

C. ANNUAL RETURNS

With effect from April 1, 1995, all corporations that participate in government tenders will be required to show evidence that they filed a return for the previous year of assessment. If such evidence is not forthcoming, 10 percent of the value of the contract awarded will be withheld and paid over to the Department of Taxes until the corporation files a return for assessment.

D. NEW EXCHANGE CONTROL REGIME

With effect from the beginning of July 1994, the Government of the Republic of Zimbabwe dismantled the two-tier exchange rate system and has replaced it with a single exchange rate determined by free market forces.

Canada*

In September of 1993 the Supreme Court of Canada rendered a landmark decision concerning "assisted suicide" in Canada. On a completely unrelated subject, in July of 1994 the Office of the Superintendent of Financial Institutions issued new guidelines for the securitization activities of federally regulated financial institutions in Canada, which will likely make it easier for Canadian financial institutions to securitize billions of dollars of their own receivables.

I. Assisted Suicide

In a lengthy, complex, and difficult decision, the Supreme Court of Canada, by a five-to-four majority decision, dismissed the appeal of Sue Rodriguez for a declaration that section 241(b) of the Canadian Criminal Code (the Code) (which is a criminal prohibition against persons aiding or abetting in the commission of suicide by another person) violates the Canadian Charter of Rights and Freedoms (the Charter) and therefore is of no force or effect.¹

A. FACTS

At the time of the appeal, Rodriguez was a 42-year-old woman suffering from amyotrophic lateral sclerosis (ALS), widely known as Lou Gehrig's disease. Her life expectancy was between two and fourteen months, but her condition was

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1. Rodriguez v. British Columbia (Attorney General), 107 D.L.R.4th 342 (1993).

rapidly deteriorating. Soon she would lose the ability to swallow, speak, walk, and move her body without assistance, and thereafter, she would lose the capacity to breathe without a respirator.

Rodriguez knew of the trajectory of her illness and the inevitability of how her life would end. Her wish was to control the circumstances, timing, and manner of her death. She had no wish to die so long as she still had the capacity to enjoy life; however, by the time she would no longer be able to enjoy life, she would be physically unable to terminate her life without assistance. Rodriguez sought an order that would allow a qualified medical practitioner to set up technological means by which she might, by her own hand, at the time of her choosing, end her life.

Rodriguez had applied to the Supreme Court of British Columbia for an order declaring section 241(b) of the Code invalid pursuant to the Charter, on the ground that it infringes or denies, in whole or in part, the rights and freedoms that sections 7, 12, and 15(1) of the Charter guarantee, and is, therefore, to the extent it prohibits a terminally ill person from committing "physician-assisted suicide," of no force and effect. Both the Supreme Court of British Columbia and the British Columbia Court of Appeal dismissed her application.

B. LEGISLATION INVOLVED

The relevant provision of the Code is section 241, which provides that "[e]very one who (a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable for imprisonment for a term not exceeding fourteen years."²

The relevant Sections of the Charter are as follows:

1. 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;

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7. 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;

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

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- 15(1) 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.

2. Criminal Code, R.S.C. 1985, ch. C-46, as amended.

C. ARGUMENT OF APPELLANT

Rodriguez based her claim on her right to enjoy her remaining life with the inherent dignity of a human person, the right to control what happened to her body while she was living, and the right to have control over and be free from governmental interference in making fundamental, personal decisions concerning the timing, method, and circumstances of her death. The argument before the courts was based not on a "right to suicide" but on a right to "die with dignity."³

D. METHOD OF CHARTER ANALYSIS

The nature of Charter analysis that has developed through case law is to determine (i) whether the substantive right involved has been infringed, an inquiry that involves interpreting and defining what comes within the scope of the subject right; and (ii) if the right as defined or interpreted has been infringed by the legislation, whether such infringement constitutes a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of section 1 of the Charter. The section 1 analysis involves two tests. The first branch of the test considers the validity of the legislative object, while the second branch of the test considers whether a reasonable balance has been struck between the legislative objective and the means chosen to achieve that objective. This latter inquiry consists of three different components: (i) the means chosen to achieve the objective must be rational, fair, and not arbitrary; (ii) the means must impair as minimally as is reasonably possible the right in question; and (iii) the infringement on the right must be sufficiently proportionate to the importance of the objective that is sought to be achieved. Only if the legislation survives each of these components may the limitation on the Charter right or freedom be found justifiable under section 1.

E. MAJORITY DECISION⁴

Justice Sopinka, speaking for the majority of the Court, found that section 241(b) of the Code infringed on the security interest of Rodriguez within the meaning of section 7 of the Charter, but that it did not deprive her of her security in a manner that did not accord with the principles of fundamental justice. The criminal prohibition of section 241(b) had the effect of depriving Rodriguez of the ability to end her life when she was no longer able to do so without assistance. This prohibition deprived the appellant of autonomy over her person, causing her physical pain and psychological stress in a manner that impinged on the security of her person.

3. 107 D.L.R.4th at 350.

4. *Id.* at 386-412.

In general, however, the Court found section 241(b) to be valid and desirable legislation that fulfils the government's objectives of preserving life and protecting the vulnerable. The blanket prohibition on assisted suicide is neither arbitrary nor unfair in the sense of being unrelated to the state's interest in protecting the vulnerable. According to the majority of the Court, this purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. The active participation by one person in the death of another is intrinsically, morally, and legally wrong and there is no certainty that abuses can be prevented by anything less than a complete prohibition. Canada and other western democracies recognize and apply the sanctity of life as a general principle that is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail. These societies have drawn valid distinctions between passive (that is the removal of life support systems) and active forms of intervention in the dying process. In Canada, suicide itself is not unlawful, and the common law allows a physician to withhold or withdraw life-saving or life-maintaining treatment on the patient's instructions and to administer palliative care that has the effect of hastening death.

Justice Sopinka went on to find that section 241(b) does not violate the guarantee of protection against cruel and unusual treatment or punishment in section 12 of the Charter. Rodriguez argued that the prohibition on assisted suicide had the effect of imposing upon her cruel and unusual treatment, in that the prohibition subjected her to a prolonged suffering until her natural death or required that she end her life at an earlier point while she could do so without help.

The majority found that while "treatment" within the meaning of section 12 can include treatment the state imposes in contexts other than of a penal or quasi-penal nature, a mere state prohibition on certain action, without more, cannot constitute "treatment" under section 12. Rodriguez was simply subject to the edicts of the Code, as are all individuals in society. The fact that, because of her personal situation, this prohibition impacted her in a manner that caused her suffering did not subject her to treatment at the hands of the state. There must be some more active state process in operation, involving an exercise of state control over the individual, in order for that state action to constitute treatment.

Justice Sopinka then went on to deal with the appellant's argument that section 241(b) violates section 15 of the Charter and that because of her physical disability she was deprived of a benefit or subjected to a burden by virtue of section 241(b) of the Code. Without going into a detailed analysis of section 15, Justice Sopinka stated that assuming some violation of section 15 exists, any infringement is clearly saved under section 1 of the Charter. Section 241(b) is grounded in respect for its desire to protect human life and has a clearly pressing and substantial legislative objective. Prohibition on giving assistance to commit suicide is ratio-

nally connected to that purpose. The section protects all individuals against the control of others over their lives. To introduce an exception to this blanket prohibition for certain groups would itself create an inequality. The blanket prohibition, without exception, on giving assistance to commit suicide is the most effective means of protecting life and those who are vulnerable in society. Historically, attempts to fine-tune this approach by creating exceptions have been unsatisfactory and have failed to allay fears that a relaxation of the clear standards the law sets will undermine the protection of life and will lead to abuses of the exception. The provision is not overbroad. No halfway measure could be relied upon with assurance to fully achieve the legislative purpose. In view of the significant support for the type of legislation in section 241(b) and the contentious and complex nature of the issues, the government had a reasonable basis for concluding that the section complied with the requirement of minimal impairment for the purposes of the proportionality test in section 1 of the Charter.

F. MINORITY OPINIONS

Justice McLachlin, with Justice L'Heureux-Dube concurring,⁵ also concluded that section 241(b) infringes the right in section 7 of the Charter to security of the person. The provision deprived Rodriguez of her security of the person, being the right to make decisions concerning her own body in a way that offends the principles of fundamental justice. Section 241(b) violates section 7 because it imposed a limit on Rodriguez's right to deal with her own body as she chose and that limit is arbitrary. A physically able person is legally allowed to end his or her own life and cannot be criminally penalized for attempting to commit suicide. A person who is physically unable to accomplish that act is not similarly allowed to end his or her life. According to Justice McLachlin, it did not accord with the principles of fundamental justice that the appellant was disallowed what was available to others only because it was possible that other people, at some other time, might suffer, not what she sought, but an act of killing without true consent.

Justice McLachlin held that the violation of section 7 is not a reasonable limit within the meaning of section 1 of the Charter. The objective of section 241 relates to the fear that if people are allowed to assist others in committing suicide, the power will be abused in a way that may lead to the killing of others who have not truly and of their own free will consented to death. However, other provisions of the Code (that is homicide provisions) go a considerable distance to meeting the concerns of a lack of consent and improperly obtained consent. Accordingly, Justice McLachlin concluded that the court should declare that section 241(b) has no force and effect on the condition that the effect of this

5. *Id.* at 414-24.

declaration be suspended for one year. During the one year suspension, a superior court may grant persons constitutional exemptions on application.

The Chief Justice of Canada, Antonio Lamer, wrote a strong dissent in this case.⁶ Chief Justice Lamer analyzed the issue under section 15 of the Charter and concluded that section 241(b) of the Code infringes the right to equality that section 15(1) of the Charter guarantees. Section 241(1)(b) creates an inequality by preventing persons physically unable to end their lives without assistance from choosing suicide when that option is in principle available to other members of the public. This inequality is imposed on persons unable to end their lives without assistance solely because of a physical disability, a personal characteristic that is among the grounds of discrimination listed in section 15(1) of the Charter. The inequality is properly categorized as a burden or disadvantage. It limits the principle of self-determination. While a blanket prohibition on aiding suicide may appear to treat all persons identically, the effect of section 241(b) is to deprive persons who are unable to commit suicide without assistance of any ability to commit suicide in a way that is not unlawful. Section 15 of the Charter is not limited to deliberate and direct discrimination, but protects against incidental and indirect discrimination.

According to Chief Justice Lamer, the infringement of section 15 cannot be justified under section 1 of the Charter. The objective of the legislation is to protect persons who may be vulnerable to the influence of others in deciding whether, when, and how to terminate their lives. This prohibition is rationally connected to the pressing and substantial objective of protecting vulnerable persons who may be contemplating terminating their own lives. This section cannot, however, meet the minimal impairment part of the proportionality test. Speculation that subtle and overt pressures may be brought to bear on vulnerable persons if assisted suicide is decriminalized, even in limited circumstances, is not sufficient to justify depriving a disadvantaged group of the right to equality. An absolute prohibition that is indifferent to the individual or the circumstances in question cannot satisfy the constitutional duty on the government to impair the rights of persons with physical disabilities as little as reasonably possible. Accordingly, Chief Justice Lamer declared that section 241(b) should be of no force and effect; however, such declaration should be suspended for a period of twelve months so that Parliament may look into drafting more appropriate legislation. During the period of constitutional invalidity persons such as Rodriguez would be entitled to a personal remedy. The remedy would be a constitutional exemption during that period. The application for an exemption would be made to superior court and supported by a physician's certificate that the person is competent to make the decision to end his or her own life, that he or she is or will become physically incapable of committing suicide unassisted, and that the act causing the applicant's death is that of the applicant and not of anyone else.

6. *Id.* at 349-86.

Justice Cory, also dissenting,⁷ agreed that section 241(b) infringes both sections 7 and 15 of the Charter and stated that section 7 is a provision that emphasizes the innate dignity of human existence. Dying, however, is an integral part of living and is entitled to constitutional protection under section 7 of the Charter. The right to die with dignity should be as well protected as is any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity. According to Justice Cory, no difference exists between permitting a patient of sound mind to choose death with dignity by refusing treatment and permitting a patient of sound mind who is terminally ill to choose death with dignity by terminating life-preserving treatment, even if, because of incapacity, that step has to be physically taken by another on the patient's instructions. The right to choose death is open to patients who are not physically handicapped, and there is no reason for denying that choice to those who are.

Rodriguez died of natural causes within a couple of months after the Supreme Court of Canada rendered its decision.

As a result of the *Rodriguez* decision, the Supreme Court of Canada has made it clear that the assisted suicide provisions of the Criminal Code are constitutional and that assisting a person to commit suicide in Canada remains a crime. If the prohibition against assisted suicide is to be decriminalized, then Canada's federal Parliament will have to address the issue in legislation. The issues of assisted suicide and euthanasia evoke strong personal emotions. Political rhetoric will likely ensure that the status quo will prevail.

II. Securitization

A great untapped reservoir of securitizable assets resides on the balance sheets of Canada's financial institutions. Canadian banks and trust companies have not entered boldly into this field primarily because of the conservative approach taken by regulatory authorities. In May 1992 the Office of the Superintendent of Financial Institutions (OSFI), which regulates all federal financial institutions (including banks and certain insurance, trust, and loan companies), set out the criteria that would determine the amount of capital these institutions would be required to maintain with respect to their various roles in the securitization process. In the case of an institution that supplies securitized assets, the Guideline reiterated OSFI's previous position to deny sale treatment (with the result that securitization would not effect a reduction in required capital) unless (i) the transferor transfers all the significant risks and rewards of ownership, (ii) recourse does not exceed a small fraction of expected losses, and (iii) the seller's participation in the transferred income stream does not exceed a small fraction of future cash flows.

7. *Id.* at 412-14.

On July 7, 1994, OSFI issued two new replacement Guidelines applicable to the securitization activities of federally regulated financial institutions.⁸ Taken together, the Guidelines will facilitate securitization by such institutions since recourse will cease to be a bar to obtaining off balance sheet treatment.

A. GUIDELINE D-4—TRANSFERS OF FINANCIAL ASSETS WITH RECOURSE

Guideline D-4 sets out the accounting treatment that federally regulated financial institutions must adopt in respect of transfers of all financial assets with recourse, including receivables transferred under asset securitization arrangements and securities transferred under repurchase and reverse purchase agreements. Insofar as securitization is concerned, the Guideline primarily impacts two critical issues: (i) whether a transfer of financial assets should be accounted for as a sale or a financing, and (ii) if accounted for as a sale, how and when any gain should be recorded.

Guideline D-4 adopts, with a number of “clarifications and interpretations,” the accounting treatment accorded to securitizations by EIC-9 that the Emerging Issues Committee of the Canadian Institute of Chartered Accountants released in 1989. The main thrust of EIC-9 is to permit off balance sheet treatment so long as (i) the transferor has transferred the significant risks and rewards of ownership of receivables; and (ii) reasonable assurance exists regarding the measurement of the consideration derived from the transfer of the receivables. Guideline D-4 will likely propel Canadian financial institutions seriously to consider securitizing billions of dollars of their own receivables.

B. GUIDELINE B-5—ASSET SECURITIZATION

Guideline B-5 provides federally regulated financial institutions with guidance on the regulatory framework for asset securitization transactions and for other types of asset transfers with recourse. It is intended to ensure that such institutions maintain adequate capital to protect themselves against the risks of securitization transactions and insulate themselves from moral recourse obligations. The Guideline analyzes the various roles the institutions play in the securitization process and outlines those activities that would require the maintenance of additional capital. Guideline B-5 deals with the requirements that must be met by Canadian financial institutions in the event that they (i) set up or cause to be set up a special purpose corporation or trust, (ii) act as a servicing agent that may structure the securitization transaction, analyze the assets, perform due diligence and credit reviews, and monitor the credit quality of the portfolio, and (iii) collect interest and principal payments and transmit them to investors.

Guideline B-5 recognizes that if a financial institution complies with the require-

8. Office of the Superintendent of Financial Institutions Canada: Guideline B-5—Asset Securitization; Guideline D-4—Transfer of Financial Assets with Recourse.