

# CCB Rules No Jurisdiction Where Patient Declared Brain Dead

November 01, 2016

The Consent and Capacity Board has recently provided some welcome clarification.

Every so often, we are consulted with respect to whether or not a medical team must keep a patient connected to life support at the insistence of a family, even where that patient meets the criteria for a neurological determination of death. We have consistently advised that the team may discontinue, without consent, because the continued interventions are not "treatment". The Consent and Capacity Board (CCB) has recently provided some welcome clarification supporting this view.

The CCB has released two decisions in the past month which conclude that it has no jurisdiction to hear applications connected to the withdrawal of mechanical ventilation from a patient in respect of whom there has been a neurological determination of death (brain death).<sup>1</sup>

The CCB held that the reason it does not have jurisdiction is because neurological death is "death according to the law of Ontario".<sup>2</sup> Panel member Mr. Eugene Williams outlined:

[D]eath terminates the person. Thus when death occurs, there is no longer a "person" who is subject to treatment under the HCCA. Since section 35 of the HCCA contemplates that an application for directions under that section relates to treatment of a person, where there is no person to treat, neither the substitute decision maker nor the attending physician may apply under that section for directions.<sup>3</sup>

In the body of the Re UH decision, Mr. Williams highlights the fact that the finding of neurological determination of death was not contradicted and that two physicians had completed the testing to support the finding of brain death. Mr. Williams referenced the earlier decision of Re EI in which Vice Chair Lora Patton found that it was not the role of the Board to question a determination of death made by a physician. In that decision, she remarked:

While cardiac death typically results in fairly short order following death by neurological criteria due to the role of the brain stem in supporting all body functions, it may take days or weeks leaving the health care team and family in a legal and medical limbo.

Such a circumstance creates a number of concerns for the health practitioners and broader health care team. Continuation of "treatment" for someone declared dead offers, obviously, no medical benefit and there would be no ethical or moral reason to continue.<sup>4</sup>

While the CCB's analysis in UH does not specifically discuss the difference between brain death and a patient in a persistent vegetative state, the reasons include the submissions of the applicant physician that patients in a vegetative state have some degree of brain stem function that can permit them to respond to stimuli. The circumstances of a patient declared brain dead are therefore different than those in the Rasouli case.<sup>5</sup>

Summarizing this decision in another way, consent is not required to halt medical interventions up to and including mechanical ventilation once the patient has been declared brain dead (in keeping with the requirements of the Trillium Gift of Life Network Act), although cardiac death has not yet occurred. An appropriate procedure in light of the tragic circumstances inherent to these cases is to provide the patient's family with a notice period, such as a day or two, prior to halting current interventions.

1 Re [UH \(released October 28, 2016\)](#) and [Re EI \(released September 30, 2016\)](#)

2 Re UH at page 8.

3 Ibid. at page 10.

4 Re EI at page 9.

5 Cuthbertson v. Rasouli, [2013] S.C.C. 53.

By

[Anna Marrison](#), [Daphne G. Jarvis](#)

---

## BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### BLG Offices

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.