

# Property in Human Tissues: History, Society and Possible Implementations\*

CHRISTOPHER CATES

IS IN HIS SECOND  
YEAR AT OSGOODE  
HALL LAW SCHOOL.  
HE PREVIOUSLY  
COMPLETED  
TWO YEARS OF  
THE BACHELOR  
OF BUSINESS  
ADMINISTRATION  
(CO-OP) PROGRAM AT  
WILFRED LAURIER  
UNIVERSITY.

\* This paper is dedicated to  
Andrew M. Kuske and  
Professor Kent McNeil  
(Osgoode Hall Law School).  
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1 Sir E. Coke, *Third Part  
of the Institutes of the Laws  
of England*, 6th ed.  
(London: W. Rawlins,  
1681).

2 P.D.G. Skegg, "Human  
Corpses, Medical  
Specimens and the Law of  
Property" (1975) *Anglo-  
American Law Review* 412  
at 412.

3 See above.

Property is an abstract concept. It is defined so broadly that almost anything may be encompassed by the term, from the physical to the intangible and intellectual. However, it is disputed whether a person "owns" his or her body, or more specifically, whether it is desirable to have property interests in one's own body. This issue is certainly multifaceted, and this paper considers several contexts in which the issue is becoming increasingly relevant in modern society. For example, many North American drivers fail to sign organ donor cards, resulting in a dire shortage of organs, and one reason for this failure to donate may be that people are reluctant to provide a valuable commodity without compensation. This problem could be addressed by creating property rights in human tissues.

As medical technology advances, the need for law reform in the area becomes more urgent. The purpose of this paper is to canvass some of the key issues, including a consideration of the common law, current statute law, and public policy concerns, any of which may influence the feasibility of law reform. While several possible options for such reform will be summarized, it should be evident that none of these is ideal, but rather that there is a pressing need for further discussions which should lead to the establishment of direct regulation of property interests in human tissues.

## Background

Historically, the common law classified human bodies as either those which are deceased or those which are alive, and the case law is generally divided along these lines. Each division will be dealt with in turn.

### Property Rights in Deceased Bodies and their Tissues

Several early English cases laid the foundation for the law of property in deceased bodies that exists in Canada. The issue was dealt with in Coke's *Institutes*,<sup>1</sup> which stated that deceased persons buried in consecrated grounds were protected by ecclesiastical law and therefore the buried cadaver was *res nullis*;<sup>2</sup> it was considered illogical to state that simply because something is of a religious nature that it is not owned by any person.<sup>3</sup>

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his or her body ...

Early in the eighteenth century, the case of *Dr. Handyside* enunciated what could best be described as the “no property” rule for deceased bodies.<sup>4</sup> There could be no prosecution for theft of a corpse because it was not property; however, the items buried with the corpse were viewed as property of the executor. In most cases of “grave-robbing,” theft was considered on grounds other than the theft of the body itself.<sup>5</sup>

Beginning in 1788, three cases (*R. v. Lynn*,<sup>6</sup> *R. v. Fox*,<sup>7</sup> *R. v. Sharpe*<sup>8</sup>) articulated more modern discussions of human beings as property. *Sharpe*, as the last to be decided, merits further discussion. In this case, the defendant disinterred the corpse of his mother with the intention of reburying it adjacent to the grave of his deceased father. The Court applied the following rule:

Our law recognises no property in a corpse, and the protection of the grave at common law, as contradistinguished from the ecclesiastical protection to consecrated grounds, depends upon this form of indictment.<sup>9</sup>

This passage has been interpreted to mean that because the corpse is not property, and therefore cannot be stolen, the only way to be liable for a crime when disinterring is by public policy at common law. The trilogy decisions were based on reasons other than the “no property” rule for corpses, focusing instead on policy and established, although stretched, principles of conventional jurisprudence. Generally, courts were reluctant to

4 This case was unreported throughout the eighteenth century and was eventually referred to in the nineteenth century in E.H. East, *Pleas of the Crown* (London, 1803) 652. In the case, an action was brought to determine the proper resting place of “Siamese Twins.” The doctor had apparently obtained the body for study. The entire record of this case states as follows:

“There can be no property in a dead corpse; and therefore stealing it is no felony, but a very high misdemeanour. In the case of *Dr. Handyside*, where trover was brought against him for two children that grew together; Lord C.J. Willes held the action would not lie, as no person had any property in corpses. But a shroud stolen from the corpse must be laid to be the property of the executors, or whoever else buried the deceased, and not of the deceased himself.”

The apparent result is that one may steal a body, as it is not property, but not anything attached to or clothing the corpse.

Skegg, see note 2, at 413.

See also: W. Boulier, “Sperm, spleens and other valuables: The need to recognize property rights in human body parts” (1995) 23 *Hofstra Law Review* 693 at 706.

5 Skegg, see note 2.

find property rights in the human body and tried to decide the cases “correctly” on other grounds.

The later case of *Williams v. Williams*<sup>10</sup> determined that the executors of a will are not bound to dispose of the body in the manner prescribed by the deceased’s will. The Court held that a person cannot bequeath his or her body because there is “no property” in a human’s remains. Canadian common law has generally followed *Williams*,<sup>11</sup> and it would appear that *Williams* is still the primary source of the “no property” concept and that it is applicable in Canada. In conclusion, the common law generally has not recognized interests in deceased persons, their corpses, or “gifts” of the corpses from a testator to a beneficiary.

### Property Rights in Living Bodies and their Tissues

#### 1. Obsolete Common Law

In the past, the law has allowed ownership by one person in another. Examples which are now obsolete in Canadian law include attachment of a debtor’s person as payment of a debt,<sup>12</sup> slavery, or possession of a woman’s body by her husband.<sup>13</sup> Courts have found such ownership to be clearly immoral.

#### 2. Current Common Law

Tort law is one of the few remaining common law constructs that has not done away completely with the concept of property loss in damages to living human beings. An example of these “non-pecuniary” losses can be found in the case of *Andrews v. Grand & Toy Alta. Ltd.*<sup>14</sup> in which Supreme Court of Canada Justice Dickson set out three potential ways to allocate a monetary value to personal injury. First, the “conceptual” approach treats each faculty as a proprietary asset with an objective value.<sup>15</sup> Therefore, the value of a body part would be almost “pre-determined” by tariff. Second, the “personal” approach values injuries in terms of the loss of happiness to the particular victim. Third, the “functional” approach attempts to determine the compensation to provide “reasonable” solace for the person’s misfortune. The “functional” approach is prevalent; however property concepts are implicated because in order for tort law to compensate bodily losses, a person’s body must have value.<sup>16</sup>

### Statute Law

Canadian courts have been hesitant to allocate property to body parts, and legislation which regulates the area further removes any property rights in human tissues. In Ontario, for example, relevant legislation includes the Coroners Act,<sup>17</sup> the Anatomy Act,<sup>18</sup> and the Human Tissue Gift Act.<sup>19</sup> The provincial acts are generally uniform in substance throughout Canada and consequently provide a regulatory framework.

Coroners acts in Canada supersede common law powers of coroners to intervene and take possession and control of a deceased body for the purposes of investigation.<sup>20</sup> These statutes also provide for autopsies to be performed in the event of an inquest pursuant to other statutes.<sup>21</sup> Of specific interest is a provision in the Ontario Coroners Act which allows the coroner to remove a deceased’s pituitary gland and deliver it to a

6 *R. v. Lynn* (1788), 100 English Reports 394 (Court of King’s Bench).

*Lynn* was convicted on indictment for entering a burial ground and disintering a corpse which was later removed and used for dissection. The Court, in spite of the case law to the contrary, stated that although no person shall have property in a corpse, the act committed was addressable by common law as contrary to public decency. It was also given that the indictment delivered was such that it was still phrased in terms of stealing the corpse and the clothes. The corpse’s theft alone would not result in a felony; however, the theft of the clothes would.

7 *R. v. Fox* (1841), 114 English Reports 95 (Court of Queen’s Bench).

In *Fox*, a debtor had died while in prison and the coroner had ordered a burial. The jailer refused to release the body until the executors paid the sum of money that was owing. The Court held that regardless of who has possession, the executors have an immediate right to possession so that a proper burial may take place. This was an extension of the “no property” rule in that it stated that withholding a body is contrary to public policy and should be prevented by the courts.

8 *R. v. Sharpe*, (1856-57) Dearsly & Bell’s Crown Cases 160 (Court of Queen’s Bench) [hereinafter *Sharpe*].

9 See above at 163.

medical practitioner for use with a patient who has a pituitary gland deficiency.<sup>22</sup> This provision allows an agent of the state to remove an item of value from a body without a *positive* request to do so by either the deceased or the deceased's estate, unless it is "reasonably" known that the deceased or his/her estate is unwilling to comply.<sup>23</sup> This reverse onus provision suggests that pituitary glands, at least, are in the public domain unless a person or his/her estate specifically declares them to be otherwise.

The anatomy acts in Canada evolved from 19th century English enactments which were intended to respond to cadaver thefts and sale to educational institutions, and to address common law developments that might have led to property rights in the body and body parts. Pursuant to anatomy acts in Canada, the entire body of a person may be donated to a medical school for the purposes of anatomical dissection. The intention of the deceased is important but not binding on the next of kin; the next of kin must authorize the donation of the body for scientific study.

Human tissue gift acts regulate the removal and use of cadaveric and non-cadaveric tissues. The Canadian system is based primarily on gift-driven motives and the consent of the donor or the family of the deceased individual.<sup>24</sup> Ontario's statute is generally representative of legislation in the other provinces and the territories, and appears to renounce property interests in human beings. Section 10 of the Human Tissue Gift Act, for example, bans dealing in human tissue for valuable consideration:

No person shall buy, sell or otherwise deal in, directly or indirectly, for a valuable consideration, any tissue for a transplant, or any body or part or parts thereof other than blood or a blood constituent, for therapeutic purposes, medical education or scientific research, and any such dealing is invalid as being contrary to public policy.<sup>25</sup>

The section is problematic in that while it appears to prohibit all sales, "tissue" does not include regenerative tissues, such as skin, bone, blood, and blood constituents.<sup>26</sup> In addition, the statute itself contains a measure of ambiguity and is in need of reform. First, it is uncertain whether any of the excluded types of tissue would still fall under the term "body parts" as used in section 10.<sup>27</sup> Second, the suggestion has been made that cellular or sub-cellular by-products are excluded from this definition.<sup>28</sup> Third, it should also be noted that while the statute addresses gifts, it does not address other natural mechanisms of conveying human tissue to another. Typically organs are donated and that donation is a voluntary process of surrendering a person's tissue in the form of a gift. Fourth, the Act does not deal with waste products. Body fluids or tissue that are left over from an operation or test are no longer in the control or possession of the "donor"; however, the statute does not explicitly prohibit obtaining and converting the "waste" for the financial gain of another.<sup>29</sup> Fifth, the statute may potentially be circumvented: if the organ is not "sold" for "valuable consideration," but rather if it is given, then the act of transplant is viewed as a service.<sup>30</sup> Without a "sale," it would appear that the statute is ineffective. This point has yet to be litigated.<sup>31</sup> A further criticism of the Act is that the penalty provisions are too lenient,<sup>32</sup> but no province has yet responded to proposals to increase penalties.

10 *Williams v. Williams* (1882), 20 Ch D. 659 [hereinafter *Williams*].

In this case, a testator directed that "within three days after my death, or as soon as conveniently may be, my body shall be given to my friend Miss Eliza Williams, to be dealt with by her in such a manner as I have directed to be done in a private letter to her." In addition, directions were given that Miss Williams be reimbursed out of the estate for any expenses she may incur in disposing of the body. The letter to Miss Williams requested that the body be cremated and placed in a vase, to be disposed of as Miss Williams wished. The family, and the executor had the body buried despite protest from Miss Williams. Miss Williams, some time later, disinterred the body, had it cremated and removed from the country. She brought an action to collect damages for her expenses in this matter.

11 *Hunter v. Hunter* (1930), 65 Ontario Law Reports 586, [1930] 4 Dominion Law Reports 255 (Ontario High Court) held that the burden of disposing of a deceased body falls to the executor but that the executor may dispose of the body as he/she sees fit (be it burial or by cremation). *Edmonds v. Armstrong Funeral Home Ltd.*, [1930] 25 Alberta Law Reports 173, [1931] 1 Dominion Law Reports 676 (Alberta Court of Appeal) allocated the burden to the surviving spouse, who possessed the legal obligation to dispose of the body as s/he wished. *Miner v. Canadian Pacific Railroad* (1911), 3 Alberta Law Reports 408 (Alberta Court of Appeal) allocated the burden to next of kin who possessed the legal obligation to dispose of the body as s/he wished.

12 B.M. Dickens, "The Control of Living Body Materials" (1977) 27 University of Toronto Law Journal 142 at 144.

In summary, in Canada today there are no express legislative indications that property in human tissues exists. Instead, there are express indications of an active legislative intent to eliminate property interest in human tissues.

## Policy Considerations

Although Canadian legislation does not embrace the concept of property in human tissues, both it and the common law can be modified in accordance with public policy. There is a concern that the current legislative provisions are insufficient and therefore should be altered to effectively allow a more efficient delivery of human organs and tissues to those who need them, when they need them. There are a number of problems with Canadian legislation. For example, few people sign organ donor cards,<sup>33</sup> and hospitals and health care professionals are often unaware as to whether a person has signed a card.<sup>34</sup> In addition, relatives are given the ability to countermand any wishes expressed by the deceased.<sup>35</sup> When there is no effective indication as to the deceased's intention, two factors can affect the donation of tissues. First, the nearest relative's willingness to authorize the removal of tissue may constitute a valid direction,<sup>36</sup> and second, health care professionals have a limited coercive role in the organ donation process as they are regulated by hospital policy or the like.<sup>37</sup> Creating property in human tissues can make the statutes more effective, and a more commercialized (property-based) system may effectively rectify the concern that there is currently an insufficient supply of organs for transplant demand.<sup>38</sup>

## Quality of Available Organs

It is claimed that if human organs are sold, the supply of organs that are diseased or unhealthy will increase significantly.<sup>39</sup> This fear centres around the belief that the poor, indigent, malnourished, or alcoholic will make up the largest proportion of the new class of donors, and that people in these groups will misrepresent their medical condition in order to qualify for the potential monetary rewards of organ donation.<sup>40</sup>

In contrast, it is claimed that inherent economic incentives will increase quality,<sup>41</sup> as individuals purchasing organs for resale will likely carefully check the quality of their organs and donors so as to maintain the highest quality possible. Economic analysis shows that once the supply of organs is more plentiful, suppliers providing sub-standard organs will be driven out of the market by competitive activities.<sup>42</sup> In fact, the increased supply of organs available through organ sales could result in more instances where surgeons are able to find the organ that is best suited to the recipient.<sup>43</sup>

## Economic Externality

An objection to sale of organs, the likely by-product of property in human tissues, is that there will be negative economic externalities that will prohibit the sale of organs. In other words, the fact that people often feel uncomfortable about dealing in human organs<sup>44</sup> is an externality which increases the price to the ultimate consumer. The public may be concerned about the moral repercussions of endorsing trade in human tissues, or the potential health consequences for donors (including health complications

13 S.A. Mortinger, "Spleen for Sale: *Moore v. Regents of the University of California* and the Right to Sell Parts of Your Body" (1990) *Ohio State Law Journal* 51 (1990) 499 at 503.

14 *Andrews v. Grand & Toy Alta Ltd.*, [1978] 2 Canada Supreme Court Reports 229, 83 Dominion Law Reports (3d) 452 (Supreme Court of Canada).

15 See above.

16 See above.

17 Coroners Act, Revised Statutes of Ontario 1990, c. C-37.

18 Anatomy Act, Revised Statutes of Ontario 1990, c. A-21.

19 Human Tissue Gift Act, Revised Statutes of Ontario 1990, c. H-20.

20 Coroners Act, see note 17, section 2.

21 Manitoba Law Reform Commission, Report on The Human Tissue Act (March 31, 1986) at 21.

22 Coroners Act, see note 17, section 29.

### 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.

### 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.

23 Coroners Act, see note 17, s.29(2).

or even death). If public sentiment is clearly against such activities, there could potentially be no trade in organs whatsoever due to a high economic externality.<sup>45</sup>

FIGURE ONE – ECONOMIC EXTERNALITIES<sup>46</sup>

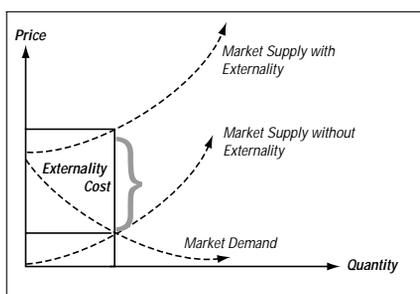


Figure One indicates that if the externality is large enough, there will be such potentially prohibitively high costs that no market equilibrium will occur.

The economic externality argument, however, is questionable as it overlooks an important factor. In response to concerns about harm to donors and thus to society, thousands of people die each year because organs are not available for transplant, a fact that might outweigh this concern. Society will likely benefit from an increased organ supply and a likely improvement in transplant procedures (through increased practice and financial motivations for innovation). Therefore, the general externalities will likely balance each other such that the standard economic supply and demand model will tend to function unaltered.<sup>47</sup> This model will operate in a more efficient manner than the current regulatory system of donations.

#### Altered Supply of Organs

Opponents raise the argument that sales in human tissues, and organs specifically, will create a decreased supply of “free” organs for the less affluent. Commercialization in the human tissues trade takes away motivation (other than goodwill) to donate tissues for “free,” at least when a donor and donee are not acquainted with each other, with the result that the affluent will be able to afford the available tissues and the less wealthy will simply go without.<sup>48</sup> This is a valid policy concern as people should have equal access to health resources.

However,<sup>49</sup> there are indications that the market price for organs will decrease as the supply of organs increases. In addition, an economy of scale is achieved by allowing specialization in the provision of organ transplants with the higher available supply.<sup>50</sup> The reduction in costs will likely save the provincial health plans significant sums of money while not creating the affluence-dominated system as suggested by the opponents of property interests in human tissues.<sup>51</sup>

#### D. Valuable Scientific Research and Exploitation

A further public policy issue was raised in the case of *Moore v. Regents of the University of California*.<sup>52</sup> John Moore suffered from a rare type of leukemia which required the removal of his spleen for the purposes of treatment. He received treatment at UCLA and samples of his blood, bone marrow, and other bodily substances were

24 J.M. Gilmour, “Our Bodies: Property Rights in Human Tissue” (Fall 1993) 8 *Canadian Journal of Legal Studies* 113 at 116.

25 Human Tissue Gift Act, see note 19, section 10.

26 See above, section 1.

27 As an aside, a statutory drafting analysis implies that “body parts” and “tissues” are not synonymous. The inclusion of the terms “tissues,” and “body parts” means that “tissues” should not include “body parts” as that would render those terms invalid. Therefore, to give all the words meaning, then the proper interpretation would have “body parts” only applying to items which are not “tissues”. This provision has yet to be litigated and as a result, there is no additional information as to how this provision would be interpreted.

28 Gilmour, see note 24, at 116-17.

29 It is illegal to purchase, sell or handle human tissue. However, the conversion of materials obtained legally is not addressed in any provision of the Act. Finally, “conversion” requires that there be property interests at one time. That property interest was not created by the statute.

30 Gilmour, see note 24, at 117.

See also: B.M. Dickens, “The Ectogenic Human Being: A Problem Child of Our Time” (1980) 18 *University of Western Ontario Law Review* 241.

31 Gilmour, see above. Note: although the possibility exists for an exemption, any actions may be found void at common law as against public policy.

32 The Ontario statute provides for penalties of up to 6 months in prison, and a \$1000 fine, upon summary conviction.

33 Report on The Human Tissue Act, see note 21, at 23.

34 See above.

35 See above.

- 36 See above at 27.  
 37 See above at 28.  
 38 Gilmour, see note 24, at 136.  
 39 Mortinger, see note 13, at 508.  
 40 See above at 508.  
 41 See above at 510.  
 42 See above at 510.  
 43 See above at 510-11.  
 44 See above at 509.  
 45 See above at 509.  
 46 M. Parkin & R. Bade, *Microeconomics: Canada in the Global Environment*, 2nd ed. (Toronto: Addison-Wesley Publishers Limited, 1994) at 533.  
 47 Mortinger, see note 13, at 511.  
 48 See above, at 510.  
 49 See: Gilmour, see note 24; Boulter, see note 4.  
 50 Parkin & Bade, see note 46 at 254.  
 51 Mortinger, see note 13, at 511.  
 52 *Moore v. Regents of the University of California*, 271 California Reporter 146 (Supreme Court of California, 1990) [hereinafter *Moore*].  
 Prior to trial, the defendants were successful in nullifying the claim of property rights in human tissue. On appeal the California Court of Appeal reversed the finding of the trial Court and held that Moore could indeed satisfy the claim of conversion of his property. The Supreme Court of California granted review and held that Moore did not have a cause of action for conversion, although he could proceed with the action insofar as it was based on lack of informed consent and breach of fiduciary duty. Appeal to the Supreme Court of the United States was denied.  
 53 Mortinger, see note 13, at 510.  
 54 I. Jane Churchill, "Patenting Humanity: The Development of Property Rights in the Human Body and the Subsequent Evolution of Patentability of Living Things," 8 Intellectual Property Journal 249 at 282.  
 55 See above.

regularly taken for testing. During repeated return visits to UCLA, tests identified that Moore's tissues could be converted into a "cell line" which had unusually high immune chemicals. This "cell line" was of great value to the pharmaceutical community and consequently a patent was awarded to the researchers who later assigned that patent back to UCLA. Moore was later asked to "voluntarily" sign over the rights in his tissues and research flowing from those tests. At this point Moore asserted a claim to the research work reportedly worth \$3 million (with royalty-type payments up to ten times that amount). Moore claimed ownership in his cells and their derivatives and a breach of informed consent.

The Court in *Moore* was concerned that the recognition of a property right in Moore's spleen cells would discourage scientists from conducting socially valuable research. In addition, recognition of a property right would interfere with free trade of information essential to useful scientific progress. Exchange of medical information is a valid social objective as it leads to greater scrutiny of samples which may lead to scientific discovery. By establishing property rights, it is felt that scientists would either be "scared" or administratively restrained from engaging in independent research which may have legal consequences.

*Moore* also considered the prevention of unremunerated exploitation. People are outraged when confronted with the possibility of such a loss of control over their bodies, or the bodies of loved ones. As the California Court of Appeal noted in *Moore*, many people have moral, ethical, and religious objections to research or transplants being performed on human tissue.<sup>53</sup> If surgery patients, such as Moore, are not allowed the right to sell their organs to medical researchers, they will lose several rights. The "victim" not only loses the right to claim the profits reaped from the use of his/her organs, but will also lose the best means of controlling the disposition of the organs.

The moral and ethical concerns may also be mitigated against by the fact that the legal system is inherently ill-equipped to deal with such ethical, moral and scientific questions.<sup>54</sup> It is suggested that the recognition of even limited property rights in the human body would among other things lead to the establishment of a right to bodily privacy.<sup>55</sup> This would have the effect of creating a greater sense of value in the human body than is currently present in society. This is clearly a benefit of *any* regulation (whether or not it establishes complete property rights in human tissues).

### Potential Implementations of Property Rights in Human Tissues

Given the above policy concerns, it is evident that the issue of property rights in human tissue requires further discussion, and the next logical step is a discussion of the potential implementations of property rights in human tissues. While few authors have yet considered how to implement these property rights, Judy Ogden has provided a comprehensive study of the area and this paper places notable reliance on her study.<sup>56</sup>

## A. Pre-Death Contracting

### 1. Description

Many contracts made pre-death, for the care of the body post-death, are honoured. In actuality, their legal enforceability is highly questionable. The body, after death, is treated under law as a form of quasi-property which is inheritable under statutes governing intestate succession.<sup>57</sup> To increase the likelihood that a person's pre-death intent to donate organs is honoured, it would be important to give those intentions legal significance. Either consent may be extended to cover the organ/tissue donation post-death, or contracting may be allowed to cover organ/tissue donation (in addition to numerous other post-death arrangements).<sup>58</sup> Table One documents the process under this option.

TABLE ONE

STEP:	DESCRIPTION:
1	A purchaser and seller arrange for the purchase of the seller's compatible organ.
2	The contract between the two parties is signed and consideration is provided.
3	The contract is subject to the condition precedent that the seller dies.
4	When the seller dies, the transaction is completed by the estate of the deceased.

### 2. Advantages and Disadvantages

The advantages of this process are significant. Minor changes in legal theory and practice are required.<sup>59</sup> People would not have total property rights in their bodies; rather, the right would be limited to human tissue issues, post-death.<sup>60</sup> The implementation would also be straightforward, requiring provincial statutes to be only slightly modified. Finally, this option has a measure of political feasibility. The extension proposed would be consistent with the current widespread support for personal autonomy and related Charter arguments.<sup>61</sup>

One disadvantage of this method lies in the difficulty in ascertaining the genuine nature of the contract.<sup>62</sup> In addition, an administrative problem exists with regards to ensuring that the evidence of intent to donate is delivered in a timely fashion to medical personnel.<sup>63</sup> Despite these concerns, it appears that the advantages of this method outweigh its disadvantages, and this option may be a moderate position that finds common ground between the two extremes of ownership in human tissues.

## Irrevocable Trusts

### 1. Description

The option of using an irrevocable trust is grounded in existing trust law. The essential idea is that potential donors would be given some incentive, payable currently or in the future, to make an irrevocable commitment to donate their tissues or organs at the time of their death.<sup>64</sup> The promise could be evidenced in various ways, such as a national data bank or a discrete mark (tattoo).<sup>65</sup> It would also be possible to assign the interest, for monetary value, to others. Table Two summarizes a possible transaction under this option.

*Canadian courts have been hesitant to allocate property to body parts ...*

56 J.S. Ogden, *Improving Human Organ Availability for Transplantation: Legal Paradigms and Policy Options* (Ann Arbor: UMI Dissertation Services, 1996). Ogden's study is statistical in nature and generally considers technical implementations rather than policy concerns. Her study uses survey results to determine the feasibility of each potential implementation option. This paper relies on measures of efficiency rather than statistical data. As well, it should be noted that Ogden's study is based on American law, and that this paper suggests implementations which are practicable in the Canadian legal environment.

57 See above at 125.

58 See above.

59 See above at 129.

60 See above at 130.

61 See above.

62 See above at 127.

63 See above.

64 See above at 131.

65 See above.

... people often feel uncomfortable about dealing in human organs ...

TABLE TWO

STEP:	DESCRIPTION:
1	The purchaser buys the rights to several compatible organs. Financing is obtained as required.
2	The purchaser pays for the right to the organ after the death of a donor.
3	The donors hold the organs in trust until one of them dies.
4	When one compatible donor dies, the benefit vests in the beneficiary upon the execution of the trust.
5	The transplant takes place.
6	The remaining organs being held in trust can effectively be assigned to other persons in need of that particular organ.
7	The remaining beneficial interests are conveyed for consideration to another party or parties.
8	The purchaser of the original organ pays for the outstanding financing from the proceeds of step 7.

## 2. Advantages and Disadvantages

The key advantage of this option is that it is firmly grounded in traditional trust law doctrine, which is widely understood. Also, it enables a large pool of organ donors to be reached.<sup>66</sup> The process avoids the unsavoury concept of organ “trading,” by allowing only the trade of rights to the organ once a person is deceased and thus creating a “futures-type” market in human tissues.<sup>67</sup> A financial incentive may motivate a larger segment of the public to donate than if donation was voluntary. In terms of dealing with research and scientific development, the tissue removed after death, for payment in the present.<sup>68</sup> Therefore, it would not impede scientific discovery and would provide for “fair” compensation.

This option has few disadvantages. The major concern is that the creation of a futures market would require strong regulatory mechanisms for control over the market.<sup>69</sup> The requirements of the regulatory mechanism would include guarantees of voluntariness, and requirements for non-coercive marketing of organs and tissues.<sup>70</sup> Further, there may be issues relating to whether the donor has a fiduciary duty to protect and keep healthy his or her body or organs. Similar to the way in which professional athletes are restricted in their personal lives, future donors may be restricted from engaging in dangerous activities. Relevant legal tests, however, already exist in other legal practice areas, such as criminal law, contract law and evidence. Imposition of fiduciary duties may be regulated through statute, and may also be subject to suitable compensation. This option is capable of meeting all relevant policy considerations and, given the proper implementation of a regulatory scheme, can be politically feasible.

## Regulated Pre-Death Sales

### 1. Description

This proposed option would allow the body to be treated as the property of its inhabitant prior to death. This is by far the proposal with the widest scope.<sup>71</sup> Its attraction is the potential for compensation for an organ unneeded by a person prior to

66 See above at 135.

67 See above.

68 See above.

69 See above at 136.

70 See above.

71 See above at 138.

death. Currently organs, such as kidneys, are removed prior to death, but with no financial incentives.<sup>72</sup> This proposed implementation would add the benefit of private financial remuneration. Table Three documents a possible transaction under this method.

TABLE THREE

STEP:	DESCRIPTION:
1	A purchaser and seller arrange for the purchase of the seller's compatible organ.
2	The contract between the two is signed and consideration is provided.
3	There is no condition precedent and consequently the execution of the tissue removal can be either now or at some time in the future.
4	The tissue is implanted or studied by the purchaser and the transaction is completed at that time.

## 2. Advantages and Disadvantages

The advantages of this system are that benefits accrue directly to the donor, thus providing a powerful incentive to donate. However, there are several inherent disadvantages, the greatest relating to political feasibility. Public concern about organ sales is presumably based on the commoditization of the body and the political abuses of such a policy.<sup>73</sup> In addition, social structures and institutions would have to be redeveloped to create a regulatory market to prevent misuse of this system.<sup>74</sup> These disadvantages make it unlikely that this option would ever be implemented by provincial legislatures.<sup>75</sup>

## Recognition of “Right to Commerciality”

### Description

Moore enunciates the idea that a person has a “right to commerciality.” This means that a person has the right to the commercial benefits of his/her body parts through an analogy to the right of publicity.<sup>76</sup> In contrast to a person's right to “privacy,” the right of “publicity” protects the monetary value of a celebrity's name, likeness and *distinctive characteristics*.<sup>77</sup> Courts endeavour to protect the unique traits of an individual from unauthorized commercial exploitation, and by analogy, a person could be allowed to claim a “right of commerciality” in the part of the body when that part is exploited for profit by an unauthorized person.<sup>78</sup>

This method operates primarily as a remedial measure, by indirectly recognizing property interests in a person's tissues. Table Four documents the way in which people can be compensated for use of their tissues.

... there are indications that the market price for organs will decrease as the supply of organs increases.

72 See above.

73 See above.

74 See above at 140.

75 See above.

76 See: *Ali v. Playgirl, Inc.* 447 F.Supp. 723 (United States District Court, S.D. New York, 1978); *Gould Estate v. Stoddart Publishing Co.* (1996), 30 Ontario Reports (3d) 520, [1995] Ontario Journal No. 3925 (Ontario Court of Justice, General Division); *Krouse v. Chrysler Canada Ltd. et al.* (1974), 1 Ontario Reports (2d) 255, [1972] 2 Ontario Reports 133-154 (Ontario Court of Appeal); *Horton v. Tim Donut Ltd.*, [1997] Ontario Journal No. 390 (Ontario Court of Justice, General Division); *McCreadie v. Rivard*, [1995] Ontario Journal No. 3117 (Ontario Court of Justice, General Division).

77 Mortinger, see note 13, at 513.

78 See above at 513.

People are outraged when confronted with the possibility of such a loss of control over their bodies ...

TABLE FOUR

Step:	Description:
1	The donor is involved in a procedure in which tissues are removed either for testing or study.
2	The organ or tissue is then tested and utilized for its intended purpose.
3	Should the intended purpose yield a profitable result (any research that earns profit), there can be some prior agreement (between the "donor" and the researcher) as to the compensation.
4	Should the compensation not be in accordance with the agreement, then the donor can bring a statutorily recognized cause of action to recover his/her lost benefits.

### 1. Advantages and Disadvantages

Application of the right of commerciality in the context of human tissues may avoid several key objections raised by those who oppose the sale and trade in body parts and tissues.<sup>79</sup> The application of such a rule would not lead to a property interest in organs that are used for pure, non-profit research or transplant.<sup>80</sup>

This option may not increase the volume of donated organs, leaving supply stagnant at a point below equilibrium and far less than demand. While this option would prevent the policy concern of "exploitation" from arising, it does not comprehensively address the problem. It may provide an acceptable transitional position given conservative political attitudes, but it is insufficient to satisfy the greater policy objects of motivating the public to trade and efficiently allocate organs.

Further, by viewing the human body as a commercial vehicle, an argument can be made that the human body is to be inherently devalued. If the body is viewed as a production facility for biological materials then there is the potential that the body will no longer maintain the same "value" and that the degeneration of the human body is not a desirable social by-product.<sup>81</sup> The alternative argument is that the introduction of an explicit commercial inducement for biotechnology allows those who make the research possible at a fundamental level to receive the benefit of that research. The "right to commerciality" approach would allow the sharing of the profits without actually allowing a person fully alienable rights in his or her body.<sup>82</sup>

## Conclusions

Although the definition of "property" is very broad, it is not generally broad enough to encompass the human body as property. As this paper discussed, Canadian common law does not acknowledge property interest in the body, although there is a tenuous representation in tort law. In addition, provincial legislation which regulates the transfer of human bodies and their parts tends to restrict property interests and prohibits commercial transactions in tissues. However, a number of policy concerns give rise to the need to develop some concept of property interests in human organs and tissues.

While this paper has raised several possible solutions to guide law reform in the area, the best option appears to be the creation of irrevocable trusts in human tissues. This option addresses the majority of policy concerns both for and against property in

79 See above at 514.

80 See above at 514.

81 B. Hoffmaster, "Between the Sacred and the Profane: Bodies, Property, and Patents in the *Moore Case*" (1993) 7 *Intellectual Property Journal* 115 at 131.

82 See above.

human tissues, while requiring the fewest alterations to current legal doctrines. Although this alternative appears to be best, further discussion is necessary to address regulatory changes that must be implemented. A logical “next-step” is to engage in a study that will evaluate the public’s views in order to enact the best legislation for the current social mores.

To conclude, as medical technology advances, the issue of property rights in human tissues becomes a pressing concern.<sup>83</sup> Such property rights do not currently exist in Canada, and if they are to be created, a very complex set of policy issues must be reconciled. Statutory reform is recommended to implement a basic regulatory regime for property rights in human tissues. It is preferable for legislative bodies, which theoretically reflect the public’s mores, to regulate to a comfortable level, rather than allowing this very complex matter to go before the courts where issues may be determined based on distorted and misused principles of law.

83 Some issues not discussed in this paper include cloning of mammalian tissues and genetic engineering. Recently, technology has allowed the cloning of tissue from a grown mammal, presenting interesting property issues regarding potential application to human beings. Questions of ownership (which are beyond the scope of this paper) would arise if a person could use his or her tissue to create another human being; for example, would the tissue donor “own” the product of the tissue? Another example is the recent approval in Canada of the sale of skin manufactured from human cells. These biotechnology developments add increased pressures on legislatures to address property issues in human tissues.