

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

**Sue Rodriguez**

*Appellant*

v.

**The Attorney General of Canada and  
the Attorney General of British Columbia**

*Respondents*

and

**British Columbia Coalition of People  
with Disabilities, Dying with Dignity,  
Right to Die Society of Canada, Coalition  
of Provincial Organizations of the Handicapped,  
Pro-Life Society of British Columbia,  
Pacific Physicians for Life Society,  
Canadian Conference of Catholic Bishops,  
Evangelical Fellowship of Canada, and People  
in Equal Participation Inc.**

*Interveners*

**Indexed as: Rodriguez v. British Columbia (Attorney General)**

File No.: 23476.

1993: May 20; 1993: September 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory,  
McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

*Constitutional law -- Charter of Rights -- Life, liberty and security of the person -- Fundamental justice -- Terminally ill patient seeking assistance to commit suicide -- Whether Criminal Code provision prohibiting aiding a person to commit suicide infringes s. 7 of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Remedies available if Charter infringed -- Criminal Code, R.S.C., 1985, c. C-46, s. 241(b).*

*Constitutional law -- Charter of Rights -- Equality rights -- Discrimination on basis of physical disability -- Terminally ill patient seeking assistance to commit suicide -- Whether Criminal Code provision prohibiting aiding a person to commit suicide infringes s. 15(1) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Remedies available if Charter infringed -- Criminal Code, R.S.C., 1985, c. C-46, s. 241(b).*

*Constitutional law -- Charter of Rights -- Cruel and unusual punishment -- Terminally ill patient seeking assistance to commit suicide -- Whether Criminal Code provision prohibiting aiding a person to commit suicide infringes s. 12 of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Remedies available if Charter infringed -- Criminal Code, R.S.C., 1985, c. C-46, s. 241(b).*

The appellant, a 42-year-old mother, suffers from amyotrophic lateral sclerosis. Her condition is rapidly deteriorating and she will soon lose the ability to swallow, speak, walk and move her body without assistance. Thereafter she will lose the capacity to breathe without a respirator, to eat

without a gastrotomy and will eventually become confined to a bed. Her life expectancy is between 2 and 14 months. The appellant does not wish to die so long as she still has the capacity to enjoy life, but wishes that a qualified physician be allowed to set up technological means by which she might, when she is no longer able to enjoy life, by her own hand, at the time of her choosing, end her life. The appellant applied to the Supreme Court of British Columbia for an order that s. 241(b) of the *Criminal Code*, which prohibits the giving of assistance to commit suicide, be declared invalid on the ground that it violates her rights under ss. 7, 12 and 15(1) of the *Charter*, and is therefore, to the extent it precludes a terminally ill person from committing "physician-assisted" suicide, of no force and effect by virtue of s. 52(1) of the *Constitution Act, 1982*. The court dismissed the appellant's application and the majority of the Court of Appeal affirmed the judgment.

*Held* (Lamer C.J. and L'Heureux-Dubé, Cory and McLachlin JJ. dissenting): The appeal should be dismissed. Section 241(b) of the *Code* is constitutional.

*Per* La Forest, Sopinka, Gonthier, Iacobucci and Major JJ.: The appellant's claim under s. 7 of the *Charter* is based on an alleged violation of her liberty and security of the person interests. These interests cannot be divorced from the sanctity of life, which is the third value protected by s. 7. Even when death appears imminent, seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life as a value is also engaged in the present case. Appellant's security of the person interest must be considered in light of the other values mentioned in s. 7.

Security of the person in s. 7 encompasses notions of personal autonomy (at least with respect to the right to make choices concerning one's own body), control over one's physical and psychological integrity which is free from state interference, and basic human dignity. The prohibition in s. 241(b), which is a sufficient interaction with the justice system to engage the provisions of s. 7, deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. Any resulting deprivation, however, is not contrary to the principles of fundamental justice. The same conclusion is applicable with respect to any liberty interest which may be involved.

The expression "principles of fundamental justice" in s. 7 of the *Charter* implies that there is some consensus that these principles are vital or fundamental to our societal notion of justice. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also be legal principles. To discern the principles of fundamental justice governing a particular case, it is helpful to review the common law and the legislative history of the offence in question and, in particular, the rationale behind the practice itself (here, the continued criminalization of assisted suicide) and the principles which underlie it. It is also appropriate to consider the state interest. Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual. The respect for human dignity, while one of the underlying principles upon which our society is based, is not a principle of fundamental justice within the meaning of s. 7.

Assisted suicide, outlawed under the common law, has been prohibited by Parliament since the adoption of Canada's first *Criminal Code*. The long-standing blanket prohibition in s. 241(b), which fulfils the government's objective of protecting the vulnerable, is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This state policy is part of our fundamental conception of the sanctity of life. A blanket prohibition on assisted suicide similar to that in s. 241(b) also seems to be the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. These societies, including Canada, recognize and generally apply the principle of the sanctity of life subject to narrow exceptions where notions of personal autonomy and dignity must prevail. Distinctions between passive and active forms of intervention in the dying process continue to be drawn and assisted suicide in situations such as the appellant's is prohibited with few exceptions. No consensus can be found in favour of the decriminalization of assisted suicide. To the extent that there is a consensus, it is that human life must be respected. This consensus finds legal expression in our legal system which prohibits capital punishment. The prohibition against assisted suicide serves a similar purpose. Parliament's repeal of the offence of attempted suicide from the *Criminal Code* was not a recognition that suicide was to be accepted within Canadian society. Rather, this action merely reflected the recognition that the criminal law was an ineffectual and inappropriate tool for dealing with suicide attempts. Given the concerns about abuse and the great difficulty in creating appropriate safeguards, the blanket prohibition on assisted suicide is not arbitrary or unfair. The prohibition relates to the state's interest in protecting

the vulnerable and is reflective of fundamental values at play in our society. Section 241(b) therefore does not infringe s. 7 of the *Charter*.

As well, s. 241(b) of the *Code* does not infringe s. 12 of the *Charter*. The appellant is not subjected by the state to any form of cruel and unusual treatment or punishment. Even assuming that "treatment" within the meaning of s. 12 may include that imposed by the state in contexts other than penal or quasi-penal, a mere prohibition by the state on certain action cannot constitute "treatment" under s. 12. There must be some more active state process in operation, involving an exercise of state control over the individual, whether it be positive action, inaction or prohibition. To hold that the criminal prohibition in s. 241(b), without the appellant being in any way subject to the state administrative or justice system, falls within the bounds of s. 12 would stretch the ordinary meaning of being "subjected to . . . treatment" by the state.

It is preferable in this case not to decide the difficult and important issues raised by the application of s. 15 of the *Charter*, but rather to assume that the prohibition on assisted suicide in s. 241(b) of the *Code* infringes s. 15, since any infringement of s. 15 by s. 241(b) is clearly justified under s. 1 of the *Charter*. Section 241(b) has a pressing and substantial legislative objective and meets the proportionality test. A prohibition on giving assistance to commit suicide is rationally connected to the purpose of s. 241(b), which is to protect and maintain respect for human life. This protection is grounded on a substantial consensus among western countries, medical organizations and our own Law Reform Commission that in order to protect life and those who are vulnerable in society effectively, a prohibition without exception on the giving

of assistance to commit suicide is the best approach. Attempts to modify this approach by creating exceptions or formulating safeguards to prevent excesses have been unsatisfactory. Section 241(b) is thus not overbroad since there is no halfway measure that could be relied upon to achieve the legislation's purpose fully. In dealing with this contentious, complex and morally laden issue, Parliament must be accorded some flexibility. In light of the significant support for s. 241(b) or for this type of legislation, the government had a reasonable basis for concluding that it had complied with the requirement of minimum impairment. Finally, the balance between the restriction and the government objective is also met.

*Per L'Heureux-Dubé and McLachlin JJ. (dissenting):* Section 241(b) of the *Code* infringes the right to security of the person included in s. 7 of the *Charter*. This right has an element of personal autonomy, which protects the dignity and privacy of individuals with respect to decisions concerning their own body. A legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under s. 7 if the limit is arbitrary. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation. When one is considering whether a law breaches the principles of fundamental justice under s. 7 by reason of arbitrariness, the focus is on whether a legislative scheme infringes a particular person's protected interests in a way that cannot be justified having regard to the objective of this scheme. The principles of fundamental justice require that each person, considered individually, be treated fairly by the law. The fear that abuse may arise if an individual is permitted that which she is wrongly denied plays no part at the s. 7 stage. Any balancing

of societal interests against the interests of the individual should take place within the confines of s. 1 of the *Charter*. Here, Parliament has put into force a legislative scheme which makes suicide lawful but assisted suicide unlawful. The effect of this distinction is to deny to some people the choice of ending their lives solely because they are physically unable to do so, preventing them from exercising the autonomy over their bodies available to other people. The denial of the ability to end their life is arbitrary and hence amounts to a limit on the right to security of the person which does not comport with the principles of fundamental justice.

Section 241(b) of the *Code* is not justified under s. 1 of the *Charter*. The practical objective of s. 241(b) is to eliminate the fear of lawful assisted suicide's being abused and resulting in the killing of persons not truly and willingly consenting to death. However, neither the fear that unless assisted suicide is prohibited, it will be used for murder, nor the fear that consent to death may not in fact be given voluntarily, is sufficient to override appellant's entitlement under s. 7 to end her life in the manner and at the time of her choosing. The safeguards in the existing provisions of the *Criminal Code* largely meet the concerns about consent. The *Code* provisions, supplemented, by way of remedy, by a stipulation requiring a court order to permit the assistance of suicide in a particular case only when the judge is satisfied that the consent is freely given, will ensure that only those who truly desire to bring their lives to an end obtain assistance.

Section 15 of the *Charter* has no application in this case. This is not a case about discrimination and to treat it as such may deflect the equality jurisprudence from the true focus of s. 15.

Although some of the conditions stated by Lamer C.J. seem unnecessary in this case, the remedy proposed is generally agreed with. What is required will vary from case to case. The essential in all cases is that the judge be satisfied that if and when the assisted suicide takes place, it will be with the full and free consent of the applicant.

*Per* Lamer C.J. (dissenting): Section 241(b) of the *Code* infringes the right to equality contained in s. 15(1) of the *Charter*. While, at first sight, s. 241(b) is apparently neutral in its application, its effect creates an inequality since it prevents persons physically unable to end their lives unassisted from choosing suicide when that option is in principle available to other members of the public without contravening the law. This inequality -- the deprivation of the right to choose suicide -- may be characterized as a burden or disadvantage, since it limits the ability of those who are subject to this inequality to take and act upon fundamental decisions regarding their lives and persons. For them, the principles of self-determination and individual autonomy, which are of fundamental importance in our legal system, have been limited. This inequality is imposed on persons unable to end their lives unassisted solely because of a physical disability, a personal characteristic which is among the grounds of discrimination listed in s. 15(1).

Section 241(b) of the *Code* is not justifiable under s. 1 of the *Charter*. While the objective of protecting vulnerable persons from being pressured or coerced into committing suicide is sufficiently important to warrant overriding a constitutional right, s. 241(b) fails to meet the proportionality test. The prohibition of assisted suicide is rationally connected to the legislative objective, but the means chosen to carry out the objective do not impair the appellant's equality rights as little as reasonably possible. The vulnerable are effectively protected under s. 241(b) but the section is over-inclusive. Those who are not vulnerable or do not wish the state's protection are also brought within the operation of s. 241(b) solely as a result of a physical disability. An absolute prohibition that is indifferent to the individual or the circumstances cannot satisfy the constitutional duty on the government to impair the rights of persons with physical disabilities as little as reasonably possible. The fear that the decriminalization of assisted suicide will increase the risk of persons with physical disabilities being manipulated by others does not justify the over-inclusive reach of s. 241(b).

In view of the findings under s. 15(1), there is no need to address the constitutionality of the legislation under ss. 7 or 12 of the *Charter*.

Pursuant to s. 52(1) of the *Constitution Act, 1982*, s. 241(b) is declared to be of no force or effect, on the condition that the effect of this declaration be suspended for one year from the date of this judgment to give Parliament adequate time to decide what, if any, legislation should replace s. 241(b). While a personal remedy under s. 24(1) of the *Charter* is rarely available in conjuncture with action under s. 52(1), it is appropriate in this case

to grant the appellant, subject to compliance with certain stated conditions, a constitutional exemption from the operation of s. 241(b) during the period of suspension. A constitutional exemption may only be granted during the period of a suspended declaration of invalidity. During that one-year suspension period, this exemption will also be available to all persons who are or will become physically unable to commit unassisted suicide and whose equality rights are infringed by s. 241(b), and it may be granted by a superior court upon application if the stated conditions, or similar conditions tailored to meet the circumstances of particular cases, are met.

*Per Cory J. (dissenting):* Substantially for the reasons given by Lamer C.J. and McLachlin J., s. 241(b) of the *Code* infringes ss. 7 and 15(1) of the *Charter* and is not justifiable under s. 1 of the *Charter*.

Section 7 of the *Charter*, which grants Canadians a constitutional right to life, liberty and the security of the person, is a provision which emphasizes the innate dignity of human existence. Dying is an integral part of living and, as a part of life, is entitled to the protection of s. 7. It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.

There is no difference between permitting a patient of sound mind to choose death with dignity by refusing treatment and permitting a patient of sound mind who is terminally ill to choose death with dignity by terminating

life preserving treatment, even if, because of incapacity, that step has to be physically taken by another on her instructions. Nor is there any reason for failing to extend that same permission so that a terminally ill patient facing death may put an end to her life through the intermediary of another. Since the right to choose death is open to patients who are not physically handicapped, there is no reason for denying that choice to those that are. This choice for a terminally ill patient would be subject to conditions. With those conditions in place, s. 7 of the *Charter* can be applied to enable a court to grant the relief proposed by Lamer C.J.

Section 15(1) of the *Charter* can also be applied to grant the same relief at least to handicapped terminally ill patients.

### **Cases Cited**

By Sopinka J.

**Applied:** *R. v. Morgentaler*, [1988] 1 S.C.R. 30; **referred to:** *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Beare*, [1988] 2 S.C.R. 387; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385; *Malette v. Shulman* (1990), 72 O.R. (2d) 417; *Cruzan v. Director, Missouri Health Department* (1990), 111 L. Ed. 2d 224; *Airedale N.H.S.*

*Trust v. Bland*, [1993] 2 W.L.R. 316; Application No. 10083/82, *R. v. United Kingdom*, July 4, 1983, D.R. 33, p. 270; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Smith*, [1987] 1 S.C.R. 1045; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Soenen v. Director of Edmonton Remand Centre* (1983), 6 C.R.R. 368; *R. v. Blakeman* (1988), 48 C.R.R. 222; *Weatherall v. Canada (Attorney General)*, [1988] 1 F.C. 369 (T.D.), rev'd on other grounds, [1989] 1 F.C. 18 (C.A.); *Howlett v. Karunaratne* (1988), 64 O.R. (2d) 418; *Re McTavish and Director, Child Welfare Act* (1986), 32 D.L.R. (4th) 394; *Carlston v. New Brunswick (Solicitor General)* (1989), 43 C.R.R. 105; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

By McLachlin J. (dissenting)

*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Swain*, [1991] 1 S.C.R. 933; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Beare*, [1988] 2 S.C.R. 387; *Cunningham v. Canada*, [1993] 2 S.C.R. 143.

By Lamer C.J. (dissenting)

*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Burke v. Prince Edward Island* (1991), 93 Nfld. & P.E.I.R. 356; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Big M Drug Mart Ltd.*,

[1985] 1 S.C.R. 295; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Swain*, [1991] 1 S.C.R. 933; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, [1985] 3 W.W.R. 717; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Egan and Nesbit v. Canada* (1993), 153 N.R. 161; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Malette v. Shulman* (1990), 72 O.R. (2d) 417; *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, aff'g (1987), 35 C.R.R. 300 (Ont. C.A.); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By Cory J. (dissenting)

*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

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*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 12, 15(1), 24(1).

*Constitution Act, 1982*, s. 52(1).

*Criminal Code*, R.S.C., 1985, ch. C-46, ss. 14, 215 [am. 1991, c. 43, s. 9 (Sch., item 2)], 241(a) [am. c. 27 (1st Supp.), s. 7(3)], (b).

*Criminal Code, 1892*, S.C. 1892, c. 29, ss. 237, 238.

*Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13, s. 16.

*Penal Code (Denmark)*, art. 240.

*Penal Code (France)*, arts. 63, 318-1, 318-2, 319.

*Penal Code (Italy)*, art. 580.

*Penal Code (Spain)*, art. 409.

*Penal Code (Switzerland)*, art. 115.

*Suicide Act, 1961 (U.K.)*, 9 & 10 Eliz. 2, c. 60, s. 2.

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APPEAL from a judgment of the British Columbia Court of Appeal (1993), 76 B.C.L.R. (2d) 145, 22 B.C.A.C. 266, 38 W.A.C. 266, 14 C.R.R. (2d) 34, 79 C.C.C. (3d) 1, [1993] 3 W.W.R. 553, dismissing the appellant's appeal from a judgment of Melvin J. (1992), 18 W.C.B. (2d) 279, [1993] B.C.W.L.D. 347, dismissing the appellant's application for an order declaring s. 241 of the *Criminal Code* invalid. Appeal dismissed, Lamer C.J. and L'Heureux-Dubé, Cory and McLachlin JJ. dissenting.

*Christopher M. Considine and Philip N. Williams, for the appellant.*

*James D. Bissell, Q.C., and Johannes A. Van Iperen, Q.C.,* for the respondent the Attorney General of Canada.

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*James F. Sayre and James W. Pozer,* for the intervener British Columbia Coalition of People with Disabilities.

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*Robyn M. Bell,* for the intervener Right to Die Society of Canada.

*Anne M. Molloy and Janet L. Budgell,* for the intervener COPOH.

*A. G. Henderson, Q.C., and Neil Milton,* for the interveners Pro-Life Society of British Columbia and Pacific Physicians for Life Society.

*Robert M. Nelson and Todd J. Burke,* for the interveners Canadian Conference of Catholic Bishops and Evangelical Fellowship of Canada.

*G. Patrick S. Riley and John A. Myers,* for the intervener People in Equal Participation Inc.

The following are the reasons delivered by

LAMER C.J. (dissenting) --

I. Facts

The facts of this case are straightforward and well known. Sue Rodriguez is a 42-year-old woman living in British Columbia. She is married and the mother of an 8½-year-old son. Ms. Rodriguez suffers from amyotrophic lateral sclerosis (ALS), which is widely known as Lou Gehrig's disease; her life expectancy is between 2 and 14 months but her condition is rapidly deteriorating. Very soon she will lose the ability to swallow, speak, walk and move her body without assistance. Thereafter she will lose the capacity to breathe without a respirator, to eat without a gastrostomy and will eventually become confined to a bed.

Ms. Rodriguez knows of her condition, the trajectory of her illness and the inevitability of how her life will end; her wish is to control the circumstances, timing and manner of her death. She does not wish to die so long as she still has the capacity to enjoy life. However, by the time she no longer is able to enjoy life, she will be physically unable to terminate her life without assistance. Ms. Rodriguez seeks an order which will allow a qualified medical practitioner to set up technological means by which she might, by her own hand, at the time of her choosing, end her life.

Ms. Rodriguez applied to the Supreme Court of British Columbia for an order that s. 241(b) of the *Criminal Code*, R.S.C., 1985, c. C-46, be declared invalid, pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, on the ground that it violates her rights under ss. 7, 12 and 15(1) of the *Charter*, and was therefore, to the extent it prohibits a terminally ill person from committing "physician-assisted" suicide, of no force and effect by virtue of s. 52(1) of the *Constitution Act, 1982*. Melvin J. of the Supreme Court of British Columbia dismissed the appellant's application: (1992), 18 W.C.B. (2d) 279, [1993] B.C.W.L.D. 347. The British Columbia Court of Appeal dismissed the appellant's appeal, McEachern C.J.B.C. dissenting: (1993), 76 B.C.L.R. (2d) 145, 22 B.C.A.C. 266, 38 W.A.C. 266, 14 C.R.R. (2d) 34, 79 C.C.C. (3d) 1, [1993] 3 W.W.R. 553.

## II. Relevant Statutory Provisions

The relevant provision of the *Criminal Code* is as follows:

**241.** Every one who

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

The relevant sections of the *Charter* are as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable

limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

### III. Judgments Below

#### *Supreme Court of British Columbia*

In order to determine whether a right or freedom had been infringed, Melvin J. considered the nature of the right claimed by the appellant, i.e., her right to enjoy her remaining life with the inherent dignity of a human person, the right to control what happens to her body while she is living and the right to have control over the timing, method and circumstances of her death. In the context of s. 7, Melvin J. noted that the appellant based her argument not on a "right to suicide", but on a right to "die with dignity".

Melvin J. observed that in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, the majority of the Court struck down s. 251 of the *Code* as violating a woman's s. 7 right to security of the person on the basis that the effect of the law was to limit a woman's ability to obtain effective and timely "medical treatment". Applying this finding to the case before him, Melvin J. reached the following conclusion:

As to the submission that the right to life, liberty and security of the person of the petitioner and her fundamental choices are affected by s. 241, in my opinion, s. 241 does not impact on her choices. Her choice can be made; the difficulty that she faces is the impact of this disease with reference to the timing of the event she wishes to occur. At best, all the petitioner would have, absent s. 241, would be an opportunity to request a medical professional to assist her in achieving her goal.

Thus, as no physician has a duty to perform the act that the appellant seeks a right to obtain, the right cannot, by definition, be enforced. If anything, the trial judge argued, s. 241(b) interferes with the right of a doctor to assist the appellant if he or she wished to do so. To grant Ms. Rodriguez a remedy under the *Charter*, would, in Melvin J.'s view, be tantamount to imposing a duty on physicians to assist patients who choose to terminate their own lives, which would be "diametrically opposed to the underlying hypothesis upon which a *Charter of Rights and Freedoms* is based, namely, the sanctity of human life".

Melvin J. proceeded to review the purpose of s. 7 and the "Legal Rights" as entrenched under the *Charter*. Based on this analysis, he found that s. 7 will generally come into play when a person is placed in the justice system, and specifically, under the threat of penal sanction or detention. According to the trial judge, Ms. Rodriguez would not come into contact with the criminal justice system regardless of what action she takes; rather, it is the party who assists her in committing suicide who may be placed in jeopardy. In light of this, Melvin J. stated the following:

Her fundamental decisions concerning her life are not restricted by the state. Her illness may restrict her ability to implement her decisions but, in my opinion, that does not amount to an infringement of a right to life, liberty or security of the person by the state. The interests she seeks to protect pursuant to s. 7 are not those

which determine the means by which she may be brought before or within the justice system.

According to the trial judge, the appellant was asking the court to go beyond the judicial domain and into the realm of general public policy, which, as this Court cautioned in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, courts should refrain from doing. Melvin J. concluded that it was the illness from which Ms. Rodriguez suffers, not the state or the justice system, which has impeded her ability to act on her wishes with respect to the timing and manner of her death. Also for this reason, the trial judge found no application of the protection afforded by s. 12 to be free from cruel or unusual treatment.

The trial judge referred to *Burke v. Prince Edward Island* (1991), 93 Nfld. & P.E.I.R. 356 (P.E.I.S.C.), as the only Canadian authority regarding the legal status of suicide. In *Burke*, the court had asserted that s. 7 protects the right to life not to death. Melvin J. added that "[t]o interpret s. 7 so as to include a constitutionally guaranteed right to take one's own life as an exercise in freedom of choice is inconsistent, in my opinion, with life, liberty and the security of the person". Having found no constitutional right at issue under s. 7 of the *Charter* in this case, the trial judge correspondingly found no violation under s. 7 in the operation of s. 241 of the *Code*.

With respect to the appellant's claim under s. 15(1), Melvin J. rejected the argument that because it is not unlawful to refuse life-saving or life-prolonging medical treatment, or to commit suicide, or to accelerate death through therapeutic doses of pain relievers, to make physician-assisted suicide

unlawful discriminates against physically disabled people in the position of Ms. Rodriguez. The trial judge concluded that "[s]ection 241 does not, in my opinion, single out the physically disabled. It is designed to protect, not discriminate; consequently, in my opinion, there has been no violation of that section of the *Charter*".

Finally, in *obiter*, with respect to whether, should an infringement of the *Charter* be found by a higher court, such an infringement could be saved under s. 1, Melvin J. declared that s. 241 would constitute a reasonable limit on the *Charter*, demonstrably justifiable in a free and democratic society. He reasoned that s. 241 safeguards the welfare of persons making the decision to terminate their life in "a moment of weakness" or those who are especially vulnerable to the influence of others, and prevents the possibilities for abuse which arise in sanctioning those who, regardless of motive, aid and abet in the termination of another's life.

*British Columbia Court of Appeal*

McEachern C.J.B.C., dissenting

McEachern C.J. commenced his analysis by outlining the history of the assisted suicide provision at common law and in statutory form. McEachern C.J. characterized this evolution as leading towards what he subsequently referred to as "a fairly recent, enlightened medical-jurisprudential trend towards greater humanity and sensitivity towards the awful problems of terminally ill citizens" (p. 163).

McEachern C.J. canvassed the various options open to the terminally ill which are lawful in Canada, including the right to refuse medical treatment and the right to terminate life-supporting devices. He emphasized however, that should a terminally ill patient opt for physician-assisted suicide, this would not only be unlawful for the doctor, but also could subject the patient to charges of conspiracy and, until his or her death, to the charge of being a party to commit the offence by those assisting him or her.

McEachern C.J. rejected the appellant's contention that the reasonable management of terminal illness does not engage the common law, stating that physician-assisted suicide could not be considered palliative care. According to McEachern C.J., the only route open to Ms. Rodriguez was under the *Charter*. After reviewing the nature of the purposive inquiry into *Charter* rights and its relation to questions of human dignity, McEachern C.J. held the following (at p. 158):

Considering the nature of the rights protected by the *Charter* in other cases, I have no doubt that a terminally ill person facing what the Appellant faces qualifies under the value system upon which the *Charter* is based to protection under the rubric of either liberty or security of her person. This would include at least the lawful right of a terminally ill person to terminate her own life, and, in my view, to assistance under proper circumstances.

It would be wrong, in my view, to judge this case as a contest between life and death. The *Charter* is not concerned only with the fact of life, but also with the quality and dignity of life. In my view, death and the way we die is a part of life itself.

McEachern C.J. supported this finding principally through reliance on the *Morgentaler* decision, and specifically passages highlighting the

flexibility of the protection afforded by the "liberty" and "security of the person" components of s. 7. In his view, a *prima facie* violation of both these components of s. 7 arises when the state imposes prohibitions that have the effect of prolonging the physical and psychological suffering of a person. The question to which McEachern C.J. then turned is whether this deprivation of a terminally ill person's rights under s. 7 may be said to have been done in accordance with the principles of fundamental justice.

McEachern C.J. found in *Morgentaler* support for the position that a provision which operates unequally or causes manifest unfairness would not conform to the substantive element of the principles of fundamental justice. Further, based on the decision in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, McEachern C.J. established that the substantive element of fundamental justice is not confined to matters described in ss. 8 to 14 of the *Charter*. He pointed out at p. 161 that in *Motor Vehicle*, at p. 512, I had held fundamental justice to include whatever might reasonably be expected in and from a society and a system of justice which is "founded upon the belief in the dignity and worth of the human person and the rule of law".

While acknowledging that the case at bar addresses a class of terminally ill people, McEachern C.J. stressed that it was the appellant alone who was before the court. While acknowledging the importance of the policy dimension of this case, he rejected the notion that the courts should abnegate responsibility for interpreting the law and await further direction from Parliament. Finally, with respect to the traditional common law prohibition on suicide, McEachern C.J. found this fact historically interesting but not

particularly relevant to the disposition of this case, noting that Parliament removed this prohibition from the *Code* in 1972.

After describing Canadian society's acceptance of palliative care and recognition of the right of the dying to be left alone if they are lucid, McEachern C.J. reached the following conclusion with respect to whether the deprivation of the terminally ill's s. 7 rights is accomplished in accordance with the principles of fundamental justice (at p. 164):

As already mentioned, s. 7 was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else. When one considers the nobility of such purpose, it must follow as a matter of logic as much as of law, that any provision which imposes an indeterminate period of senseless physical and psychological suffering upon someone who is shortly to die anyway cannot conform with any principle of fundamental justice. Such a provision, by any measure, must clearly be characterized as the opposite of fundamental justice.

Having found a violation of s. 7 of the *Charter*, McEachern C.J. declined to address the other possible infringements under ss. 12 and 15(1). Rather, he turned his attention to s. 1 of the *Charter* to determine if the violation of s. 7 could be demonstrably justified in a free and democratic society.

McEachern C.J. began by noting the inherent difficulty of finding a provision that deprives someone of a right to liberty or security of the person, in a manner not in accordance with the principles of fundamental justice, as nonetheless justified under s. 1. He did not have to face this dilemma, however, as he concluded that s. 241 could not satisfy the *Oakes* test. While s. 241 may have been enacted with a pressing and substantial objective in mind,

McEachern C.J. held that it did not impair the rights of the terminally ill, or of the appellant in particular, as little as possible. Therefore, he found that the violation of s. 7 by the operation of s. 241 of the *Code* could not be justified.

McEachern C.J. found s. 241 to be unconstitutional, but only in so far as the operation of the section affected the appellant in her unique circumstances. While acknowledging the distinction which I drew between remedies under s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982* in *Schachter v. Canada*, [1992] 2 S.C.R. 679, McEachern C.J. preferred to fashion a remedy under s. 24(1), directly tailored to the appellant, but structured so as to offer a guideline to future claimants in analogous circumstances.

Therefore, McEachern C.J. held that the section was inoperative to the extent it affected the appellant and any physician assisting her, and that the appellant could proceed to arrange for physician-assisted suicide, provided certain conditions were met. These conditions were set out in the following passage (at pp. 168-69):

First, the Appellant must be mentally competent to make a decision to end her own life, such competence to be certified in writing by a treating physician and by an independent psychiatrist who has examined her not more than 24 hours before arrangements are put in place which will permit the Appellant to actually terminate her life and such arrangements must only be operative while one of such physicians is actually present with the Appellant.

Such certificate must include the professional opinion of the physicians not just that she is competent, but also that, in the opinion of such physicians, she truly desires to end her life and that, in their opinion, she has reached such decision of her own free will without pressure or influence from any source other than her circumstances.

The fact that the Appellant has made her intentions known by bringing these proceedings, and in many other ways, may be taken

into consideration by the physicians in reaching their opinions, but they will of course be careful to ensure that the Appellant has not changed her mind since making her earlier declarations.

Secondly, in addition to being mentally competent, the physicians must certify that, in their opinion, (1) the Appellant is terminally ill and near death, and that there is no hope of her recovering; (2) that she is, or but for medication would be, suffering unbearable physical pain or severe psychological distress; (3) that they have informed her, and that she understands, that she has a continuing right to change her mind about terminating her life; and (4) when, in their opinion, the Appellant would likely die (a) if palliative care is being or would be administered to her, and (b) if palliative care should not be administered to her.

Thirdly, not less than three clear days before any psychiatrist examines the Appellant for the purposes of preparing a certificate for the purposes aforesaid, notice must be given to the Regional Coroner for the area or district where the Appellant is to be examined, and the Regional Coroner or his nominee, who must be a physician, may be present at the examination of the Appellant by a psychiatrist in order to be satisfied that the Appellant does indeed have mental competence to decide, and does in fact decide, to terminate her life.

Fourthly, one of the physicians giving any certificate as aforesaid, must re-examine the Appellant each day after the above-mentioned arrangements are put in place to ensure she does not evidence any change in her intention to end her life. If she commits suicide, such physician must furnish a further certificate to the Coroner confirming that, in his or her opinion, the Appellant did not change her mind.

Fifthly, no one may assist the Appellant to attempt to commit suicide or to commit suicide after the expiration of thirty-one days from the date of the first mentioned certificate, and, upon the expiration of that period, any arrangements made to assist the Appellant to end her life must immediately be made inoperative and discontinued. I include this condition to ensure, to the extent it can be ensured, that the Appellant has not changed her mind since the time she was examined by a psychiatrist.

This limitation troubles me greatly as I would prefer that the Appellant be permitted a free choice about the time when she wishes to end her life. I am, however, unwilling to leave it open for a longer period because of the concern I have that the Appellant might change her mind. She is able to proceed at her preferred pace by delaying the time for her psychiatric examination until the time she thinks she is close to the time when she wishes to end her ordeal. If she delays causing her death for more than thirty-one days after such examination then there is a risk either that she had not finally made up her mind, or that, as is everyone's right, she has changed it, or possibly that she is no longer competent to make such a decision.

Lastly, the act actually causing the death of the Appellant must be the unassisted act of the Appellant herself, and not of anyone else.

These conditions have been prepared in some haste because of the urgency of the Appellant's circumstances, and I would not wish judges in subsequent applications to regard them other than as guidelines.

In closing, McEachern C.J. emphasized once again that his remedy is directed specifically towards the appellant in her unique circumstances, and that other people in her situation would have to apply individually to a court to receive a similar order.

Hollinrake J.A.

Hollinrake J.A. agreed with McEachern C.J. that, by the operation of s. 241(b) of the *Code*, the appellant is deprived of her s. 7 right to the security of the person. However, he was not of the view that this deprivation contravened the principles of fundamental justice. Hollinrake J.A. set out this position in the following passage (at p. 171):

While there may be only a fine line between physician assisted suicide and palliative care from the viewpoint of medicine (not necessarily the profession as opposed to the science) I think that from a historical and philosophical viewpoint, the difference between palliative care and physician assisted suicide is a marked and significant one.

Hollinrake J.A. stated that the principles of fundamental justice must be anchored in the legislative, social and philosophical context of our society. Citing a range of medical association reports and Law Reform Commission reports, the legislative and medical history of s. 241 of the *Code* suggested to

Hollinrake J.A. that the weight of medical opinion and the intent of Parliament favour retaining the prohibition on physician-assisted suicide. He highlighted the enduring distinction between palliative care which is aimed at reducing pain in order to increase the quality of a terminally ill person's remaining life and physician-assisted suicide which is aimed at terminating life.

Hollinrake J.A. proceeded to analyze the *Morgentaler* decision. In his view, *Morgentaler* could be distinguished from the case at bar because in the case of abortion, an exemption was adopted in 1968 that made the activity lawful in certain circumstances. The prohibition against physician-assisted suicide, by contrast, had always been absolute. Based on this, Hollinrake J.A. reached the following conclusion (at p. 177):

In the case before us, there has been no legislative recognition that a physician assisted suicide is in line with contemporary societal views. The case would be different if Parliament had enacted an exception to the prohibition against aiding suicides such as was the case in *Morgentaler*. The difference would be not only because a legislative enactment would show the lead taken by Parliament but also because a statutory exemption could be said to be the result of a public consensus in this controversial area. One must be mindful of the criticism whenever courts say it is the function of Parliament to legislate that this effectively means courts are shying away from the full force of the power entrusted to them under the *Charter*. However, it is my view in areas with public opinion at either extreme, and which involve basically philosophical and not legal considerations, it is proper that the matter be left in the hands of Parliament as historically has been the case.

Until there is a basis in legislative, medical or societal views for crossing that line (as there was for the social reform undertaken in *Morgentaler*), Hollinrake J.A. stated that he could find no grounds on which to overturn s. 241. The guiding principle, in his view, underlying society's approach to this

problem had always been, and continued to be, the sanctity of life. He added that the appellant in this case is "one of the very persons that it is the focus of s. 241(b) to protect" (p. 180).

Although Hollinrake J.A. held s. 241(b) to be consistent with the *Charter*, he nonetheless decided to comment on the remedial approach adopted by McEachern C.J. Hollinrake J.A. characterized it as an amendment to s. 241(b) which, in his view, infringed on a policy area that has historically and legally been the exclusive province of Parliament. However, though finding that the appeal should be dismissed, Hollinrake J.A. stated that, were he of the view that the deprivation of the security of the person of the appellant was contrary to the principles of fundamental justice, he would not hesitate in endorsing the remedy fashioned by McEachern C.J.

Proudfoot J.A.

Proudfoot J.A., while reaching the same result as Hollinrake J.A., restricted her analysis to the proper interpretation and application of the *Morgentaler* decision to the case at bar. In her view, that case was not determinative of the issues in this case because it was specifically directed to the problem of limited access to medical treatment. She stated "[t]he *Morgentaler* case does not, in my view, go beyond preservation of health." She subsequently added, "obviously death is the antithesis of the s. 7 guarantee of 'life, liberty and security of the person'" (p. 182).

Additionally, Proudfoot J.A. observed that *Morgentaler* was decided in a criminal context. The suggestion that Ms. Rodriguez herself could be liable for conspiracy charges and therefore is in the realm of criminal jeopardy struck Proudfoot J.A. as having "no air of reality". Thus, she viewed the application before her as seeking to exempt an unnamed person from future criminal liability -- a remedy for which, in her opinion, no legal authority or legal precedent existed.

Further, Proudfoot J.A. expressed agreement for the Law Reform Commission's position that the matter is essentially a policy decision that should be left to Parliament to resolve. In concluding that the appeal should be dismissed, she concluded the following (at p. 186):

In my view, leaving aside the legal and procedural aspects, the broad religious, ethical, moral and social issues implicit in the merits of this case are not suited to resolution by a court on affidavit evidence at the instance of a single individual. On the material available to us, we are in no position to assess the consensus in Canada with respect to assisted suicide.... I would leave to Parliament the responsibility of taking the pulse of the nation.

#### IV. Constitutional Questions

The following constitutional questions were stated by order of this Court on March 25, 1993:

1. Does s. 241(b) of the *Criminal Code* of Canada infringe or deny, in whole or in part, the rights and freedoms guaranteed by ss. 7, 12 and 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

V. Analysis

I find that s. 241(b) of the *Criminal Code* infringes s. 15(1) of the *Charter*. In my view, persons with disabilities who are or will become unable to end their lives without assistance are discriminated against by that provision since, unlike persons capable of causing their own deaths, they are deprived of the option of choosing suicide. I further find that s. 1 of the *Charter* does not save s. 241(b) of the *Criminal Code*. The means chosen to carry out the legislative purpose of preventing possible abuses do not in my opinion impair as little as reasonably possible the right to equality enshrined in s. 15(1) of the *Charter*.

In view of my findings under s. 15(1), I need not address the constitutionality of the legislation under ss. 7 or 12 of the *Charter*.

(1) *Section 15(1) of the Charter*

(a) Method of Analysis

In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court defined the way in which the right to equality contained in s. 15(1) of the *Charter* should be considered.

McIntyre J., whose opinion was supported by the majority as to the meaning and scope of s. 15, suggested a three-step analysis to determine whether the *Charter* has been violated. The first step is to determine whether there is an infringement of one of the rights to equality mentioned in that provision. The question essentially is whether the statute makes distinctions between groups or classes of persons based on personal characteristics. If such inequality is found, the second step is to determine whether the inequality is discriminatory. Where there is discrimination, finally, justifications are to be considered in light of s. 1 of the *Charter*.

In discussing the first step of the analysis, McIntyre J. began by noting the essentially comparative nature of the difficult concept of equality (at p. 164):

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.

However, he rejected the view of equality which sees it as necessarily meaning that persons in similar situations must be given similar treatment, otherwise known as the rule of formal equality. He said (at p. 164):

It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.

With this in mind, McIntyre J. adopted the following observations of Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 347:

The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

McIntyre J. went on to say that not all inequalities fall within the scope of s. 15(1), only those inequalities which lead to "discrimination". He stated (at p. 172):

The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee. [Emphasis added.]

McIntyre J. adopted the following definition of "discrimination" (at p. 174):

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

In *R. v. Turpin*, [1989] 1 S.C.R. 1296, Wilson J. returned to the concept of discrimination. She stated (at pp. 1331-32):

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context....

...

Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

In *R. v. Swain*, [1991] 1 S.C.R. 933, I summarized as follows the method of analysis to be used in considering a complaint under s. 15(1) (at p. 992):

The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15 -- namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

Before turning to the application of these principles in terms of s. 241(b) of the *Criminal Code*, it is worth adding certain observations on the concepts of involuntary discrimination and adverse effect discrimination.

(b) Involuntary Discrimination and Adverse Effect Discrimination

In *Andrews, supra*, McIntyre J. confirmed that in connection with the right to equality contained in the *Charter*, courts had to apply the approach taken in connection with various human rights statutes, namely that individuals are not protected only against deliberate and direct discrimination, but also against incidental or indirect discrimination.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, McIntyre J. explained in connection with the *Ontario Human Rights Code* that an intention to discriminate was not necessary for the anti-discriminatory provisions of that statute to apply, since the purpose of the statute was not to punish the perpetrator of the discrimination but to correct the situation (at p. 547):

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.

A distinction based on a prohibited ground, even where made without the intent to disadvantage or deprive of a benefit some person or class of persons, could therefore be discriminatory in terms of human rights legislation.

In the same way, McIntyre J. established that, in order to come within the *Ontario Human Rights Code*, the disputed legislation did not have to

directly and expressly create the distinctions on a prohibited ground. An apparently neutral rule could also be discriminatory if its effect was to give rise to such distinctions. This is the adverse effect discrimination concept which McIntyre J. defined and explained the reasons for as follows (at p. 551):

It [adverse effect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

There can be no doubt following *Andrews* that this approach should also be applied in connection with s. 15(1) of the *Charter*. In that decision McIntyre J. adopted the definition of discrimination applied in *Simpsons-Sears*, *supra*, and also emphasized the crucial importance of taking into account the effect of the disputed provision in the analysis pursuant to s. 15(1).

Accordingly, he said (at p. 165):

To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal

should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

(c) Section 241(b) of the *Criminal Code*

In applying these rules which I have just stated, I have concluded that s. 241(b) of the *Criminal Code* infringes the right to equality contained in s. 15(1) of the *Charter*. Section 241(b) creates an inequality since it prevents persons physically unable to end their lives unassisted from choosing suicide when that option is in principle available to other members of the public. This inequality is moreover imposed on persons unable to end their lives unassisted solely because of a physical disability, a personal characteristic which is among the grounds of discrimination listed in s. 15(1) of the *Charter*. Furthermore, in

my opinion the inequality may be characterized as a burden or disadvantage, since it limits the ability of those who are subject to this inequality to take and act upon fundamental decisions regarding their lives and persons. For them, the principle of self-determination has been limited.

(i) *An Inequality*

It seems clear that s. 241(b) of the *Criminal Code* creates an inequality in that it prevents persons who are or will become incapable of committing suicide without assistance from choosing that option in accordance with law, whereas those capable of ending their lives unassisted may decide to commit suicide in Canada without contravening the law. Since 1972, attempted suicide has ceased to be a crime in Canada (*Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13, s. 16).

I accept that s. 241(b) was never intended to create such an inequality, and that that provision, which contains no distinction based on personal characteristics, does at first sight treat all individuals in the same way. For the reasons given above, however, saying this does not dispose of the argument that the provision creates inequality. Even if this was not the legislature's intent, and although s. 241(b) does not contain any provision specifically applicable to persons with disabilities, the fact remains that such persons, those who are or will become incapable of committing suicide unassisted, are on account of their disability affected by s. 241(b) of the *Criminal Code* differently from others.

I note in passing that in *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, [1985] 3 W.W.R. 717, the Saskatchewan Court of Appeal, in connection with discrimination based on a physical disability, has demonstrated the absurdity of the argument that there is no discrimination where persons with disabilities receive the same treatment as the general public. Commenting on this argument, Vancise J.A. stated (at p. 741):

If that interpretation of the meaning of discrimination in s. 12(1)(b) is correct then the right not to be discriminated against for physical disability protected by the Code is meaningless. If that interpretation is correct, I can conceive of no situation in which a disabled person could be discriminated against in the use of accommodation, services or facilities which are offered to the public. If that interpretation is correct, the owner of a public facility, who offers washroom facilities of the same kind offered to the public generally to a disabled person or offers any other service notwithstanding that it cannot be used by a wheelchair reliant person, will then be found to have discharged his obligation under the Code. A physically reliant person does not, in my opinion, acquire an equal opportunity to utilize facilities or services which are of no use to him or her. Identical treatment does not necessarily mean equal treatment or lack of discrimination.

In short, although at first sight persons who cannot commit suicide and those who can are given identical treatment under s. 241(b) of the *Criminal Code*, they are nevertheless treated unequally since by the effect of that provision persons unable to commit suicide without assistance are deprived of any ability to commit suicide in a way which is not unlawful, whereas s. 241(b) does not have that effect on those able to end their lives without assistance.

The question then is whether this inequality is discriminatory. Before turning to this, however, I feel it is necessary to add a few words on the

scope of the inequality created by s. 241(b) of the *Criminal Code*. This is a very difficult matter. In my opinion it is better, in the context of the appeal at bar, to refrain from defining too broadly the scope of the inequality resulting from s. 241(b) of the *Code*. As I see it, all that has actually been established in this Court is the inequality due to the effect of s. 241(b) affecting persons suffering from a very serious disability who, as in the case of the appellant, are or will become completely unable to commit suicide without assistance, even assuming that all the usual means of committing suicide are available. I prefer not to express any opinion on the position of persons suffering from less serious disabilities, whose physical condition may certainly complicate access to the usual means of committing suicide, but who if those means were available to them would be capable of doing so. I am not required to express any opinion on this situation and I prefer not to do so, in the absence of information to indicate that, as regards access to methods of suicide, persons with disabilities are in a radically different situation from the rest of the public. The problem also arises in that situation of defining what is a "physical disability" within the meaning of s. 15(1) of the *Charter*.

I therefore consider that s. 241(b) has an unequal effect on persons who are or will become unable to commit suicide, even assuming that all the usual means are available to them. Is such an inequality discriminatory?

To determine whether the inequality created by s. 241(b) of the *Criminal Code* is discriminatory, it must first be determined whether the effect of that provision is to impose on certain persons or groups of persons a disadvantage or burden or to deprive them of an advantage, benefit and so on.

It must then be determined whether that deprivation is imposed by or by the effect of a personal characteristic listed in s. 15(1) of the *Charter*, or a similar characteristic.

(ii) *Disadvantage or Burden*

Does the fact that one is unable to commit suicide in accordance with law constitute a disadvantage or burden giving rise to application of s. 15(1) of the *Charter*?

First, it should be pointed out that the advantage which the appellant claims to be deprived of is not the option of committing suicide as such. She does not argue that suicide is a benefit which she is deprived of by the effect of s. 241(b) of the *Criminal Code*. What the appellant is arguing is that she will be deprived of the right to choose suicide, of her ability to decide on the conduct of her life herself.

In *Turpin, supra*, this Court recognized that being deprived of the right to choose could be a disadvantage or burden for the purposes of an analysis under s. 15(1) of the *Charter*. The difference in treatment in question in that case resulted from the right certain accused had, but the appellants did not, to opt for trial before a judge alone or trial before a judge and jury. Concluding that loss of this right could disadvantage the appellants, Wilson J. adopted at pp. 1329-30 the observations of the Ontario Court of Appeal, which had stated:

What we are faced with in this case is not so much whether one form of trial is more advantageous than another, *i.e.*, whether a person charged with murder is better protected by a judge and jury trial or by a trial by judge alone. Rather, the question is whether having that *choice* is an advantage in the sense of a benefit of the law. Mr. Gold, on behalf of the respondents in this case, suggested that it is the having of the option, "the ability to elect one's mode of trial" that was a benefit which accused persons charged with murder in Alberta had over accused persons charged with murder elsewhere in Canada. We have to agree with that submission. [Emphasis in original.]

Can the right to choose at issue here, that is the right to choose suicide, be described as an advantage of which the appellant is being deprived? In my opinion, the Court should answer this question without reference to the philosophical and theological considerations fuelling the debate on the morality of suicide or euthanasia. It should consider the question before it from a legal perspective -- *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 -- while keeping in mind that the *Charter* has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions. As Dickson J. said in *Big M Drug Mart, supra*, at p. 336:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*.

He went on to add (at p. 346):

It should also be noted . . . that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.

In medical matters, the common law recognizes to a very large degree the right of each individual to make decisions regarding his or her own person, despite the sometimes serious consequences of such choices. In *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119, Cory J., for this Court recently restated the right of a patient to decide on the treatment he is prepared to undergo (at p. 135):

It should not be forgotten that every patient has a right to bodily integrity. This encompasses the right to determine what medical procedures will be accepted and the extent to which they will be accepted. Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent. This concept of individual autonomy is fundamental to the common law ....

Like the *Charter* itself in several of its provisions, therefore, the common law recognized the fundamental importance of individual autonomy and self-determination in our legal system. That does not mean that these values are absolute. However, in my opinion s. 15(1) requires that limitations on these fundamental values should be distributed with a measure of equality.

In this connection, and without expressing any opinion on the moral value of suicide, I am forced to conclude that the fact that persons unable to end their own lives cannot choose suicide because they do not legally have access to assistance is -- in legal terms -- a disadvantage giving rise to the application of s. 15(1) of the *Charter*. Is this disadvantage based on a personal characteristic covered by s. 15(1)?

(d) Personal Characteristic

In *Andrews, supra*, McIntyre J. stated that the first characteristic of discrimination is that it is "a distinction . . . based on grounds relating to personal characteristics of the individual or group" (p. 174). Can it be said that the distinction here is "based" on grounds relating to a personal characteristic covered by s. 15(1)? In my view, if s. 15(1) is to be applied to adverse effect discrimination, as McIntyre J. implies, the definition given in *Andrews* should not be taken too literally. I adopt in this regard the observations of Linden J.A., who said in dissent in *Egan and Nesbit v. Canada* (1993), 153 N.R. 161 (F.C.A.), at p. 196:

While a distinction must be based on grounds relating to personal characteristics of the individual or group in order to be discriminatory, the words "based on" do not mean that the distinction must be designed with reference to those grounds. Rather, the relevant consideration is whether the distinction affects the individual or group in a manner related to their personal characteristics . . . .

In other words, the difference in treatment must be closely related to the personal characteristic of the person or group of persons. In the case at bar, there can be no doubt as to the existence of such a connection. It is only on account of their physical disability that persons unable to commit suicide unassisted are unequally affected by s. 241(b) of the *Criminal Code*. The distinction is therefore unquestionably "based" on this personal characteristic. Is it a characteristic covered by s. 15(1)?

A physical disability is among the personal characteristics listed in s. 15(1) of the *Charter*. There is therefore no need to consider at length the connection between the ground of distinction at issue here and the general

purpose of s. 15, namely elimination of discrimination against groups who are victims of stereotypes, disadvantages or prejudices. No one would seriously question the fact that persons with disabilities are the subject of unfavourable treatment in Canadian society, a fact confirmed by the presence of this personal characteristic on the list of unlawful grounds of this discrimination given in s. 15(1) of the *Charter*. In *Andrews, supra*, McIntyre J. said (at p. 175):

The enumerated grounds do . . . reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s. 15(1), receive particular attention.

There is also no need to undertake any lengthy demonstration in order to show that persons so physically disabled that they are or will become unable to end their own lives without assistance, even assuming that all the usual means of committing suicide are available to them, fall within the classes of persons with disabilities covered by s. 15(1) of the *Charter*, which contains no definition of the phrase "physical disability". Persons whose movement is so limited are even to some degree the classic case of what is meant by a person with a disability in ordinary speech. I prefer to postpone to a later occasion the task of defining the meaning of the phrase "physical disability" for the purposes of s. 15(1).

It is moreover clear that the class of persons with physical disabilities is broader than that of persons unable to end their lives unassisted. In other words, some persons with physical disabilities are treated unequally by the effect of s. 241(b) of the *Criminal Code*, but not all persons, nor undoubtedly the majority of persons with disabilities, are so treated. The fact that this is not

a bar to a remedy under s. 15(1) seems to me to have been clearly decided by *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

In *Brooks*, the question was whether unfavourable treatment on account of pregnancy could be regarded as sex discrimination. Responding to the argument that this was not so because all women were not affected by this discriminatory provision, Dickson C.J. said (at p. 1247):

I am not persuaded by the argument that discrimination on the basis of pregnancy cannot amount to sex discrimination because not all women are pregnant at any one time. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Many, if not most, claims of partial discrimination fit this pattern. As numerous decisions and authors have made clear, this fact does not make the impugned distinction any less discriminating.

In *Janzen* this Court had to determine whether sexual harassment was a form of sex discrimination. The Court of Appeal had accepted the argument that since all women were not affected by this type of behaviour, no discrimination had resulted. Dickson C.J. rejected this argument as follows (at pp. 1288-89):

If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically.

(e) Conclusion

For all these reasons, I conclude that s. 241(b) of the *Criminal Code* infringes the right to equality guaranteed in s. 15(1) of the *Charter*. This provision has a discriminatory effect on persons who are or will become incapable of committing suicide themselves, even assuming that all the usual means are available to them, because due to an irrelevant personal characteristic such persons are subject to limitations on their ability to take fundamental decisions regarding their lives and persons that are not imposed on other members of Canadian society. I now turn to considering s. 241(b) in light of s. 1.

(2) *Section 1*

(a) Introduction

Having found s. 241(b) of the *Code* to infringe s. 15 of the *Charter*, it is now necessary to determine if this infringement may be justified under s. 1. The onus under s. 1 is on the state to demonstrate that an infringement on a *Charter* right is demonstrably justified in a free and democratic country. The standard that the state must satisfy under s. 1 is now well established and consists of the two branches first outlined in *R. v. Oakes*, [1986] 1 S.C.R. 103. The first branch of the test considers the validity of the legislative objective, while the second branch considers the validity of the means chosen to achieve that objective.

(b) Legislative Objective

The appellant does not appear to dispute that the legislation in question is aimed at the protection of persons who may be vulnerable to the influence of others in deciding whether, when and how to terminate their lives. The trial judge referred to this constituency in the following terms:

... those who may at a moment of weakness, or when they are unable to respond or unable to make competent value judgments, may find themselves at risk at the hand of others who may, with the best or with the worst of motives, aid and abet in the termination of life. Section 241 protects the young, the innocent, the mentally incompetent, the depressed, and all those other individuals in our society who at a particular moment in time decide the termination of their life is a course that they should follow for whatever reason.

I accept this characterization. However, while s. 241(b) has always been intended for the protection of such vulnerable people, the context in which this provision operated was altered when, in 1972, Parliament removed the offence of attempted suicide from the *Criminal Code*. The evidence suggests that the offence of attempted suicide was repealed in order to reflect the prevailing societal view that suicide was an issue related more to health and social policy than to the ambit of the criminal justice system. Parliament by so doing was acknowledging that the threat of jail offered minimal deterrence to a person intent on terminating his or her life.

I also take the repeal of the offence of attempted suicide to indicate Parliament's unwillingness to enforce the protection of a group containing many vulnerable people (i.e., those contemplating suicide) over and against the freely determined will of an individual set on terminating his or her life. Self-

determination was now considered the paramount factor in the state regulation of suicide. If no external interference or intervention could be demonstrated, the act of attempting suicide could no longer give rise to criminal liability. Where such interference and intervention was present, and therefore the evidence of self-determination less reliable, the offence of assisted suicide could then be triggered.

As I noted above, however, s. 241(b), while remaining facially neutral in its application, now gave rise to a deleterious effect on the options open to persons with physical disabilities, whose very ability to exercise self-determination is premised on the assistance of others. In other words, can it be said that the intent of Parliament in retaining s. 241(b) after repealing the offence of attempted suicide was to acknowledge the primacy of self-determination for physically able people alone? Are the physically incapacitated, whether by reason of illness, age or disability, by definition more likely to be vulnerable than the physically able? These are the vexing questions posed by the continued existence of the offence of assisted suicide in the wake of the repeal of the attempted suicide provision.

The objective of s. 241(b) also must be considered in the larger context of the legal framework which regulates the control individuals may exercise over the timing and circumstances of their death. For example, it is now established that patients may compel their physicians not to provide them with life-sustaining treatment (*Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.)); and patients undergoing life-support treatment may compel their physicians to discontinue such treatment (*Nancy B. v. Hôtel-Dieu de Québec*

(1992), 86 D.L.R. (4th) 385 (Que. S.C.), even where such decisions may lead directly to death. The rationale underlying these decisions is the promotion of individual autonomy; see *Ciarlariello, supra*, at p. 135. An individual's right to control his or her own body does not cease to obtain merely because that individual has become dependent on others for the physical maintenance of that body; indeed, in such circumstances, this type of autonomy is often most critical to an individual's feeling of self-worth and dignity. As R. Dworkin concisely stated in his recent study, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993), at p. 217: "Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny."

I also wish to stress, however, that the scope of self-determination with respect to bodily integrity in our society is never absolute. While there may be no limitations on the treatments to which a patient may refuse or discontinue, there are always limits on the treatment which a patient may demand, and to which the patient will be legally permitted to consent. Palliative care, for example, which is made available to ease pain and suffering in the terminal stages of an illness even though the effect of the treatment may be to significantly shorten life, may not necessarily be made available to a person with a chronic illness but whose death is not imminent: see M. A. Somerville, "Pain and Suffering at Interfaces of Medicine and Law" (1986), 36 *U.T.L.J.* 286, at pp. 299-301. Most important of these limits is s. 14 of the *Criminal Code*, which stipulates that an individual may not validly consent to have death inflicted on him or her. Additionally, it is well established that, under the common law, there are circumstances under which an individual's

consent to an assault against him or her will not be recognized: *R. v. Jobidon*, [1991] 2 S.C.R. 714.

With these limitations in mind, I conclude that the objective of s. 241(b) of the *Code* may properly be characterized as the protection of vulnerable people, whether they are consenting or not, from the intervention of others in decisions respecting the planning and commission of the act of suicide. Underlying this legislative purpose is the principle of preservation of life. Section 241(b) has, therefore, a clearly pressing and substantial legislative objective. For that reason, I find the provision satisfies the first branch of the *Oakes* test. However, I hasten to add that the repeal of the offence of attempted suicide demonstrates that Parliament will no longer preserve human life at the cost of depriving physically able individuals of their right to self-determination. The question to which I must now turn is whether, given the importance of the legislative objective, Parliament is justified in depriving persons with disabilities of their right to an equal measure of self-determination.

(c) Proportionality

The second branch of the test under s. 1 considers whether a reasonable balance has been struck between the legislative objective and the means chosen to achieve that objective. There are three different components to this inquiry. The first component requires that the means chosen to achieve the objective are rational, fair and not arbitrary. The second component requires that the means impair as minimally as is reasonably possible the right in question. Finally, the third component requires the assessment of whether

the infringement on the right is sufficiently proportional to the importance of the objective that is sought to be achieved. Only if the legislation survives each of these components may the limitation of the *Charter* right or freedom be found justifiable under s. 1.

(i) *Rational Connection*

The first component of the proportionality test requires that the means chosen to fulfil the legislative objective be carefully designed to meet the objective. Can it be said that a provision which prohibits a person from aiding or abetting another's suicide has been carefully designed to protect vulnerable people? The government has argued that an absolute prohibition on assisted suicide is necessary as there is no practicable way for the government to divine what the motives of those assisting in a suicide might be. The compassionately motivated, in other words, cannot be distinguished from the corrupt. In light of the irrevocable nature of the act of suicide, the government contends that, in the final analysis, it is necessary and justifiable to thwart the self-determination of some persons with physical disabilities in order to assure the protection of all those who may be vulnerable to being pressured or coerced into committing suicide.

I find that the prohibition of assisted suicide is rationally connected to the objective of protecting vulnerable persons who may be contemplating terminating their own life. As a result of the operation of s. 241(b), it is clear that no one may coercively "assist" another to commit suicide without facing criminal sanction. The limitation of this prohibition to those who require

assistance to terminate their own life is, to a certain extent, irrational, since it is based on the untenable assumption that those who require assistance will necessarily be more vulnerable to coercion or other undue influence. As a result, there is no way, under the present legislation, to distinguish between those people whose freely chosen will it is to terminate their life, and those people who are potentially being pressured or coerced by others. Vulnerability, in a sense, is simply imposed on all people who happen to be physically unable to commit suicide independently and the right to choose suicide is therefore removed from this entire class of persons.

This question, however, suggests a problem not so much with the rationality of the means chosen by the state to achieve its objective, but rather with the overbroad nature of the means chosen. The vulnerable are effectively protected under s. 241(b), but so, it would appear, are those who are not vulnerable, who do not wish the state's protection, but who are brought within the operation of s. 241(b) solely as a result of a physical disability. The question of overbreadth in such circumstances is properly dealt with under the second component of the proportionality test.

(ii) *Minimal Impairment*

Under the second component of the proportionality test, the question that must be answered is whether the provision in question was carefully designed to impair the equality rights of the appellant as little as reasonably possible.

In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, this Court distinguished between circumstances where the state performed the role of the "singular antagonist" such as in the prosecution of crime, and circumstances where the state performed the role of "the reconciliation of claims of competing individuals or groups" (p. 994). In *Irwin Toy*, as the following passage indicates, it was found that more flexibility under s. 1 should be accorded legislation that is the result of the balancing of competing interests than where the legislation is primarily prosecutorial (at p. 993):

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

The case at bar does not arise as a result of an actual criminal prosecution; the state is not, in this context, the "singular antagonist". Indeed, there is no certainty as to whether anyone will be charged with anything on the facts before us. Neither party can guarantee that Ms. Rodriguez will in fact seek assistance to commit suicide at the point when she finds herself physically unable to terminate her life independently. She may choose to live out her life without intervention. She may choose to take her own life while she is still able to do so unassisted.

In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1199, which also dealt with a provision of the *Criminal Code*

reflecting a policy compromise premised on moral values, I stated that Parliament must be afforded a measure of flexibility in its policy choices:

The role of this Court is not to second-guess the wisdom of policy choices made by our legislators. Prostitution, and specifically, the solicitation for the purpose thereof, is an especially contentious and at times morally laden issue, requiring the weighing of competing political pressures. The issue for this Court to determine is not whether Parliament has weighed those pressures and interests wisely, but rather whether the limit they have imposed on a *Charter* right or freedom is reasonable and justified.

The offence of assisted suicide also may be characterized as "contentious" and "morally laden"; consequently, I think it would be wrong for this Court to unduly circumscribe the ambit of options open to Parliament in addressing the "competing political pressures" that will factor in to such decision-making.

In *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1343, I stated that "Parliament may not have chosen the absolutely least intrusive means of meeting its objective, but it has chosen from a range of means which impair s. 11(d) as little as is reasonably possible. Within this range of means it is virtually impossible to know, let alone be sure, which means violate *Charter* rights the least." (Emphasis in original.) Similarly, the question to be answered in this case is whether the equality rights of the appellant have been impaired as little as reasonably possible. In so doing, the concern for the intricate and delicate function of Parliament to choose between differing reasonable policy options, some of which may impair a particular individual or group's rights more than others, should not be misconstrued as providing Parliament with a license for indifference to whatever *Charter* rights it deems necessary. As La

Forest J. observed in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44:

It should go without saying, however, that the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down. For example, in *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, the Ontario Court of Appeal found that s. 19(2) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, which permitted discrimination in athletic organizations and activities on the basis of sex, could not be justified under s. 1. Writing for the majority, Dubin J.A. (as he then was) emphasized (at p. 530) that the sweeping effects of s. 19(2) were disproportionate to the ends sought to be achieved, and that the government had made no effort to justify this broad scope as a reasonable limit on the right to equality.

It was argued that if assisted suicide were permitted even in limited circumstances, then there would be reason to fear that homicide of the terminally ill and persons with physical disabilities could be readily disguised as assisted suicide and that, as a result, the most vulnerable people would be left most exposed to this grave threat. There may indeed be cause for such concern. Sadly, increasingly less value appears to be placed in our society on the lives of those who, for reason of illness, age or disability, can no longer control the use of their bodies. Such sentiments are often, unfortunately, shared by persons with physical disabilities themselves, who often feel they are merely a burden and expense to their families or on society as a whole. Moreover, as the intervener COPOH (Coalition of Provincial Organizations of the Handicapped) observed in its written submissions, "[t]he negative stereotypes and attitudes which exist about the lack of value and quality inherent in the life of a person with a disability are particularly dangerous in this context because they tend to

support the conclusion that a suicide was carried out in response to those factors rather than because of pressure, coercion or duress".

The principal fear is that the decriminalization of assisted suicide will increase the risk of persons with physical disabilities being manipulated by others. This "slippery slope" argument appeared to be the central justification behind the Law Reform Commission of Canada's recommendation not to repeal this provision. The Commission stated the following in its Working Paper 28, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982), at p. 46:

The principal consideration in terms of legislative policy, and the deciding one for the Commission, remains that of possible abuses. There is, first of all, a real danger that the procedure developed to allow the death of those who are a burden to themselves may be gradually diverted from its original purpose and eventually used as well to eliminate those who are a burden to others or to society. There is also the constant danger that the subject's consent to euthanasia may not really be a perfectly free and voluntary act.

While I share a deep concern over the subtle and overt pressures that may be brought to bear on such persons if assisted suicide is decriminalized, even in limited circumstances, I do not think legislation that deprives a disadvantaged group of the right to equality can be justified solely on such speculative grounds, no matter how well intentioned. Similar dangers to the ones outlined above have surrounded the decriminalization of attempted suicide as well. It is impossible to know the degree of pressure or intimidation a physically able person may have been under when deciding to commit suicide. The truth is that we simply do not and cannot know the range of implications that allowing some form of assisted suicide will have for persons with physical

disabilities. What we do know and cannot ignore is the anguish of those in the position of Ms. Rodriguez. Respecting the consent of those in her position may necessarily imply running the risk that the consent will have been obtained improperly. The proper role of the legal system in these circumstances is to provide safeguards to ensure that the consent in question is as independent and informed as is reasonably possible.

The fear of a "slippery slope" cannot, in my view, justify the over-inclusive reach of the *Criminal Code* to encompass not only people who may be vulnerable to the pressure of others but also persons with no evidence of vulnerability, and, in the case of the appellant, persons where there is positive evidence of freely determined consent. Sue Rodriguez is and will remain mentally competent. She has testified at trial to the fact that she alone, in consultation with her physicians, wishes to control the decision-making regarding the timing and circumstances of her death. I see no reason to disbelieve her, nor has the Crown suggested that she is being wrongfully influenced by anyone. Ms. Rodriguez has also emphasized that she remains and wishes to remain free not to avail herself of the opportunity to end her own life should that be her eventual choice. The issue here is whether Parliament is justified in denying her the ability to make this choice lawfully, as could any physically able person.

While s. 241(b) restricts the equality rights of all those people who are physically unable to commit suicide without assistance, the choice for a mentally competent but physically disabled person who additionally suffers from a terminal illness is, I think, different from the choice of an individual

whose disability is not life-threatening; in other words, for Ms. Rodriguez, tragically, the choice is not whether to live as she is or to die, but rather when and how to experience a death that is inexorably impending. I do not, however, by observing this distinction, mean to suggest that the terminally ill are immune from vulnerability, or that they are less likely to be influenced by the intervention of others whatever their motives. Indeed, there is substantial evidence that people in this position may be susceptible to certain types of vulnerability that others are not. Further, it should not be assumed that a person with a physical disability who chooses suicide is doing so only as a result of the incapacity. It must be acknowledged that mentally competent people who commit suicide do so for a wide variety of motives, irrespective of their physical condition or life expectancy.

The law, in its present form, takes no account of the particular risks and interests that may be at issue in these differing contexts. The Law Reform Commission used the distinction between these differing contexts to justify its recommendation not to decriminalize assisted suicide in the Working Paper 28, *supra*, at pp. 53-54:

... the prohibition in section 224 is not restricted solely to the case of the terminally ill patient, for whom we can only have sympathy, or solely to his physician or a member of his family who helps him to put an end to his suffering. The section is more general and applies to a variety of situations for which it is much more difficult to feel sympathy. Consider, for example, a recent incident, that of inciting to mass suicide. What of the person who takes advantage of another's depressed state to encourage him to commit suicide, for his own financial benefit? What of the person who, knowing an adolescent's suicidal tendencies, provides him with large enough quantities of drugs to kill him? The "accomplice" in these cases cannot be considered morally blameless. Nor can one conclude that the criminal law should not punish such conduct. To decriminalize

completely the act of aiding, abetting or counselling suicide would therefore not be a valid legislative policy. [Emphasis added.]

I agree with the importance of distinguishing between the situation where a person who is aided in his or her decision to commit suicide and the situation where the decision itself is a product of someone else's influence. However, I fail to see how preventing against abuse in one context must result in denying self-determination in another. I remain unpersuaded by the government's apparent contention that it is not possible to design legislation that is somewhere in between complete decriminalization and absolute prohibition.

In my view, there is a range of options from which Parliament may choose in seeking to safeguard the interests of the vulnerable and still ensure the equal right to self-determination of persons with physical disabilities. The criteria for assuring the free and independent consent of Ms. Rodriguez set out in McEachern C.J.'s dissenting reasons in the Court of Appeal seem designed to address such concerns though they relate only to terminally ill persons. Regardless of the safeguards Parliament may wish to adopt, however, I find that an absolute prohibition that is indifferent to the individual or the circumstances in question cannot satisfy the constitutional duty on the government to impair the rights of persons with physical disabilities as little as reasonably possible. Section 241(b) cannot survive the minimal impairment component of the proportionality test, and therefore I need not proceed to the third component of the proportionality test. As a result, I find the infringement of s. 15 by this provision cannot be saved under s. 1.

(3) *Remedy*

As I have found a limitation of s. 15 which cannot be justified under s. 1, it is necessary to consider what remedial effect this holding should have.

(a) Reading In/Reading Down

This is not an appropriate case for either of the remedies of reading down or reading in. Since the extent of the inconsistency in this case is the blanket nature of the prohibition in s. 241(b), there is no part of the provision which can be read down or severed in order to render it constitutional. As for reading in, the guidelines I discussed in *Schachter v. Canada, supra*, indicate that reading in is not appropriate, given the range of alternative schemes from which the Court would have to choose. In other words, the best constitutional way to achieve the legitimate legislative objective, short of an absolute prohibition, is not obvious. Reading in an assisted suicide "code" to apply for an indefinite period following this decision would certainly not comport with Parliament's decision to impose an absolute prohibition, and would also raise serious concerns about the roles of the courts and the legislature.

(b) Declaration of Invalidity

The most common remedial order where a statutory provision is found to violate the *Charter*, and reading down or reading in are inappropriate, is a declaration that the provision is henceforth of no force or effect. However, this Court has recognized that an immediate declaration of invalidity is not

always advisable, especially where, as here, the provision pursues an important objective but is over-inclusive: were this Court to strike down the provision effective immediately, those whom the government could protect constitutionally with a more tailored provision, and who indeed should be protected, would be left unprotected. This would clearly pose a "potential danger to the public" as understood in *Swain* and *Schachter*, *supra*.

For this reason, I would suspend the declaration that s. 241(b) is of no force or effect for a period long enough to allow Parliament to address this most difficult issue. In my view, one year from the date of this judgment would give Parliament adequate time to decide what, if any, legislation should replace s. 241(b).

(c) Personal Remedy -- Constitutional Exemption

While this suspended declaration of invalidity will afford relief to those affected by the legislation once the suspension period expires, a remedy must also be available to Ms. Rodriguez in this case. In *Nelles v. Ontario*, [1989] 2 S.C.R. 170, in the context of discussing the meaning of "court of competent jurisdiction" in s. 24(1), I wrote that "[t]o create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur" (p. 196). The cases to date are unclear on the precise status and rights of persons subject to the law during a period of suspended invalidity, since this Court has never before been faced by a litigant denied a personal remedy because the

legislation is challenged under s. 52 of the *Constitution Act, 1982* rather than s. 24(1) of the *Charter*.

In *Swain*, I held, for the majority, that the provisions of the *Criminal Code* authorizing the indefinite detention of those found not guilty by reason of insanity violated the *Charter*, but suspended the declaration of invalidity for a "transitional period" of six months. However, I also tailored the legislative scheme which would apply within that transitional period, limiting automatic detention orders to a duration of 30 to 60 days. I also allowed the parties to apply to the Court to seek to extend the transitional period or modify the regimen set out. It was not necessary to deal with Swain's particular case since I entered a stay of proceedings, the Lieutenant Governor of Ontario having vacated his warrant and effected his absolute discharge.

Therefore, *Swain* indicates that the legislation subjected to a suspended declaration of invalidity will not necessarily be left operative in all of its violative aspects, and that the Court has jurisdiction under s. 52 to make the declaration subject to such conditions as it considers just and necessary to vitiate the impact of the violation during the period of the suspension.

The possibility that a form of immediate personal relief may be granted during the suspension period was also suggested in subsequent decisions. In *Schachter*, I addressed the relationship between ss. 24(1) and 52 remedies in depth. I recognized the availability of a suspended declaration of invalidity, but noted (at p. 716) that it was a "serious matter", for where that invalidity arose ought of a *Charter* violation, it "allows a state of affairs which

has been found to violate standards embodied in the *Charter* to persist for a time despite the violation". While recognizing that "[t]here may be good pragmatic reasons to allow this in particular cases", I later suggested that there was some flexibility to temper this result (at p. 720):

An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*.... It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. [Emphasis added.]

As Parliament had repealed and replaced the legislation at issue in *Schachter* before the appeal was heard, it was not necessary to make a declaration of invalidity, or to decide whether and on what terms to suspend that declaration or grant an immediate remedy.

This case raises before the Court, for the first time, the necessity of granting a personal remedy in conjunction with a suspended declaration of invalidity. I am of the view that an appropriate personal remedy for Ms. Rodriguez during the period of suspension is what has been called a "constitutional exemption". The possibility of a constitutional exemption where otherwise, or temporarily, valid legislation is unconstitutional in its application to a particular group has been recognized only in *obiter* statements of this Court.

In *Big M Drug Mart, supra*, at p. 315, Dickson J. distinguished the positions of a corporation which challenged legislation under s. 2(a) of the *Charter* from that of a natural person who holds religious beliefs, holding that the corporation was entitled to challenge the legislation, since "it is one thing to

claim that the legislation is itself unconstitutional, it is quite another to claim a 'constitutional exemption' from otherwise valid legislation, which offends one's religious tenets". In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson C.J. returned to the remedy of a so-called "constitutional exemption", characterizing the earlier decision as follows (at p. 783):

In *Big M Drug Mart Ltd.* at p. 315, the majority of the Court left open the possibility that in certain circumstances a "constitutional exemption" might be granted from otherwise valid legislation to particular individuals whose religious freedom was adversely affected by the legislation.

Different members of the Court have returned to the constitutional exemption described by Dickson C.J. In *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, McLachlin J., for the Court, noted that allowing exemptions from unconstitutionally over-broad legislation would have a chilling effect, preventing people from engaging in lawful behaviour because the prohibition remains "on the books".

In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, a case concerning a challenge to the federal provisions prohibiting public servants from working for or against candidates or political parties, Wilson J., for herself and L'Heureux-Dubé J., wrote (at pp. 76-77) that once legislation is found to be over-inclusive, infringes a *Charter* right and cannot be justified under s. 1,

the Court has no alternative but to strike the legislation down or, if the unconstitutional aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. I do not believe it is open to the Court in these circumstances to create exemptions to the legislation (which, in my view, presupposes its constitutional validity) and grant individual remedies under s. 24(1) of the

*Canadian Charter of Rights and Freedoms*. In other words, it is not, in my opinion, open to the Court to cure over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books.

Wilson J. argued that s. 24(1) existed to provide an appropriate and just remedy to individuals, and cited the decision of Dickson J. in *Big M Drug Mart*, who said that where a challenge is based on the unconstitutionality of legislation, "recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant" (p. 313). Wilson J. also distinguished between a constitutional exemption and "reading down", since the latter was a matter of interpreting the legislation so as to conform to the *Charter*, while the former amounted to overriding what had been found to be the "proper" interpretation.

Sopinka J. (Cory and McLachlin JJ. concurring), referred in *Osborne* to reading down and the constitutional exemption as "companions", and stated that they could achieve the same result. He noted that the Ontario Court of Appeal adopted the constitutional exemption in *R. v. Seaboyer* (1987), 35 C.R.R. 300. Sopinka J. declined to apply either remedy in *Osborne*, stating (at p. 105) that "[t]o maintain a section that is so riddled with infirmity would not uphold the values of the *Charter* and would constitute a greater intrusion on the role of Parliament."

This Court responded to the Ontario Court of Appeal's use of the constitutional exemption in *Seaboyer* in its decision on appeal: [1991] 2 S.C.R. 577. In *Seaboyer*, the majority of the Ontario Court of Appeal endorsed a case-by-case constitutional exemption, involving a determination of whether the former rape-shield provisions of the *Criminal Code* (R.S.C., 1985, c. C-46, ss.

276 and 277 (now repealed)) violated the accused's *Charter* right to make a full answer and defence. I concurred in McLachlin J.'s reasons for the majority, in which she assumed, without deciding, that granting a constitutional exemption was open to the Court, but decided that it could not apply in the case at bar as fashioned by the Court of Appeal. She based her decision on three factors. First, the exemption fashioned by the majority of the Court of Appeal gave the trial judge a discretion to not apply the blanket prohibition of the section where it would result in a *Charter* violation, thus saving the law in one sense but "dramatically" altering it in another by substituting a regime of exceptions for the blanket prohibition. Second, a regime based on judicial discretion would replace one set of common law notions of relevancy, which Parliament clearly sought to exclude, with another. Third, McLachlin J. argued that the practice would amount to tautologically telling trial judges not to apply the law where it should not be applied because of the resulting *Charter* violation; in the absence of criteria outside the *Charter*, it would never be necessary to strike down legislation under such an approach. McLachlin J. distinguished *Big M Drug Mart* and *Edwards Books* on the basis that those cases concerned a situation where certain groups, whose characteristics were determinable by criteria outside of the *Charter* (i.e., store owners who closed on days other than Sunday for religious reasons), claimed an exemption from the operation of the legislation, thus satisfying the requirement that the law be certain and predictable. McLachlin J. also noted that, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J. rejected the notion that the Court should read constitutional standards into legislation, which would be the effect of setting standards for the application of a constitutional exemption.

The scope of the constitutional exemption, then, has been limited by the majority of this Court: an over-broad blanket prohibition should not be tempered by allowing judicially granted exemptions to nullify it, and the criteria on which the exemption would be granted must be external to the *Charter*. That is, the fact that the application of the legislation to the party challenging it would violate the *Charter* cannot be the sole ground for deciding to grant the exemption; rather, there must be an identifiable group, defined by non-*Charter* characteristics, to whom the exemption could be said to apply.

The remedy requested by Ms. Rodriguez, and that fashioned by McEachern C.J., can best be understood as constitutional exemptions. The appellant asks for "a declaration that the operation of s. 241(b) of the *Criminal Code* violates [her] constitutionally guaranteed rights and that, upon compliance with certain conditions, neither the Appellant nor any physician assisting her to attempt to commit, or to commit suicide, will by that means commit any offence against the law of Canada". McEachern C.J. preferred "to leave s. 241 alone for the good things it does" (p. 166) and looked to s. 24(1) of the *Charter* for a "less drastic remedy" than that required by s. 52. He also noted that he was concerned only with a single appellant, and that others would have to come to court to establish their identity as members of a class "in the same position as she is" and that individual remedies would have to be fashioned for each of them. He also drew the following distinction (at p. 167):

Thirdly, even though the result under both sections may seem to be the same, the analysis under the two sections, in these circumstances, is different. In either event, in order to prevent abuse, the court would be required to attach conditions to any remedy which, under s. 52, might be thought to apply to all members of the class of persons in the position of the Appellant. Moreover,

attaching conditions to a remedy under s. 52 is much more like legislating than is the case when conditions are made a part of a personal remedy. A remedy under s. 24(1), on the other hand, applies only to the Appellant.

Therefore, I think it is clear that McEachern C.J., even if he did not use the term "constitutional exemption", was thinking in terms of that particular remedy.

I am in agreement with many of the concerns Wilson J. expressed in *Osborne* about constitutional exemptions, and would address them by holding that constitutional exemptions may only be granted during the period of a suspended declaration of invalidity. In this circumstance, the provision is both struck down and temporarily upheld, making the constitutional exemption peculiarly apt, and limiting its application to situations where it is absolutely necessary. The exemption is only available for a limited time, so that the Court is not put in the position of, in the words of Wilson J., curing "over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books" (p. 77). Nor is the Court put in the position of appearing to save a blanket prohibition in one respect while "dramatically altering it" in another by granting exemptions from that prohibition. The blanket prohibition is saved for reasons only of practical necessity, so granting exemptions where the necessity does not exist avoids the contradiction. Because I have held that the equality rights of all persons who are or will become physically unable to commit unassisted suicide are infringed, that description captures the class of persons to whom the constitutional exemption may be available; the class is not defined with reference only to *Charter* concepts and values.

The constitutional exemption I propose would be available only on the authority of a superior court order, granted on terms similar to those outlined by McEachern C.J. The criteria he suggests provide adequate safeguards that the concerns necessitating the suspension of invalidity are not present in any case which may come before the courts. However, I would make an important change to the order he would have granted in this appeal.

I have held that s. 241(b) violates the equality rights of all persons who desire to commit suicide but are or will become physically unable to do so unassisted. Restricting the remedy to those who are terminally ill, and suffering from incurable diseases or conditions, as McEachern C.J. would have, does not follow from the principles underlying my holding, and might well itself give rise to a violation of the equality rights of those who do not fit that description but wish to commit suicide and need assistance. Therefore, I would eliminate that part of McEachern C.J.'s conditions for a court order granting the constitutional exemption. There is another aspect of McEachern C.J.'s order that has caused me concern. One of McEachern C.J.'s conditions is that the act of terminating the appellant's life be hers and not anyone else's. While I believe this to be appropriate in her current circumstances as a mechanism can be put in place allowing her to cause her own death with her limited physical capabilities, why should she be prevented the option of choosing suicide should her physical condition degenerate to the point where she is no longer even physically able to press a button or blow into a tube? Surely it is in such circumstances that assistance is required most. Given that Ms. Rodriguez has not requested such an order, however, I need not decide the issue at this time. Therefore, I prefer to leave it to be resolved at a later date.

To summarize, then, I would make a constitutional exemption available to Ms. Rodriguez, and others, on the following conditions:

- (1) the constitutional exemption may only be sought by way of application to a superior court;
- (2) the applicant must be certified by a treating physician and independent psychiatrist, in the manner and at the time suggested by McEachern C.J., to be competent to make the decision to end her own life, and the physicians must certify that the applicant's decision has been made freely and voluntarily, and at least one of the physicians must be present with the applicant at the time the applicant commits assisted suicide;
- (3) the physicians must also certify:
  - (i) that the applicant is or will become physically incapable of committing suicide unassisted, and (ii) that they have informed him or her, and that he or she understands, that he or she has a continuing right to change his or her mind about terminating his or her life;
- (4) notice and access must be given to the Regional Coroner at the time and in the manner described by McEachern C.J.;

- (5) the applicant must be examined daily by one of the certifying physicians at the time and in the manner outlined by McEachern C.J.;
- (6) the constitutional exemption will expire according to the time limits set by McEachern C.J.; and
- (7) the act causing the death of the applicant must be that of the applicant him- or herself, and not of anyone else.

I wish to emphasize that these conditions have been tailored to the particular circumstances of Ms. Rodriguez. While they may be used as guidelines for future petitioners in a similar position, each application must be considered in its own individual context.

VI. Disposition

I would answer the constitutional questions as follows:

1. Does s. 241(b) of the *Criminal Code* of Canada infringe or deny, in whole or in part, the rights and freedoms guaranteed by ss. 7, 12 and 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If so, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: No.

I would therefore allow the appeal, with costs to the appellant against the Attorneys General of British Columbia and Canada, and declare s. 241(b) to be of no force or effect, on the condition that the effect of this declaration be suspended for one year from the date of this judgment. During that one-year suspension period, a constitutional exemption from s. 241(b) may be granted by a superior court on application, on the terms and in accordance with the conditions set out above. In the case of Ms. Rodriguez, in light of the factual record before this Court, it is not necessary for her to make application to a superior court. As long as she satisfies the conditions outlined above, she is granted the constitutional exemption and may proceed as she wishes.

DATED AT OTTAWA this                      day of August 1993

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Antonio Lamer, C.J.C.

#### ADDENDUM

In the course of preparing my judgment, the Court received a letter dated July 13, 1993, from Ms. Rodriguez's counsel. Enclosed was a report dated

July 9, 1993, from Ms. Rodriguez's family physician informing us that Ms. Rodriguez's medical condition continues to deteriorate. In light of this report and the fact that we are now into the end of August, I wish to modify the fourth condition above. This modification will apply only in the appellant's case. Specifically, I would dispense with the 3-day notice required to be given to the Regional Coroner and replace it with a 24-hour notice requirement.

DATED AT OTTAWA this            day of August 1993

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Antonio Lamer, C.J.C.

The judgment of La Forest, Sopinka, Gonthier, Iacobucci and Major JJ. was delivered by

SOPINKA J. -- I have read the reasons of the Chief Justice and those of McLachlin J. herein. The result of the reasons of my colleagues is that all persons who by reason of disability are unable to commit suicide have a right under the *Canadian Charter of Rights and Freedoms* to be free from government interference in procuring the assistance of others to take their life. They are entitled to a constitutional exemption from the operation of s. 241 of the *Criminal Code*, R.S.C., 1985, c. C-46, which prohibits the giving of assistance to commit suicide (hereinafter referred to as "assisted suicide"). The exemption would apply during the period that this Court's order would be suspended and thereafter Parliament could only replace the legislation subject to this right. I must respectfully disagree with the conclusion reached by my

colleagues and with their reasons. In my view, nothing in the *Charter* mandates this result which raises the following serious concerns:

1. It recognizes a constitutional right to legally assisted suicide beyond that of any country in the western world, beyond any serious proposal for reform in the western world and beyond the claim made in this very case. The apparent reason for the expansion beyond the claim in this case is that restriction of the right to the terminally ill could not be justified under s. 15.

2. It fails to provide the safeguards which are required either under the Dutch guidelines or the recent proposals for reform in the states of Washington and California which were defeated by voters in those states principally because comparable and even more stringent safeguards were considered inadequate.

3. The conditions imposed are vague and in some respects unenforceable. While the proposals in California were criticized for failure to specify the type of physician who is authorized to assist and the Dutch guidelines specify the treating physician, the conditions imposed by my colleagues do not require that the person assisting be a physician or impose any restriction in this regard. Since much of the medical profession is opposed to being involved in assisting suicide because it is antithetical to their role as healers of the sick, many doctors will refuse to assist, leaving open the potential for the growth of a macabre specialty in this area reminiscent of Dr. Kervorkian and his suicide machine.

4. To add to the uncertainty of the conditions, they are to serve merely as guidelines, leaving it to individual judges to decide upon application whether to grant or withhold the right to commit suicide. In the case of the appellant, the remedy proposed by the Chief Justice, concurred in by McLachlin J., would not require such

an application. She alone is to decide that the conditions or guidelines are complied with. Any judicial review of this decision would only occur if she were to commit suicide and a charge were laid against the person who assisted her. The reasons of McLachlin J. remove any requirement to monitor the choice made by the appellant to commit suicide so that the act might occur after the last expression of the desire to commit suicide is stale-dated.

I have concluded that the conclusion of my colleagues cannot be supported under the provisions of the *Charter*. Reliance was placed on ss. 7, 12 and 15 and I will examine each in turn.

I. Section 7

The most substantial issue in this appeal is whether s. 241(b) infringes s. 7 in that it inhibits the appellant in controlling the timing and manner of her death. I conclude that while the section impinges on the security interest of the appellant, any resulting deprivation is not contrary to the principles of fundamental justice. I would come to the same conclusion with respect to any liberty interest which may be involved.

Section 7 of the *Charter* provides as follows:

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The appellant argues that, by prohibiting anyone from assisting her to end her life when her illness has rendered her incapable of terminating her life without such assistance, by threat of criminal sanction, s. 241(b) deprives her of both her liberty and her security of the person. The appellant asserts that her application is based upon (a) the right to live her remaining life with the inherent dignity of a human person, (b) the right to control what happens to her body while she is living, and (c) the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life. The first two of these asserted rights can be seen to invoke both liberty and security of the person; the latter is more closely associated with only the liberty interest.

(a) *Life, Liberty and Security of the Person*

The appellant seeks a remedy which would assure her some control over the time and manner of her death. While she supports her claim on the ground that her liberty and security of the person interests are engaged, a consideration of these interests cannot be divorced from the sanctity of life, which is one of the three *Charter* values protected by s. 7.

None of these values prevail a priori over the others. All must be taken into account in determining the content of the principles of fundamental justice and there is no basis for imposing a greater burden on the propounder of one value as against that imposed on another.

Section 7 involves two stages of analysis. The first is as to the values at stake with respect to the individual. The second is concerned with possible limitations

of those values when considered in conformity with fundamental justice. In assessing the first aspect, we may do so by considering whether there has been a violation of Ms. Rodriguez's security of the person and we must consider this in light of the other values I have mentioned.

As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by governmental action. There is no doubt that the prohibition in s. 241(b) will contribute to the appellant's distress if she is prevented from managing her death in the circumstances which she fears will occur. Nor do I accept the submission that the appellant cannot avail herself of s. 7 because she is not presently engaged in interaction with the criminal justice system, and that she will likely never be so engaged. It was argued that the comments concerning security of the person found in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, and the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, were not applicable to this case and that the appellant could not seek the protection of s. 7 at all, as that section is concerned with the interaction of the individual with the justice system. In my view, the fact that it is the criminal prohibition in s. 241(b) which has the effect of depriving the appellant of the ability to end her life when she is no longer able to do so without assistance is a sufficient interaction with the justice system to engage the provisions of s. 7 assuming a security interest is otherwise involved.

I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life

is sacred or inviolable (which terms I use in the non-religious sense described by Dworkin (*Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993)) to mean that human life is seen to have a deep intrinsic value of its own). As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution which embodies our most fundamental values a right to terminate one's own life in any circumstances? This question in turn evokes other queries of fundamental importance such as the degree to which our conception of the sanctity of life includes notions of quality of life as well.

Sanctity of life, as we will see, has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.

The appellant suggests that for the terminally ill, the choice is one of time and manner of death rather than death itself since the latter is inevitable. I disagree. Rather it is one of choosing death instead of allowing natural forces to run their course. The time and precise manner of death remain unknown until death actually occurs. There can be no certainty in forecasting the precise circumstances of a death. Death is, for all mortals, inevitable. Even when death appears imminent, seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life as a value is engaged even in the case of the terminally ill who seek to choose death over life.

Indeed, it has been abundantly pointed out that such persons are particularly vulnerable as to their life and will to live and great concern has been expressed as to their adequate protection, as will be further set forth.

I do not draw from this that in such circumstances life as a value must prevail over security of person or liberty as these have been understood under the *Charter*, but that it is one of the values engaged in the present case.

What, then, can security of the person be said to encompass in the context of this case? The starting point for the answer to this question is *Morgentaler, supra*, in which this Court struck down *Criminal Code* provisions which had the effect of preventing women access to therapeutic abortion unless they complied with an administrative scheme found to be contrary to principles of fundamental justice. In finding a violation of security of the person, Beetz J. held, at p. 90, that:

"Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction.

Whether or not Beetz J. can be said to have restricted his reasoning to criminal prohibitions limiting access to medical treatment which improves health, he made it clear (at p. 90) that his reasons should not be taken as delineating the bounds of s. 7 in other contexts. In any event, Dickson C.J. does not appear to have limited his reasons in this manner. The former Chief Justice stated as follows, at pp. 54-57:

Canadian courts have already had occasion to address the scope of the interest protected under the rubric of "security of the person". In *R. v. Caddedu* (1982), 40 O.R. (2d) 128, at p. 139, the Ontario High Court

emphasized that the right to security of the person, like each aspect of s. 7, is a basic right, the deprivation of which has severe consequences for an individual. This characterization was approved by this Court in *Re B.C. Motor Vehicle Act*, at p. 501. The Ontario Court of Appeal has held that the right to life, liberty and security of the person "would appear to relate to one's physical or mental integrity and one's control over these..." (*R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, at p. 433.)

...

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of the security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

...

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. [Emphasis added.]

Wilson J. took a broader view, preferring to decide the case under the rubric of the liberty interest in s. 7. Nonetheless, she agreed that security of the person "protects both the physical and psychological integrity of the individual" and that state control over the woman's capacity to reproduce "is a direct interference with her physical "person" as well" (p. 173).

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the

person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

The effect of the prohibition in s. 241(b) is to prevent the appellant from having assistance to commit suicide when she is no longer able to do so on her own. She fears that she will be required to live until the deterioration from her disease is such that she will die as a result of choking, suffocation or pneumonia caused by aspiration of food or secretions. She will be totally dependent upon machines to perform her bodily functions and completely dependent upon others. Throughout this time, she will remain mentally competent and able to appreciate all that is happening to her. Although palliative care may be available to ease the pain and other physical discomfort which she will experience, the appellant fears the sedating effects of such drugs and argues, in any event, that they will not prevent the psychological and emotional distress which will result from being in a situation of utter dependence and loss of dignity. That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. In my view, these considerations lead to the conclusion that the prohibition in s. 241(b) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest

(considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.

(b) *The Principles of Fundamental Justice*

In approaching this step of the analysis in this most difficult and troubling problem, I am impressed with the caveat expressed by the American scholar, L. Tribe, in his text *American Constitutional Law* (2nd ed. 1988). He states, at pp. 1370-71:

The right of a patient to accelerate death as such -- rather than merely to have medical procedures held in abeyance so that disease processes can work their natural course -- depends on a broader conception of individual rights than any contained in common law principles. A right to determine when and how to die would have to rest on constitutional principles of privacy and personhood or on broad, perhaps paradoxical, conceptions of self-determination.

Although these notions have not taken hold in the courts, the judiciary's silence regarding such constitutional principles probably reflects a concern that, once recognized, rights to die might be uncontrollable and might prove susceptible to grave abuse, more than it suggests that courts cannot be persuaded that self-determination and personhood may include a right to dictate the circumstances under which life is to be ended. In any event, whatever the reason for the absence in the courts of expansive notions about self-determination, the resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting people, may endanger personhood.

On the one hand, the Court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of legislation. On the other hand, the Court

has not only the power but the duty to deal with this question if it appears that the *Charter* has been violated. The power to review legislation to determine whether it conforms to the *Charter* extends to not only procedural matters but also substantive issues. The principles of fundamental justice leave a great deal of scope for personal judgment and the Court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only.

In this case, it is not disputed that in general s. 241(b) is valid and desirable legislation which fulfils the government's objectives of preserving life and protecting the vulnerable. The complaint is that the legislation is over-inclusive because it does not exclude from the reach of the prohibition those in the situation of the appellant who are terminally ill, mentally competent, but cannot commit suicide on their own. It is also argued that the extension of the prohibition to the appellant is arbitrary and unfair as suicide itself is not unlawful, and the common law allows a physician to withhold or withdraw life-saving or life-maintaining treatment on the patient's instructions and to administer palliative care which has the effect of hastening death. The issue is whether, given this legal context, the existence of a criminal prohibition on assisting suicide for one in the appellant's situation is contrary to principles of fundamental justice.

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however,

be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. (as he then was) in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 512-13, are as follows:

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

... the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots"....

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

This Court has often stated that in discerning the principles of fundamental justice governing a particular case, it is helpful to look at the common law and legislative history of the offence in question (*Re B.C. Motor Vehicle Act* and *Morgentaler, supra*, and *R. v. Swain*, [1991] 1 S.C.R. 933). It is not sufficient, however, merely to conduct a historical review and conclude that because neither Parliament nor the various medical associations had ever expressed a view that assisted suicide should be decriminalized, that to prohibit it could not be said to be contrary to the principles of fundamental justice. Such an approach would be problematic for two reasons. First, a strictly historical analysis will always lead to the conclusion in a case such as this that the deprivation is in accordance with fundamental justice as the legislation will not have kept pace with advances in medical technology.

Second, such reasoning is somewhat circular, in that it relies on the continuing existence of the prohibition to find the prohibition to be fundamentally just.

The way to resolve these problems is not to avoid the historical analysis, but to make sure that one is looking not just at the existence of the practice itself (i.e., the continued criminalization of assisted suicide) but at the rationale behind that practice and the principles which underlie it.

The appellant asserts that it is a principle of fundamental justice that the human dignity and autonomy of individuals be respected, and that to subject her to needless suffering in this manner is to rob her of her dignity. The importance of the concept of human dignity in our society was enunciated by Cory J. (dissenting, Lamer C.J. concurring) in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 813. Respect for human dignity underlies many of the rights and freedoms in the *Charter*.

That respect for human dignity is one of the underlying principles upon which our society is based is unquestioned. I have difficulty, however, in characterizing this in itself as a principle of fundamental justice within the meaning of s. 7. While respect for human dignity is the genesis for many principles of fundamental justice, not every law that fails to accord such respect runs afoul of these principles. To state that "respect for human dignity and autonomy" is a principle of fundamental justice, then, is essentially to state that the deprivation of the appellant's security of the person is contrary to principles of fundamental justice because it deprives her of security of the person. This interpretation would equate security of the person with a principle of fundamental justice and render the latter redundant.

I cannot subscribe to the opinion expressed by my colleague, McLachlin J., that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539, La Forest J., referring to his own reasons in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 327, and *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 402-3, stated that one must "consider (the impugned measure) against the applicable principles and policies that have animated legislative and judicial practice in the field". La Forest J. concluded that:

What these practices have sought to achieve is a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice; see *R. v. Lyons, supra*, at pp. 327 and 329; *R. v. Beare, supra*, at pp. 403-5; also my reasons in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 745 (dissenting on another point); see also *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 304, *per* La Forest J. (Dickson C.J. and Lamer J. concurring). The interests in the area with which we are here concerned involve particularly delicate balancing, and, as Wilson J. has demonstrated, the various common law countries have approached it in rather different ways. I do not wish to undertake the invidious task of examining which is the better way. All seem to me to be reasonable approaches, but what is important is that the *Charter* provisions seem to me to be deeply anchored in previous Canadian experience. By this, I do not mean that we must remain prisoners of our past. I do mean, however, that in continuing to grope for the best balance in specific contexts, we must begin with our own experience ....

This concept of balancing was confirmed in a very recent judgment of this Court. In *Cunningham v. Canada*, [1993] 2 S.C.R. 143, McLachlin J. concluded that the appellant had been deprived of a liberty interest protected by s. 7. She then considered whether that deprivation was in accordance with the principles of fundamental justice (at pp. 151-52):

The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 502-3, *per* Lamer J.; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 212, *per* Wilson J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882, *per* Iacobucci J.). In my view the balance struck in this case conforms to this requirement.

The first question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society. The interest of society in being protected against the violence that may be perpetrated as a consequence of the early release of inmates whose sentence has not been fully served needs no elaboration. On the other side of the balance lies the prisoner's interest in an early conditional release. [Emphasis added.]

McLachlin J. held that the appropriate balance had been struck "by qualifying the prisoner's expectation regarding the form in which the sentence would be served" (p. 152).

Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose. This is, to my mind, essentially the type of analysis which E. Colvin advocates in his article "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 *Can. Bar Rev.* 560, and which was carried out in *Morgentaler*. That is, both Dickson C.J. and Beetz J. were of the view that at least some of the restrictions placed upon access to abortion had no relevance to the state objective of protecting the foetus while protecting the life and health of the mother. In that regard the restrictions were arbitrary or unfair. It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. One cannot conclude that a particular limit is arbitrary because (in the words of my colleague, McLachlin J. at pp.

619-20) "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation" without considering the state interest and the societal concerns which it reflects.

The issue here, then, can be characterized as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.

Section 241(b) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This policy finds expression not only in the provisions of our *Criminal Code* which prohibit murder and other violent acts against others notwithstanding the consent of the victim, but also in the policy against capital punishment and, until its repeal, attempted suicide. This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life. The Law Reform Commission expressed this philosophy appropriately in its Working Paper 28, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982), at p. 36:

Preservation of human life is acknowledged to be a fundamental value of our society. Historically, our criminal law has changed very little on this point. Generally speaking, it sanctions the principle of the sanctity of human life. Over the years, however, law has come to temper the apparent absolutism of the principle, to delineate its intrinsic limitations and to define its true dimensions.

As is noted in the above passage, the principle of sanctity of life is no longer seen to require that all human life be preserved at all costs. Rather, it has come to be understood, at least by some, as encompassing quality of life considerations, and to be subject to certain limitations and qualifications reflective of personal autonomy and dignity. An analysis of our legislative and social policy in this area is necessary in order to determine whether fundamental principles have evolved such that they conflict with the validity of the balancing of interests undertaken by Parliament.

(i) History of the Suicide Provisions

At common law, suicide was seen as a form of felonious homicide that offended both against God and the King's interest in the life of his citizens. As Blackstone noted in *Commentaries on the Laws of England* (1769), vol. 4, at p. 189:

... the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on oneself.

This is essentially the view first propounded by Plato and Aristotle that suicide was "an offence against the gods or the state" (M. G. Velasquez, "Defining Suicide" (1987), 3 *Issues in Law & Medicine* 37, at p. 40).

However, the contrary school of thought has always existed and is premised on notions of both freedom and compassion. The Roman Stoics, for

example, "tended to condone suicide as a lawful and rational exercise of individual freedom and even wise in the cases of old age, disease, or dishonor" (Velasquez, *supra*, at p. 40). A more humane tone was struck by the Chancellor Francis Bacon who would have preferred leaving to the doctors the duty of lessening, or even ending, the suffering of their patients (L. Depaule, "Le droit à la mort: rapport juridique" (1974), 7 *Human Rights Journal* 464, at p. 467). There has never been a consensus with respect to this contrary school of thought.

Thus, until 1823, English law provided that the property of the suicide be forfeited and his body placed at the cross-roads of two highways with a stake driven through it. Burial indignities were also imposed in *ancien régime* France where the body of the suicide was often put on trial before being crucified (G. Williams, *The Sanctity of Life and the Criminal Law* (1957), at p. 259; Depaule, *supra*, at p. 465, citing the *Ordonnance de 1670*, title XXII).

However, given the practical difficulties of prosecuting the successful suicide, most prohibitions centred on attempted suicide; it was considered an offence and accessory liability for assisted suicide was made punishable. In England, this took the form of a charge of accessory before the fact to murder or murder itself until the passage of the *Suicide Act, 1961* (U.K.), 9 & 10 Eliz. 2, c. 60, which created an offence of assisting suicide which reads much like our s. 241. In Canada, the common law recognized that aiding suicide was criminal (G. W. Burbidge, *A Digest of the Criminal Law of Canada* (1890), at p. 224) and this was enshrined in the first *Criminal Code*, S.C. 1892, c. 29, s. 237. It is, with some editorial changes, the provision now found in s. 241.

The associated offence of attempted suicide has an equally long pedigree in Canada, found in the original *Code* at s. 238 and continued substantively unaltered until its repeal by S.C. 1972, c. 13, s. 16. The fact of this decriminalization does not aid us particularly in this analysis, however. Unlike the situation with the partial decriminalization of abortion, the decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens. Rather, the matter of suicide was seen to have its roots and its solutions in sciences outside the law, and for that reason not to mandate a legal remedy. Since that time, there have been some attempts to decriminalize assistance to suicide through private members bills, but none has been successful.

(ii) Medical Care at the End of Life

Canadian courts have recognized a common law right of patients to refuse consent to medical treatment, or to demand that treatment, once commenced, be withdrawn or discontinued (*Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119). This right has been specifically recognized to exist even if the withdrawal from or refusal of treatment may result in death (*Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. S.C.); and *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.)). The United States Supreme Court has also recently recognized that the right to refuse life-sustaining medical treatment is an aspect of the liberty interest protected by the Fourteenth Amendment in *Cruzan v. Director, Missouri Health Department* (1990), 111 L. Ed. 2d 224. However, that Court also enunciated the view that when a patient was unconscious and thus unable to express her own views, the state was justified in

requiring compelling evidence that withdrawal of treatment was in fact what the patient would have requested had she been competent.

The House of Lords has also had occasion very recently to address the matter of withdrawal of treatment. In *Airedale N.H.S. Trust v. Bland*, [1993] 2 W.L.R. 316, their Lordships authorized the withdrawal of artificial feeding from a 17-year-old boy who was in a persistent vegetative state as a result of injuries suffered in soccer riots, upon the consent of his parents. Persistence in a vegetative state was found not to be beneficial to the patient and the principle of sanctity of life, which was not absolute, was therefore found not to be violated by the withdrawal of treatment.

Although the issue was not before them, their Lordships nevertheless commented on the distinction between withdrawal of treatment and active euthanasia. Lord Keith stated at p. 362 that though the principle of sanctity of life is not an absolute one, "it forbids the taking of active measures to cut short the life of a terminally ill patient". Lord Goff also emphasized this distinction, stressing that the law draws a crucial distinction between active and passive euthanasia. He stated as follows, at pp. 368-69:

...the former [passive euthanasia] may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be.... So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia -- actively causing his death to avoid or to end his suffering.... It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic

will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. It is true that the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out his misery straight away, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he dies. But the law does not feel able to authorise euthanasia, even in circumstances such as these; for once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others.

Following Working Paper 28, the Law Reform Commission recommended in its 1983 Report to the Minister of Justice that the *Criminal Code* be amended to provide that the homicide provisions not be interpreted as requiring a physician to undertake medical treatment against the wishes of a patient, or to continue medical treatment when such treatment "has become therapeutically useless", or from requiring a physician to "cease administering appropriate palliative care intended to eliminate or to relieve the suffering of a person, for the sole reason that such care or measures are likely to shorten the life expectancy of this person" (Report 20, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1983), at pp. 34-35).

The Law Reform Commission had discussed in the Working Paper the possibility of the decriminalization of assisted suicide in the following terms, at pp. 53-54:

First of all, the prohibition in [s. 241] is not restricted solely to the case of the terminally ill patient, for whom we can only have sympathy, or solely to his physician or a member of his family who helps him to put an end to his suffering. The section is more general and applies to a variety of situations for which it is much more difficult to feel sympathy. Consider, for example, a recent incident, that of inciting to mass suicide. What of the person who takes advantage of another's depressed state to encourage him to commit suicide, for his own financial benefit? What of the person who, knowing an adolescent's suicidal tendencies, provides him

with large enough quantities of drugs to kill him? The "accomplice" in these cases cannot be considered morally blameless. Nor can one conclude that the criminal law should not punish such conduct. To decriminalize completely the act of aiding, abetting or counselling suicide would therefore not be a valid legislative policy. But could it be in the case of the terminally ill?

The probable reason why legislation has not made an exception for the terminally ill lies in the fear of the excesses or abuses to which liberalization of the existing law could lead. As in the case of "compassionate murder", decriminalization of aiding suicide would be based on the humanitarian nature of the motive leading the person to provide such aid, counsel or encouragement. As in the case of compassionate murder, moreover, the law may legitimately fear the difficulties involved in determining the true motivation of the person committing the act.

Aiding or counselling a person to commit suicide, on the one hand, and homicide, on the other, are sometimes extremely closely related. Consider, for example, the doctor who holds the glass of poison and pours the contents into the patient's mouth. Is he aiding him to commit suicide? Or is he committing homicide, since the victim's willingness to die is legally immaterial? There is reason to fear that homicide of the terminally ill for ignoble motives may readily be disguised as aiding suicide.

In its Working Paper, the Commission had originally recommended that the consent of the Attorney General should be required before prosecutions could be brought under s. 241(b). However, after negative public response, the Commission retracted this recommendation in its 1983 Report.

It can be seen, therefore, that while both the House of Lords, and the Law Reform Commission of Canada have great sympathy for the plight of those who wish to end their lives so as to avoid significant suffering, neither has been prepared to recognize that the active assistance of a third party in carrying out this desire should be condoned, even for the terminally ill. The basis for this refusal is twofold it seems -- first, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and second, there is no certainty that abuses can be

prevented by anything less than a complete prohibition. Creating an exception for the terminally ill might therefore frustrate the purpose of the legislation of protecting the vulnerable because adequate guidelines to control abuse are difficult or impossible to develop.

(iii) Review of Legislation in other Countries

A brief review of the legislative situation in other Western democracies demonstrates that in general, the approach taken is very similar to that which currently exists in Canada. Nowhere is assisted suicide expressly permitted, and most countries have provisions expressly dealing with assisted suicide which are at least as restrictive as our s. 241. For example, the *Austrian Penal Act 1945*, s. 139b, and the Spanish *Penal Code*, art. 409, have provisions virtually identical to our own, while the Italian *Penal Code* of 1930, art. 580, is even more broadly drafted, reading as follows:

Whoever brings about another's suicide or reinforces his determination to commit suicide, or in any way facilitates its commission, shall be punished. . . . [Emphasis added.]

(*The Italian Penal Code* (1978), translated by E. M. Wise, in the American Series of Foreign Penal Codes, vol. 23, at p. 194.)

The relevant provision of the *Suicide Act, 1961* of the United Kingdom punishes a "person who aids, abets, counsels or procures the suicide of another or an attempt by another, to commit suicide", and this form of prohibition is echoed in the criminal statutes of all state and territorial jurisdictions in Australia (M. Otlowski, "Mercy Killing Cases in the Australian Criminal Justice System" (1993), 17 *Crim. L.J.*

10). The U.K. provision is apparently the only prohibition on assisted suicide which has been subjected to judicial scrutiny for its impact on human rights prior to the present case. In the Application No. 10083/82, *R. v. United Kingdom*, July 4, 1983, D.R. 33, p. 270, the European Commission of Human Rights considered whether s. 2 of the *Suicide Act, 1961* violated either the right to privacy in Article 8 or freedom of expression in Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. The applicant, who was a member of a voluntary euthanasia association, had been convicted of several counts of conspiracy to aid and abet a suicide for his actions in placing persons with a desire to kill themselves in touch with his co-accused who then assisted them in committing suicide. The European Commission held (at pp. 271-72) that the acts of aiding, abetting, counselling or procuring suicide were "excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life, as reflected in the criminal provisions of the 1961 Act", and upheld the applicant's conviction for the offence. Further, the Commission upheld the restriction on the applicant's freedom of expression, recognizing (at p. 272):

. . . the State's legitimate interest in this area in taking measures to protect, against criminal behaviour, the life of its citizens particularly those who belong to especially vulnerable categories by reason of their age or infirmity. It recognises the right of the State under the Convention to guard against the inevitable criminal abuses that would occur, in the absence of legislation, against the aiding and abetting of suicide.

Although the factual scenario in that decision was somewhat different from the one at bar, it is significant that neither the European Commission of Human Rights nor any other judicial tribunal has ever held that a state is prohibited on constitutional or human rights grounds from criminalizing assisted suicide.

Some European countries have mitigated prohibitions on assisted suicide which might render assistance in a case similar to that before us legal in those countries. In the Netherlands, although assisted suicide and voluntary active euthanasia are officially illegal, prosecutions will not be laid so long as there is compliance with medically established guidelines. Critics of the Dutch approach point to evidence suggesting that involuntary active euthanasia (which is not permitted by the guidelines) is being practised to an increasing degree. This worrisome trend supports the view that a relaxation of the absolute prohibition takes us down "the slippery slope". Certain other European countries, such as Switzerland and Denmark, emphasize the motive of the assistor in suicide, such that the Swiss *Penal Code*, art. 115, criminalizes only those who incite or assist a suicide for a selfish motive, and the Danish *Penal Code*, art. 240, while punishing all assistance, imposes a greater penalty upon those who act out of self-interest. In France, while no provision of the *Penal Code* addresses specifically the issue of assisted suicide, failure to seek to prevent someone from committing suicide may still lead to criminal sanctions under art. 63, para. 2 (omission to provide assistance to a person in danger) or art. 319 (involuntary homicide by negligence or carelessness) of that Code. Moreover, the *Loi n° 87-1133 du 31 décembre 1987* introduced two new articles to the *Penal Code*, arts. 318-1 and 318-2, which criminalize the provocation of suicide. This offence, which requires a form of incitement over and above merely aiding in the commission of a suicide, was adopted in response to the macabre impact of the book *Suicide, mode d'emploi* (1982).

Similarly, a few American jurisdictions take into account whether the accused caused the victim to commit suicide by coercion, force, duress or deception in deciding whether the charge should be murder, manslaughter or assisted suicide

(Connecticut, Maine and Pennsylvania) or whether the person is guilty of even assisted suicide (Puerto Rico and Indiana). See C. D. Shaffer, "Criminal Liability for Assisting Suicide" (1986), 86 *Colum. L. Rev.* 348, at pp. 351-53, nn. 25-26, 35-36. As is the case in Europe and the Commonwealth, however, the vast majority of those American states which have statutory provisions dealing specifically with assisted suicide have no intent or malice requirement beyond the intent to further the suicide, and those states which do not deal with the matter statutorily appear to have common law authority outlawing assisted suicide (Shaffer, *supra*, at p. 352; and M. M. Penrose, "Assisted Suicide: A Tough Pill to Swallow" (1993), 20 *Pepp. L. Rev.* 689, at pp. 700-701). It is notable, also, that recent movements in two American states to legalize physician-assisted suicide in circumstances similar to those at bar have been defeated by the electorate in those states. On November 5, 1991, Washington State voters defeated Initiative 119, which would have legalized physician-assisted suicide where two doctors certified the patient would die within six months and two disinterested witnesses certified that the patient's choice was voluntary. One year later, Proposition 161, which would have legalized assisted suicide in California and which incorporated stricter safeguards than did Initiative 119, was defeated by California voters (usually thought to be the most accepting of such legal innovations) by the same margin as resulted in Washington -- 54 to 46 percent. In both states, the defeat of the proposed legislation seems to have been due primarily to concerns as to whether the legislation incorporated adequate safeguards against abuse (Penrose, *supra*, at pp. 708-14). I note that, at least in the case of California, the conditions to be met were more onerous than those set out by McEachern C.J.B.C. in the court below and by my colleagues the Chief Justice and McLachlin J.

Overall, then, it appears that a blanket prohibition on assisted suicide similar to that in s. 241 is the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. Recent attempts to alter the status quo in our neighbour to the south have been defeated by the electorate, suggesting that despite a recognition that a blanket prohibition causes suffering in certain cases, the societal concern with preserving life and protecting the vulnerable rendered the blanket prohibition preferable to a law which might not adequately prevent abuse.

(iv) Conclusion on Principles of Fundamental Justice

What the preceding review demonstrates is that Canada and other Western democracies recognize and apply the principle of the sanctity of life as a general principle which is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail. However, these same societies continue to draw distinctions between passive and active forms of intervention in the dying process, and with very few exceptions, prohibit assisted suicide in situations akin to that of the appellant. The task then becomes to identify the rationales upon which these distinctions are based and to determine whether they are constitutionally supportable.

The distinction between withdrawing treatment upon a patient's request, such as occurred in the *Nancy B.* case, on the one hand, and assisted suicide on the other has been criticized as resting on a legal fiction -- that is, the distinction between active and passive forms of treatment. The criticism is based on the fact that the withdrawal of life supportive measures is done with the knowledge that death will

ensue, just as is assisting suicide, and that death does in fact ensue as a result of the action taken. See, for example, the *Harvard Law Review* note "Physician-Assisted Suicide and the Right to Die with Assistance" (1992), 105 *Harv. L. Rev.* 2021, at pp. 2030-31.

Other commentators, however, uphold the distinction on the basis that in the case of withdrawal of treatment, the death is "natural" -- the artificial forces of medical technology which have kept the patient alive are removed and nature takes its course. In the case of assisted suicide or euthanasia, however, the course of nature is interrupted, and death results directly from the human action taken (E. W. Keyserlingk, *Sanctity of Life or Quality of Life in the Context of Ethics, Medicine and Law* (1979), a study paper for the Law Reform Commission of Canada's Protection of Life Series). The Law Reform Commission calls this distinction "fundamental" (at p. 19 of the Working Paper 28).

Whether or not one agrees that the active vs. passive distinction is maintainable, however, the fact remains that under our common law, the physician has no choice but to accept the patient's instructions to discontinue treatment. To continue to treat the patient when the patient has withdrawn consent to that treatment constitutes battery (*Ciarlariello* and *Nancy B.*, *supra*). The doctor is therefore not required to make a choice which will result in the patient's death as he would be if he chose to assist a suicide or to perform active euthanasia.

The fact that doctors may deliver palliative care to terminally ill patients without fear of sanction, it is argued, attenuates to an even greater degree any legitimate distinction which can be drawn between assisted suicide and what are

currently acceptable forms of medical treatment. The administration of drugs designed for pain control in dosages which the physician knows will hasten death constitutes active contribution to death by any standard. However, the distinction drawn here is one based upon intention -- in the case of palliative care the intention is to ease pain, which has the effect of hastening death, while in the case of assisted suicide, the intention is undeniably to cause death. The Law Reform Commission, although it recommended the continued criminal prohibition of both euthanasia and assisted suicide, stated, at p. 70 of the Working Paper, that a doctor should never refuse palliative care to a terminally ill person only because it may hasten death. In my view, distinctions based upon intent are important, and in fact form the basis of our criminal law. While factually the distinction may, at times, be difficult to draw, legally it is clear. The fact that in some cases, the third party will, under the guise of palliative care, commit euthanasia or assist in suicide and go unsanctioned due to the difficulty of proof cannot be said to render the existence of the prohibition fundamentally unjust.

The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people. From the review that I have conducted above, I am unable to discern anything approaching unanimity with respect to the issue before us. Regardless of one's personal views as to whether the distinctions drawn between withdrawal of treatment and palliative care, on the one hand, and assisted suicide on the other are practically compelling, the fact remains that these distinctions are maintained and can be persuasively defended. To the extent that there is a consensus,

it is that human life must be respected and we must be careful not to undermine the institutions that protect it.

This consensus finds legal expression in our legal system which prohibits capital punishment. This prohibition is supported, in part, on the basis that allowing the state to kill will cheapen the value of human life and thus the state will serve in a sense as a role model for individuals in society. The prohibition against assisted suicide serves a similar purpose. In upholding the respect for life, it may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide. To permit a physician to lawfully participate in taking life would send a signal that there are circumstances in which the state approves of suicide.

I also place some significance in the fact that the official position of various medical associations is against decriminalizing assisted suicide (Canadian Medical Association, British Medical Association, Council of Ethical and Judicial Affairs of the American Medical Association, World Medical Association and the American Nurses Association). Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it can not be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society. I am thus unable to find that any principle of fundamental justice is violated by s. 241(b).

II. Section 12

Section 12 of the *Charter* provides as follows:

**12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

In order to come within the protection of s. 12, the appellant must demonstrate two things: first, that she is subjected to treatment or punishment at the hands of the state, and second, that such treatment or punishment is cruel and unusual. In this case, the appellant alleges that the prohibition on assisted suicide has the effect of imposing upon her cruel and unusual treatment in that the prohibition subjects her to prolonged suffering until her natural death or requires that she end her life at an earlier point while she can still do so without help. In my opinion, it cannot be said that the appellant is subjected by the state to any form of punishment within the meaning of s. 12. The question of whether the appellant is subjected to "treatment", however, is less clear.

The degree to which "treatment" in s. 12 may apply outside the context of penalties imposed to ensure the application and enforcement of the law has not been definitively determined by this Court. In *R. v. Smith*, [1987] 1 S.C.R. 1045, in which this Court struck down the minimum seven-year sentence for importing narcotics, Lamer J. (as he then was) referred to the lobotomisation of certain dangerous offenders and the castration of sexual offenders as examples of "treatment" which would be contrary to s. 12 as opposed to punishment. Even granting that there may be a distinction in purpose between punishments such as imprisonment or lashings, which

involve the convicted person paying his debt to society for the wrong he has committed, and the examples of treatment offered by Lamer J. which are arguably primarily concerned with protecting society from the offender, I would note that these treatments are still imposed by the state in the context of dealing with criminal behaviour.

In *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, this Court suggested that s. 12 may have application outside of the criminal context. In that case, I found, for the Court, that the deportation order at issue was not a punishment for any particular offence, but that (at p. 735):

Deportation may, however, come within the scope of a "treatment" in s. 12. The *Concise Oxford Dictionary* (1990) defines "treatment" as "a process or manner of behaving towards or dealing with a person or thing...." It is unnecessary, for the purposes of this appeal, to decide this point since I am of the view that the deportation authorized ... is not cruel and unusual.

While the deportation order in *Chiarelli* was not penal in nature as it did not result from any particular offence having been committed, it was nonetheless imposed by the state in the context of enforcing a state administrative structure -- in that case, the immigration system and its body of regulation. The respondent Chiarelli in that case, who had not complied with the requirements imposed by the regulatory scheme, was dealt with in accordance with the precepts of the administrative system. In that regard, any "treatment" was still within the bounds of the state's control over the individual within the system set up by the state.

Certain decisions of lower courts have held that "treatment" should be seen to have a much broader scope than "punishment". In *Soenen v. Director of Edmonton Remand Centre* (1983), 6 C.R.R. 368 (Alta. Q.B.), a case dealing with restrictions imposed on an accused in remand custody while awaiting trial, McDonald J. stated as follows, at p. 372:

In my view the word "treatment" is not limited in its breadth by the word "punishment".... Moreover, the word "treatment" is a more general word than "punishment", and there is no apparent common denominator between the two which, even if the order of the words were reversed, could call the *ejusdem generis* rule into play.

Similarly, in *R. v. Blakeman* (1988), 48 C.R.R. 222 (Ont. H.C.), Watt J. held that, at a preliminary level, subjecting an ill individual to a trial may be cruel treatment. He commented as follows, at p. 239:

"Treatment" connotes any conduct, action or behaviour towards another person. It is a word of more expansive or comprehensive import than is its disjunctive partner "punishment", in that it extends, or potentially so, to all forms of disability or disadvantage and not merely to those imposed as a penalty to ensure the application and enforcement of a rule of law.

Other actions outside the penal context which have been seen to constitute "treatment" for the purposes of s. 12 include strip searches (*Weatherall v. Canada (Attorney General)*, [1988] 1 F.C. 369 (T.D.), overturned on other grounds, [1989] 1 F.C. 18 (C.A.)), and medical care imposed without consent on mentally ill patients (*Howlett v. Karunaratne* (1988), 64 O.R. (2d) 418). But see *Re McTavish and Director, Child Welfare Act* (1986), 32 D.L.R. (4th) 394 (Alta. Q.B.), in which it was held that s. 12 "may even be restricted to penal or *quasi*-penal matters" (p. 409).

For the purposes of the present analysis, I am prepared to assume that "treatment" within the meaning of s. 12 may include that imposed by the state in contexts other than that of a penal or quasi-penal nature. However, it is my view that a mere prohibition by the state on certain action, without more, cannot constitute "treatment" under s. 12. By this I should not be taken as deciding that only positive state actions can be considered to be treatment under s. 12; there may well be situations in which a prohibition on certain types of actions may be "treatment" as was suggested by Dickson J. of the New Brunswick Court of Queen's Bench in *Carlston v. New Brunswick (Solicitor General)* (1989), 43 C.R.R. 105, who was prepared to consider whether a complete ban on smoking in prisons would be "treatment" under s. 12. The distinction between that case and all of those referred to above, and the situation in the present appeal, however, is that in the cited cases the individual is in some way within the special administrative control of the state. In the present case, the appellant is simply subject to the edicts of the *Criminal Code*, as are all other individuals in society. The fact that, because of the personal situation in which she finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to "treatment" at the hands of the state. The starving person who is prohibited by threat of criminal sanction from "stealing a mouthful of bread" is likewise not subjected to "treatment" within the meaning of s. 12 by reason of the theft provisions of the *Code*, nor is the heroin addict who is prohibited from possessing heroin by the provisions of the *Narcotic Control Act*, R.S.C., 1985, c. N-1. There must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute "treatment" under s. 12. In my view, to hold that the criminal prohibition in s. 241(b), without the appellant being in any way subject to the state administrative or justice system, falls within the bounds

of s. 12 stretches the ordinary meaning of being "subjected to ... treatment" by the state.

For these reasons, in my view s. 241(b) does not violate s. 12.

III. Section 15

The Chief Justice concludes that disabled persons who are unable to commit suicide without assistance are discriminated against contrary to s. 15 in that they are deprived of a benefit or subjected to a burden by virtue of s. 241(b) of the *Criminal Code*. Two difficult and important issues arise with respect to this application of s. 15:

(1) whether a claim by the terminally ill who cannot commit suicide without assistance can be supported on the ground that s. 241(b) discriminates against all disabled persons who are unable to commit suicide without assistance;

(2) whether deprivation of the ability to choose suicide is a benefit or burden within the meaning of s. 15 of the *Charter*.

These issues would require the Court to make fundamental findings concerning the scope of s. 15. Since I am of the opinion that any infringement is clearly saved under s. 1 of the *Charter*, I prefer not to decide these issues in this case. They are better left to a case in which they are essential to its resolution. Rather, I will assume that s. 15 of the *Charter* is infringed and consider the application of s. 1.

IV. Section 1

I agree with the Chief Justice that s. 241(b) has "a clearly pressing and substantial legislative objective" grounded in the respect for and the desire to protect human life, a fundamental *Charter* value. I elaborated on the purpose of s. 241(b) earlier in these reasons in my discussion of s. 7.

On the issue of proportionality, which is the second factor to be considered under s. 1, it could hardly be suggested that a prohibition on giving assistance to commit suicide is not rationally connected to the purpose of s. 241(b). The Chief Justice does not suggest otherwise. Section 241(b) protects all individuals against the control of others over their lives. To introduce an exception to this blanket protection for certain groups would create an inequality. As I have sought to demonstrate in my discussion of s. 7, this protection is grounded on a substantial consensus among western countries, medical organizations and our own Law Reform Commission that in order to effectively protect life and those who are vulnerable in society, a prohibition without exception on the giving of assistance to commit suicide is the best approach. Attempts to fine tune this approach by creating exceptions have been unsatisfactory and have tended to support the theory of the "slippery slope". The formulation of safeguards to prevent excesses has been unsatisfactory and has failed to allay fears that a relaxation of the clear standard set by the law will undermine the protection of life and will lead to abuses of the exception. The recent Working Paper of the Law Reform Commission, quoted above, bears repeating here:

The probable reason why legislation has not made an exception for the terminally ill lies in the fear of the excesses or abuses to which liberalization of the existing law could lead. As in the case of

"compassionate murder", decriminalization of aiding suicide would be based on the humanitarian nature of the motive leading the person to provide such aid, counsel or encouragement. As in the case of compassionate murder, moreover, the law may legitimately fear the difficulties involved in determining the true motivation of the person committing the act.

The foregoing is also the answer to the submission that the impugned legislation is overbroad. There is no halfway measure that could be relied upon with assurance to fully achieve the legislation's purpose; first, because the purpose extends to the protection of the life of the terminally ill. Part of this purpose, as I have explained above, is to discourage the terminally ill from choosing death over life. Secondly, even if the latter consideration can be stripped from the legislative purpose, we have no assurance that the exception can be made to limit the taking of life to those who are terminally ill and genuinely desire death.

I wholeheartedly agree with the Chief Justice that in dealing with this "contentious" and "morally laden" issue, Parliament must be accorded some flexibility. In these circumstances, the question to be answered is, to repeat the words of La Forest J., quoted by the Chief Justice, from *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44, whether the government can "show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment". In light of the significant support for the type of legislation under attack in this case and the contentious and complex nature of the issues, I find that the government had a reasonable basis for concluding that it had complied with the requirement of minimum impairment. This satisfies this branch of the proportionality test and it is not the proper function of this Court to speculate as to whether other alternatives available to Parliament might have been preferable.

It follows from the above that I am satisfied that the final aspect of the proportionality test, balance between the restriction and the government objective, is also met. I conclude, therefore, that any infringement of s. 15 is clearly justified under s. 1 of the *Charter*.

V. Disposition

I agree with the sentiments expressed by the justices of the British Columbia Court of Appeal -- this case is an upsetting one from a personal perspective. I have the deepest sympathy for the appellant and her family, as I am sure do all of my colleagues, and I am aware that the denial of her application by this Court may prevent her from managing the manner of her death. I have, however, concluded that the prohibition occasioned by s. 241(b) is not contrary to the provisions of the *Charter*.

In the result, the appeal is dismissed, but without costs.

The constitutional questions are answered as follows:

1. Does s. 241(b) of the *Criminal Code* of Canada infringe or deny, in whole or in part, the rights and freedoms guaranteed by ss. 7, 12 and 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No, except as to s. 15 in respect of which an infringement is assumed.

2. If so, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: As to ss. 7 and 12, no answer is required. As to s. 15, the answer is yes.

The reasons of L'Heureux-Dubé and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting) -- This case raises the question of whether a physically disabled patient may be precluded from obtaining medical assistance in committing suicide by reason of s. 241 of the *Criminal Code*, R.S.C., 1985, c. C-46, which provides:

**241.** Every one who

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Sue Rodriguez would like to live, but she is dying from an incurable disease (ALS) which will inevitably bring her death within a more or less short time. She is asking this Court to allow her to determine the time and manner of her death. To proceed to end her life at the contemplated time, she will need medical assistance. Section 241 of the *Criminal Code* renders a person who would provide assistance to such an act liable for criminal sanction.

I have read the reasons of the Chief Justice. Persuasive as they are, I am of the view that this is not at base a case about discrimination under s. 15 of the *Canadian Charter of Rights and Freedoms*, and that to treat it as such may deflect the

equality jurisprudence from the true focus of s. 15 -- "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society": *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 992, *per* Lamer C.J. I see this rather as a case about the manner in which the state may limit the right of a person to make decisions about her body under s. 7 of the *Charter*. I prefer to base my analysis on that ground.

I have also had the benefit of reading the reasons of my colleague Sopinka J. I am in agreement with much that he says. We share the view that s. 241(b) infringes the right in s. 7 of the *Charter* to security of the person, a concept which encompasses the notions of dignity and the right to privacy. Sopinka J. concludes that this infringement is in accordance with the principles of fundamental justice, because the infringement is necessary to prevent deaths which may not truly be consented to. It is on this point that I part company with him. In my view, the denial to Sue Rodriguez of a choice available to others cannot be justified. The potential for abuse is amply guarded against by existing provisions in the *Criminal Code*, as supplemented by the condition of judicial authorization, and ultimately, it is hoped, revised legislation. I cannot agree that the failure of Parliament to address the problem of the terminally ill is determinative of this appeal. Nor do I agree that the fact that medically assisted suicide has not been widely accepted elsewhere bars Sue Rodriguez's claim. Since the advent of the *Charter*, this Court has been called upon to decide many issues which formerly lay fallow. If a law offends the *Charter*, this Court has no choice but to so declare.

In my view, the reasoning of the majority in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, is dispositive of the issues on this appeal. In the present case, Parliament

has put into force a legislative scheme which does not bar suicide but criminalizes the act of assisting suicide. The effect of this is to deny to some people the choice of ending their lives solely because they are physically unable to do so. This deprives Sue Rodriguez of her security of the person (the right to make decisions concerning her own body, which affect only her own body) in a way that offends the principles of fundamental justice, thereby violating s. 7 of the *Charter*. The violation cannot be saved under s. 1. This is precisely the logic which led the majority of this Court to strike down the abortion provisions of the *Criminal Code* in *Morgentaler*. In that case, Parliament had set up a scheme authorizing therapeutic abortion. The effect of the provisions was in fact to deny or delay therapeutic abortions to some women. This was held to violate s. 7 because it deprived some women of the right to deal with their own bodies as they chose thereby infringing their security of the person, in a manner which did not comport with the principles of fundamental justice. Parliament could not advance an interest capable of justifying this arbitrary legislative scheme, and, accordingly, the law was not saved under s. 1 of the *Charter*.

Section 7 of the *Charter*

Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It is established that s. 7 of the *Charter* protects the right of each person to make decisions concerning his or her body: *Morgentaler, supra*. This flows from the fact that decisions about one's body involve "security of the person" which s. 7

safeguards against state interference which is not in accordance with the principles of fundamental justice. Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This is in accordance with the fact, alluded to by McEachern C.J.B.C. below, that "s. 7 was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else": (1993), 76 B.C.L.R. (2d) 145, at p. 164.

As Wilson J. wrote in *Morgentaler*, *supra*, at p. 164:

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control.

Section 7 of the *Charter* mandates that if the state limits what people do with their bodies, the state must do so in a way which does not violate the principles of fundamental justice: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1176, *per* Lamer J.; and E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 *Can. Bar Rev.* 560. It requires the court to inquire into whether the manner in which the state has chosen to limit what one does with one's body violates the principles of fundamental justice. The question on this appeal is whether, having chosen to limit the right to do with one's body what one chooses by

s. 241(b) of the *Criminal Code*, Parliament has acted in a manner which comports with the principles of fundamental justice.

This brings us to the next question: what are the principles of fundamental justice? They are, we are told, the basic tenets of our legal system whose function is to ensure that state intrusions on life, liberty and security of the person are effected in a manner which comports with our historic, and evolving, notions of fairness and justice: *Re B.C. Motor Vehicle Act, supra*. Without defining the entire content of the phrase "principles of fundamental justice", it is sufficient for the purposes of this case to note that a legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under s. 7 of the *Charter* if the limit is arbitrary. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation. This was the foundation of the decision of the majority of this Court in *Morgentaler, supra*.

This brings us to the critical issue in the case. Does the fact that the legal regime which regulates suicide denies to Sue Rodriguez the right to commit suicide because of her physical incapacity, render the scheme arbitrary and hence in violation of s. 7? Under the scheme Parliament has set up, the physically able person is legally allowed to end his or her life; he or she cannot be criminally penalized for attempting or committing suicide. But the person who is physically unable to accomplish the act is not similarly allowed to end her life. This is the effect of s. 241(b) of the *Criminal Code*, which criminalizes the act of assisting a person to commit suicide and which may render the person who desires to commit suicide a conspirator to that crime. Assuming without deciding that Parliament could criminalize all suicides, whether

assisted or not, does the fact that suicide is not criminal make the criminalization of all assistance in suicide arbitrary?

My colleague Sopinka J. has noted that the decriminalization of suicide reflects Parliament's decision that the matter is best left to sciences outside the law. He suggests that it does not reveal any consensus that the autonomy interest of those who wish to end their lives is paramount to a state interest in protecting life. I agree. But this conclusion begs the question. What is the difference between suicide and assisted suicide that justifies making the one lawful and the other a crime, that justifies allowing some this choice, while denying it to others?

The answer to this question depends on whether the denial to Sue Rodriguez of what is available to others can be justified. It is argued that the denial to Sue Rodriguez of the capacity to treat her body in a way available to the physically able is justified because to permit assisted suicide will open the doors, if not the floodgates, to the killing of disabled persons who may not truly consent to death. The argument is essentially this. There may be no reason on the facts of Sue Rodriguez's case for denying to her the choice to end her life, a choice that those physically able have available to them. Nevertheless, she must be denied that choice because of the danger that other people may wrongfully abuse the power they have over the weak and ill, and may end the lives of these persons against their consent. Thus, Sue Rodriguez is asked to bear the burden of the chance that other people in other situations may act criminally to kill others or improperly sway them to suicide. She is asked to serve as a scapegoat.

The merits of this argument may fall for consideration at the next stage of the analysis, where the question is whether a limit imposed contrary to the principles of fundamental justice may nevertheless be saved under s. 1 of the *Charter* as a limit demonstrably justified in a free and democratic society. But they have no place in the s. 7 analysis that must be undertaken on this appeal. When one is considering whether a law breaches the principles of fundamental justice under s. 7 by reason of arbitrariness, the focus is on whether a legislative scheme infringes a particular person's protected interests in a way that cannot be justified having regard to the objective of this scheme. The principles of fundamental justice require that each person, considered individually, be treated fairly by the law. The fear that abuse may arise if an individual is permitted that which she is wrongly denied plays no part at this initial stage. In short, it does not accord with the principles of fundamental justice that Sue Rodriguez be disallowed what is available to others merely because it is possible that other people, at some other time, may suffer, not what she seeks, but an act of killing without true consent. As Lamer C.J. stated in *Swain, supra*, at p. 977:

It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by s. 7 should take place within the confines of s. 1 of the *Charter*.

I add that it is not generally appropriate that the complainant be obliged to negate societal interests at the s. 7 stage, where the burden lies upon her, but that the matter be left for s. 1, where the burden lies on the state.

As my colleague Sopinka J. notes, this Court has held that the principles of fundamental justice may in some cases reflect a balance between the interests of the individual and those of the state. This depends upon the character of the principle of fundamental justice at issue. Where, for instance, the Court is considering whether it accords with fundamental justice to permit the fingerprinting of a person who has been arrested but not yet convicted (*R. v. Beare*, [1988] 2 S.C.R. 387), or the propriety of a particular change in correctional law which has the effect of depriving a prisoner of a liberty interest (*Cunningham v. Canada*, [1993] 2 S.C.R. 143), it may be that the alleged principle will be comprehensible only if the state's interest is taken into account at the s. 7 stage. The *Charter* complainant may be called upon to bear the onus of showing that long-established or *prima facie* necessary practices do not accord with the principles of fundamental justice. The inquiry whether a legislative scheme is arbitrary raises different concerns. The state will always bear the burden of establishing the propriety of an arbitrary legislative scheme, once a complainant has shown it is arbitrary. It will do so at the s. 1 stage, where the state bears the onus, and where the public concerns which might save an arbitrary scheme are relevant. This is precisely the way the majority judgments in *Morgentaler* treated the issues that arose there; it is the way I think the Court should proceed in this case.

It is also argued that Sue Rodriguez must be denied the right to treat her body as others are permitted to do, because the state has an interest in absolutely forbidding anyone to help end the life of another. As my colleague Sopinka J. would have it: "... active participation by one individual in the death of another is intrinsically morally and legally wrong" (p. 601). The answer to this is that Parliament has not exhibited a consistent intention to criminalize acts which cause the death of another. Individuals are not subject to criminal penalty when their omissions cause

the death of another. Those who are under a legal duty to provide the "necessaries of life" are not subject to criminal penalty where a breach of this duty causes death, if a lawful excuse is made out, for instance the consent of the party who dies, or incapacity to provide: see *Criminal Code*, s. 215. Again, killing in self-defence is not culpable. Thus there is no absolute rule that causing or assisting in the death of another is criminally wrong. Criminal culpability depends on the circumstances in which the death is brought about or assisted. The law has long recognized that if there is a valid justification for bringing about someone's death, the person who does so will not be held criminally responsible. In the case of Sue Rodriguez, there is arguably such a justification -- the justification of giving her the capacity to end her life which able-bodied people have as a matter of course, and the justification of her clear consent and desire to end her life at a time when, in her view, it makes no sense to continue living it. So the argument that the prohibition on assisted suicide is justified because the state has an interest in absolutely criminalizing any wilful act which contributes to the death of another is of no assistance.

This conclusion meets the contention that only passive assistance -- the withdrawal of support necessary to life -- should be permitted. If the justification for helping someone to end life is established, I cannot accept that it matters whether the act is "passive" -- the withdrawal of support necessary to sustain life -- or "active" -- the provision of a means to permit a person of sound mind to choose to end his or her life with dignity.

Certain of the interveners raise the concern that the striking down of s. 241(b) might demean the value of life. But what value is there in life without the choice to do what one wants with one's life, one might counter. One's life includes

one's death. Different people hold different views on life and on what devalues it. For some, the choice to end one's life with dignity is infinitely preferable to the inevitable pain and diminishment of a long, slow decline. Section 7 protects that choice against arbitrary state action which would remove it.

In summary, the law draws a distinction between suicide and assisted suicide. The latter is criminal, the former is not. The effect of the distinction is to prevent people like Sue Rodriguez from exercising the autonomy over their bodies available to other people. The distinction, to borrow the language of the Law Reform Commission of Canada, "is difficult to justify on grounds of logic alone": Working Paper 28, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982), at p. 53. In short, it is arbitrary. The objective that motivates the legislative scheme that Parliament has enacted to treat suicide is not reflected in its treatment of assisted suicide. It follows that the s. 241(b) prohibition violates the fundamental principles of justice and that s. 7 is breached.

### Section 1 of the Charter

A law which violates the principles of fundamental justice under s. 7 of the *Charter* may be saved under s. 1 of the *Charter* if the state proves that it is "reasonable ... [and] demonstrably justified in a free and democratic society".

The first thing which the state must show is that the law serves an objective important enough to outweigh the seriousness of the infringement of individual liberties. What then is the objective of the provision of the *Criminal Code* which criminalizes the act of assisting another to commit suicide? It cannot be the prevention

of suicide, since Parliament has decriminalized suicide. It cannot be the prevention of the physical act of assisting in bringing about death, since, as discussed above, in many circumstances that act is not a crime. The true objective, it seems, is a practical one. It is the fear that if people are allowed to assist other people in committing suicide, the power will be abused in a way that may lead to the killing of those who have not truly and of their free will consented to death. It is this concern which my colleague Sopinka J. underscores in saying that the purpose of s. 241(b) is "the protection of the vulnerable who might be induced in moments of weakness to commit suicide" (p. 595).

This justification for s. 241(b) embraces two distinct concerns. The first is the fear that unless assisted suicide is prohibited, it will be used as cloak, not for suicide, but for murder. Viewed thus, the objective of the prohibition is not to prohibit what it purports to prohibit, namely assistance in suicide, but to prohibit another crime, murder or other forms of culpable homicide.

I entertain considerable doubt whether a law which infringes the principles of fundamental justice can be found to be reasonable and demonstrably justified on the sole ground that crimes other than those which it prohibits may become more frequent if it is not present. In Canada it is not clear that such a provision is necessary; there is a sufficient remedy in the offences of culpable homicide. Nevertheless, the fear cannot be dismissed cavalierly; there is some evidence from foreign jurisdictions indicating that legal codes which permit assisted suicide may be linked to cases of involuntary deaths of the aging and disabled.

The second concern is that even where consent to death is given, the consent may not in fact be voluntary. There is concern that individuals will, for example, consent while in the grips of transitory depression. There is also concern that the decision to end one's life may have been influenced by others. It is argued that to permit assisted suicide will permit people, some well intentioned, some malicious, to bring undue influence to bear on the vulnerable person, thereby provoking a suicide which would otherwise not have occurred.

The obvious response to this concern is that the same dangers are present in any suicide. People are led to commit suicide while in the throes of depression and it is not regarded as criminal conduct. Moreover, this appeal is concerned with s. 241(b) of the *Criminal Code*. Section 241(a), which prohibits counselling in suicide, remains in force even if it is found that s. 241(b) is unconstitutional. But bearing in mind the peculiar vulnerability of the physically disabled, it might be facile to leave the question there. The danger of transitory or improperly induced consent must be squarely faced.

The concern for deaths produced by outside influence or depression centre on the concept of consent. If a person of sound mind, fully aware of all relevant circumstances, comes to the decision to end her life at a certain point, as Sue Rodriguez has, it is difficult to argue that the criminal law should operate to prevent her, given that it does not so operate in the case of others throughout society. The fear is that a person who does not consent may be murdered, or that the consent of a vulnerable person may be improperly procured.

Are these fears, real as they are, sufficient to override Sue Rodriguez's entitlement under s. 7 of the *Charter* to end her life in the manner and at the time of her choosing? If the absolute prohibition on assisted suicide were truly necessary to ensure that killings without consent or with improperly obtained consent did not occur, the answer might well be affirmative. If, on the other hand, the safeguards in the existing law, supplemented by directives such as those proposed by McEachern C.J. below are sufficient to meet the concerns about false consent, withholding from Sue Rodriguez the choice to end her life, which is enjoyed by able-bodied persons, is neither necessary nor justified.

In my view, the existing provisions in the *Criminal Code* go a considerable distance to meeting the concerns of lack of consent and improperly obtained consent. A person who causes the death of an ill or handicapped person without that person's consent can be prosecuted under the provisions for culpable homicide. The cause of death having been established, it will be for the person who administered the cause to establish that the death was really a suicide, to which the deceased consented. The existence of a criminal penalty for those unable to establish this should be sufficient to deter killings without consent or where consent is unclear. As noted above, counselling suicide would also remain a criminal offence under s. 241(a). Thus the bringing of undue influence upon a vulnerable person would remain prohibited.

These provisions may be supplemented, by way of a remedy on this appeal, by a further stipulation requiring court orders to permit the assistance of suicide in a particular case. The judge must be satisfied that the consent is freely given with a full appreciation of all the circumstances. This will ensure that only those who truly desire to bring their lives to an end obtain assistance. While this may be to ask more of Ms.

Rodriguez than is asked of the physically able person who seeks to commit suicide, the additional precautions are arguably justified by the peculiar vulnerability of the person who is physically unable to take her own life.

I conclude that the infringement of s. 7 of the *Charter* by s. 241(b) has not been shown to be demonstrably justified under s. 1 of the *Charter*.

### The Respective Roles of Parliament and the Courts

It was strenuously argued that it was the role of Parliament to deal with assisted suicide and that the Court should not enter on the question. These arguments echo the views of the justices of the majority of the Court of Appeal below. Hollinrake J.A. stated: "it is my view in areas with public opinion at either extreme, and which involve basically philosophical and not legal considerations, it is proper that the matter be left in the hands of Parliament as historically has been the case" (p. 177). Proudfoot J.A. added: "On the material available to us, we are in no position to assess the consensus in Canada with respect to assisted suicide.... I would leave to Parliament the responsibility of taking the pulse of the nation" (p. 186).

Were the task before me that of taking the pulse of the nation, I too should quail, although as a matter of constitutional obligation, a court faced with a *Charter* breach may not enjoy the luxury of choosing what it will and will not decide. I do not, however, see this as the task which faces the Court in this case. We were not asked to second guess Parliament's objective of criminalizing the assistance of suicide. Our task was the much more modest one of determining whether, given the legislative scheme regulating suicide which Parliament has put in place, the denial to Sue

Rodriguez of the ability to end her life is arbitrary and hence amounts to a limit on her security of the person which does not comport with the principles of fundamental justice. Parliament in fact has chosen to legislate on suicide. It has set up a scheme which makes suicide lawful, but which makes assisted suicide criminal. The only question is whether Parliament, having chosen to act in this sensitive area touching the autonomy of people over their bodies, has done so in a way which is fundamentally fair to all. The focus is not on why Parliament has acted, but on the way in which it has acted.

### Remedy

I concur generally in the remedy proposed by the Chief Justice in his reasons, although I am not convinced that some of the conditions laid down by his guidelines are essential. In the case at bar, where the plaintiff's own act will trigger death, it may not be necessary to ascertain the consent on a daily basis, nor to place a limit of 31 days on the certificate. What is required will vary from case to case. The essential in all cases is that the judge be satisfied that if and when the assisted suicide takes place, it will be with the full and free consent of the applicant. I would leave the final order to be made by the chambers judge, having regard to the guidelines suggested by McEachern C.J. below and the exigencies of the particular case.

I would answer the constitutional questions as proposed by the Chief Justice.

The following are the reasons delivered by

CORY J. (dissenting) -- I have read the excellent reasons of the Chief Justice and Justices Sopinka and McLachlin. I am in agreement with the disposition of this appeal proposed by the Chief Justice, substantially for the reasons put forward both by the Chief Justice and McLachlin J. The bases for my conclusion can be briefly stated.

At the outset I would observe that all parties to this debate take the same basic position, namely that human life is fundamentally important to our democratic society. Those opposed to the relief sought by Sue Rodriguez seek to uphold the impugned provisions of the *Criminal Code* on the grounds that it assists society to preserve human life. Those supporting her position recognize the importance of preserving the essential dignity of human life, which includes the right of Sue Rodriguez to die with dignity.

Section 7 of the *Canadian Charter of Rights and Freedoms* has granted the constitutional right to Canadians to life, liberty and the security of the person. It is a provision which emphasizes the innate dignity of human existence. This Court in considering s. 7 of the *Charter* has frequently recognized the importance of human dignity in our society. See, for example, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 512, and *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 166, *per* Wilson J.

The life of an individual must include dying. Dying is the final act in the drama of life. If, as I believe, dying is an integral part of living, then as a part of life it is entitled to the constitutional protection provided by s. 7. It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life.

State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.

In this regard it was conceded by those opposing this application that it was open to a patient of sound mind to refuse treatment even though that refusal would inevitably result in death. It follows that it is the right of those who are sound in mind to choose death with dignity rather than accepting life preserving treatment. The right of a patient to refuse treatment arising from the common law concept of bodily integrity was recently recognized by this Court in *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119.

I can see no difference between permitting a patient of sound mind to choose death with dignity by refusing treatment and permitting a patient of sound mind who is terminally ill to choose death with dignity by terminating life preserving treatment, even if, because of incapacity, that step has to be physically taken by another on her instructions. Nor can I see any reason for failing to extend that same permission so that a terminally ill patient facing death may put an end to her life through the intermediary of another, as suggested by Sue Rodriguez. The right to choose death is open to patients who are not physically handicapped. There is no reason for denying that choice to those that are. This choice for a terminally ill patient would be subject to conditions such as those suggested by the Chief Justice being in place and complied with by the applicant. With those conditions in place, s. 7 of the *Charter* can be applied to enable a court to grant the relief proposed by the Chief Justice. This will ensure that Sue Rodriguez, who has lived her life with such dignity and courage, may choose to end her life with that same courage and dignity.

As well, for the reasons so ably expressed by the Chief Justice, s. 15 can be applied to grant the same relief at least to handicapped terminally ill patients. It is significant that this Court when considering s. 15 of the *Charter* once again stressed the importance of respecting human life. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171. I would therefore dispose of the appeal in the manner suggested by the Chief Justice.

*Appeal dismissed, LAMER C.J. and L'HEUREUX-DUBÉ, CORY and MCLACHLIN JJ. dissenting.*

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