SCC No. 35591

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

LEE CARTER, HOLLIS JOHNSON, DR. WILLIAM SHOICHET, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and GLORIA TAYLOR

Appellants

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF QUEBEC, COUNCIL OF CANADIANS WITH DISABILITIES and THE CANADIAN ASSOCIATION FOR COMMUNITY LIVING, CHRISTIAN LEGAL FELLOWSHIP, CANADIAN HIV/AIDS LEGAL NETWORK and THE HIV & AIDS LEGAL CLINIC ONTARIO, ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, PHYSICIANS' ALLIANCE AGAINST EUTHANASIA, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA and CANADIAN FEDERATION OF CATHOLIC PHYSICIANS' SOCIETIES, DYING WITH DIGNITY, CANADIAN MEDICAL ASSOCIATION, CATHOLIC HEALTH ALLIANCE OF CANADA, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), FAREWELL FOUNDATION FOR THE RIGHT TO DIE and ASSOCIATION QUÉBÉCOISE POUR LE DROIT DE MOURIR DANS LA DIGNITÉ, CANADIAN CIVIL LIBERTIES ASSOCIATION, CATHOLIC CIVIL RIGHTS LEAGUE and FAITH AND FREEDOM ALLIANCE and PROTECTION OF CONSCIENCE PROJECT, ALLIANCE OF PEOPLE WITH DISABILITIES WHO ARE SUPPORTIVE OF LEGAL ASSISTED DYING SOCIETY, EUTHANASIA PREVENTION COALITION and EUTHANASIA PREVENTION COALITION BRITISH COLUMBIA and, CANADIAN UNITARIAN COUNCIL

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Association for Reformed Political Action (ARPA) Canada ("ARPA Canada") was granted leave to intervene in this appeal by the Order of the Honourable Justice LeBel on July 4, 2014. ARPA Canada accepts the facts as set out in the Respondent Attorney General of Canada's factum.

2. ARPA Canada makes this intervention in defense of the inviolability and dignity of human life which must be understood objectively and apply equally to all humanity.

PART II – ISSUES

3. ARPA Canada will make the following submissions on the legal principles pertaining to the existential nature of the right to life and its relationship to other human rights:

   A. Canadian jurisprudence and public policy hold the right to life as existential;

   B. Western philosophy and theology, upon which our law is partly grounded, hold the right to life to be existential;

   C. A qualitative approach to the right to life necessarily results in a subjective standard for the right to life which is untenable;

   D. When the right to life is interpreted as anything other than existential, the concept of human dignity is severely diminished;

   E. An existential understanding of the right to life requires absolute prohibitions of assisted suicide;

   F. The right to liberty and security of the person are dependent upon and cannot be divorced from the adjoining right to life;

   G. Properly understood, the right to life is a necessary grounding for all human rights in the *Charter*.

PART III – ARGUMENT

4. All humans equally possess inalienable dignity simply by being human. This dignity is not based on ability, age, or any other characteristic. This basic human worth is granted to us and is not something that an individual can chose to forfeit, either for themselves or another.

5. This principle of the inviolability or dignity of human life is a necessary grounding for human rights doctrine. This Court has emphasized that the *Canadian Charter of Rights and Freedoms*[1] (the "*Charter*") is "inextricably bound to concepts of human dignity".[2] Further, the Preamble to the *Charter of the United Nations*[3] states that it is determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person".[4]

6. Because human life is inviolable, disease or suffering does not reduce or remove dignity. It is one's reaction to a dying person that either respects or undermines the dignity of that person. How we individually and corporately respond to this "last enemy"[5] speaks to our beliefs about human worth and human rights and our mutual responsibility to uphold both, even in the face of suffering. ARPA Canada submits that "dying with dignity" means dying in a way that upholds the inviolability of human life rather than diminishing it.

7. To respect a person's dignity does not mean unnecessarily prolonging life, as the trial judge incorrectly assumed.[6] It means upholding the inherent worth of life itself, both in an individual and corporate sense. Loving our neighbour involves caring for the person who is dying or suffering rather than actively ending their life. There is little dignity evident in physician-assisted suicide as support from loved ones is purposefully and permanently cut off.

8. The decision of this Court will determine whether a moral and philosophical line is crossed – a "bright" line that determines whether human life is inviolable or whether it is subjectively determined by a select group who get to decide who qualifies for state and doctor assisted death. We respectfully submit that it is therefore essential this Court consider a broader moral, philosophical and religious perspective of human dignity and human rights.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [***Charter***].
[2] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 76 [ARPA Canada Book of Authorities ("ARPA BoA") Tab 1] [***Blencoe***].
[3] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7. [ARPA BoA Tab 10].
[4] Preamble, *Charter of the United Nations, supra* note 3. [ARPA BoA Tab 10].
[5] *The Holy Bible*, 1 Corinthians 15:26 [ARPA BoA Tab 5].
[6] Reasons for Judgment of the Honourable Madam Justice Smith, pronounced June 15, 2012, cited as *Carter v. Canada (Attorney General)*, 2012 BCSC 866, at para. 355 [Joint Record ("JR") vol. I, pp.109-110] [**TJ Reasons**].

A. Canadian jurisprudence and public policy hold the right to life to be existential

9. Justice Lamer made it clear that the rights in s. 7 of the *Charter* are independent: "it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7. Each of these, in my view, is a distinct though related concept to be construed as such by the courts."[7]

10. The British Columbia Court of Appeal noted that "since *Rodriguez*, courts have continued to regard the making of personal decisions regarding one's body as falling under the "security of the person" rubric and to a lesser extent, under "liberty" in s. 7."[8] However, "the right to life" has been interpreted "in its existential sense, not its qualitative sense with… "deep intrinsic value of its own".[9]

11. When the right to life is understood objectively, there is little dispute over whether someone is a human being and when this right comes into play. All humans are afforded this right simply on the basis of their being human. As pointed out by the Court of Appeal for British Columbia, referencing Professor Peter Hogg, it is understandable therefore that this Court rarely discusses the right to life as there are not many scenarios when government action results in the death of a human being.[10]

12. The right to life is engaged not because of the quality of life but because of an active choice of death over life:

> 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.[11]

13. Sopinka J. noted a consensus that "human life must be respected and we must be careful not to undermine the institutions that protect it."[12] This Court did consider the right to life, and it

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[7] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 500 [Appellants' Book of Authorities ("ABoA") v. III, Tab 61].
[8] Reasons for Judgment of B.C. Court of Appeal dated October 10. 2013 at para. 277 (Finch CJBC, dissenting) [JR, v. III, p. 119] [**CA Reasons**].
[9] CA Reasons, at para. 279 [JR, v. III, p. 120].
[10] CA Reasons, at para. 273 [JR, v. III, p. 118-119].
[11] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 586 [ABoA vol. III, Tab 67] [***Rodriguez***].
[12] *Rodriguez,* at 608 [ABoA v. III, Tab 67].

did so with the understanding that this right is existential.

14. As the Evangelical Fellowship of Canada details in its factum, an existential understanding of the right to life is further confirmed by the Law Reform Commission of Canada, a special Senate committee, and multiple times in Parliament via its votes on matters pertaining both to euthanasia and suicide prevention.[13]

B. Western philosophy and theology, upon which our law is partly grounded, hold the right to life to be existential

15. An objective and existential understanding of the right to life is also consistent with Western philosophy. Immanuel Kant's "work on human dignity has perhaps had the greatest influence of all philosophers on this concept as it is understood in present-day Canadian law and politics."[14] In his *Grounding for the Metaphysics of Morals* he lays out a reasoned argument for all people to submit themselves to a self-legislated universal law. This law is built on the premise that all humans are to be treated as ends in themselves because they are autonomous and free and thereby possess dignity.[15]

16. Kant would disagree with those who interpret dignity in a way that would allow it to be lost as a result of a terminal illness. Indeed, Kant even considers someone who wishes to commit suicide in order to relieve suffering:

> If he destroys himself in order to flee from a burdensome condition, then he makes use of a person merely as a means, for the preservation of a bearable condition up to the end of life. The human being, however, is not a thing, hence not something that can be used merely as a means, but must in all his actions always be considered as an end in itself. Thus I cannot dispose of the human being in my own person, so as to maim, corrupt, or kill him.[16]

17. An existential understanding of the right to life is also consistent with the Judeo-Christian faith. Philosopher Kurt Bayertz explains that the origins of the term human dignity "lie at least partly in the Christian idea of the *Imago Dei*... From this religious context, the idea of an inherent human dignity became part of Modern Philosophy and was reformulated in

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[13] See factum of the intervener The Evangelical Fellowship of Canada.
[14] Mark Penninga, *Building on Sand: Human Dignity in Canadian Law and Society* (Winnipeg: Premier Printing, 2005) at 35. See generally pp. 34-39 [ARPA BoA Tab 8] [**Penninga**].
[15] Penninga, at 36 [ARPA BoA Tab 8].
[16] Immanuel Kant, *Grounding for the Metaphysics of Morals* (1785), translated by James W. Ellington (Indianapolis: Hacket Publishing Company, 1981), at standard page number 429 [ARPA BoA Tab 6].

categories of secular reason."[17] ARPA Canada respectfully submits that sanctity or dignity do not come from human ability, superiority, or some sort of social contract. Rather it is because God, as our Creator, set humanity apart from the rest of creation and made us in His image.[18]

18. This foundation provides an objective basis for human dignity which cannot be lost or given up because of disability or illness. It also includes a corresponding ethic of love and care, which places a positive obligation on individuals to uphold the dignity of their neighbours.

19. As this Court recognized in *Rodriguez*, the principle of the sanctity of human life has been "deeply rooted in our society."[19] Although this Court has previously looked to a secular understanding of sanctity via legal philosopher Ronald Dworkin, it has been the Judeo-Christian understanding of sanctity which gave rise to its prominence in Western civilization long before Dworkin. Society has needed this theological basis because it provides a basis for why individuals *ought* to look beyond themselves and recognize and uphold the dignity of others. It is not just a desire that happens to be protected by law.

20. Regardless of whether this philosophical or theological basis for the right to life is recognized by this Court, the reality still remains that the right to life has been understood objectively and existentially in philosophy, theology, and law. There is good reason why this has been the case for well over three thousand years.

C. A qualitative approach to the right to life necessarily results in a subjective standard for the right to life which is untenable

21. If the right to life is understood as qualitative rather than existential, the standard for when the right comes into play moves from objective to subjective. The question that then needs to be answered is: who gets to determine when a life can be taken intentionally?

22. Those who advocate for physician-assisted suicide tell us that it would be the person who is contemplating death for him or herself. However, as the trial judge herself conceded[20], and

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[17] Kurt Bayertz, *Sanctity of Life and Human Dignity*, (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1996), at xiii-xiv [ARPA BoA Tab 2].
[18] *The Holy Bible*, Genesis 1:27 [ARPA BoA Tab 5].
[19] *Rodriguez* at 585 [ABoA vol. III, Tab 67].
[20] TJ Reasons, para. 1384-1393 [JR vII, pp.185-187].

the Christian Legal Fellowship so aptly explains in its factum,[21] even those advocating for the "right to assisted death" all concur that this right will not ultimately lie with the patient but with a third party (such as a doctor or judge) who will have to decide whether to accede to the request or not. Not every request for suicide should be automatically granted. As such, the individual who wishes to die is not autonomous after all.[22] Even with express consent from a patient, a select few will be entrusted with the power and responsibility to decide whether the request may be granted.

23. A line has to be drawn by society somewhere. It will either be a qualitative line where a certain person or a select group of individuals will determine where that line ought to be on a specific day and in a specific set of circumstances, or the line will be an existential line, drawn where it has been drawn for millennia past and where it ought to remain – no intentional killing.

24. When the right to life is qualitative, a decision has to be made about what qualities are worthy of protection. It is no longer accurate to speak of "human" rights, but rather the rights of some humans with certain qualities who are deemed by the select individuals in society to have lives worth living. The standards are necessarily subjective – there is no means to prevent the subjective standards of others from changing them.

25. The British Columbia Court of Appeal correctly concludes: "If 'life' were regarded as incorporating various qualities which some persons enjoy and others do not, the protection of the *Charter* would be expanded far beyond what the law can 'guarantee', while conversely, a slippery slope would open up for those who are unable to enjoy the blessings described by the Chief Justice."[23]

D. When the right to life is interpreted as anything other than existential, the concept of human dignity is severely diminished

26. It is important that human dignity is not turned into a subjective term, dependent on a

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[21] See factum of the intervener Christian Legal Fellowship.
[22] As this factum is being finalized, television, newspapers and magazines are dominated by stories about actor and comedian Robin Williams' recent suicide. No one speaks or writes of Robin Williams exercising his right to determine when his life should end or making a decision to end his life in a dignified way. Instead, the stories all report his suicide as a tragedy and ask if his pain and anguish could not have been treated.
[23] CA Reasons, at para. 280 [JR, Vol. III, p. 120-121].

person's ability to do, think, or feel as others. By stating that a terminal disease robs a person of their dignity, the logical extension is that dignity is something that can be gained or lost depending on ability rather than an inalienable quality of all human life.

27. When dignity is equated with autonomy and liberty, then disease or other factors which limit liberty are understood as a loss of dignity. But when dignity is understood existentially, as a status that a person possesses, cannot lose or give up, and which grounds other's obligations to that person, then no disease or disability can rob a person of their dignity. Dignity remains as long as life remains.

28. The logical implication of a subjective understanding of dignity and life is that those individuals who do not possess the abilities of others (e.g. the ill, aged, infants, disabled, etc.) are either excluded from the protection recognized in the right to life, or are vulnerable to the will of those with power over them. Their worth would become dependent on how others feel about them, and how they feel about themselves. The onus shifts to individuals having to justify their existence to others, especially to those who may view them as a burden.

E. An existential understanding of the right to life requires an absolute prohibition of assisted suicide

29. Absolute prohibitions of assisted suicide are necessary for upholding the sanctity of human life. Exceptions based on subjective determinations of the value of a person's life will radically destabilize the protection that law provides to the vulnerable. To assume that Canada will be the exception to every other jurisdiction that has failed to maintain adequate safeguards fails to understand that the problem is not with the particular safeguards enacted, but with the nature of safeguards themselves. Crossing the bright line and deeming some lives as unworthy of living creates an unstable regime, regardless of where the line is drawn. There is no foundation by which to uphold any safeguards once that threshold is crossed.[24]

30. As discussed at the trial level of this case, both the Netherlands and Belgium offer a multitude of evidence in this regard, with access to assisted suicide being broadened continually,[25] and

[24] See factum of the Intervener Christian Legal Fellowship on inviolability; see factum of the intervener The Evangelical Fellowship of Canada on sanctity of life.
[25] TJ Reasons, para. 455-462, 505, 508-509 [JR v. I, pp.139-141, 152-153] see also Tinne Smets et al, "Reporting of euthanasia in medical practice in Flanders, Belgium: cross sectional analysis of reported and unreported cases"

now even including children.[26] In Canada, with the ink not yet dry on Bill 52, the secretary of Québec's College of Physicians was already publically contemplating the need to extend the law to include far more people, calling Bill 52 "only a step."[27]

31. The *Canadian Medical Association* understands this as well. They have noted that if assisted suicide is permitted for competent, suffering, terminally ill patients, then "there may be legal challenges, based on the [*Charter*], to extend these practices to others who are not competent, suffering or terminally ill."[28]

F. The right to liberty and security of the person are dependent upon, and cannot be divorced from, the adjoining right to life

32. In *Rodriguez*, this Court used the concept of the sanctity of human life as a counterweight to liberty and security of the person:

> a consideration of these interests [liberty and security of the person] 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.[29]

33. Regardless of the circumstances, suicide is an active choice for death over life. The right to liberty and security of the person must work alongside the right to life of the person who lives or dies as a result of the choice, rather than undermining it. In *Rodriguez*, Justice Sopinka stated "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."[30] In regard to the principle of sanctity of life he concluded that it "has been understood historically as excluding

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BMJ 2010;341:c5174 [ARPA BoA Tab 9].
[26] Affidavit of Professor Etienne Montero sworn 23 April 2014 (English translation) at paras. 79-82, 87 [Respondent's Record, Tab 3, pp. 56-58].
[27] Graeme Hamilton "As Quebec set to legalize euthanasia, doctors already looking to expand who qualifies for lethal injections" *National Post* (13 February 2014), online: <http://news.nationalpost.com/2014/02/13/as-quebec-set-to-legalize-euthanasia-doctors-already-looking-to-expand-who-qualifies-for-lethal-injections/> [ARPA BoA Tab 4].
[28] Canadian Medical Association, *CMA Policy: Euthanasia and Assisted Suicide* (June 2014), online: <http://policybase.cma.ca/dbtw-wpd/Policypdf/PD14-06.pdf> [ARPA BoA Tab 3].
[29] *Rodriguez*, at 584 [ABoA vol. III, Tab 67].
[30] *Rodriguez*, at 585 [ABoA vol. III, Tab 67].

freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice."[31]

G. Properly understood, the right to life is a necessary grounding for all human rights in the Charter

34. Law itself can only function when grounded upon foundational principles. For example, consider what the law would look like if the Court were to grant that a right to liberty trumped the necessity of speaking the truth in the justice system. A person could then make the case that their right to liberty allows them to decide which facts are true, based on their preference of how these facts ought to be perceived. The result is an exercise in absurdity, in which the court is tasked with determining truth by making use of a subjective set of "facts". It is impossible to correctly interpret the law when there is no objective standard of truth.

35. We posit this example to make the case that there are some lines which cannot be crossed without undermining the basis of law itself. The same is true with the right to life. When the right to life is subjective and determined by society, it makes it incredibly difficult to give any meaning or permanence to all other human rights, which, by definition, require a living human. Rights that are socially constructed are not rights per se but rather desires or entitlements. And when rights are only applied to some humans, such as those who meet the criteria of the legislatures or courts, then they cannot truly be called "human" rights because being human is no longer a sufficient basis to possess them. More is needed.

36. Lawyer, professor, and theologian John Warwick Montgomery states the importance of the relational component to rights and their necessary grounding:

> Thus, whether we consider the relational nature of rights as entitlements or analyze the necessary implications of interest theory, the conclusions are the same: human rights logically require an identification of human value and pose the question of "someone" – Someone! – who has "the right, authority or power" to give them. And the quest to define rights cannot be separated from the need to justify them.[32]

37. As referenced earlier, this Court has emphasized that the *Charter* is "inextricably bound" to

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[31] *Rodriguez*, at 585 [ABoA vol. III, Tab 67].
[32] John Warwick Montgomery, *Human Rights and Human Dignity* (Edmonton: Canadian Institute for Law, Theology, and Public Policy, 1995) at 79-80 [ARPA BoA Tab 7].

"concepts of human dignity".[33] How is it possible for a constitution to be bound on a principle that is defined subjectively? And how can human rights be fundamental and universal if built on a dignity that shifts like sand?

38. Wesley J. Smith appropriately calls out the consequences of how we answer this question:

> The morality of the 21st century will depend on how we respond to this simple but profound question: Does every human life have equal moral value simply and merely because it is human? Answer yes, and we have a chance of achieving universal human rights. Answer no, and it means that we are merely another animal in the forest.[34]

39. Our society may feel obliged to grant the request of those who seek state-condoned death. But doing so means constructing a new moral foundation that is capable of upholding the right to life. If that foundation is subjective, it will ultimately mean that humanity becomes "merely another animal in the forest." In the forest, it is strength that determines superiority. The weak must learn to hide.

40. ARPA Canada urges this Court to uphold genuine human rights by recognizing the right to life as strictly inviolable. This principle is a solid foundation upon which we can build a free, equal, and loving society where human rights can flourish.

PART IV: COSTS

41. ARPA Canada does not seek costs, and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

42. ARPA Canada seeks no specific order or remedy.

43. ARPA Canada requests permission to present oral argument at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of August 2014.

ANDRÉ MARSHALL SCHUTTEN
Counsel for The Association for Reformed Political Action (ARPA) Canada

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[33] *Blencoe* at para. 76 [ARPA BoA Tab 1].
[34] Wesley J. Smith, — The Way I See It #127, as printed on Starbucks coffee cups.

PART VI: TABLE OF AUTHORITIES

CASES **PARAGRAPH(S)**

Other References

PART VII: LEGISLATIVE PROVISIONS

Court File Number: 35591

LEE CARTER et al. **and** **ATTORNEY GENERAL OF CANADA et al.**

Appellants Respondents

IN THE SUPREME COURT OF CANADA (ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

FACTUM OF THE INTERVENER, THE ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA

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