Enthanasia and Self-Determinism: Is There a *Charter* Right to Die in Canada?

Fran Carnerie*

The common law right to self-determination allows anyone to refuse medical treatment, but when a terminally ill patient wants to refuse life-sustaining treatment in order to end her suffering this right is put in question. The *Criminal Code*, by various provisions, effectively outlaws acts of euthanasia; however, the author argues that the *Canadian Charter of Rights and Freedoms* may be used to assert a constitutional right to choose death, when to refuse the patient's request would effectively deny the right to life, liberty and security of the person, freedom of conscience, or the right to be free from cruel and unusual treatment. This also involves a discussion of whether the *Charter* is applicable to quasi-governmental bodies, in relation to which such situations usually arise.

Le droit à l'auto-détermination permet à toute personne de refuser le traitement médical, mais dans le cas d'une patiente en phase terminale désirant faire cesser les traitements qui la maintiennent en vie, l'exercice de ce droit devient sujet à controverse. Le *Code criminel*, par différents articles, fait de l'euthanasie un acte illégal ; cependant, l'auteure soutient que la *Charte canadienne des droits et libertés* pourrait permettre la protection constitutionnelle du droit de choisir la mort, lorsque le refus de reconnaître ce droit signifierait pour la patiente une violation du droit à la vie, à la liberté et à la sécurité de sa personne, de la liberté de conscience, ou du droit d'être protégé contre les traitements cruels et inusités. Cette idée soulève par le fait même la question de l'applicabilité de la *Charte* aux organismes quasi-gouvernementaux, qui sont habituellement impliqués dans ce genre de situations.

*Reg. N., N.P., M.H.Sc., LL.B. Dalhousie University, 1987. The author wishes to thank Professor A. Wayne MacKay of Dalhousie University for his suggestions and support in the preparation of this article. Of course, the author alone assumes responsibility for the final product.

Synopsis

* * *

Introdnction

Until the latter part of the twentieth century, a discussion of the right to die would likely have been an academic one, engaging theologians and moralists in an exploration of attitudes and beliefs regarding suicide. For the terminally ill, there was little recourse but to endure the natural progression of disease to its inexorable end or simply to wait for the onset of pneumonia, "The Old Man's Friend".[1] The recent marriage of medicine and technology, however, has pushed back the frontiers of death. Aggressive drugs, sophisticated surgical techniques, and computers have caused the spectre of death to fade to such an extent that at times an instrument is required to indicate if death has actually occurred.[2]

For the stricken individual, the implications of this Orwellian medicotechnical revolution are extraordinary, as no medical intervention is without its potential side effect. Cardiopulmonary resuscitation (C.P.R.) can lead to brain damage; successful anti-cancer and antibiotic therapy could mean a prolongation of life with poorly controlled pain;[3] while neurosurgical interventions may lead to years of a comatose or non-cognitive existence.

The past two decades have also witnessed the increasing emphasis on agathanasia,[4] a concept arising from the Greek words *Agathos*, meaning good, and *Thanatos*, meaning death. Dying with dignity is a concern in the twentieth century because artificially induced prolongation of life can lead

---

[1]B.M. Dickens lucidly discusses the role of antibiotic therapy for individuals with pneumonia who are also confronting death within a short time, "The Right to Natural Death" (1981) 26 McGill L.J. 847 at 861. The role of individual prognosis as a determinant to withdraw or withhold treatment will receive further elaboration in this paper.

[2]Encephalography is used on a person with irreversible coma to determine if the condition precludes reactivation of any part of the brain. For a provocative discussion dealing with "the life of a brainless body", see H. Jonas, "Against the Stream: Comments on the Definition and Redcfinition of Death" in J.E. Thomas, cd., *Matters of Life and Death: Crises in Bio-Medical Ethics* (Toronto: Samuel Stevens, 1978) 78.

[3]J.J. Bonica, "Cancer Pain" in I. Ajemian & B.M. Mount, eds, *The R.V.H. Manual on Palliative/Hospice Care* (New York: Arno Press, 1980) 113 at 113, analyzed a number of surveys on the incidence of cancer pain which suggested that moderate to severe pain is experienced by approximately 40% of the patients in intermediate stages of the discase. This figure increases to between 60% and 80% of patients who have advanced cancer.

[4]Thanatology writings at first trickled into the literature, but have become an extensive body of theory since the works of Dr E. Kubler-Ross first achieved medical acclaim. See *On Death and Dying* (New York: MacMillan, 1969).

to a dramatically decreased quality of life for the individual, perhaps even to a morally repugnant degree.[5]

Issues of euthanasia are among the most polemical and extensively debated within the realms of medicine, ethics, theology and law. The legal response to this academic activity and dialogue in Canada has been a subordination of the common law right of self-determination to the presumption of preference for life as embodied in the Canadian *Criminal Code*.[6] But what of the persons who would rather discontinue procedures than maintain life beyond what they view as reasonable limits? Should they so desire, do they have protection against what is certainly for some an extension of physical suffering, financial and psychological hardship, or incognizance?

In the absence of accommodating statutory protection, such as "Natural Death Acts"[7] found in other jurisdictions, those who advocate a right to die in Canada naturally look to the *Canadian Charter of Rights and Freedoms*[8] for assistance. This paper explores the arguments that might be made under the *Charter* to assert that there is a constitutional right to die in Canada. Although it has been argued that from a morality perspective there is no difference between active and passive euthanasia,[9] for the purposes of this paper, discussion is confined to passive euthanasia for persons who are terminally ill or dependent on life support systems.[10]

---

[5]Dr V. Rakoff argues that, although medical professionals are technically adept at life-saving procedures, to resuscitate a person under certain conditions may be both morally improper and obtuse. Although as a society we may value the prolongation of life through technical intervention, such measures may be surprising in their moral and ethical implications: see V. Rakoff, "High Technology, Will, Ethics, and Medicine" (Killam Lecture Series on *Morality and Medicine*, Dalhousie University, 17 October 1985) [unpublished].

[6]R.S.C. 1970, c. C-34. The specific sections reflecting this presumption will be discussed at more length in this paper.

[7]Such legislation includes the *Natural Death Act, 1983*, S. Austl. Sess. Stat. 1983, No. 121, and the California *Natural Death Act*, 1976 Cal. Stat. c. 1439.

[8]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[9]J. Rachels, "Active and Passive Euthanasia" in J.E. Thomas, ed., *Medical Ethics and Human Life: Doctor, Patient and Family in the New Technology*, (Sanibel, Fl.: Samuel Stevens, 1983) 291 at 295. The author argues that since the underlying motive (compassion) and end sought (the cessation of suffering) are common to both active and passive forms of euthanasia, there is no moral difference between the two. See also Samek, *infra*, note 50 at 93-94 and Dickens, *supra*, note 1 at 858-62.

[10]It is now generally acknowledged that there are four types of euthanasia: voluntary passive — a person is permitted to die with her consent and knowledge; involuntary passive — a person is permitted to die without her consent and knowledge; voluntary active — a person is killed with her knowledge and consent; involuntary active — a person is killed without her knowledge and consent: see M.J. Fronier, *Ethical Issues in Health Care* (Toronto: C.V. Mosby, 1981) at 390.

I. Underlying Principles

A. Applicability of the Charter

The application of the *Charter* has been extensively debated in legal literature. One group of scholars propounds that the language of section 32[11] of the *Charter* extends protection to both the private and government sectors.[12] An opposing school argues that the reach of section 32 is confined to "governmental activity", and thus the issue pivots on how this is defined.[13]

In the recent case of *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd*, the Supreme Court of Canada stated that the *Charter* does not apply to purely private action. Rather, section 32 makes the *Charter* applicable to governmental action, whether that action is based on a statutory or common law rule. The Court did not have to delineate the scope of governmental action, since the litigation was between private parties, but McIntyre J., speaking for the majority, did make the following statement:

> It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures. It is not suggested that this list is exhaustive. Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the *Charter* will be applicable.[14]

The issue to be determined, then, is whether the activity in question may be said to be governmental. Professor Swinton has posited two guides for the interpretation of this concept which would accord *Charter* protection to a health care recipient.[15]

---

[11]S. 32(1) states:

32(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[12]See D. Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man. L.J. 213; M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Edmond-Montgomery, 1983) at 115-16.

[13]See, *e.g.*, P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 671.

[14](18 December 1986) No. 18720 at 37 [hereinafter *Dolphin Delivery*].

[15]K. Swinton, "Application of the Canadian Charter of Rights and Freedoms (Ss. 30, 31, 32)" in W.S. Tarnopolsky & G.-A. Beaudoin, eds, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 41 at 49.

The first of these guides is the American doctrine of "state action". The Fourteenth Amendment of the American Constitution, which guarantees that "[n]o State shall" deprive any citizen of certain rights without due process of law, has been interpreted to extend to the rights contained in the Bill of Rights, thus making these guarantees applicable to state action.[16] On a case-by-case basis, however, the courts have broadened the scope of State action so that it encompasses apparently private actions as well, despite the absence of clearly articulated rules to guide such extensions. American commentators have articulated tests to determine the reach of the Bill of Rights in such cases. Briefly summarized, these tests have found that the private action is subject to the Bill of Rights where the private entity customarily allows public access to its private property, where the private entity carries out a government function and so becomes the State's agent, and where there is a sufficiently close nexus between the State and the private entity as evidenced by the degree of State control of the entity through regulation.[17]

Hospitals in Canada are created pursuant to enabling provincial legislation to provide state-funded health care. It can thus be speculated that public function and access tests are met, thereby bringing the patient within the *Charter*'s protection. What of nursing and special care homes, however, which are subject to provincial legislation, but many of which are privately owned? Although it may be argued that such institutions serve a public function, Canadian courts in contrast to their American counterparts may be reluctant to find a "sufficiently close nexus" between the State and the private activity.

According to Swinton, a second source of guidance in the section 32 issue might be found in the law of Crown immunity as it applies to Crown agents. In addition to examining the specific agent for any regulatory authority it may hold over individuals, she submits that a purposive approach is required. In such a case the issue to be determined is "whether the action or institution in question carries out a function of the state against which an individual has a need for protection."[18] In this instance, a strong argument can be made for extending *Charter* coverage to the terminally ill who wish release from their suffering. Such a population needs protection against the unwanted bodily intrusion which accompanies the provision of state-funded and state-regulated health care. In addition, the legislative function of hospitals, as embodied in their ability to enact by-laws and resolutions,

[16]See Congressional Research Service, Library of Congress, ed., *The Constitution of the United States of America: Analysis and Interpretation* (Washington: U.S. Government Printing Office, 1973) at 899-907; L.H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978) at 567-69.

[17]Swinton, *supra*, note 15 at 54-56.

[18]*Ibid.* at 59.

brings them squarely within the ambit of other bodies which Swinton posits are agents of the Crown, such as municipal governments and school boards.

The question of the application of the *Charter* in the hospital setting was considered in *Larose* v. *R.*[19] In this case, the accused alleged an infringement of his *Charter* right to security of the person when a lab technician took a blood specimen to ascertain its alcohol content. Maranger D.C.J. held that there was no evidence to show that hospital personnel fall within the purview of section 32. On the other hand, in the recent case of *Stoffman* v. *Vancouver General Hospital*[20] the Court stated that section 32 may extend the application of the *Charter* to agencies set up by the provincial government and which provide government services to the public. *Dolphin Delivery* has extended the application of the *Charter* to governmental activity under the common law and shown that the *Charter* cannot apply to all private litigation, but it still remains for the Supreme Court to articulate the limits of the "legislative, executive and administrative branches of government",[21] to which it has said the *Charter* does apply.

B. Interpretation and Judicial Roles

The *Charter*, as a constitutional document, is to enjoy special judicial consideration under the doctrine of progressive interpretation in order to give full effect to the civil liberties guaranteed therein.[22] Lord Sankey in an oft-quoted metaphor from *Edwards* v. *A.G. Canada* described the constitution as "a living tree capable of growth and expansion within its natural limits", with a view to affording constitutional instruments "a large and liberal interpretation" in order that their provisions would not be "cut down" by "a narrow and technical construction."[23]

Generosity in *Charter* interpretation is contingent upon the role of the judiciary. Although historically the Canadian judiciary has had to deal with many constitutional questions, these have been confined primarily to issues concerning the division of powers in a federal State. Canadian judges have been reluctant to depart from traditional Anglo-Canadian judicial roles and have avoided venturing into politically oriented or policy-laden issues.[24] The advent of the *Charter*, however, has introduced a number of changes

---

[19](1983), 25 M.V.R. 225 (Ont. Dist. Ct).

[20](1986), [1986] 6 W.W.R. 23 (B.C.S.C.).

[21]*Supra*, note 14 at 31.

[22]*Law Society of Upper Canada* v. *Skapinker* (1984), [1984] 1 S.C.R. 357 at 365-66, 11 C.C.C. (3d) 481, 53 N.R. 169 [hereinafter *Skapinker* cited to S.C.R.].

[23](1929), [1930] A.C. 124 at 136, [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 (P.C.).

[24]See B. Hovius & R. Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada" (1983) 61 Can. Bar Rev. 354 at 364; A. Roman, "The Charter of Rights: Renewing the Social Contract?" (1982-83) 8 Queen's L.J. 188 at 192-93.

which directly affect the process of judicial review. Canadian judges have been presented with a new and potent document to apply, one which by its very nature has substantially expanded the area of judicial review.[25] Not only are the *Charter* rights expressed in broad, even vague, terms, but they may conflict with other traditionally cherished rights. Section 7 intrinsically demonstrates this polarization in relation to the euthanasia issue. Advocating that terminally ill persons have the "liberty" to choose the cessation of life clearly comes into conflict with the rights to "life" and "security of the person" which are ageless and vigorously defended Canadian values.

The policy issues involved in finding solutions to these conflicting claims are obvious and mark a departure from the historical role of the Canadian judiciary. In the United States, however, the similarly broadly defined rights enshrined in the Bill of Rights have been broadly interpreted by the courts on political issues and at times in controversial ways.[26] Whether this tradition of judicial activism is apt to dawn in Canada has been a topic of extensive discussion by legal scholars. Historically, the philosophical orientation of Canadian judges has favoured the supremacy of Parliament.[27] When contrasted with the revolutionary history of the United States — American traditions of "self evident principles and universal natural rights"[28] and avoidance of governmental regulation — some writers have been led to express doubts as to whether a similar spirit of judicial activism will emerge in Canada.[29]

It is not yet clear if a philosophical and attitudinal change toward judicial review is occurring. In any examination of the short record of *Charter* interpretation by the Supreme Court of Canada, it is only apparent that judicial responses have been labile. In *Skapinker*, Mr Justice Estey opened the door to interpretative expansion by expressly endorsing the consider-

---

[25]See generally, Swinton, *supra*, note 15.

[26]The appointment of Chief Justice Warren heralded such an era of judicial activism. By giving a broad reading to clauses in the American Bill of Rights, the Warren court made several controversial decisions including requiring the desegregation of segregated schools in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and affording women the liberty to have an abortion in *Roe* v. *Wade*, 410 U.S. 113 (1973).

[27]A.W. MacKay, "Fairness after the Charter: A Rose by Any Other Name?" (1985) 10 Queen's L.J. 263 at 264.

[28]P. Russell, "The Political Role of the Supreme Court of Canada" (1975) 53 Can. Bar Rev. 576 at 592.

[29]See L. Tremblay, "Section 7 of the Charter: Substantive Due Process?" (1984) 18 U.B.C. L. Rev. 201 at 202-7.

ation of American cases.[30] As well, the intention of subjecting Cabinet decisions to judicial scrutiny was clearly articulated in *Operation Dismantle Inc.* v. *R.*[31] In that case, however, although the question brought to the court was a highly political and controversial one,[32] the judicial response was to hold in favour of the government. A distinct break with Canadian tradition occurred in the recent case, *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979.*[33] By ruling that section 7 should receive substantive review, a significant departure from previous Supreme Court of Canada decisions was evidenced[34] and a step in the direction of American interpretation decidedly was taken. Whether this decision is the harbinger of continued activism in Canadian judicial review remains to be seen.[35]

---

[30]*Supra*, note 22 at 367. Mr Chief Justice Dickson, in an address for the opening of the Cambridge Lectures on July 15, 1985, stated that the jurisprudence under the American Bill of Rights is helpful in determining the scope of the *Charter*. His Lordship further stated that reviewing American decisions on a *Charter* issue would "almost always" be useful as they provide a place to begin forming ideas. In *Hunter* v. *Southam Inc.*, *infra*, note 57 at 159, Dickson C.J.C. considered the protection accorded persons against unreasonable search and seizure under the Fourth Amendment. He expressly approved this approach in construing the protections afforded by section 8 of the *Charter*. Lamer J., however, articulated concerns about importing American constitutional concepts, terminology and jurisprudence into the Canadian context in *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979* (1985), [1985] 2 S.C.R. 486 at 498, 24 D.L.R. (4th) 536 [hereinafter cited to S.C.R.]. Allowing the U.S. debate to simply define the issue in Canada was seen by His Lordship as a disservice to the *Charter*, given the fundamental structural differences between the two constitutions.

[31](1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 59 N.R. 1 [hereinafter *Operation Dismantle* cited to S.C.R.].

[32]A group of organizations and unions sought a declaration that the federal government's decision to allow cruise missile testing in Canada was unconstitutional on the grounds that it violated s. 7 of the *Charter*.

[33]*Supra*, note 30.

[34]In *Duke* v. *R.* (1972), [1972] S.C.R. 917 at 923, 18 C.R.N.S. 302, Laskin C.J. soundly dismissed the possibility of substantive due process in Canada:

> Under s. 2(e) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

It is interesting to note that three years later in *R.* v. *Morgentaler* (1975), [1976] 1 S.C.R. 616 at 633, 4 N.R. 277 Laskin C.J. opened the door to substantive due process under s. 1(a) of the *Canadian Bill of Rights*, *infra*, note 139. He stated:

> I am not, however, prepared to say ... that the prescriptions of s. 1(a) must be rigidly confined to procedural matters.... [I]t may be that there can be a proper invocation of due process of law in respect of federal legislation as improperly abridging a person's right to life, liberty, security and enjoyment of property.

[35]For a provocative discussion on the consequences of liberal judicial review under the *Charter*, see P.H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 30 at 49.

It is against this restless constitutional landscape of as yet undefined rights and variations in long-held judicial roles that the right to die in Canada is explored.

II. Interactions of the *Criminal Code* and the Common Law

As succinctly stated by Professor Dickens, ours is "a life-affirming culture where the preservation of human life is celebrated."[36] Not surprisingly, the *Criminal Code* asserts and protects the sanctity of life in a number of ways which directly confront the autonomy of the terminally ill in their medical decision-making.

Section 14 states that:

> No person is entitled to consent to have death inflicted upon him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted upon the person by whom consent is given.

At first blush it may appear that a competent adult could argue for the withdrawal of medical treatment or life support, as death would not be "inflicted". Rather, death would naturally ensue in the absence of interventions which keep it temporarily at bay. Thus, the ambit of this provision potentially could be avoided. Once medical treatment has been initiated, however, the practitioner must use reasonable knowledge, skill and care[37] to administer ongoing therapy, if the discontinuation of treatment would be dangerous to life.[38] In addition, functioning adjunctively with these provisions is subsection 241(b):

> Everyone who ... without reasonable cause prevents or impedes or attempts to prevent or impede any person who is attempting to save the life of another person, is guilty of an indictable offence ... .

The *Criminal Code* goes even further by requiring persons who are under a legal duty for individuals in their charge to provide the necessaries of life[39] which include the provision of health care.[40] It can be inferred, then,

---

[36]*Supra*, note 1 at 847.

[37]S. 198 states: "Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful acts that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing."

[38]S. 199 states: "Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life."

[39]S. 197(2)(a)(ii) requires parents, foster parents, guardians, heads of families and spouses to provide necessaries of life to their charges if "the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be injured permanently."

[40]See *R.* v. *Brooks* (1902), 9 B.C.R. 13, 5 C.C.C. 372 (S.C.); *R.* v. *Cyrenne, Cyrenne & Cramb* (1981), 62 C.C.C. (2d) 238 (Ont. Dist. Ct).

that the Canadian criminal law presumes that a person does not wish to die. So strong is this presumption that Dickens has proposed on the basis of section 241 that even patients cannot prohibit physicians from attempting to save their lives in emergency situations.[41]

But what of a person's common law right to determine what shall be done with her own body? Autonomy and consensual touching in the provision of health care have long been protected in Canadian medical jurisprudence. The Supreme Court of Canada recently approved an oft-quoted statement of Cardozo J. in *Schloendorff* v. *Society of New York Hospital*,[42] that "every human being of adult years and sound mind has a right to determine what shall be done with his own body ...". Mr Chief Justice Laskin added that battery would lie where surgery or treatment was performed without consent, or where, apart from emergency situations, surgery or medical treatment was given beyond that to which there was consent.[43] By awarding statutory precedence to the physician's right to rescue, however, the common law protections have been relegated to a position of lesser importance. The right to refuse treatment has been further emasculated by section 45 of the *Criminal Code*. Sometimes referred to as the Good Samaritan provision, section 45 states that no criminal liability will lie for

---

[41]*Supra*, note 1 at 851. It is most interesting to note the paradoxical effect of s. 241. On one hand, the patient cannot prevent the physician from attempting to save her life. On the other hand, it is legally acceptable for a physician to prescribe and administer a medical treatment which may ultimately accelerate the patient's death as long as the standard of reasonable care demanded by the common law and *Criminal Code* s. 198 has been met. Adoption of the following formulation was suggested in Law Reform Commission of Canada, *Euthanasia, Aiding Suicide and Cessation of Treatment* (Report No. 20) (Hull, Que: Supply & Services Canada, July 1983) at 35 [hereinafter Report No. 20]:

> 199.2 Nothing in sections 14, 45, 198, 199 and 229 shall be interpreted as preventing a physician from undertaking or obliging him to cease administering appropriate palliative care intended to eliminate or to relieve the suffering of a person, for the sole reason that such care or measures are likely to shorten the life expectancy of this person.

This suggestion was reiterated in Law Reform Commission of Canada, *Some Aspects of Medical Treatment and Criminal Law* (Report No. 28) (Hull, Que.: Supply & Services Canada, March 1986) at 8 [hereinafter Report No. 28].

[42]105 N.E. 92 at 93 (1914).

[43]*Reibl* v. *Hughes* (1980), [1980] 2 S.C.R. 880 at 890-91, 114 D.L.R. (3d) 1, 14 C.C.L.T. 1 [hereinafter cited to S.C.R.]. In Law Reform Commission of Canada, *Medical Treatment and Criminal Law* (Working Paper No. 26) (Hull, Que.: Supply & Services Canada, 1980) [hereinafter Working Paper No. 26] at 71 and 90-91 it was suggested that the *Criminal Code* preserve the common law tradition since the right to refuse treatment could be implied in the absence of contrary statutory exception. Examples of specific exemptions included the ordering of custody of insane persons (s. 545) and compulsory custody of the mentally ill (ss 465, 543, 608.2, 738(5) and 738(6)). Under s. 240 a medical practitioner can be required to take a blood sample without the accused's consent in order to establish serum alcohol levels. It is important to note, however, that this statutory exception is made for evidentiary, not therapeutic, reasons.

operations which are performed skillfully and are reasonable in light of the person's state of health.[44]

III. Purposes of the *Charter*

At this intersection of majoritarian and counter-majoritarian interests, the role of the *Charter* as a protector of rights and freedoms[45] should be examined. By way of the broad language and phraseology used, somewhat ambiguous rights and guarantees are thrown up as limitations upon the powers of government as evidenced by section 32. These, nevertheless, must guide the judiciary in their delicate balancing of interests between the individual and the State.

There are actually three groups of identifiable interests competing in the right to die issue. Firstly, the medical profession is quite conspicuously involved in a person's choice to die. At once physicians may feel torn between witnessing the prolonged suffering of an individual and fearing civil liability which could follow from failing to implement appropriate medical intervention.[46] The patient-physician relationship as reflected in the governing common law and the medical *Code of Ethics*,[47] however, is a consensual one. In *Reibl* v. *Hughes*[48] the Supreme Court of Canada suggested that competent adults have the right to make their own medical decisions even if such decisions are unwise.[49] An informed person's refusal to undergo further medical treatment terminates the physician's duty and thus makes the assertion of a medical interest untenable, though the temptation will remain for physicians to intervene due to their interest in possible discoveries important to medical research.

---

[44]Professor Dickens indicates that where "death is irresistible and imminent", however, life prolonging extraordinary measures may be refused by patients: see *supra*, note 1 at 876. Consequently, the provision of ordinary care in concert with an individual's physical and emotional resources will determine whether or not that person achieves natural death.

[45]According to Russell, *supra*, note 35 at 31-43, political leaders who were the chief sponsors of the *Charter* also intended it to be a promoter of national unity. See also Hogg, *supra*, note 13 at 651-52.

[46]See B.A. Gazza, "Compulsory Medical Treatment and Constitutional Guarantees: A Conflict?" (1972) 33 U. Pitt. L. Rev. 628 at 636.

[47]Canadian Medical Association, *Code of Ethics*, June 1978, Canon 5: "An ethical physician . . . will recognize that the patient has the right to accept or reject any physician and any medical care recommended to him . . .".

[48]*Supra*, note 43 at 16.

[49]Opponents of the right to die would argue that opting for death over life demonstrates not unwise decision-making, but unsoundness of the mind. Cultural and statutory presumptions support this position and thus elucidate the precariousness in a person asserting the right to die. See Report No. 28, *supra*, note 41 at 17, where the right to refuse treatment is recommended.

The interests of society are multiple in regard to the right to refuse treatment. These embrace the power to provide for the health, welfare and safety of society,[50] and the power of *parens patriae*.[51] Social interests also arise in protecting third parties from the emotional distress caused by the death of a relative,[52] as well as the need to ensure their financial support if the person who has died was the primary wage earner.

Naturally, the third interests are those of the person asserting the right to die. Principles of inviolability of the body and autonomy of the person are the bases for asserting rights to privacy, freedom of religion and freedom of contract.[53] In addition, the risk to the patient inherent in any imposed medical intervention directly threatens the person's life, liberty[54] and security. Finally, of perhaps fundamental significance is the reality that by refusing individuals the right to die, their pain and suffering are prolonged.[55]

Having identified the interests involved, the truly formidable nature of reconciling one against the other is realized. Section 52, the primacy provision of the *Constitution Act, 1982*[56] is central to the weighing of these interests. It states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

It is clear that, if the individual interest prevailed, the *Criminal Code* provisions inconsistent with the right to die would be invalidated. In order for the "interest" to prevail, however, it must be classifiable as a guaranteed right or freedom as expressly contained within the *Charter*. In other words, is the "right" to die an assertion of self-determination or *a constitutionally recognized interest*? To address this question attention turns to specific *Charter* provisions.

---

[50]The concern for the safety of society is embodied in the "wedge objection". The basis of this apprehension is that if euthanasia were legalized the consequences would lead to non-consensual mercy killings at the least, and indiscriminate murder at the most. The wedge theory receives a caustic disposal by the late Professor R. Samek in "Euthanasia and Law Reform" (1985) 17 Ottawa L. Rev. 86 at 94-98 and 114.

[51]See Working Paper No. 26, *supra*, note 43 at 70-77.

[52]See C. Beraldo, "Give Me Liberty and Give Me Death: the Right to Die and the California Natural Death Act" (1980) 20 Santa Clara L. Rev. 971 at 975-76.

[53]See Working Paper No. 26, *supra*, note 43 at 70-77.

[54]See P. Garant, "Fundamental Freedoms and Natural Justice (Section 7)" in Tarnopolsky & Beaudoin, eds, *supra*, note 15, 257 at 269.

[55]G. Fairweather rhetorically questioned how an individual's pain and suffering could be balanced against public risk in "Human Rights in Health Care" (Third National Conference on Health Care, 31 October 1985, Ottawa) [unpublished].

[56]Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

IV. The Pertinent *Charter* Provisions

A. Section 7 — Life, Liberty and Security of the Person

Section 7 is located under the "legal rights" portion of the *Charter*. It states:

> 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.

As this is a constitutional provision, its meaning cannot be determined merely by referring to a dictionary or rules of statutory construction.

The goal of *Charter* interpretation was expressed in *Hunter* v. *Southam Inc.*[57] Mr Justice Dickson (as he then was) stated that a constitution, which is joined by a charter of rights, functions to provide a framework for the exercise of legitimate governmental power and unremitting protection of individual liberties.

In order to breathe life into these functions, a broad perspective is required in *Charter* interpretation. Some assistance in the development of such a perspective may emerge through examining the practices in other jurisdictions.[58] Accordingly, some parallel constitutional and statutory provisions from other democracies are presented.

1. Other Jurisdictions

In the United States, a terminally ill person can assert the right to die either as an incident to the constitutionally protected right to privacy, or as a statutory right in some states. The American Bill of Rights[59] expressly guarantees aspects of the right to privacy in several provisions. It is generally thought that the right to make a positive choice emerges from the First Amendment guarantee of freedom of religious exercise, of speech, and of the press.[60] Specific instances of the right to be left alone are explicitly guaranteed in the Third,[61] Fourth[62] and Fifth[63] Amendments. Further, since

---

[57](1984), [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641, 41 C.R. (3d) 97 [hereinafter cited to S.C.R.].

[58]See the discussion, *supra*, note 30.

[59]U.S. Const. amends I-X.

[60]U.S. Const. amend. I.

[61]"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner": U.S. Const. amend. III.

[62]"The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated": U.S. Const. amend. IV.

[63]"No person shall ... be compelled in any criminal case to be a witness against himself": U.S. Const. amend. V.

privacy is subsumed by liberty,[64] the Fourteenth Amendment confers the right of privacy by its guarantee of liberty.[65] The courts have accordingly recognized a constitutional right of privacy in many instances dealing with family life and procreation.[66]

In the landmark case of *Re Quinlan*,[67] the Supreme Court of New Jersey ruled that the unwritten constitutional right of privacy[68] was broad enough to encompass a patient's decision to decline medical treatment in certain circumstances. The Court granted Mr Quinlan express power to discontinue all the extraordinary procedures which had been necessary to sustain his daughter's vital processes. Individual privacy rights were allowed to prevail over the State interest in light of the following factors: Karen's prognosis was extremely poor; she would never resume a cognitive life; and the invasion of her body was considerable since she required 24-hour intensive nursing care, antibiotics, a respirator, feeding tube and catheter.

More recent cases have considered the privacy interest and upheld the individual's right to discontinue life-sustaining treatment. In the case of *Re Spring*,[69] the Supreme Court of Massachusetts adumbrated additional factors to be considered when faced with the issue of discontinuing medical treatment,[70] which included the following: the extent of impairment of the person's mental faculties; whether the person is in the custody of a state institution; what the patient's prognosis would be with or without the proposed treatment; the complexity, risk and novelty of the proposed treatment; its possible side effects; the patient's level of understanding and probable reaction; the urgency of the decision; the consent of the patient, spouse or guardian; the good faith of those who participate in the decision; the clarity

---

[64]See Beraldo, *supra*, note 52 at 977.

[65]U.S. Const. amend. XIV, s. 1.

[66]For example, the courts have upheld the right to privacy in conjunction with the following issues: abortion, in *Roe* v. *Wade*, *supra*, note 26; marriage, in *Loving* v. *Virginia*, 388 U.S. 1 (1967); education, in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), the court suggested that the right to be left alone should be extended to other decisions involving intimate and important issues.

[67]355 A.2d 647, 70 N.J. 10, 79 A.L.R. 3d 205 (1976) [hereinafter *Quinlan*].

[68]Kaplan, *infra*, note 77 at n. 3 comments that although the Court did not use the term "right to die", this became the practical effect in granting the "right to privacy". In addition, it is interesting to note that the court included the right to privacy under the broader class of "rights of personality". Although such a class of rights is recognized in Canada under defamation theory, pursuing this in order to assert a constitutional right to die offers no greater force than using the common law right to refuse medical treatment.

[69]405 N.E.2d 115 (1980) [hereinafter *Spring*].

[70]The *Quinlan* and *Spring* cases deal with continuation of treatment of mentally incompetent persons, hence the inclusion of elements pertaining to the *bona fide* character of guardians' acts and to the question of mental capacity.

of professional opinion as to what is good medical practice; the interests of third persons; and the administrative requirements of any institution involved.

The *Charter* guarantees many of the same civil liberties which are contained in the American Bill of Rights. The right to make positive choices is reflected in the fundamental freedoms granted in section 2.[71] Similar rights to be left alone are found in *Charter* sections 8 (the right to be secure against unreasonable search and seizure) and 13 (the right to not be compelled to give self-incriminating evidence). Finally, the guarantee of liberty is provided in section 7; but, unlike the United States, the right of privacy being consummated by these underlying protections is uncertain. In a wiretapping case, *R.* v. *Rowbotham*,[72] Mr Justice Ewaschuk did not accept the defense's argument that section 7 created a right to privacy or zones of privacy. His reasoning was based on the express rejection of a separate right of privacy by the Joint Committee on the Repatriation of the Constitution.[73]

Later, however, in *Hunter* v. *Southam Inc.*, Mr Chief Justice Dickson stated that the public had an interest in being "left alone by government".[74] Whether this presupposes the existence of an individual's right to privacy is uncertain. It should be borne in mind that these dicta were made in the context of using section 8 of the *Charter* to protect individuals against unreasonable search and seizure. Historically, these common law protections were based on the right to enjoy property and were affiliated with trespass laws.[75] To attempt, therefore, construing these remarks as endorsing a right to a good death under section 7 may represent an unwarranted leap of faith.

For the institutionalized terminally ill person in Canada there may be an additional factor operant in the denial of a right to privacy. Professor Thompson propounds that individuals forego their right to privacy when

---

[71]Section 2 of the *Charter* states:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

[72](1984), 11 C.R.R. 302, 42 C.R. (3d) 164 (Ont. H.C.) [hereinafter cited to C.R.R.].

[73]*Ibid.* at 310.

[74]*Supra*, note 57 at 159.

[75]*Ibid.* at 157.

they are the recipients of public funding.[76] In light of the considerable public expenditure required to maintain the life of a terminally ill patient, this is particularly ironic. The individual's life is so devoid of quality that death is perceived to be preferable. The person is debilitated to such a degree that government-funded institutionalization is required. The right of privacy which would allow the person to choose release from suffering can now be denied, however, because she or he is institutionalized.

In addition to the constitutional right of privacy, some American states extend statutory protection for medical decision-making in the form of "natural death" legislation.[77] The California *Natural Death Act*[78] exemplifies such legislation, and is predicated on the conviction that adults have the fundamental right to control decisions pertaining to their own medical care. The Act allows individuals with terminal disease the right to withdraw from medical procedures which prolong life and which may cause a loss of dignity and protracted suffering. Further, in balancing other interests, the legislation provides immunity for health professionals from civil and criminal liability when they withhold or withdraw life-sustaining procedures according to the patient's directives. Failure by the physician to effectuate the patient's directive, on the other hand, constitutes unprofessional conduct.

A British legislative proposal dealing with euthanasia was introduced into the House of Lords in 1936 under the sponsorship of the English Euthanasia Society.[79] The Bill failed to pass largely because the procedural safeguards it contained were felt to "bring too much formality into the sick room."[80] The euthanasia legislation movement underwent a period of inactivity until it resurged in the 1960's. In 1969 the *Voluntary Euthanasia Act* was proposed, but once again failed to pass on the basis of poor drafting, vague definition of terms and procedural problems.[81]

---

[76]R. Thompson, "The Charter and Child Protection: The Need for a Strategy" (1986) 5 Can. J. Fam. L. 53 at 78 and 57. Referring to the *Charter* as "an empty document for the poor", Thompson states: "The right to privacy flows from the right to property and those on the public dole forego their privacy . . .". This assertion was made in reference to the regular public inspection and discipline welfare families undergo to ensure their parenting standards are commensurate with their receipt of public funds. On the other hand, H.P. Glenn contends that there can be no theoretical justification for the assertion that the right to privacy is based on property rights, since the principal interests protected by the right are solitude and anonymity to which no commercial value can be attached. See "The Right to Privacy in Quebec Law" in D. Gibson, ed., *Aspects of Privacy Law* (Toronto: Butterworths, 1980) c. 3 at 49.

[77]For a comprehensive survey dealing with such legislation in the U.S., see R.P. Kaplan, "Euthanasia Legislation: A Survey and a Model Act" (1976) 2 Am. J.L. Med. 41.

[78]*Supra*, note 7.

[79]See G. Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957) at 331. See also Kaplan, *supra*, note 77 at 52-53.

[80]Williams, *ibid.* at 334.

[81]See H. Trowell, *The Unfinished Debate on Euthanasia* (London: SCM Press, 1973) at 17-18.

The State of South Australia enacted a Natural Death Act in 1983.[82] Like the California statute, this Act allows terminally ill persons to withdraw from life-prolonging medical/surgical procedures. In addition, provisions are incorporated to insulate medical practitioners from liability when they are acting according to the patient's directives and in good faith. Another feature it shares with the California Act is a specific prohibition on causing or accelerating death by means other than withdrawing extraordinary medical interventions.

In comparison to these other jurisdictions, Canada has been relatively inactive regarding the introduction of euthanasia legislation. A Natural Death Act was proposed for Ontario in 1977. This measure was approved on second reading by a sizeable majority of the Legislature and was sent to Committee for detailed consideration. The process was halted by a provincial election, however, and it has remained dormant since that time.[83]

Two additional reference sources are found in the *International Covenant on Civil and Political Rights*[84] and the *European Convention on Human Rights.*[85] These instruments are treaties and as such are not incorporated into our domestic laws. Nonetheless, they influence interpretation of the *Charter* since statutes, and arguably the Constitution,[86] should be interpreted in conformity with international law.[87]

The *International Covenant* recognizes the "inherent dignity of the human person" in its Preamble and has a number of provisions which may touch on the right to die. Article 1 grants the right of self-determination and accordingly the right to determine political status and to pursue economic, social and cultural development. Article 6 provides for the inherent right to life and procedural safeguards pertaining to capital punishment. A parallel to section 7 of the *Charter* is seen in Article 9(1) which states:

> Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

---

[82]*Supra*, note 7.

[83]See Dickens, *supra*, note 1 at 873.

[84]16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (in force in Canada 19 August 1976) [hereinafter *International Covenant*].

[85]4 November 1950, 213 U.N.T.S. 221, E.T.S. No. 5 [hereinafter *Convention*].

[86]See Hogg, *supra*, note 13 at 662.

[87]See *R.* v. *Videoflicks Ltd* (1984), 48 O.R. (2d) 395 at 420, 14 D.L.R. (4th) 10, 15 C.C.C. (3d) 353 (C.A.) [hereinafter cited to O.R.] where Tarnopolsky J.A. said: "Although our constitutional tradition is not that a ratified treaty is self-executing within our territory, but must be implemented by the domestic constitutional process ... unless the domestic law is clearly to the contrary, it should be interpreted in conformity with our international obligations". See also, D. Turp, "Droit international et interpretation de la *Charte*" (1984) 18 R.J.T. 353.

The subsections which follow in Article 9 all deal with issues of arrest and detention. Article 17 expressly recognizes a right to privacy and provides for protection against unlawful interference with this right.

Canada ratified the *International Covenant* in 1976 and under international law is bound to comply with its provisions. At first blush it may appear that Canada is therefore obliged to breathe life into the provisions of self-determination, liberty and privacy. However, there are substantial difficulties in trying to use the *International Covenant* as a springboard to advocate a constitutional right to die. Firstly, compliance with the *International Covenant* does not need to be embodied in the Constitution,[88] since statutory and administrative enactments are sufficient to fulfill these obligations.[89] Thus *Criminal Code* provisions or institutional policies pertaining to autonomy and procedural safety in medical decision-making could be viewed as adequately discharging international obligations. Secondly, the language used in the articles of the *International Covenant* as seen within that context may not lead to a presumption in favour of euthanasia. For example, self-determinism in Article 1 is used in conjunction with political status, and economic, social and cultural development. Against this background it may be difficult to construe such language as guaranteeing absolute autonomy in all facets of medical decision-making. Similarly, deprivation of life is viewed in the context of procedural fairness in relation to death penalties, and the liberty interest is expressed in association with arrest and detention. Hence it may be untenable to attempt on these bases to fashion a constitutional right to withdraw from life-sustaining procedures. The right to privacy contained in Article 17 appears to offer promise to those making such an intimate decision as the discontinuation of treatment. Since it is counterposed to "unlawful interference", however, it lends no assistance to the euthanasia issue. Interference with death-inducing acts or omissions is specifically required by the *Criminal Code* and therefore cannot be viewed as unlawful intervention.

The *European Convention on Human Rights* came into force in 1953, but Canada is not a party to the *Convention* since it is a regional treaty. It has been stated that the *Convention* nonetheless has persuasive value in assisting Canadian courts to interpret the *Charter*, since many of the same civil liberties are guaranteed in both documents.[90] However, a significant departure from this line of reasoning was recently witnessed.

---

[88]See Hogg, *supra*, note 13 at 663.

[89]See W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1983) 8 Queen's L.J. 211 at 212.

[90]See Hogg, *supra*, note 13 at 663.

In *R.* v. *Morgentaler*,[91] Mr Chief Justice Parker observed that the European Commission on Human Rights had narrowly interpreted the words "liberty and security of the person" taken from Article 5 of the *Convention*. He read from the Commission's *Decisions and Reports*:

> "Personal liberty" in Article 5 means primarily freedom from arrest and detention. The right to security of person comprises the guarantee that individuals will be arrested and detained only for the reasons and according to the procedure prescribed by law. This is a guarantee against arbitrariness in the matter of arrest and detention.[92]

He then went on to state, "I do not find that the interpretation of the phrase 'liberty and security of person' in the European context offers much persuasive guidance in resolving the issues before this court."[93] The decision was based partly on structural differences between section 7 of the *Charter* and Article 5 of the *Convention*, since section 7 is not restricted to the rights in sections 8 to 14. Further, since the *Convention* was drafted as a process of negotiation among sovereign States, it was felt that the legal systems involved were significantly different from the Canadian context. The *Convention* thus has an uncertain role to play in determining what rights may be protected under section 7 of the *Charter*.

In summary, other jurisdictions offer constitutional or statutory approval for terminally ill persons to withdraw from life-sustaining treatment. Despite this, however, analogous rights have not been accorded in Canada. This is attributable to political and judicial reluctance to extend the liberty interest to include a right to privacy, the phenomenon of public funding in the provision of health care services, the inertia of the legislative process concerning euthanasia, and the contextual inadequacy or ambiguous language found in the treaties which influence *Charter* interpretation.

In order to ascertain if a constitutional right to die can yet be asserted by section 7 of the *Charter*, attention turns to domestic jurisprudence.

2. Interests Protected under Section 7

A discussion of which interests are protected begins with addressing *how many* rights there are in section 7. The courts have focussed on the structure of section 7 to answer the question of whether it contains a single right or two independent rights. In *Operation Dismantle*, Wilson J. summarized this issue:

---

[91](1984), 47 O.R. (2d) 353 at 400-1, 12 D.L.R. (4th) 502, 41 C.R. (3d) 193 (H.C.) [hereinafter cited to O.R.], rev'd on other grounds (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641 (C.A.). The Court of Appeal substantially agreed with Parker A.C.J.H.C.'s analysis.

[92]Eur. Comm. H.R., No. 7050/75, Report of 12 October 1978, *Arrowsmith* v. *United Kingdom*, 19 D.R. 5 at 18.

[93]*Supra*, note 91 at 403.

> The appellants submit that on its proper construction s. 7 gives rise to two separate and presumably independent rights, namely the right to life, liberty and security of the person, and the right not to be deprived of such life, liberty and security of the person except in accordance with the principles of fundamental justice. In their submission, therefore, a violation of the principles of fundamental justice would only have to be alleged in relation to a claim based on a violation of the second right. As Marceau J. points out in his reasons, the French text of s. 7 does not seem to admit of this two-rights interpretation since only one right is specifically mentioned. Moreover, as the respondents point out, the appellants' suggestion does not accord with the interpretation that the courts have placed on the similarly structured provision in s. 1(a) of the *Canadian Bill of Rights* ... .[94]

The significance of pursuing this debate appeared to centre on whether the interpretation of section 7 should involve procedural or substantive review. Wilson J. articulated this as follows:

> The appellants' submission, however, touches upon a number of important issues regarding the proper interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well.[95]

Some of these aspects were clarified by the watershed case, *Reference Re Section 94(2) of the Motor Vehicle Act R.S.B.C., 1979*.[96] Mr Justice Lamer, speaking for the majority, stated that the term "principles of fundamental justice" did not constitute a right. Instead he found that this term exists as a qualifier of the right not to be deprived of life, liberty and security of the person. Further, he held that fundamental justice involves substantive as well as procedural review in order to secure for persons "the full benefit of the Charter's protection."[97] His Lordship then adopted a purposive analysis which was the approach set forth by the court in *Hunter* v. *Southam Inc.*[98] In *Big M Drug Mart* Mr Chief Justice Dickson referred to this purposive definition:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.[99]

---

[94]*Supra*, note 31 at 487, referring to *Miller* v. *R.*, *infra*, note 140.

[95]*Operation Dismantle, ibid.* at 487-88.

[96]*Supra*, note 30. In this reference case the analysis of s. 7 was limited to determining the scope of the term "principles of fundamental justice".

[97]His Lordship quoted Dickson C.J.C. from *R.* v. *Big M Drug Mart Ltd* (1985), [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321, [1985] 3 W.W.R. 481 [hereinafter *Big M Drug Mart* cited to S.C.R.].

[98]*Supra*, note 57.

[99]*Supra*, note 97 at 344.

The rights to be protected under section 7 were considered by the court in *R.* v. *Morgentaler.*[100] Mr Chief Justice Parker stated:

> In my opinion, a determination of the rights encompassed by s. 7 should begin by an inquiry into the legal rights Canadians have at common law or by statute. If the claimed right is not protected by our system of positive law, the inquiry should then consider if it is "so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental" ... .[101]

Enquiring into common law and statutory rights of terminally ill persons would thus far indicate the following: all adults with the capacity to consent have the common law right to refuse medical treatment and the right of self-determination. If patients attempted to extend these by claiming the right to die, however, it would clearly conflict with *Criminal Code* provisions which function to promote life. In the end, the common law is available only if a statute does not prescribe a contrary result.[102] This was demonstrated in *A.G. Canada* v. *Notre Dame Hospital.*[103] The Quebec Superior Court authorized the respondent to perform the surgery or treatments needed to remove a metal wire from the body of Niemiec (which also included feeding him as it was seen as an appropriate pre-operative step). The learned trial judge recognized the legal right to self-determination, but held that this right could not be used to facilitate the choice to die.

Our traditions and conscience must also be searched to ascertain which values are fundamental. Professor MacKay warns that this undertaking can be problematic since the historical approach protects the *status quo* and traditional values.[104] Certainly that is the case here, where formerly medical technology did not have the sophistication to extend life beyond unreasonable, unnatural bounds and patients willingly abdicated their decision-making roles to the medical patriarchs. As was indicated earlier, ours is a life-celebrating society, but one which is uncomfortable in dealing with the implications of technical prowess. Thus the claimed right is not deeply rooted in our country because until now there was no need for this to be so.

---

[100]*Supra*, note 91. To arrive at his decision, the learned High Court Judge adopted the mode of reasoning used by Estey J. in *Skapinker*, *supra*, note 22.

[101]*Supra*, note 91 at 405-6, quoting a statement made by Cardozo J. in *Palko* v. *Connecticut*, 302 U.S. 319 (1937) at 325, quoting himself in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934) at 105.

[102]See R.A. Sedler, "Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms" (1984) 59 Notre Dame L. Rev. 1191.

[103](1984), [1984] C.S. 426, 8 C.R.R. 382.

[104]*Supra*, note 27 at 329.

Some assistance in resolving the contemporary nuances of this issue may be had by addressing a subsidiary concern. How many rights are encompassed by the words "life, liberty and security of the person"?

Madam Justice Wilson alluded to a single concept for "life, liberty and security of the person" in *Singh* v. *Minister of Employment and Immigration.*[105] She stated that if the narrow approach of section 7 was adopted, that is, that section 7 expresses only one right, it "must encompass freedom from the threat of physical punishment *or suffering* as well as freedom from such punishment itself."[106] Recognition of a constitutional right to be free of physical suffering obviously has enormous implications for the terminally ill. Of additional assistance is a decision of the Ontario Court of Appeal in *R.* v. *Videoflicks Ltd.* The concept of life, liberty and security of the person was considered as a unit and was seen to "relate to one's physical or mental integrity and one's control over these."[107] As attractive as it is to attempt asserting the constitutional right to die on this authority, the context supporting this statement should be examined. This case revolved around Sunday closing laws. Although one could speculate that the sweeping language used was designed to deal with more than retail hours, it requires a considerable leap of faith to therefore claim a right to a good death.

Since the "single right theory" was neither adopted nor repudiated in *Operation Dismantle* and *Singh*, the relevant component parts will be addressed.

3. Life

The Law Reform Commission's Working Paper No. 28 proposed three principles based on the relationship between the quality of life and the sanctity of life.[108] The first principle is a presumption in favour of life. The

---

[105](1985), [1985] 1 S.C.R. 177 at 204, 58 N.R. 1 [hereinafter *Singh* cited to S.C.R.].

[106]*Ibid.* at 207 [emphasis added].

[107]*Supra*, note 87 at 433.

[108]Law Reform Commission of Canada, *Euthanasia, Aiding Suicide and Cessation of Treatment* (Working Paper No. 28) (Hull, Que: Supply & Services Canada, 1982) at 36-39 [hereinafter Working Paper No. 28]. These principles were predicated on three conclusions arrived at by E. Keyserlingk, in Law Reform Commission of Canada, *Sanctity of Life or Quality of Life in the Context of Ethics, Medicine and Law* (Study Paper No. 3) (Hull, Que.: Supply & Services Canada, 1979) at 70 [hereinafter Study Paper No. 3]:

> (1) The indeterminate sanctity of life principle alone cannot be used to determine in advance all treatment decisions, without consideration as well of the quality of the lives in question. To do so would be to use that principle as a "decision-avoiding" not a "decision-making" guide.
>
> (2) The meaning of quality of life in the medical context need not mean wholly subjective judgments about the relative worth, value, utility or equality of the lives of persons. Purged of connotations of "relative worth" or "social utility", the function of quality of life thinking in this context ... can be one of improving and

second principle is the recognition that all human beings are masters of their own destinies except if the exercise of this right affects public order or the rights of others. Third is the principle that human life should be considered from "qualitative" as well as "quantitative" perspectives:

> The autonomous person has the right to define his own priorities and requirements in terms of the effects of treatment or non-treatment upon the quality of his life. Others should respect these priorities. If the person is not autonomous, others must determine these priorities, taking into account the utility of the act in light of the benefit to the person involved.[109]

These principles of life promote the argument that "life" is much more than the mere beating of a heart. Life within our democratic political traditions surely connotes a measure of dignity which exceeds basic physiological function. The difficult question to address in advancing this notion, however, is deciding how far the limits of quality extend. Further, consideration must be given to the standard of quality to be used in deciding the demarcation between acceptable and unacceptable quality.

It is submitted that in dealing with a properly informed, competent adult, the limit of unreasonable quality of life must be decided by the affected individual. The State has no sensors which perceive the discomforts of bodily invasion by drugs, tubes, electrodes or injections. There are no instruments which can register where misery descends from tolerable to unendurable levels for any given person. This point was most forcefully made by Samek: "If it is right to keep the government out of the bedrooms of the nation, it surely has no place on our deathbeds."[110]

4. Liberty

Defining the essence of liberty is a difficult task. Indeed the Court in *Re Mia and Medical Services Commission of B.C.* stated that liberty is "so grand a concept that it may not be possible to capture its meaning in words."[111]

---

benefiting the patient, and can focus on objective criteria and needs.

(3) In particular there are two such quality of life criteria relevant to decisions to treat, or to continue treatment or to stop treatment. The first considers the capacity to experience, to relate. The second considers the intensity and susceptibility to control of the patient's pain and suffering. If despite treatment there is not and cannot be even a minimal capacity to experience, and to relate, or if the level of pain and suffering will be prolonged, excruciating and intractable, then a decision to cease or not initiate treatment (of for instance a comatose patient) can be preferable to treatment.

[109]Working Paper No. 28, *ibid.* at 39.

[110]*Supra*, note 50 at 114.

[111](1985), 17 D.L.R. (4th) 385 at 411, 61 B.C.L.R. 273 (S.C.), quoting from the judgment of Finch J. in *R.* v. *Robson* (1984), 11 D.L.R. (4th) 727 at 732, 56 B.C.L.R. 194, 41 C.R. (3d) 68 (S.C.), aff'd 19 D.L.R. (4th) 112, 45 C.R. (3d) 68, 19 C.C.C. (3d) 137 (B.C.C.A.) [hereinafter cited to 11 D.L.R.].

In the United States it has been held to comprehend a wide range of incidental freedoms including the right "to be left alone",[112] the freedom to contract[113] and to enjoy property,[114] the right to take up any lawful occupation without government interference,[115] as well as the rights to acquire useful knowledge, to marry, establish a home, raise children and pursue religious worship.[116] In addition, without due process, people cannot be deprived of their good reputations,[117] or of their right to choose a personal style of appearance.[118]

The context in which "liberty" is used in the *Charter* is conducive to a broad interpretation and makes the expansive American constructions persuasive.[119] Although found under the "legal rights" section of the *Charter*, it has been argued that section 7 is a general provision as opposed to the specific nature of the other sections dealing with fundamental freedoms and legal rights. As such, section 7 could be said to be a residual provision which does not augment the rights expressed in other *Charter* sections.[120] Thus, the narrower position, that liberty merely pertains to freedom from physical restraint is weakened,[121] since rights safeguarding against arbitrary detention and arrest are amply provided in sections 9 to 11.

Liberty can thus be seen to embrace a right which is distinct from issues of physical restraint. Moreover, liberty implies a freedom to make choices. Considered in conjunction with the persuasive and broad American jurisprudence, one could therefore contend that "liberty" in section 7 constitutionally protects freedom and autonomy in medical decision-making.

5. Security of the Person

The thrust of the *Criminal Code* provisions in question is to protect and promote life. In preventing a terminally ill person from discontinuing medical treatment, the State can be said to be enforcing "security of the person" even if over the protests of the patient.

---

[112]*Pavesich* v. *New England Life Ins.*, 50 S.E. 68, 122 Ga. 290 (Sup. Ct 1905).

[113]*Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (7th Cir. 1972).

[114]*Blauvelt* v. *Beck*, 76 N.W.2d 738, 106 Ia. 492 (Neb. Sup. Ct 1956).

[115]*Ibid.*

[116]*Meyer* v. *State of Nebraska*, 262 U.S. 390 (1923).

[117]*Goss* v. *Lopez*, 419 U.S. 565 (1975).

[118]*Kelley* v. *Johnson*, 425 U.S. 238 (1976).

[119]See J.E. Magnet, *Constitutional Law of Canada*, vol. 2, 2d ed. (Toronto: Carswell, 1985) at 1149.

[120]*Ibid.* at 1150.

[121]This position emanates from that in the *International Covenant*, *supra*, note 84, wherein Art. 9(1) deals with "liberty and security of the person" solely within the context of arrest and detention.

There is, however, another side to ensuring security of the person. The medicotechnical interventions required to maintain life are not without problems. Every medical treatment carries with it iatrogenic risks and the potential for side effects which may vary from the imposition of discomforts to death. These are only possibilities, however, and there is no predicting which person will develop what technology-induced disorder. This is problematic considering the interpretation that "security of the person" was given in *Operation Dismantle*.[122] Acts which *might* lead to consequences that deprive (or threaten to deprive) individuals of their security of person were not held to be contemplated by section 7.[123] In other words, until medical expertise evolves to the point where iatrogenic disease can be predicted with certitude, the patient is barred from claiming an interference with security of the person.[124]

B. Subsection 2(a) — Freedom of Conscience and Religion

The constitutional guarantee of religious freedom in subsection 2(a) enshrines the rights to hold and profess beliefs openly, as well as observe the essential practices demanded by the tenets of one's religion.[125] Mr Chief Justice Dickson carefully discussed this freedom in *Big M Drug Mart*:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion

---

[122]*Supra*, note 31.

[123]*Ibid.* at 455.

[124]Wilson J.'s *obiter* in *Singh*, *supra*, note 105 may initially appear comforting since she envisages freedom from the threat of physical suffering. Until the person actually becomes symptomatic from physician-caused illness, however, the situation remains hypothetical and the *Charter* is correspondingly unavailable.

[125]Tarnopolsky J.A. made this comment when considering s. 2 of the *Charter* in conjunction with Art. 18 of the *International Covenant* in *R.* v. *Videoflicks Ltd*, *supra*, note 87 at 420. It is most interesting to note another Ontario Court of Appeal decision rendered five months after this: *R.* v. *Tutton* (1985), 44 C.R. (3d) 193, 18 C.C.C. (3d) 328, 14 C.R.R. 314 concerned the refusal of parents to obtain medical assistance for their child because to do so would have been contrary to a tenet of their faith. Tarnopolsky J.A. was a member of the unanimous court which ruled that s. 2(a) of the *Charter* did not apply to this situation (leave to appeal to the Supreme Court of Canada was granted on 23 May 1985).

> includes indirect forms of control which determine or limit alternative courses of conduct available to others.[126]

The person who wishes to refuse medical treatment on the basis of religious freedom confronts the State's interest in promoting life. To determine if the life-affirming *Criminal Code* provisions offend religious freedom, their purpose and effects must be analyzed.[127] This approach was used in the American case of *Braunfield* v. *Brown*[128] and adopted by the Supreme Court of Canada in *Big M Drug Mart*. The court held that legislation which operates to advance the State's secular interests is constitutionally valid. If the legislation has a secular purpose but interferes by its impact on religious freedom, however, it can be challenged for constitutional infirmity.[129]

The *Criminal Code* provisions which conflict with a person's claim to the right to refuse treatment are clearly secular. They operate solely to promote life and protect those who seek to uphold this goal. In some circumstances, however, the effects of these enactments result in interference with religious practice. This was clearly demonstrated in a recent Ontario case.[130] Lisa K. was a 12 year old Jehovah's Witness diagnosed with leukemia. When Lisa and her parents refused the administration of chemotherapy and blood transfusions, the Children's Aid Society of Toronto sought to establish that she was a child in need of protection. Justice Main of the Ontario Family Court ruled that pursuant to the *Child Welfare Act*,[131] Lisa was not in need of protection and accordingly should have "the opportunity to fight this disease with dignity and peace of mind."[132] He predicated his finding on the perception that she had "a well thought out, firm and clear religious belief" which would have been offended by forcing her to undergo unwanted treatment.[133] Such a result is consistent with the notions of freedom expressed by Mr Chief Justice Dickson. To hold otherwise would have invited State coercion in the form of administration of unwanted medical treatment.

---

[126]*Supra*, note 97 at 336-37.

[127]*Ibid.* at 331.

[128]366 U.S. 599 (1961).

[129]*Supra*, note 97 at 316. This line of reasoning represents a departure from earlier *Charter* jurisprudence. For example, in *Re B.* (1982), 2 C.R.R. 329 (Alta Prov. Ct) the legislation was seen to affect Jehovah's Witnesses in the exercise of their faith. Since the pith and substance of the impugned legislation was not religion, however, no infringement of s. 2(a) was found.

[130]*Children's Aid Society of Metropolitan Toronto* v. *K. and K.* (1985), 48 R.F.L. (2d) 164 (Ont. Prov. Ct, Fam. Div.) [hereinafter *Children's Aid Society*].

[131]R.S.O. 1980, c. 66, s. 19(1)(b)(i), (ix) and (xi).

[132]*Children's Aid Society, supra*, note 130 at 171.

[133]*Ibid.* Main J. also addressed the fact that Lisa had received one blood transfusion. He accordingly found that she had been discriminated against on the basis of her religion and her age pursuant to s. 15(1) of the *Charter*. In addition, he held that her right to security of the person had been infringed.

A constitutional recognition of the right to manifest one's religious beliefs has far-reaching implications for the terminally ill person. If an individual espouses no religion, however, pursuing a right to die under the guarantee of freedom of conscience presents additional hurdles.

The scope of subsection 2(a) was significantly extended in *Big M Drug Mart*. Chief Justice Dickson gave an expansive interpretation to the rights guaranteed in general and to freedom of conscience in particular. He sought to protect those, for example, atheists, agnostics and corporations,[134] who could not prove a genuinely held theistic belief. This approach was used by the Ontario Court of Appeal in *R.* v. *Videoflicks Ltd.*[135] Tarnopolsky J.A., speaking for the court, stated that freedom of conscience necessarily embraced the right not to have a religious basis for conducting one's actions. To merit constitutional protection, however, the behaviour in issue would "have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions."[136]

Any claim to the right to a good death in accordance with a conscientiously held belief still has to clear this hurdle. Cherishing beliefs about human worth and dignity is one matter. Demonstrating that most, if not all, actions are based on such convictions is entirely different and exceedingly more complex. This is particularly true in the case of such a claim being made by one person alone, since she will hold singular values regarding the limits of reasonable life and will have an individual threshold for suffering. The ability of a religious collective, for example Jehovah's Witnesses, to demonstrate that conduct is guided by belief is considerably easier given the commonality of belief shared by many, the written testimony to these beliefs and the frequent, uniform manifestation of the belief by the members. In other words, the first instance presents a person who is experiencing an event — an incurable, progressive disease — likely for the first time. She arrives at the decision to withdraw from treatment after discovering personal limits of endurance and re-ordering her priorities accordingly. In the second instance, the person is a member of a recognizable group with well-known, long-established beliefs, and she has been trained by religious doctrine to arrive at only one conclusion. The difficulty in demonstrating a constitutional right to die based on freedom of conscience, as opposed to religious freedom, is therefore pronounced.[137]

---

[134]*Supra*, note 97 at 314.

[135]*Supra*, note 87 at 422.

[136]*Ibid.*

[137]It is interesting to note the concomitant discriminatory result for members of a religious faith as against an individual with privately held beliefs.

C. Section 12 — Cruel and Unusual Treatment

Section 12 states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

To date there is no satisfactory definition of "cruel and unusual treatment" for this *Charter* provision[138] or its *Canadian Bill of Rights* precursor.[139] Both enactments have received cautious interpretation by the judiciary, and the jurisprudence is largely confined to penal situations, as in the landmark case of *Miller* v. *R.*[140] Addressing the issue of "punishment" in that case, Chief Justice Laskin stated that social and moral factors entered into the consideration of the scope and application of subsection 2(b) of the *Canadian Bill of Rights*: "Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there may still be a question ... whether the punishment prescribed is so excessive as to outrage standards of decency."[141] His Lordship further indicated that the words "cruel" and "unusual" were not to be considered disjunctively. Rather, he envisaged them as interacting terms which coloured each other and conjunctively expressed a norm.[142]

The section 12 language "subjected to" and its *Bill of Rights* counterpart "imposition" were considered by Chief Justice Parker in the *Morgentaler* case. He concluded that both connote a conscious decision by the State.[143] In this instance, the State's intention to promote life is clearly manifested in the *Criminal Code* provisions which prohibit the withholding or withdrawal of medical treatment. As a result, the person's wish to die is disregarded, while uncomfortable, troublesome, non-curative medical intervention continues to be administered.

---

[138]See Hogg, *supra*, note 13 at 778.

[139]S. 2 of the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III, states that "no law of Canada shall be construed or applied so as to ... (b) impose or authorize the imposition of cruel and unusual treatment or punishment ...".

[140](1976), [1977] 2 S.C.R. 680 at 688, 70 D.L.R. (3d) 324 [hereinafter cited to S.C.R.].

[141]*Ibid.* at 688. Factors used to determine if treatment was cruel or unusual under the *Charter* had been considered in the court below by McIntyre J.A. in (1975), 63 D.L.R. (3d) 193 at 260, 24 C.C.C. (2d) 401 (B.C.C.A.) and adopted more recently in *Soenan* v. *Director of Edmonton Remand Centre* (1983), 48 A.R. 31 at 40, 35 C.R. (3d) 206, 8 C.C.C. (3d) 224 (Q.B.). The relevant factors were said to be as follows: that the treatment is in accord with public standards of decency, that the treatment is necessary in light of available alternatives, and that the treatment can be applied rationally in accordance with ascertainable standards.

[142]*Miller* v. *R.*, *ibid.* at 689-90.

[143]*Supra*, note 91 at 414. The same reasoning appears to have been used by Laskin C.J.C. in *Morgentaler* v. *R.* (1975), [1976] 1 S.C.R. 616 at 630-31, 53 D.L.R. (3d) 161.

The question then begged is whether or not unwanted medical therapy is "cruel and unusual". This juncture of severity of consequences, standards of decency and individual human suffering presents the most troubling aspects of voluntary passive euthanasia. Non-curative medical intervention which poses discomfort and possibly a threat to life itself is surely as harsh a consequence as can be envisaged. Further, how can the prolongation of such suffering, especially over the protests of the patient, be seen to serve any standard of public decency?

It must be borne in mind that thresholds of pain tolerance and the concomitant value one places on life are highly personal. In order to reconcile this with concepts of public decency, therefore, the most appropriate standard is that which was adopted for dealing with causation in informed consent situations in *Reibl* v. *Hughes*.[144] Chief Justice Laskin stated that "aspects of the objective standard would have to be geared to what the average prudent person, the reasonable person in the patient's particular position, would agree to or not agree to."[145] Further His Lordship stated that special considerations affecting the particular patient were very material, and it was essential that the patient put his own position forward.

Judging the quality of life of other persons was the pivotal issue in the *Dawson* case. In the Provincial Court the learned trial judge found the operation proposed to correct Steven's blocked brain shunt exceeded "necessary medical attention". As such, she held that this was cruel and unusual treatment which offended section 12 of the *Charter*.[146]

In the Supreme Court of British Columbia, Mr Justice McKenzie skirted the issue of cruel and unusual treatment. He found that it was not the prerogative of parents or the court to judge the quality of a person's life to be so low as to not deserve continuance.[147] Since His Lordship found that withholding the surgery would not necessarily cause Steven's death, his pain could be prolonged. Accordingly, he reversed the Provincial Court decision.

---

[144]*Supra*, note 43.

[145]*Ibid.* at 899.

[146]*Re S.D.* (1983), [1983] 3 W.W.R. 597 (Prov. Ct), rev'd (*sub nom. Superintendent of Family and Child Service* v. *R.D. and S.D.*) [1983] 3 W.W.R. 618, 42 B.C.L.R. 173 (S.C.) [hereinafter *Dawson* cited to W.W.R.].

[147]*Ibid.* at 629. In the landmark case of *Superintendent of Belchertown State School* v. *Saikewicz*, 370 N.E.2d 417, 373 Mass. 728 (D. 1977) the court dealt with a 67 year old retarded man who had leukemia. The learned judge ruled that a person's retardation doesn't mean that quality of life considerations should not be taken into account. Accordingly, it was decided that the man would not receive palliative chemotherapy. By holding that the quality of life of "a disadvantaged person" should not be judged by others, it is arguable that the *Dawson* decision represents a violation of s. 15 equality rights. Using this reasoning it is interesting to speculate if the same result would be reached had Steven been able to articulate the impoverished quality of his own life.

It is essential to note the context in which the presumption of life standard was applied by the British Columbia Supreme Court in *Dawson*. McKenzie J. stated:

> This is not a "right to die" situation where the courts are concerned with people who are terminally ill from incurable conditions. Rather it is a question of whether S has the right to receive appropriate medical and surgical care of a relatively simple kind which will assure to him the continuation of his life, such as it is.[148]

His Lordship further stated that the court lacked jurisdiction to sanction the termination of life "except for the most coercive reasons".[149] Unfortunately, circumstances which would illustrate such coercive reasons were not explored by the court. In considering the context of the decision, however, (namely, that it was not a "right to die" issue), and given that Steven could not assert his own wishes, it is conceivable that the "cruel and unusual treatment" reasoning used in the Provincial Court has not been overruled. In other words, a terminally ill person who is barred from discontinuing treatment may claim a violation of section 12 rights without departing from the *Dawson* decision.[150]

At this point it is useful to summarize how sections 7, 2 and 12 affect a patient's argument that she may claim the right to die. Attempts to fashion a *Charter* guarantee of freedom in medical decision-making are apt to meet varying degrees of success depending on which *Charter* provisions are used.

Determination of the rights encompassed by section 7 can be made by inquiring into rights conferred by positive law. Here the common law right to self-determination is defeated by the statutory provisions which protect life. Examining our traditions and conscience is similarly to no avail in claiming a right to die, since previously it has not been possible to extend life beyond reasonable bounds. *Singh* offers some hope by its inclusion of the freedom from the threat of physical suffering as coming within the purview of section 7. Although "life" and "liberty" have not been definitively interpreted, arguments can be made that qualitative considerations and freedom in decision-making are essential elements. This is particularly

---

[148] *Dawson, ibid.*

[149] *Ibid.*

[150] S. 12 of the *Charter* was used in argument in a similar case recently in Quebec: *Couture-Jacquet* v. *Montreal Children's Hospital*, (1986), [1986] R.J.Q. 1221 (C.A.). The Court of Appeal refused the hospital's request to authorize continued chemotherapy of a three-year-old cancer victim, without referring to the *Charter*, on the grounds that the mother and grandmother's refusal of treatment was not "unjustified" (as per s. 42 of the *Public Health Protection Act*, S.Q. c. P-35) considering the condition of the child. See also the comment on this case by E. Keyserlinck, "Non-treatment in the Best Interest of the Child: A Case Comment on *Couture-Jacquet* v. *Montreal Children's Hospital* (1987) 32 McGill L.J. 413.

true given that exegesis of the *Charter* is occurring with an eye to American jurisprudence. "Security of the person" as against the discomforts and risks of continued medical treatment is not apt to be of assistance unless the person has actually developed iatrogenic symptomatology.

Subsection 2(a) holds variable results in claiming a right to withdraw from medical intervention. A person can resist the administration of treatment if that treatment would contravene a fundamental religious belief. Asserting freedom of conscience is much more difficult, since the person would have to demonstrate that belief in the right to death with dignity was reflected in most, if not all, of her voluntary actions.

Interpretation of "cruel and unusual treatment or punishment" is receiving cautious, incremental expansion by the judiciary. Removing this phrase from its historical penal applications holds some promise of assistance to the terminally ill. Non-consensual administration of treatment which prolongs suffering constitutes an infliction which may be seen to offend a subjective standard of decency. Although this subjective standard corresponds with the individuality of the pain experience and autonomy in decision-making, it directly confronts the presumption of life standard in Canadian jurisprudence. The availability of section 12 as a springboard to claim a right to die is therefore questionable.

V. Whither Section 1?

The operation of section 1 makes it clear that the guaranteed rights and freedoms in the *Charter* are not absolute. Rather, they are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Challenging legislation under the *Charter* accordingly contemplates two stages of judicial review.[151] Initially the impugned law is considered under the individual *Charter* provision in question. In this instance, the pertinent areas of the *Criminal Code* would be analyzed under sections 2, 7 and 12 of the *Charter* to ascertain if the right to die was infringed. Should a limitation of a guaranteed right be established, section 1 of the *Charter* would be interpreted and applied to determine if the legislation is reasonable and can be demonstrably justified in a free and democratic society.

At the outset, however, the character of *Charter* sections 7 and 12 is to be considered, since by their own terms they are limited by notions of reasonableness.[152] To illustrate, one must ask if, in Canada, it could *ever* be

[151] See *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225 at 240, 145 D.L.R. (3d) 638, 34 C.R. (3d) 97, 4 C.C.C. (3d) 385 (C.A.).

[152] S. 2 is expressed in unqualified terms.

reasonable to abridge an individual's right to "life, liberty and security of the person". Similarly, can treatment which is "cruel and unusual" ever be perceived as reasonable and justifiable in our society? Although no case law is available to illuminate the issue with respect to section 12, there has been judicial consideration of this issue under section 7. The right to life, liberty and security of the person was seen as being already qualified in *R.* v. *Robson.*[153] Further, in *Singh*, Wilson J. stated that there must be a compelling reason to justify a review of section 7 under section 1.[154] Since the countervailing interest is the preservation of a human life, however, this easily constitutes "a compelling reason" which consequently calls for a section 1 analysis.

The burden of proof, which rested with the individual in establishing an infringement of rights, shifts onto the State when the reasonableness of the *Criminal Code* provisions is considered under section 1.[155] It is therefore incumbent on the State to establish that the *Criminal Code* provisions which prevent terminally ill persons from discontinuing life-sustaining treatment constitute reasonable limits on the right to die, are prescribed by law, and can be demonstrably justified in a free and democratic society. State resistance to the right to die will be discussed under each of these conditions.

A. Reasonable Limits

The reasonable limits argument can be cast as a conflict between the individual rights of patients versus the collective rights of the medical profession and State.[156] An articulate expression of these collective rights is found in the Law Reform Commission's Study Paper No. 3,[157] where Keyserlingk propounded three main reasons for the unacceptability of euthanasia to society.

Medical fallibility was one justification for denying the right to withdraw from life-sustaining treatment. This was based on an apprehension that even a seemingly irrefutable prognosis could be wrong. It can hardly be seen as humane, much less justifiable, however, to compel the administration of treatment. Such ministrations can be in themselves a risk to life and entail the risk of causing severe side effects which are totally out of proportion to the hard-won chance of a miracle. Moreover, medical infallibility also extends to the efficacy of analgesics in controlling pain. Key-

[153] *Supra*, note 111 at 732.

[154] *Supra*, note 105 at 219.

[155] See *Hunter* v. *Southam Inc.*, *supra*, note 57 at 169.

[156] The specific interests giving rise to these rights were discussed above in section III ("Purposes of the *Charter*").

[157] *Supra*, note 108.

serlingk states that "control is now so well advanced that [cases of real suffering] are increasingly rare."[158] With the greatest respect, this faith in pharmacological effectiveness is not supported by empirical evidence. As was mentioned earlier,[159] sixty to eighty percent of patients with advanced cancer suffer moderate to severe pain. These people cannot be seen as merely the "boundary case" upon which Keyserlingk hesitates to ground a professional ethic.[160]

The second main argument advanced against euthanasia in the Study Paper is the wedge theory.[161] Samek easily disposed of this issue. At the outset he suggested it was wrong to link euthanasia with killing — rather it could be defined as a desire to be dead.[162] Further, he thought it highly unlikely that "a society that is honest and courageous enough to recognize the need for euthanasia would turn the world into a paradise for killers."[163] This was consistent with an argument on the "wedge" objection forwarded by Glanville Williams. He stated:

> It is said that a person who has taken life lawfully will then have his inhibitions so far removed that he is likely to take life unlawfully. This may be true in some applications, but it is ridiculous as applied to the physician *who gently and humanely extinguishes his patient's life as the last service that he can perform for him.*[164]

This physician-patient relationship is the ground for the third main objection to voluntary euthanasia. If the patient was allowed to die when she wanted to, the physician would be required to be the agent of that death. Keyserlingk has argued that such an agency would constitute a radical transformation of the doctor's present role and ethics to the detriment of both, and that the "health of patient trust in physicians"[165] would be adversely affected.

These views do not reflect the true circumstances of the physician-patient relationship. It has been suggested that terminal illness symbolizes a physician's helplessness and limitation of personal skills.[166] *A fortiori*, the contention that physicians tend to have an above-average fear of death has been supported by empirical evidence which demonstrates that dealing with

---

[158] *Ibid.* at 129.

[159] *Supra*, note 3.

[160] *Supra*, note 108 at 129.

[161] *Ibid.* at 126.

[162] *Supra*, note 50 at 96. Samek quoted from the Study Paper No. 3, *supra*, note 108.

[163] *Ibid.*

[164] *Supra*, note 79 at 315-16 [emphasis added].

[165] Study Paper No. 3, *supra*, note 108 at 128-29.

[166] For an informative summary of the issues involved, see R.M. Green, "Truth Telling in Medical Care" in M.D. Hiller, ed., *Medical Ethics and the Law: Implications for Public Policy*, (Cambridge, Mass.: Ballinger, 1981) 183 at 185.

death and dying issues causes tremendous anxiety amongst physicians.[167] These speak of anything but detached impartiality by physicians. In other words, physicians' decisions to continue life-prolonging treatment may have more to do with physician death anxiety, than consideration of the individual patient. In addition, the phenomenon of health consumer activism has emerged from a growing mistrust of medical technique and decision-making and as a response to the ongoing depersonalization and patriarchy in physician-patient relations.[168] Finally, the "health of patient trust in physicians" is surely not enhanced by forcing the patient to endure suffering when the physician acts as the "State's agent" in prolonging life.

A terminally ill person is faced with the interests of the State and the medical profession in promoting life. The unacceptability of euthanasia to society arises mainly from the possibility of error in prognosis, a fear that physicians could lose their inhibitions and therefore kill others if permitted to acquiesce to patients' requests for death, and concern that the doctor's agency in death would jeopardize medical ethics and disrupt the trusting aspect of the professional relationship. These objections are neither grounded in statistical fact nor empirical reality. Therefore, to compel a suffering person to undergo continued treatment is a violation of fundamental rights and freedoms, which has not been shown to be based on a reasonable limit of those rights.

B. Prescribed by Law

The phrase "prescribed by law" indicates that regardless of how reasonable or demonstrably justifiable a limitation of a freedom may be, if it is not legally sanctioned, it can never be justified under section 1.[169]

In *Re Ontario Film and Video and Ontario Board of Censors*, the Divisional Court considered this phrase and articulated two requirements which

---

[167]In a cohort-analytic study (N = 306), H. Feifel *et al.* found support for their contention that physicians tend to have an above-average fear of death. They reasoned that the practice of medicine is used to assert mastery over disease and therefore helps control personal death anxiety: "Physicians Consider Death" in American Psychological Association, ed., *Proceedings of the 75th Annual Convention of the American Psychological Association*, vol. 2 (Washington, D.C.: American Psychological Association, 1967) 201 at 202. Other studies have revealed similar findings. For further readings see: B.G. Glaser & A. L. Strauss, *Awareness of Dying* (Chicago: Aldine, 1965); C.A. Garfield, ed., *Psychosocial Care of the Dying Patient* (Toronto: McGraw-Hill, 1978); R.J. Kastenbaum, *Death, Society, and Human Experience*, 2d ed. (Toronto: C.V. Mosby, 1981).

[168]See, in general, I. Illich, *Limits to Medicine* (Toronto: McClelland & Stewart, 1976); T. McKeown, *The Role of Medicine: Dream, Mirage, or Nemesis?* (New Jersey: Princeton University Press, 1979); C. Dollery, *The End of an Age of Optimism: Medical Science in Retrospect and Prospect* (London: Nuffield Provincial Hospitals Trust, 1978).

[169] See Hogg, *supra*, note 13 at 684.

the limit must meet.[170] Firstly, the law itself had to be ascertainable, understandable and not totally discretionary. Secondly, the limits had to be articulated with some precision or they could not be considered as law.

At the outset, it is appealing to argue that subsection 241(b) of the *Criminal Code* does not contemplate "prolonging life" in its prohibition of interference with saving life. Further, section 14 proscribes consent to having death inflicted on oneself. It is therefore open to contention that infliction of death is distinguishable from voluntary euthanasia where death naturally *ensues* when life sustaining treatment is withdrawn. These positions are likely to falter, however, as the *Criminal Code* embodies the presumption that a person does not wish to die. This is reflected in other provisions like subsection 197(2)(b), which imposes the duty to provide necessaries of life. An additional and more problematic duty is found in section 199 where undertaking an act requires that the act must be done if the omission (or in this case, discontinuation) would be dangerous to life.

In light of these clearly articulated criminal law provisions which enshrine the protection of life, it can be said that the limits on agathanasia are prescribed by law.

C. Demonstrably Justified in a Free and Democratic Society

This phrase in section 1 recognizes that guaranteed rights may conflict with legitimate government objectives, which may justify individual rights being sacrificed to concerns of the collective. In other words, at this stage the court is required to issue a policy decision upholding a right or a law which breaches that individual right.[171] The reasoning process may involve consideration of social needs and democratic conditions in other countries. It is here that the delicate balance may once more tip in favour of the individual who is dependent on life-support technology. Let us first turn to the majoritarian perspective, that euthanasia is unacceptable. As has been discussed, the State opposes the killing of its citizens. The political aspect of this position was examined by Samek who posited:

> The real reason for society's opposition to euthanasia is not its antagonism to killing, but its fear of losing the monopoly over killing. If citizens were free to arrange their own ends, the authority and the prestige of the state might suffer irreparable harm. In this respect *the democratic state has merely taken over where Church and the King left off.*[172]

On the other hand, other democracies have implemented natural death legislation, most notably in Australia and some American states. Such leg-

---

[170](1983), 41 O.R. (2d) 583 at 592, 147 D.L.R. (3d) 58, 34 C.R. (3d) 73.

[171]See Hogg, *supra*, note 13 at 686.

[172]*Supra*, note 50 at 88 [emphasis added].

islation is premised on an acknowledgement of the inviolability of the person and an appreciation for the moral right to self-determination. These are values enshrined in Canadian democracy and ones that have long been judicially protected.

The social needs of terminally ill persons in Canada are not at variance with those of patients in countries having similar democratic traditions *and* the right to passive euthanasia. From a policy perspective, then, it is reasonable that a parallel right should be conferred in Canada, as well.

Conclusions

It is reasonable to propose that a constitutional right to die exists indirectly under subsection 2(a), and more precariously under sections 7 and 12. Notwithstanding that such a claim conflicts with life-preserving sections of the *Criminal Code*, once these rights are established, the role of section 1 is arguably weak. This is attributable in part to the deference given to religious practice, even if interference with religion would likely extend someone's life. In addition, once an act is seen to infringe life, liberty or security of the person, or is shown to be cruel and unusual, the judiciary will exercise caution in approving the reasonableness of the infringement. Medical fallibility in controlling pain, the frailty of the wedge objection and unrealistic perceptions of the physician-patient relationship contribute to the unreasonableness of interfering with an individual's freedom to die, when the only alternative is endurance of pointless suffering. Although this interference is prescribed by the criminal law of Canada, it does not correspond to the social policies and democratic traditions of other countries and thus cannot be demonstrably justified. This is particularly true given that human integrity and inviolability are central to Canadian democracy. A terminally ill person who has endured pain, anguish and gradual destruction of hope for future improvement should not be prevented from ending a life so devoid of quality. To do so would constitute a violation of integrity that is repugnant to Canadian traditions.