

VANCOUVER

DEC 21 2012

**COURT OF APPEAL
REGISTRY**

Court of Appeal File No. CA040079

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE
JUDGMENT OF THE HONOURABLE MADAM JUSTICE LYNN SMITH
PRONOUNCED ON THE 15TH DAY OF JUNE, 2012

BETWEEN:

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

RESPONDENTS
Appellants On Cross Appeal
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT
Respondent On Cross Appeal
(Defendant)

AND:

ALLIANCE OF PEOPLE WITH DISABILITIES, CANADIAN UNITARIAN COUNCIL,
FAREWELL FOUNDATION FOR THE RIGHT TO DIE, CHRISTIAN LEGAL
FELLOWSHIP, THE EVANGELICAL FELLOWSHIP OF CANADA, EUTHANASIA
PREVENTION COALITION AND THE EUTHANASIA PREVENTION COALITION OF
BC, COUNCIL OF CANADIANS WITH DISABILITIES AND CANADIAN ASSOCIATION
FOR COMMUNITY LIVING

INTERVENORS

FACTUM OF THE INTERVENOR THE EVANGELICAL FELLOWSHIP OF CANADA

Attorney General of Canada

Lee Carter, Hollis Johnson, Dr. William
Shoichet, the British Columbia Civil
Liberties Association and Gloria Taylor

DONNAREE NYGARD
Counsel for the Appellant
The Department of Justice
900 – 840 Howe Street
Vancouver, B.C. V6Z 2S9
Tel: 604.666.3049/Fax: 604.775.5942

**JOSEPH ARVAY, Q.C. and
ALISON LATIMER**
Counsel for the Respondents
Arvay Finlay
1320 – 355 Burrard Street
Vancouver, B.C. V6C 2G8
Tel: 604.689.4421/Fax: 1.888.575.3281

SHEILA TUCKER
Counsel for the Respondents
Davis LLP
2800 – 666 Burrard Street
Vancouver, B.C. V6C 2Z7
Tel: 604.643.2980/Fax: 604.605.3781

The Evangelical Fellowship of Canada

GEOFFREY TROTTER
Counsel for the Intervenor
Gudmundseth Mickelson LLP
2525 – 1075 West Georgia Street
Vancouver, B.C. V6E 3C9
Tel: 604.685.6272/Fax: 604.685.8434

INDEX

PART	PAGE
OPENING STATEMENT	- i -
PART I: STATEMENT OF FACTS.....	- 1 -
PART II: ERRORS IN JUDGMENT	- 1 -
PART III: ARGUMENT	- 1 -
a) The Sanctity of Life is a Core Principle of Canadian Constitutional and Criminal Law.....	- 1 -
b) The related <i>Charter</i> value of human dignity	- 5 -
c) The purpose of the impugned provisions is, at a minimum, to prohibit all consensual killing.....	- 6 -
d) The right to life does not include the right to be killed	- 7 -
e) The prohibition on consensual killings is fundamentally just	- 8 -
f) Section 15 and section 1.....	- 9 -
PART IV: NATURE OF ORDER SOUGHT.....	- 10 -
APPENDIX: ENACTMENTS RELIED UPON.....	- 11 -
Private Member's Bill C-300 An Act respecting a Federal Framework for Suicide Prevention (41st Parliament, 1st Session)	- 11 -
<i>Canadian Charter of Rights and Freedoms (Constitution Act, 1982</i> <i>being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11,</i> <i>preamble and ss. 1, 7, 15)</i>	- 14 -
<i>Criminal Code, R.S.C., 1985, c. C-46, ss. 25, 34, 35, 39-41.....</i>	- 15 -
International Covenant on Civil and Political Rights.....	- 19 -
United Nations Universal Declaration of Human Rights.....	- 20 -
LIST OF AUTHORITIES.....	- 21 -

OPENING STATEMENT

All human life has inestimable worth.

This proposition is the bedrock of civilized nations, and of Canada's Constitutional order. It is the animating principle of much of our criminal law.

The Supreme Court of Canada affirmed in *Rodriguez* that the sanctity of human life is a valid Parliamentary consideration under the *Charter*, and is in itself an animating *Charter* value. Derived from and consistent with the sanctity of human life is its twin *Charter* value of human dignity.

Ethically, morally, legally, and constitutionally, dying and killing are drastically different things. There can be such a thing as a good death. There is never such a thing as a good killing.

In the decision under review, Smith J. posited a constitutional right for Canadians to consent to their own killing.

It is an understatement to say that dying is hard – hard for the person who is dying, hard for their family, hard for their community. While on the one hand death can involve elements of love, culmination, satisfaction, and release, it can also involve pain, suffering, helplessness, and loss. That is indeed what death can be like.

But it is grievously misdirected compassion which posits killing as the antidote to what is hard about dying or, in the ultimate irony in the decision under review, as the way to uphold life. The very real difficulties on the path towards death do not violate human dignity. Killing does. The trial decision sows the seeds of the destruction of the very rights it claims to uphold.

Nothing in the *Charter* compels the legalization of private killings of our fellow citizens. That Rubicon has rightly never been crossed. It should not be crossed here.

PART I: STATEMENT OF FACTS

1. The Evangelical Fellowship of Canada ("EFC")¹ accepts the Statement of Facts as presented by the Attorney General of Canada ("AGC").

PART II: ERRORS IN JUDGMENT

2. The trial judge erred by: a) misconceiving the purpose of the impugned provisions; b) conflating death with killing; c) failing to give effect to the *Charter*² values of sanctity of human life and human dignity; d) interpreting sections 7 and 15 of the Charter contrary to these *Charter* values, and in a manner contrary to the sections' own purposes; e) engaging in a s. 1 analysis which incorporated all of the foregoing flaws.

PART III: ARGUMENT

a) The Sanctity of Life is a Core Principle of Canadian Constitutional and Criminal Law

3. Peter Hogg describes the Constitution as "a mirror reflecting the national soul" which "must recognize and protect the values of a nation."³ These values, both gleaned from the text of the *Charter* and used to give those rights a purposive interpretation, are often referred to as '*Charter* values'.

4. Perhaps the most fundamental *Charter* value is the sanctity of human life. This value was articulated forcefully in *Rodriguez*, the Canadian touchstone for the principle:

the sanctity of life ... is one of the three *Charter* values protected by s. 7. ...human life is sacred or inviolable (which terms I use in the non-religious sense described by Dworkin ... to mean that human life is seen to have a deep intrinsic value of its own).⁴

5. Intentional killing is anathema to the *Charter* value of the sanctity of human life. It is rightly condemned by our criminal law, which is the nation's fundamental statement of public policy and applied morality:

¹ The EFC is a national, interdenominational association of churches, church-related organizations, and educational institutions. It represents 40 Protestant denominations. Over 1.9 million Canadians are members or adherents of EFC affiliated organizations. EFC has intervened in 8 sanctity of life cases at the SCC, including *Rodriguez*.

² *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

³ Peter W. Hogg, *Constitutional Law of Canada* (5 ed., 2007; looseleaf) at p. 1; first quotation drawn from Cheffins and Tucker, *The Constitutional Process in Canada*.

⁴ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (QL) at paras. 125, 129 [*Rodriguez*]. See also the reasons of Smith J. below at para. 1306. [*Reasons*]

In truth the Criminal Law is fundamentally a moral system. It may be crude, it may have faults, it may be rough and ready, but basically it is a system of applied morality and justice. It serves to underline those values necessary or important to society. When acts occur that seriously transgress essential values, like the sanctity of life, society must speak out and reaffirm those values. This is the true role of criminal law.⁵

6. Society broadly recognizes that human life is *sui generis* in that it is not a personal possession to be bartered away at will, but rather constitutes a *sacred trust*.

Our society recognizes that morally, religiously, philosophically, human life merits special protection. This recognition of life's fundamental importance has often been expressed by the concept of the sanctity of human life. One expression of this concept is that because life is God given and we merely hold it in trust, we should not then interfere with it or put an end to it.⁶

7. The unique nature of human life as a sacred trust means that individual autonomy is subject to inherent limits in respect of intentional killing (even if 'consensual'). In considering claims akin to the Respondents', the Law Reform Commission of Canada concluded:

... the principle of self-determination should not confer a right on a third party to aid or abet a person to commit the act [of assisted suicide]... the new Criminal Code should continue to prohibit aiding suicide...⁷

8. The *Charter* value of the sanctity of human life is embraced by, among many others, the 1.9 million Canadians represented by EFC, who believe that human beings are created in the image of God and have inherent worth and dignity; that human life is sacred and must be valued, respected and protected throughout all its stages; and that we are but stewards of what God has entrusted to us – i.e. life is a sacred trust.

9. While the "deeper reason" for the EFC's embrace of these principles originates in sacred texts and theology, the EFC does not come to this court to assert the legal authority of a biblical text. Rather, the EFC comes to contribute to this court's articulation of the non-sectarian political ethic which arises from the convergence of the perspectives of diverse Canadians in respect of the issue before the court. As recently stated by the highly regarded Canadian philosopher, Charles Taylor:

⁵ Law Reform Commission of Canada, Report No.3 "Our Criminal Law" (1976) at p. 16.

⁶ Law Reform Commission of Canada, Working Paper No. 28, "euthanasia, aiding suicide and cessation of treatment" (1982) at pp. 3-4. [**LRCC Euthanasia**]

⁷ Law Reform Commission of Canada, Working Paper No. 28, "Some aspects of medical treatment and criminal law" (1982) at p. 13. [**LRCC Medicine and Criminal Law**]

... this political ethic can be and is shared by people of very different basic outlooks (what Rawls calls “comprehensive views of the good”). A Kantian will justify the rights to life and freedom by pointing to the dignity of rational agency; a utilitarian will speak of the necessity to treat beings who can experience joy and suffering in such a way as to maximize the first and minimize the second. A Christian will speak of humans as made in the image of God. They concur on the principles, but differ on the deeper reasons for holding to this ethic. **The state must uphold the ethic, but must refrain from favoring any of the deeper reasons.**⁸

10. Taylor’s view finds resonance in the text of the *Charter* and is affirmed by the Supreme Court of Canada in *Chamberlain*:

... nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the Charter itself establishes that “... Canada is founded upon principles that recognize the supremacy of God and the rule of law”.⁹

11. *Charter* values/rights must be interpreted in light of Canada’s and the *Charter*’s historical and philosophical context. That context certainly includes the Judeo-Christian tradition, of which the EFC is one of the recognized contemporary voices.

12. With that historical and philosophical context in mind, the majority in *Rodriguez* asked whether the *Charter* values of the sanctity of human life and human/“inherent dignity” (addressed further below) could co-exist with a narrowly circumscribed right for people like Ms. Rodriguez (and Ms. Taylor) to receive assistance in “terminat[ing] [their] own li[ves] in any circumstances” After a comprehensive historical, legislative, and policy analysis, the court held that “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” and certainly that “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 thrust of the *Rodriguez* court’s finding was that the lives of the

⁸ Butler, Habermas, Taylor, and West, *The Power of Religion in the Public Square* (New York: Columbia University Press: 2011), at p. 37 [*Taylor*]; see also p. 54 regarding the fact that there is no *a priori* reason or justification for favouring ‘non-religious’ views.

⁹ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (QL) at para. 137 per Gonthier J. in dissent, as adopted by the majority per McLachlin C.J.C. at para. 3. The “rule of law” has been used to similar effect, e.g. *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236 (QL) at p. 250 (para. 32).

sick and dying are as sacred as any other.¹⁰

13. The consensus articulated by the SCC went back in time to Aristotle; the specific criminal offence at issue dated back more than a century. Nothing has happened since *Rodriguez* to reverse the consensus. Instead, it has been repeatedly re-affirmed.

14. In the June 1995 Senate report *Of Life and Death*, the committee majority recommended against the decriminalization of either physician-assisted suicide or euthanasia. Their reasons included concerns about abuses and the ineffectiveness of safeguards, and went deeper to be rooted firmly in the sanctity of human life:

The members opposed to changing the existing legislation with respect to assisted suicide are **primarily concerned with maintaining the fundamental social value of respect for life. They feel that legalizing assisted suicide could undermine respect for life which they believe is the most universally accepted value in society. ... respect for life is a societal value that transcends individual, religious or diverse cultural values. ... Some of these members note that individual autonomy cannot be absolute because individuals need each other in order to realize their goals. ... while there are a small number of cases that cannot be dealt with adequately [with medical treatment], these are not sufficient to justify legalizing euthanasia because it could create serious risks for the most vulnerable and threaten the fundamental value of life in society.**¹¹

15. The majority recommendation in *Of Life and Death* has been consistently affirmed in Parliament. None of the nine private members' bills introduced since 1991 to repeal the impugned provisions have succeeded. The 2010 attempt failed 228-59.¹²

16. In tandem with its unwavering commitment to the prohibition of consensual killings, Parliament has focused on furthering the inestimable worth of human life through improved patient care at end of life through palliative care, and the prevention of suicide and elder abuse. These three topics figured in three Senate reports from 2000 to 2010,¹³ and the November 2011 report of the Canadian Parliamentary Committee on Palliative and Compassionate Care *Not to be Forgotten: Care of Vulnerable Canadians* which also recommended that the federal government establish a suicide prevention

¹⁰ quotations from paras. 129, 173; see also paras. 130, 150.

¹¹ Joint Appeal Book [JAB] pp. 4252-3, 4258; emphasis added

¹² *Reasons* paras. 109-112. Neither the non-governmental Royal Society of Canada nor the Quebec committee express the views of Parliament – the only entity with Constitutional competence over, and responsibility for, the impugned provisions.

¹³ *Reasons* paras. 701-707. See also *Veterans Suicide Prevention Framework* JAB p. 5724

secretariat. Throughout the report, human dignity is repeatedly linked to compassionate end-of-life care, not with consensual killing.¹⁴

17. One result of the 2011 report was Private Member's Bill C-300, *An Act respecting a Federal Framework for Suicide Prevention*, which passed in the House of Commons by a vote of 285:3, and received Royal Assent on December 14, 2012.

18. As a consistently re-affirmed *Charter* value, the sanctity of human life remains a core principle of Canadian Constitutional and Criminal Law.

19. The intervenor Christian Legal Fellowship explains how the sanctity of human life is supportive of the equality of all persons before the law and a medical ethical culture against killing. EFC adopts those submissions as the natural sequelae of the foregoing.

b) The related Charter value of human dignity

20. The *Rodriguez* court made clear that "Respect for human dignity underlies many of the rights and freedoms in the Charter" and that "respect for human dignity is one of the underlying principles upon which our society is based."¹⁵

21. As a correlate to the sanctity of human life, human dignity inheres in a person simply by virtue of their membership in the human family. In *R. v. Oakes* Dickson C.J.C. phrased the principle as "respect for the inherent dignity of the human person"¹⁶ Human dignity is not 'earned' through an existentialist exercise of autonomous decisions. It exists regardless of one's capacities.¹⁷

22. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights directly link "inherent dignity" with "inalienable rights".

23. It is accordingly an error to equate human dignity with unbridled individual autonomy. Rather, properly understood and interpreted in its historical and philosophical context, the *Charter* value of human dignity (and the right to life in s. 7, as addressed

¹⁴ Reasons para. 297; Joint Appeal Book p. 14498 ff. On human dignity, see particularly pages 14515, 14543-45, 14548, 14557.

¹⁵ Paras. 144, 145

¹⁶ [1986]1 S.C.R. 103 (QL) at p. 136 (para. 64).

¹⁷ From the Jewish and Christian perspectives, this flows from "the human person as the image of God": David Novak, *Natural Law in Judaism* (Cambridge: Cambridge U.P., 1998) pp. 167-8 and 172. This view is shared by many 'non-religious' worldviews: Taylor.

below) does not provide authority for a right to be killed. As human dignity is inherent, there is no such thing as a 'bad life' which can render killing 'good'. Intentional killing is a direct affront to life – the sole and sufficient condition for dignity to persist.

24. Thus, 'death with dignity' does not mean to be killed at the time of one's choosing, but rather to live one's remaining life with the inherent dignity of a human person, with such assistance as modern medicine can provide, and the option to decline unwanted medical treatment. Indeed, the 1995 Senate report stated:

... Dignity exists when one faces the final stages of life with a feeling of self-worth and with the care, solicitude and compassion...

c) The purpose of the impugned provisions is, at a minimum, to prohibit all consensual killing

25. The EFC adopts the submissions of the AGC as to the purpose of the impugned provisions as found by the SCC in *Rodriguez*,¹⁸ where the objective was linked to "the respect for and the desire to protect human life, a fundamental Charter value" (para. 186).

26. *Butler* does not assist the Respondents. *Rodriguez* was decided one year after *Butler*, the SCC clearly had the latter in mind and rightly did not consider the prohibition on consensual killing equivalent to "legal moralizing" about "dirt for dirt's sake".¹⁹ The *Rodriguez* court found that respect for life is a broadly held view even among those with no religious commitment.²⁰ It is a valid exercise of the criminal law power to prohibit what is anathema to the *Charter* value of the sanctity of life – i.e. intentional killing.

27. Respondents incorrectly assert that the "absolute protection of life is inconsistent with other provisions of the *Code* which justify and hence condone the taking of life". In fact, all *Code* sections cited are consistent with upholding the sanctity of life.²¹

¹⁸ AGC Factum paras. 41-43.

¹⁹ Respondents' Factum para. 52. *R. v. Butler*, [1992] 1 S.C.R. 452 (QL) at para. 79; See para. 80: "Moral disapprobation is recognized as an appropriate response when it has its basis in Charter values" – i.e. the sanctity of human life. *Malmo-Levine* is to similar effect.

²⁰ See for example Sopinka J's invocation of Dworkin at para. 129 of *Rodriguez*.

²¹ See Respondents' footnote 71. Sections 25, 34(2), and 35 of the *Code* permit the use of lethal force only to where necessary for someone to save their own life. Sections 34(1) and 39-41 permit only reasonable force and thus prohibit the taking of life except to preserve one's own life. Nowhere does the *Code* condone intentional killing. The Respondents in this case posit a right to consensual killings where no countervailing threat of death is being avoided. The avoidance of natural suffering cannot justify killing.

28. The *Charter* values which underpin the impugned provisions support the prohibition on all killing regardless of consent (s. 14) or request (s. 241(b)). Together these provisions protect all Canadians – not only the vulnerable like Tracy Latimer, but also the strong like Gloria Taylor, and even the organized crime associate who chooses (consents) to live outside the law but is nonetheless protected by the law from being targeted for killing.

29. Should the AGC's articulation be found too broad on this point, the EFC submits that the objective of the impugned provisions is the prohibition of all consensual killings.

30. Our Constitution and Criminal Law stakes the ground that neither circumstance, conduct, nor choice can make any person 'better off dead than alive.' Just as there is no such thing as "good polygamy", there is no such thing as a 'good killing'.²²

31. Where certain choices are clearly contrary to the shared ethic of the body politic – as in the case of intentional killings – the state is right to prohibit them. The question is not whether the prohibition on consensual killing is paternalistic (the educative function of the criminal law always is); the question is whether it is fundamentally just.

d) The right to life does not include the right to be killed

32. Section 7 of the Charter is, on its face, a life affirming right. It promises the enhancement and protection of life, not its removal. The *Rodriguez* majority held 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" and that "life as a value is engaged even in the case of the terminally ill who seek to choose death over life."²³

33. The trial judge erred by using life – a *Charter* value and enumerated right in s. 7 – as a basis for demanding the opposite of life: death (through killing by another), which is simultaneously the ultimate denial of liberty and security of the person. This interpretation of the *Charter* is internally contradictory and contrary to human dignity.

34. The trial judge also erred in accepting the Respondents' argument that if others are not authorized to kill them, they will go ahead and kill themselves even sooner, such

²² *Reference Re: Section 293*, 2011 BCSC 1588 at para. 1343 [CLF Authorities]. Killing is still killing even if the victim is 'going to die some time anyway' (all victims are).

²³ paras. 129 and 131.

that their s. 7 right to life is engaged.²⁴ First, such self-killing would be an independent act in which the state is not complicit. More fundamentally, Parliament has embraced the *Charter* value of the sanctity of life which seeks to prevent all suicides.

e) **The prohibition on consensual killings is fundamentally just**

35. The societal interests considered at the second stage of the s. 7 analysis²⁵ are the twin *Charter* values of the sanctity of life and human dignity.

36. *Charter* rights must be interpreted in light of each other; *a fortiori*, the constituent elements *within* a right must be interpreted in the same manner. Section 7 of the *Charter* cannot be interpreted in a way that liberty or security of the person are used to trump life through sanctioned killings. Indeed, the Respondents acknowledge at footnote 45 that “the three s. 7 interests have a natural hierarchy, with life being the most critical.”

37. The SCC in a similar context in *R. v. Latimer* stated “It is difficult, at the conceptual level, to imagine a circumstance in which the proportionality requirement could be met for a homicide.” This was found to be so in relation to a girl with an incurable congenital condition believed to cause her chronic pain and requiring several surgeries over many years. Tracy Latimer’s consent would not have changed this conclusion.²⁶

38. The plain wording of s. 7 and a consideration of the *Charter* values at play direct that it is never in a patient’s ‘best interest’ to be killed. ‘Consent’ is irrelevant. Being ‘denied’ that choice cannot engage the s. 7 liberty interest.²⁷ Killing is anathema to one’s human dignity; being denied the opportunity to be killed is not. The correct response to such a person is to ask how we can help them to live in the most dignified manner possible.²⁸

39. The Respondents’ analysis fails to grasp the nettle in this case: that ‘assisted suicide’ requires the involvement of another moral agent – another person – who will be committing the act of killing. As the Law Reform Commission succinctly stated: “[T]he legalization of euthanasia is unacceptable to the Commission because it would indirectly condone murder...” Our Criminal law, consistent with *Charter* values, declares that no

²⁴ Reasons, para. 1322.

²⁵ *Rodriguez* para. 147; Reasons para. 958

²⁶ *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1, at para. 40

²⁷ Reasons para. 1326; as to the ‘best interest’ error, see e.g. para. 339, 342, 358.

²⁸ e.g. the dignity therapy model: Chochinov Expert Report (Appeal Book, volume 19)

one – including the terminally ill – may label anyone, including themselves, as one whose “life ought to be extinguished”.²⁹

40. The Trial Judge correctly recognized that the risk of wrongful deaths is “inherent” in any permissive regime, and that that the “absolute prohibition” could be justified if the evidence from permissive jurisdictions showed significant abuses.³⁰ Her findings of fact showed exactly this – i.e. that no permissive jurisdiction has achieved consistent safeguard compliance.³¹ The existing prohibition is therefore fundamentally just.³² The Trial Judge’s *legal* conclusion at para. 1367 to the contrary (i.e. that safeguards would be sufficiently effective in Canada that the prohibition fails constitutional muster) is based on the unfounded leap of faith that Canada will be the first jurisdiction in the world to solve the compliance problems seen everywhere else, without experiencing any new ones.

41. The fact that palliative care is not a panacea does not change this result. There is no constitutional right to be free from pain. Parliament is taking action to enhance palliative care. The fact that medicine has limits does not give rise to a right to be killed.

42. The Respondents have not discharged their legal burden to establish that any remaining infringements of liberty or security of the person are contrary to the principles of fundamental justice.

f) Section 15 and section 1

43. The lynchpin of the Respondents’ s. 15 argument is the mistaken conflation of

²⁹ LRCC Euthanasia at p. 18; *Re Eve*, [1986] 2 S.C.R. 388 (QL) at para. 53.

³⁰ Reasons paras. 854, 1364, 1366.

³¹ Netherlands: 18% of all physician-assisted deaths were not requested (Reasons para. 475); in 17% of those cases the doctor decided unilaterally that “the decision was clearly in the patient’s best interest” (568). 20% of doctors did not respond (para. 472); compliance is still inadequate (656). That members of “vulnerable groups” may not be over-represented within those wrongfully killed is a red herring based on a misunderstanding of the purpose of the impugned provisions. The Trial Judge had doubt about compliance with the mental health referral requirement in Oregon (para. 649); at least 3 depressed people appear to have been accepted (670). Safeguards have been relaxed to permit babies to be euthanized in the Netherlands (484; see also Joint Appeal Book p. 2580). Blind people may choose to be killed in Switzerland (599).

³² Even if, as Respondents’ contend, ‘zero tolerance’ for wrongful killings is not the correct test, ‘greatly minimizing’ or ‘substantially minimizing’ abuse (Reasons paras. 883, 1240) is not sufficient when dealing with wrongful killings, particularly when in one study, 50% of terminally ill patients who were seriously considering euthanasia changed their minds over the next few months (Reasons para. 602).

suicide with killing. Suicide is a solitary act in its implementation (although not its effects). In stark contrast, physician-assisted 'suicide' is a social act where the doctor commits the act of killing in which all of society is complicit through legal sanction. Parliament, seeking to protect the inestimable worth of human life, has sought to prevent all suicide.

44. Attempted suicide was decriminalized precisely in order to try to save the lives of suicidal people by making them more willing to seek help, not to legitimize suicide, which the Law Reform Commission of Canada confirmed "remains an act which is fundamentally contrary to human nature." That is, the repeal was done with the intent of protecting life. Decriminalizing assisted suicide would have the opposite effect.³³

45. Killing the disabled does not ameliorate any disadvantage related to their disability, and is anathema to the *Charter* values – particularly human dignity – which animate s. 15. Prohibiting such killing perpetuates neither prejudice or disadvantage. The prohibition on consensual killings corresponds perfectly to the common sanctity of life and human dignity which inheres in every Canadian, and has nothing to do with stereotypes about the decisional capacity or vulnerability of the disabled.

46. If this Court should find a breach of either s. 7 or s. 15, EFC submits that any such breach would be saved under s. 1. The thing prohibited is an act contrary to public policy and *Charter* values. On either the broader legislative objective articulated by the AGC, or the narrower objective of prohibiting all consensual killings articulated herein, the impugned provisions are both minimally impairing and proportionate to any breach.

PART IV: NATURE OF ORDER SOUGHT

47. The EFC seeks to make oral arguments of not more than 60 minutes; on the merits it seeks an order allowing the appeal and setting aside the order below in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED DECEMBER 21, 2012



Geoffrey Trotter
Counsel for the Evangelical Fellowship of Canada

³³ Rodriguez at para. 155; Reasons at para. 926; LRCC Medicine and Criminal Law at p. 13.

APPENDIX: ENACTMENTS RELIED UPON

Private Member's Bill C-300 An Act respecting a Federal Framework for Suicide Prevention (41st Parliament, 1st Session)

<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&billId=5135265&Mode=1>

Last Stage Completed
Royal Assent (2012-12-14)

House of Commons Votes

Vote 130: 2nd reading of Bill C-300, An Act respecting a Federal Framework for Suicide Prevention

Yeas: 285 - Nays: 3 - Total Votes: 288 - Paired: 0

Latest Publication

60-61 ELIZABETH II

CHAPTER 30

An Act respecting a Federal Framework for Suicide Prevention

[Assented to 14th December, 2012]

Whereas suicide is a complex problem involving biological, psychological, social and spiritual factors, and can be influenced by societal attitudes and conditions;

Whereas Canadians want to reduce suicide and its impact in Canada, and suicide prevention is everyone's responsibility;

Whereas suicide is preventable by knowledge, care and compassion;

Whereas concerted, collaborative action by committed communities, governments, organizations and individuals across Canada will help prevent deaths by suicide, and assist in educating and comforting those who have been affected by suicidal behaviour;

Whereas suicide is a significant public health issue in Canada and the grief and trauma associated with it produce long-term social costs and devastating effects on surviving individuals and communities;

Whereas the Parliament of Canada affirmed its respect for life by unanimously adopting Motion No. 388, in 2009, which called for meaningful deterrents and punishment for those who encourage vulnerable individuals to commit suicide;

And whereas a federal plan designed to disseminate information, promote the use of

research, share best practices and affect public attitudes towards suicide and its prevention is in the interest of all Canadians;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

1. This Act may be cited as the *Federal Framework for Suicide Prevention Act*.

FEDERAL FRAMEWORK FOR SUICIDE PREVENTION

2. The Government of Canada must establish a federal framework for suicide prevention that

(a) recognizes that suicide, in addition to being a mental health issue, is a public health issue and that, as such, it is a health and safety priority; and

(b) designates the appropriate entity within the Government of Canada to assume responsibility for

(i) providing guidelines to improve public awareness and knowledge about suicide,

(ii) disseminating information about suicide, including information concerning its prevention,

(iii) making publically available existing statistics about suicide and related risk factors,

(iv) promoting collaboration and knowledge exchange across domains, sectors, regions and jurisdictions,

(v) defining best practices for the prevention of suicide, and

(vi) promoting the use of research and evidence-based practices for the prevention of suicide.

CONSULTATIONS

3. Within 180 days after the day on which this section comes into force, the Government of Canada must enter into consultations with relevant non-governmental organizations, relevant entities within the governments of the provinces and territories and relevant federal departments, in order to share information and align the elements of the framework described in section 2 with existing efforts that relate to suicide prevention.

REPORT

4. Within four years after the coming into force of this Act and every two years thereafter, the entity designated in accordance with paragraph 2(b) must report to Canadians on its progress and activities related to the federal framework for suicide prevention.

Canadian Charter of Rights and Freedoms (Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11, preamble and ss. 1, 7, 15)

<http://laws-lois.justice.gc.ca/eng/Const/page-15.html>

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Rights and freedoms in Canada

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.

Life, liberty and security of person

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.

Equality before and under law and equal protection and benefit of law

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.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Criminal Code, R.S.C., 1985, c. C-46, ss. 25, 34, 35, 39-41

<http://laws-lois.justice.gc.ca/eng/acts/C-46/>

Protection of persons acting under authority

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Idem

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

When not protected

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

When protected

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person

may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

Power in case of escape from penitentiary

(5) A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the Corrections and Conditional Release Act, if

(a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and

(b) the escape cannot be prevented by reasonable means in a less violent manner.

Self-defence against unprovoked assault

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

Extent of justification

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Self-defence in case of aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification

provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

Defence with claim of right

39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

Defence without claim of right

(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

Defence of dwelling

40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

Defence of house or real property

41. (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

Assault by trespasser

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

International Covenant on Civil and Political Rights

<http://www2.ohchr.org/english/law/ccpr.htm>

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966
entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles

United Nations Universal Declaration of Human Rights

<http://www.un.org/en/documents/udhr/index.shtml>

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

LIST OF AUTHORITIES

TAB	AUTHORITY	Paragraphs
CASELAW		
1.	<i>Canadian Council of Churches v. Canada</i> , [1992] 1 S.C.R. 236 (QL)	10
2.	<i>Chamberlain v. Surrey School District No. 36</i> , [2002] 4 S.C.R. 710, 2002 SCC 86 (QL)	10
3.	<i>R. v. Butler</i> , [1992] 1 S.C.R. 452 (QL)	26
4.	<i>R. v. Latimer</i> , [2001] 1 S.C.R. 3, 2001 SCC 1	37
5.	<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103 (QL)	21
6.	<i>Re Eve</i> , [1986] 2 S.C.R. 388 (QL)	40
7.	<i>Rodriguez v. British Columbia (Attorney General)</i> , [1993] 3 S.C.R. 519 (QL)	4, 12, 13, 20, 25, 26, 32, 35, 45
ENACTMENTS		
8.	Bill C-300, <i>An Act respecting a Federal Framework for Suicide Prevention</i> (41st Parliament, 1st Session)	17
9.	<i>Canadian Charter of Rights and Freedoms</i> , Part I of The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11: preamble and ss. 1, 7, 15	
10.	<i>Criminal Code</i> , R.S.C., 1985, c. C-46, ss. 25, 34, 35, 39-41	27
11.	International Covenant on Civil and Political Rights (United Nations), preamble	22
12.	The Universal Declaration of Human Rights (United Nations), preamble	22
OTHER		
13.	Hogg, Peter W., <i>Constitutional Law of Canada</i> (5 ed., 2007; looseleaf)	3
14.	<i>Law Reform Commission of Canada</i> , Report No.3 "Our Criminal Law" (1976)	5
15.	<i>Law Reform Commission of Canada</i> , Working Paper No. 28, "euthanasia, aiding suicide and cessation of treatment" (1982)	6, 39
16.	<i>Law Reform Commission of Canada</i> , Working Paper No. 28, "Some aspects of medical treatment and criminal law" (1982)	7, 45
17.	Novak, David, <i>Natural Law in Judaism</i> (Cambridge: Cambridge University Press, 5 1998)	21
18.	[Taylor] Butler, Habermas, Taylor, and West, <i>The Power of Religion in the Public Square</i> (New York: Columbia University Press: 2011)	9, 21

