

A S & E :

a Proposal for Restructuring the Criminal Code of Canada

by Eike-Henner Kluge

The *Criminal Code of Canada* prohibits assisted suicide. This prohibition is contained in section 241 (b), which states that

241. Every one who ... 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.

There were various reasons for enacting this prohibition. One of them was to deter unscrupulous persons from advancing their own ends by aiding or abetting clinically depressed individuals, those of limited intelligence or individuals who are otherwise *non compos mentis*. Another was the value that society places on human life – a value which, in the eyes of the law-makers, might easily be eroded if assistance in committing suicide were to be decriminalized. Still another reason was that Parliament wanted to ensure that persons who are emotionally disturbed or otherwise disabled would not die as a result of a temporary lapse in their mental stability. Finally, it may be speculated – although there are insufficient data to confirm conclusively, **this suspicion – that Parliament was influenced in its considerations by the essentially religiously-based convictions of many members** who, on the basis of their Judaeo-Christian and Moslem beliefs, saw suicide and assisted suicide as a violation of the injunctions of a supreme deity.

With the advent of the *Charter of Rights and Freedoms*, religiously-centred laws became

unconstitutional – which means that only the first three considerations for the retention of Section 241(b) remained as valid. The Supreme Court of Canada had occasion to assess the validity of these considerations in light of the *Charter* in 1993, when it agreed to hear the celebrated case of *Rodriguez v. British Columbia (Attorney General)*. That case was focused in Section 15 of the *Charter* – the equality and justice section – and argued that Section 241(b) violates the *Charter* prohibition against discrimination on the grounds of disability. Specifically, Rodriguez argued that since suicide and attempted suicide are not crimes, able-bodied persons may commit suicide if they competently decide to do so. By contrast, persons who suffer from a disabling disease like amyotrophic lateral sclerosis cannot do this but must rely on others to help them carry out their decision. Since this is specifically prohibited by Section 241(b), and since it affects only disabled persons that – so ran the argument – constitutes discrimination on the basis of disability.

The Supreme Court unanimously agreed that Section 241(b) of the *Criminal Code* constitutes discrimination on the basis of disability and therefore violates the equality rights that are guaranteed in Section 15.1 of the *Charter*. Where it split was on the matter of safety and social policy. By a bare majority (5–4), it held that it is necessary to retain Section 241(b). The decision was based on Section 1 of the *Charter*, which allows the abrogation of otherwise guaranteed *Charter* rights if it is ‘demonstrably necessary in a free and democratic society.’

Both the Chief Justice of the British Columbia Court of Appeal, when the latter had considered

the matter on its way to the Supreme Court, and the Chief Justice of the Supreme Court had expressed clear reservations about such reasoning.

They had suggested that it would be possible to draft a law that would protect the vulnerable and achieve the otherwise defensible aims of a democratic society without violating the equality rights that are guaranteed in Section 15. They even sketched in outline what such a law might look like, thereby contradicting the claim of the majority that it was 'demonstrably necessary' to violate the equality rights of the disabled for the sake of a 'free and democratic society.' Since the considerations of the two Chief Justices were not rebutted in the reasoning of the Supreme Court majority, it is arguable that the majority decision in *Rodriguez* was a miscarriage of justice.

As is well known, the matter of assisted suicide and euthanasia subsequently became a political football and led to the matter being considered by the House of Commons and the Senate. Neither study resulted in any new legislation being passed – despite the fact that the British Columbia Royal Commission on Health Care and Costs had previously supported a change in legislation; that a significant majority of Canadians have consistently supported a change in the law; and that a 1995 study of Canadian physicians found that 42% of them believed that it was sometimes right to engage in euthanasia, and that 70% of the respondent physicians had indicated that active euthanasia, if it were legalized, should be performed only by physicians and should be taught at medical sites.

It appears the Parliament has once again decided to consider the issue: this time in the form of Bill C-407 – *An Act to amend the Criminal Code (right to die with dignity)*. The purpose of the Bill is to amend the *Criminal Code* so as to allow assisted suicide under certain specified conditions. Specifically, such assistance must be requested in writing and before at least two witnesses who do not stand to benefit from this act, it must be requested by a competent person who is at least eighteen years of age and who suffers from a terminal illness and who is or has been under medical care trying to alleviate or otherwise ameliorate the condition from which he or she is suffering. Moreover, it specifies that assistance in dying must be given by a licensed physician.

If previous experience is anything to go by, Bill C-407 will not be passed into law. The political forces that are arrayed against it are far too well organized, far too powerful and far too vociferous. However,

that may not be a bad thing – because the proposed law itself has fundamental flaws and is seriously incomplete. Specifically, like Section 241(b) itself, it also violates the principle of equality and justice. In particular, the provision that the person who makes the request for assistance in committing suicide must be eighteen years old violates Section 15 of the *Charter* because it discriminates on the basis of age. The provincial laws that historically specified an age of consent for medical interventions have all been struck down as unconstitutional, and provisions that centre in 'competence' have been substituted. Nowadays, competent children may refuse life-saving and/or sustaining medical interventions. By now there is case law to that effect – and the skies have not fallen, nor has there been a rash of child-deaths as a result of this change in legislation. There is no reason to suppose that a similar 'competence-centred' provision for assisted suicide would fare any differently.

There are other flaws with Bill C-407, but this is not the place to present them in detail. However, there is one serious flaw that is appropriately considered in this forum, and that is the fact that the Bill is a partial measure at best. It deals only with assisted suicide, not euthanasia. It would not help those who, although competent, could not perform the final act themselves because they are disabled.

That is to say, disabled persons at the end-stage of their suffering and who have lost control of their limbs would therefore still find themselves in the same position as before, and Sue Rodriguez would have had no release from her suffering if she had waited any longer. As well, the Bill ignores those who have never been competent and never will be. Their rights would still be less than those of other persons: they would be condemned to suffer when a competent person would not. An appropriately crafted suicide and euthanasia Bill would change that situation.

What follows is an attempt to correct some of these shortcomings. It is grounded in considerations of equality and justice, yet it takes into account the concerns that were raised by the majority of Supreme Court justices in *Rodriguez*. It is based on suggestions made by the Chief Justice of the BC Court of Appeals and by the Chief Justice of the Supreme Court of Canada when they respectively heard the case of Sue Rodriguez. Finally, it is more than an exercise in idle speculation and logic. It derives from participation in the Sue Rodriguez case as planner and ethics consultant. ^{hp}

A Legislative Proposal

217.1 Nothing in sections 14, 45, 215, 216 and 217 and other relevant sections of the *Criminal Code* shall be interpreted as

- (a) requiring a qualified medical practitioner to initiate or to continue surgical or medical treatment to a person who competently requests that such treatment not be commenced or continued;
- (b) requiring a qualified medical practitioner to initiate or to continue surgical or medical treatment to a person who has previously made a competent determination that such treatment not be commenced or continued and who has not revoked such determination;
- (c) requiring a qualified medical practitioner to initiate or to continue surgical or medical treatment to a person when a duly empowered proxy decision-maker of that person, using appropriate standards of proxy decision-making, formally requests that such treatment not be commenced or continued; or
- (d) preventing a qualified medical practitioner from initiating or continuing palliative care and measures intended to eliminate or relieve the suffering of a person solely for the reason that such care or measures will or are likely to shorten the life expectancy of the person, except where
 - (i) that person competently requests or has competently requested that such measures not be undertaken if these measures have a life shortening effect; or
 - (ii) the duly empowered proxy decision-maker of that person, using appropriate standards of proxy decision-making, requests that such measure not be undertaken if these measures have a life shortening effect.

xxx.1 Notwithstanding anything in sections 14, 45, 215, 216, 217 or any other relevant section, no qualified medical practitioner commits an offence set out in those sections where the practitioner

- (a) does not initiate or continue to administer
 - (i) surgical or medical treatment to a person who competently and formally requests that such treatment not be commenced or continued;
 - (ii) surgical or medical treatment to a person who has previously made a competent determination that such treatment not be commenced or continued and who has not revoked such determination;
 - (iii) surgical or medical treatment to a person when a duly empowered proxy decision-maker of that person, using appropriate standards of proxy decision-making, formally requests that such treatment not be commenced or continued;
- or
- (b) commences or continues to administer palliative care and measures intended to eliminate or relieve the suffering of a person for the sole reason that such care or measures will or are likely to shorten the life expectancy of the person, except where
 - (i) that person competently requests or has competently requested that such measures not be undertaken if these measures have such a life-shortening effect, or
 - (ii) the duly empowered proxy decision-maker of that person, using appropriate standards of proxy decision-making, requests that such measure not be undertaken if these measures have a life-shortening effect.

xxx.2
yyy.1
zzz.1

xxx.2 In the event that the life of the person will or is likely to be shortened by the use of palliative measures involving medications or similar means, and the time-span of this shortening exceeds what would normally be expected using appropriate and recognized palliative measures, the case shall be subject to review by an independent body consisting of a physician having no connection with any party involved in the case, a member of the Attorney General's Department of the jurisdiction in which the death has occurred, and an independent member of the public having training in ethics.

xxx.3 If this independent body finds that the event was not in accordance with the competently expressed wishes of the patient or in accordance with appropriate standards of proxy decision-making, as the case may be, the otherwise relevant provisions of the *Criminal Code* shall apply.

yyy.1 If a person suffers from an incurable and irremediable disease or medical condition, and if that person experiences the disease or condition as violating the fundamental values of that person, then

- (a) that person may make application to a superior court for permission to request the assistance of a physician in terminating his life as quickly and as painlessly as possible in keeping with the fundamental values of that person; and
- (b) on presentation of evidence by an independent psychiatrist and the attending physician that the person making the request is competent to do so, the court shall hear such a request as expeditiously as possible.

yyy.2 The court, upon due consideration of the mental and physical state of the person requesting permission under yyy.1, and of that person's fundamental values; and taking due account of the medical nature of the affliction of the person requesting such assistance, may grant such an application.

yyy.3 Any permission granted under sec. yyy.2

- (a) shall be registered with the regional coroner of the relevant jurisdiction;
- (b) shall be for a period of six months; and
- (c) shall include an order that there shall be due notification of the coroner if such a permission has been acted upon.

yyy.4 Any physician acting upon a permission under sec. yyy.2 and in accordance with the wishes of the person making the request under yyy.1, shall use such measures as he or she deems, upon due consideration, to be appropriate for terminating the life of that person as quickly and painlessly as possible.

yyy.5 Any physician acting upon a permission granted under secs. yyy.2, yyy.3 and yyy.4, and acting in accordance with the provisions set out therein, shall be deemed not to have committed an offence within the meaning of this Act.

yyy.6 Any revocation of a request made by a competent person under sec. yyy.1 shall take immediate effect and shall be deemed to render null and void any previous request made by that person under sec. yyy.1

zzz.1 Any person who suffers from an incurable and irremediable disease or medical condition, and who, by reason of incompetence, is unable to make application to a court as allowed under sec. yyy.1, may have such application made for him by a duly empowered proxy decision-maker using appropriate standards of proxy decision-making.

zzz.2 Any application brought under sec. zzz.1 shall be treated by the court as though it were an application brought by the incompetent person on his own behalf.

zzz.3 In considering an application brought under sec. zzz.1, the court shall have due regard to the previous competently expressed wishes and values of the now incompetent person, if that person was previously competent.

zzz.4 In the event that such values cannot be satisfactorily ascertained, the court shall use the values and standards currently accepted by Canadian society, where the nature of these values and standards shall be determined by the court in consultation with

- (a) a duly empowered representative of an association for handicapped persons;
- (b) a practising physician;
- (c) a practising nurse;
- (d) a person having expertise in biomedical ethics; and
- (e) a member of the public at large.

zzz.5 In the event that an application brought under sec. zzz.1 is on behalf of a person who has never been competent, the court shall use the values and standards currently accepted by society, where these values shall be determined as under sec. zzz.4.

zzz.6 Any revocation of a request brought under sec. zzz.1 by a duly empowered proxy decision maker using appropriate standards of proxy decision-making shall take effect immediately and shall be deemed to render null and void any previous request made by that person under s. zzz.1.

241. (b) This Section is struck down

- i. Special Senate Committee on Euthanasia and Assisted Suicide, *On Life and Death: Report of the Special Senate Committee on Euthanasia and Assisted Suicide* (Ottawa: Minister of Supply and Services, 1995) at 71 *et pass.*
- ii. *Rodriguez v. British Columbia (Att. Gen.)* [1993] 3 SCR 519.
- iii. British Columbia Royal Commission on Health Care Costs, *Closer To Home* (Victoria: Crown Publications, 1991) 3 vols. Part C: 'The Right to Die With Dignity.'
- iv. Gallup Canada, July 24, 1989.
- v. Marja J. Verhoef and T. Douglas Kinsella, 'Alberta Euthanasia Survey: 3-year Follow-up' *Canadian Medical Association Journal* 1996; 155: 885-890.

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