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Rodriguez v Attorney General of Canada et al

Supreme Court of Canada minority would have legalized euthanasia for mental illness in 1993

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Abstract

Sue Rodriguez, a 42 year old British Columbia woman was diagnosed with amytrophic lateral sclerosis (ALS), a progressive and terminal motor neuron disease. She applied to the Supreme Court of British Columbia for a constitutional declaration that the absolute prohibition of assisted suicide were of no force and effect to the extent that they prevented physician-assisted suicide by a terminally ill person.

The trial court judge stated that medical practitioners had no legal duty to help Ms. Rodriguez commit suicide; at best, she could only request their assistance. He stated that her choice as to the timing of her death was constrained by her disease, not the law. He found that if the law had any impact on her life, liberty or security of the person it was only because it interfered with medical practitioners who might wish to assist her.

Ms. Rodriguez' appeal to the British Columbia Court of Appeal was dismissed by a panel of three judges in a 2/1 decision. Justice Proudfoot stated that she was seeking death, the antithesis of rights to "life, liberty and security of the person," not medical treatment. She held there was no legal authority or precedent to support her application. Justice Hollinrake joined her in dismissing the appeal, noting that Ms. Rodriguez was one of the persons the law was intended to protect. Chief Justice Allen McEachern (dissenting) would have granted a constitutional exemption from prosecution for Ms. Rodriguez and physicians assisting her, subject to conditions set out in his opinion.

In a 5/4 decision the Supreme Court of Canada dismissed Ms. Rodriguez' appeal The majority found that the absolute prohibition of assisted suicide did not constitute cruel and unusual punishment. It assumed (without deciding) that the law violated *Charter* s. 15 (equality) but found this demonstrably justifiable under *Charter* s. 1. It held that the law impinged upon Ms. Rodriguez right to security of the person, but was constitutional because it was not contrary to principles of fundamental justice.

The minority was divided on the law. Chief Justice Antonio Lamer found that law unjustifiably violated *Charter* s. 15 (equality). Justices McLachlin and L'Heureux-Dube held that the law arbitrarily violated rights to life, liberty and security of the person guaranteed by *Charter* s. 7.

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Justice Cory agreed with his three dissenting colleagues.

The minority conclusions of discrimination and arbitrariness were premised upon a judicially constructed theoretical legislative scheme that enabled suicide. The majority conclusions were informed by the actual legislative history disclosed by the evidence.

While divided on the law, the minority agreed with the disposition proposed by Chief Justice Lamer. He would have struck down the law against assisted suicide and suspended the ruling for one year to give Parliament time to amend the *Criminal Code*. In the interim, he would have granted exemptions from prosecution for assisted suicide *whether or not* applicants were near death and suffering from incurable diseases or conditions. The minority would thus have legalized assisted suicide for mental illness in 1993, despite having heard no evidence or argument on the subject, and notwithstanding the global absence of experience and research into legalized physician-assisted suicide and euthanasia for *any* disorder or illness.

Lamer CJC was also willing to legalize euthanasia by invalidating laws against murder and consent to being killed, even though they had not been constitutionally challenged, and it does not appear that any evidence or argument had been heard on this point. He did not pursue this because Ms. Rodriguez had not asked for such an order.

The *Charter* guarantee of freedom of conscience was not raised or directly considered at any level. Chief Justice Lamer of the Supreme Court of Canada, writing in dissent, did not judicially consider the *Charter* provision, but seems to have incorporated popular ideas about freedom of conscience supportive of the philosophy of political liberalism, which almost certainly informed his reasoning about *Charter* s. 15.

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Facts

Sue Rodriguez, a 42 year old woman living in British Columbia, developed problems with her left hand in April, 1991, and was subsequently found to have amytrophic lateral sclerosis (ALS), a progressive and terminal motor neuron disease.[1] Ms. Rodriguez' treating neurologist described her condition in November, 1992:

> Ms. Rodriguez presented to the clinic in a wheelchair. She is barely able to walk 20 feet with support. She needs daily care for personal hygiene and her speech is barely audible. She also has difficulty swallowing foods and suffers with spasms affecting her legs and hands with associated pain in her shoulders and upper back region at the end of each day. It is clear that Ms. Rodriguez' illness has progressed significantly and rapidly over the past 12 months. I feel that Ms. Rodriguez' life expectancy based on previous clinical assessments would be between 6 and 18 months from November 1992. During both neurological assessments, Ms. Rodriguez' neurological mental status examination was completely normal and I therefore found her to be of sound mind. Regarding further progression of her disease, I anticipate that Ms. Rodriguez will lose her voice and be completely unable to speak and as well will be unable to swallow food orally within the next few weeks to months. I will also anticipate that she will be bedridden and/or in a wheelchair permanently within the next few weeks and with progressive respiratory muscle involvement she will become short of breath at rest , in bed, or in wheelchair.[2]

British Columbia Supreme Court

Ms. Rodriguez applied to the Supreme Court of British Columbia for a declaration that *Criminal Code* provisions prohibiting assisted suicide were of no force and effect to the extent that they prevented physician-assisted suicide by a terminally ill person.[3] She asserted that the prohibition violated her rights under the *Canadian Charter of Rights and Freedoms*, specifically her right to "life, liberty and security of the person" (*Charter* s. 7) her the right "not to be subjected to any cruel and unusual treatment or punishment" (*Charter* s. 12) and her right to equality "before and under the law" (*Charter* s. 15).[4] Her reasons for seeking the declaration and goals were described succinctly during the litigation:

> She expects that with the onslaught of the disease she will arrive at a condition

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[1] *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 1191 (BC CA) [*Rodriguez BCCA*] at para 7 (McEachern CJA, dissenting), online: <https://www.canlii.org/en/bc/bcca/doc/1993/1993canlii1191/1993canlii1191.pdf>

[2] *Ibid* at para 9.

[3] *Rodriguez v British Columbia (Attorney General)*, (1992), 18 WCB (2d) 279, [1993] BCWLD 347 (BCSC) [*Rodriguez BCSC*], online: <https://www.bccourts.ca/jdb-txt/sc/92/16/s92-1623.htm>.

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, online: <https://laws-lois.justice.gc.ca/eng/Const/page-12.html >, [*Charter*].

> whereby she will be unable to take steps herself to terminate her life and that, as a consequence, she will require, when she makes the decision as to the appropriate time for such an act, assistance of . . . competent medical professionals . . . who would be able to arrange for some procedure which would allow the petitioner to make the ultimate choice and carry out the final act herself. Those persons may be unwilling or unable to act [because of the criminal prohibition of assisted suicide].[5]

Ms. Rodriguez wanted "to continue to enjoy her remaining life with the inherent dignity of a human person" and did not think she should "be required to terminate her life prematurely while she is still enjoying it in order to avoid the agony and loss of dignity" which would otherwise follow, " by which time she will be powerless to end her physical and psychological suffering without assistance."[6]

> What is proposed, subject to many safeguards, is that a physician will be able lawfully to install an intravenous line containing some effective agent which, at the appropriate time, the Appellant will be able to transfer into her body by activating a switch by her finger, hand or other movement, and thereby end her struggle with both life and death.[7]

A mechanism of this kind was used in 2016 at a Swiss assisted suicide facility operated by The Eternal Spirit Foundation to assist the suicide of Canadian euthanasia activist John Hoffsess.[8]

Justice F. Allen Melvin of the B.C. Supreme Court, the trial court judge, stated that, quite apart from the criminal prohibition, medical practitioners had no legal duty to help Ms. Rodriguez achieve her goal; at best, she could only request their assistance. His elaboration of this point was obscure. On the one hand, he observed that a constitutional right to assistance in suicide would necessarily entail a duty "either not to interfere with the attainment of that right or alternatively to ensure that the right is recognized." However, he went on to say that recognizing such a constitutional right "would ultimately mean that the petitioner could apply for a court order to compel another to assist her in carrying out her wishes."[9] The conclusion does not follow from the alternatives stated in the premise, since neither would logically entail a duty to do more than refrain from obstructing Ms. Rodriguez. It appears that Justice Melvin was attempting an argument *ad absurdum* that lacked a stable foundation.

In any case, he stated that Ms. Rodriguez' choice as to the timing of her death was constrained by the nature of her disease, "not the legal system nor the state." To the extent that the law against assisted suicide had any impact on her life, liberty or security of the person (*Charter* s. 7), he said, it was only

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[5] *Rodriguez v British Columbia (Attorney General)*, (1992), 18 WCB (2d) 279, [1993] BCWLD 347 (BCSC) [*Rodriguez BCSC*], online: <https://www.bccourts.ca/jdb-txt/sc/92/16/s92-1623.htm>.

[6] *Rodriguez BCCA*, *supra* note 1 at para 39.

[7] *Ibid* at para 41.

[8] Madeline Weld, "Inside the Swiss death room where John Hofsess ended his life", *Toronto Life* (4 March, 2016), online: <https://torontolife.com/life/john-hofsess-switzerland-death-room/>.

[9] *Rodriguez BCSC*, *supra* note 3.

because it interfered with the rights of medical practitioners who might wish to assist her.[10] He rejected her other *Charter* claims and dismissed the application.

British Columbia Court of Appeal

Ms. Rodriguez' appeal of Justice Melvin's ruling was dismissed by a panel of three judges in a 2/1 decision.

Chief Justice Allen McEachern, writing in dissent and applying *R v. Morgentaler*,[11] ruled in favour of Ms. Rodriguez' s. 7 *Charter* claim[12] and would have granted Ms. Rodriguez and physicians assisting her an exemption from prosecution subject to conditions set out in his opinion.[13] The exemption was tailored to Ms. Rodriguez circumstances, but the conditions were intended to serve as guidelines for others seeking a similar exemption.[14]

Justice Proudfoot rejected the Chief Justice's application of *Morgentaler* to Ms. Rodriguez *Charter* s. 7 claim because, in her view, the issue in *Morgentaler* was an infringment of security of the person in relation to "access to medical treatment which would preserve or restore health"[15] (i.e., abortion), but Ms. Rodriguez was seeking assisted suicide, not "'medical treatment' to secure her life or health."[16]

"Furthermore," she observed, "obviously death is the antithesis of the s. 7 guarantee of 'life, liberty and security of the person'".[17]

While she did not consider the *Charter* s. 12 or 15 claims, Justice Proudfoot was direct and terse in dismissing the appeal:

> In this case the appellant seeks a declaration which in effect would exempt an un-named person from future criminal liability. I am not aware of any legal authority or legal precedent for the court to grant such a remedy in these circumstances. . . There can be no doubt that this is a hard case but it ought not, in my opinion, be allowed to influence the court to make bad law.[18]

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[10] *Ibid*.

[11] *R v Morgentaler*, [1988] 1 SCR 30, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do?q=Morgentaler>.

[12] *Rodriguez BCCA, supra* note 1 at para 77 (McEachern BCCJA, dissenting).

[13] *Ibid* at para 99-108 (McEachern BCCJA, dissenting).

[14] *Ibid* at para 109 (McEachern BCCJA, dissenting).

[15] *Rodriguez v British Columbia (Attorney General)*, (1992), 18 WCB (2d) 279, [1993] BCWLD 347 (BCSC) (Factum of the Attorney General of Canada at para 22), quoted in *Rodriguez BCSC, supra* note 5 at para 165.

[16] *Rodriguez BCSC, supra* note 5 at para 167.

[17] *Ibid* at para 165.

[18] *Ibid* at para 168-169.

Justice Hollinrake joined Justice Proudfoot in dismissing the appeal. Unlike Justice Proudfoot, he thought the Chief Justice was correct in finding the law deprived Ms. Rodriguez of her s. 7 *Charter* right to security of the person based on "the breadth of the concepts of human dignity" articulated in *Morgentaler*.[19] However, he disagreed with MacEachern CJA's view that *Morgentaler* was also authority for finding the deprivation contrary to principles of fundamental justice.[20] On this point he argued that the majority in *Morgentaler* had relied on the fact that Parliament had permitted abortion in some circumstances.[21]

> The significance of *Morgentaler* to the case before us is that Parliament by recognizing abortion in some circumstances had opened the door to the assertion that there was a constitutional right of every woman to an abortion under the rubric of s.7. Because there had been a historical recognition of the right to an abortion, there was a basis for finding such a right existed in the *Charter*.[22]

In contrast, he argued, assisted suicide had never been permitted by Parliament in any circumstances[23] and had never been accepted by the medical profession,[24] so there was no historical foundation for the claim that the prohibition of assisted suicide was contrary to principles of fundamental justice.[25] In other words, the facts in *Morgentaler* provided a basis for concluding that the impugned legal restrictions were contrary to principles of fundamental justice, but the facts in *Rodriguez* did not.[26] Consistent with this, he pointed out that Ms. Rodriguez to be one of the persons the law against assisted suicide was intended to protect.[27]

Supreme Court of Canada

Majority (5 judges)

Ms. Rodriguez' appeal to the Supreme Court of Canada was unsuccessful, but the Court split 5/4 in the decision. The majority found that the absolute prohibition of assisted suicide did not violate *Charter* s. 12 (prohibition of cruel and unusual punishment).[28] It assumed (without deciding) that the

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[19] *Ibid* at para 117.

[20] *Ibid* at para 155.

[21] *Ibid* at para 137, 140--141.

[22] *Ibid* at para 142.

[23] *Ibid* at para 134, 136, 140, 143

[24] *Ibid* at para 128-134,.

[25] *Ibid* at para 144.

[26] It will presently be seen that disagreement on this point between MacEachern CJA and Hollinrake J reflected different views of the authority of parliament and the judiciary.

[27] *Ibid* at para 154.

[28] *Rodriguez v. British Columbia (Attorney General)* [1993] 3 SCR 519 [*Rodriguez SCC*] online: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/1054/1/document.do> at 608-612.

absolute prohibition violated Charter s. 15 (equality)[29] but found this demonstrably justifiable under *Charter* s. 1.[30]

In considering Ms. Rodriguez claims under *Charter* s. 7 (security of the person) the majority looked to the leading case on the issues, *R v Morgentaler*:

> . . . *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. . . There is no question, then, that 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 are encompassed within security of the person at least to the extent of freedom from criminal prohibitions which interfere with these.[31]

Applying this reasoning, the majority concluded that the law deprived Ms. Rodriguez of autonomy and caused her "physical pain and psychological stress" that impinged upon "the security of her person."[32]

The more complex problem was whether or not the absolute prohibition of assisted suicide accorded with principles of fundamental justice.[33] Justice Hollinrake had concluded that it did because assisted suicide had never been accepted by parliament or the medical profession. The majority held that this approach was insufficient, since it would always justify continuing a prohibition simply because it existed.[34] It agreed that historical analysis was necessary, but insisted that it must examine the rationale and principles underlying the prohibition and, further, balance competing interests of the state and the individual.[35] If a deprivation of personal security "does little or nothing to advance the state's interest," wrote Justice Sopinka for the majority, "a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose."[36]

The issue thus framed, the majority asked if the absolute prohibition was "unrelated to the state's interest in protecting the vulnerable" or "lack[ed] a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition."[37] In the lengthy analysis that followed,

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[29] *Ibid* at 613.

[30] *Ibid* at 613-615.

[31] Ibid at 587–588.

[32] *Ibid* at 589a–b.

[33] For a history and critique of the meanings given to this term see Peter Hogg, "The Brilliant Career of Section 7: (2012) 58 SCLR (2d) 195, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1253&context=sclr> [*Hogg*] at 195–201.

[34] *Rodriguez SCC, supra* note 28 at 591–592.

[35] *Ibid* at 592–593.

[36] *Ibid* at 594f.

[37] *Ibid* at 595a–b.

the majority seems to have considered the interest of the state synonymous with the purpose of the law, and, while it emphasized the interest/purpose (singular) of protecting the vulnerable, the references were interconnected with remarks about the state's interest in "protecting life," ensuring that "human life should not be depreciated."[38] Ultimately, the majority held that the absolute prohibition did not lack the requisite relationship to the state's interest nor a foundation in the legal tradition and societal beliefs, even if some specific ethical issues were contested.

> Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it can not 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.[39]

The majority thus upheld the law as constitutional.

Minority (4 judges)

Divided on law

The dissenting judges split in their reasoning. Chief Justice Antonio Lamer held that the law violated *Charter* s. 15 (equality)[40] but, unlike the majority, found that the violation could *not* be justified under s. 1.[41] Having dealt with the appeal under s. 15, the Chief Justice explicitly declined to consider *Charter* s. 7 (life, liberty, security) and s. 12 (cruel/unusual punishment or treatment).[42] However, in answering the constitutional questions, he stated that the law ran afoul of all three sections in whole or in part.[43] Here we assume that his explicit decision not to address s. 7 and 12 expressed his actual view, and that including s. 7 and 12 in his answers to the constitutional questions was an inadvertent error.

Justices McLachlin and L'Heureux-Dube, like the majority, found the law violated the s. 7 guarantee of life, liberty and security of the person.[44] Unlike the majority, they ruled that it violated principles of fundamental justice.[45] Justice Cory agreed with the reasoning of his three dissenting colleagues (i.e., that the law unjustifiably violated s. 7 *and* s. 15 of the *Charter*).[46]

In a 2012 article, Peter Hogg explained that the majority and minority in *Rodriguez* used "radically

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[38] *Ibid* at 595.

[39] *Ibid* at 608g–h.

[40] *Ibid* at 544-557 (Lamer CJC, dissenting).

[41] *Ibid* at 558-569 (Lamer CJC, dissenting).

[42] *Ibid* at 544d (Lamer CJC, dissenting).

[43] *Ibid* at 580 at VI (1) (Lamer CJC, dissenting).

[44] *Ibid* at 624-628 (McLachlin & L'Hereux-Dube JJ, dissenting).

[45] *Ibid* at 617a–c (McLachlin & L'Hereux-Dube JJ, dissenting)

[46] *Ibid* at 629-631 (Cory J, dissenting).

different tests" to arrive at different conclusions about the principles of fundamental justice.[47] While that is true, the radically different tests reflected radically different views about the significance of the legislation.

Both the majority and Justices McLachlin and L'Heureux-Dubé agreed that a law that had little or no relationship to an underlying state interest would be arbitrary, and thus contrary to principles of fundamental justice.[48] Further, they agreed that this made it necessary to examine the rationale behind the law.[49] The radically different approach taken by McLachlin and L'Heureux-Dubé consisted in describing the criminal law on suicide as a scheme set up by Parliament enabling able-bodied persons to lawfully commit suicide while depriving the physically disabled the same opportunity.[50] On this point, the "scheme" they attributed to Parliament was identical to that added by Chief Justice Lamer to the legislative history disclosed by the evidence.

The Chief Justice admitted that, on the evidence, the offence of attempted suicide was abolished because it was thought that the "issue" of suicide[51] was better addressed within the ambit of "health and social policy" than criminal law, reflecting recognition that persons intent on suicide were unlikely to be deterred by "the threat of jail."[52] However, to this factual foundation he added a structure entirely of his own fabrication:

> I also take the repeal of the offence of attempted suicide to indicate Parliament's unwillingness to enforce the protection of a group containing many vulnerable people (i.e., those contemplating suicide) over and against the freely determined will of an individual set on terminating his or her life. Self-determination was now considered in the state regulation of suicide. If no external or intervention could be demonstrated, the act of attempting suicide could no longer give rise to criminal liability.[53]
>
> [T]he repeal of the offence of attempted suicide demonstrates that Parliament will no longer preserve human life at the cost of depriving physically able individuals of their right to self-determination.[54]

Justices McLachlin and L'Heureux-Dube concluded that the "scheme" of enabling suicide by able-

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47 *Hogg*, *supra* note 33 at 200.

48 *Rodriguez SCC, supra* note 28 at 594h–i, 595b (Sopinka J), 619 (McLachlin & L'Hereux-Dube JJ, dissenting).

49 *Ibid* at 605–606 (Sopinka J), 619–620 (McLachlin & L'Hereux-Dube JJ, dissenting).

50 *Ibid* at 620b-d (McLachlin & L'Hereux-Dube JJ, dissenting).

51 The Chief Justice did not characterize it as a "problem".

52 *Rodriguez SCC, supra* note 28 at 558-559 (Lamer CJC, dissenting).

53 *Ibid* at 559a–d (Lamer CJC, dissenting).

54 *Ibid* at 561b–c (Lamer CJC, dissenting).

bodied persons was arbitrary and thus violated *Charter* s. 7.[55] They preferred this analysis to that of the Chief Justice,[56] who found the scheme discriminatory and so contrary to *Charter* s. 15, but they did not disavow his ruling. In fact, they agreed with his answers to the constitutional questions,[57] probably because his answers supported their position, though the answers erroneously and inadvertently included findings he had expressly declined to make.[58]

In contrast, the majority rejected the portrayal of the decriminalization of suicide and attempted suicide as a liberalizing scheme that established suicide as a lawful choice that should be open to all:

> [T]he decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens. Rather, the matter of suicide was seen to have its roots and solutions in sciences outside the law, and for that reason not to mandate a legal remedy.[59]

The reason for decriminalization identified by the majority was that given by Minister of Justice Otto Lang when he introduced the bill abolishing the offence in 1972.[60] Abolition had been in the works for at least a year. In March, 1971, then Justice Minister John Turner had told the Standing Committee on Justice and Legal Affairs that he intended to eliminate the crime of attempted suicide because he had always believed that it was "deserving more of medical attention than a criminal sanction." Questioned about the need for police to retain "some power" to prevent suicide, Mr. Turner responded:

> I informed the Attorneys General of the provinces that I was considering abolishing the offence of attempted suicide and the majority of the provinces favoured this step and I have given them notice that they should provide some sort of provincial legislation that would give police officers the opportunity to apprehend someone by way of a temporary arrest so that he would not self destruct.[61]

Almost a year later, Members of Parliament John Forrestall (Progressive Conservative) Ian Watson (Liberal) and William Kenneth Robinson (Liberal) introduced private members' bills to abolish the offence of attempted suicide. Mr. Watson's bill would have maintained the offence but required

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[55] *Ibid* at 624f-i (McLachlin & L'Hereux-Dube JJ, dissenting).

[56] *Ibid* at 616g–j (Lamer CJC, dissenting).

[57] *Ibid* at 629f (McLachlin & L'Hereux-Dube JJ, dissenting)

[58] *Ibid* at 580 at VI (1) (Lamer CJC, dissenting).

[59] *Ibid* at 597–598.

[60] House of Commons Debates, 28th Parl., 4th Sess, Vol. 2 (27 April 1972), at 1699.

[61] House of Commons Committees, 28th Parl, 3rd Sess, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 10 (2 March,, 1971) at 19, online: <https://parl.canadiana.ca/view/oop.com_HOC_2803_10_1/301>.

every attempted suicide be reported to the provincial Attorney General or Minister of Justice for referral to a psychiatric clinic or medical practitioner. The Forrestall and Robinson bills were identical, proposing complete repeal. Mr. Forrestall explained that repeal would enable provincial health and welfare authorities to "to treat the problem of suicide in a humane manner,"[62] and Mr. Robinson wished to restrict attempted suicide "to the field of medicine, its rightful place."[63] Mr. Watson offered a more detailed explanation for his more detailed (and probably unworkable) proposal, but he, too, emphasized that the problem of attempted suicide should be addressed by medical specialists, not judges.[64]

This more fulsome legislative history demonstrates that, in repealing the offence of attempted suicide, Justice Minister Otto Lang was pushing on an open door, but not one meant to lead to enabling suicide by able-bodied persons. The minority conclusions of discrimination and arbitrariness were premised upon a judicially constructed theoretical legislative scheme to enable suicide. The majority conclusions were informed by the actual legislative history disclosed by the evidence.

Agreed on disposition

While divided in their reasons for invalidating the law, the minority was substantively unanimous about what should be done about it. They supported the disposition of the appeal proposed by the Chief Justice: striking down the law against assisted suicide, suspending the ruling for one year to give Parliament time to develop a regulatory scheme,[65] and, in the interim, authorizing superior courts to grant constitutional exemptions from prosecution to Ms. Rodriguez and to other applicants under specified conditions.[66] The conditions were those that had been proposed by B.C. Chief Justice McEachern, *except* the requirement that applicants be near death and suffering from incurable diseases or conditions, which Chief Justice Lamer had found discriminatory.[67]

Physician assists with Rodriguez' suicide

Sue Rodriguez committed suicide in February, 1994 by drinking a liquid laced with morphine and seconal in the presence of a physician who provided the drugs and Canadian Member of Parliament Svend Robinson. Mr. Robinson refused to disclose the name of the physician responsible to the

[62] Bill C-144, *An Act to amend the Criminal Code (attempted suicide)*, 4th Sess, 28th Parl, 1972 at Explanatory Note, online: <https://parl.canadiana.ca/view/oop.bills_HOC_2804_2/425>.

[63] Bill C-155, *An Act to amend the Criminal Code (attempted suicide)*, 4th Sess, 28th Parl, 1972 at Explanatory Note, online: <https://parl.canadiana.ca/view/oop.bills_HOC_2804_3/25>.

[64] Bill C-20, *An Act to amend the Criminal Code (attempted suicide)*, 4th Sess, 28th Parl, 1972 at Explanatory Note, online: <https://parl.canadiana.ca/view/oop.bills_HOC_2804_1/523>.

[65] *Rodriguez SCC, supra* note 28 at 569-570 (Lamer CJC, dissenting).

[66] *Ibid* at 578-579 (Lamer CJC, dissenting).

[67] *Ibid* (Lamer CJC, dissenting).

police or coroner. There was insufficient evidence to charge him with an offence.[68]

Looking back

In 2015 the Supreme Court of Canada overruled *Rodriguez in Carter v Canada (Attorney General)*, another case originating in British Columbia that included among the plaintiffs a woman diagnosed with ALS.[69] Revisiting *Rodriguez* in light of that litigation and developments following the ruling brings some points into sharper focus.

Margin of decision

When *Rodriguez* reached the B.C. Court of Appeal in 1993, Netherlands had just legalized euthanasia,[70] but no other jurisdiction in the world had done so. Netherlands would remain the sole outlier until 1997, when Oregon legalized only assisted suicide.[71] Within this context, though the Supreme Court of Canada might have been expected to uphold the law, the fact that only a bare majority did so attracted attention.[72]

Interventions

Eight groups intervened in the Rodriguez case at the Supreme Court of Canada.[73] Four supported

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[68] "Sue Rodriguez drank liquid morphine", *Niagara Falls Review* (2 March 1996), online: <https://www.newspapers.com/image/1016815337>.

[69] *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do> [*Carter SCC 2015*].

[70] Marlise Simons, "Dutch Parliament Approves Law Permitting Euthanasia", *The New York Times* (10 February, 1993), online: <https://www.nytimes.com/1993/02/10/world/dutch-parliament-approves-law-permitting-euthanasia.html>.

[71] Oregon Health Authority, "Death with Dignity Act", *Oregon Government* (website), online: <https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/pages/index.aspx>.

[72] Stephen Bindman, "Court agreed law was unfair: Law prohibiting assisted suicide discriminates against disabled", Edmonton Journal, 2 October, 1993 at G3; Benjamin Freedman, "The Rodriguez Case: Sticky Questions and Slippery Answers" (1994) 39:2 McGill Law J 644, online: <https://lawjournal.mcgill.ca/wp-content/uploads/pdf/1624214-39.3.Freedman.pdf> at 645; Neil Milton, "Lessons from Rodriguez v. British Columbia" (1995) 11:2 Issues in Law & Med 123, online: <https://go.gale.com/ps/retrieve.do?tabID=T002&resultListType=RESULT_LIST&searchResultsType=SingleTab&retrievalId=82ba7fd4-3a9d-4bc8-9614-a9de138c4449&hitCount=3&searchType=BasicSearchForm¤tPosition=1&docId=GALE%7CA17506604&docType=Article&sort=Relevance&contentSegment=ZONE-Exclude-FT&prodId=AONE&pageNum=1&contentSet=GALE%7CA17506604&searchId=R1&userGroupName=anon%7E21780cb7&inPS=true> at 123.

[73] *Sue Rodriguez v. Attorney General of British Columbia, et al. (British Columbia)* (Civil) (By Leave), Court File 23476: Parties (14 February, 2017), *The Supreme Court of Canada* (website), online: <https://www.scc-csc.ca/case-dossier/info/parties-eng.aspx?cas=23476>.

Ms. Rodriguez' appeal; four were opposed.[74] The Canadian Medical Association (CMA) was not among them. At the time Ms. Rodriguez launched her constitutional challenge, the CMA had no "explicit" policy on assisted suicide or euthanasia but had "always 'implicitly condemned' the procedures because they were contrary to medical ethics and illegal.[75] It spent almost two years reviewing the issue before delegates at the 1994 Annual General Council rejected the recommendations of the ethics committee and adopted a policy against physician participation in the procedures.[76]

Minority willing to approve euthanasia

One of the conditions set by B.C. Chief Justice McEachern was that "the act actually causing the death of the Appellant must be the unassisted act of the Appellant herself, and not of anyone else."[77] At first glance this might seem odd, since, after all, Ms. Rodriguez was seeking judicial authorization of assisted suicide. However, the condition was presumably imposed to ensure that what took place using an Eternal Spirit-style mechanism would be suicide (*self*-killing) — not homicide (killing by *someone else*). Homicide by a physician (i.e., euthanasia) would have engaged the law against murder[78] and the prohibition against consenting to one's death.[79]

Nonetheless, Chief Justice Lamer took exception to this condition. He questioned why Ms. Rodriguez should be denied the choice of suicide should she become unable to activate a lethal intravenous line. "Surely," he wrote, "it is in such circumstances that assistance is required most." However, since she had not requested such an order, he left it "to be resolved at a later date."[80]

The implications of invalidating laws against murder and consent to being killed would have been more far-reaching than invalidating the law against assisted suicide. Moreover, these laws were not included in Ms. Rodriguez' constitutional challenge, and it does not appear that any evidence or argument relevant to legalizing physician-administered homicide was heard by the trial court or introduced in the appeals. It is thus remarkable that the Chief Justice of Canada would so casually suggest the option, even if he did not pursue it further.

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[74] **Supporters:** Coalition of Provincial Organizations for the Handicapped, British Columbia Coalition of People with Disabilities, Right to Die Society of Canada, Dying with Dignity; **Opponents:** Pro Life Society of British Columbia, Pacific Physicians for Life Society, People in Equal Participation Inc., Canadian Conference of Catholic Bishops jointly with the Evangelical Fellowship of Canada. Stephen Bindman, "Many eyes on the case", Calgary Herald (20 May, 1993), online: <https://www.newspapers.com/image/485026074>.

[75] Letter from Dr. John R. Williams (Director of the CMA Department of Ethics and Legal Affairs) dated 11 December, 1992, quoted in *Rodriguez BCCA*, *supra* note 1 at para 128.

[76] Jill Rafuse, "CMA rejects neutral stand, comes out firmly against MD participation in euthanasia" (1994) 151(6) CMAJ 853, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1337150/>.

[77] *Rodriguez BCCA*, *supra* note 1 at para 108 (McEachern CJA, dissenting).

[78] *Criminal Code* , RSC 1985, c C-46 at s 222, 229.

[79] *Ibid* at s 14.

[80] *Rodriguez SCC, supra* note 28 at 578–579 (Lamer CJC, dissenting).

Minority willing to approve assisted suicide for mental illness

The minority view, expressed without reservation or qualification by Chief Justice Lamer, was that it would be unacceptably discriminatory to restrict assisted suicide to those near death and suffering from incurable diseases or conditions. Had the minority view prevailed in *Rodriguez*, the Supreme Court of Canada would have legalized assisted suicide (and possibly euthanasia) for mental illness in 1993, despite having heard no evidence or argument on the subject, and notwithstanding the global absence of experience and research into legalized physician-assisted suicide and euthanasia for *any* disorder or illness. This is especially striking in light of the controversy raging in Canada thirty years later about providing euthanasia for mental illness, which has forced the federal government to delay implementation once[81] and may do so again.[82]

Freedom of conscience

Sue Rodriguez made no freedom of conscience claims under *Charter* s. 2(a), and the *Charter* guarantee of freedom of conscience was not raised or directly considered at any level. Practitioners' freedom of conscience was only obliquely touched upon in the trial court and not addressed at all in the BC Court of Appeal. Chief Justice Lamer of the Supreme Court of Canada, writing in dissent, referred briefly and generally to freedom of conscience.

BC Supreme Court and Court of Appeal

Justice Melvin of the B.C. Supreme Court seems to have believed that it would follow from Ms. Rodriguez' claim that she could seek a court order compelling someone to assist her in suicide. This need not have been the case. His observation that Ms. Rodriguez could request assistance to commit suicide but physicians had no duty to assist was indirectly supportive of practitioner freedom of conscience.

Chief Justice McEachern of the B.C. Court of Appeal appears to have assumed that Ms. Rodriguez would be able to find physicians willing to assist her. Although he found in her favour, nothing in his ruling implied that any physician had a duty to assist her even under the terms of the order he was willing to make.

Supreme Court of Canada

At the Supreme Court, Chief Justice Lamer, writing in dissent, was the only judge who referred to freedom of conscience, but he was not attempting analysis of the fundamental freedom guaranteed in *Charter* s. 2(a). Rather, having decided that the law treated Ms. Rodriguez unequally, he went on to

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[81] "Canada's medical assistance in dying (MAID) law" (19 June, 2023), Government of Canada (website) online: <https://www.justice.gc.ca/eng/cj-jp/ad-am/bk-di.html>

[82] Stephanie Taylor, "'Weighing our options': Ottawa open to further pause to expand assisted dying rules" (15 December, 2023) *CTV News*, online: <https://www.ctvnews.ca/health/who-qualifies-for-maid-in-canada-federal-government-considers-pausing-expansion-1.6688608>.

ask if the inequality imposed a burden or disadvantage upon her or deprived her of a benefit.[83] He noted that the benefit was not, in Ms. Rodriguez view, suicide *per se*, "but the right to choose suicide . . . her ability to decide on the conduct of her life herself."[84]

"Can the right to choose at issue here," he asked, "that is the right to choose suicide, be described as an advantage of which the appellant is being deprived?"[85]

It was within the context of exploring the answer to this question that Lamer CJC referred to freedom of conscience.

> In my opinion, the Court should answer this question without reference to the philosophical and theological considerations fuelling the debate on the morality of suicide or euthanasia. It should consider the question before it from a legal perspective - *Tremblay v. Daigle,* [1989] 2 S.C.R. 530 - while keeping in mind that the *Charter* has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions.[86]

That the Court could (and should) adjudicate the issues before it without reference to theological considerations was indisputably correct. That it could do so without reference to philosophical considerations was not,[87] a point repeatedly demonstrated by Chief Justice Lamer himself.

In the first place, he unreflectively made a philosophical distinction between the freedom to choose and the object of choice and presented it as a legal distinction. He went on to adopt the philosophical definition of a free society offered by Chief Justice Brian Dixon in a 1985 Supreme Court of Canada decision:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms, and I say this without any reliance upon s. 15 of the *Charter*. [88]

Continuing to quote Dixon CJC, Chief Justice Lamer identified the role and importance of

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[83] *Rodriguez SCC, supra* note 28 at 558 (ii).

[84] *Ibid* at 553f (emphasis in original).

[85] *Ibid*.

[86] *Ibid* at 553f–h.

[87] David M Brown, "The Courts' Spectacles: Some Reflections on the Relationship between Law and Religion in Charter Analysis: Reasonable Accommodation and Role of the State: A Democratic Challenge" (Paper delivered at the CIAJ Conference, Quebec City, 24 September 2008) [unpublished], online: <https://ciaj-icaj.ca/wp-content/uploads/documents/import/2008/7%20-%20Brown.pdf?id=1150&1532633338> at 3–4.

[88] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 [*Big M Drug Mart*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/43/index.do> at 336, quoted in *Rodriguez SCC, supra* note 28 at 553j (Lamer CJC dissenting. Note Chief Justice Dixon's explicit disavowal of suggestions that this was a purely legal definition sprung full-formed from the text of the *Charter*).

conscience within the context of political philosophy:

> It should also be noted . . . that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.[89]

It is important to reiterate here that the *Charter* s. 2(a) guarantee of freedom of conscience was not in issue and was not judicially considered by Chief Justice Lamer in his opinion. Rather, he seems to have incorporated popular ideas about freedom of conscience supportive of the philosophical outlook that informed his reasoning about *Charter* s. 15. This was almost certainly political liberalism, which sees freedom to choose *per se* as central to human flourishing:

> [L]iberalism takes the view that the individual is best able to flourish when left to exercise free choice with respect to the good. On this view of human flourishing, the obligations of the public are twofold: first, not to interfere with individual autonomy and, second, to intervene wherever free choice is constrained. Self-realization is the goal, and autonomy is the mechanism.[90]

One of the principal attractions of this approach is its purported neutrality as to the object of choice, which, theoretically, permits courts to be "agnostic as to the good"[91] and stand above contentious debates about morality. Thus Chief Justice Lamer's conclusion:

> [W]ithout expressing any opinion on the moral value of suicide, I am forced to conc1ude that the fact that persons unable to end their own lives cannot choose suicide because they do not legally have access to assistance is - in legal terms - a disadvantage giving rise to the application of s. 15(1) of the *Charter*.[92]

Chief Justice Lamer had nothing further to say in *Rodriguez* about freedom of conscience.

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[89] *Big M Drug Mart* at 346, quoted in *Rodriguez SCC, supra* note 28 at 554a (Lamer CJC dissenting).

[90] Benjamin Berger, "Law's Religion: Rendering Culture" (2007, 45:2 Osgoode Hall LJ 277 [Berger] at 292, citing Charles Taylor, *Malaise of Modernity* (Concord: House of Anansi Press, 1991) at 69.

[91] *Ibid* at 301–302.

[92] *Rodriguez SCC, supra* note 28 at 554i (Lamer CJC dissenting, emphasis added).