

LIFE'S DOMINION IN CANADA: A LEGAL SURVEY

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I. INTRODUCTION

This paperⁱ simply seeks to provide an overview of the significant judicial and legislative decisions which have occurred during the past three decades in Canada regarding the beginning and end of life. More descriptive than analytical, the discussion which follows attempts to highlight the principles which underpin the major decisions on life issues by our highest court, and to identify certain tensions which repeatedly characterize the approaches adopted by the Supreme Court of Canada.

Any survey on Canadian law regarding life issues prepared for a largely American audience immediately must highlight three fundamental aspects of Canadian constitutional law. First, in Canada the constitutional power to legislate with respect to criminal law resides in the federal government,ⁱⁱ and the federal government has exercised this legislative power by passing the *Criminal Code*.ⁱⁱⁱ The debates and court challenges relating to abortion, euthanasia, and assisted suicide consequently have focused on provisions of the *Criminal Code*.

Second, until 1982 the Canadian *Constitution* did not contain what Americans would call an entrenched "Bill of Rights." In 1960 the Federal Parliament passed the *Canadian Bill of Rights*^{iv} against which federal legislation had to be measured, but the *Bill of Rights* had no more force than any other federal statute. In 1982, however, the Canadian *Constitution* was amended by including the *Canadian Charter of Rights and Freedoms*, a constitutional guarantee of rights and freedoms, both individual and political.^v The advent of the Charter prompted most of the litigation which has involved life issues.

Finally, the structure of the *Charter* is such that none of the guaranteed rights and freedoms is absolute; they are all "subject to such reasonable limits prescribed by law as can be

demonstrably justified in a free and democratic society.”^{vi} This structure has resulted in courts broadly interpreting guaranteed rights and freedoms, then placing a heavy burden on governments to justify infringements of those rights.

II. THE LAW REGARDING ABORTION

A. CRIMINAL CODE—THERAPEUTIC ABORTIONS

Prior to 1969 the *Criminal Code* made the procurement of an abortion a criminal offense. In 1969 the federal Parliament enacted the Omnibus Bill, which amended the *Criminal Code* to permit “therapeutic abortions.” It remained an offense for anyone to procure the miscarriage of a female person by any means, but a defense was created in favor of qualified medical practitioners who performed abortions after receiving approval from the “therapeutic abortion committee” of an approved hospital. Such approval would constitute a complete defense to any charge of procuring a miscarriage.^{vii} This new regime had several features:

1. Since each province possesses the constitutional jurisdiction to legislate with respect to health, “approved hospitals” had to be authorized by provincial ministers of health. Consequently, it was up to provincial governments to decide whether or not to approve any hospitals in their jurisdictions in which abortions would be performed.

2. The therapeutic abortion committee had to be comprised of no less than three members, each of whom was a qualified medical practitioner. A majority of the members of the Committee had to approve any abortion.

3. In order to approve an abortion, a majority of the therapeutic abortion committee had to certify that “the continuation of the pregnancy of the female person would or would be likely to endanger her life or health.”

4. The *Criminal Code* did not restrict therapeutic abortions to any stage of gestation. It was up to the individual province, or in practice the individual hospital, to formulate guidelines regarding the gestational periods during which abortions could be performed. Most hospitals adopted a policy prohibiting abortions

after 11 to 13 weeks gestation.

B. CHALLENGES TO THE *CRIMINAL CODE*—

MORGENTALER (NO. 1 & NO.2)

The introduction of the Omnibus Bill in 1969 permitting therapeutic abortions generated considerable criticism from all quarters in Canada, the history of which has been documented elsewhere. The bill's restriction limiting abortions to "approved hospitals" prompted a legal challenge by certain physicians who wished to provide abortions in free-standing clinics. One of the physicians, Dr. Henry Morgentaler, brought successive court challenges which culminated in a 1989 decision of the Supreme Court of Canada that can be styled as Canada's equivalent to *Roe v. Wade*.

Very briefly, in 1973 Dr. Morgentaler was charged with unlawfully procuring an abortion by reason of performing an abortion in a free-standing clinic. A jury returned a verdict of not guilty, which was set aside on appeal, and upheld by the Supreme Court of Canada in *Morgentaler (No.1)*.^{viii} The majority of the Supreme Court of Canada upheld Parliament's jurisdiction to enact criminal legislation regarding abortion, and rejected the argument that the common law defense of necessity could be used as a defense to a charge under the *Criminal Code* of unlawfully procuring a miscarriage.

Morgentaler (No. 1) remained the law until the enactment of the *Charter* in 1982. Morgentaler was once again charged under the *Criminal Code* with performing an abortion in a clinic and, again, acquitted by a jury. Once again the appeals court allowed the Crown's appeal, and the matter proceeded before the Supreme Court of Canada. This time the Supreme Court of Canada was required to measure the constitutionality of the *Criminal Code*'s therapeutic abortion provisions against the constitutional guarantee contained in section 7 of the *Charter* which reads: "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 Supreme Court of Canada (5-2) struck down the therapeutic abortion regime in the

Criminal Code.^{ix} Three sets of reasons were issued by members of the majority, making it difficult to identify the *ratio* of the court. One can state with some fairness, however, that *Morgentaler (No. 2)* established several key propositions.

First, the guarantee of “security of the person” protects an individual from “state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context.”^x Chief Justice Dickson did not consider it necessary to determine whether “security of the person” extended further to protect “either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.”^{xi} Justices Beetz and Estey arrived at essentially the same definition, but using different language. In their view a pregnant woman’s person could not be said to be secure if, when her life or health is in danger, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment.^{xii} The right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction underlay the decision of these two justices.

Second, the therapeutic abortion regime established by the *Criminal Code* infringed a woman’s guarantee to security of the person, but the basis of the infringement varied within the majority.

The Chief Justice and Justice Lamer held that the regime interfered with a woman’s bodily integrity in both a physical and emotional sense:

At the most basic physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of the decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with the woman’s bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with the woman’s body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter*

to comport with the principles of fundamental justice.^{xiii}

The Chief Justice and Justice Lamer also held that certain administrative procedures under section 251 did not accord with the principles of fundamental justice, specifically: the statutory requirement of approval by a therapeutic abortion committee could mean that abortions might be unavailable in many hospitals in Canada^{xiv} since they were under no obligation to create a therapeutic abortion committee.^{xv} The statute also failed to provide an adequate standard for the work of therapeutic abortion committees, particularly in its lack of a definition of “health.”^{xvi}

Justices Beetz and Estey did not focus on the interference with the priorities and aspirations of a woman, but on the issue of danger to a woman’s health. In their view, the procedural requirements of s. 251 of the *Criminal Code* significantly delayed pregnant women’s access to medical treatment, resulting in an additional danger to their health and thereby depriving them of their right to security of the person.^{xvii} While these two justices recognized that Parliament was justified in requiring a reliable, independent, and medically sound opinion as to the “life or health” of the pregnant woman in order to protect the state interest in the fetus, certain of the procedural requirements of the therapeutic abortion committee regime were manifestly unfair, in particular the requirement that abortions must take place in an eligible hospital to be lawful,^{xviii} and the requirement that the therapeutic abortion committee come from the approved hospital in which the abortion is to be performed,^{xix} as well as the exclusion of all physicians who practice therapeutic abortions from membership on the committee.^{xx}

These two justices suggested that a somewhat revised section could meet the requirements of the *Charter*:

The primary objective of section 251 of the *Criminal Code* is the protection of the fetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s.1 of the *Charter* justify

reasonable limits to be put on a woman's right. However, rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as some of the rules contained in section 251, cannot be said to be rationally connected to these objectives under s.1 of the *Charter*. Consequently, s.1 does not constitute a reasonable limit to the security of the person....

But I feel bound to observe that the objective of protecting the fetus would not justify the severity of the breach of pregnant women's rights to security of the person which would result if the exculpatory provision of s.251 was *completely* removed from the *Criminal Code*. However, a rule that would require a higher degree of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful, could possibly achieve a proportionality which would be acceptable under s.1 of the *Charter*.^{xxi}

Whereas these four judges rested their decisions largely upon the administrative delays created by the therapeutic abortion regime, the final judge of the majority, Madam Justice Wilson, proceeded to recognize a constitutionally-protected privacy right. Focusing on the infringement of a woman's liberty interest under the *Charter*, Justice Wilson thought that the basic theory underlining the *Charter's* conception of "liberty and security of the person" is that "the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life. Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty."^{xxii} Commenting that section 7 of the *Charter* guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their lives, Justice Wilson concluded that a decision of a woman to terminate her pregnancy fell within this class of protected decisions because it is one that would have a profound, psychological, economic, and social consequence for the pregnant woman.^{xxiii} The *Criminal Code* infringed this right by taking the decision away from the woman and giving it to a committee.^{xxiv}

Yet Justice Wilson did recognize that the state had some

legitimate interest in protecting the fetus, and she adopted a trimester approach to state regulation:

In my view, the primary objective of the impugned legislation must be seen as the protection of the fetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s.7 right is the protection of the fetus. I think this is a perfectly valid legislative objective....

It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the fetus as potential life is directly related to the stage of its development during gestation.... Indeed, I agree with the observation of O'Connor, J., dissenting in *City of Akron v. Akron Center for Reproductive Health Inc.* ...that the fetus is potential life from the moment of conception. It is simply to say that in balancing the state's interest in the protection of the fetus as potential life under s.1 of the *Charter* against the right of the pregnant woman under s.7, greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The fetus should accordingly, for the purposes of s. 1, be viewed in differential and developmental terms....

The precise point in the development of the fetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature, which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.^{xv}

C. CHALLENGES TO THE CRIMINAL CODE—BOROWSKI

The Supreme Court of Canada released its decision in *Morgentaler (No. 2)* on January 28, 1988. At that time the matter of *Borowski v. Attorney General of Canada* was pending before the Supreme Court of Canada, a case in which Borowski, a taxpayer, sought to strike down the 1969 amendments to the *Criminal Code* that made available therapeutic abortions on the basis that they deprived an unborn child of rights guaranteed under the *Charter*. A lengthy trial had been conducted in which numerous experts testified regarding *in utero* development. The *Borowski* trial remains the only comprehensive trial of fact in Canada involving medical evidence relating to the unborn child.

Notwithstanding the extensive evidence before the trial judge,

the case was decided upon a legal issue. The trial judge concluded that the law had not previously recognized the unborn child as a “person” under Canadian law, and therefore the fetus did not fall within the scope of the term “everyone” in section 7 of the *Charter*. Following English, American, and Canadian jurisprudence, the court decided that the common law did not recognize the fetus as a person until “born alive,” and therefore to include a fetus within the term “everyone” in the *Charter* would place upon the term an interpretation which it could not reasonably bear.^{xxvi} The trial judge demarcated a clear line of jurisdiction between legislatures and the courts:

Although rapid advances in medical science may make it socially desirable that some legal status be extended to fetuses, irrespective of ultimate viability, it is the prerogative of Parliament, and not the courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons. Because there is no existing basis in law which justifies a conclusion that fetuses are legal persons, and therefore within the scope of the term “everyone” utilized in the *Charter*, the claim of the plaintiff must be dismissed.^{xxvii}

The case wound its way to the Supreme Court of Canada where, on March 9, 1989, that court dismissed Borowski’s appeal on the sole basis that his case had been rendered moot when the Supreme Court of Canada had struck down section 251 of the *Criminal Code* in the *Morgentaler (No. 2)* case.^{xxviii}

D. PARLIAMENT’S RESPONSE

Parliament’s initial response to the *Morgentaler (No. 2)* decision was summarized by one court^{xxix} as follows:

Parliament attempted to respond to the 1988 Supreme Court decision. The government during the 33rd Parliament tabled a motion for debate and to vote in the House of Commons on the framing of a new law. Under the terms of this motion, an abortion would have been lawful during the early stages of pregnancy if, in the opinion of a licensed physician, the continuation of a pregnancy would or would have been likely to threaten the woman’s physical or mental well-being. During the subsequent stages of pregnancy, an abortion would have been lawful only if certain further conditions were satisfied, including the finding of

two physicians that the continuation of the pregnancy would or would have been likely to endanger the woman's life or seriously endanger her health. What constituted the "earlier" and "subsequent" stages of the pregnancy was not defined under the proposal, nor were the "further conditions" under which an abortion could lawfully have been procured during the subsequent stages of the pregnancy. The debate occupied two days and a free vote was conducted on July 28, 1988. At that point, 5 of 21 amended proposals were retained for vote by the Speaker. None of the proposals, including those of the government, were adopted. Of the 6 proposals considered by the House, the one that received the most votes contained the most restrictive policy on abortion. This proposal would have permitted abortion only if two or more independent licensed physicians had, in good faith and on reasonable grounds, stated that in their opinion, the continuation of the pregnancy would or would be likely to endanger the woman's life. This amendment was defeated by a vote of 118 to 105.^{xxx}

Over a year and a half later, on November 3, 1989, the Minister of Justice introduced Bill C-43, *An Act Respecting Abortion*. The Bill proposed to make it a criminal offense to induce an abortion unless it was done by, or under the direction of, a physician who considered that the woman's life or health was otherwise likely to be threatened. "Health" was defined as including physical, mental, and psychological health. Bill C-43 was referred to a legislative committee on November 28, 1989, and the committee heard from numerous witnesses, both supporting and opposing the bill. In April 1990 the committee reported the Bill back to the House of Commons without amendment. Third reading began on May 22, 1990, and on May 23 the House rejected all proposed amendments to Bill C-43 by a significant majority. Most of the proposed amendments would have limited the conditions under which an abortion could be obtained. The Bill passed third reading in the House on May 29, 1990 by a vote of 140 to 131. The Bill then was transmitted to the Senate for consideration. On January 23, 1991 the Senate held a free vote on Bill C-43. Of the 86 senators present, 43 voted for the Bill and 43 voted against it. Since under the rules of the Senate a tie vote is deemed to be a negative vote, the Bill was thereby defeated.^{xxxi} During the entire legislative process surrounding Bill C-43, a split emerged within

the pro-life movement regarding the legitimacy of supporting Bill C-43, with many pro-life organizations opposing it.

Since the defeat of Bill C-43 in 1991, no federal government has introduced legislation to criminalize, restrict, or regulate abortions.

A few members of Parliament have introduced private members' bills, but none has received government support. As a result, at present Canadian law does not impose any civil or criminal sanctions or restrictions on the performance of abortions.

III. THE MEANING OF "PERSON"

While the political debate surrounding abortion reached its crescendo in the period 1988 to 1991 and has since fallen off the national political agenda for all intents and purposes, the 1990's have witnessed an increase in litigation dealing with the issue of whether an unborn child has legal personhood. The cases have covered a variety of fact situations, prompting our highest court to grapple with the latest developments in fetology and prenatal medical assessment.

A. *TREMBLAY V. DAIGLE*

The first case involved a proceeding brought by a boyfriend, the father of the unborn child, to obtain an injunction preventing his estranged girlfriend from aborting their 18-week-old unborn child. The father succeeded in obtaining an injunction before a trial judge who found that a fetus was a "human being" under the Quebec provincial *Charter of Human Rights and Freedoms*, and thereby enjoyed a "right to life" under section 1 of that *Charter*. The injunction was upheld by a majority of the Quebec Court of Appeal but set aside by the Supreme Court of Canada.^{xxxii}

The Supreme Court of Canada's analysis focused on one issue: whether an unborn child enjoys under the Quebec *Charter* substantive legal rights upon which an injunction could be founded. Section 1 of the Quebec *Charter* reads as follows: "Every human being has a right to life, and to personal security, inviolability, and freedom. Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne." In

considering the argument of whether a fetus is an “être humain,” the Supreme Court marked out an approach which would characterize its subsequent decisions in the 1990’s. The court framed its task as follows:

In examining this argument it should be emphasized at the outset that the argument must be viewed in the context of the legislation in question. The Court is not required to enter the philosophical and theological debates about whether or not a fetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the fetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a fetus determinative in our inquiry. *The task of properly classifying a fetus in law and in science are different pursuits. Ascribing personhood to a fetus in law is a fundamentally normative task. It results in the recognition of rights and duties—a matter which falls outside the concerns of scientific classification.* In short, this Court’s task is a legal one. Decisions based upon broad social, political, moral, and economic choices are more appropriately left to the legislature.^{xxxiii} (emphasis added)

Notwithstanding this statement of purpose, the court did not expressly articulate what steps were required to be taken under its “fundamentally normative task,” nor did the court explain how a “fundamentally normative task” could not but require the court “to enter the philosophical and theological debates about whether or not a fetus is a person.”

The analysis the court in fact engaged in was merely one of historical statutory interpretation: *i.e.*, did either the Quebec *Charter*, or the Quebec *Civil Code*, expressly and unambiguously place the unborn child within the terms “human being” or “person”? Curiously, when the court actually engaged in its analysis, it immediately rejected the propriety of relying on a linguistic analysis of the text. Section 180 of the Quebec *Charter* uses the phrase “human being,” but the court commented that a linguistic analysis could not settle “the difficult and controversial question” of whether a fetus was intended by the provincial legislature to be a person. Instead “what is required are

substantive legal reasons which support a conclusion that the term “human being” has such and such a meaning.^{xxxiv} At the end of the day, the Supreme Court simply reasoned that since the Quebec *Charter* lacked any definition of “human being” or “person,” one could not conclude that an unborn child fell within those terms.^{xxxv} The court then proceeded to pass over provisions in the Quebec *Civil Code* protecting testamentary rights of unborn children, describing them as a “fiction of the civil law” which disappeared unless the child is born alive,^{xxxvi} noted that no prior *Civil Code* case had recognized an unborn child as a person,^{xxxvii} and concluded that the Quebec *Civil Code* therefore did not accord a fetus legal personality.^{xxxviii}

Although not required to do so, the court then embarked upon a review of Canadian common law jurisprudence, concluding that those cases also showed that an unborn child enjoyed no legal rights until “born alive.”^{xxxix} The court refrained from commenting on whether the term “everyone” as used in section 7 of the Canadian *Charter*, which secures to everyone the “right to life, liberty, and security of the person,” would include an unborn child, observing that, since the case involved a civil action between two parties, the *Charter* could not be invoked.^{xl}

B. SULLIVAN AND LEMAY

The issue of the personhood of the unborn child was considered less than a year later by the Supreme Court of Canada in *R. v. Sullivan*,^{xli} a case involving charges against two mid-wives of criminal negligence causing the death of a child. The two mid-wives were hired to supervise a home birth. After five hours of second-stage labor, the child’s head emerged and no further contractions occurred. The two mid-wives attempted to stimulate further contractions, but were unsuccessful. Direct pressure was applied to the uterus, causing soreness to the mother’s stomach and back and some bruising. Approximately 20 minutes later emergency services were called and the mother was transported to the hospital. Within two minutes of arrival at the hospital, an intern delivered the baby, using what was characterized at trial as

“a basic delivery technique.” The child showed no signs of life and resuscitation attempts were unsuccessful.^{xlii}

The two mid-wives were jointly charged with criminal negligence for causing death to the child, according to section 203 of the *Criminal Code*,^{xliii} which reads: “Everyone who by criminal negligence causes death to another person is guilty of an indictable offense and is liable to imprisonment for life.” The *Code* also provided in section 206 (1)^{xliiv} that: “A child becomes a *human being* within the meaning of this act when it has completely proceeded, in a living state, from the body of its mother, whether or not (a) it has breathed, (b) it has an independent circulation, or, (c) the navel string is severed.”

The Supreme Court started its analysis by noting that the language of section 206 meant that a fetus was not a human being for purposes of the *Criminal Code*, and then proceeded to conclude that the statutory history of the provisions of the *Criminal Code* showed that the *Code* used the terms “person” and “human being” interchangeably. Accordingly, the court reasoned, the child was not a “person” within the meaning of section 203, and the two mid-wives could not be convicted for criminal negligence for causing death to another person.^{xliv} The court did not engage in any other analysis beyond its review of the statutory history of the language used in the relevant provisions of the *Criminal Code*.

C. WINNIPEG CHILD AND FAMILY SERVICES CASE

More recently, the Supreme Court of Canada was faced with the question of whether a court could intervene to protect the health of an unborn child where a mother intends to carry the child to term.^{xlvi} The case started out as a tragic tale, but ultimately had a happy ending, notwithstanding the decisions of the appellate courts involved. The case involved a 22-year-old pregnant woman who was addicted to sniffing glue. It was her fourth pregnancy. The mother had become addicted to solvents when she was 16 years of age, and her first three children were made wards of the child welfare agencies upon birth. One child was born jittery and showed symptoms of drug withdrawal.^{xlvii}

In the spring of 1996 the mother went to the hospital complaining of difficulty walking and loss of balance, and it was discovered that she was 13½ weeks pregnant. She was admitted to the chemical withdrawal unit with a diagnosis of solvent abuse, but was discharged several days later. A few weeks later she was again admitted to the hospital because she had lost her co-ordination due to glue sniffing. At this point the child welfare authorities became involved, and the mother promised that she would enter a residential treatment program for substance abuse. However, when the time came to enter the program, the mother, smelling strongly of solvents, refused to attend the treatment program.

As a result, the local child welfare agency applied to the Manitoba Court of Queen's Bench for an order compelling the mother to live at a place of safety and to refrain from consuming any intoxicating substance or drug until the birth of her child. The motions court judge granted the order.^{xlviii}

On August 6, 1996, the mother entered the hospital. Two days later, the Manitoba Court of Appeal stayed the lower court's order, and in an expedited hearing several weeks later allowed the mother's appeal from the order.^{xlix} Notwithstanding the court proceedings, the mother chose voluntarily to continue treatment in the hospital, and she remained there until discharged by her physician on August 14, 1996. After her discharge she went to live with her sister, and her family agreed to provide support and encouragement in an effort to prevent her from resuming solvent abuse. The family support worked, and on December 6, 1996 the mother delivered a baby boy who appeared to be physically healthy. Since that date 24-hour in-home support was provided to her to assist her in parenting the child. The mother remained solvent free and eventually married the father of the child.¹ This was the way the situation stood when the Supreme Court of Canada heard the child welfare authority's appeal on June 19, 1997.

The Supreme Court of Canada dismissed the appeal (7-2), but the two judgments delivered by the court displayed a fascinating tension within the court regarding how the law should respond to

the emerging medical knowledge about the physiology of the unborn child. The two dissenting justices^{li} would have allowed the appeal on the ground that the common law “born alive” rule should be abandoned as outdated.^{lii} These judges found persuasive the article by Clarke D. Forsythe, “Homicide of the Unborn Child: The Born-Alive Rule and Other Legal Anachronisms,”^{liii} and they accepted Forsythe’s argument that the “born alive rule” was an evidentiary one which came into being as a result of the lack of medical knowledge regarding the development of the fetus. Noting that several U.S. courts had abandoned the born-alive rule as out-dated in light of developments in medical knowledge,^{liv} and noting that in a 1933 case the Supreme Court of Canada re-evaluated the born-alive rule in light of advances in medical technology,^{lv} the minority concluded:

Precedent that states that a fetus is not a “person” should not be followed without an inquiry into the purpose of such a rule. In the well-known case of *Edwards v. Canada (Attorney General)*, [1930] 8 A.C. 124 (P.C.)..., the Privy Council overruled precedent and a unanimous Supreme Court of Canada, [1928] S.C.R. 276..., and held that women were “persons” with respect to s.24 of the *B.N.A. Act, 1867*. Rigidly applying precedents of questionable applicability without inquiry will lead the law to recommit the errors of the past.

Moreover, Canada is a signatory to the United Nations Declaration on the Rights of the Child (1959), which states in its preamble that: “...the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth....” The “born-alive” rule should be abandoned, for the purposes of this case, as it is medically out-of-date. It may be that the rule has continuing utility in the context of other cases with their own particular facts. The common law boasts that it is adaptable. If so, there is no need to cling for the sake of clinging to notions rooted in rudimentary medical and scientific knowledge of the past. A fetus should be considered within the class of person whose interests can be protected through the exercise of the *parens patriae* jurisdiction.^{lvi}

The minority considered that it was only a modest expansion of existing jurisprudence to include a fetus within the class of

persons protected by the exercise of the *parens patriae* jurisdiction, although they commented that the jurisdiction could only be exercised in extreme cases where the conduct of the mother has a reasonable probability of causing serious and irreparable harm to the unborn child.^{lvii} The minority also distinguished the instant case from the issue of abortion, employing the following analysis:

In my view, there is a distinction between abortion and the case under appeal. *R. v. Morgentaler*... struck down this country's criminal prohibitions against abortion. Nothing in these reasons purports to interfere with the effect of that decision. However, where a woman has chosen to carry a fetus to term, the situation is different. Having chosen to bring a life into this world, that woman must accept some responsibility for its well-being. In my view, that responsibility entails, at the least, the requirement that the pregnant woman refrain from the abuse of substances that have, on proof to the civil standard, a reasonable probability of causing serious and irreparable damage to the fetus. It is not inconsistent to place restraints upon a woman's abusive behavior towards her fetus that she has decided to carry to term yet continue to preserve her ability to choose abortion at any time during her pregnancy.

It is not a question of a woman making a "declaration" of her intentions. Rather, the law will presume that she intends to carry the child to term until such time as she indicates a desire to receive, makes arrangements for, or obtains an abortion.^{lviii}

The majority rejected the appeal by the child welfare authority, in large part reciting and relying upon past jurisprudence that an unborn child does not become a legal "person" until "born-alive." Yet there are several fascinating aspects to the majority's judgment:

1. Canadian tort law differs little from American tort law in respect to the conditions which must be met before a duty of care is imposed in a given situation. Under Canadian jurisprudence, a court first must be satisfied that there is a sufficiently close relationship between the parties to give rise to the duty of care, and then find that there are no considerations which ought to negate or limit the scope of the duty.^{lix} In the *Winnipeg* case, the majority found that the first criteria in fact was met: "The

relationship between a woman and her fetus (assuming for the purposes of argument that they can be treated as separate legal entities) is sufficiently close that in the reasonable contemplation of the woman, carelessness on her part might cause damage to the fetus.”^{lx} The court considered the second branch of the test to pose the real problem, for the recognition of a duty of care owed by a mother to her child for negligent prenatal behavior might create a conflict between the pregnant woman as an autonomous decision-maker and her fetus.^{lxi}

2. The court regarded the public policy ramifications of imposing a duty of care on a mother towards her unborn child as exceedingly complex, involving the balancing of competing interest. This task, in the view of the majority, was properly one for the legislatures to undertake, and it was up to the elected representatives to fashion a proper remedy for the problem.^{lxii}

3. The majority again returned to the question of what is involved in classifying the unborn child at law. The majority appeared to regard it proper for legislatures, as law-makers, to embark upon moral decision-making, but improper for courts, as law-makers under the common law, to do so. Having rejected in *Daigle v. Tremblay*^{lxiii} the “normative task” of classifying a fetus in law as an exercise involving morality, the majority of the court, in passing the buck back to the legislature, seemed to rely squarely on the moral nature of the task of legal classification as meriting a decision by the legislatures. The majority stated:

The proposed changes to the law of tort are major, affecting the rights and remedies available in many other areas of tort law. They involve moral choices and would create conflicts between fundamental interests and rights. They would have an immediate and drastic impact on the lives of women as well as men who might find themselves incarcerated and treated against their will for conduct alleged to harm others. And they possess complex ramifications impossible for this Court to fully assess, giving rise to the danger that the proposed order might impede the goal of healthy infants more than it would promote it. In short, these are not the sort of changes which common law courts can or should make. These are the sort of changes which should be left at the legislature.^{lxiv}

In its decision the majority did not acknowledge or provide a response to the ongoing rejection by American courts of the “born-alive” rule as out-of-date. Nor did the majority deal with the large body of medical evidence regarding fetal alcohol syndrome and other related diseases, thus reflecting its view that the issue of legal personhood is not one of biological status or scientific classification.^{lxv} The court took the attitude that unless a clear consensus could show that an extension of tort liability would decrease the instance of substance-injured children, then the court should not intervene.^{lxvi}

4. Finally, the majority of the court continued its view that science and law apparently have little to offer each other. The court stated: “The common law has always distinguished between an unborn child and a child after birth. The proposition that biologically there may be little difference between the two is not relevant to this inquiry. For legal purposes there are great differences between the unborn and the born child, differences which raise a host of complexities.”^{lxvii}

D. *DOBSON V. DOBSON*

The majority decision in the *Winnipeg Child and Family Services* case can fairly be characterized as a dogged insistence on the “born-alive” rule as the dividing line between legal personhood and legal non-existence. Yet no sooner had the Supreme Court released its reasons in the *Winnipeg* case on October 31, 1997 than it was asked and it agreed to hear an appeal which, if successful, would mark a radical retreat from even the born-alive rule. In 1933 the Supreme Court of Canada affirmed that a child, once born-alive, could sue for damages for injury suffered *in utero*.^{lxviii} Yet, the pending case of *Dobson v. Dobson*^{lxix} calls that principle of liability and recovery into question.

The facts of the case are simple. Mrs. Dobson, 27 weeks pregnant, was involved in a motor vehicle accident. Shortly after the accident, her son was delivered by caesarean section. The son’s litigation guardian commenced a lawsuit alleging that, as a

result of his mother's negligent driving, he received prenatal injuries resulting in permanent mental and physical impairment. Mrs. Dobson sought a summary dismissal of the action on the basis that a child cannot sue his mother for injuries suffered while *in utero*. The two lower courts dismissed the mother's motion, concluding that the born-alive rule would permit Ryan Dobson to sue his mother for *in utero* injuries caused by her negligence.^{lxx}

In seeking to immunize pregnant mothers from any tort liability for injuries suffered by their children *in utero*, Mrs. Dobson raised two main points before the Supreme Court of Canada. First, she contended that there exists a legal unity of the pregnant woman and her unborn child and that to hold a pregnant woman to the same standard of care as is owed by a third-party motorist to an unborn child would, in fact, discriminate against her by imposing a higher duty of care based upon her biological capacity to bear children. A rule of maternal tort liability would effectively make the pregnant woman legally responsible for an injury sustained at the time to herself.^{lxxi}

Mrs. Dobson also argued that in practice it is not possible to apply the born-alive rule of liability to maternal conduct which is similar to the conduct of any third party (*e.g.*, driving a car), while immunizing from liability maternal conduct which is peculiar to parenthood, as attempted by the appellate court. The only practical rule, Mrs. Dobson argued, is one of complete maternal immunity, otherwise a woman's rights of privacy, autonomy, and equality would be endangered.^{lxxii} Since a woman has the legal right during pregnancy to control her body, including the right to engage in behavior which may carry risk for herself, to make her liable for her child for having exercised that freedom is to make her a virtual insurer of the health of her fetus and effectively elevates the interest of the fetus above her legal rights.^{lxxiii} It is expected that oral argument of the case will take place late in 1998 or in early 1999.

IV. EUTHANASIA AND ASSISTED SUICIDE

A. THE CRIMINAL CODE PROHIBITIONS

Under the *Criminal Code* an act of euthanasia would constitute first or second degree murder.^{lxxiv} The *Criminal Code* also makes assisting suicide a criminal offense by providing in section 241: “Everyone 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 14 years.”

B. SUE RODRIGUEZ CASE

In 1993 Sue Rodriguez launched a constitutional challenge seeking to declare section 241 (b) of the *Criminal Code* in violation of the *Charter*. Ms. Rodriguez was a 42-year-old woman, married, and a mother of an 8½-year-old son. She suffered from Lou Gherig’s disease and, at the time of her application, her life expectancy was between 2 and 14 months. Although not in acute distress at the time of her court application, and expressing a wish to live as long as she had the capacity to enjoy life, Ms. Rodriguez sought to obtain an exemption from the *Criminal Code* prohibition against assisted suicide so that she could control the circumstances, timing, and manner of her death. She wanted to be able to enroll the assistance of a physician to help her commit suicide when she so chose.

Ms. Rodriguez advanced three arguments in support of her position: first, that the provision of the *Criminal Code* infringed her right to life, liberty, and security of the person; second, that the provision constituted “cruel and unusual treatment or punishment”; and, finally, that it violated the equality guarantee contained in section 15 of the *Charter*. By a bare majority (5-4) the Supreme Court of Canada rejected Ms. Rodriguez’s challenge.^{lxxv}

(i) SECURITY OF THE PERSON

(a) THE MAJORITY

The majority concluded that while the *Criminal Code* impinged on a *Charter*-protected security interest of a person, the deprivation

of that security interest was not contrary to principles of fundamental justice.^{lxxvi} Writing for the majority, Justice Sopinka posed the following threshold question:

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... 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?^{lxxvii}

The starting point in answering this question, and especially in the identification of the content of "security of the person," was the *Morgentaler (No.2)* decision, which Justice Sopinka regarded as encompassing "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."^{lxxviii} Implicitly rejecting any principle of the absolute sanctity of life, the majority found that s.241 (b) of the *Criminal Code* deprived Ms. Rodriguez of autonomy over her person and caused her physical pain and psychological stress in a manner which impinged on the security of her person.^{lxxix}

The majority went on to find, however, that this deprivation of security of the person was in accordance with the principles of fundamental justice. What is a principle of fundamental justice? Writing for the majority, Justice Sopinka stated:

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 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.^{lxxx} (emphasis added)

The majority then employed the following reasoning. While respect for human dignity is one of the underlying principles upon which Canadian society is based, it is not, in itself, a principle of fundamental justice.^{lxxxi} The state's interest in any issue is an appropriate consideration in recognizing principles of fundamental justice.^{lxxxii} Where the deprivation of the right in question does little or nothing to enhance the state's interest, a breach of fundamental justice will occur since *the individual's rights will have been deprived for no valid purpose.*^{lxxxiii} This means that the issue of fundamental justice in the case of assisted suicide is whether the blanket prohibition on assisted suicide is "arbitrary or unfair, and 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."^{lxxxiv} The court concluded that a rule against assisted suicide was not arbitrary:

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's 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.^{lxxxv}

In reviewing the factors supporting this conclusion, the court started by stating that the principle of the sanctity of life is no longer seen to require that all human life be preserved at all costs, or, in other words, that the principle of sanctity of life is not absolute.^{lxxxvi} The court then reviewed the jurisprudence in other countries, prior Canadian Law Reform Commission reports, and legislation in other countries to conclude "...that a blanket prohibition on assisted suicide similar to that in section 241 is the

norm among Western democracies, as such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights.^{lxxxvii} Continuing its focus on the practice of other countries, the majority stated:

What the preceding review demonstrates is that Canada and other Western democracies recognize and apply the principles 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.^{lxxxviii}

The court highlighted, and viewed as important, the distinction between “active” and “passive” forms of treatment, resting, as they do, on the issue of intent. Yet the court then relied upon the absence of “consensus to the contrary” to guide its inquiry into principles of fundamental justice:

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 that we must be careful not to undermine the institutions that protect it.^{lxxxix}

(b) THE DISSENTING OPINIONS

Two of the dissenting judges, Justices McLachlin and L’Heureux-Dubé, viewed the case as one about the manner in which the state may limit the right of a person to make decisions about her body under section 7 of the *Charter*.^{xc} In concluding that section 241 (b) of the Criminal Code violated section 7 of the *Charter*, these two justices rested their starting point squarely on the

reasoning in *Morgentaler* (No. 2):

In my view, the reasoning of the majority in *R. v. Morgentaler*...is dispositive of the issues on this appeal. In the present case, Parliament has put into force a legislative scheme which does not bar suicide but criminalizes the act of assisting suicide. The effect of this is to deny to some people the choice of ending their lives solely because they are physically unable to do so. This deprives Sue Rodriguez of her security as a person (the right to make decisions concerning her own body, which affect only her own body) in a way that offends the principles of fundamental justice, thereby violating s.7 of the *Charter*. The violation cannot be saved under s.1. This is precisely the logic which led the majority of this Court to strike down the abortion provisions of the *Criminal Code* in *Morgentaler*. In that case, Parliament had set up a scheme authorizing therapeutic abortion. The effect of the provision was in fact to deny or delay therapeutic abortions to some women. This was held to violate s.7 because it deprived some women of their right to deal with their own bodies as they chose, thereby infringing their security of the person in a manner which did not comport with the principles of fundamental justice. Parliament could not advance an interest capable of justifying this arbitrary legislative scheme, and, accordingly, the law was not saved under section 1 of the *Charter*.^{xci}

These justices described the content of “security of the person” as “an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body.”^{xcii}

In dealing with the content of the “principles of fundamental justice” against which any deprivation of security of the person must be measured, Justice McLachlin examined such principles as follows:

This brings us to the next question: What are the principles of fundamental justice? They are, we are told, the basic tenets of our legal system, whose function is to ensure that state intrusions on life, liberty and security of the person are effected in a manner which comports with our historic, and evolving, notions of fairness and justice.... Without defining the entire content of the phrase “principles of fundamental

justice,” it is sufficient for the purposes of this case to note that a legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under s.7 of the *Charter* if a limit is arbitrary. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation. This was the foundation of the decision of the majority of this court in *Morgentaler*.^{xci}

The question then posed by this minority was whether a reasonable justification could be advanced for distinguishing between physically able persons, for whom there is no criminal prohibition against ending their lives, and the physically unable person, who is not allowed to do so. The minority regarded it as inappropriate to consider any “floodgates argument” in an analysis under s.7; such a concern, in their view, should be dealt with under the s.1 analysis. To ask that Ms. Rodriguez serve as a “scapegoat” to a slippery slope argument, in the view of these justices, was not fair: “In short, it does not accord with the principles of fundamental justice that Sue Rodriguez be disallowed what is available to others merely because it is possible that other people, at some other time, may suffer, not what she seeks, but an act of killing without true consent.”^{xci}

The members of this minority did not consider it proper to take into account a societal interest in ascertaining the principles of fundamental justice.^{xci} They also rejected the notion of “sanctity of life”:

Certain of the interveners raised the concern that the striking down of s.241 (b) might demean the value of life. But what value is there in life without the choice to do what one wants with one’s life, one might counter. One’s life includes one’s death. Different people hold different views on life and on what devalues it. For some, the choice to end one’s life with dignity is infinitely preferable to the inevitable pain and diminishment of a long, slow decline. Section 7 protects that choice against arbitrary state action which would remove it.^{xci}

While Justices McLachlin and L’Heureux-Dubé recognized that there existed some legitimate fear that the absence of an absolute

prohibition might result in some involuntary deaths of the aging and disabled, they viewed the existing provisions of the *Criminal Code* on homicide and counseling suicide as providing considerable protection.^{xcvii} In addition, they thought such provisions of the *Criminal Code* could be supplemented by a further stipulation requiring court orders to permit the assistance of suicide in any particular case—a judge would have to be satisfied that consent was freely given with full appreciation of all of the circumstances.^{xcviii} They concurred with the remedy proposed by the Chief Justice.

(ii) CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT

The majority of the court rejected the argument that the *Criminal Code* prohibition on assisted suicide constituted “cruel and unusual treatment or punishment” on the grounds that while “treatment” may include that imposed by the state in a context other than that of a penal nature, a mere prohibition by the state of certain action cannot constitute “treatment” under section 12 of the *Charter*.^{xcix}

(iii) SECTION 15—THE EQUALITY GUARANTEE

(a) THE DISSENT

Chief Justice Lamer concluded that section 241 (b) of the *Criminal Code* infringed the guarantee of equality contained in section 15 (1) of the *Charter* in that persons with disabilities “who are or will become unable to end their lives without assistance are discriminated against...since, unlike persons capable of causing their own deaths, they are deprived of the option of choosing suicide.”^c Such an infringement, in his view, could not be saved under s.1 of the *Charter*. The Chief Justice thought it clear that the *Criminal Code* created a distinction, or inequality, in that it prevents persons who are, or will become, incapable of committing suicide without assistance from choosing that option in accordance with the law, whereas those capable of ending their lives unassisted may decide to commit suicide without contravening the law.^{ci} The Chief Justice recognized that while this may not

have been the intent of section 241 (b) of the *Criminal Code*, it was its effect and therefore the source of inequality.

In accordance with the principles of *Charter* equality analysis, the Chief Justice moved on to consider whether this legislative distinction constituted a “disadvantage or burden,” giving rise to the application of section 15 of the *Charter*. He concluded that it did. The advantage of which the appellant was deprived was not the option of committing suicide as such, but the deprivation of “the right to choose suicide, of her ability to decide on the conduct of her life herself.” Whether the right to choose suicide could be described as an advantage should be answered “without reference to the philosophical and theological considerations fueling the debate on the morality of suicide or euthanasia. [The court] should consider the question before it from a legal perspective...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.”^{cii} As a result, and “without expressing any opinion on the moral value of suicide,” the Chief Justice was “forced to conclude” that the fact that persons unable to end their own lives could not choose suicide because they do not legally have access to assistance was “in legal terms” a disadvantage.^{ciii}

Finally, the Chief Justice considered whether this disadvantage was based on a “personal characteristic” covered by s.15 of the *Charter*. The Chief Justice had no difficulty with this branch of the test. Since he regarded the differential treatment by the legislation as being on account of the appellant’s physical disability, the differential treatment was based upon a personal characteristic in respect of which the *Charter* prohibited discrimination.^{civ} Accordingly, the equality guarantee had been infringed.

Turning to whether this infringement was saved under s.1 of the *Charter*, the Chief Justice acknowledged that the objective underlying s. 241 (b) of the *Criminal Code* was clearly pressing and substantial, in that it sought to protect vulnerable people from the intervention of others in decisions respecting the planning and commission of the act of suicide, and, further, that the prohibition

of assisted suicide was rationally connected to that objective.^{cv}

The Chief Justice concluded, however, that the legislation did not “minimally impair” Ms. Rodriguez’s rights for two reasons. First, the fear of a “slippery slope” could not justify the over-inclusive reach of the *Criminal Code* to encompass not only people who may be vulnerable to the pressures of others but also persons with no evidence of vulnerability.^{cv} Further, the Chief Justice remained “unpersuaded by the government’s apparent contention that it is not possible to design legislation that it is somewhere in between complete decriminalization and absolute prohibition.”^{cvii}

In the result, the Chief Justice was prepared to create a “constitutional exemption” from s.241 (b) of the *Criminal Code* for Ms. Rodriguez and for others in order to enable them to seek the assistance of others to commit suicide, provided that certain conditions were met:

1. the exemption be sought by way of application to a court;
2. a treating physician and independent psychiatrist certify that the person is competent to make the decision to end their own life and that the decision has been made freely and voluntarily;
3. the physician certifies that the person will become physically incapable of committing suicide unassisted;
4. access be given to the regional coroner to the person while she or he was being so assessed;
5. the person be examined daily by a physician after certification to ensure she does not evidence any change in her intention to end her life;
6. no one may assist in the attempt to commit suicide after the expiration of 31 days from the date of the first certification; and,
7. the act of causing the death of the person must be that of the person herself, and not of anyone else.^{cviii}

(b) THE MAJORITY

The majority, following the judgment of the Chief Justice, was prepared to assume that s.241 (b) of the *Criminal Code* infringed the equality guarantee in s.15 of the *Charter*, but the majority considered the provision was saved by s.1 of the Charter because (1) the provision had a “pressing and substantial legislative objective” grounded in the respect for, and the desire to protect, human life, (2) was rationally connected to the purpose of

protecting individuals against the control of others over their lives, and (3) there existed a substantial consensus among Western countries that a prohibition, without exception, was the best approach to protecting life and those who are vulnerable in society.^{ci^x} Finally, since assisted suicide is a “contentious” and “morally laden” issue, the courts must accord Parliament some flexibility in approaching the issue and, in the case of section 241 (b) of the *Criminal Code*, Parliament had “a reasonable basis for concluding that it had complied with the requirement of minimal impairment.”

C. REPORT OF THE SPECIAL SENATE COMMITTEE
ON EUTHANASIA AND ASSISTED SUICIDE

The *Rodriguez* decision generated a nation-wide debate on the issue of assisted suicide, prompting the Senate of Canada to strike a special committee to examine and report upon the legal, social, and ethical issues relating to euthanasia and assisted suicide. The committee held extensive public hearings across the country and in June 1995 released its report, entitled *Of Life and Death*. Although a majority of the committee recommended no change to the *Criminal Code* provisions prohibiting assisted suicide and euthanasia, the Report opened the door to further initiatives to weaken the prohibitions against assisted suicide and euthanasia.

While the committee recommended that no changes be made to the prohibitions against assisting suicide, at the same time it recommended that research be undertaken into how many are requesting assisted suicide, why it is being requested, and whether there are any alternatives that might be acceptable to those who are making the request.^{cx} A minority of the committee recommended that an exemption be made to section 241 (b) of the *Criminal Code* to permit assisted suicide “under clearly defined safeguards.” The safeguards would include ensuring the competence of the individual, requiring that an individual be suffering from an irreversible illness, confirming that the request be “free and informed,” and requiring that a healthcare

professional assess and certify that the conditions have been met.^{cxix}

Although the committee also recommended that euthanasia (voluntary, non-voluntary, and involuntary) remain a criminal offense, it suggested a significant softening in the accompanying criminal sanctions. Involuntary euthanasia^{cxii} would continue to be treated as murder under the *Criminal Code*, but the committee recommended amendments to provide for less severe penalties in cases of non-voluntary euthanasia where “there is the essential element of compassion or mercy.” To implement this change it proposed creating a third category of murder that would not carry a mandatory life-sentence or, alternatively, creating a separate offense of compassionate homicide carrying a less severe penalty.^{cxiii}

In the case of voluntary euthanasia, the committee was split, with the majority recommending amendments to the *Criminal Code* allowing for less severe penalties where there is an essential element of compassion or mercy, but with the minority recommending that voluntary euthanasia be permitted for competent individuals who are physically incapable of committing assisted suicide.^{cxiv}

Since the publication of the Senate’s Report, Parliament has not passed any legislation amending the *Criminal Code* to implement any of the recommendations of the Committee. However, the Committee’s recommendation about lessening the penalties in cases of non-voluntary euthanasia was effectively enacted by the courts in the *Latimer* case.

D. LATIMER CASE

In October 1993 Tracy Latimer, who was 12 years old, was suffering from severe cerebral palsy. She was quadriplegic and immobile, save for some slight head and facial movements. Tracy had 5 or 6 seizures each day, was unable to sit up on her own, had to be spoon-fed, and could not communicate except to laugh or cry. A dislocated right hip caused her considerable pain. Tracy was scheduled to undergo surgery in November 1993 to deal with

the dislocated hip.^{cxv}

Tracy's family lived on a farm and provided her with constant care. Between July and October 1993 she was placed in a group home in a nearby town to provide some rest for the family. The family also had applied for her permanent placement at the group home. On October 12, 1993 a social worker spoke with Mr. Robert Latimer, her father, to ascertain more details of the application. Latimer told her that the application was not urgent, and that if there was any immediate opening at the home, he was not sure if they wanted a placement.^{cxvi}

On October 24, 1994 Latimer killed Tracy by placing her in a pick-up truck, connecting a hose to the exhaust pipe, running the pipe into the truck's cab, and turning on the engine. After she died of carbon monoxide poisoning, Latimer placed her back in bed. Tracy was discovered by her mother when she returned from church.^{cxvii}

About two hours after Tracy's death, Latimer called the police and advised them that Tracy had passed away in her sleep. Latimer repeated this story later the same day to a police officer and coroner who attended the farm. Suspecting a possible homicide, the police took forensic samples which revealed that Tracy's blood was "saturated with carbon monoxide." On November 4, 1993 the police searched the Latimer farm and arrested Latimer. During police questioning Latimer admitted that he had killed Tracy and described how her death occurred. Latimer was charged with first-degree murder.^{cxviii}

Although Latimer did not testify at his trial, he described his motive in killing his daughter during an interview with the police:

She's been in pain for years. Ever since she was born she's had trouble.... She had an operation a year ago in August to straighten her back. Put rods in. Prior to that her hip was dislocated—intermittent. So they operated on her back. They knew there would be one on her hip. But the hip was secondary, didn't sound that serious. Then since May or June almost full-time dislocated. Every time you moved her there was pain. So the operation for the hip was planned for this time of year, the scheduling date was for the 12th of October with an orthopaedic surgeon

in Saskatoon, and they scheduled it for today. It was more complicated than we had expected. So we just couldn't see another operation. She'll be confined to a cast for I don't know what time. So I felt the best thing for her was that she be put out of pain.^{cxxix}

Latimer was convicted at his trial of second-degree murder, and the presiding judge imposed the mandatory sentence of life imprisonment without eligibility for parole for 10 years.^{cxxx}

In a unanimous decision the Saskatchewan Court of Appeal upheld Latimer's conviction, rejecting Latimer's assertion that he had the legal right to decide to commit suicide for his daughter by virtue of her complete absence of physical and intellectual ability and his assertion that the defense of necessity should have been left to the jury.^{cxxxi} The court split (2-1) on Latimer's appeal from his sentence. Latimer did not challenge the constitutional validity of the minimum sentence provisions of the *Criminal Code*, but he argued that his circumstances differed so fundamentally from the vast majority of murder cases that he should be granted a "constitutional exemption" from the minimum punishment.

The majority rejected Latimer's argument that the minimum ten-year sentence without parole would infringe his right of "life, liberty, and security of the person" guaranteed by s.7 of the *Charter* or offend against the prohibition against "cruel and unusual treatment or punishment" contained in s.12 of the *Charter*. The majority held that the law would not countenance Latimer assuming the role of a surrogate decision-maker to decide whether or when to take the life of another person. Justice Tallis stated:

Our law does not authorize such surrogate decision-making based on the assessments of the personal worth or social utility of another's life or the value of that life to the individual involved or to others. Our society, through its criminal law, may properly decline to make judgments about the quality of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life. Surrogate decision-makers are not entitled to arrogate to themselves the life and death decisions under review in this case.^{cxxxi}

While it was open to Parliament to modify the existing law by establishing sentencing criteria for “mercy” killing, the majority stated that it was not open to the courts to pass on the wisdom of Parliament with respect to the range of penalties to be imposed on those found guilty of murder.^{cxxiii}

A dissenting opinion on the sentencing was issued by the Chief Justice of Saskatchewan, who was prepared to grant a constitutional exemption to Latimer from the mandatory sentence.

In finding that the minimum sentence was disproportionate to what was appropriate, the Chief Justice focused on the low degree of criminal culpability present in Latimer’s case, and in particular the motives of Latimer in killing his daughter. The Chief Justice stated:

It is also noteworthy that [Latimer] resolved to kill Tracy on the day (12th October) he received word that Tracy would need yet another painful operation. On that very day [Latimer] received another important telephone call. The social worker who worked on Tracy’s case offered, in effect, to place Tracy in a nursing home. [Latimer] obviously reasoned that while it may relieve him and the family from having to care for Tracy in the family home, the placement in the nursing home would not relieve her pain. [Latimer] therefore declined the offer of a placement.

Those circumstances are strong indicators that [Latimer] was obsessed with Tracy’s pain. It is a fair inference and an important one to keep in mind that she was not put into her father’s truck because she was disabled. She was put there because of her pain, something very different from her disability. She was put there because her father loved her too much to watch her suffer. While the killing was a purposeful one, it had its genesis in altruism and was motivated by love, mercy, and compassion, or a combination of those virtues, generally considered by people to be life-enhancing and affirmative.

As for the physical components of the act, they did not produce a violent, painful killing. The act showed no heinousness or abnormal or aberrant behaviour. Rather, the act was committed in a gentle, painless and compassionate way.^{cxxiv}

The Chief Justice did not indicate what sentence he considered would be appropriate; he called for further submissions.

Latimer appealed his conviction to the Supreme Court of Canada on the basis that the police had failed to inform him of his

constitutional right to counsel when arrested, and that Crown counsel at the trial had interfered with the jury. The Supreme Court of Canada allowed the appeal, set aside Latimer's conviction and ordered a new trial.^{cxxv} The court concluded that Crown counsel's administration of a questionnaire to potential jury members in advance of the trial constituted a flagrant abuse of process and interference with the administration of justice.^{cxxvi} The Supreme Court of Canada explicitly stated that its decision was not "...about the legality and morality of mercy killing, nor is it directly about Mr. Latimer's guilt or innocence."^{cxxvii}

At the new trial, the jury found Latimer guilty of second-degree murder.^{cxxviii} The trial judge, however, granted Latimer a constitutional exemption from the minimum sentence prescribed by the *Criminal Code* on the basis that a ten-year minimum sentence without parole infringed Latimer's right against cruel and unusual punishment guaranteed under s.12 of the *Charter*. In reaching that result, the trial judge concluded that the minimum sentence was "grossly disproportionate" to the offense committed,^{cxxix} and basically followed the reasons given by Chief Justice of Saskatchewan in his dissenting opinion.^{cxxx}

In reaching his sentencing decision, the trial judge commented on the gravity of Mr. Latimer's offense in the following language:

Mr. Latimer's moral culpability in killing his daughter can only be placed on that scale of one to ten by briefly reviewing what happened, including how and why he did it...

As I indicated earlier, it is my opinion that the evidence establishes that Mr. Latimer was motivated solely by his love and compassion for Tracy and the need—at least in his mind—that she should not suffer any more pain. The decision he made was in clear conflict with the law and he knew it but he did not seem to care as long as he accomplished his goal.

There are different ways of characterizing his decision to take Tracy's life. The Court of Appeal saw him as 'assuming the role of a surrogate decision-maker' who then decided to terminate her life. I would characterize it by saying that he (and his wife) became the surrogates of Tracy at her birth and that 12 years later he decided when faced with the despairing news that her pain would continue unremitting that he must do his duty as her father to relieve her of that prospect. It is significant in my opinion that the jurors indicated through the questions submitted to

the court that they too felt he should not have killed Tracy but they sympathized to a significant degree with why he had done it. I repeat again that in my opinion the evidence does not in any way suggest that he killed his daughter because she was so severely disabled. It is admittedly a difficult task to prove what motivates a person to carry out such a grave act as murder that was not somehow related to self-interest, malevolence, hate, or violence. But in my view of the evidence presented in this case, which is for the most part clear and uncontradicted, we have that rare act of homicide that was committing for caring and altruist reasons. That is why, for want of a better term, this is called compassionate homicide.

It is therefore my conclusion that Mr. Latimer's place on the scale of culpability I spoke of is very near the low end.^{cxxxii}

The trial judge then sentenced Latimer to two years of imprisonment. Latimer was quickly released on bail because the Crown filed an appeal, and Latimer filed a cross-appeal to the Saskatchewan Court of Appeal.

V. SUMMARY

What general observations can be made about the approaches by Canadian courts and legislatures to life issues? I offer the following general comments:

1. Canadian courts have rejected any principle of the absolute sanctity of life and increasingly look for direction and guidance towards the "consensus" or "norm" on life issues as reflected by popular opinion within Canada and the legislative practice in other countries. The Supreme Court of Canada's movement away from a principle of sanctity of life is incremental, and the court appears reluctant to move any more quickly than legislative developments in other countries. At the same time, its reliance on "consensus" and "norm" clearly indicates that the Court will be prepared to follow movements in other countries towards the decriminalization of practices which terminate life.

2. The Supreme Court of Canada has doggedly insisted on separating "legal" issues from the influences of medicine, science, morality, and philosophy in reaching its decisions. With all due respect to our highest court, it does not appear to have

developed a principled approach to its “normative” task of deciding when and how the law will regulate decisions which end life. Indeed, the main component of its “normative” task appears to involve no more than a detailed review of the “consensus” and “norm” on any particular issue at the time it is presented to the Court.

3. The conceptual framework in which the Supreme Court of Canada analyzes these legal issues rests upon a broad conception of individual autonomy with respect to decisions affecting one’s own body, whatever they may be.

4. Canadian trial and appellate courts increasingly appear prepared to institutionalize a category of “compassionate murder” by creating constitutional exemptions to penalties prescribed in the *Criminal Code*. 5. On issues relating to the legal status of the unborn child, Canadian courts continue to state that changes in the area may be made by legislatures. Yet, at the other end of life’s dominion, the courts increasingly erode legislative sanctions by creating constitutional exemptions.

6. In all of this, for the better part of the decade, the federal Parliament has adopted a policy of silence and inaction in either direction, reflecting an all too frequent reluctance by Canadian legislatures to deal with any controversial social issues and a desire to leave policy-making in these areas to the hands of the courts.

NOTES

i. Background paper for a panel discussion entitled “Life Issues in Canada: Retrospect and Prospect” at *Life and Learning VIII*.

ii. *Constitution Act*, 1867, s. 91 (27).

iii. R.S.C. 1985, c. C-46.

iv. S.C. 1960, c. 44.

v. *Constitution Act*, 1982, Part I.

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- vi. *Ibid.*, s.1.
- vii. *Criminal Code*, s.287.
- viii. *Morgentaler v. The Queen* (1975), 53 D.L.R. (3d) 161 (S.C.C.).
- ix. *Morgentaler, Smoling and Scott v. The Queen* (1988), 44 D.L.R. (4th) 385 (S.C.C.).
- x. *Ibid.*, per Dickson, C.J.C., at p. 401.
- xi. *Ibid.*, p. 401.
- xii. *Ibid.*, p. 427.
- xiii. Per Chief Justice 44 D.L.R. (4th) at p. 402.
- xiv. *Ibid.*, p. 409.
- xv. *Ibid.*
- xvi. *Ibid.*, p. 410.
- xvii. *Ibid.*, p. 421.
- xviii. *Ibid.*, p. 446.
- xix. *Ibid.*, p. 450.
- xx. *Ibid.*, p. 451.
- xxi. *Ibid.*, p. 421-22.
- xxii. *Ibid.*, p. 486.
- xxiii. *Ibid.*, p. 490.
- xxiv. *Ibid.*, p. 491.
- xxv. *Ibid.*, pp. 498-99.
- xxvi. *Borowski v. Attorney General of Canada* (1983), 4 D.L.R. (4th) 112 (Sask. Q.B.), at p. 130.
- xxvii. *Ibid.*, p. 131.
- xxviii. *Borowski v. Attorney General of Canada* (1989), 57 D.L.R. (4th) 231 (S.C.C.).
- xxix. *Ontario (Attorney General) v. Dieleman* (1994), 117 D.L.R. (4th) 449

(Ont. Ct. (Gen. Div.)).

xxx. *Ibid.*, p. 487.

xxxii. *Ibid.*, pp. 487h-488h.

xxxiii. *Daigle v. Tremblay*, [1989] 2 S.C.R. 530.

xxxiiii. *Ibid.*, at pp. 552-53.

xxxv. *Ibid.*, at p. 553.

xxxvi. *Ibid.*, at p. 555.

xxxvii. *Ibid.*, at p. 560.

xxxviii. *Ibid.*, at p. 562.

xxxix. *Ibid.*, at p. 564.

xl. *Ibid.*, at pp. 566-70.

xli. *Ibid.*, at p. 571.

xlii. [1991] 1 S.C.R. 489.

xliii. *Ibid.*, p. 494.

xliv. Now s. 220.

xlv. Now s. 223 (1).

xlvi. *Ibid.*, p. 503.

xlvii. *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* (1997), 152 D.L.R. (4th) 193 (S.C.C.).

xlviii. *Ibid.*, pp. 220-21.

xlix. (1996), 138 D.L.R. (4th) 238 (Man. Q.B.).

l. (1996), 138 D.L.R. (4th) 254 (Man. C.A.).

I. S.C.C., *supra*, p. 224, and *Maclean's Magazine* (July 1, 1997) at p. 94.

li. Justices Major and Sopinka.

lii. S.C.C., *supra*, pp. 219-20.

liii. (1987), 21 *Valparaiso University Law Review* 563.

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- liv. *Ibid.*, p. 235, para. 111.
- lv. *Ibid.*, p. 236, para. 114.
- lvi. *Ibid.*, pp. 237-38, para. 118-20.
- lvii. *Ibid.*, para. 121.
- lviii. *Ibid.*, pp. 236-37, para. 116.
- lix. *Neilson v. Kamloops (City)*, [1984] 2 S.C.R. 2.
- lx. *Ibid.*, p. 210, para. 36.
- lxi. *Winnipeg Child and Family Services*, p. 210, para. 37.
- lxii. *Ibid.*, p. 213, para. 45.
- lxiii. *Ibid.*, p. 202, para. 12.
- lxiv. *Ibid.*, pp. 204-05, para. 20.
- lxv. *Daigle, supra*, at pp. 552-53.
- lxvi. *Winnipeg Child and Family Services*, pp. 212-13, para. 43.
- lxvii. *Ibid.*, p. 206, para. 25.
- lxviii. *Montreal Tramways Co. v. Léveillé*, [1993] S.C.R. 456.
- lix. (1997), 148 D.L.R. (4th) 332 (N.B.C.A.).
- lxx. *Dobson v. Dobson* (1997), 148 D.L.R. (4th) 332 (N.B.C.A.), affirming (1996), 143 D.L.R. (4th) 189 (N.B.Q.B.).
- lxxi. *Dobson v. Dobson*, Factum of the Appellant, para. 19 and 20.
- lxxii. *Ibid.*, para. 31.
- lxxiii. *Ibid.*, para. 42.
- lxxiv. *Criminal Code*, s. 231.
- lxxv. *Rodriguez v. British Columbia (Attorney General)* (1993), 107 D.L.R. (4th) 342 (S.C.C.).
- lxxvi. *Ibid.*, p. 387.
- lxxvii. *Ibid.*, p. 389a-c.
- lxxviii. *Ibid.*, p. 391a.

lxxix. *Ibid.*

lxxx. *Ibid.*, p. 393c-d.

lxxxi. *Ibid.*, p. 394f-g.

lxxxii. *Ibid.*

lxxxiii. *Ibid.*, p. 396c.

lxxxiv. *Ibid.*, p. 396e.

lxxxv. *Ibid.*, pp. 396h-397a.

lxxxvi. *Ibid.*, p. 397c-d.

lxxxvii. *Ibid.*, p. 404d.

lxxxviii. *Ibid.*, p. 404f-g.

lxxxix. *Ibid.*, p. 406c-d.

xc. These justices viewed s.7 as protecting "...the right of each person to make decisions concerning his or her body." *Ibid.*, p. 415h.

xc. *Ibid.*, p. 415b-f.

xcii. *Ibid.*, pp. 415h-416a.

xciii. *Ibid.*, pp. 416h-417b.

xciv. *Ibid.*, p. 418d.

xcv. *Ibid.*, p. 418e-f.

xcvi. *Ibid.*, p. 420b-c.

xcvii. *Ibid.*, p. 422e-f.

xcviii. *Ibid.*, p. 422g-h.

xcix. *Ibid.*, p. 409a.

c. *Ibid.*, p. 359a.

ci. *Ibid.*, p. 363b-c.

cii. *Ibid.*, p. 366a-b.

ciii. *Ibid.*, pp. 366h-367a.

civ. *Ibid.*, p. 367f-g.

cv. *Ibid.*, pp. 371f-372h.

cvi. *Ibid.*, p. 376d-e.

cvii. *Ibid.*, p. 376d-e.

cviii. *Ibid.*, pp. 384g-385c.

cix. *Ibid.*, p. 410d-h.

cx. *Report of the Special Senate Committee on Euthanasia and Assisted Suicide* (Ottawa: Minister of Supply and Services of Canada, 1995) at p. 74.

cxii. *Ibid.*, p. 74.

cxii. The Committee defined euthanasia as involuntary "...when it is done without the knowledge or the wishes of a patient either because he or she has always been incompetent, or is now incompetent and has left no advanced directive." According to the Committee, an example would be when a "daughter smothers her incompetent father who is suffering from advanced ALS, but who did not make his wishes known while he was competent" (p. 75).

cxiii. *Ibid.*, p. 88.

cxiv. *Ibid.*

cxv. *R. v. Latimer* (1995), 126 D.L.R. (4th) 203 (Sask. C.A.) at pp. 208h-209d.

cxvi. *Ibid.*, p. 209f-h.

cxvii. *Ibid.*, p. 209h.

cxviii. *Ibid.*, pp. 210a-211b.

cxix. *Ibid.*, p. 215b-c.

cxx. *Ibid.*, p. 208g.

cxxi. *Ibid.*, pp. 211g and 232e-235c.

cxxii. *Ibid.*, p. 241g-h.

cxxiii. *Ibid.*, p. 242e-f.

cxxiv. *Ibid.*, pp. 252f-253b.

cxxv. *Latimer v. The Queen* (1997), 142 D.L.R. (4th) 577 (S.C.C.).

cxxvi. *Ibid.*, p. 594e.

cxxvii. *Ibid.*, p. 580f.

cxxviii. *Re Latimer and The Queen* (1997), 121 C.C.C. (3d) 326 (Sask. Q.B.).

cxxix. *Ibid.*, p. 333.

cxx. *Ibid.*, p. 337.

cxxxi. *Ibid.*, pp. 341-44.