COURT OF APPEAL FOR ONTARIO

CITATION: McKitty v. Hayani, 2019 ONCA 805
DATE: 20191009
DOCKET: C65690 & M49886

Doherty, Miller and Paciocco JJ.A.

BETWEEN

Taquisha Deseree McKitty, by her substituted decision makers, Stanley Stewart and Alyson Selena McKitty

Applicant (Appellant)

and

Dr. Omar Hayani

Respondent (Respondent)

Hugh R. Scher, for the appellant

Erica J. Baron, Christine Wadsworth and Leah Ostler, for the respondent

Heard: December 12-13, 2018

On appeal from the judgment of Justice M. J. Lucille Shaw of the Superior Court of Justice, dated May 26, 2018, with reasons reported at 2018 ONSC 4015, 411 C.R.R. (2d) 310.

B.W. Miller J.A.:

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A. OVERVIEW

[1] This appeal concerns a freedom of religion challenge to the medical criteria accepted by Ontario's common law and legislation to determine that a person has died. More particularly, it is about the end of Taquisha McKitty's life, her family's attempt to honour what they understood to be her religious commitments, and whether there is a duty on others to accommodate the demands placed on Ms. McKitty by her own religious conscience.

[2] I would uphold the application judge's ultimate conclusion that Ms. McKitty's claim, as brought by her substitute decision-makers, cannot succeed. I would, accordingly, dismiss the appeal. However, for the benefit of parties to future cases of this nature, these reasons explain the analytical approach that should have been followed.

[3] Determining when a person has died usually presents no difficulty. It is most often obvious – even to a lay person – when a person has taken her final breath, and her heart has stopped beating irreversibly. Total brain death, and the death of every living cell, typically follows shortly thereafter.

[4] But in circumstances where a patient has been maintained on a mechanical ventilator and during that time has suffered total brain death, things are more complicated. With mechanical assistance, the heart and lungs can keep oxygenating the body even after the brain has entirely ceased functioning and can

no longer direct the heart and lungs. Where mechanical ventilation is provided, organs can continue to perform their ordinary functions. Cells can continue to grow. The body remains capable of fighting off infection and healing wounds.

[5] Notwithstanding that a human body can continue this degree of functioning, there is a consensus in Canadian medical practice that if total brain death (or "neurologically determined death") has occurred, the human person has died. The common law definition is the same: death has occurred where there is either an irreversible loss of cardiorespiratory function or total loss of neurological function. Although there is no Ontario legislation that prescribes a definition of death, several statutes are clearly premised on this definition.

[6] Ms. McKitty's substitute decision-makers brought a challenge in the appellant's name[1] to the constitutionality of the statutory and common law approaches to defining death. Specifically, the claim is that the adoption of neurological criteria to establish the death of those persons who hold a religious belief that life does not end until the heart stops beating (with or without mechanical assistance) violates such persons' religious freedom. The appellant asserted a religious obligation not to acquiesce in the removal of life support as long as her

[1] This proceeding was commenced by Ms. McKitty's parents as her substitute decision-makers. There was some issue below as to whether the substitute decision-makers had standing to bring an application on behalf of someone who had been declared dead. Because the question of standing depended on the outcome of the *Charter* rights argument, the application judge decided to proceed as though the appellant had standing, and that aspect of the judgment has not been appealed.

heart is beating. The appellant also argued that the law, by accepting neurological criteria to determine death, fails to accommodate her religious obligations and violates her *Charter* rights.

[7] The appellant sought an order rescinding the certificate of medical death filed by the respondent, Dr. Omar Hayani, and a declaration that she is not dead because she is alive according to the precepts of her Christian faith and therefore entitled to continue to receive medical treatment. She also served a notice of constitutional question, challenging the determination and definition of death.

[8] The application judge dismissed the application, primarily on the basis that the appellant is not a bearer of *Charter* rights and the respondent, as a private party, was not acting as an agent of government and that the *Charter* therefore did not apply.

[9] Some weeks after this appeal was argued, the appellant's heart ceased beating, satisfying the condition for death according to cardiovascular criteria. The appeal thus became moot. Both parties nevertheless requested that this court decide the appeal. We agreed to do so. There has been at least one other case before the Ontario courts which had similarly become moot before it could be resolved.[2] The issues presented in this appeal will likely arise again in urgent circumstances. Although I would dismiss the appeal, some correction from this

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[2] *Ouanounou v. Humber River Hospital*, 2018 ONSC 6511.

court is needed with respect to the issues of standing, the analysis of s. 2(a) freedom of religion claims, and the methodology for applying *Charter* values to the development of the common law. It is also desirable for this court to clarify the concept of legal death at common law. As explained below, however, there are some significant shortcomings in the record because the Attorney General of Ontario did not participate in this litigation. Accordingly, some of the issues raised should not be resolved in a moot appeal on this record and must await future litigation or legislation. Nevertheless, there is some correction and direction that this court is able to provide.

B. BACKGROUND

[10] The appellant was found unconscious on a Brampton sidewalk and taken to hospital. She had suffered significant brain damage due to a period of hypoxia (lack of oxygen supply to the brain). She was placed on a ventilator. Initially, her brain stem was still functioning and she was able to breathe spontaneously. While she was in the hospital, a second hypoxic event resulted in the loss of the ability to breathe without a ventilator. On September 20, 2017, the respondent, Dr. Hayani, a critical care physician at the hospital, conducted diagnostic tests on the appellant's brain functioning and determined that the appellant met the neurological criteria for death. He completed a death certificate the next day.

[11] On September 21, the appellant's parents, acting as her substitute decision-makers, sought an interlocutory injunction restraining the respondent from withdrawing mechanical ventilation. The injunction was granted. The underlying application sought various remedies, including an order rescinding the appellant's death certificate, a declaration that the appellant was not dead, a declaration that the Consent and Capacity Board has jurisdiction to adjudicate any disputes regarding the appellant's treatment as well as the determination of her death, and a declaration that the appellant's *Charter* rights had been breached. The hospital where Dr. Hayani served as a critical care physician is not a party to the application. Nor is any government actor. However, a notice of constitutional question was served on the Attorney General for Ontario and the Attorney General of Canada, who both declined to participate in the litigation.

[12] The notice of constitutional question in the Superior Court challenges: "the constitutional validity and applicability of the *Vital Statistics Act,* R.S.O. 1990, c.V-4, and its regulations, particularly s. 21(1) of the Act, and 35(2) of the Regulation with respect to the *requirements* to determine and certify death in Ontario."; and "the unconstitutional actions of the Respondent in the failure of the Respondent to take into consideration the Applicant's religious beliefs as part of the legal process to determine and certify death pursuant to the Canadian Guidelines and the *Vital Statistics Act,* R.S.O. 1990, cV-4." [*sic*]

[13] The notice of constitutional question in this court is somewhat broader, referencing more legislation and the common law. The appellant challenges: “the constitutional validity and applicability of the *Public Hospitals Act* and its Regulations, particularly Regulation 965, s. 17(1), and the *Vital Statistics Act,* R.S.O. 1990, c.V-4, and its regulations, particularly s. 21(1) of the Act, and 35(2) of the Regulation, particularly with respect to the statutory duty imposed on Doctors to determine and certify death in Ontario.”; “the unconstitutional application of the Common Law to determine and define death in a manner that fails to account for and respect the individual wishes, values and beliefs of the Appellant, or *Charter* values and the application of the *Charter* to the Appellant and Respondent.”; and “the unconstitutional actions of the Respondent in the failure of the Respondent to take into consideration the Appellant’s wishes, values and religious beliefs as part of the legal process to determine and certify death pursuant to the Statutory Duty imposed upon Doctors”.

[14] On June 26, 2018, the application judge dismissed the application.

C. ISSUES ON APPEAL

[15] The appellant argued that the application judge erred in finding that:

1. death at common law includes death by neurological criteria;
2. the appellant is not a subject of *Charter* rights;
3. the *Charter* does not apply to the respondent;

4. the appellant's rights under ss. 2(a), 7, and 15(1) of the *Charter* were not engaged; and

5. the Consent and Capacity Board had no jurisdiction over the appellant.

[16] These issues are addressed below. Although there was an additional ground of appeal – that the application judge erred in finding that the appellant satisfied the neurological criteria for the determination of death – that ground was not pursued in oral argument and there is no need for this court to address it. Finally, I will consider the appellant's request for leave to appeal costs.

D. ANALYSIS

(1) The criteria for death at statute and common law

a. Medical practice

[17] Historically, the single criterion used to determine death medically was cardiorespiratory failure. As a practical matter, this is the simplest test and remains the test that is applied in the vast majority of cases. According to this test, a person is considered dead when the heart and lungs irreversibly stop functioning. However, medical practice developed a second criterion: neurologically determined death. Satisfaction of either criterion is sufficient to determine death.

[18] The relationship between the two criteria is that absent medical intervention cardiorespiratory failure inevitably results in total brain death. It is brain death that results in "the disintegration of the organism as a whole": John C. Irvine, Philip H.

Osborne & Mary Shariff, *Canadian Medical Law: An introduction for Physicians, Nurses and other Health Care Professionals*, 4th ed. (Toronto: Carswell, 2013), at p. 425, citing *Defining Death: Medical, Legal, and Ethical Issues in the Determination of Death* (Washington, DC: President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 1981), at p. 58. As explained by bioethicist Patrick Lee, "because the functioning of the brain is necessary for the integration of the human body – it integrates the various cells, tissues, and organs into a single organism – the complete loss of the functioning of the brain results in the complete loss of integration of the human body and death": Patrick Lee, "Total Brain Death and the Integration of the Body Required of a Human Being" (2016) 41:3 J. Med. Philos. 300, at p. 300.

[19] Mechanical ventilation has made it possible to maintain cardiorespiratory functioning despite total brain death. With a mechanical ventilator, a person's heart could be kept beating – and the other organs oxygenated and kept alive – even after total brain death has occurred. In such cases, diagnostic tests are used to establish the occurrence of total brain death.

[20] Total brain death must be distinguished from other neurological damage that does not constitute total brain death, such as that suffered by persons who are in a minimally conscious state. Nothing less than total brain death constitutes death of the human person.

b. Legislation

[21] The criteria for determining death at law, as the application judge noted, have not been prescribed legislatively either federally or in Ontario. Although the Law Reform Commission of Canada in its 1981 report, *Criteria for the Determination of Death* (Report 15)(Ottawa: Law Reform Commission of Canada, 1981), at p. 25, proposed an amendment to the *Interpretation Act*, R.S.C. 1970, C. I-23, to state that "a person is dead when an irreversible cessation of all that person's brain functions has occurred", the proposal was never adopted legislatively.

[22] Some Ontario statutes establish rights, obligations, and powers that are contingent on a person's death. None establish criteria for determining death, but rather adopt, expressly or implicitly, the criteria used in medical practice. For example, the *Trillium Gift of Life Network Act*, R.S.O. 1990, c. H.20, which authorizes post-mortem organ transplants, expressly provides that "the fact of death shall be determined … in accordance with accepted medical practice": s. 7(1). The *Vital Statistics Act*, R.S.O. 1990, c. V.4, creates a number of obligations consequent to a person's death, including the registration of death at s. 21, but implicitly leaves the determination of death to the standards of medical practice by requiring the medical certificate of death to be completed and signed by a legally qualified medical practitioner.

[23] As discussed below, the appellant argues that these statutes and others violate the *Charter*, and that the respondent's actions in reliance on these statutes – both in treating the appellant and in completing a certificate of medical death - are therefore legally unauthorized.

c. The common law

The definition of death

[24] The medical practice of using neurological and cardiorespiratory criteria to diagnose death has been accepted by Canadian courts. In estates litigation, neurological criteria have been accepted in establishing the date of death for succession purposes. In the criminal law context, neurological criteria have been accepted in the analysis of causation of death: see e.g. *Leclerc (Succession) v. Turmel*, [2005] J.Q. no 2451 (S.C.); and at least implicitly in *R. v. Kitching* (1976), 32 C.C.C. (2d) 159 (Man. C.A.), leave to appeal refused, 32 C.C.C. (2d) 159n (S.C.C.).

[25] On the application judge's review of the law she appropriately found that Canadian medical practice has added the concept of neurologically determined death as a second sufficient criterion for establishing death, and that the common law has concurred with this practice.

[26] The current state of the common law is that a person is considered dead where there is either the irreversible cessation of cardiorespiratory function or the irreversible cessation of all brain function.

[27] Counsel for the appellant, however, argues that the state has an obligation to define death through law, and that the common law rule as formulated by the application judge is an abdication: it allows the medical profession an unfettered licence to set the criteria for death. In oral submissions, counsel argued that this passive stance could allow the medical profession to liberalize the definition of death to include not only persons who have suffered total brain death, but also persons with functioning, but severely compromised brains (e.g. the minimally conscious). Counsel argues that by deferring to current medical practice rather than making a definitive declaration of what constitutes death, courts have abdicated the responsibility to ensure that the benefit of the law extends to the most vulnerable.

[28] This is a serious concern. Nevertheless, it rests on a misunderstanding of the relevant common law rule. The criteria for determining whether death has occurred is not a technical question that is indefeasibly the province of the medical profession, to which the common law must defer. The two criteria for death have not been accepted by the common law because medical practice is determinative, but because they have been judged by the common law to provide a sound answer to the question of how to determine whether a person has died. Although

contemporary medical practice accepts total brain death as a specific criterion that allows physicians to declare a patient to be dead, it does not follow that should a different medical practice emerge – for example if physicians were to accept that persons who are minimally conscious meet the medical definition of death – that the common law would be obliged to accept this as well.

[29] The determination of legal death is not simply, or even primarily, a medical or biological question. The question of who the law recognizes as a human being – entitled to all of the benefits and protections of the law – cannot be answered by medical knowledge alone. Facts about the physiology of the brain-dead patient are needed to determine what obligations are owed to the brain-dead patient, but the enquiry is not ultimately technical or scientific: it is evaluative. Who the common law ought to regard as a human being – a bearer of legal rights – is inescapably a question of justice, informed but not ultimately determined by current medical practice, bioethics, moral philosophy, and other disciplines.

The accommodation of religious commitments

[30] The appellant's primary submission, however, is not that the common law's acceptance of total brain death as a criterion of death is inherently unconstitutional or unjust. The main submission is that the absence of accommodation for persons who object on religious grounds to the concept of brain death is unconstitutional.

[31] This challenge to the common law was framed in the application in two ways. First, the appellant argued that the respondent violated her *Charter* rights by relying on criteria for death recognized by the common law – which does not recognize a religious exemption – in making the diagnosis that the appellant had died. Second, she argued in the alternative that the common law should nevertheless be developed to provide for accommodation of religious conscience, such that the appellant would be considered to be living, and entitled to medical treatment. The application judge rejected both of these arguments.

[32] The arguments on appeal are addressed below, beginning with the preliminary questions of whether the appellant is a subject of *Charter* rights, and whether the *Charter* applies to the respondent. Thereafter, I address the substantive *Charter* rights argument, followed by the *Charter* values argument.

(2) The appellant's status as a *Charter* rights holder

[33] The appellant's central submission is that the common law's acceptance of neurological determination of death (and the legislature's implicit reliance on it in statutes such as the *Vital Statistics Act* and *Trillium Gift of Life Network Act*), without providing accommodation for religious communities that reject total brain death as constitutive of death, violates the appellant's *Charter* rights. The appellant argues that, to be compliant with the *Charter*, the common law definition of death must be modified by a legal proposition: where a person's religious beliefs preclude

acceptance of the neurological determination of death, death should be determined only according to cardiorespiratory criteria. The result would be that with respect to such persons, until such time as the heart stops beating, whether unassisted or through the use of a mechanical ventilator, a physician would be precluded from diagnosing or certifying death, and the person would remain entitled to the full protection and benefit of the law.

[34] Before the appellant's substantive *Charter* argument can be addressed, however, a preliminary question must be addressed: does a human being remain a subject of *Charter* rights after total brain death? The application judge's conclusion was no, but the reasoning was in error. As explained below, on the exceptional facts of this case, it is appropriate to assume the appellant is a subject of *Charter* rights. Where an appellant's status as a subject of *Charter* rights depends on the outcome of the substantive *Charter* rights claim, it is appropriate to assume for the purposes of the analysis that the appellant is a subject of *Charter* rights and proceed to address the substantive question. If the religious freedom argument is successful, then she remains a legal person. If it fails, she does not. However, as explained below, it is ultimately not possible on this appeal to resolve the substantive *Charter* rights issue: this case lacks a record that would allow for a s. 1 analysis as to whether the limit placed on the exercise of the right is reasonable. Nevertheless, it is necessary to address the application judge's

methodological approach to resolving the appellant's status, which was substantially in error.

[35] The application judge provided two bases for concluding that the appellant could not be a subject of *Charter* rights, both of which I would reject: (1) the appellant was physically incapable of exercising rights; and (2) the framers of the *Charter* did not intend to extend *Charter* rights to brain-dead patients.

a. The meaning of "everyone" – capacity to exercise rights

[36] The first basis for the application judge's conclusion that the appellant is not a subject of *Charter* rights is that the appellant lacks any capacity to exercise those rights. In an argument that parallels the Supreme Court's conclusion in *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, that "everyone" does not include corporations, the application judge reasoned that because the appellant has no brain stem function, she is unable to exercise any *Charter* rights.

[37] In *Irwin Toy*, the Supreme Court concluded there could have been no intention to include corporations within the meaning of "everyone" in the context of s. 7 of the *Charter*, because the rights to life, liberty, and security of the person are premised on bodily existence. An artificial entity is physically incapable of exercising these rights. The application judge concluded analogously, and by drawing on *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, that because the appellant

was not able to exercise any of these rights and freedoms, she could not come within the meaning of “everyone” to whom the rights are extended.

[38] This proposition is too broad and must be rejected. A great many persons, by reason of immaturity, decline, or other physical or mental impairment, have little or no present ability to exercise many, if not most, of the rights and freedoms guaranteed by the *Charter*. These impairments have no bearing on their status as subjects of *Charter* rights. Furthermore, at least some of the *Charter* rights protect not only one’s interest in doing, but simply in *being*. The rights govern how one is to be treated by others. These include, for example, the right not to be deprived of life and the right to equal benefit of the law.

[39] It is uncontroversial that a person whose body is dead is insensate and lacks any present or future capacity to participate in any of the human goods protected by the *Charter*. However, for the purposes of this litigation, it cannot be determined whether a human person who has died according to neurological criteria but not cardiovascular criteria – and who asserts that her *Charter* rights preclude the application of neurological criteria – is legally dead, prior to conducting the substantive *Charter* analysis that determines whether the application of neurological criteria would be unconstitutional.

b. The meaning of "everyone" – the intentions of the framers

[40] The second basis for the application judge's conclusion that the appellant is not a subject of *Charter* rights is that "a reading of the *Charter* as a whole does not display any intention [on] the part of the framers to consider the status of persons declared brain dead."

[41] The application judge is correct that there is nothing in the text of the *Charter* addressing the concept of total brain death. The text of the *Charter* is entirely silent on the matter. Neither were we taken to any extratextual evidence that would suggest that the criteria for establishing death formed any part of the deliberations surrounding the drafting and enactment of the *Charter*. The question is what flows from this.

[42] The application judge appeared to reason this way: (1) the common law pre-dating the *Charter* accepted total brain death as a criterion of death; (2) the framers of the *Charter* would have been aware of the state of the law in this regard; (3) nothing in the *Charter* purported to change the common law in this respect; and therefore (4) the *Charter* does not "confer legal personhood upon someone who is brain dead."

[43] There are three problems with this analysis. First, the *Charter* does not confer legal personality. That is not one of its functions. The *Charter* confers constitutional rights on certain categories of persons (e.g. "everyone" or "every

citizen”), but it does not address who is a person. Who is recognized as a legal person under Canadian law is determined by common law and statute. Those determinations are subject to review for their consistency with *Charter* rights, but it is an error to draw any inference about the constitutionality of the concept of brain death from the fact that the *Charter* does not specifically address it.

[44] Second, where a common law rule is relied on in order to perform a government function, the common law rule is subject to *Charter* rights: *Halpern v. Canada (Attorney General)*, (2003) 65 O.R. (3d) 161 (C.A.). The mere fact that the common law rule predated the *Charter*, and the framers of the *Charter* may have been aware of it and showed no intention to change it, is not determinative that the rule is consistent with *Charter* rights.

[45] Third, the methodology used by the application judge has been consistently rejected in constitutional adjudication since at least the *Persons Case*: *Edwards v. Canada (Attorney General)*, [1930] 1 D.L.R. 98 (P.C.). In the *Persons Case*, the Supreme Court reasoned in a fashion similar to the application judge, finding that the term “qualified persons” (those eligible for appointment to the Senate) in s. 24 of the *Constitution Act, 1867* could not include women because the common law at the time did not permit the appointment of women to public office and it could not have been the intention of the framers of the *Constitution Act, 1867* to change the common law by making women eligible for appointment.

[46] In overturning the Supreme Court, the Privy Council was similarly focused on what had (and had not) been settled by the adoption of the constitutional text: “the question is not what may be supposed to have been intended, but what has been said”: *Persons Case*, at p. 107, citing *Brophy v. Attorney General (Manitoba)*, [1895] A.C. 202 (P.C.). Faced with an ambiguity in the text as to whether “persons” indicated male persons only or male and female persons, the Privy Council applied a presumption in favour of the more inclusive meaning, concluding that the text should be read as including male and female persons.

[47] Similarly, the application judge was here required to interpret general terms (“everyone” or “every individual”). Uncontroversially, the ordinary meaning of these terms exclude persons who have died. But the terms themselves, read in context, say nothing whatsoever about the criteria to be used to determine death. In circumstances such as these, where a common law rule that limits access to the protections of the *Charter* is the very law whose constitutionality is impugned, the methodology of the *Persons Case* suggests that we apply a presumption of membership in the class (“everyone”) who is to benefit from the *Charter*, for the limited purpose of assessing the substantive *Charter* claim that purportedly establishes membership in the class. Denying the opportunity to make the argument, on the basis of a criterion whose constitutionality is the subject of the litigation, begs the question that is in dispute.

(3) Application of the *Charter*

[48] Dr. Hayani is the only respondent in this application. As he is a private party and not a government actor, the *Charter* does not apply to him and cannot impose any duties on him unless, and only to the extent that, he is performing some specific government function or acting as a government agent: *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 25. It is not sufficient that he be carrying out some purpose that is regulated and for the public good: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 43, *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 269. The appellant has not established that the respondent was performing a governmental function or acting as a government agent. The respondent does not, therefore, owe any duties to the appellant under the *Charter*, and the application judge made no error in this regard.

[49] However, even if the *Charter* cannot impose any duties on a party, the *Charter* may nevertheless bear on legislation that does. The analysis therefore needs to continue to ask whether the respondent's legal obligations to the appellant were imposed by a statute, and whether that statute is in some way unconstitutional: *M. v. H.*, [1999] 2 S.C.R. 3; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

[50] The appellant raised this argument below, but the application judge did not address it. The appellant relies on the obligations imposed on the respondent by s. 35(2) of R.R.O. 1990, Reg 1094 (the "Regulation"), enacted under the *Vital*

Statistics Act, which requires physicians to complete a medical certificate of death consequent to diagnosing someone as having died. In this proceeding, the appellant not only sought an order that the respondent be restrained from discontinuing her medical treatment, but that the medical certificate of death he prepared be rescinded.

[51] The *Vital Statistics Act* obligates the respondent to complete a medical certificate of death and forward it to a funeral director. Together with the Statement of Death prepared (usually) by family members, it is forwarded by the funeral director to the Registrar General, who generates a Death Certificate.

[52] The respondent's actions were this: on September 20, 2017, he determined that the appellant had suffered total brain death, which, according to standard medical practice, meant that the appellant had died. He made and recorded his diagnosis. The following day, he completed a medical certificate of death, as he was required to do by s. 35(2) of the Regulation, made pursuant to the *Vital Statistics Act*.

[53] The appellant argues that the respondent ought not to have completed the medical certificate of death as the statute compelling him to do so violated her freedom of religion. As noted above, this argument was not addressed by the application judge, and I would not consider it for the first time on this moot appeal. The main issue before the application judge was the continuation of the appellant's

medical treatment. The constitutional status of the *Vital Statistics Act*, and the nature of a physician's responsibilities under the *Act*, would be better left to a future case in which there is a proper record explaining how a physician's duties to treat a patient are thought to flow from the physician's statutory obligations.

[54] This is enough to dispose of the *Charter* rights arguments. There remains the argument that the application judge erred by not amending the common law through an appeal to *Charter* values. Because the application judge to some extent confused the methodology for a *Charter* values analysis with the methodology for a *Charter* rights analysis, it is necessary to set out the distinction between them.

(4) *Charter* rights and *Charter* values

[55] The appellant advanced two distinct arguments with respect to the *Charter*. With the first – the *Charter* rights argument – the appellant sought to invalidate legislation and the common law relating to the definition of death, and replace them with a new definition that allowed for religious accommodation, on the basis that existing law violated the appellant's *Charter* rights. A *Charter* rights claim invokes the court's extraordinary power under s. 52 of the *Constitution Act, 1982* to declare law, including legislation, to be of no force or effect.

[56] With the second argument – the *Charter* values argument – the appellant requested that the court use its inherent power to modify the common law to require religious accommodation. Whereas *Charter* rights can only be invoked

against legislation and government action, *Charter* values can be used in litigation between private parties to guide incremental change to the common law. The distinction between these two bases for changing the law was explained in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at paras. 93-95:

> When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.
>
> In *Dolphin Delivery* … it was noted that the *Charter* sets out those specific constitutional duties which the state owes to its citizens. When government action is challenged, whether it is based on legislation or the common law, the cause of action is founded upon a *Charter* right. The claimant alleges that the state has breached its constitutional duty. The state, in turn, must justify that breach.
>
> …
>
> Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law

> is found to be inconsistent with *Charter* values. [Emphasis in original.]

[57] Because the application judge concluded that the appellant is not a subject of *Charter* rights, she did not proceed to a substantive analysis of the *Charter* rights claims. She expressly stated that she declined to make any findings about the appellant's religious beliefs: at para. 228. Nevertheless, in conducting a *Charter* values analysis in the alternative, the application judge wrongly imported a s. 2(a) *Charter* rights analysis, and made factual findings about the appellant's religious beliefs. In the course of doing so, the application judge made errors of law with respect to s. 2(a) *Charter* rights analysis and *Charter* values methodology, as well as palpable and overriding errors of fact with respect to the appellant's religious beliefs. I will first address the s. 2(a) rights errors and the errors of fact in the context of the s. 2(a) rights analysis that ought to have been undertaken, and then address the *Charter* values analysis.

[58] In what follows immediately, I set out the applicable doctrine of freedom of religion, review the evidence of the appellant's religious beliefs, and conclude that the appellant's beliefs come within the protection of s. 2(a). The more ultimate question of whether the appellant's s. 2(a) rights have been limited is better left, however, to a case with a more developed record. Neither would it be appropriate here to assume a first-stage finding that a *Charter* right has been *limited*, for the purpose of continuing with a second-stage inquiry into whether a *Charter* right has

been *violated*. A finding of a *Charter* rights violation, where the limit in question is prescribed by law, can only be made after a s. 1 inquiry in which it is determined that the limit is not justified. Justification of a limit requires that a court consider the reasons for the limitation. The proper party to supply those reasons and defend the limitation is, in this case, the Attorney General for Ontario. As that party was not before the court, there is no record that would allow for an assessment of the reasonableness of the limit, and I would decline to do so in this moot appeal.

a. *Charter rights*

i. Freedom of religion under s. 2(a)

[59] A claimant establishes a limit on the exercise of a s. 2(a) right by showing, (1) a sincere belief having a nexus with religion; and (2) state conduct that interferes with the ability to act in accordance with these religious beliefs in a manner that is more than trivial or insubstantial: Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed. (Markham: LexisNexis Canada, 2017), at p. 614; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; and *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 63.

[60] The breadth of the interests protected by this fundamental freedom has been continually stressed from the earliest articulations of s. 2(a) doctrine in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 336-37:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.
>
> …
>
> Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.

[61] Freedom of religion thus encompasses not only the right to hold beliefs and engage in private or corporate acts of worship, but also to manifest those beliefs publicly through conduct and practices that are shaped by those beliefs.

[62] The reason why religious belief is deserving of constitutional protection was explored in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759: “to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one’s conduct and practices.” For the religious believer, religion shapes the understanding of what is right and wrong, permissible and impermissible, mandatory and optional. As expressed by

Sachs J. of the Constitutional Court of South Africa in *Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (4) S.A. 757, at para. 36:

> For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. … It affects the believer's view of society and founds the distinction between right and wrong.

[63] The protection of religious conscience is not a matter of protecting lifestyle choices, but of not interfering with what a person understands to be an obligation, regardless of whether it is something she desires or would much rather avoid. For this reason, "subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience": *Big M*, at p. 337.

[64] What, then, were the beliefs of the appellant?

The religious beliefs of the appellant

[65] The record before the application judge on the question of the appellant's religious beliefs was sparse. The only evidence of the appellant's religious beliefs came from the fourth affidavit of Mr. Stewart (the appellant's father), sworn on November 5, 2017, and his cross-examination on that affidavit.

[66] Mr. Stewart identified the appellant as a “lifelong Christian” who attended a Baptist church when with him and her grandparents, and a Seventh-day Adventist church when with her mother’s side of the family.

[67] Her father stated that the appellant made clear to him “that she wanted to have her life preserved, including through life support measures, so long as her heart was beating.” He attributed her opposition to the withdrawal of life support to what he characterized as a Christian theology: “[her] world view and belief has always been that it is not the brain, but the beating heart that determines and is essential to life.” The rejection of brain death as a criterion for death was characterized by him as “prescribed by her Christian beliefs and faith”; “it would be against [her] fundamental and express religious beliefs to withdraw mechanical ventilation, and to allow the determination of her death by neurological criteria to stand.” Accordingly, he asserted that cessation of life support while her heart was still beating would be a wrongful taking of life – it would be murder. It would be just as wrong for her to acquiesce in her killing (and for her substitute decision-maker to do so for her).

[68] When Mr. Stewart was asked on cross-examination why he believed the appellant shared his understanding of this particular religious norm, he replied:

> Well, I would say that because that is one, was the [view] that I was raised on, that life begins with conception, and life ends up when your heart stops beating, and your soul leave[s] your body. That’s the – that’s the context of, I

> was taught as a, as a young man growing up from my family. And that's the same value system that I've passed down to my four children, and my granddaughter as well. So, growing up, that would be the way that I would have instructed my children, or taught them in, in relation to life and death.

[69] It would have been helpful had the evidence of the appellant's religious beliefs been more fully developed. There was, for example, no evidence as to whether the religious beliefs propounded by Mr. Stewart on the appellant's behalf were understood to be universally held by Christians, unique to particular Christian denominations such as Baptist and Seventh-day Adventist, or idiosyncratic to the appellant and her family. The freedom of religion guarantee, of course, does not depend on whether one's religious beliefs are shared by one's coreligionists or indeed by anyone else: *Amselem*, at para. 54. A claimant is under no obligation to provide any evidence that these beliefs are held by others. But where, as here, a rights claimant professes membership in a particular religious community, it can be helpful if there is some evidence before the court as to the beliefs of that community, simply to help the judge understand what the claimant believes. Even where the rights claimant dissents from the beliefs of her community in some respect, the community teachings or precepts can serve as a point of contrast to bring the claimant's beliefs into sharper focus. Here, for example, the appellant's end-of-life ethics might have been clarified by contrast with the principle of inviolability or sanctity of life (itself incorporated into the common law, and later modified in cases such as *Rodriguez v. British Columbia (Attorney General)*, [1993]

3 S.C.R. 519 and *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331) that although one may never intentionally take the life of the morally innocent, no one is under any obligation to accept every life-extending treatment, no matter how burdensome or futile: John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalization*, 2nd ed. (New York: Cambridge University Press, 2018), at pp. 38-49 and 397-404.

[70] Parties should not assume that judges share or can readily understand their religious commitments without assistance. As Prof. Dwight Newman recently cautioned in "Judicial Method on Rights Conflicts in the Context of Religious Identity" in Iain T. Benson & Barry W. Bussey, eds., *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis, 2017) 245 at p. 257:

> [C]ourts within a more secularized society … may simply not have sufficiently extensive knowledge about religion. Tests in the religious-freedom context are often designed so as to avoid the need for judges to inquire into the details of religious beliefs … but some understanding of religious beliefs will nonetheless be unavoidable in various contexts. Canadian courts have largely not tended to offer discussions of religion that show much understanding of religion's deep significance to those of faith.

[71] The failure of courts to accurately describe the religious practices and beliefs of parties from the point of view of the people whose beliefs they are, has drawn academic criticism: in addition to Newman, see Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto:

University of Toronto Press, 2015); and Howard Kislowicz, “Faithful Translations? Cross-Cultural Communications in Canadian Religious Freedom Litigation” (2014) 52 Osgoode Hall L.J. 141.

[72] Without adequate evidence, judges will not be well-placed either to provide an adequate description of a claimant’s beliefs, or to understand the significance of the limitation from the perspective of the rights claimant. This places a judge in a difficult position throughout the constitutional analysis, but particularly when assessing whether a limit on freedom of religion is justified. A clearer evidential record may have prevented the application judge from mischaracterizing the appellant’s evidence.

The application judge’s s. 2(a) errors

[73] The appellant sought to fulfill what she understood to be her obligation, as informed by religious teaching, to observe an exceptionless moral norm. As I explain below, the application judge mischaracterized the appellant’s claim as a matter of protection from interference with worship: protecting her “spiritual focal point of worship” and “object of belief”. As the appellant’s claim was not about protecting the object of her worship, or with interference with worship generally, the application judge erred in analogizing the claim to the one advanced in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386.

[74] *Ktunaxa* presented a novel claim under s. 2(a). A First Nation in British Columbia objected to government approval of a land development project on the basis that the development would, as a side effect, cause the departure of the Grizzly Bear Spirit, a spiritual entity believed to inhabit that geographic area. The development would thus desecrate a place of great spiritual significance to the Ktunaxa. The claim was that the development would "remove the basis of [the Ktunaxa Nation's] beliefs and render their practices futile": at para. 59. The Supreme Court majority understood the Ktunaxa to be seeking to protect "the presence of Grizzly Bear Spirit in Qat'muk." As such, it characterized the claim as a matter of using s. 2(a) to protect "the object of beliefs" and "the spiritual focal point of worship", the Grizzly Bear Spirit itself: at paras. 70-71. The court held that s. 2(a) does not protect the "object of beliefs".

[75] Relying on *Ktunaxa*, the application judge concluded "the *Charter* value of religious freedom does not extend to protecting the object of the belief which, in this case, is the soul." The application judge concluded that the appellant sought to protect "not just her belief, but to protect the soul which she believes does not leave the body until the heart stops beating."

[76] It is not at all clear what the application judge meant by soul or protection of the soul. The appellant's claim was not framed in these terms. As I understand the evidence of Mr. Stewart, the relevant religious beliefs of the appellant can be summarized as follows. First, a human being remains alive until such time as his

or her heart stops beating. Second, there is a divinely instituted and exceptionless moral norm that one must never intentionally kill a human person, including self-killing and acquiescing in one's own killing. Third, ending life support of a person whose brain is dead but heart is beating constitutes intentional killing of a human person. Fourth, to breach this norm against killing (including acquiescing in one's own killing) is to choose to defy God and to separate oneself from him.

[77] In short, on the evidence of Mr. Stewart, the appellant understood that she had a religious obligation to have life support maintained as long as she was alive, which she understood – according to the tenets of her religious faith – to be determined by whether her heart was beating. Insisting that she be recognized as a living human person who is entitled to all the benefits of law and membership in a political community is a manifestation of that religious belief.

[78] To succeed on a s. 2(a) claim, a claimant must demonstrate that she has a sincere belief or practice that has a nexus with religion, and that the impugned state conduct interferes in a manner that is more than trivial or insubstantial with the ability to manifest that belief: *Trinity Western*, at para. 63; *Amselem*, at para. 65. Although the record is sparse, I would conclude that it is sufficient to establish that the appellant held the beliefs attributed to her by her father, that these beliefs were sincerely held, and that they have the requisite nexus with religion to come within the protection of s. 2(a) of the *Charter*.

[79] A more difficult question, given the state of the record would be whether these beliefs, and the practices associated with them, have been limited by legislation or the common law. That question is best left to a case in which the record related to the beliefs of the claimant is more fully developed than this record.

ii. Section 1: limitations on rights

[80] Again, in order to clarify the methodology to be followed in future adjudication, it is appropriate to comment briefly on the s. 1 analysis that follows a finding that the exercise of a s. 2(a) right has been limited.

[81] It is only possible to determine that a claimant's *Charter* rights have been violated after considering whether the limit placed on the exercise of a *Charter* right is justified. A finding of a rights limitation at the first stage of the analysis is not a finding that a claimant's rights have been violated, which is the product of the second stage analysis under s. 1.

[82] It is at this stage of the analysis that a court would address the claim that some regime of religious accommodation, as is found in the legislation of some American states, could potentially remedy an unjustified limitation. As noted above, however, there is no record on which to base a s. 1 analysis. Although the application judge speculated about floodgates, impacts on health care resources, and difficulties in administrating a regime of reasonable religious accommodation, there was no evidence on which to make any findings in this regard.

iii. Section 7 and 15(1) claims

[83] Counsel for the appellant conceded in oral argument that the appellant's claim of violations of ss. 7 and 15(1) of the *Charter* depend on the success of the claim that her s. 2(a) rights have been violated by governmental reliance on the common law acceptance of neurological criteria as a determinant of death. Absent a finding that there is an obligation to accommodate the religious conviction that a person who has suffered brain death is not dead, the appellant has not advanced any theory as to how she could bring herself within the protections of the *Charter*. As explained, with these parties and this record, it is not possible to conduct a s. 1 analysis and thereby determine whether the *prima facie* limit on the appellant's exercise of her s. 2(a) rights is, all things considered, a *Charter* violation. Given that this is a moot appeal and that it is not possible to make the determination that is a necessary precondition to establishing either the s. 7 or s. 15(1) claims, it would be inadvisable to engage in an adjudication of those claims. However, nothing in the reasons should be taken as an endorsement of the application judge's s. 7 or s. 15(1) analyses.

b. Charter values - modification of the common law

[84] The application judge considered an alternative basis for the appellant's claim – that the common law rule recognizing total brain death as a criterion of death is inconsistent with *Charter* values and should therefore be modified so as

not to apply to persons whose religious beliefs preclude the acceptance of total brain death as a determinant of death.

[85] The application judge concluded that "[t]he common law definition of death as including brain death is not inconsistent with the *Charter* value of religious belief to believe in the soul and to manifest that belief." In the alternative, she found that if "the common law definition of death as including brain death does violate the *Charter* value of religious freedom, the competing value which must be considered is that of a need for certainty, predictability and clarity in the law regarding the determination of death." The application judge concluded that the religious accommodation sought by the appellant would create the potential for disputes among family members as to the actual religious beliefs of the patient, as well as the type, extent, and duration of medical services to be provided. It would create confusion among physicians as to their obligations. It would complicate other legal disputes where ascertaining the date and time of death is relevant, it would impose additional costs on the public health care system, and have possible adverse impact on the organ donation system. Taking these concerns into account, the application judge concluded that "the common law definition of death as including brain death is consistent with *Charter* values."

[86] As explained below, the application judge erred in this analysis, both with respect to common law and *Charter* values methodology generally, and specifically with respect to the application of freedom of religion and other relevant principles.

i. *Charter* values methodology

[87] In litigation between private parties, it is open to a party to argue that an applicable common law principle or rule is inadequate in some respect and ought to be changed. In deciding whether it would be appropriate to modify the common law, courts must consider the reasons for the proposed change. To identify relevant considerations and to minimize judicial subjectivity, courts have sometimes sought guidance from principles that motivated the enactment of particular provisions of constitutional texts, including the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603. The various moral norms, principles, and aspects of well-being associated with the particular provisions of the *Charter* are sometimes referred to as "*Charter* values".

[88] *Charter* values are not *Charter* rights by another name or in a different setting; they are a different juridical concept. They do not extend the application of *Charter* rights by imposing *Charter* duties on private parties: *Hill*, at para. 95. Although they can supply a reason to change the common law, they cannot be used to invalidate legislation.

[89] *Charter* values are, essentially, a catalogue of some of the human goods that judges can use in legal reasoning, all of which were known to the common law prior to the enactment of the *Charter*, though of course imperfectly realized. As Dickson C.J. noted in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, "the underlying

values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter*".

[90] Recent decisions from the Supreme Court and this court have scrutinized the use of *Charter* values. There is a concern that although the concept of *Charter* values is intended to reduce judicial subjectivity in moral reasoning, the selection of *Charter* values and their prioritization are both unavoidably idiosyncratic: see *Trinity Western*, *per* McLachlin C.J. (concurring), at para. 111, *per* Rowe J. (concurring in the result), at paras. 171-72, and *per* Côté and Brown JJ. (dissenting) at paras. 307-11; see also *Gehl v. Canada (Attorney General),* 2017 ONCA 319, 138 O.R. (3d) 52, at para. 79; *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, 140 O.R. (3d) 11, at paras. 103-4. *Charter* values, unlike *Charter* rights, are not taken from a canonical text. There is no methodology to guide the degree of abstraction at which they are formulated, or to resolve claims of priority when they conflict. Their formulation and use in judicial reasoning should therefore be approached with careful attention to the rules that govern their use in different contexts.

[91] Appeals to *Charter* values have been made in five main adjudicative contexts: (1) common law reasoning, (2) statutory interpretation, (3) exercises of discretion by judges and administrative decision-makers, (4) *Charter* rights limitations analysis in administrative law, and (5) *Charter* rights limitations analysis in the context of *Charter* challenges to legislation. In each context, there are

different rules that govern how *Charter* values can be used. As a result, it cannot be assumed that case law governing the use of *Charter* values in one context can be transposed to another. This is particularly the case in the context of administrative law, where the relationship between *Charter* rights and *Charter* values remains unsettled: see e.g. *Trinity Western,* at paras. 41 and 169.

ii. *Charter* values and the common law

[92] In the context of a proposal to change a common law rule, the use of appeals to *Charter* values are subject to the ordinary constraints on making changes to the common law. The obligation to interpret the common law in a manner consistent with *Charter* principles "is simply a manifestation of the inherent jurisdiction of the court to modify or extend the common law": *Hill*, at para. 94. A court's power to change the common law is unlike the legislature's wholesale power to amend or repeal statutes, and must be exercised interstitially. The reasons for avoiding far-reaching change were articulated by McLachlin J. in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the

> choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

[93] In *Hill*, the Supreme Court explained that the constraints on the power of the judiciary to change the law are no different where the reason for the change is to better align the common law with *Charter* values or other moral norms. “Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking *Charter* values into account. Far-reaching changes to the common law must be left to the legislature”: *Hill*, at para. 96.

[94] Even where it would be appropriate – according to the criteria articulated in *Watkins* and *Hill* – for a judge to amend the common law, a judge who seeks to be guided by *Charter* values and thereby avoid idiosyncrasy faces the hidden traps mentioned above: (1) the problem of identifying or choosing *Charter* values; and (2) the problem of prioritizing particular *Charter* values against other considerations.

[95] As noted above, there is no set list of *Charter* values, or canonical formulation of them. The category of *Charter* values is extremely broad, including human goods derived from the enumerated rights and freedoms, from s. 1’s

principles of a free and democratic society, and entailments from even more abstract principles, such as human dignity, as in *Hill*, at para. 120. So a judge who would rely on *Charter* values in common law reasoning must not only select some values from among others, but must formulate them at an appropriate level of abstraction. The Supreme Court has provided some guidance in this regard.

[96] The methodology for applying *Charter* values in common law reasoning has been most fully developed in cases addressing the moral norms associated with freedom of expression: see e.g. *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835; and *Hill*. The first step in the methodology applied in those cases was to identify the core rationales or purposes behind the adoption of the *Charter* right – that is, those aspects of human flourishing the *Charter* right is intended to promote. In the case of s. 2(b), the underlying purpose has been characterized as a matter of furthering democratic discourse, truth-finding, and self-fulfillment: *Irwin Toy*, at p. 976.

[97] Having considered why and how the constitutional provision in question furthers human well-being, the second step is to consider whether the impugned common law rule (in the s. 2(b) cases, often the law of defamation and its defences) adequately promotes or protects these goods, when considered alongside competing goods.

[98] In the context of a proposal to change a common law rule where freedom of religion is of concern, an appeal to the *Charter* values corresponding to freedom of religion must therefore be a deeper inquiry than simply reading off the text of the *Charter*. It requires an account, similar to that provided in the context of freedom of expression in *Irwin Toy*, of the human goods served by protecting the right. Without this, it would be difficult to engage in the appropriate reconciliation of principle.

[99] With respect to weight or priority, although what has been characterized as a *Charter* value may be significant to judicial reasoning, it does not have indefeasible priority over competing considerations: *Gehl*, at paras. 78-82. Although a fully specified *Charter* right (that is, a right whose limitation has been found to have been justified under s. 1) operates as a trump, a *Charter* value does not. Accordingly, in common law reasoning, it may be that little turns on whether a reason for modifying the common law is characterized as a *Charter* value or not. What matters is the salience of the reason for changing the law and not the label that is attached to it: *E.T. v. Hamilton*, at para. 104.

iii. The application judge's *Charter* values analysis

[100] The application judge's formulation of the relevant *Charter* value was stated in terms of s. 2(a): "the value protected by s. 2(a) is the right to hold religious beliefs and manifest those beliefs without fear or coercion." This formulation, however, is

simply a restatement of the scope of the *Charter* right and is not adequate. As in *Grant*, *Dagenais*, and *Hill*, to get to a principle it is necessary to ask what reason there is to respect conscientious religious beliefs and acts of persons. It is necessary to explain how the manifestation of the particular religious belief in question is important from the perspective of the claimant: a person who engages in religious practice in order to understand truths about the world. This would involve an analysis of the type outlined in paragraphs 59-62 above, in the discussion of s. 2(a) rights. But the analysis is not necessarily restricted to principles that are directly analogous to the substantive *Charter* rights. Other salient principles would include, for example, the inviolability of life: *Rodriguez*, at p. 595; *Carter*, at para. 63.

[101] The application judge also identified competing principles as *Charter* values, including “a need for certainty, predictability and clarity in the law regarding the determination of death.” In addition to these, she raised concerns about unjustifiably privileging some religions over others, the financial cost of maintaining the appellant in an intensive care unit, and the impact on the organ donation system. The application judge ultimately concluded that the consideration of all of the relevant matters of principle “are beyond the scope of this court to consider but must be addressed if there is to be an accommodation of religious beliefs in the determination of death.”

[102] As outlined above, the reasoning of the application judge, including the inadequate characterization of the nature of freedom of religion, the idiosyncratic identification of “a need for certainty, predictability and clarity in the law regarding the determination of death” as *Charter* values, and the equally idiosyncratic “weighing” of the various *Charter* values against each other, amply illustrates the difficulties inherent in using *Charter* values to amend the common law.

[103] Given the deficiencies in the record, whether a common law rule should be crafted to provide accommodation for persons whose religious convictions cannot accept neurological criteria for death, is a question that must, ultimately, be left for another case. I would not, on this record in a moot appeal, attempt to determine whether such a change to the law is within the institutional capacity of courts to make incremental changes to the common law or is the type of far-reaching change that must be left to the legislature.

(5) The jurisdiction of the Consent and Capacity Board

[104] This is not an appropriate case to determine the jurisdiction of the Consent and Capacity Board. Such a review should be by way of judicial review of an actual decision of the Board by the appropriate court.

(6) Leave to appeal costs

[105] Costs were awarded against the appellant in the court below. The appellant argued below for an order for special costs on the basis that the appellant is a

public interest litigant. The application judge refused to grant costs on this basis. It must be noted that the party from whom costs were sought was Dr. Hayani, a private party, and not the Crown. I would deny leave to appeal the costs award below.

E. DISPOSITION

[106] I would dismiss the appeal and dismiss the motion for leave to appeal the award of costs below. As the respondent is not seeking costs, I would make no order as to costs of the appeal.

Released: “DD” OCT 9 2019

“B.W. Miller J.A.”
“I agree. Doherty J.A.”
“I agree. David M. Paciocco J.A.”