I would like to thank John Hofsess and Chris Considine for their permissions to reproduce the document.

François Lareau
2 August 2011

APPENDIX "CODE-11"

STANDING COMMITTEE ON JUSTICE

AND THE SOLICITOR GENERAL

ON THE RECODIFICATION OF THE GENERAL PART

OF THE CRIMINAL CODE

PRESENTED TO THE SUB-COMMITTEE NOVEMBER 24, 1992.

Theme: *'CONSENT TO DEATH: NO DEFENCE'*

Recommendation: SPECIFIC PROTOCOLS

FOR *PHYSICIAN-ASSISTED SUICIDE*

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COMMENTARY BY JOHN HOFSESS

Sue Rodriguez is essentially a private person. She has not entered the public arena because she has an insatiable need for attention. She has sacrificed much of what would otherwise be a quiet reflective time for her. She has more than enough to deal with - coping with her illness and facing the fact that her life has suddenly been cut short - without adding the stress and the strain of becoming part of a major court battle and social controversy. Yet existing Canadian law gives her no alternative.

There are those who dismiss Sue Rodriguez as a "hard case." On her first appearance on national television, on CBC's *The Journal*, Sept 18th, medical ethicist **Barry Hoffmaster** from the University of Western Ontario said he sympathized with "the poor woman" but took refuge in the old cliché that "hard cases make bad laws" and said that Sue Rodriguez was "a very hard case." Shortly thereafter, following Sue's appearance on CTV's *Canada AM*, (Sept 29) Dr. **Margaret Somerville** from McGill University's Centre of Medicine, Ethics and Law put forth the argument: "There's no such thing as a right to die. In legal *theory* a right to die means that someone has a *duty* to kill you and I don't think doctors are prepared to kill their patients." Those who occupy ivory towers in Academe seem uncomfortable when dealing with the realities of Sue Rodriguez's plight. They act surprised that anyone with ALS - or any other form of catastrophic illness - isn't willing to suffer their afflictions with the patience of Job.

But I can assure you as one who dwells down in the trenches of human suffering that Sue Rodriguez is not a statistical rarity. The truth is: Canada is *filled* with so-called "hard cases." Each one, taken in isolation, may allow Mr. Hoffmaster and Dr. Somerville (among other apologists for the status quo) to dismiss them; but each one added to another, form in the aggregate, a serious social problem. Sue only *appears* to be a singular case because she is the first to speak out publicly - but listen to a couple of examples of the mail I currently receive.

From a 38-year old man in Toronto:

"I was diagnosed with ALS in December 91. I am now starting to deteriorate more rapidly and am getting worried about my future. I want to live as long as I can, but do not want to be a vegetable. My speech is now failing, as is my ability to walk, grasp, and eat solid food. I feel as if my future will be a living Hell if I don't take the situation into my own hands very soon. I am aware of the Sue Rodriguez case and I would like to know if you can help me achieve a peaceful end. Please call soon."

And this from a man in Calgary.

"My dad is also suffering from ALS and is unable to talk or eat now, although he is still ambulatory. The course of the disease has been rampant and swift having begun mid-1991....Theoretically, hospitals can provide enough pain relief to comfort terminally ill persons, but a prolonged course of death is really a dignity issue as well...There will always be many very courageous people who shall fight disease processes to the very end, and my dad may well be one of them. They are to be supported and commended. However it is ***not*** *just nor honourable to require by law that* ***all*** *terminally ill people expire in this way - gradually, by the disease process only."*

I could read dozens of such letters by the hour to this or any other Parliamentary Committee that **wants** to know more about *the way things actually are* for countless Canadians facing the process of dying. These people who contact me *don't* write to the Hoffmasters or Somervilles of this world apparently. They *don't* write to hidebound politicians or grandstanding moralists either. They *know* they will not be paid much attention by anyone with a doctrinaire position on suicide and euthanasia. Nevertheless they exist by the thousands. Resigned to their fates with quiet desperation. And they look to Sue Rodriguez to give them hope. And she - *looks to you,* gentlemen; and prays that she is not naive.

Sue Rodriguez asked me if her appearance before this Sub-Committee was worth the effort. I told her that I could comment only upon my *actual* experience with Parliamentary Committees - which is limited. Last November 7th (1991) I appeared before a Parliamentary Committee *ostensibly* examining the merits of Bob Wenman's Private Members Bill C-203 - which sought to enshrine in law the right of a patient to refuse and/or withdraw from any and all forms of medical treatment.

The Right to Die Society of Canada is not one of those organizations which is so eager to have changes made in the Criminal Code on behalf of the terminally ill, that it is willing to endorse *any* initiative in this area. We did support the laudable aims of Bill C-203 but found it to be flawed in its wording. We arranged for **Eike-Henner Kluge,** Director of Ethics and Legal Affairs, Canadian Medical Association (1989-91) to appear before the Committee with an detailed analysis of what was inadequate in the existing Bill and to suggest revisions. I might add that officials from the Law Reform Commission also came forward a few weeks later and submitted similarly redrafted wording which fully had our support.

We asked the Committee *specifically* not to play politics with such a vital issue as human suffering. But, rather, to act in good faith and with good will and return an amended Bill C-203 back to the House of Commons for full debate. I am sure you know, nothing like that happened. In February of this year, the Committee held an *in camera* session and - far from the ears and eyes of the public - voted to ***adjourn indefinitely*** - effectively killing the Bill but without *any* public accountability for their actions. It may be argued that it is technically within a Committee's rights of procedure to adopt such a dodgy course. But a subsequent press report in the *Vancouver Sun,* in which reporter Peter O'Neil quoted a "gleeful" member of the Committee - Liberal MP **Don Boudria** - as saying *"We euthanized the Bill!"* puts to rest any suggestion that this was the handiwork of an unbiased Committee acting in the public interest.

Weeks of public input - and dozens of reports - came to naught with a single vote by that Committee.

So I had to say to Sue Rodriguez: "I have no idea if your plea and our presentation *will* make a difference." We can only hope that the public demand for greater input into the political process, concerning the recent Referendum on the Constitution, will continue to have an effect in Ottawa. We have to go on having faith in the political and legal systems - **that the public will not only be heard, but heeded** - because what alternative is there in a *supposedly* democratic society based on law?

The law prohibiting assisted suicide has been ***unrevised*** for 100 years and not evoked once in the past 29 years. What kind of law *is* that? A law which doesn't appear to serve any purpose except to intimidate and oppress the terminally ill, their families and friends.

Sue Rodriguez puts a human face to this problem. In breaking the silence on behalf of thousands of others who are wracked by irreversible terminal illnesses, she may be likened to one of the first victims in the Mount Cashel and similar scandals to get up enough nerve to say: *I have been violated and I am **not** going to keep quiet about it.* As we now know, many years later, the first victims of physical and sexual abuse by the Christian Fathers in Newfoundland, were greeted with institutionalized hypocrisy. The religious establishment didn't want to hear their testimony and sought to suppress any complaints. The political establishment - and the legal establishment - tried covering up for the Church. But eventually the combined hypocrisy of all these mighty forces was shattered. And then we began to hear about other instances of sexual and physical abuse by priests of native children in Residential Schools, and other young men and women in other institutions, all over the country. Some people like to forget these terrible scandals as quickly as possible, but in my view, the Catholic Church would be better occupied cleaning out its own stables than riding on the high horse of moral rectitude, telling other people how to live and die.

Sue Rodriguez believes that, for herself and all others similarly afflicted, *truth will out and justice will prevail.* Even though *she* must contend with more opposing forces than those faced by victims of sexual abuse. Not only does she have the Catholic Church arraigned against her in the form of Pro-Life activists, and many politicians and legal consultants - but much of the medical establishment is cool, or cowardly, or in some instances hostile to any change in the law permitting physician-assisted suicide. We are encouraged to note however in a recent poll of doctors in Alberta, 51% said they would assist a terminally ill patient to die - IF the law allowed them to. And as Sue noted: 75% of Canadians in repeated Gallup Polls over the last 20 years have called for a change in the law - considerably higher than *any* state or national poll in the United States.

You've heard from the heart. Now it's time to hear more incisive legal analysis. The core of our presentation today is provided by lawyer Chris Considine who will defend Sue Rodriguez's rights in court in the hope that she may obtain a wise and merciful judgment - and not be driven out of her country in her quest for a death with dignity.

SUE RODRIGUEZ - PHYSICIAN-ASSISTED SUICIDE

INTRODUCTION

We are the solicitors for Ms. Susan Rodriguez. We have been asked by her to make representations to you with respect to legal changes that ought to be made to the Criminal Code to permit physician-assisted suicide. While Ms. Rodriguez believes that the law ought not to be changed necessarily just because of one case, she believes that her case symbolizes the plight of many people in Canada. She has been confirmed in that view by the articles which she has read and the comments that she has received from many people. Accordingly, we will use her case as an example of why physician- assisted suicide should be permitted in Canada.

MS. RODRIGUEZ'S ILLNESS

Ms. Rodriguez suffers from Amyotrophic Lateral Sclerosis (ALS which is commonly known as Lou Gehrig's Disease. She was diagnosed as having this disease in August, 1991. ALS is a form of motor-neuron disease. It has no cure. Her life expectancy is two to five years. Fifty percent of patients die within three years of onset. Only twenty percent of patients may expect to live five years. Some patients may experience periods of remission which will lengthen their life span. Unfortunately, Ms. Rodriguez has not experienced remission and her condition is steadily declining.

The manner of death from ALS is not particularly pleasant. Ms. Rodriguez faces the prospect of choking to death as a result of the balling of tissues and muscles in her throat, suffocating due to collapse of her pulmonary system, or starvation. Usually patients will have difficulty in swallowing within a year to two years from the onset of symptoms and will ultimately be completely unable to swallow. Accordingly, tubes are connected to their stomach to provide sustenance. Pulmonary function usually deteriorates to the point where the patient will require mechanical ventilation in order to continue breathing. The patient usually remains fully and mentally competent throughout the course of the disease. There is no medically accepted cure for this disease. Ms. Rodriguez has explored the peripheral issues of whether mercury poisoning from tooth fillings may have caused her symptoms. That route was unsuccessful. She has also explored vitamin therapy which has also been unsuccessful.

Our client is married, lives in the Greater Victoria area in British Columbia and has a seven and a half year old son. She does not wish her family and close friends to see her die an undignified and mentally agonizing death. Frankly, she does not wish to go through such a death herself. She wishes to have the option, in the event that her symptoms become unbearable, of having a physician assist her with suicide. She is unlikely to be able to take her own life in a conventional manner of an overdose, when her symptoms become unbearable because she will be unable to swallow. She would like the assistance of a competently trained medical doctor. Unfortunately for Ms.

Rodriguez, because there is not enormous pain associated with this disease, but rather tremendous discomfort and difficulties, it is unlikely that "palliative care" will hasten her end. Accordingly, Ms. Rodriguez requests that she be able to commit suicide with the assistance of a physician. Ms. Rodriguez hopes that the physician would be permitted to attach an intervenus tube to her arm which would contain a lethal overdose of a drug. She recognizes that in order to protect the interests of society and patients who are in a similar position, that the law should only permit the patient to activate the device which would administer the drug, whether by pushing a button, activating a light beam or turning on a tap in the tube. In her circumstances, she feels that she must have the final decision as to when she should die.

POLICY CONSIDERATIONS FOR PHYSICIAN-ASSISTED SUICIDE

Suicide and attempted suicide are no longer crimes in Canada. However, s. 241 of the Criminal Code makes it an offence for a person to aid or abet another in the commission of suicide. The wording of that offence is specifically set out as follows:

> "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.";

Physician-assisted suicide ought to be clearly distinguished from active euthanasia. Physician-assisted suicide allows a patient to determine if he or she wishes to die and

when. It also is a safeguard for the patient. The major concern with active euthanasia is that patients will be persuaded to consent to their death by friends, family or doctors, when they are not really ready or do not wish to die. As stated by Dr. Timothy Quill in his article "Care of the Hopelessly Ill", published in the New England Journal of Medicine on November 5, 1992:

> "In assisted suicide, the final act is solely the patient's, and the risk of subtle coercion from doctors, family members, institutions or other social forces is greatly reduced. The balance of power between doctor and patient is more nearly equal in physician-assisted suicide than in euthanasia. The physician is counselor and witness and makes the means available, but ultimately the patient must be the one to act or not act. In voluntary euthanasia, the physician both provides the means and carries out the final act, with greatly amplified power over the patient and an increased risk of error, coercion, or abuse."

Consequently, since suicide is no longer an offence in this country, those who assist the patient, such as the physician who prescribes an overdose of barbituates which can be taken orally or intravenously by the patient, ought to be protected. Similarly, it ought to be the patient who commits the final act of suicide by swallowing the medication or activating the intervenous device. However before a physician does assist with suicide, certain features ought to be established to provide maximum protection to the patient.

CHARTER OF RIGHTS CONSIDERATIONS

Before dealing with the specific rights which are infringed by the offending legislation, it is useful to review the comments which the Chief Justice made in the case of R. v. Oakes, [1986] 1 S.C.R. 103 (at page 136 and pages 138-139), concerning the genesis of the rights and freedoms guaranteed by the Charter and the criteria of justification for limiting those constitutionally guaranteed rights. First, the Charter was entrenched in the Constitution in order to protect the underlying values and principles of our free and democratic society. The Chief Justice listed the following as but a few of the values and principles which he believes are essential to a free and democratic society: respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. There is of course considerable overlap between these values and principles and it follows that each section of the Charter must be interpreted in light of the value structure as a whole which the Charter is meant to protect. Secondly, the objective of any limit on a constitutionally guaranteed right must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Finally, once a determination has been made that the objective is sufficiently significant, the means chosen must be shown to be reasonable and demonstrably justified. This involves balancing the interests of society with those of individuals and for a finding to be made that the

means chosen are reasonable and demonstrably justified, it must be shown that: the means are carefully designed to achieve their objective, that is to say, they are not arbitrary, unfair, or based on irrational considerations; the means employed are the least restrictive means available; and the deprivation of an individual's right is proportional to the objective.

With these comments in mind, we shall consider briefly the purpose of the legislation in issue in order to provide a context for our argument. The Criminal Code is concerned with moral turpitude. That being the case, presumably s. 241 was enacted to prohibit morally reprehensible behaviour. We have no quarrel with this section as it relates to counselling or abetting suicide. These are indeed morally reprehensible acts which should be protected by the Criminal Code. We do however take issue with this section as it relates to aiding suicide in a situation where a terminally ill patient, who is genuinely desirous of ending his or her life in a quick and painless manner, is unable to do so without assistance. We are unable to speculate with any degree of certainty as to the governmental objective inherent in this provision given that the Criminal Code section which made suicide a criminal offence was repealed in 1972. So much for any argument that the interest of the state in preserving life is the basis for this provision. We might have supposed that this section was somehow intended to safeguard the integrity of the medical profession were it not for the fact that it is not unlawful for a member of the medical profession to withdraw life support from a

patient. Accordingly, we are left wondering how this provision could possibly warrant overriding a single right as guaranteed by the Charter, let alone a number of rights.

Section 7 - Life, liberty and security of the person

We shall now discuss the specific rights which are infringed by the legislation in issue, commencing with the right to life, liberty and security of the person. When thinking about the right to life, we were reminded of one of the values mentioned by the Chief Justice, namely, respect for the inherent dignity of the human person. As noted by Madam Justice Wilson in the case of R. v. Morgentaler, [1988] 1 S.C.R. 30 (at page 166), indeed the idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Her Ladyship further stated that an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the State. As is consistent with the concept that each section of the Charter is to be interpreted in light of the context of the Charter as a whole and the value structure which it was designed to protect, Madam Justice Wilson is of the view that a deprivation of a s. 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter, cannot be in accordance with the principles of fundamental justice (at page 175). Her Ladyship discussed a woman's decision regarding whether or not to terminate a pregnancy, which she stated, is essentially a moral decision and a matter of conscience, in the context of s. 2(a) of the Charter which guarantees freedom of conscience and religion.

Madam Justice Wilson made the point that when a person is denied the freedom of conscience which is involved in making a very personal moral decision, that person is deprived of his or her essential human dignity (at page 179).

Sue Rodriguez is faced with a personal, moral decision. It is a decision which she alone must make and a decision which, as a matter of conscience, she must be free to make. To deprive her of the right to make such a choice concerning her life would be to deprive her of her dignity. The Charter speaks of the right to life, not the duty to continue living whatever the consequences. Surely a concern for the dignity of the individual must allow Sue Rodriguez the option of putting an end to her suffering.

When considering the right to liberty, we are further assisted by the judgment of Madam Justice Wilson in the Morgentaler case. It is Her Ladyship's view that the right to liberty grants the individual a degree of autonomy in making decisions of fundamental, personal importance (at page 166). Her Ladyship stated that, "Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them." (at page 167). In concluding that the decision of a woman to terminate her pregnancy falls within this class of protected decisions, Her Ladyship noted that such a decision is one that will have profound psychological, economic and social consequences for the pregnant woman (at page 171).

The decision facing Sue Rodriguez is likewise a decision of fundamental, personal importance which will have profound psychological, economic and social consequences. Technically speaking, Sue Rodriguez is at liberty to make the decision to end her life, but a law that requires that she do so without assistance has the effect of depriving her of her right to life when it insists that, having made that decision, she do so while she is still physically capable of doing it herself.

The judgment of the Chief Justice in the Morgentaler case is also of assistance, particularly concerning the right to security of the person. The Chief Justice concluded that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person. The Chief Justice held that s. 251 of the Criminal Code (which deals with the issue of abortion), clearly interferes with a woman's bodily integrity in both a physical and emotional sense. He further stated that, "Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person." (at pages 56 - 57). While the Chief Justice concluded that the objective of s. 251 as a whole is sufficiently important to meet the requirements of the first step in the Oakes test, he further concluded that the means chosen to advance the legislative objectives of s. 251 do not satisfy any of three elements of the proportionality component of the Oakes test. In holding that the infringement of the security of the person of pregnant

women caused by s. 251 is not accomplished in accordance with the principles of fundamental justice, the Chief Justice noted that the procedures and administrative structures created by s. 251 are arbitrary and unfair, the procedures established to implement the policy of s. 251 impair s. 7 rights far more than is necessary, and the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objectives sought to be achieved (at page 75).

Sue Rodriguez will be forced to continue suffering unless she ends her life now while she still has the ability to do so without assistance. It is difficult to imagine any situation which would constitute a more serious violation of her right to security of her person. Even if we were to accept, which we do not, that the objective of the limit on her right is of sufficient importance to warrant overriding it, we cannot accept that the means are reasonable and demonstrably justified.

This is also evident when one considers the liberty of the medical practitioner to whom Sue Rodriguez might turn for assistance. Clearly it can be argued that the effect of the provisions of s. 241 of the Criminal Code, is to create an absolute liability offence which is punishable by a lengthy term of imprisonment. Yet our system of justice is based upon the principle that punishment must be proportionate to moral blameworthiness. As Mr. Justice Lamer stated in the case of the Reference re: s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, a law pursuant to which a person who has not really done anything wrong could potentially be convicted,

offends the principles of fundamental justice, and further if imprisonment is available as a penalty, it violates a person's right to liberty as guaranteed in s. 7 of the Charter (at page 492). In that case, the Court held that the combination of imprisonment and of absolute liability violates s. 7 of the Charter and is not a reasonable limit which can be justified in a free and democratic society (at page 515 and page 521).

Let us suppose for the moment that Sue Rodriguez is able to find a caring physician who is willing, as a matter of conscience, to assist her to end her suffering. Imagine the psychological torment inherent in the making of that decision: to believe on the one hand that providing assistance to Sue Rodriguez is the morally proper action to take, yet to know that to take such action would be to expose oneself to criminal sanctions, including imprisonment. Such a person would not only be denied freedom of conscience, but would be risking his or her right to liberty. Surely this cannot be justified.

Section 12 - Cruel and unusual treatment

The Charter right not to be subjected to any cruel and unusual treatment or punishment is also infringed by the legislation in issue. This right was carefully considered in the case of R. v. Smith, [1987] 1 S.C.R. 1045. In that case, the court held that s. 5(2) of the Narcotic Control Act, which provides that upon conviction a minimum mandatory sentence of imprisonment for a period of not less than seven

years must be imposed, is unconstitutional. Madam Justice Wilson is of the view that the arbitrary nature of that section, that is to say, the fact that the seven year sentence must be imposed regardless of the circumstances of the offence or the circumstances of the offender, is fundamental to its designation as cruel and unusual (at page 1109 and page 1110). Mr. Justice Le Dain commented that the legislation could not be held valid simply because the court has the power to find that it is constitutionally inapplicable in a particular case. He further commented upon the uncertainty which would be created and the prejudicial effects which the assumed validity might have in particular cases (at page 1112). Mr. Justice Lamer had this to say:

> "... the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the Charter. To do so would be to disregard totally s. 52 of the Constitution Act, 1982, which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter." (at page 1078).

Even the dissenting Judge, Mr. Justice McIntyre, stated that a punishment is cruel and unusual if it is of such character or duration as to outrage the public conscience or is degrading to human dignity (at page 1097).

In a sense Sue Rodriguez has been sentenced to death. It is cruel to be indifferent to her suffering and to force her to endure the prolonged indignity of living through the progressive disintegration of her bodily functions. It cannot be anything other than cruel to be so merciless as to punish her further by depriving her of her dignity.

Section 15 - Equality rights for the disabled

We have already alluded to the inequality inherent in a law which makes it unlawful for a terminally ill person, who is genuinely desirous of ending his or her life in a quick and painless manner, but is unable to do so without assistance, to obtain such assistance in a country where it is lawful for a person to commit suicide and lawful for a person not only to consent to the withdrawal of life support, but also to decline life-preserving medical treatment. The case of Andrews v. The Law Society of British Columbia, [1989] 1 S.C.R. 143, deals with the issue of equality, and in that case, Mr. Justice McIntyre stated that:

> "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration." (at page 171).

He then described discrimination as a distinction based on grounds relating to personal characteristics of an individual, which has the effect of imposing burdens, obligations, or disadvantages on such an individual which are not imposed upon others, or which

withholds or limits access to opportunities, benefits, and advantages available to other members of society. (at page 174). He further stated that:

> "Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant." (at page 172).

It is clear that Sue Rodriguez is afforded the benefit of equal treatment under the law. It is equally clear that she is subject to discrimination simply because she is a person who has a physical disability. Applying the Andrews test, there can be no doubt that the legislation discriminates against Sue Rodriguez by virtue of her physical disability and that in the result, the legislation violates her right to equality.

SUGGESTED AMENDMENTS

It is recognized that there is a right to commit suicide and that in logic and law, those who assist with commission of suicide in the case of a terminally ill person ought not to be prosecuted. However appropriate safeguards must be provided to ensure that the patient is not under duress or acting unreasonably.

Appropriate criteria were carefully considered by Dr. Quill in his article "Care of the Hopelessly Ill", supra. He and his co-authors devised the policy in light of the fact that there are physicians who do assist their patients with the commission of suicide

without formal procedures. They feel that this is a risky and undesirable practice both from the patient's perspective as well as the physician's. They suggest that a protocol be laid down to include the following:

1. The patient must have a condition that is incurable and associated with severe, unrelenting suffering. This would include Amyotrophic Lateral Sclerosis or Multiple Sclerosis. The patient must understand the medical problem and any uncertainties ought to be resolved by obtaining additional medical opinions;

2. The doctor must be sure that the patient is not asking for death only because the patient is not getting treatment which would relieve him or her from his or her suffering. In other words, there must not be a treatment which would relieve their suffering which and has not been tried or very carefully considered;

3. The patient must clearly and repeatedly of his or her own free will and initiative ask to die. However the patient must not have to beg for assistance in order to retain the patient's dignity. At any sign of ambivalence or uncertainty, the process must be aborted. Requests for assisted suicide in advance directive or by health care surrogates should not be honoured. This would clearly apply to such situations as people creating living Wills before they are aware of the illness which becomes terminal;

4. The physician must be sure that the patient's judgment is not disorientated resulting from a treatable problem like depression;

5. The physician who assists the suicide should be the patient's physician unless he or she has moral objections;

6. An independent experienced physician should give a second opinion on the case to ensure that the patient's request is voluntary. To ensure:

   (a) the patient's request is voluntary and rational;

(b) the diagnosis and prognosis is accurate;

(c) that there has been a thorough exploration of comfort-orientated alternatives;

(d) that to assist with this process the consulting physician should interview and examine the patient as well as review the supporting material.

7. Appropriate consents and documentation ought to be signed by the patient, attending physician and consulting physician. In addition, even though it is not for consideration with the aim of the Criminal Code, the authors do recommend that physician-assisted suicide in the case of terminally ill patients ought not to invalidate a life insurance policy.

In 1991, he British Columbia Royal Commission chaired by Mr. Justice Peter D. Seaton of the British Columbia Court of Appeal, studied health care and costs. In their report entitled "Closer to Home", the commissioners stated as follows at page C-183:

> "All of the commissioners agree that there is a right to commit suicide, and that, under appropriate circumstances, a physician should be allowed to assist a person who chooses to exercise that right. Therefore, the Commission recommends that:
>
> > the provincial government request that the federal government amend s. 241(b) of the Criminal Code so it does not apply where the person who commits or attempts to commit suicide is terminally ill, and where a health care worker who helps that person commit or attempt to commit suicide does so in accordance with the ethical standards of his or her profession."

Accepting that physician-assisted suicide ought to be permitted under appropriate circumstances, and in other words brought out of the closet, the framers of the legislation will need to decide whether to place specific safeguards such as advocated by Dr. Quill into the Criminal Code or in the alternative to simply incorporate an exemption into s. 241 such as the following:

> Provisions of this section do not apply to a physician who is a member in good standing of a College of Physicians and Surgeons in Canada, who, acting in good faith and with the approval of at least one other physician who is also a physician in good standing with a College of Physicians and Surgeons in Canada, and at the request of and with the voluntary consent of the terminally ill patient, aids that person to commit suicide.

If this proposed legislation is enacted, it will provide the fundamental safeguards of:

a) at least two qualified physicians;

b) initiation or request from the patient;

c) voluntary consent of the patient;

d) a terminally ill patient;

e) the patient must commit the final act.

In addition, s. 14 ought to be amended to be subject to s. 241's exemption in order to avoid any possible difficulties for the physicians involved.

We would recommend that each of the Colleges of Physicians and Surgeons in Canada adopt moral and ethical guidelines along the lines outlined by Dr. Timothy Quill which could conform with the proposed amendment.

CONCLUSION

It is clear from a review of the medical literature that there are many people in Canada who are in a like position as Ms. Rodriguez. They will ultimately be incapable of taking their own lives without some assistance from a physician. Ms. Rodriguez does not address the issues of active euthanasia in which a physician directly administers to the patient a lethal overdose for the express purpose of ending life or of palliative care which results in death being the administration by a physician of a medication for the purpose of relieving pain which will have a secondary effect of potentially shortening life. Active euthanasia, as defined above, ought not be considered by the Committee as being appropriate in Canada unless the Committee believes that it is possible to put in place procedural safeguards which ensure that the patient's free will has not been usurped by family, institution or the medical profession. The taking of one's own life with the assistance of a third party is something entirely different than one's life being taken by a third party.

Similarly, in Canada, the practice of palliative care has been adopted by many of the medical profession which includes the administration of overdoses of medication to relieve pain and as a side effect hasten death. As the law presently stands, this practice might leave a physician open to prosecution. In addition, procedural safeguards have not been codified to ensure that the patient fully consents to this form of palliative care. Consequently, if palliative care overdoses are to be accepted

by the Committee, we strongly recommend that similar procedural safeguards be introduced as outlined by Dr. Quill and his associates. Naturally, there is a fine line between palliative care medication, and voluntary euthanasia. A distinction must be made between medication being given for the primary purpose of pain relief as opposed to the primary purpose causing death.

If the Committee accepts active euthanasia or the principle of palliative care causing death then it ought to consider eliminating s. 14 and deal with it in specific sections of the Criminal Code with built-in safeguards, or making s. 14 subject to s. 241 and the new sections dealing with palliative care and active euthanasia.

We believe that the limits imposed upon Sue Rodriguez and her physician by s. 241 and s. 14 are overly intrusive and the effects of the limit are out of proportion to the objective which is sought to be achieved by the Criminal Code. Accordingly, infringements of her rights are not in accordance with the principles of fundamental justice. It is her hope that the principles of fundamental justice which would be applied by the Committee would be based on a respect for the autonomy and inherent dignity of a human person. Ms. Rodriguez does not have much time to wait for the law to change and accordingly and she would ask that this Committee recommend that the necessary legislative changes be made forthwith.

Ms. Rodriguez has asked us to thank the Committee on her behalf for taking the time to consider this submission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

CHRISTOPHER M. CONSIDINE

APPENDIX "CODE-12"

A SUBMISSION TO THE HOUSE OF COMMONS

STANDING COMMITTEE ON JUSTICE

AND THE SOLICITOR GENERAL

ON THE RECODIFICATION OF THE GENERAL PART

OF THE CRIMINAL CODE

PRESENTED TO THE SUB-COMMITTEE NOVEMBER 24, 1992.

Theme: *'CONSENT TO DEATH: NO DEFENCE'*

Recommendation: SPECIFIC PROTOCOLS

FOR *PHYSICIAN-ASSISTED SUICIDE*

6-1/2 minute videotaped statement by SUE RODRIGUEZ

Presented by:

THE RIGHT TO DIE SOCIETY OF CANADA

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SUE'S PLEA TO PARLIAMENT

TRANSCRIPT OF A VIDEOTAPED STATEMENT MADE
BY SUE RODRIGUEZ (Oct 28, 1992):

SUE: Mr. Chairman....and members of the Standing Committee on Justice and the Solicitor General.

I appreciate having the opportunity to speak to you, as you consider recodification of certain sections of the Criminal Code of Canada.

My name is Sue Rodriguez. I am 42 years old and I suffer from a terminal illness known as ALS or Lou Gehrig's Disease.

A year ago - when I was first diagnosed - I was quite agile. Today I can barely walk.

I had full control of my hands except for some occasional twitching. Today - as you can see - my hands are misshapen and it is all I can do to sign my name in a scrawl.

There's much worse to come. ALS is a motor neuron disease which affects nearly all bodily functions. Soon I will be unable to talk. I will be unable to breathe without a respirator. I will be unable to eat or swallow - unable to move without assistance.

The deterioration which I am undergoing is acceptable to me - up to a point. Beyond that point, my life will have degenerated to mere biological existence. I will become a helpless victim of my illness and have to suffer prolonged suffering - lasting many months or even years.

That is not acceptable to me. But when I sought legal advice as to my options...I was told that it *is* legal for someone to commit suicide in Canada - but it is *not* legal for someone like myself, who lacks the motor skills to terminate my own life, to ask or receive any assistance in ending my life.

Why it should be illegal for someone to assist me to do something that is legal - is a paradox I will never understand. But more to the point, it is a paradox which forces me to suffer greatly - both mentally and physically.

If my suffering was being inflicted upon me, in any other context, it would be called an abuse of human rights and might well be called a crime. But because it happens in the name of modern medicine, I am supposed to accept whatever indignities my illness inflicts upon me and keep quiet. If my doctors refuse to relieve my suffering, I am not supposed to say anything. And if politicians won't change the law, I'm supposed to be helpless and powerless and not make my suffering known. To die in quiet desperation, the way that most terminally ill people do.

There is a section of the Criminal Code of Canada which states that ***"no person is entitled to give consent to have death inflicted upon himself or herself and - that such consent does not affect the criminal responsibility of any person who inflicts death."***

I want to ask you, gentlemen, if I cannot give consent to my own death, then whose body is this? Who *owns* my life?

I want to ask something else: when you consider redrafting this section of the Code, as I hope you will, please remember the human reality that lies beyond those words. I do not speak to you as a rare and isolated case of human suffering due to illness. ***In the latest Gallup Poll for which we have figures (Nov 7, 1991) 75% of Canadians - 80% in Quebec - said that they favoured a change in the law whereby terminally ill individuals who are suffering should have the legal right to have a doctor assist them in ending their lives.*** I daresay that I speak on behalf of that overwhelming majority of Canadians who care deeply about this issue.

Please listen to what I have to say: A law which states or implies that Canadians are not masters of their own fate - but belong somehow to the State or some other hypothetical authority - simply won't be tolerated much longer. In the meantime, I will continue to seek what justice I can under existing Canadian law. And I can only hope that somewhere in the system I will find a recognition for my rights as a person.

Thank you for listening.