reduction actions has been to subtract between $15 and $20 billion from the economy and to weaken growth by close to 3 percent.

More important, in a small economy, such as Canada's, there is little scope for the central government to use budgetary or monetary policies to stimulate the economy. Our trading partners would be the main beneficiaries of increasing government deficits. Even the United States acting on its own would have difficulty stimulating its economy and becoming the engine of growth for the world economy.

Clinton's original stimulation package, totalling about $60 billion in new spending and tax incentives, was ridiculed for being insignificant in a $7 trillion economy. The scaled-back version would have even been less effective and, not surprisingly, was easily sacrificed to the deficit-reducing fanatical hordes in Congress.

As long as the other members of the G-7 remain committed to reducing their respective deficits, the world economy and the Canadian economy will continue to struggle along. Only a concerted effort by the G-7 to provide stimulus will propel the world economy onto a higher growth path that may begin to make some inroads into the tragically high unemployment levels. Getting the G-7 to act on the fiscal side will prove to be much more important for the health of the world economy and for tackling the unemployment crisis in Canada than completing the current round of GATT negotiations. In other words, if the G-7 have to concentrate their efforts in one area, it should not be the GATT.

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LEGAL REPORT

DYING LEGALLY

by Joan M. Gilmour

In December 1992, Sue Rodriguez, a 42-year-old woman suffering from amyotrophic lateral sclerosis (ALS), sought a court order declaring that the section of the *Criminal Code* that makes it a criminal offence to assist in suicide was invalid because it infringed her rights under the *Charter of Rights and Freedoms*, and sought a further order allowing a physician to provide the means whereby she might end her own life. Ten months later, on September 30, 1993, the Supreme Court of Canada in a 5-4 decision affirmed the lower courts' rulings that the prohibition in the Code did not contravene the provisions of the Charter.

ALS is an inevitably fatal disease, characterized by generalized and increasing loss of voluntary and involuntary muscle function. It does not, however, affect mental capacity. Although Sue Rodriguez had no wish to die while she could still enjoy life, she anticipated that by the time she ceased to do so, she would be physically unable to end her own life without assistance. Attempting suicide has not been a criminal offence in Canada since 1972; Rodriguez asserted that continued criminalization of assisting in suicide infringed her rights under sections 7, 12 and 15 of the Charter, which guarantee the rights to life, liberty and security of the person, to freedom from cruel and unusual treatment or punishment, and to equality.

RODRIGUEZ V. BRITISH COLUMBIA (A.-G.)

With the exception of Lamer C.J., who rested his dissenting opinion on the ground that the prohibition on assisted suicide breached Rodriguez's equality rights, all of the remaining judges agreed that it infringed on the security of the person guaranteed her under section 7 of the Charter. The question that divided the court was whether that infringement was nonetheless in accordance with the principles of fundamental justice and, hence, permissible under section 7, and whether it could be upheld under section 1 of the Charter.

Writing for the majority, Sopinka J. built on the court's earlier decision in *R. v. Morgentaler* to conclude that "security of the person" includes a right to personal autonomy — to make choices about one's own body, control over one's physical and psychological integrity, and basic human dignity — "at least to the extent of freedom from criminal prohibitions which interfere with these." The court affirmed that competent patients can refuse even life-preserving medical treatment, thus effectively approving of lower court decisions in *Malette v. Shulman* and *Nancy B. v. Hôtel Dieu de Québec*.

ACTIVE AND PASSIVE INTERVENTION

The court also accepted that physicians can provide palliative care to terminally ill patients even if the effect of such treatment will be to hasten death. Although these are important pronouncements for patients and health care providers with respect to the legal status of their actions, they still do not satisfactorily resolve the conundrum presented by the legal distinction drawn between what Sopinka J. termed "active and passive forms of intervention in the dying process." The distinction has been the subject of cogent criticism both in academic writing and in recent judicial decisions, such as that of the House of Lords in *Airedale NHS Trust v. Bland*. It reflects an uneasy

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"Dying Legally," continued from page 45.

and inherently unstable compromise between a commitment to preserving life and the reality that, in particular circumstances, preserving life may not be for the patient's good at all. The tension between these two will become increasingly apparent when courts are required to address questions that arise in the provision of life-sustaining treatment to patients who are incompetent and cannot decide for themselves whether to end treatment.

Principles of Fundamental Justice

The majority concluded that the infringement of Rodriguez's security of the person occasioned by the *Criminal Code* prohibition nonetheless accorded with principles of fundamental justice. From the beginning, the court has been deliberately uninformative about the parameters of this term. Sopinka J. ventured the opinion that "fundamental" principles must have "general acceptance among reasonable people." It would flow from this statement that any such principles must be in keeping with morality that is both conventional and widely shared. Although he acknowledged that there is no consensus on this issue, he nonetheless proffered two principles: respect for human life and support for institutions (including laws) that protect it. Given the grave dangers of abuse if assisted suicide were permitted, the difficulty (if not the impossibility) of drafting adequate safeguards, and the departure from fundamental social values any change would represent, the majority maintained the existing prohibition.

McLachlin J. dissented (with L'Heureux-Dubé J. concurring) on the ground that the state could not justify denying Rodriguez a choice available to others (suicide). Furthermore, in her view the legislation was arbitrary because it bore no relation to the legislative objective — controlling the potential for abuse — and could not be justified under section 1. Cory J. in his dissent held that, since the life of an individual includes dying, the right to die with dignity is as protected as any other aspect of the right to life. He would have recognized a right to end one's life even if assistance is required, although he limited those comments to the situation of terminally ill patients.

Had the dissent prevailed and the legislation been declared invalid after a period of suspension to allow Parliament to replace it if it chose, then Lamer C.J. (joined by all the dissenting judges on this point) would have granted a constitutional exemption from the operation of the legislation during the hiatus so that Rodriguez could be assisted in ending her life if she chose to do so. Others seeking similar relief could also make an application to a superior court in the interim. The chief justice added that the period during which a declaration of invalidity is suspended is the only circumstance in which it is appropriate to grant a constitutional exemption.

"The court recognized that the complex and contentious nature of the questions raised by new and changing medical possibilities could be better addressed through legislation than judicial decisions."

In this case, the exemption would have been subject to stringent terms in its exercise. Lamer C.J. would have required physical inability to commit suicide, frequent assessments of competence and voluntariness by a medical specialist, involvement of the regional coroner, time limitations on the effectiveness of the order, and (although not without doubt) that the act causing death be that of Rodriguez herself. McLachlin J. would have imposed somewhat different conditions. What is striking in both dissenting judgments, though, is the detailed code of conduct proposed, more akin to regulations implementing a statute than to a piece of legislation. Although one appreciates the concern to tailor a solution to the circumstances of the case while ensuring appropriate safeguards, if it were to be taken as a model in other contexts, then the exercise raises significant questions about the relationship between the courts and the legislature, and the institutional roles and capacities of each.

Future Legislative Initiatives

The court recognized that the complex and contentious nature of the questions raised by new and changing medical possibilities could be better addressed through legislation than judicial decisions. In this, its view coincides with that of the federal Law Reform Commission, members of Parliament who have introduced private members' bills, a provincial royal commission on health care, and numerous other individuals and organizations over the last decade. Despite all this, the political will has been notably lacking at the federal level. As recently as March 1993, the House of Commons defeated a motion calling on the government to consider the advisability of introducing legislation on euthanasia and assisted suicide. Sue Rodriguez's struggle with both her illness and the law may be the impetus needed to put the issue on the legislative agenda at last. The questions remain deeply divisive, however, and there is no guarantee that any legislative change will reflect the result Rodriguez sought unsuccessfully through the courts.

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