

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

SUE RODRIGUEZ,

APPELLANT

AND:

ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF BRITISH COLUMBIA,

RESPONDENTS

AND:

CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE
EVANGELICAL FELLOWSHIP OF CANADA, THE ATTORNEY
GENERAL OF ONTARIO, PRO LIFE SOCIETY OF BRITISH
COLUMBIA, PACIFIC PHYSICIANS FOR LIFE SOCIETY,
BRITISH COLUMBIA COALITION OF PEOPLE WITH DISABILITIES,
PEOPLE IN EQUAL PARTICIPATION, INC.,
THE CANADIAN ASSOCIATION FOR SUICIDE PREVENTION/
L'ASSOCIATION CANADIENNE POUR LA PREVENTION DU SUICIDE
and DYING WITH DIGNITY: A CANADIAN SOCIETY CONCERNED WITH
THE QUALITY OF DYING,

INTERVENERS

FACTUM OF THE INTERVENERS,
CANADIAN CONFERENCE OF CATHOLIC BISHOPS and
THE EVANGELICAL FELLOWSHIP OF CANADA

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PART 1

STATEMENT OF FACTS

1. The Intervenors, The Canadian Conference of Catholic Bishops ("CCCB") and The Evangelical Fellowship of Canada ("EFC"), were granted leave to intervene in this appeal by an Order of the Honourable Mr. Justice Sopinka dated April 20, 1993.

2. The CCCB and The EFC accept as correct the facts set out in the Appellant's factum except that these Intervenors question the Appellant's assertion that Palliative Care is not available in her circumstances. The Intervenors also point out that there is no evidence before the Court that a qualified medical practitioner is prepared to assist the Appellant to commit suicide and no evidence as to the nature of the technological means to be employed.

3. The CCCB was founded in 1943 and is the national association of Catholic Bishops in Canada. The CCCB is active in bringing a moral, philosophical and spiritual perspective to a number of critical public policy issues. The EFC is a national association of Protestant denominations, churches and church related agencies. The organization is interdenominational and represents a constituency of twenty-eight Christian denominations. One of its prime objectives is to be a public advocate of its members' values and beliefs to government, courts and other public institutions and to promote a life affirming ethic within contemporary Canadian culture.

PART II

POINTS IN ISSUE

4. The issues raised in this Appeal that will be argued by the Intervenors are set out below. The Intervenors will not address the issues raised under ss. 12 and 15 of the Charter, which are being dealt with by the parties.

- (i) Does s. 241 (b) of the Criminal Code violate the Appellant's right to life, liberty and security of the person contrary to s.7 of the Charter?

- (ii) If s. 241 (b) of the Criminal Code is found to violate s. 7, of the Charter, is this infringement justified as a reasonable limit which can be demonstrably justified in a free and democratic society under s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982?

- (iii) In the alternative, neither s. 52 of the Constitution Act, 1982 nor s. 24 (1) of the Charter authorizes the remedy sought at paragraphs 71 and 72 (pages 37-39) of the Appellant's Factum.

PART III
ARGUMENT

A. INTRODUCTION

5. This appeal raises profound social, moral and philosophical questions which engage the underlying principles of our Constitution and legal system. The Constitution has been described as a "mirror reflecting the national soul". It must recognize and protect the values of a nation.

Peter W. Hogg, *Constitutional Law of Canada* (2d ed., 1985) at p. 1.

6. The Charter is an expression of the basic rights and values held in common by our society. "Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at p. 156.

7. The criminal law is the Nation's fundamental statement of public policy and applied morality.

"In truth the Criminal Law is fundamentally a *moral* system. It may be crude, it may have faults, it may be rough and ready,

but basically it is a system of applied morality and justice. It serves to underline those values necessary or important to society. When acts occur that seriously transgress essential values, like the sanctity of life, society must speak out and reaffirm those values. This is the true role of criminal law."

Law Reform Commission of Canada, Report No. 3
"Our Criminal Law" (1976) at p. 16.

B. (1) INTERPRETATION OF THE CHARTER

8. The Charter was not enacted in a vacuum. In R. v. Big M Drug Mart Ltd., this Court recognized that the values enshrined in the Charter must be placed in their proper linguistic, philosophic and historical contexts.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 344.

B. (2) THE PREAMBLE TO THE CHARTER

9. The preamble to the Constitution Act, 1982 states:

"Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:"

Constitution Act, 1982 [en. by Canada Act, 1982 (U.K.),
c. 11, s. 1].

10. The Preamble to a constitutional enactment must play an important role in clarifying and supplementing the substantive provisions of the constitutional document.

Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at pp. 750 - 751.

11. The supremacy of God is recognized in the Preamble to the Charter. In Canadian Council of Churches v. Canada (Minister of Employment), this Court stated that the entrenchment of the rule of law into the Preamble of the Charter is a recognition of the fact that it is a "cornerstone of our democratic form of government." The same must necessarily hold true for the supremacy of God.

Canadian Council of Churches v. Canada (Minister of Employment), [1992] 1 S.C.R. 236 at p. 250.

12. The founding principles that recognize the "supremacy of God" and "the rule of law" are rooted in Canada's philosophical and theological traditions which are the foundation of Canada's fundamental values. Like the rule of law, the supremacy of God is a fundamental aspect of the Charter and should be expressly recognized and applied by the courts in interpreting and shaping the fundamental rights and freedoms guaranteed by the Charter.

Canadian Council of Churches v. Canada (Minister of Employment), [1992] 1 S.C.R. 236 at p. 250.

Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at pp. 750 - 751.

C. LIFE AFFIRMING PRINCIPLES

13. The Intervenors believe that human beings, created in the image of God, have inherent worth and dignity. Human life, therefore, must be valued, respected and protected throughout all its stages. We are but stewards of what God has entrusted to us.

14. These principles have also become an integral part of our civil and criminal law. As the Law Reform Commission of Canada stated:

"... law faithfully reflects one of society's traditional attitudes. Our society recognizes that morally, religiously, philosophically, human life merits special protection. This recognition of life's fundamental importance has often been expressed by the concept of the sanctity of human life. One expression of this concept is that because life is God given and we merely hold it in trust, we should not then interfere with it or put an end to it."

Law Reform Commission of Canada, Working Paper No. 28, "Euthanasia, Aiding Suicide and Cessation of Treatment" (1982) at p. 3.

15. This life-affirming ethic permeates our entire system of law, both criminal and civil. For example, causing bodily harm with wanton or reckless disregard for the life or safety of another is an offence under the Criminal Code. Other examples include laws which limit speeds on highways and laws which regulate environmental, health and safety matters, provincially and federally.

"The laws of this country contain numerous provisions designed to protect life and the bodily integrity of the human person. Such laws also punish severely those who jeopardize or take away human life. The right to self-determination is subject to all such laws. It is an offence to counsel, aid or abet a person to commit suicide... The law promotes life and prohibits any form of complicity with those attempting to destroy it. While the law recognizes the right to self-determination, it cannot be used to facilitate the choice to die."

Attorney General of Canada v. Notre Dame Hospital et al., (1984) 8 C.R.R. 382 at p. 382.

16. While attempting suicide is no longer a crime, our society continues to reject it for philosophical, moral and social reasons. The decriminalization of attempted suicide in 1973 did not legitimize suicide.

"The decriminalization of attempted suicide, in 1973, did not have the effect of legitimizing suicide or of creating a true "right" to suicide in the classical sense of that word. The Commission feels that suicide remains an act which is fundamentally contrary to human nature."

Law Reform Commission of Canada, Report No. 28, "Some Aspects of Medical Treatment and Criminal Law" (1986) at p. 13.

D. PHYSICIAN-ASSISTED SUICIDE

17. Physician-assisted suicide is contrary to the Criminal Code and to Canada's social, moral and philosophical traditions. No appellate court in Canada, the United States, or Britain has ever recognized the legality of physician-assisted suicide, and the Law Reform Commission has consistently recommended its retention in the Criminal Code.

"In 1973, Parliament retained aiding suicide as an offence... In Working Paper No. 28 and Report No. 20, the Commission stated its opposition to the decriminalization of aiding suicide on the ground that the principle of self-determination should not confer a right on a third party to aid or abet a person to commit the act... The Commission therefore considers that the new Criminal Code should continue to prohibit aiding suicide as one of the offences against the integrity of the person."

Law Reform Commission Report No. 28, *supra* p. 7.

18. It is submitted that physician-assisted suicide is a euphemism for a killing arranged by a physician so that the act will be accorded an element of societal approval.

E. SECTION 7

19. The Intervenors agree with the Appellant that there is no constitutional right to commit suicide. The Intervenors disagree, however, with her assertion that this case is not about the killing of terminally-ill patients.

20. The Appellant asserts that the state should not interfere with her right to make fundamental personal decisions. Irrespective of whether this is correct or not, the law against assisted suicide does not prevent the Appellant from making a decision to end her life, but prohibits a third party from killing her or assisting her to die. In his article "Choosing Death: Exploring Assisted Suicide", Thomas G. Dailey, ThD, Director of St. Joseph's College Catholic Bioethics Centre in Edmonton, summarizes an argument made by Daniel Callahan:

"Even if I could make a case that I have a right to self-determination even unto death, it does not follow that my right to kill myself can be transformed into the right to someone else to kill me. What is the basis of his right to do so? My authorization? But what right have I to authorize another to kill?

An analogy suggests itself. Why has the central liberal tradition of self-determination consistently excluded the right to voluntarily become the slave of another? John Stuart Mill, in his classic "On Liberty," provided a compelling reason. "By selling himself for a slave," he wrote, "[a person] abdicated his liberty; he foregoes any future use of it beyond that single act... The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom." The same reasoning can extend to that alienation both of freedom and of life represented by euthanasia; it is a double alienation. I would add to that another reason. Just as there should be a limit on our power to alienate our life and freedom because of what it forces us to cede to another, it cannot be a good for those given the power to enslave or kill us. No human being, whatever the motives, should have that kind of ultimate power over the fate of another. It is to give away precisely that which makes us human, our freedom and life, and to give to another that which they should not have, power over the freedom and life of another. It takes too much from ourselves and gives too much to another. It is also to

create the wrong kind of relationship between people, the creation of a community that sanctions private killings between its members. Even if we fully grant the argument that acts of euthanasia stemming from compassion and mercy can embody some commendable aspects, they are not sufficient to justify so momentous a social change, one that would be fundamental and far-reaching in its implications for human relationships. It would be to make the killing of another a matter of individual choice and personal contract rather than societal judgement and (rarely evoked) social necessity."

Thomas G. Dailey ThD, "Choosing Death: Exploring Assisted Suicide", Our Family (Sept. 1992) 12 at p. 14.

21. The rights to life, liberty and security of the person, on their face, are life affirming principles. To accede to the Appellant's request would be to undermine the rights entrenched in Section 7 of the Charter and to ignore their philosophical and historical underpinnings.

22. The Appellant asserts that to grant her request would impose no duty upon any physician to provide physician-assisted suicide to a terminally-ill patient. There can be no right, however, without a corresponding duty or remedy in law.

F. DEATH WITH DIGNITY

23. The Intervenors support the Appellant's right to live her remaining life with the inherent dignity of a human person. By "death with dignity" the Intervenors mean dying in a way that is not unduly burdened by the prolonged use of life-sustaining technology in an alienating and depersonalizing environment.

24. Society and the immediate caregivers must offer the greatest respect and care for all of the dying person's human needs - physical, emotional, social, and spiritual. Providing the dying person with utmost personal attention, the best palliative care and the best pain control that modern medicine can offer are all components of what we have traditionally meant by "death with dignity."

Catholic Health Association of the United States, "Care of the Dying: A Catholic Perspective", Health Progress, April 1993 at p. 16.

Archbishop Marcel Gervais, President of the Canadian Conference of Catholic Bishops, "Statement on Assisted Suicide and Euthanasia", January 13, 1993.

G. EUTHANASIA, ASSISTED-SUICIDE AND ALLOWING TO DIE

25. In her factum, the Appellant confuses euthanasia, assisted suicide and allowing to die. Euthanasia means an action or omission of an action which of itself or by intention causes death in order that all suffering may be eliminated. There is both a moral and legal distinction between killing or assisting suicide and allowing a patient to die. Both the act of killing and assisting suicide require the deliberate intervention of a human agent with the intention of bringing about another's death. Allowing to die, by contrast, is merely the withholding or withdrawing of medically useless or unduly burdensome treatment so that the disease may take its natural course. The Intervenors do not consider physical life to be an

absolute good that must be preserved at all costs. Death, though full of grief, is unavoidable and is part of the human condition.

Catholic Health Association of Canada, "Health Care Ethics Guide" (1991) Articles 78 - 88 at pp. 53 - 54 and Appendix I at p. 63.

Human Life Research Institute, "Public Policy, Private Voices: The Euthanasia Debate" (1992) at p. 7.

Archbishop Marcel Gervais, President of the Canadian Conference of Catholic Bishops, "Statement on Assisted Suicide and Euthanasia", January 13, 1993.

H. PALLIATIVE CARE

26. The Appellant also confuses palliative care with physician-assisted suicide. The accepted definition of palliative care is correctly expressed by the Health Services Directorate, Department of National Health and Welfare (1989):

"Palliative care is a program of active compassionate care PRIMARILY directed towards improving the quality of life for the dying.

Health Services Directorate, Report of the Subcommittee on Institutional Program Guidelines, "Palliative Care Services" (1989) at p.1.

27. Palliative care is not killing the patient or assisting the patient in suicide. Dr. John F. Scott, Head of Palliative Medicine at the University of Ottawa, in a paper written for the Human Life Research Institute, wrote:

"Palliative care is a philosophy and a system of care that affirms life when a person with irreversible disease is approaching death; it is care that enables a person to live as fully as possible until they die At its heart it is the affirmation of life, not the choosing of death ...

Canadians must not believe the lie that they are faced with a choice between a quick good death and a slow painful death. Hospice/palliative care has demonstrated to the world that the pain and other symptoms of advanced disease can be relieved."

Dr. John F. Scott, "Waiting for death, waiting for life", reprinted in Catholic New Times, February 21, 1993 at p. 10.

I. CONSEQUENCES OF DECRIMINALIZING PHYSICIAN-ASSISTED SUICIDE AND LEGALIZING EUTHANASIA

28. Should this Honourable Court find that s. 241(b) of the Criminal Code of Canada infringes upon the rights and freedoms guaranteed by ss. 7, 12 and 15 (1) of the Charter, the Intervenor submit that it is justified under s. 1 of the Charter. The legislation is a reasonable limit on the guaranteed rights and freedoms and can be justified in a free and democratic society on any one or more of the following grounds.

29. The Intervenor disagree with Mr. Justice McEachern's conclusion that what is at stake in this appeal is not a general policy question but rather the right of a single person not to have continuing pain and psychological trauma imposed on her. The Appellant, by asking this Court to sanction her decision and thereby grant to a third party (whether identified or not) immunity from the usual consequences of taking another's life,

raises some of the most profound moral, legal and social issues that any court or any civilized society can ever be called upon to adjudicate.

30. The Intervenors submit that the request of the Appellant implicates all Canadians and the major institutions of society. It is much more than a personal and private decision of one individual.

"We are also social by nature since we are made in the image of God - a community of loving persons. Because we live in a community of interdependent persons, no one person's freedom is absolute. Other people's welfare must also be taken in consideration.

To treat euthanasia and assisted suicide solely as private acts of personal freedom is a mistake, because they are actually social actions that involve at least one other person. Insofar as the health care profession is involved, euthanasia and assisted suicide are private claims on a social good, namely the good of the health care profession committed to serving the broader health care needs of others, not just the preferences of one person. The personal desire to request death from the hand of another, then, ought to be considered a social action, not a private action. And any effort to sanction it should be evaluated in light of how it helps or hinders the common good, not whether it promotes one person's self-interest."

Catholic Health Association of the United States, "Care of the Dying: A Catholic Perspective", Health Progress, (March 1993) 34 at p. 37.

31. Our living together in community requires a basic trust that human life and dignity will be respected and protected. Euthanasia and assisted suicide erode this trust and undermine the community's commitment to life and responsibility to care and comfort.

Rev. Michael Place, "Why We Should not Legalize Euthanasia" Health Progress, (March 1993) 39 at p. 42.

32. The role of the physician and the patient's trust in the physician will be undermined. Leon R. Kass, Addie Clark Harding Professor, College and Committee on Social Thought at the University of Chicago, in his article, "Is There a Right to Die?" wrote:

"The medical profession's devotion to healing and refusal to kill - its ethical center - will be permanently destroyed, and with it patient trust and physicianly self-restraint. Here is yet another case where acceding to a putative personal right would wreak havoc on the common good."

Leon R. Kass, "Is There a Right to Die?" (1993) 23:1 Hastings Center Report 34 at p. 42.

33. The public acceptance of physician-assisted suicide will also result in an undue pressure on those who are elderly or infirm, to lessen what they perceive to be a burden on others by instructing one's physician to kill them.

In "Choosing Death: Exploring Assisted Suicide", Thomas G. Dailey writes:

"The legalization of aid-in-dying would pose a threat to the elderly and handicapped. This kind of legislation would say to them: "You're not important; you're not needed; in fact, you're a burden to others".

Such a law would indeed effect a slippery slope. How long would it be before we would move from seeing old people deciding to eliminate themselves to watching society deciding to eliminate them, together with the handicapped, the powerless, the gullible, and the uneducated? "In Holland for example, a recent survey of three hundred physicians (conducted by an author who supports euthanasia) disclosed that over forty percent had performed euthanasia without the patients' request".

Thomas G. Dailey, "Choosing Death: Exploring Assisted Suicide" (1992) *Our Family* 12 at pp. 13 - 14.

34. The right to an assisted suicide would have the effect of conferring a right on a third party to assist in another's death. The Law Reform Commission also expresses concern about conferring such a right on a third party:

"In 1973, Parliament retained aiding suicide as an offence... In Working Paper 28 and Report 20, the Commission stated its opposition to the decriminalization of aiding suicide on the ground that the principle of self-determination should not confer a right on a third party to aid or abet a person to commit the act... The Commission therefore considers that the new Criminal Code should continue to prohibit aiding suicide as one of the offences against the integrity of the person."

Law Reform Commission Report No. 28, *supra* p. 7.

35. The right to an assisted suicide would also lead to an obligation on the part of others to kill. In his article "Is There a Right to Die?", Kass states:

"First, the right to die, especially as it comes to embrace a right to aid-in-dying or assisted suicide, or euthanasia, will translate into an obligation on the part of others to kill or help to kill. Even if we refuse to impose such a duty but merely allow those to practice it who are freely willing, our society would be drastically altered. For unless the state accepts the job of euthanizer, which God forbid that it should, it would thus surrender its monopoly on the legal use of lethal force, a monopoly it holds and needs if it is to protect innocent life, its first responsibility."

Leon R. Kass, *supra* p. 15.

36. The Law Reform Commission of Canada maintained that the legalization of euthanasia is unacceptable for the following reasons.

"(T)he legalization of euthanasia is unacceptable to the Commission because it would indirectly condone murder, because it would be open to serious abuses, and because it appears to be morally unacceptable to the majority of the Canadian people. The Commission believes that there are better answers to the problems posed by the sufferings of the terminally ill. The development of palliative care and the search for effective pain control methods constitute a far more positive response to the problem than euthanasia on demand. To allow euthanasia to be legalized, directly or indirectly, would be to open the door to abuses, and hence indirectly weaken respect for human life."

Law Reform Commission of Canada, Report No. 20, "Euthanasia, Aiding Suicide and Cessation of Treatment" (1983) at p. 18.

The Intervenors take the position that the same reasoning applies to physician-assisted suicide.

37. The issues raised in this Appeal concern the very nature of human life and the significance of suffering and death in human experience. It is the Intervenors' position that these issues are more properly within the mandate of the Parliament of Canada. The Appellant in the bringing of this appeal is asking the Court to adopt and exercise a legislative function which is beyond this Court's jurisdiction.

PART IV

ORDER SOUGHT

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4 38. The Intervenors, the CCCB and The EFC, respectfully request that this
5 Honourable Court answer the first point in issue in the negative.

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7 39. The Intervenors, the CCCB and The EFC, respectfully request that this
8 Honourable Court answer the second point in issue in the affirmative.

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10 40. The Intervenors, the CCCB and The EFC, request that the appeal be
11 dismissed.

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14 ALL OF WHICH IS RESPECTFULLY SUBMITTED.
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20 _____
21 ROBERT M. NELSON
22 Counsel for the Intervenors, the Canadian
23 Conference of Catholic Bishops and
24 The Evangelical Fellowship of Canada

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27 DATED at Ottawa Ontario this 10th day of May, 1993.
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