File No. 35591

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

BETWEEN:

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

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PART I - OVERVIEW

1. The defenders of the criminalization of physician-assisted death generally offer two justifications.

2. The first and most substantial one is practical. The defenders say that an absolute prohibition is required to protect vulnerable persons because no system of safeguards can adequately dispose of all the risks. This position, however, cannot stand in light of the voluminous evidence in this case and the trial judge's careful factual findings, including that "a system with properly designed and administered safeguards could, with a very high degree of certainty, prevent vulnerable persons from being induced to commit suicide while permitting exceptions for competent, fully-informed persons acting voluntarily to receive physician-assisted death".[1] Indeed, such safeguards would provide much greater certainty than the existing requirements for informed consent relating to the refusal or withdrawal of life-sustaining treatment.

3. The second attempted justification, and the one which the Canadian Unitarian Council ("**CUC**") will address, is moral in nature. Justice Sopinka considered in *Rodriguez*,[2] and Canada contends in the case at bar, that the prohibition is required to discourage everyone from "choosing death over life".[3] A number of faith groups intervene in this appeal to support that position. The Evangelical Christian Fellowship, for instance, submits that human life is a "sacred trust" which limits individual autonomy and precludes consent to assisted death.[4]

4. As a faith group itself, the CUC intervenes in this appeal to urge that a decision to die made by a competent, interminably ill and grievously-suffering patient does not violate any moral consensus within our society. Different people have very different conceptions of what approach to death best honours the value of life. Some believe that hastening death would contradict the sanctity of life; others believe that their lives would be dishonoured by the

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[1] *Carter v. Canada (Attorney General)*, 2012 BCSC 886 ("**TJ Reasons**") at para. 1367.
[2] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (Book of Authorities of the Attorney General of Canada ("**AGC BoA**") at Tab 44).
[3] See the Factum of the Attorney General of Canada ("**AGC Factum**") at 47, para 147, and *Rodriguez* at, *interalia*, 586*b* (AGC BoA at Tab 44).
[4] Factum of the Evangelical Christian Fellowship at 2, paras 10-11.

anguish, helplessness and incapacity accompanying a terrible illness. As the trial judge found on the extensive evidence, there is simply no societal consensus in this regard.

5. A choice to die in the face of incurable illness and grievous suffering is therefore not antithetical to any fundamental moral conception integral to our society, as it would need to be for the prohibition on physician-assisted death to be justified on moral grounds. To the contrary, self-determination and human dignity underlie the paramount value we place on human life and inform s. 7 of the *Charter* and the life interest included within it. Far from weighing against the legalization of physician-assisted death, the s. 7 life interest guarantees to each individual the freedom to make the ultimate decision to live or die according to one's own religious and ethical beliefs and conceptions of how to honour and uphold the value of life.

PART II - POSITION ON THE QUESTIONS IN ISSUE

6. The CUC supports the Appellants' appeal in all respects but will confine its submissions to the s. 7 issue set out in the Appellants' factum at paragraph 25(c).

PART III - ARGUMENT

A. The Prohibition Cannot Be Justified on the Basis of Moral Considerations

7. In *Rodriguez*, the majority of this Court dismissed the challenge to the ban on physician-assisted dying in part because "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".[5] Justice Sopinka, writing for the majority, observed that the "sanctity of life ... 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",[6] although he later noted that "the principle of sanctity of life is no longer seen to require that all human life be preserved at all costs" but rather "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".[7]

8. While Sopinka J. was "unable to discern anything approaching unanimity" with respect to "whether the distinctions drawn between withdrawal of treatment and palliative care, on the

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[5] *Rodriguez* at 585*h-i* (AGC BoA at Tab 44).
[6] *Rodriguez* at 585*h-i* (AGC BoA at Tab 44).
[7] *Rodriguez* at 595*i-j* (AGC BoA at Tab 44).

one hand, and assisted suicide on the other are practically compelling," he found that, "[t]o 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".[8] He expressed his view that the choice to access physician-assisted dying "constitutes a conscious choice of death over life",[9] such that "life" is "one of the values engaged in the present case".[10] He determined that, "[i]n upholding the respect for life, the prohibition against physician-assisted dying "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", and that "[t]o permit a physician to lawfully participate in taking life would send a signal that there are circumstances in which the state approves of suicide".[11] Ultimately, Sopinka J. concluded that "it cannot 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".[12]

9. The CUC submits that Sopinka J.'s dismissal of the challenge to the prohibition on the basis that "no new consensus has emerged in society" against the prohibition is fundamentally flawed in two respects.

10. First, in referring to the possibility that the prohibition may discourage vulnerable persons from ending their lives, Sopinka J. inappropriately injected societal considerations into the s. 7 analysis. As McLachlin J. (as she then was) properly stated in her dissent,[13] and as this Court has now unanimously held in *Bedford*, any "benefits to society" of a challenged law are irrelevant to the s. 7 analysis and rather fall to be considered under s. 1 of the *Charter*.[14] Section 7 is concerned with whether the limitation on any individual's life, liberty or security of the person is arbitrary, overbroad or grossly disproportionate for *that individual*. While it may be that in extreme cases societal interests will be so pressing and substantial and the means

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[8] *Rodriguez* at 607*i* – 608*a* (AGC BoA at Tab 44).
[9] *Rodriguez* at 586*b* (AGC BoA at Tab 44).
[10] *Rodriguez* at 586*e* (AGC BoA at Tab 44).
[11] *Rodriguez* at 608*d* (AGC BoA at Tab 44).
[12] *Rodriguez* at 608*g-h* (AGC BoA at Tab 44).
[13] *Rodriguez* at 620*j*-622*c* (AGC BoA at Tab 44).
[14] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at 1151-52, para. 123 (Appellants' Book of Authorities ("**APP BoA**") at Tab 10).

employed so necessary so as to justify the fundamental injustice caused to certain individuals, that justification analysis must be performed under s. 1. That is not the case here.

11. The more substantial flaw in Sopinka J.'s analysis, however, is his imposition on the *challengers* of the prohibition of a requirement to demonstrate that a new societal consensus had emerged against it. The *Charter*'s purpose is to protect minorities from the tyranny of the governing majority, and it is directly antithetical to that purpose to find that *Charter* rights are violated only where they are expressed in a manner consistent with a societal consensus. As Dickson C.J. stated in *Big M Drug Mart*, "[t]he values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own".[15] The great promise of the *Charter* is not its protection of the beliefs and choices of the majority, but rather those of minorities.

12. Where the law is sought to be justified on moral grounds, as it is with the prohibition against physician-assisted dying, it is the *state* that bears the onus of demonstrating that the law is consistent with a true societal consensus. As Sopinka J. observed in *Butler*, "[t]o impose a certain standard of public… morality, solely because it reflects the conventions of a given community, is inimical the exercise and enjoyment of individual freedoms, which form the basis of our social contract".[16] Rather, while Parliament does have the right to legislate for the object of morality, it may only do so on "the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society".[17] In *Malmo-Levine*, Gonthier and Binnie JJ. cited cannibalism, bestiality and duelling as "examples of crimes that rest on their offensiveness to deeply held social values", such that the prohibition of them is "integral to our ideas of civilized society".[18]

13. There is nothing approaching that level of societal consensus, either now or 20 years ago, that would indicate that an absolute ban on physician-assisted dying in the circumstances sought

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[15] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 346*i-j* (CUC's Book of Authorities ("**CUC BoA**") at Tab 5).
[16] *R. v. Butler*, [1992] 1 S.C.R. 452 at 492*h-i* (APP BoA at Tab 42).
[17] *Butler* at 493*a-b* (APP BoA at Tab 42).

by the appellants is required by the fundamental values of our society or is essential to its proper functioning. On the contrary, in *Rodriguez*, Sopinka J. observed that opinion on the issue was divided,[19] and in this case the trial judge found on all the evidence that there is no clear societal consensus either way.[20] The alleged distinction between "active" physician-assisted death and "passive" withdrawal or withholding of life-sustaining treatment attracts even less support: the trial judge found that "the preponderant ethical opinion is that there is no bright-line ethical distinction, in an individual case, between physician-assisted dying and end-of-life practices such as withholding or withdrawing life-sustaining treatment or administering palliative sedation where the highly probable consequence is to hasten death".[21]

14. Accordingly, the prohibition cannot be justified by reference to moral considerations. Certainly there is consensus that human life is of very high inherent value and should almost always be protected, but the consensus does not go farther than that. Many persons in our society – including many of those who are most informed on the issue – believe that human life is best honoured by respecting a wish to access physician-assisted death when expressed by a decisionally-competent patient facing intolerable suffering.[22] In the absence of a societal consensus in favour of an absolute prohibition of physician-assisted suicide, the state is not entitled to impose, on individuals facing a decision of fundamental personal importance to them, a compelled course of action that accords only with the state's own moral view.

B. The Prohibition Violates the Section 7 Life Interest

15. In *Rodriguez*, Sopinka J. opined that physician-assisted death conflicts with the "sanctity of life" – which he found to be "one of the three *Charter* values protected by s. 7"[23] – because physician-assisted death "constitutes a conscious choice of death over life".[24]

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[18] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at 635-36, paras. 117-118 (CUC BoA at Tab 7). See also *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 at 743-44, paras. 33 and 37 (CUC BoA at Tab 6).

[19] *Rodriguez* at 607*i-j* (AGC BoA at Tab 44).

[20] TJ Reasons at para. 358.

[21] TJ Reasons at para. 1336.

[22] For a similar analysis in the American context, see Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Judith Jarvis Thomson, et al., "Assisted Suicide: The Philosophers' Brief" at 5-6 of 17, filed as an *amici curiae* brief before the United States Supreme Court in *State of Washington et al. v. Glucksberg et al.*, 521 U.S. 702 (1997), and published in *The New York Review of Books*, March 27, 1997 issue; found online: http://www.nybooks.com/articles/archives/1997/mar/27/assisted-suicide-the-philosophers-brief/ (CUC BoA at Tab 11).

[23] *Rodriguez* at 584*a-b* (AGC BoA at Tab 44).

16. Respectfully, Sopinka J. erred in viewing choice over the manner and timing of one's own death as conflicting with "life as a value".[25] Just as there is no societal consensus for or against physician-assisted death, the meaning of "life as a value" is not universal. While some may define it in relation to a bare minimum of physical existence, others see the value of life as dependent upon subjective assessments of the *quality* of that existence.[26]

17. There is nothing about the latter approach that is contrary to our society's fundamental norms. To the contrary, the common law fully respects the right of a decisionally-competent patient to choose to die by refusing life-sustaining treatment[27] or demanding that it be withdrawn.[28] The law does not adopt that position simply out of regard for the law of battery, but rather because it is fully consistent with society's conception of the value of human life, which incorporates fundamental notions of self-determination and human dignity. We value human life not because of *physical existence*, but because of the existence of our *personhood*, which includes the marvelous human capacities to feel joy and suffering and love, to form our own conceptions of the meaning of existence, to be conscious that we live and that we will die, and to make decisions about how we will live and indeed about how we will die.

18. That is not at all to say that the value of a person's life is dependent upon the extent of one's capacities in those regards; the constitutional value of any particular human life is always equal to any other. But it is to say that the reasons we respect human life so deeply and defend it with rights are inextricably related to fundamental notions of self-determination and human dignity. Exercising choice over the manner and timing of one's death is not inherently inconsistent with "life as a value"; when made by someone who is decisionally competent, terminally ill and grievously suffering, the choice can instead be an expression of the very qualities that make human life so valuable.

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[24] *Rodriguez* at 586*b*, *e* (AGC BoA at Tab 44).
[25] Justice Sopinka used this phrase in *Rodriguez* at 586*b* (AGC BoA at Tab 44).
[26] *Rodriguez* per Sopinka J. at 585*f*, per McLachlin J. at 624*c*-*e*, per Cory J. at 629*i* – 630*a* (AGC BoA at Tab 44).
[27] *Malette v. Shulman* (1990), 67 D.L.R. (4th) 321, 72 O.R. (2d) 417 (C.A.) at paras. 19, 32, 41 (WL) (CUC BoA at Tab 3); *Rodriguez*, per Sopinka J. at 598*b*-*c*, per Lamer C.J. at 559*j* (AGC BoA at Tab 44); *A.C. v. Manitoba (Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 at 209-10, para. 40 (AGC BoA at Tab 1).
[28] *Nancy B. v. Hôtel-Dieu de Québec et al.* (1992) 86 D.L.R. (4th) 385, 69 C.C.C. (3d) 450 (Q.C.S.C.) at 392*a* (D.L.R.) (CUC BoA at Tab 4); *Rodriguez*, per Sopinka J. at 598*b*-*c*, per Lamer C.J. at 560*a* (AGC BoA at Tab 44).

19. Indeed, if self-determination as a value were subservient to "life as a value" in the sense of the preservation of physical existence, then it would be appropriate for the criminal law to prohibit the refusal or withdrawal of life-preserving treatment and for the common law of battery to make an exception for life-saving medical treatment. However, "[t]he right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law",[29] "even if the withdrawal from or refusal of treatment may result in death".[30] We allow for decisionally-competent patients to *choose to die* by refusing life-saving treatment, or requiring its withdrawal, precisely because of the paramountcy we accord to the value of self-determination. Many may not understand why someone would refuse the blood transfusion that would allow them to live a healthy life, but so long as that person is decisionally competent, we respect his or her right to do so. As was stated in *Malette*:

> 19. ...The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care. For this freedom to be meaningful, people must have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others....[31]

20. Many of the opinions expressed by the members of this Court in *Rodriguez*, including by the majority, confirmed that personal autonomy and human dignity underlie the s. 7 security of the person guarantee, which "protects the right of each person to make decisions concerning his or her body".[32] In *Morgentaler*, both Dickson C.J. (Lamer J. concurring)[33] and Wilson J.[34] concluded that state interference with a woman's control over her own body itself violated the right to security of the person, regardless of any objective determination that the state's interference would be likely to cause physical harm. Self-determination also, of course, underlies the s. 7 liberty guarantee.[35]

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[29] *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (C.A.) at para. 33 (WL) (CUC BoA at Tab 2).
[30] *Rodriguez*, per Sopinka J. at 598*b-c*. (AGC BoA at Tab 44); citing, *inter alia*, *Malette* (CUC BoA at Tab 3).
[31] *Malette* at para. 19 (WL) (CUC BoA at Tab 3).
[32] *Rodriguez*, per McLachlin J. at 618*f-i*; per Sopinka J. at 587*j*-588*d* (AGC BoA at Tab 44).
[33] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 53*g*-56*d* (CUC BoA at Tab 8).
[34] *Morgentaler* at 173*a*-174*a* (CUC BoA at Tab 8).
[35] *Morgentaler*, per Wilson J. at 166*d-f* (CUC BoA at Tab 8); cited with approval in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, per La Forest J. at 368-69, paras. 80-81 (CUC BoA at Tab 1) and in *Malmo-Levine* at 623, para. 85 (CUC BoA at Tab 7).

21. The animating values underpinning s. 7, therefore, are self-determination and human dignity. Section 7 is not a promise that the state will take such steps as are necessary to provide for each person the interests listed therein; it is rather a guarantee that the state will not interfere with each person's *control* over those interests, except in accordance with fundamental justice. For instance, the security of the person interest does not require the state to protect each individual from making decisions that would undermine one's physical security, such as by compelling medical treatment; s. 7 instead guarantees to each person the *right to make such decisions for oneself* without interference from the state, unless such is consistent with fundamental justice.

22. The s. 7 life interest should not be approached in any different manner. The right to life does not just defend against state action that would end our physical existence. The purpose of the right to life is rather to guarantee to each individual freedom from state interference in relation to ultimate decisions over one's own death, except where such interference is consistent with fundamental justice. The life interest properly recognizes that control over life and death decisions belongs to each of us.

23. In the Court of Appeal, Finch C.J. concluded that the s. 7 life interest encompasses the the "intensely personal decision" to determine when life's meaning is lost.[36] The majority, however, disagreed, holding instead that the life interest is "an existential value" separate from "considerations involving personal autonomy, decision-making and dignity", which instead "have consistently been regarded as engaging security of the person and to a lesser extent, liberty".[37] Before this Court, Canada similarly resists an autonomy-based view of the life interest, arguing that such an approach to the life interest would inappropriately subsume within it the security of the person and liberty interests.[38]

24. These objections to an autonomy-based conception of the life interest should be rejected. If both the security of the person and liberty interests enshrine aspects of personal autonomy, it is only consistent with the animating purposes of s. 7 for the life interest to do so as well. After all,

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[36] *Carter v. Canada (Attorney General)*, 2013 BCCA 435 ("**CA Reasons**"), per Finch C.J. at para. 86.
[37] CA Reasons, per Newbury and Saunders JJ.A. at paras. 279-280.
[38] AGC Factum at para 77.

while distinct meaning must be given to the interests listed in s. 7,[39] each interest is also a "related concept to be construed as such by the courts".[40]

25. An autonomy-based view of the s. 7 life interest is indeed distinct from, though related to, the security of the person and liberty interests. The security of the person guarantee protects individuals from state violations of their physical and psychological integrity. The liberty interest provides individuals with "an irreducible core of personal autonomy" wherein they may make "fundamentally or inherently personal" decisions.[41] The life interest, on the other hand, encompasses freedom from state interference in decisions regarding life and death. While the life interest is, appropriately, related to security of the person and liberty, inclusion of it within s. 7 reflects the supreme importance to our human dignity of our freedom from state interference over our own life and death decisions.

26. A hypothetical illustrates the distinction between the life and security of the person interests. Consider a decisionally-competent patient on a ventilator and feeding tube who decides she wishes to die and therefore demands the withdrawal of the treatment. Under our current law, it is not criminal (indeed, it is mandatory) for her physicians to comply with her wish, even though the intended and necessary result will be her death.[42] If, however, Parliament instead criminalized physicians' non-application or withdrawal of life-sustaining treatment, regardless of their patients' wishes, what would be the proper basis of the patient's constitutional claim against that law? Certainly she would have a claim that the law interferes with her bodily integrity, and hence her security of the person, by prohibiting the removal of medical treatment to which she did not consent. But that interest does not capture the heart of her complaint. It is not just that she wishes to remove the tubes that are invading her body. The gravamen of her claim is not the

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[39] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, *per* Wilson J. at 205*h-J.* (CUC BoA at Tab 10); cited with approval in, *inter alia*, *Re: B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 ("***Motor Vehicle Reference***"), per Lamer J. for the majority at 500*c-e* (CUC BoA at Tab 9).

[40] *Motor Vehicle Reference* at 500*e* (CUC BoA at Tab 9).

[41] *Malmo-Levine* at 623, para. 85 (CUC BoA at Tab 7).

[42] It is worth observing that no party or intervenor in this case objects to the right of such a patient to refuse or have withdrawn treatment that would otherwise sustain her life. In order to reconcile such a right with the "inviolability of life" and the importance it places on intention in determining which end-of-life decisions are consistent with that notion and which are not, the Christian Legal Fellowship ("**CLF**") submits that "an intention to kill oneself is entirely absent from the decision to refuse treatment": CLF Factum, paras. 22-23. But while such an intention may *sometimes* be absent from a decision to refuse treatment, it is false and indeed

battery and assault committed against her; rather, it is that the law forces her to continue living when she no longer wishes to do so. Only the life interest encapsulates the unique gravity of the law's intrusion upon her autonomy and dignity in that regard.

27. The prohibition on physician-assisted death is analogous to the law in that hypothetical. While it does not necessitate the continuation of a battery, it does visit upon patients the cruel injustice of being forced to continue living in grievous suffering and irremediable illness, no matter how free, uncoerced and understandable their wishes to the contrary may be. Like the law in the hypothetical, the prohibition on physician-assisted death constitutes a grave and unjustifiable violation of the s. 7 right to life.

PART IV - SUBMISSIONS CONCERNING COSTS

28. The CUC does not seek costs and asks that none be ordered against it.

PART V - ORDER SOUGHT

29. The CUC requests leave to present oral argument at the hearing of this appeal.

All of which is respectfully submitted this 29th day of August, 2014

Tim Dickson

Ryan Androsoff

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disingenuous to presume that it *always* or even "typically" will be. In any event, the presence of such an intention does not in any way disentitle a patient to that choice.

PART VI - TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES