Euthanasia and Section 7 of the Charter

The Issue

Technology has enabled humans to live longer than is naturally possible. Although medical technology has drastically increased the ability to improve the quality of life in many individuals, in others it has prolonged their life where in earlier generations death was expected. Individuals' dependant on technology to remain alive may experience a drastic reduction in their quality of life, such as pain, suffering, and decreased abilities. Should such individuals be legally permitted to die if they choose to do so? Should doctors and family members be legally allowed to hasten another person's death? Should this option only extend to very ill individuals or to anyone? Can euthanasia be preformed on individuals who are mentally incapable of choosing to end their own life? These are the questions surrounding the question of whether or not Canadian law should condone euthanasia to some extent.

The *Criminal Code*

Euthanasia, or assisted suicide, is a crime in Canada.[1] Section 14 of the *Criminal Code* (*Code*)states that no person can consent to have death inflicted on them.[2] Any such consent does not negate that that person's criminal responsibility for killing an individual. For example, a doctor may not consensually administer a lethal dosage of medicine to a patient. Currently, euthanasia consists of two separate offences. It is a criminal offence to counsel someone to commit suicide.[3] It is also an offence to aid or abet another person to commit suicide.[4] Either offence carries a maximum punishment of 14 years in prison. Finally, a person can be found guilty of contravening either offence even if a suicide does not occur.[5] A number of other criminal offences can also be applied in instances of euthanasia. For example, a person who assists in killing another person may be charged with such offences as criminal negligence,[6]murder,[7] manslaughter,[8] or failing to provide the necessaries of life.[9] The case law is examined below.

Rodriguez v. British Columbia

In the 1993 case *Rodriguez v. British Columbia*, the Supreme Court of Canada (S.C.C.) upheld the *Criminal Code* provisions prohibiting euthanasia.**[10]** By a 5-4 majority, the S.C.C. decided that section 241 of the*Criminal Code* did not violate section 7 of the *Charter of Rights and Freedoms* (*Charter*).[11] The *Charter* guarantees that "everyone has the right to life, liberty, and security of the person" at Section 7.[12] Such rights are not to be deprived from Canadians "except in accordance with the principles of fundamental justice."[13]

***Rodriguez* Facts**

In 1993, Sue Rodriguez was a 42-year-old British Columbia woman living with amyotrophic lateral sclerosis (ALS).[14] Once diagnosed, those with ALS quickly lose their ability to move. Eventually, feeding tubes are necessary for nourishment and respirators are required to allow those affected to breath. Sensation and intellectual capacity are not affected.[15] Most ALS sufferers die within 3 years of its onset.[16] There is no cure for ALS. Rodriguez did not wish to endure living in a physically disabled state, nor cope with the mental aguish she felt would occur when she became completely dependant on others for survival. She wanted a physician to help her commit suicide. Rodriguez asked the court to strike down the *Criminal Code* provisions prohibiting physician-assisted suicide on the basis that it offended her section 7 *Charter* rights.[17]

Rodriguez **Majority Ruling**

The majority in *Rodriguez* went through a 3-part analysis of whether or not section 241 of the *Code* infringed section 7 of the *Charter*. For section 241 to be found unconstitutional, the first part of the analysis must be answered "yes" and the latter parts answered "no".

1. Does section 241 infringe upon the individual's right to life, liberty, or security of the person?
2. If yes, is the infringement in accordance with the principles of fundamental justice?
3. If not, is the infringement justified by section 1 of the *Charter*?[18]

The majority found that while section 241 "infringes on the [s. 7] security interest" of Rodriguez, the violation was in accordance with the principles of fundamental justice. As no section 7 violation was found, section 1 of the *Charter* did not apply. Ms. Rodriguez lost the application.

The majority held that the section 7 right to the security of the person was infringed. The majority followed the section 7 interpretation of *Morgentaler*, the 1988 decision that struck down the abortion regulations in the*Code*.[19] Dickson, C.J.C. in *Morgentaler* stated that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal context, constitute a breach of the security of the person."[20] In other words, the right to "security of the person" means that individuals should have the personal autonomy to "control over one's bodily integrity free from state interference."[21] Thus, section 241(b) of the *Code*, which prevents assisted suicide, deprived Rodriguez of her section 7 guarantee of personal autonomy.

The majority, however, found that the deprivation of personal autonomy was justified and in accordance with the principles of fundamental justice. To determine whether section 241 was unconstitutional, the majority stated that the Code provisions had to lack a foundation in the Western legal tradition and societal beliefs, as well as be arbitrary or unfair. Their thinking balanced the interests of society and those of an individual. The majority concluded that those principles of justice which remain "fundamental" must have "general acceptance among reasonable people."[22] The Court noted that, at the time, virtually all Western

democracies had a blanket prohibition on assisted suicide similar to section 241.[23] That indicated that the Canadian *Code* prohibition of euthanasia was not arbitrary or unfair. The majority also noted that Western law generally reflects the idea that human life is sacred. Laws prohibiting murder and capital punishment showed that preserving human life is valuable. Allowing individuals to end another person's existence depreciated the value of human life. Finally, the majority noted that the consensus of society, history, and Western medical associations was that society must respect the value of preserving human life and the legal institutions that help protect it.[24] The societal interest took precedence over the individual's desire to die at their own hand, or with someone else's assistance.

Rodriguez **Dissent**

Judges L'Heureux-Dubé and McLachlin disagreed. They took a different approach to the issue, saying that the balancing of societal and individual interests should not take place within a section 7 analysis, but a section 1 analysis.[25] The *Code* provisions prohibiting euthanasia violated the principles of fundamental justice because they were arbitrary. For example, the *Code* permits a physically capable person to commit suicide, but not a physically incapable person. In effect, this prevented "people like Sue Rodriguez from exercising the autonomy over their bodies available to other people."[26]

Chief Judge Lamer also disagreed with the majority, but he found a violation of Rodriguez's section 15*Charter* equality rights.[27] Judge Lamer found it unnecessary to discuss the section 7 issue.

Judge Cory agreed with the reasons of both Judges McLachlin and Lamer.[28] Cory added dying should merit the same constitutional protection as that given to life. "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."[29] Cory felt that laws that force a disabled person to die a cruel death offend that person's dignity.[30]

Post-*Rodriguez*

Courts have continued to enforce euthanasia laws since *Rodriguez*. A controversial aspect of upholding these laws is the type of sentence offenders receive. In 1993, Robert Latimer used carbon monoxide to kill his 12-year-old disabled daughter, who had cerebral palsy. Latimer argued that he had done so to relieve the pain and anguish she was suffering. He was convicted of second degree murder. The Supreme Court upheld the mandatory minimum sentence for second-degree murder, 10 years,[31] without eligibility for parole.[32]

Other accusations of euthanasia have had different results. Nova Scotia doctor Nancy Morrisson was charged with first degree murder of Paul Mills. Dr. Morrisson gave Mr. Mills a deadly cocktail of non-painkilling drugs shortly after he was taken off life support. A judge dismissed the charges, saying that no reasonable jury would convict Dr. Morrisson.[33] In another case, Evelyn Martens, a member of the Right to Die Society of Canada, was charged with aiding an abetting two assisted suicides in British Columbia. Martens sent suicide

literature to the two individuals who committed suicide. Martens also admitted she was with them when they died. She also was found to possess do-it-yourself suicide paraphernalia in our home and vehicle. A jury found Martens not guilty.[34] It is debatable whether this indicates greater societal acceptance of euthanasia or merely due to the unique circumstances of each particular case.

Legislative activity on euthanasia

Some Members of Parliament have tried to overcome the ruling in *Rodriguez*. Throughout the 1990's, MP Svend Robinson repeatedly introduced motions to further the legalization of euthanasia. In 2005, MP Francine Lalonde introduced a bill that would not make it an offence for a medical practitioner to assist in the death of another person, provided the deceased was severely ill and had the capacity to consent to lethal assistance.[35] On June 12, 2008, Lalonde reintroduced a similar bill into Parliament.[36] None of those bills were accepted by Parliament.

Conclusion

While it appears that some Canadians are in favour of allowing euthanasia, the fact is that the practice remains illegal in Canada.

Further Reading

Mollie Dunsmuir & Marlisa Tiedemann, *"Euthanasia and Assisted Suicide in Canada" Library of Parliament* (February 23, 2006).

Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (New York: Alfred A. Knopf, 1993).

Benjamin Freedman, "*The Rodriguez Case: Sticky Questions and Slipper Answers*", Case Comment, (1994) 39 McGill L.J. 644.

Lorraine Weinrib, "*The Body and the Body Politic: Assisted Suicide under the Charter of Rights and Freedoms*" (1994) 39 McGill L.J. 618.

Law Reform Commission of Canada. *Euthanasia, Aiding Suicide and Cessation of Treatment*. Report 20, 1983.

Senate of Canada. *Of Life and Death*. Report of the Special Senate Committee on Euthanasia and Assisted Suicide. June, 1995.

Margaret Somerville, *Death Talk: The Case against Euthanasia and Physician-Assisted Suicide* (Montreal: McGill Queen's University Press, 2001).

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[1] *Criminal Code*, R.S.C., 1985, c. C-46, s. 241. Some create a distinction between euthanasia, or the "mercy killing" of a suffering individual, and assisted

suicide, killing ones self with the assistance of another. Here, euthanasia includes assisted suicide.
[2] *Ibid*., s.14.
[3] *Ibid*., s. 241(a).
[4] *Ibid*., s. 241(b).
[5] *Ibid*., s. 241.
[6] *Ibid*., s. 219.
[7] *Ibid*., s. 229.
[8] *Ibid*., s. 234.
[9] *Ibid*., s. 216.
[10] *Rodriguez v. British Columbia (AG)*, [1993] 3 S.C.R. 519 .
[11] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.
[12] *Ibid*.
[13] *Ibid*.
[14] *Rodriguez v. British Columbia (Attorney General)* (1993), 79 C.C.C. (3d) 1 (B.C.C.A.) at para. 1.
[15] *Ibid*. at paras. 4-6.
[16] *Ibid*. at para. 7.
[17] *Ibid*. at para. 11.
[18] See Terry Romaniuk, "The Oakes Test" *Centre for Constitutional Studies* (20 August 2007).
[19] *R. v. Morgentaler*, 1 S.C.R. 30.
[20] *Ibid*. at 56.
[21] *Rodriguez*, *supra* note 10 at 588.
[22] *Ibid*. at 607.
[23] *Ibid*. at 601-08, 612-15. Note: The Netherlands passed laws allowing licensed medical doctors to practice euthanasia in 2001. Netherlands Ministry of Health, Wellness and Sport <http://www.minvws.nl/dossiers/euthanasie/default.asp>.
[24] *Ibid*.
[25] Romaniuk, *supra* note 18.
[26] *Rodriguez*, *supra* note 10 at 624.
[27] *Rodriguez*, *supra* note 10 at 530.
[28] *Ibid*. at 629.
[29] *Ibid*. at 630.
[30] *Ibid*. at 631.
[31] *Criminal Code*, *supra* note 1 at s. 235.
[32] *R. v. Latimer*, [2001] 1 S.C.R. 3.
[33] Barney Sneiderman, "Dr. Nancy Morrison and Her Dying Patient: A Case of Medical Necessity" *Ethics Centre* (2002); "Nancy Morrison reprimanded by doctors' governing body" *CBC News* (November 10, 2000).

[34] “Martens not guilty in assisted suicide case” *CTV News* (November 5, 2004).
[35] Bill C-407, *An Act to Amend the Criminal Code* (right to die with dignity). 1st Sess., 38th Parl., 2005.
[36] Bill C-562, *An Act to Amend the Criminal Code* (right to die with dignity), 2nd Sess., 39th Parl., 2008.