Rodriguez v. British Columbia (Attorney General) [1993] 3 SCR 519

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank; Major, John C.

The appellant, a 42-year-old mother, suffers from amyotrophic lateral sclerosis. Her condition is rapidly deteriorating and she will soon lose the ability to swallow, speak, walk and move her body without assistance. Thereafter she will lose the capacity to breathe without a respirator, to eat without a gastrotomy and will eventually become confined to a bed. Her life expectancy is between 2 and 14 months. The appellant does not wish to die so long as she still has the capacity to enjoy life, but wishes that a qualified physician be allowed to set up technological means by which she might, when she is no longer able to enjoy life, by her own hand, at the time of her choosing, end her life. The appellant applied to the Supreme Court of British Columbia for an order that s. 241(*b*) of the *Criminal Code*, which prohibits the giving of assistance to commit suicide, be declared invalid on the ground that it violates her rights under ss. 7, 12 and 15(1) of the *Charter*, and is therefore, to the extent it precludes a terminally ill person from committing "physician-assisted" suicide, of no force and effect by virtue of s. 52(1) of the *Constitution Act, 1982*. The court dismissed the appellant's application and the majority of the Court of Appeal affirmed the judgment.

Held ([5 judges to 4, with] Lamer C.J. and L'Heureux-Dubé, Cory and McLachlin JJ. dissenting): The appeal should be dismissed. Section 241(*b*) of the *Code* is constitutional.

Per La Forest, Sopinka, Gonthier, Iacobucci and Major JJ.: The appellant's claim under s. 7 of the *Charter* is based on an alleged violation of her liberty and security of the person interests. These interests cannot be divorced from the sanctity of life, which is the third value protected by s. 7. Even when death appears imminent, seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life as a value is also engaged in the present case. Appellant's security of the person interest must be considered in light of the other values mentioned in s. 7.

Security of the person in s. 7 encompasses notions of 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 which is free from state interference, and basic human dignity. The prohibition in s. 241(*b*), which is a sufficient interaction with the justice system to engage the provisions of s. 7, deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. Any resulting deprivation, however, is not contrary to the principles of fundamental justice. The same conclusion is applicable with respect to any liberty interest which may be involved.

The expression "principles of fundamental justice" in s. 7 of the *Charter* implies that there is some consensus that these principles are vital or fundamental to our societal notion of justice. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also be legal principles. To discern the principles of fundamental justice governing a particular case, it is helpful to review the common law and the legislative history of the offence in question and, in particular, the rationale behind the practice itself (here, the continued criminalization of assisted suicide) and

the principles which underlie it. It is also appropriate to consider the state interest. Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual. The respect for human dignity, while one of the underlying principles upon which our society is based, is not a principle of fundamental justice within the meaning of s. 7.

Assisted suicide, outlawed under the common law, has been prohibited by Parliament since the adoption of Canada's first *Criminal Code*. The long-standing blanket prohibition in s. 241(*b*), which fulfils the government's objective of protecting the vulnerable, 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. This state policy is part of our fundamental conception of the sanctity of life. A blanket prohibition on assisted suicide similar to that in s. 241(*b*) also seems to be the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. These societies, including Canada, recognize and generally apply the principle of the sanctity of life subject to narrow exceptions where notions of personal autonomy and dignity must prevail. Distinctions between passive and active forms of intervention in the dying process continue to be drawn and assisted suicide in situations such as the appellant's is prohibited with few exceptions. No consensus can be found in favour of the decriminalization of assisted suicide. To the extent that there is a consensus, it is that human life must be respected. This consensus finds legal expression in our legal system which prohibits capital punishment. The prohibition against assisted suicide serves a similar purpose. Parliament's repeal of the offence of attempted suicide from the *Criminal Code* was not a recognition that suicide was to be accepted within Canadian society. Rather, this action merely reflected the recognition that the criminal law was an ineffectual and inappropriate tool for dealing with suicide attempts. Given the concerns about abuse and the great difficulty in creating appropriate safeguards, the blanket prohibition on assisted suicide is not arbitrary or unfair. The prohibition relates to the state's interest in protecting the vulnerable and is reflective of fundamental values at play in our society. Section 241(*b*) therefore does not infringe s. 7 of the *Charter*.

As well, s. 241(*b*) of the *Code* does not infringe s. 12 of the *Charter*. The appellant is not subjected by the state to any form of cruel and unusual treatment or punishment. Even assuming that "treatment" within the meaning of s. 12 may include that imposed by the state in contexts other than penal or quasi-penal, a mere prohibition by the state on certain action cannot constitute "treatment" under s. 12. There must be some more active state process in operation, involving an exercise of state control over the individual, whether it be positive action, inaction or prohibition. To hold that the criminal prohibition in s. 241(*b*), without the appellant being in any way subject to the state administrative or justice system, falls within the bounds of s. 12 would stretch the ordinary meaning of being "subjected to . . . treatment" by the state.

It is preferable in this case not to decide the difficult and important issues raised by the application of s. 15 of the *Charter*, but rather to assume that the prohibition on assisted suicide in s. 241(*b*) of the *Code* infringes s. 15, since any infringement of s. 15 by s. 241(*b*) is clearly justified under s. 1 of the *Charter*. Section 241(*b*) has a pressing and substantial legislative objective and meets the proportionality test. A prohibition on giving assistance to commit suicide is rationally connected to the purpose of s. 241(*b*), which is to protect and maintain respect for human life. This protection is grounded on a substantial consensus among western countries, medical organizations and our own Law Reform Commission that in order to protect life and those who are vulnerable in society effectively, a prohibition without exception on the giving of assistance to commit suicide is the best approach. Attempts to modify this approach

by creating exceptions or formulating safeguards to prevent excesses have been unsatisfactory. Section 241(*b*) is thus not overbroad since there is no halfway measure that could be relied upon to achieve the legislation's purpose fully. In dealing with this contentious, complex and morally laden issue, Parliament must be accorded some flexibility. In light of the significant support for s. 241(*b*) or for this type of legislation, the government had a reasonable basis for concluding that it had complied with the requirement of minimum impairment. Finally, the balance between the restriction and the government objective is also met.

[***Some background to this case:***

Section 241of the Criminal Code: Counselling or aiding suicide

241. Every 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 to imprisonment for a term not exceeding fourteen years.

Canadian Charter of Rights and Freedoms
Section **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.

Section **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.

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

Section **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.

The judgment of La Forest, Sopinka, Gonthier, Iacobucci and Major JJ. was delivered by

SOPINKA J. -- I have read the reasons of the Chief Justice and those of McLachlin J. herein. The result of the reasons of my colleagues is that all persons who by reason of disability are unable to commit suicide have a right under the *Canadian Charter of Rights and Freedoms* to be free from government interference in procuring the assistance of others to take their life. They are entitled to a constitutional exemption from the operation of s. 241 of the *Criminal Code*, R.S.C., 1985, c. C-46, which prohibits the giving of assistance to commit suicide (hereinafter referred to as "assisted suicide"). The exemption would apply during the period that this Court's order would be suspended and thereafter Parliament could only replace the legislation subject to this right. I must respectfully disagree with the conclusion reached by my colleagues and with their reasons. In my view, nothing in the *Charter* mandates this result which raises the following serious concerns:

1. It recognizes a constitutional right to legally assisted suicide beyond that of any country in the western world, beyond any serious proposal for reform in the western world and beyond the claim made in this very case. The apparent reason for the expansion beyond the claim in this case is that restriction of the right to the terminally ill could not be justified under s. 15.

2. It fails to provide the safeguards which are required either under the Dutch guidelines or the recent proposals for reform in the states of Washington and California which were defeated by voters in those states principally because comparable and even more stringent safeguards were considered inadequate.

3. The conditions imposed are vague and in some respects unenforceable. While the proposals in California were criticized for failure to specify the type of physician who is authorized to assist and the Dutch guidelines specify the treating physician, the conditions imposed by my colleagues do not require that the person assisting be a physician or impose any restriction in this regard. Since much of the medical profession is opposed to being involved in assisting suicide because it is antithetical to their role as healers of the sick, many doctors will refuse to assist, leaving open the potential for the growth of a macabre specialty in this area reminiscent of Dr. Kervorkian and his suicide machine.

4. To add to the uncertainty of the conditions, they are to serve merely as guidelines, leaving it to individual judges to decide upon application whether to grant or withhold the right to commit suicide. In the case of the appellant, the remedy proposed by the Chief Justice, concurred in by McLachlin J., would not require such an application. She alone is to decide that the conditions or guidelines are complied with. Any judicial review of this decision would only occur if she were to commit suicide and a charge were laid against the person who assisted her. The reasons of McLachlin J. remove any requirement to monitor the choice made by the appellant to commit suicide so that the act might occur after the last expression of the desire to commit suicide is stale-dated.

I have concluded that the conclusion of my colleagues cannot be supported under the provisions of the *Charter*. Reliance was placed on ss. 7, 12 and 15 and I will examine each in turn.

I.Section 7

The most substantial issue in this appeal is whether s. 241(*b*) infringes s. 7 in that it inhibits the appellant in controlling the timing and manner of her death. I conclude that while the section impinges on the security interest of the appellant, any resulting deprivation is not contrary to the principles of fundamental justice. I would come to the same conclusion with respect to any liberty interest which may be involved.

Section 7 of the *Charter* provides as follows:

> **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.

The appellant argues that, by prohibiting anyone from assisting her to end her life when her illness has rendered her incapable of terminating her life without such assistance, by threat of criminal sanction, s. 241(*b*) deprives her of both her liberty and her security of the person. The appellant asserts that her application is based upon (a) the right to live her remaining life with the inherent dignity of a human person, (b) the right to control what happens to her body while she is living, and (c) the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life. The first two of these asserted rights can be seen to invoke both liberty and security of the person; the latter is more closely associated with only the liberty interest.

(a) *Life, Liberty and Security of the Person*

The appellant seeks a remedy which would assure her some control over the time and manner of her death. While she supports her claim on the ground that her liberty and security of the person interests are engaged, a consideration of these interests cannot be divorced from the sanctity of life, which is one of the three *Charter* values protected by s. 7.

None of these values prevail a priori over the others. All must be taken into account in determining the content of the principles of fundamental justice and there is no basis for imposing a greater burden on the propounder of one value as against that imposed on another.

Section 7 involves two stages of analysis. The first is as to the values at stake with respect to the individual. The second is concerned with possible limitations of those values when considered in conformity with fundamental justice. In assessing the first aspect, we may do so by considering whether there has been a violation of Ms. Rodriguez's security of the person and we must consider this in light of the other values I have mentioned.

As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by governmental action. There is no doubt that the prohibition in s. 241(*b*) will contribute to the appellant's distress if she is prevented from managing her death in the circumstances which she fears will occur. Nor do I

accept the submission that the appellant cannot avail herself of s. 7 because she is not presently engaged in interaction with the criminal justice system, and that she will likely never be so engaged. It was argued that the comments concerning security of the person found in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, and the*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, were not applicable to this case and that the appellant could not seek the protection of s. 7 at all, as that section is concerned with the interaction of the individual with the justice system. In my view, the fact that it is the criminal prohibition in s. 241(*b*) which has the effect of depriving the appellant of the ability to end her life when she is no longer able to do so without assistance is a sufficient interaction with the justice system to engage the provisions of s. 7 assuming a security interest is otherwise involved.

I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or inviolable (which terms I use in the non-religious sense described by Dworkin (*Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993)) to mean that human life is seen to have a deep intrinsic value of its own). As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution which embodies our most fundamental values a right to terminate one's own life in any circumstances? This question in turn evokes other queries of fundamental importance such as the degree to which our conception of the sanctity of life includes notions of quality of life as well.

Sanctity of life, as we will see, 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. At the very least, 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.

The appellant suggests that for the terminally ill, the choice is one of time and manner of death rather than death itself since the latter is inevitable. I disagree. Rather it is one of choosing death instead of allowing natural forces to run their course. The time and precise manner of death remain unknown until death actually occurs. There can be no certainty in forecasting the precise circumstances of a death. Death is, for all mortals, inevitable. Even when death appears imminent, seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life as a value is engaged even in the case of the terminally ill who seek to choose death over life.

Indeed, it has been abundantly pointed out that such persons are particularly vulnerable as to their life and will to live and great concern has been expressed as to their adequate protection, as will be further set forth.

I do not draw from this that in such circumstances life as a value must prevail over security of person or liberty as these have been understood under the *Charter*, but that it is one of the values engaged in the present case.

... [text omitted]

The effect of the prohibition in s. 241(*b*) is to prevent the appellant from having assistance to commit suicide when she is no longer able to do so on her own. She fears that she will be required to live until the deterioration from her disease is such that she will die as a result

of choking, suffocation or pneumonia caused by aspiration of food or secretions. She will be totally dependent upon machines to perform her bodily functions and completely dependent upon others. Throughout this time, she will remain mentally competent and able to appreciate all that is happening to her. Although palliative care may be available to ease the pain and other physical discomfort which she will experience, the appellant fears the sedating effects of such drugs and argues, in any event, that they will not prevent the psychological and emotional distress which will result from being in a situation of utter dependence and loss of dignity. That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. In my view, these considerations lead to the conclusion that the prohibition in s. 241(*b*) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.

(b) *The Principles of Fundamental Justice*

In approaching this step of the analysis in this most difficult and troubling problem, I am impressed with the caveat expressed by the American scholar, L. Tribe, in his text *American Constitutional Law* (2nd ed. 1988). He states, at pp. 1370-71:

> The right of a patient to accelerate death as such -- rather than merely to have medical procedures held in abeyance so that disease processes can work their natural course -- depends on a broader conception of individual rights than any contained in common law principles. A right to determine when and how to die would have to rest on constitutional principles of privacy and personhood or on broad, perhaps paradoxical, conceptions of self-determination.
>
> Although these notions have not taken hold in the courts, the judiciary's silence regarding such constitutional principles probably reflects a concern that, once recognized, rights to die might be uncontainable and might prove susceptible to grave abuse, more than it suggests that courts cannot be persuaded that self-determination and personhood may include a right to dictate the circumstances under which life is to be ended. In any event, whatever the reason for the absence in the courts of expansive notions about self-determination, the resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting people, may endanger personhood.

On the one hand, the Court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles

and its own view of the wisdom of legislation. On the other hand, the Court has not only the power but the duty to deal with this question if it appears that the *Charter* has been violated. The power to review legislation to determine whether it conforms to the *Charter* extends to not only procedural matters but also substantive issues. The principles of fundamental justice leave a great deal of scope for personal judgment and the Court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only.

In this case, it is not disputed that in general s. 241(*b*) is valid and desirable legislation which fulfils the government's objectives of preserving life and protecting the vulnerable. The complaint is that the legislation is over-inclusive because it does not exclude from the reach of the prohibition those in the situation of the appellant who are terminally ill, mentally competent, but cannot commit suicide on their own. It is also argued that the extension of the prohibition to the appellant is arbitrary and unfair as 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 which has the effect of hastening death. The issue is whether, given this legal context, the existence of a criminal prohibition on assisting suicide for one in the appellant's situation is contrary to principles of fundamental justice.

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. (as he then was) in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 512-13, are as follows:

> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

... the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots"....

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

This Court has often stated that in discerning the principles of fundamental justice governing a particular case, it is helpful to look at the common law and legislative history of the offence in question (*Re B.C. Motor Vehicle Act* and *Morgentaler*, *supra*, and *R. v. Swain*, [1991] 1 S.C.R. 933). It is not sufficient, however, merely to conduct a historical review and conclude that because neither Parliament nor the various medical associations had ever

expressed a view that assisted suicide should be decriminalized, that to prohibit it could not be said to be contrary to the principles of fundamental justice. Such an approach would be problematic for two reasons. First, a strictly historical analysis will always lead to the conclusion in a case such as this that the deprivation is in accordance with fundamental justice as the legislation will not have kept pace with advances in medical technology. Second, such reasoning is somewhat circular, in that it relies on the continuing existence of the prohibition to find the prohibition to be fundamentally just.

The way to resolve these problems is not to avoid the historical analysis, but to make sure that one is looking not just at the existence of the practice itself (i.e., the continued criminalization of assisted suicide) but at the rationale behind that practice and the principles which underlie it.

The appellant asserts that it is a principle of fundamental justice that the human dignity and autonomy of individuals be respected, and that to subject her to needless suffering in this manner is to rob her of her dignity. The importance of the concept of human dignity in our society was enunciated by Cory J. (dissenting, Lamer C.J. concurring) in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 813. Respect for human dignity underlies many of the rights and freedoms in the *Charter*.

That respect for human dignity is one of the underlying principles upon which our society is based is unquestioned. I have difficulty, however, in characterizing this in itself as a principle of fundamental justice within the meaning of s. 7. While respect for human dignity is the genesis for many principles of fundamental justice, not every law that fails to accord such respect runs afoul of these principles. To state that "respect for human dignity and autonomy" is a principle of fundamental justice, then, is essentially to state that the deprivation of the appellant's security of the person is contrary to principles of fundamental justice because it deprives her of security of the person. This interpretation would equate security of the person with a principle of fundamental justice and render the latter redundant.

I cannot subscribe to the opinion expressed by my colleague, McLachlin J., that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required.

... [text omitted]

The issue here, then, can be characterized as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.

Section 241(*b*) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. 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. This policy finds expression not only in the provisions of our *Criminal Code* which prohibit murder and other violent acts against others notwithstanding the consent of the victim, but also in the policy against capital punishment and, until its repeal, attempted suicide. This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life. The Law Reform Commission

expressed this philosophy appropriately in its Working Paper 28, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982), at p. 36:

> Preservation of human life is acknowledged to be a fundamental value of our society. Historically, our criminal law has changed very little on this point. Generally speaking, it sanctions the principle of the sanctity of human life. Over the years, however, law has come to temper the apparent absolutism of the principle, to delineate its intrinsic limitations and to define its true dimensions.

As is noted in the above passage, the principle of sanctity of life is no longer seen to require that all human life be preserved at all costs. Rather, it 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. An analysis of our legislative and social policy in this area is necessary in order to determine whether fundamental principles have evolved such that they conflict with the validity of the balancing of interests undertaken by Parliament.

(i) <u>History of the Suicide Provisions</u>

At common law, suicide was seen as a form of felonious homicide that offended both against God and the King's interest in the life of his citizens. As Blackstone noted in *Commentaries on the Laws of England* (1769), vol. 4, at p. 189:

... the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on oneself.

This is essentially the view first propounded by Plato and Aristotle that suicide was "an offence against the gods or the state" (M. G. Velasquez, "Defining Suicide" (1987), 3 *Issues in Law & Medicine* 37, at p. 40).

However, the contrary school of thought has always existed and is premised on notions of both freedom and compassion. The Roman Stoics, for example, "tended to condone suicide as a lawful and rational exercise of individual freedom and even wise in the cases of old age, disease, or dishonor" (Velasquez, *supra*, at p. 40). A more humane tone was struck by the Chancellor Francis Bacon who would have preferred leaving to the doctors the duty of lessening, or even ending, the suffering of their patients (L. Depaule, "Le droit à la mort: rapport juridique" (1974), 7*Human Rights Journal* 464, at p. 467). There has never been a consensus with respect to this contrary school of thought.

Thus, until 1823, English law provided that the property of the suicide be forfeited and his body placed at the cross-roads of two highways with a stake driven through it. Burial indignities were also imposed in *ancien régime*France where the body of the suicide was often

put on trial before being crucified (G. Williams, *The Sanctity of Life and the Criminal Law* (1957), at p. 259; Depaule, *supra*, at p. 465, citing the *Ordonnance de 1670*, title XXII).

However, given the practical difficulties of prosecuting the successful suicide, most prohibitions centred on attempted suicide; it was considered an offence and accessory liability for assisted suicide was made punishable. In England, this took the form of a charge of accessory before the fact to murder or murder itself until the passage of the *Suicide Act, 1961* (U.K.), 9 & 10 Eliz. 2, c. 60, which created an offence of assisting suicide which reads much like our s. 241. In Canada, the common law recognized that aiding suicide was criminal (G. W. Burbidge, *A Digest of the Criminal Law of Canada* (1890), at p. 224) and this was enshrined in the first *Criminal Code*, S.C. 1892, c. 29, s. 237. It is, with some editorial changes, the provision now found in s. 241.

The associated offence of attempted suicide has an equally long pedigree in Canada, found in the original *Code* at s. 238 and continued substantively unaltered until its repeal by S.C. 1972, c. 13, s. 16. The fact of this decriminalization does not aid us particularly in this analysis, however. Unlike the situation with the partial decriminalization of abortion, the 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 its solutions in sciences outside the law, and for that reason not to mandate a legal remedy. Since that time, there have been some attempts to decriminalize assistance to suicide through private members bills, but none has been successful.

(ii) Medical Care at the End of Life

Canadian courts have recognized a common law right of patients to refuse consent to medical treatment, or to demand that treatment, once commenced, be withdrawn or discontinued (*Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119). This right has been specifically recognized to exist even if the withdrawal from or refusal of treatment may result in death (*Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. S.C.); and *Malette v. Shulman*(1990), 72 O.R. (2d) 417 (C.A.)). The United States Supreme Court has also recently recognized that the right to refuse life-sustaining medical treatment is an aspect of the liberty interest protected by the Fourteenth Amendment in*Cruzan v. Director, Missouri Health Department* (1990), 111 L. Ed. 2d 224. However, that Court also enunciated the view that when a patient was unconscious and thus unable to express her own views, the state was justified in requiring compelling evidence that withdrawal of treatment was in fact what the patient would have requested had she been competent.

The House of Lords has also had occasion very recently to address the matter of withdrawal of treatment. In *Airedale N.H.S. Trust v. Bland*, [1993] 2 W.L.R. 316, their Lordships authorized the withdrawal of artificial feeding from a 17-year-old boy who was in a persistent vegetative state as a result of injuries suffered in soccer riots, upon the consent of his parents. Persistence in a vegetative state was found not to be beneficial to the patient and the principle of sanctity of life, which was not absolute, was therefore found not to be violated by the withdrawal of treatment.

Although the issue was not before them, their Lordships nevertheless commented on the distinction between withdrawal of treatment and active euthanasia. Lord Keith stated at p. 362 that though the principle of sanctity of life is not an absolute one, "it forbids the taking of

active measures to cut short the life of a terminally ill patient". Lord Goff also emphasized this distinction, stressing that the law draws a crucial distinction between active and passive euthanasia. He stated as follows, at pp. 368-69:

> ...the former [passive euthanasia] may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be.... So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia -- actively causing his death to avoid or to end his suffering.... It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. It is true that the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out his misery straight away, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he dies. But the law does not feel able to authorise euthanasia, even in circumstances such as these; for once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others.

... [text omitted]

It can be seen, therefore, that while both the House of Lords, and the Law Reform Commission of Canada have great sympathy for the plight of those who wish to end their lives so as to avoid significant suffering, neither has been prepared to recognize that the active assistance of a third party in carrying out this desire should be condoned, even for the terminally ill. The basis for this refusal is twofold it seems -- first, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and second, there is no certainty that abuses can be prevented by anything less than a complete prohibition. Creating an exception for the terminally ill might therefore frustrate the purpose of the legislation of protecting the vulnerable because adequate guidelines to control abuse are difficult or impossible to develop.

... [text omitted]

(iv) Conclusion on Principles of Fundamental Justice

What the preceding review demonstrates is that Canada and other Western democracies recognize and apply the principle of the sanctity of life as a general principle which

is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail. However, these same societies continue to draw distinctions between passive and active forms of intervention in the dying process, and with very few exceptions, prohibit assisted suicide in situations akin to that of the appellant. The task then becomes to identify the rationales upon which these distinctions are based and to determine whether they are constitutionally supportable.

The distinction between withdrawing treatment upon a patient's request, such as occurred in the *Nancy B.*case, on the one hand, and assisted suicide on the other has been criticized as resting on a legal fiction -- that is, the distinction between active and passive forms of treatment. The criticism is based on the fact that the withdrawal of life supportive measures is done with the knowledge that death will ensue, just as is assisting suicide, and that death does in fact ensue as a result of the action taken. See, for example, the *Harvard Law Review* note "Physician-Assisted Suicide and the Right to Die with Assistance" (1992), 105 *Harv. L. Rev.* 2021, at pp. 2030-31.

Other commentators, however, uphold the distinction on the basis that in the case of withdrawal of treatment, the death is "natural" -- the artificial forces of medical technology which have kept the patient alive are removed and nature takes its course. In the case of assisted suicide or euthanasia, however, the course of nature is interrupted, and death results directly from the human action taken (E. W. Keyserlingk, *Sanctity of Life or Quality of Life in the Context of Ethics, Medicine and Law* (1979), a study paper for the Law Reform Commission of Canada's Protection of Life Series). The Law Reform Commission calls this distinction "fundamental" (at p. 19 of the Working Paper 28).

Whether or not one agrees that the active vs. passive distinction is maintainable, however, the fact remains that under our common law, the physician has no choice but to accept the patient's instructions to discontinue treatment. To continue to treat the patient when the patient has withdrawn consent to that treatment constitutes battery (*Ciarlariello* and *Nancy B.*, *supra*). The doctor is therefore not required to make a choice which will result in the patient's death as he would be if he chose to assist a suicide or to perform active euthanasia.

The fact that doctors may deliver palliative care to terminally ill patients without fear of sanction, it is argued, attenuates to an even greater degree any legitimate distinction which can be drawn between assisted suicide and what are currently acceptable forms of medical treatment. The administration of drugs designed for pain control in dosages which the physician knows will hasten death constitutes active contribution to death by any standard. However, the distinction drawn here is one based upon intention -- in the case of palliative care the intention is to ease pain, which has the effect of hastening death, while in the case of assisted suicide, the intention is undeniably to cause death. The Law Reform Commission, although it recommended the continued criminal prohibition of both euthanasia and assisted suicide, stated, at p. 70 of the Working Paper, that a doctor should never refuse palliative care to a terminally ill person only because it may hasten death. In my view, distinctions based upon intent are important, and in fact form the basis of our criminal law. While factually the distinction may, at times, be difficult to draw, legally it is clear. The fact that in some cases, the third party will, under the guise of palliative care, commit euthanasia or assist in suicide and go unsanctioned due to the difficulty of proof cannot be said to render the existence of the prohibition fundamentally unjust.

The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people. From the review that I have conducted above, I am unable to discern anything approaching unanimity with respect to the issue before us. Regardless of one's personal views as to whether the distinctions drawn between withdrawal of treatment and palliative care, on the one hand, and assisted suicide on the other are practically compelling, the fact remains that these distinctions are maintained and can be persuasively defended. To 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.

This consensus finds legal expression in our legal system which prohibits capital punishment. This prohibition is supported, in part, on the basis that allowing the state to kill will cheapen the value of human life and thus the state will serve in a sense as a role model for individuals in society. The prohibition against assisted suicide serves a similar purpose. In upholding the respect for life, it 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. To permit a physician to lawfully participate in taking life would send a signal that there are circumstances in which the state approves of suicide.

I also place some significance in the fact that the official position of various medical associations is against decriminalizing assisted suicide (Canadian Medical Association, British Medical Association, Council of Ethical and Judicial Affairs of the American Medical Association, World Medical Association and the American Nurses Association). 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. I am thus unable to find that any principle of fundamental justice is violated by s. 241(*b*).

... [text omitted]

V.Disposition

I agree with the sentiments expressed by the justices of the British Columbia Court of Appeal -- this case is an upsetting one from a personal perspective. I have the deepest sympathy for the appellant and her family, as I am sure do all of my colleagues, and I am aware that the denial of her application by this Court may prevent her from managing the manner of her death. I have, however, concluded that the prohibition occasioned by s. 241(*b*) is not contrary to the provisions of the *Charter*.