

**THE *RODRIGUEZ* CASE: A REVIEW OF
THE SUPREME COURT OF CANADA
DECISION ON ASSISTED SUICIDE**

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INTRODUCTION

On 30 September 1993, the Supreme Court of Canada rendered its long-awaited judgment in the Sue Rodriguez case.

Sue Rodriguez, a 42-year-old woman suffering from the debilitating, terminal illness, amyotrophic lateral sclerosis, wishes to have a qualified physician assist her in terminating her life at the time of her choosing. Section 241(b) of the *Criminal Code*,⁽¹⁾ however, makes it a criminal offence to assist a person to commit suicide. Ms. Rodriguez applied to the Supreme Court of British Columbia for an order declaring s. 241(b) invalid under the *Canadian Charter of Rights and Freedoms* (the “Charter”). The B.C. court dismissed her application and a majority of the British Columbia Court of Appeal affirmed the trial judge’s decision. Ms. Rodriguez then appealed to the Supreme Court of Canada, where she argued that s. 241(b) violates sections 7, 12, and 15 of the Charter.

In a five to four decision, the Supreme Court of Canada dismissed the appeal and found s. 241(b) to be constitutional. This paper summarizes the majority and dissenting opinions rendered by the justices of the Supreme Court of Canada.⁽²⁾

MAJORITY DECISION - MR. JUSTICE SOPINKA

A. Section 7

For the majority of the Court, the most important issue was whether s. 241(b) of the *Criminal Code* infringes s. 7 of the Charter.

Section 241(b) provides as follows:

(1) R.S.C., 1985, c. C-46.

(2) At the time of writing, the reasons for judgment had not been published.

Everyone who ...

(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.

Section 7 of the Charter provides:

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.

Ms. Rodriguez argued that the criminal offence created by s. 241(b) prohibits a person from aiding her to terminate her life when she cannot do so without assistance, thus depriving her of liberty and security of the person under s. 7 of the Charter.

To begin, the majority dealt with the question of whether Ms. Rodriguez's security of the person had been violated. This inquiry involved a two-stage analysis in which the Court examined values related to the individual and limitations on those values when considered in conjunction with principles of fundamental justice.

Before conducting this analysis, however, the majority noted that all values protected by s. 7, including the sanctity of life, must figure in a determination of the principles of fundamental justice. Mr. Justice Sopinka, writing for the majority, rejected Ms. Rodriguez's contention that she was choosing the time and manner of her death rather than death itself. Her choice, he contended, is death over life, and, as a result, life as a value is brought into play under s. 7.

The majority began by seeking to define the notion of "security of the person." Relying on previous judgments of the Court, they held that security of the person includes "... 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 ... at least to the extent of freedom from criminal prohibitions which interfere with these" (p. 10 of the reasons for judgment). They then held that s. 241(b) deprives Sue Rodriguez of her security of the person, because it deprives her of the ability to control decisions about her body and causes her physical pain and psychological stress.

Having decided there is a security interest at stake, the majority turned to the question of whether Ms. Rodriguez had been deprived of her security of the person in accordance with principles of fundamental justice. At this stage of the analysis, the issue before the Court was whether a criminal prohibition on assisting suicide in situations where a person is terminally ill and mentally competent but unable to commit suicide by him or herself, is contrary to the principles of fundamental justice.

What are principles of fundamental justice? Mr. Justice Sopinka noted that determining these principles can be an onerous task. Such principles, he pointed out, are those for which there is some consensus among reasonable people as to their importance to our societal concept of justice. Thus, he cautioned, they are not principles that the court alone views as vital; rather, they are identifiable, tenets of our legal system which have historic roots, yet evolve in accordance with society's views of justice. Moreover, in arriving at these principles, it is necessary to balance the interests of the state with those of the individual.

The majority noted that the state has a fundamental interest in protecting human life; s. 241(b), which is designed to protect the vulnerable who, in a moment of weakness, might be persuaded to commit suicide, reflects this interest. The principle of sanctity of life, however, is not absolute and has evolved over time to encompass other notions and values. This evolution is manifested in both statute and the common law. Attempted suicide is no longer a criminal offence. And Canadian and foreign courts recognize, for example, that patients have the right to refuse treatment or to have it withdrawn or discontinued, even if death may result.

In spite of these changes, there is a reluctance to condone active assistance in bringing about the death of another person, even where that person is terminally ill. This reticence, the majority suggested, stems from the belief that it is morally and legally wrong to assist another to commit suicide and from the fear that abuses may occur if any form of assisted suicide is permitted.

Canada is not alone in prohibiting assisted suicide. The majority noted that this is the norm in other Western democracies and, to date, the prohibition has not been found unconstitutional or contrary to fundamental human rights. Like Canada, these societies also distinguish between active and passive forms of intervention in the dying process.

The majority could find no consensus in support of assisted suicide. To the extent that a consensus exists, Mr. Justice Sopinka noted, "it is that human life must be respected" (p. 35 of the reasons for judgment). This consensus manifests itself in the prohibition against capital

punishment and various provisions of the *Criminal Code* that proscribe murder, as well as in the widespread belief among western countries and medical associations that, in order to protect the lives of the vulnerable, it is necessary to maintain a blanket prohibition on assisted suicide. To allow physician-assisted suicide, he observed, would erode the belief in the sanctity of human life and suggest that the state condones suicide. Furthermore, concerns about abuse and the difficulty in establishing safeguards to prevent it indicate that the prohibition against assisted suicide is not arbitrary or unfair. The majority, therefore, upheld s. 241(b) because, in their view, it does not violate any principle of fundamental justice.

B. Section 12

The majority then considered Ms. Rodriguez's claim that s. 241(b) violates s. 12 of the Charter, which provides that:

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

To mount a successful challenge under s. 12, it must be shown that a person has been subjected to cruel and unusual treatment or punishment at the hands of the state. Ms. Rodriguez argued that the prohibition of assisted suicide constitutes cruel and unusual treatment under s. 12 of the Charter because it forces her to endure a prolonged period of suffering until her natural death occurs or requires her to end her life before she wishes so that she can do so without assistance.

The majority reasoned that the mere prohibition of an action by the state does not constitute "treatment" within the meaning of s. 12, which would require some form of state control over an individual. In Sue Rodriguez's case, the majority concluded the requisite control did not exist and therefore held that s. 241(b) did not violate s. 12 of the Charter.

C. Section 15

Finally, the majority dealt with the question of whether s. 241(b) violates s. 15(1) of the Charter, which provides as follows:

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.

Ms. Rodriguez argued s. 241(b) discriminates against disabled persons who are unable to commit suicide without assistance, in that it deprives them of the right to choose suicide.

For the purposes of the case, Mr. Justice Sopinka assumed that Ms. Rodriguez's equality rights under s. 15 of the Charter had been infringed. As a result, the principal question before him was whether the infringement could be saved by s. 1 of the Charter, which provides:

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.

Mr. Justice Sopinka concluded that the infringement under s 15 was justified under s. 1. The purpose of s. 241(b), he noted, is to protect individuals from others who may wish to control their lives. To create an exception to the prohibition against assisted suicide for certain groups of persons would create an inequality and lend support to the notion that we are starting down the “slippery slope” toward full recognition of euthanasia. He considered the creation of safeguards to prevent abuse unsatisfactory and insufficient to calm fears of the likelihood of abuse.

Mr. Justice Sopinka did not consider s, 241(b) to be too broad. The legislation, he noted, extends to protect the lives of the terminally ill; even if an exception could be made for such persons, there could be no guarantee that assisted suicide could be limited to those who genuinely wish to die.

MINORITY DECISIONS

A. Madam Justice McLachlin

For Madam Justice McLachlin, whose dissenting opinion was concurred with by Madam Justice L’Heureux-Dubé, the case rests on s. 7 of the Charter. Although she agrees with Mr. Justice Sopinka, that s. 241(b) infringes the s. 7 right to security of the person, Madam Justice McLachlin disagrees with his conclusion that the infringement accords with the principles of fundamental justice. According to Madam Justice McLachlin, security of the person encompasses an individual’s right to make decisions about his or her body and s. 241(b) constitutes a limit on such personal autonomy.

For Madam Justice McLachlin, the main issue in the appeal is whether s. 241(b) is arbitrary and therefore in violation of s. 7, since it denies Sue Rodriguez the right to commit suicide because of her physical incapacity. Legislation that limits an individual's right to make decisions about his or her body, she notes, will violate principles of fundamental justice if the limit is arbitrary because it bears no relationship to or is inconsistent with the objective of the legislation.

In Madam Justice McLachlin's view, the principles of fundamental justice require that every individual be treated fairly by the law. Concerns relating to abuse should not play a part at this stage of the legal analysis. To deny Sue Rodriguez the choice that is available to those who are physically able merely because of a fear that others may suffer abuse, she concludes, would be contrary to such principles. Madam Justice McLachlin felt that Sue Rodriguez was being treated as a "scapegoat" for others who might be improperly persuaded to commit suicide.

There is an important state interest in ensuring that people do not take the lives of others, but, as Madam Justice McLachlin notes, this interest is not absolute. The state does not criminalize all acts that result in the death of another. Where there is a valid justification for the death (self-defence, for example) criminal liability does not ensue. She therefore rejected the argument that the prohibition against assisted suicide is justified because the state has an interest in criminalizing wilful acts that contribute to another person's death.

Madam Justice McLachlin also rejected the distinction between passive and active intervention to end life. "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" (p. 12-13 of the reasons for judgment).

Madam Justice McLachlin concluded that the distinction between suicide that is legal in Canada and assisted suicide, which is not, effectively prevents Sue Rodriguez from exercising control over her body in a manner that others can exercise over their bodies and is thus arbitrary. Section 241(b) therefore violates the principles of fundamental justice and is contrary to s. 7 of the Charter.

Can s. 241(b) be saved under s. 1 of the Charter? Madam Justice McLachlin concluded that it could not. In reaching this decision, Madam Justice McLachlin looked at the objective of s. 241(b) and whether this was sufficiently important to override the infringement of individual rights. She concluded that the objective was to combat the possibility that legalizing

assisted suicide might lead to abuses resulting in the death of individuals who had not genuinely and voluntarily consented to death. While acknowledging that this possibility was legitimate, Madam Justice McLachlin felt that it was not sufficient to outweigh Sue Rodriguez's right to end her life when she wishes to do so. Concerns about abuse, she suggested, could be dealt with under existing provisions of the *Criminal Code* and by requiring court orders to permit assisted suicide in individual cases.

Madam Justice McLachlin generally agreed with the remedy below proposed by Chief Justice Lamer, although she questioned whether some of the conditions were necessary.

B. Chief Justice Lamer

Chief Justice Lamer's dissent was based on s.15(1) of the Charter. He therefore did not address the constitutionality of s.241(b) under ss. 7 or 12 of the Charter.

Chief Justice Lamer concluded that s. 241(b) "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" (p. 27). While it was not intended that s. 241(b) would create this type of inequality for physically disabled persons, the provision nevertheless has this effect.

Having concluded that s. 241(b) creates an inequality, the Chief Justice looked at whether the inequality is discriminatory. The question here is two-fold: whether s. 241(b) deprives certain persons of an advantage and whether the deprivation is the result of a personal characteristic listed in s. 15(1) of the Charter. The Chief Justice concluded that, from a legal rather than a moral perspective, the fact that persons physically unable to commit suicide cannot choose suicide because it is illegal for them to obtain assistance, is a disadvantage under s. 15(1) of the Charter. Section 241(b) therefore infringes the right equality guaranteed under s. 15(1).

The Chief Justice then turned to the question of whether s. 241(b) was justified under s. 1 of the Charter. He found the objective of the provision -- protecting the vulnerable from the intervention of others in the act of suicide -- valid. He noted, however, that the repeal of the offence of attempted suicide indicates that Parliament no longer believes that the preservation of human life overrides the right to self-determination of physically able persons.

While the Chief Justice was concerned that the decriminalization of assisted suicide might increase the risk to those vulnerable to manipulation by others, he contended that speculation to this effect and the fear of a “slippery slope” could not justify including within the purview of the provision those who are not vulnerable and who would freely consent to suicide. A complete prohibition on assisted suicide is too severe an impairment of the right of the physically disabled and cannot be saved under s.1.

The Chief Justice then went on to set out the remedy he would order. While declaring s. 241(b) invalid, he would not strike it down immediately, since those who need protection would then be left unprotected. He would therefore suspend the declaration that s. 241(b) is no longer in force and effect for a period of one year, in order to give Parliament time to replace the provision. During the period of suspension, he would grant Sue Rodriguez and others a “constitutional exemption” which would allow assistance to commit suicide provided the following conditions were met:

1. the constitutional exemption would have to be obtained by way of application to a superior court;
2. the applicant would have to be certified by a treating physician and an independent psychiatrist to be competent to make the decision to end his or her life; the physicians would have to certify that the decision was made freely and voluntarily; and at least one of the physicians would have to be present when the applicant committed assisted suicide;
3. the physicians would also have to certify that: the applicant was or would become physically unable to commit suicide without assistance; and they had informed the applicant and the applicant understood that he or she had the right to change his or her mind about terminating life;
4. notice and access would have to be given to the Regional Coroner;
5. the applicant would have to be examined daily by one of the certifying physicians;
6. no one could assist the applicant to commit suicide after the expiration of thirty-one days from the date of the certificate; and
7. the act of causing the death of the applicant would have to be that of the applicant alone, not of anyone else.

The Chief Justice stressed that these conditions could be used as guidelines for future applicants.

In setting out the conditions for obtaining an order for assisted suicide, the Chief Justice repeated many of the provisions outlined in the dissenting opinion of Chief Justice McEachern of the British Columbia Court of Appeal. Chief Justice Lamer, however, parted company with Mr. Justice McEachern on one important point -- whether the remedy should be restricted to the terminally ill. Chief Justice McEachern would have restricted the remedy to individuals suffering from terminal illnesses; Chief Justice Lamer would not have included such a restriction because of the possibility that it might constitute a violation of equality rights.

C. Mr. Justice Cory

Mr. Justice Cory agreed with the disposition of the appeal proposed by Chief Justice Lamer for the reasons put forward by the Chief Justice and Madam Justice McLachlin. He would give the right to die with dignity protection under s. 7 of the Charter.

Mr. Justice Cory could see no difference between allowing a mentally competent patient to choose death by refusing treatment and permitting the patient to die as a result of authorizing the termination of life-preserving treatment; this was so, even if, because of disability, a person other than the patient had to terminate the treatment. Thus, he would allow terminally ill patients to end their lives with the assistance of another person, provided the conditions outlined by Chief Justice Lamer were followed.

COMMENTS BY MR. JUSTICE SOPINKA FOR THE MAJORITY ON THE MINORITY DECISIONS

At the outset of his judgment, Mr. Justice Sopinka expressed his disagreement with the opinions of his colleagues in the minority and raised what he felt were the following serious concerns with respect to their reasons for striking down s. 241(b). Striking down the prohibition on assisted suicide, he argued, would recognize a constitutional right to assisted suicide that went beyond that in any other western country and any legitimate proposals for reform. Moreover, it would extend beyond the claim made by Sue Rodriguez. He also pointed out that the minority decisions did not provide for safeguards of the type found in the Dutch guidelines or the recent reform proposals in the states of Washington and California. Mr. Justice Sopinka found the proposed conditions for obtaining an order approving assisted suicide to be vague and in some cases unenforceable. He also felt that uncertainty would arise because the conditions were to serve only as guidelines; thus, individual judges would be left to decide upon any application for assisted suicide.