempt by the hospital to repair the system manually. As a result, the men sued the hospital in tort for damages for psychiatric injury and mental distress.

The Court rejected the principle in *Doodeward, supra*, and stated that the principle of owning body parts subject to the exercise of work and skill was not logical. The court held that the sperm was the property of the men based on the following broader basis:

- 1) the sperm was generated and produced by their bodies;
- 2) the samples were given so that it may later be used for their benefit;
- 3) although they did not have the ability to direct its use pursuant to the Human Tissue Act 2004, they were able to direct that the sperm not be used in a certain way; and
- 4) at any time they could require the destruction of their samples.

In conclusion, the court held that for purposes of bailment, the sperm was the property of the men and that they were in law capable of recovering damages.

### **Use of Posthumous Genetic Material**

There is no case on point regarding the "ownership" of posthumous genetic material. However, the issue of posthumous sperm retrieval was recently dealt with in an article in the *National Post*.<sup>105</sup> Dr. Jarvi, head of urology at Toronto's Mount Sinai Hospital stated

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<sup>105</sup> *Supra*, note 98.

that he had been involved in a few cases that had led to pregnancies using sperm from deceased donors.

The article informed the public of the *Assisted Human Reproduction Act*<sup>106</sup> that came into effect just over a year ago.<sup>107</sup>

The relevant provisions of this Act regarding posthumous genetic material read as follows:

8 (2). No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

The Act requires that there be informed written consent from the deceased. Dr. Ravi suggests that men think about completing a sperm donation form for post mortem sperm retrieval.<sup>108</sup>

The rules surrounding the consent are enumerated in Part 2 of the Regulation of this Act.<sup>109</sup>

In one of Dr. Ravi's cases, after the deceased died, one parent of the deceased wanted the deceased's sperm to be cryo-preserved since a surrogate mother could conceive her son's child. The other parent was against this. Under the terms of the consent agreement, the clinic decided to destroy the fluid.<sup>110</sup>

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<sup>106</sup> *Supra*, note 99.

<sup>107</sup> *Supra*, note 98.

<sup>108</sup> *Ibid.*

<sup>109</sup> Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137 (see Appendix)

<sup>110</sup> *Supra*, note 98.

## **Posthumously conceived children**

If a child is conceived by using posthumous sperm retrieval, is the deceased still considered to be the father of the child? The *Uniform Child Status Act*<sup>111</sup> deals with the issue of parentage in the following provisions:

6. (5) A declaratory order that a person is in law the father of a child shall not be made under this section unless the father and the child whose relationship is sought to be established are living.

9. Unless the contrary is proved on the balance of probabilities, a person shall be presumed to be the father of a child in one or more of the following circumstances:

- (a) he was married to the mother by a marriage at the time of the child's birth;
- (b) he was married to the mother by a marriage that was terminated by
  - (i) death or judgment of nullity that occurred, or
  - (ii) divorce where the decree nisi was granted within 300 days, or a longer period the court may allow, before the birth of the child;
- (c) he married the mother after the child's birth and acknowledges that he is the father;
- (d) he and the mother have acknowledge in writing that he is the father of the child;
- (e) he was cohabiting with the mother in a relationship of some permanence at the time of the child's birth or the child was born within 300 days, or longer period the court may allow, after the cohabitation ceased;
- (f) he has been found or recognized by a court to be the father of the child.

The legislation does not appear to deal directly with the possibility of children who are conceived after the father dies.

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<sup>111</sup> R.S.P.E.I. 1988, c. C-6.

## Summary

The law in Ontario regarding who has the last word in respect of a deceased's remains can be summarized as follows:

- 1) The executor of the deceased has the right of possession of the body for purposes of disposing of it. If there is no executor, an administrator, or the person in priority to be the administrator has the right to possession of the body for purposes of burying it.
- 2) The executor has a duty to dispose of the body in a dignified manner. Burial and cremation are both sanctioned. The wishes of the deceased are not binding on the executor. As well, the executor must not act capriciously.
- 3) An executor must dispose of the body in a manner befitting the deceased's station in life. The expenses must not be extravagant or unreasonable and must not unfairly affect the creditors of the estate. If a deceased dies following an assignment into bankruptcy, the burial expenses are not paid in priority to creditors. If the deceased was alive when the assignment into bankruptcy occurred, the burial expenses would take priority over creditors.
- 4) The executor has a duty to provide the particulars of the deceased's burial to the next of kin.
- 5) The executor will not have possession of the body if: the deceased consented to post mortem donations; if a warrant was issued by the coroner; or, too, if disinterment was ordered. Post mortem donations require the consent of the deceased. Once consent is given, it is binding. The consent must now be registered with the Ministry of Health and Long-Term Care. If the deceased did not give consent, the deceased's spouse or the next of kin (as provided for in the legislation) can provide consent, so long as the deceased would not have objected.



Disinterment requires the consent of the interment rights holder and notifying the proper medical officer of health. However, it could also be ordered by: a court; a coroner; the Attorney General; or the Registrar under the *Cemeteries Act (Revised)*.

- 6) There is no Ontario case law on point as to whether genetic material deposited by the deceased pre or post mortem is considered “property” proper. However, the informed written consent of the deceased is required in order for the material to be used. It is also unclear under the *Uniform Child Status Act* whether the donor will be presumed to be the father of the child.

Rapid developments in genetic and reproductive technology will likely continue to raise legal and ethical issues regarding “ownership” of the human body and its parts. Although there is no case law on point in Ontario, there are some cases in England, the United States and Australia that have declared “property” in human body parts and genetic material.

## APPENDIX

### ***Funeral Directors and Establishments Act, R.S.O. 1990, CHAPTER F.36 and Cemeteries Act (Revised) R.S.O. 1990, CHAPTER C.4***

#### EXPLANATORY NOTE

*This Explanatory Note was written as a reader's aid to Bill 209 and does not form part of the law. Bill 209 has been enacted as Chapter 33 of the Statutes of Ontario, 2002.*

The Bill repeals the *Cemeteries Act (Revised)* and the *Funeral Directors and Establishments Act* and replaces them with one statute. The Bill provides for a transition period during which the *Funeral Directors and Establishments Act* is amended to allow the Board of Funeral Services established under that Act to continue until such time as that Act is repealed.

### ***Cremation, Interment and Funeral Services Act, [SBC 2004] CHAPTER 35 (British Columbia)***

**5** (1) Subject to this section and section 8 (3) (b) (i) [*requirement for authorization before funeral services or disposition*], the right of a person to control the disposition of the human remains or cremated remains vests in, and devolves on, the following persons in order of priority:

- (a) the personal representative named in the will of the deceased;
- (b) the spouse of the deceased;
- (c) an adult child of the deceased;
- (d) an adult grandchild of the deceased;
- (e) if the deceased was a minor, a person who was a legal guardian of the person of the deceased at the date of death;
- (f) a parent of the deceased;
- (g) an adult sibling of the deceased;
- (h) an adult nephew or niece of the deceased;
- (i) an adult next of kin of the deceased, determined on the basis provided by sections 89 and 90 of the *Estate Administration Act*;

(j) the minister under the *Employment and Assistance Act* or, if the official administrator under the *Estate Administration Act* is administering the estate of the deceased under that Act, the official administrator;

(k) an adult person having a personal or kinship relationship with the deceased, other than those referred to in paragraphs (b) to (d) and (f) to (i).

(2) If the person at the top of the order of priority set out in subsection (1) is unavailable or unwilling to give instructions, the right to give instructions passes to the person who is next in priority.

*Anatomy Act*, R.S.O. 1990, CHAPTER A.21

### **Bodies for anatomical dissection**

4. (1) Subject to the *Coroners Act*, the local inspector may cause a body under his or her control to be delivered to a teacher of anatomy or surgery in a school, for the purpose of anatomical dissection. R.S.O. 1990, c. A.21, s. 4 (1).

### **Idem**

(2) No body upon which a *post mortem* examination has been performed shall be delivered to a teacher of anatomy or surgery in a school unless the school is first informed of the *post mortem* examination and consents to accept the body. R.S.O. 1990, c. A.21, s. 4 (2).

### **Disposition of bodies by school**

7. A school receiving a body shall dispose of the body at the expense of the school after it has served the purpose for which it was received, but, before disposing of the body, the school shall give notice of the disposition to the general inspector. R.S.O. 1990, c. A.21, s. 7.

### **Duty of municipality to bury**

11. Subject to this Act, any unclaimed body found within the limits of a regional municipality or of a local municipality that is not situated within a regional municipality shall, at the request of the local inspector or, where there is no local inspector appointed under subsection 2 (2), of a coroner, be disposed of at the expense of the corporation, but the corporation may recover the expense thereof from the estate of the deceased or from

any person whose duty it was to dispose of the body. R.S.O. 1990, c. A.21, s. 11; 2002, c. 17, Sched. F, Table.

***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3***

**136.** (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

#### Payment as funds available

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

#### Balance of claim

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

R.S., 1985, c. B-3, s. 136; 1992, c. 1, s. 143(E), c. 27, s. 54; 1997, c. 12, s. 90; 2001, c. 4, s. 31; 2004, c. 25, s. 70; 2005, c. 47, s. 88.

#### Postponement of claims from reviewable transactions

**Public Hospitals Act, R.S.O. 1990, c. P. 40**

**Burial expenses by municipality**

25. In the event of the death in a hospital of a patient who is an indigent person, or the dependant of an indigent person, the municipality in which the patient was a resident at the time of the patient's admission shall pay to the hospital any expenses of his or her burial that it incurs. R.S.O. 1990, c. P.40, s. 25.

***Coroners Act, R.S.O. 1990, CHAPTER C.37***

10. (1) Every person who has reason to believe that a deceased person died,

(a) as a result of,

(i) violence,

(ii) misadventure,

(iii) negligence,

(iv) misconduct, or

(v) malpractice;

(b) by unfair means;

(c) during pregnancy or following pregnancy in circumstances that might reasonably be attributable thereto;

(d) suddenly and unexpectedly;

(e) from disease or sickness for which he or she was not treated by a legally qualified medical practitioner;

(f) from any cause other than disease; or

(g) under such circumstances as may require investigation,

shall immediately notify a coroner or a police officer of the facts and circumstances relating to the death, and where a police officer is notified he or she shall in turn immediately notify the coroner of such facts and circumstances. R.S.O. 1990, c. C.37, s. 10 (1).

**11.** No person who has reason to believe that a person died in any of the circumstances mentioned in section 10 shall interfere with or alter the body or its condition in any way until the coroner so directs by a warrant. R.S.O. 1990, c. C.37, s. 11.

**24.** Despite anything in the *Cemeteries Act*<sup>112</sup>, the Minister may, at any time where he or she considers it necessary for the purposes of an investigation or an inquest, direct that a body be disinterred under and subject to such conditions as the Minister considers proper. R.S.O. 1990, c. C.37, s. 24.

**28. (1)** A coroner may at any time during an investigation or inquest issue a warrant for a *post mortem* examination of the body, an analysis of the blood, urine or contents of the stomach and intestines, or such other examination or analysis as the circumstances warrant. R.S.O. 1990, c. C.37, s. 28 (1).

### **Extraction and use of pituitary gland**

**29. (1)** Any person performing a *post mortem* examination of a body under the warrant of a coroner may extract the pituitary gland and cause it to be delivered to any person or agency designated by the Chief Coroner for use in the treatment of persons having a growth hormone deficiency. R.S.O. 1990, c. C.37, s. 29 (1).

### **Objections**

**(2)** This section applies where the coroner or person performing the *post mortem* examination has no reason to believe that the deceased has expressed an objection to his or her body being so dealt with after death or that the surviving spouse, parent, child, brother, sister or personal representative objects to the body being so dealt with, and although no consent otherwise required by law is given. R.S.O. 1990, c. C.37, s. 29 (2); 1999, c. 6, s. 15 (4); 2005, c. 5, s. 15 (5).

### **Disinterment or removal of human remains**

**102.1 (1)** Despite anything in this Act, if a court in which a judicial proceeding is pending considers it necessary to disinter or to remove human remains for the purpose of the proceeding, the court may direct the disinterment or the removal of the remains

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<sup>112</sup> Note: On a day to be named by proclamation of the Lieutenant Governor, section 24 is amended by the Statutes of Ontario, 2002, chapter 33, section 142 by striking out “*Cemeteries Act*” and substituting “*Funeral, Burial and Cremation Services Act, 2002* or a regulation made under that Act”. See: 2002, c. 33, ss. 142, 154.

subject to those conditions as to reinterment or placement of the remains that the court considers proper. 2006, c. 34, Sched. D, s. 69.

### **Powers of Attorney General or Solicitor General**

(2) If the Attorney General, the Solicitor General or a lawful delegate of either of them considers it in the interest of justice for the purpose of an inquiry as to the cause of death or for the purpose of a criminal investigation or proceeding that human remains should be disinterred or removed, the Attorney General, the Solicitor General or the delegate, as the case may be, may exercise the powers of direction mentioned in subsection (1). 2006, c. 34, Sched. D, s. 69.

### **Powers of coroner**

(3) A coroner who has issued his or her warrant to proceed to take possession of human remains for the purpose of a coroner's investigation may direct the disinterment or the removal of the remains. 2006, c. 34, Sched. D, s. 69.

**See: 2006, c. 34, Sched. D, ss. 69, 98 (1).**

### ***Trillium Gift of Life Network Act, R.S.O. 1990, c. H.20***

#### **Consent by person for use of his or her body after death**

**4. (1)** Any person who has attained the age of sixteen years may consent,

(a) in a writing signed by the person at any time; or

(b) orally in the presence of a least two witnesses during the person's last illness,

that the person's body or the part or parts thereof specified in the consent be used after the person's death for therapeutic purposes, medical education or scientific research.

**4 (3)** Upon the death of a person who has given a consent under this section, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts for the purpose specified, except that no person shall act upon a consent given under this section if the person has reason to believe that it was subsequently withdrawn.



### **Consent by other persons**

**5. (1)** In this section,

“spouse” means a person,

(a) to whom the person is married, or

(b) with whom the person is living or, immediately before the person’s death, was living in a conjugal relationship outside marriage, if the two persons,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*. R.S.O. 1990, c. H.20, s. 5 (1); 1999, c. 6, s. 29 (1); 2005, c. 5, s. 70 (1, 2).

### **Consent by spouse, etc., for use of body after death**

(2) Where a person who has not given or cannot give a consent under section 4 dies, or in the opinion of a physician is incapable of giving a consent by reason of injury or disease and the person’s death is imminent,

(a) the person’s spouse; or

(b) if none or if the spouse is not readily available, any one of the person’s children; or

(c) if none or if none is readily available, either one of the person’s parents; or

(d) if none or if neither is readily available, any one of the person’s brothers or sisters; or

(e) if none or if none is readily available, any other of the person’s next of kin; or

(f) if none or if none is readily available, the person lawfully in possession of the body other than, where the person died in hospital, the administrative head of the hospital,

may consent,

(g) in a writing signed by the spouse, relative or other person; or

(h) orally by the spouse, relative or other person in the presence of at least two witnesses;  
or

(i) by the telegraphic, recorded telephonic, or other recorded message of the spouse, relative or other person,

to the body or the part or parts thereof specified in the consent being used after death for therapeutic purposes, medical education or scientific research. R.S.O. 1990, c. H.20, s. 5 (2); 1999, c. 6, s. 29 (2); 2005, c. 5, s. 70 (3).

### **Prohibition**

(3) No person shall give a consent under this section if the person has reason to believe that the person who died or whose death is imminent would have objected. R.S.O. 1990, c. H.20, s. 5 (3).

### **Consent is full authority, exceptions**

(4) Upon the death of a person in respect of whom a consent was given under this section the consent is binding and is, subject to section 6, full authority for the use of the body or for the removal and use of the specified part or parts for the purpose specified except that no person shall act on a consent given under this section if the person has actual knowledge of an objection thereto by the person in respect of whom the consent was given or by a person of the same or closer relationship to the person in respect of whom the consent was given than the person who gave the consent. R.S.O. 1990, c. H.20, s. 5 (4).

### **Consent is full authority, personal information**

(4.1) The authority to give consent under this section includes the authority to consent to the collection, use or disclosure of personal information that is necessary for, or ancillary to, a decision about the gift. 2004, c. 3, Sched. A, s. 98 (2).

### **Person lawfully in possession of body, exceptions**

(5) In subsection (2), person lawfully in possession of the body does not include,

(a) the Chief Coroner or a coroner in possession of the body for the purposes of the *Coroners Act*;

(b) the Public Trustee in possession of the body for the purpose of its burial under the *Crown Administration of Estates Act*;

(c) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or

(d) the superintendent of a crematorium in possession of the body for the purpose of its cremation. R.S.O. 1990, c. H.20, s. 5 (5).

## **Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137**

### **PART 1**

#### **CONSENT GIVEN UNDER SUBSECTION 8(1) OF THE ACT**

**2.** This Part applies in respect of a consent given under subsection 8(1) of the Act to make use of human reproductive material for the purpose of creating an embryo.

**3.** Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have a document signed by the donor of the material stating that, before consenting to the use of the material, the donor was informed in writing that

(a) subject to paragraph (b), the human reproductive material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,

(i) the donor's own reproductive use,

(ii) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,

(iii) the reproductive use of a third party,

(iv) improving assisted reproduction procedures, or

(v) providing instruction in assisted reproduction procedures;

(b) if the human reproductive material is to be removed from the donor's body after the donor's death, the material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,

(i) the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,

(ii) improving assisted reproduction procedures, or

(iii) providing instruction in assisted reproduction procedures;

(c) if the donor wishes to withdraw their consent, the withdrawal must be in writing;

(d) the withdrawal is effective only if the person who intends to make use of the human reproductive material is notified in writing of the withdrawal

- (i) in the case of human reproductive material to be used to create an embryo for a purpose mentioned in paragraph (a) or (b), other than subparagraph (a)(iii), before the material is used, and
- (ii) in the case of human reproductive material to be used to create an embryo for the purpose mentioned in subparagraph (a)(iii), before the third party acknowledges in writing that the material has been designated for their reproductive use;
- (e) the number of *in vitro* embryos created with the human reproductive material may be in excess of the immediate reproductive needs of the individual or couple for whom they were created;
- (f) if the human reproductive material is used to create *in vitro* embryos for a third party's reproductive use and there are *in vitro* embryos in excess of the third party's reproductive needs, the excess *in vitro* embryos will be used in accordance with the third party's consent and, if the use is providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research, the consent of the donor in accordance with section 4;
- (g) if the human reproductive material is used to create *in vitro* embryos for the reproductive use of the person who, at the time of the donor's death, is the donor's spouse or common-law partner and there are *in vitro* embryos in excess of the spouse or common-law partner's reproductive needs, the excess *in vitro* embryos will be used in accordance with the spouse or common-law partner's consent and, if the use is providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research, the consent of the donor in accordance with section 4;
- (h) if the human reproductive material is used to create *in vitro* embryos for the reproductive use of a third party who is a couple, along with human reproductive material from an individual who is a spouse or common law partner in the couple, the use of the *in vitro* embryos will be subject to the consent of that individual alone if, prior to the use of the *in vitro* embryos, the individual is no longer a spouse or common-law partner in the couple; and
- (i) if the donor consents to the human reproductive material being used to create an *in vitro* embryo for the purpose of providing instruction in assisted reproduction procedures or improving assisted reproduction procedures, no additional consent from the donor is required to permit the use of the embryo for that purpose.

4. (1) Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have the written consent of the donor of the material stating that the material may be used for one or more of the following purposes:

- (a) the donor's own reproductive use;

(b) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner;

(c) the reproductive use of a third party;

(d) improving assisted reproduction procedures; or

(e) providing instruction in assisted reproduction procedures.

(2) A donor's consent stating that the donor's human reproductive material may be used for a purpose mentioned in paragraph (1)(b) or (c) shall also state whether any *in vitro* embryos that are not required for that purpose may be used for providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research.

5. (1) If a donor wishes to withdraw their consent, the withdrawal must be in writing.

(2) The withdrawal is effective only if the person who intends to make use of the human reproductive material is notified in writing of the withdrawal

(a) in the case of human reproductive material to be used to create an embryo for a purpose mentioned in paragraph 4(1)(a), (b), (d) or (e), before the material is used; and

(b) in the case of human reproductive material to be used to create an embryo for the purpose mentioned in paragraph 4(1)(c), before the third party acknowledges in writing that the material has been designated for their reproductive use.

## PART 2

### CONSENT GIVEN UNDER SUBSECTION 8(2) OF THE ACT

6. This Part applies in respect of a consent given under subsection 8(2) of the Act to remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo.

7. Before a person removes human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, the person shall have a document signed by the donor stating that, before consenting to the removal, the donor was informed in writing that

(a) the human reproductive material will be removed in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,

- (i) the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
  - (ii) improving assisted reproduction procedures, or
  - (iii) providing instruction in assisted reproduction procedures;
- (b) if the donor wishes to withdraw their consent, the withdrawal must be in writing;
- (c) the withdrawal is effective only if the person who intends to remove the human reproductive material is notified in writing of the withdrawal before the removal of the material; and
- (d) human reproductive material removed from the donor cannot be used for a purpose mentioned in paragraph (a) unless the person who intends to make use of the material has the donor's written consent under Part 1 respecting the use of the material.

8. Before a person removes human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, the person shall have the donor's written consent respecting the removal of the material and the donor's written consent under Part 1 respecting the use of the material.

9. (1) If a donor wishes to withdraw their consent respecting the removal of human reproductive material after their death, the withdrawal must be in writing.

(2) The withdrawal is effective only if the person who intends to remove the human reproductive material is notified in writing of the withdrawal before the removal of the material.

## ***Funeral, Burial and Cremation Services Act, 2002***

### **Control of disposition of human remains or cremated remains**

**102.1** (1) Despite anything in this Act, if a court in which a judicial proceeding is pending considers it necessary to disinter or to remove human remains for the purpose of the proceeding, the court may direct the disinterment or the removal of the remains subject to those conditions as to reinterment or placement of the remains that the court considers proper. 2006, c. 34, Sched. D, s. 69.

(2) If the Attorney General, the Solicitor General or a lawful delegate of either of them considers it in the interest of justice for the purpose of an inquiry as to the cause of death or for the purpose of a criminal investigation or proceeding that human remains should be disinterred or removed, the Attorney General, the Solicitor General or the delegate, as the

case may be, may exercise the powers of direction mentioned in subsection (1). 2006, c. 34, Sched. D, s. 69.

(3) A coroner who has issued his or her warrant to proceed to take possession of human remains for the purpose of a coroner's investigation may direct the disinterment or the removal of the remains. 2006, c. 34, Sched. D, s. 69.