CASE NOTE*
IS THERE A RIGHT TO ASSISTED SUICIDE UNDER CANADIAN LAW?

THE DECISION OF THE SUPREME COURT OF CANADA IN *RODRIGUEZ v AG CANADA*[1]

In a recent essay, the legal philosopher Jeremy Waldron wrote that:

> [although i]t is said that hard cases make bad law...one of our tasks in jurisprudence is to consider the justification of legal institutions... If this enterprise is to be conducted in a spirit of argument rather than ideology, then hard cases - indeed *the hardest cases* - must be our primary point of reference. To undertake with any integrity to defend an institution, one must be willing to contemplate the existence of serious moral objections.[2]

The perplexity inherent in this was manifestly illustrated by the recent decision of the Supreme Court of Canada in *Rodriguez v AG Canada*, in which it attempted to grapple with the question of whether the *Canadian Charter of Rights and Freedoms* ("the Charter") guaranteed a right to assisted suicide. The Court held by a narrow majority that it did not, but the various judgments illustrate the confusion that exists within the realm of Canadian jurisprudence over the scope of

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1 (1994) 158 NR 1

2 "Property, Justification and Need" (1993) 6 *Canadian Journal of Law and Jurisprudence* 185.

fundamental principles by which Canadian society is governed. The decision may be timely for Australia, given that at least one Australian jurisdiction is considering legislation which would permit voluntary euthanasia[3] and that the High Court has recently signalled the onset of a new phase of judicial activism. To a society in Australia's position - one which is contemplating the appropriateness of constitutional craftsmanship by the judicial rather than the political branch of government - some reflection on the nature and implications of the ruminations of Canada's highest court may well be worthwhile.

I. THE FACTS

The facts of *Rodriguez* more than qualify it as one of Professor Waldron's hardest cases.[4] Ms Rodriguez was a 42 year old woman, and the mother of an eight year old son. Although she had formerly been a fit and active person, in April of 1991, Ms Rodriguez began to notice a loss of control over some of her muscular functions. In August of that year, she was diagnosed as suffering from amyotrophic lateral sclerosis ("ALS"), an irreversible disease which destroys cells in the brain and the spinal cord, and which ultimately leads to near complete paralysis.[5] The end result of most cases of ALS is death by suffocation after losing control over the lungs and diaphragm. In most cases, mental acuity remains intact, so that sufferers tend to be fully aware of their physical deterioration.

After her diagnosis, Ms Rodriguez initially sought treatment through naturopathy and acupuncture, but by the northern Autumn of 1992, she accepted the fact that she would die. Since suicide is no longer illegal in Canada, it would have been open for her to take her own life at that point. However, wanting to go on living to the point at which she no longer enjoyed life, she challenged, both through the legislative and judicial systems, the provisions of the *Criminal Code of Canada*[6] which made it a crime to assist suicide. In November 1992, she made a videotaped appearance before a parliamentary committee examining reform of the criminal law and in December, she made an application to the Supreme Court of British Columbia for an order declaring that the provisions of the *Criminal Code* in question were contrary to the Charter. After her application was dismissed,[7] she appealed unsuccessfully to the British Columbia Court of

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3 The Australian Capital Territory is considering such legislation. For a broader review of the current state of Australian debate on euthanasia and assisted death, see "The Right to Die", *The Bulletin*, 22 February 1994, p 26.

4 A summary of the legally material facts can be found in the dissenting judgment of Lamer CJ, pp 1-2. More background detail can be found in "The Legacy of Sue Rodriguez", *Maclean's Magazine*, 28 February 1994, pp 22-5.

5 In North America, ALS is often colloquially referred to as "Lou Gehrig's Disease", after a famous American professional baseball player who was stricken with the disease in 1941.

6 RSC 1985, c C-46. In Canada the substance of criminal law is within the federal jurisdiction, although its administration is largely within the provincial sphere.

7 (1992) 18 WCB (2d) 279.

Appeal.[8] Ms Rodriguez then sought and received leave to appeal to the Supreme Court of Canada.

II. THE LEGISLATIVE FRAMEWORK

Section 241 of the *Criminal Code* provides that:

> Every one who:
>
> (a) counsels a person to commit suicide, or
> (b) aids or abets a person to commit suicide,
>
> whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

In her appeal to the Supreme Court of Canada, Ms Rodriguez claimed that s 241 violated several of her constitutionally guaranteed rights: her right to security of the person, her right not to be subjected to cruel and unusual treatment, and her equality rights. Three different substantive provisions of the Charter were relied upon, namely ss 7, 12 and 15(1):

> 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.
>
> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
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> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 1 also came into play, as it does in every Charter case. Constitutional rights adjudication in Canada involves a two step process. The initial determination of the existence of a Charter violation is followed by a consideration of s 1, which provides that the Charter's rights and freedoms can be subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

III. THE VARIOUS JUDGMENTS

The case was decided by a majority of five judges, with four members of the Court in dissent. The majority judgment was written by Sopinka J, who was joined by La Forest, Gonthier, Iacobucci and Major JJ. There were three separate dissenting judgments. One was written by Lamer CJ and one by Cory J. The third dissent was written by McLachlin J, who was joined by L'Heureux-Dubé J. The various judgments show an alarming lack of consensus amongst members of the

8 (1993) 76 BCLR (2d) 145; [1993] 3 WWR 554.

Court as to which constitutional principles were in issue in the case. Indeed, even the dissenting judgments vary in their characterisations of the matters in dispute.

A. The Right to Liberty and Security of the Person

Section 7 of the Charter contains two elements: an enunciation of the right, followed by a statement that the right is not to be deprived "except in accordance with the principles of fundamental justice". As to the right itself, while expressing some doubt that a right to "security of the person" could include a right to end one's life, "as security of the person is intrinsically concerned with the well-being of a living person",[9] the majority accepted that the provision "encompass[es] 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".[10]

This concern with the contextual placement of the right within society at large came to the fore in Mr Justice Sopinka's discussion of the second element of s 7, the consideration of whether interference with Ms Rodriguez's life, liberty or security of the person was in accordance with the principles of fundamental justice. This was not an easy determination. On one hand, the concept of fundamental justice connotes "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice".[11] However, this consensus cannot be at the expense of precision: "Principles of fundamental justice must not, however, be so broad as to be no more than vague generalisations about what our society considers to be ethical or moral".[12] Moreover, in defining the principles, "the court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only".[13]

The other prefatory point concerning the means of interpreting s 7 offered by the majority was that in defining the scope of the principles of fundamental justice, a court must balance the interests of the individual against those of the State. Mr Justice Sopinka relied upon an earlier decision of McLachlin J - who in her reasons denied that any such balancing was required - in which Her Ladyship had stated that the principles of fundamental justice are "concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally."[14]

With these preliminary observations about s 7 in mind, Sopinka J characterised the issue before the Court as being

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9 Note 1 *supra* at 11.

10 *Ibid* at 15.

11 *Ibid* at 18.

12 *Ibid* at 18-19.

13 *Ibid* at 18.

14 *R v Cunningham* [1993] 2 SCR 143 at 151-2.

whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.[15]

To answer the question, Sopinka J looked at not only the scheme of Canadian criminal law, but also the law of other western nations relating to assisted suicide. With respect to the former, he noted that assistance in an act of suicide was forbidden by the English common law as an act of felonious homicide,[16] and that an equivalent to the modern s 241(b) had been included in the original *Criminal Code of Canada*.[17] This reflected, His Lordship said, a policy of "protection of the vulnerable who might be induced in moments of weakness to commit suicide".[18]

As to the foreign experience, His Lordship made reference to the current laws of Great Britain, Austria, Spain and Italy, all of which contain prohibitions against involvement in the suicide of others as wide as, or wider than, that of Canada. His Lordship also noted that the modern British version of the prohibition contained in s 2 of the *Suicide Act* 1961, had been upheld by the European Commission of Human Rights.[19] His Lordship also noted recent American experience, in which movements in the states of Washington and California to legalise physician-assisted suicide had been defeated in referenda.[20] Only in the Netherlands, His Lordship noted, was the situation different - and even there the act remains technically illegal, relief from criminal liability available only through an exercise of prosecutorial discretion. On the basis of this review, His Lordship concluded that "a blanket prohibition against assisted suicide similar to that in s 241 is the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights".[21]

Mr Justice Sopinka also considered the fact that the official position of several expert organisations, including the Law Reform Commission of Canada, the Canadian Medical Association and the British Medical Association, tended against the decriminalisation of assisted suicide. His Lordship was of the view that "it

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15 Note 1 *supra* at 24.

16 *Ibid* at 25-6 (referring to W Blackstone, *Commentaries on the Laws of England*, vol 4 (1769) p 189).

17 SC 1892, c 29, s 237.

18 Note 1 *supra* at 24.

19 In Application 10083/82; *R v United Kingdom*, 4 July 1983, DR 33, p 270. At p 30 Mr Justice Sopinka quoted the following portion of the Commission's judgment:
[The Commission recognises] the State's legitimate interest in this area in taking measures to protect, against criminal behaviour, the life of its citizens particularly those who belong to especially vulnerable categories by reason of their age or infirmity. It recognises the right of the State under the Convention [the *Convention for the Protection of Human Rights and Fundamental Freedoms*] to guard against the inevitable criminal abuses that would occur in the absence of legislation, against the aiding and abetting of suicide.

20 It should be noted, though, that in April of this year, a US District Court ruled that a Washington state statute banning assisted suicide was unconstitutional: *Compassion in Dying v Washington* 1994 WL 174250 (WD Wash). A week later, however, the Michigan Court of Appeals ruled that the noted "suicide doctor", Jack Kevorkian, could be committed to stand trial for murder in assisting suicide: *Michigan v Kevorkian* 154740, 10 May 1994. Most observers in the United States are awaiting the last word on the issue from the Supreme Court. For a discussion of the two cases, see "Death by Choice: Two courts clash on constitutional right to assisted suicide", *ABA Journal*, July 1994 at 73.

21 Note 1 *supra* at 37.

cannot be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society".[22] Therefore, s 241(b) was not in breach of s 7 of the Charter.

In contrast, McLachlin J took a much more individualistic view of the case. In Her Ladyship's opinion, the case was simple: since Parliament did not view it as an offence to take one's own life, it could not be baldly asserted that the "sanctity of life" was a fundamental principle upon which Canadian society was based. Indeed, she noted, the law already provided several exceptions to the proposition that involvement in another person's death ought to carry with it criminal liability.[23] Moreover, the arbitrariness of the legislation as it applied to Ms Rodriguez was made plain if one cut to the essence of the state's case:

> The argument is essentially this. There may be no reason on the facts of Sue Rodriguez' [*sic*] case for denying to her the choice to end her life, a choice that those physically able may have to them. Nevertheless, she must be denied that choice because of the danger that other people may wrongfully abuse the power they have over the weak and ill, and may end the lives of these persons against their consent. Thus, Sue Rodriguez is asked to bear the burden of the chance that other people in other situation may act criminally to kill others or to improperly sway them to suicide. She is asked to serve as a scapegoat.[24]

In reaching their conclusion that s 241(b) was in violation of s 7 of the Charter, McLachlin and L'Heureux-Dubé JJ relied on the decision in *R v Morgentaler*,[25] in which the Supreme Court had struck down a legislative scheme for regulating abortion on the basis that it interfered with the right of women to deal with their own bodies as they choose. As McLachlin J said, "the reasoning of the majority in *R v Morgentaler* is dispositive of the issues on this appeal".[26]

Since Lamer CJ thought that the case could be dealt with on the basis of the equality provision of the Charter, s 15, His Lordship did not address s 7. However, in his brief dissenting reasons, Cory J stated that since the common law permitted a patient of sound mind to refuse treatment, and since "dying is the final act in the drama of life" (thereby triggering s 7), there could be no juridically justifiable rationale for not permitting a person in the position of Ms Rodriguez to decide to terminate her own life, even if the termination had to be effected through an intermediary.[27]

B. The Right not to be Subjected to Cruel and Unusual Treatment

This argument - that by preventing her from taking the necessary steps to permit her life to be taken at a time of her own choosing, the state was violating Ms Rodriguez's s 12 rights - was dealt with solely by the majority, and then only in a relatively cursory fashion. Mr Justice Sopinka held that "a mere prohibition by the

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22 *Ibid* at 41.
23 *Ibid* at 59.
24 *Ibid* at 56.
25 [1988] 1 SCR 30.
26 Note 1 *supra* at 52.
27 *Ibid* at 132.

state on certain action, without more, cannot constitute 'treatment' under s 12 [of the Charter]".[28] None of the other judgments addressed the issue.

C. The Substantive Right to Equality

While both the majority and McLachlin and L'Heureux-Dubé JJ viewed the essence of this case as being one of a deprivation of security of the person, Lamer CJ saw it in a completely different light. In His Lordship's view, the justification for redress was based on a matter of comparative inequality, rather than individual denial. His reasoning was in fact quite elaborate, but in simple terms, the Chief Justice noted that in its landmark holding on the meaning of s 15 of the Charter, *Andrews v The Law Society of British Columbia*,[29] the Court had held that if a given legislative provision was discriminatory in effect, notwithstanding its superficial neutrality, it would be found to be unconstitutional. This being the case, he concluded that the net result of s 241(b) of the *Criminal Code* was that people who were not in a position to take their own lives, were the victims of discriminatory inequality, contrary to s 15.

The majority did not attempt to rebut Chief Justice Lamer's argument. Instead, it said that since s 241(b) would be saved in any event by s 1,[30] it was unnecessary to make "fundamental findings concerning the scope of s 15".[31] For the purpose of a s 1 analysis, Sopinka J said that he would assume that a violation of s 15 had been made out but, given the outcome of that analysis, no firm conclusions need be drawn. His Lordship was of the opinion that those issues should be decided in a case where they are essential to its resolution.

D. The Section 1 Analysis: the Question of Reasonable Limits

The width of the gap between majority and dissenting reasoning is also made plain by the different ways in which s 1 of the Charter was applied to these facts. In *R v Oakes*,[32] the Supreme Court enunciated a two step test to determine whether a given restriction would amount to a demonstrably justifiable, reasonable limit on a constitutionally protected right. The first step concerns whether or not the legislative objective itself is valid, while the second determines whether the steps taken to effect a valid legislative objective are proportional. The onus of proof of a s 1 limitation, it should be added, is upon the Crown.

In his dissenting judgment Lamer CJ engaged in the most extensive s 1 discussion. The majority, however, simply asserted that the legislation had been passed for a valid reason and that there was no halfway measure which could be used to "achieve the legislation's purpose".[33] But while the Chief Justice conceded that s 241(b) had been enacted pursuant to a valid state objective, namely the

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28 *Ibid* at 44.
29 [1989] 1 SCR 143.
30 See discussion below.
31 Note 1 *supra* at 46.
32 [1986] 1 SCR 103.
33 Note 1 *supra* at 48.

protection of the vulnerable, His Lordship was of the view that the means to the end were wholly disproportionate. Moreover, he pointed out that the protection justification was itself based on an irrational assumption that those who require assistance in the termination of their own lives are necessarily more vulnerable to coercion and undue influence than those who had the power to commit suicide without assistance.[34]

Madam Justice McLachlin also drew attention to the intellectual falseness of s 241(b), noting that "the objective of the prohibition is not to prohibit what it purports to prohibit, namely assistance in suicide, but to prohibit another crime, murder or other forms of culpable homicide".[35] Like Lamer CJ, Her Ladyship found that, even though there might be a valid state objective, the ambit of s 241(b) was far too wide to justify the denial of Ms Rodriguez's s 7 Charter right "to end her life in the manner and at the time of her choosing".[36]

Madam Justice McLachlin went on to add that, in her view, the law as it stood without s 241(b) was sufficient to alleviate the sorts of concerns about coercion raised by the majority. "In my view", she said,

> the existing provisions in the *Criminal Code* go a considerable distance to meeting the concerns of lack of consent and improperly obtained consent. A person who causes the death of an ill or handicapped person without that person's consent can be prosecuted under the provisions for culpable homicide.[37]

"The cause of death having been established", she continued, "it will be for the person who administered the cause to establish that the death was really a suicide, to which the deceased consented".[38] With great respect to Her Ladyship, this seems an extraordinary statement, given the scepticism expressed by the Supreme Court to the notion of a reverse onus of proof in other cases.[39] It also seems to be contrary to the principle of common law which holds that a person cannot consent to even the risk of fatal injury, let alone actual injury.

At the same time, though, the Chief Justice, at least, recognised that in the case of such a "morally laden" issue as this, Parliament had to be allowed some leeway: "I think it would be wrong", he wrote, "for this Court to unduly circumscribe the ambit of options open to Parliament in addressing the 'competing political pressures' that will factor in to such decision-making".[40] While McLachlin J said plainly that it was up to the Court to determine whether Parliament, "having chosen to act in this sensitive area touching the autonomy of people over their bodies, has done so in a way which is fundamentally fair to all",[41] the Chief Justice was willing to cede to Parliament the right to choose between different policy options, provided

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34 *Ibid* at 107.

35 *Ibid* at 61.

36 *Ibid* at 63.

37 *Ibid* at 63-4.

38 *Ibid* at 64.

39 For example, *R v Oakes*, note 34 *supra*, *R v Whyte* [1988] 2 SCR 3; *R v Keegstra* [1990] 3 SCR 697 and *R v Downey* [1992] 2 SCR 10.

40 Note 1 *supra* at 110.

41 *Ibid* at 65-6.

that its ultimate choice impaired the rights of people like Ms Rodriguez "as little as reasonably possible".[42]

E. The Minority's Proposed Remedy

Of as much interest as the dissenters' reasoning in concluding that Ms Rodriguez's constitutional rights had been violated in the first place is the way in which they proposed to dispose of the case. To begin, the Chief Justice suggested that given the nature of the subject matter, this was not an appropriate case for the Court to "read in" missing portions of the legislation, as the Supreme Court had said it will sometimes do.[43] At the same time, though, His Lordship was not prepared to give immediate effect to an order striking down s 241(b).

> ...were this Court to strike down the provision effective immediately, those whom the government could protect constitutionally with a more tailored provision, and who indeed should be protected, would be left unprotected.[44]

This being the case, His Lordship would have suspended the declaration of unconstitutionality for a year in order to allow Parliament "to address this most difficult issue".[45]

However, since a suspended declaration of unconstitutionality would have been of little comfort to Ms Rodriguez, he proposed a "constitutional exemption" in her case.[46] Yet even on these facts, the Chief Justice obviously had a substantial lingering concern about the prospect for abuse, for he would have adopted (with slight modification) a series of quite stringent procedural safeguards that had been proposed by one of the dissenting judges in the British Columbia Court of Appeal. Compliance with these safeguards would have been a condition precedent to any legally permissible assistance in Ms Rodriguez's suicide. Among other things, they would have included a requirement for a formal certificate of both mental competence and intention on the part of Ms Rodriguez, and a requirement for subsequent daily medical examinations to ensure that she had not changed her mind. Moreover, a certificate of intention would only have been valid for a period of thirty one days, after which it would have had to be renewed.[47]

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42 *Ibid* at 110 (relying on his own previous judgment in *R v Chaulk* [1990] 3 SCR 1303).

43 *Schacter v Canada* [1992] 2 SCR 679.

44 Note 1 *supra* at 117.

45 *Ibid* at 118.

46 *Ibid* at 118-29.

47 The conditions proposed by the Chief Justice include the following:

1. a constitutional exemption could only be granted by a superior court;
2. an applicant for a constitutional exemption would have had to be certified by a treating physician and an independent psychiatrist to be competent to make the decision to end her own life, "and the physicians must certify that the applicant's decision has been made freely and voluntarily, and at least one of the physicians must be present with the applicant at the time the applicant commits assisted suicide";
3. the physicians would also have had to certify:
   (i) that the applicant is or will become physically incapable of committing suicide unassisted, and
   (ii) that they have informed him or her, and he or she understands, that he or she has a continuing right to change his or her mind about terminating his or her life";

Madam Justice McLachlin expressed some doubt that certain of the conditions were "essential", but like the Chief Justice, she was not prepared to declare the right without some statement of procedural limitation. Her Ladyship would have remitted the matter back to the Chambers Judge, with instructions to determine whether the proposed assisted suicide would be with Ms Rodriguez's free and full consent, "having regard to the guidelines [enunciated by the dissenting judge in the British Columbia Court of Appeal] ... and the exigencies of the particular case".[48]

IV. THE JUDGMENTS AS INDICIA OF CONSTITUTIONAL CONFUSION

The various judgments of the Supreme Court of Canada in *Rodriguez* are as meaningful in what they reveal as what they say. As far as the substantive conclusion of the majority goes, it frankly is not at all surprising that a group of five common law judges would be reticent to interfere with a clear statement of parliamentary intention in such a sensitive area. The nature of the division shows that the decision could easily have gone the other way, but no one should be taken aback by the fact that the majority of the Supreme Court was disinclined to adopt a radically dissimilar course with respect to assisted suicide than has any other country with which Canada compares itself - particularly when considering that to do so would also have involved going against the "expert" opinion of various professional health care and law reform organisations.

What is instructive, though, is the way in which the judgments show the extent to which the Court is cloven on the nature, purpose and scope of the Charter. Further, the sheer degree of divergence among the judges on first principles shows beyond doubt the unworkability of attempting to resolve disputes over morally contentious and socially divisive issues by reference to fundamental rights. A case like *Rodriguez* shows the extent to which those rights are of little real assistance in resolving the sorts of disputes in which late twentieth century society finds itself. In such a case - such a hard case - all that a Bill of Rights does is transfer the responsibility for making a politically contentious decision to a tribunal that is poorly equipped at best for the job. Proceeding as they must on a case by case basis, and governed as they are by the rules of evidence, courts have little option in "morally laden" cases, to borrow the Chief Justice's description, but to grasp at

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4. notice would have had to be given to the Regional Coroner who would have had the right to be present at any examination of the would-be decadent;
5. the applicant would thereafter have had to be examined by one of the certifying physicians to ensure that she had not changed her mind;
6. any constitutional exemption would have expired after thirty one days;
7. the act causing the death of the applicant would have had to be that of the applicant herself, and not of anyone else.

See *ibid* at 128-9.

48 *Ibid* at 66.

vague and often ill defined social norms as they measure the value judgment of parliament against their own.

Such a task must be a daunting one in the extreme. In a sense, we are fortunate to have judges like McLachlin J who will not shy away from what they see as their constitutionally enshrined role, but the extensive body of conditions that Lamer CJ attached to his statement of Ms Rodriguez's "constitutionally-protected rights" shows just how at sea, and how deathly afraid of the consequences of their actions, the courts find are in cases like this.[49]

Since the adoption of the Charter in 1982, the constitution has become the dominant institution in the development of Canadian law. One increasingly hears a similar call in Australia. Perhaps there should be a legally recognised right to assisted suicide. Perhaps there should not. All that one can say at the end of the day after the Canadian judicial experience with the issue is that *Rodriguez* highlights the absurdity of imposing upon the courts final arbitral authority for the most important social issues. Surely, the lesson of this hardest of cases is that we ought not to assume that our courts are any better at resolving moral dilemmas than are we ourselves through our elected representatives.

V. POSTSCRIPT

On Saturday, February 12 of this year, in the presence of an unnamed physician, Ms Rodriguez took her own life. Also present with her was Svend Robinson, a Member of Parliament, and one of her most steadfast champions. As he described the scene:

> We were together for an hour or so, during which time she outlined for me what she wanted to happen after she died. The doctor then arrived, and she discussed with the doctor the arrangements for her death. I comforted her in her bed. I held her in my arms. She peacefully lapsed into unconsciousness and stopped breathing approximately two hours later.[50]

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49 One doubts that the Chief Justice intended this, but it also seems something of an irony that his declination of the limits of Ms Rodriguez's constitutional rights was so founded on the notion of procedural safeguards. It recalls Maine's description of the evolution of civil rights and freedoms at common law:

> So great is the ascendance of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure.

(in *Early Law and Custom*, p 389).

50 Quoted note 4 *supra*, p 23.