# Mercy and Canadian Law
## The Prohibition of Assisted Suicide

*There is a higher court than courts of justice and that is the court of conscience. It supersedes all other courts.*

Mohandas Gandhi

***Gary Bauslaugh***

Henry Morgentaler, when he was being prosecuted for carrying out illegal abortions, asked the following question: If you saw a person drowning in a pond, but there was a sign prohibiting access to the pond, would you trespass to save the person?

Are there are times when it is morally right to break the law?

There is a case to be made for the law being sacrosanct. If not the law, then who decides what is right? Do we not want rule of law rather than rule of individuals? If we let everyone decide for themselves what is right, then we run into the problem of self-deception: when it is in our interests to do so we can fool ourselves into thinking that an illegal action is right. Moreover, there are sociopaths who do not even need to fool themselves about this – they do not care whether or not their actions are right. So we need laws, not individuals, to determine what we are allowed to do.

And yet... what about that drowning person? What about the thousands of women illegally saved, by Henry Morgentaler, from bearing unwanted children, or from suffering injury or death at the hands of back alley abortionists? It is easy simply to dismiss individual conscience and insist on following the law. But if we deeply believe following a particular law is wrong, especially when the well being of others is at stake, then it is hard to escape the conclusion that our moral obligation is, then, to go against that law.

There are a number of reasons for this. For one, the law can be manipulated to serve the interests of those in power. American soldiers who were ordered to torture captives in the Iraq war were undoubtedly concerned about this, but authorities conveniently interpreted the law to provide a legal justification for these actions. This was not too different from what the Nazis did in Europe in WWII. There simply are times when one must, in the name of conscience and human decency, refuse the bidding of authorities and disregard the law.

Another reason why we have a moral obligation to consider acting against the law is that even well-meaning laws can have terrible consequences for certain individuals. The Canadian law prohibiting any form of assisted suicide (Section 241b of the Criminal Code of Canada) is an example of such a law. This law, mercifully to be struck down, in part at least, in 2016 in accordance with a recent decision of the Supreme Court of Canada, has been the cause of untold, extended suffering by the terminally ill – the weakest and most vulnerable people in society whose only wish may be that they be put out of their misery.

The law, Section 241b, was not, of course, meant to be the cause of suffering. The prohibition on assisted suicide was meant to prevent unscrupulous and self-serving people from having a hand in premature deaths – getting rid of grandma to get her inheritance. But since the legalization of suicide in Canada in 1972, Section

241b has been a bit of an oddity. How can it make sense to prohibit helping someone to carry out a legal action? It would make sense to have some sort of legal caution about not pushing people toward suicide – such encouragement, for selfish reasons, should be designated as a crime. In fact, however, most people seeking death are not being pushed to it; most are simply seeking relief from a life that has become worse than death.

Like most absolute prohibitions, this one was ill-considered. It was a bad law and like all bad laws it created a serious obstacle to the search for justice in Canada. Good and merciful people offering aid to the dying were thrown together with serious criminals. Those who took steps to spare the agonies of the dying were subject to severe penalties – up to 14 years for assisting a suicide.

Almost everyone I know has some sort of story about the helplessness felt in watching loved ones suffer through a prolonged and agonizing death.

It was not just suffering and terminally ill people who were affected by this uncompromising law. An enormous portion of our health budget has been devoted to keeping people alive, including those who no longer wish to live. Money that could have been used, for example, to help people get more timely joint replacements, so that these viable lives could be vastly improved, has instead been spent on prolonging the lives of those who would much prefer to die. Health care for seniors, about 15% of the population, accounts for about 45% of health spending in Canada, and the amount expended per person greatly increases with each year of life. Of course we cannot just abandon the elderly (I am one of them!), and we should do all we can help everyone enjoy their later years. But that does not mean that we should insist that anyone go on living beyond the point where life can no longer offer any comfort or satisfaction. Let the funds be used where they can do some good, not to prolong unhappiness and suffering.

I realize that it is risky to even mention medical costs for the dying, for it raises the ugly spectre of forced euthanasia – doing away with those who want to live but who have become unproductive. But that is something completely different and is not supported by reasonable and decent people. Helping someone die, when they wish to die, is an act of human kindness; forcing them to go before they are ready would be extreme human cruelty. Does the one lead to the other? Hardly, any more than the mercy-killing of an injured animal leads to wanton cruelty to animals. Kindness does not beget cruelty.

Kindness begets kindness. Treating our dying people with compassion and respect will help build a kinder, gentler society, a society of the sort we all want. Almost everyone I know has some sort of story about the helplessness felt in watching loved ones suffer through a prolonged and agonizing death. Most of us did nothing about it; we just let the suffering go on, paralyzed into inaction because of fear of acting against the law. Now, with the Supreme Court ruling, we have, collectively, a chance to become a kinder, more merciful society.

The evident injustice and cruelty of the prohibition of assisted death has put many Canadians uncomfortably on the horns of a moral dilemma: go against the law and provide assistance to a dying loved one, or follow the law and watch them suffer. Not only have many ordinary people struggled with this dilemma, compassionate justice system representatives have as well as they have tried to mitigate the impact of an unjust law.

These are many stories of courage and kindness, as Canadians have tried, in different ways to seek remedies for this problem of state-imposed cruelty.

**Seeking legislative change**

Many people who have recognized the injustice of the assisted suicide law have lobbied for a change in legislation. Even some politicians have tried to do so. However, even though the majority of Canadians support more progressive end-of-life legislation, there is a very vocal, religiously-based opposition to the idea – coming mostly from the idea of the "sanctity of life" and a conviction that we are God's creatures and only he can decide when we die. But this is a dubious argument. Are we not interfering with God's plan when we use modern technologies to keep people alive? What about the sanctity of the lives of soldiers we send to war, knowing that they will kill and that many of them will be killed? And why would a merciful God insist on extreme suffering at the end of life? Mercy, supposedly a central Christian value, is curiously shunned by many Christians when it comes to end-of-life matters. This is emphatically not the case for the humanists I have met.

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Still, politicians prefer to avoid matters that offend vocal minorities. So the chances of success in changing a law, even if one has access to a sympathetic politician, are slim. Eleven times in Canadian history, concerned federal politicians have taken up the cause of changing the law on assisted suicide, most notably Francine Lalonde of the Bloc Québécois, in 2005 and 2009. Lalonde spoke eloquently about the need for new end-of-life legislation:

> *...the Criminal Code* [must] *recognize that every person, subject to certain specific conditions, has the right to an end of life that is consistent with the values of dignity and freedom they have always espoused and so that an individual's wish regarding his or her death would be respected. In fact, I introduced this bill so that people would have a choice, the same right to choose that people in other countries have.*

The Lalonde attempts failed, as did nine others by other previous politicians in previous parliaments. None of them came close to getting the support that was needed to change the law.

When it is suggested that, in the name of mercy, a law should be ignored, opponents of the idea like to claim that if you do not like a law then you should go out and get the legislation changed, as though this is a simple or even feasible idea. While watching a loved one go through an agonizing death, suggestions about changing the law are hardly helpful. Changing the law, even if it were possible in a given circumstance, is a lengthy process, and not one that could help anyone in exigent circumstances.

So, this often-cited remedy for bad laws is usually not a remedy at all.

**Laying of Charges**

Police and prosecutors have the power to reduce charges to get around penalties that would be unjust. For example, in a case of mercy-killing, a charge of manslaughter might be laid, rather than the technically correct charge of murder, thereby avoiding the mandatory minimum penalties prescribed for murder.

There have been many examples of this in Canada. For example in 1993 Dr. Albert de la Rocha ended the life of a dying cancer patient by injecting him with potassium chloride. De la

Rocha was initially charged with second-degree murder, which carried a ten-year minimum sentence. However, the prosecution, recognizing the compassionate nature of the offence, then agreed to a lesser charge of administering a toxic substance, for which there is no minimum sentence. Found guilty of this lesser charge, Dr. Rocha was given a suspended sentence. In 1991, a similar incident happened when nurse Scott Mataya was similarly charged with administering a noxious substance in the death of a patient, and he too was spared prison by being given a suspended sentence.

Sometimes, of course, prosecutors have been stubbornly unwilling to press lesser charges, which is one factor that led to the severe and unconscionable punishment of Robert Latimer in Canada's most famous case of mercy-killing.

**Sentencing**

Judges, when they have the flexibility to do so, will often give lighter sentences to those convicted for crimes of mercy. Judges' hands are tied when mandatory minimum sentences are in effect, as for murder, but in other cases they have some opportunity to show leniency. The law prohibiting assisted suicide, for example, specifies a penalty of up to 14 years, but there is no mandatory minimum. In all Canadian cases of prosecution for assisted suicide which led to a guilty verdict, much lighter sentences were actually given.

For example, in 2004, Marielle Houle was charged with aiding and abetting the suicide of her 36-year-old son, Charles Fariala, who was in the early stages of multiple sclerosis. She pleaded guilty and was given a suspended sentence with three years probation.

Judicial mercy was also shown in 1997 to Dr. Nancy Morrison who was charged with first-degree murder for ending the life of a patient who was dying of cancer of the esophagus. After various attempts to relive his pain, Dr. Morrison injected him with potassium chloride. The judge ruled that a jury was unlikely to convict, and discharged the case.

Even in the Latimer case the judge tried to show mercy by passing a one-year sentence instead of the required ten-year minimum, but this was overturned on appeal.

**Jury nullification**

In 1942, Victor and Dorothy Ramberg ended the life of their two-year-old son, who was stricken with cancer – inoperable tumours were growing in his eye-sockets causing blindness and excruciating pain. They were charged with first-degree murder and faced the death penalty, except that their jury refused to find them guilty, although there was no doubt that, technically, they were guilty as charged. It took the jury less than ten minutes to make this decision.

If a jury believes a guilty verdict to be unjust, even when deemed correct according to the law, that jury has the full and unequivocal right to refuse to convict. This absolute right of juries, relating to the idea of jury independence, has a long and honourable tradition in English and Canadian law. This right has been exercised in a number of Canadian cases, most famously in the four trials of Henry Morgentaler. In all of his trials not a single juror was prepared to find him guilty, even though he had deliberately broken the law,

Regrettably, this important right of juries is being suppressed in Canadian courts, sometimes with dire results, as Robert Latimer found out. His jury members wanted to show him mercy but they were misled into thinking that they were obliged to find him guilty.

Jury nullification is a way to ensure that a law does not violate community standards of justice – ordinary citizens on a jury have the right to decide that a law is unjust. However, since 1998 in the Morgentaler ruling by the Supreme Court, defence lawyers have been prohibited from mentioning the possibility of nullifiction. As a result, most juries, like Latimer's, do not realize that they have this power. It is a real power of juries, but in Canada, sadly, it has become a secret one.

**Civil Disobedience**

A rare and widely misunderstood form of protest against unjust laws is civil disobedi-

ence: the deliberate and open breaking of a law, in a non-violent manner, as a protest and then accepting the prescribed punishment. This openness in committing the crime is necessary so that the unfairness of the law will be publicly exposed. Also required is willingness to accept the penalty for the crime; otherwise it cannot be clear that the illegal action is in protest of the law, rather than being a self-serving action. There are no clear examples in Canada of actions of civil disobedience in regard to protesting end-of-life laws, although the actions of politician Svend Robinson in the Sue Rodriguez case come close to it. Robinson openly admitted to attending the death and witnessing illegal assistance by an unnamed doctor. But he was never prosecuted or forced to testify, because it was thought that there was little likelihood of conviction.

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**Going Underground**

If an injustice is being forced upon people, and no other remedy can be seen, then secret, illegal operations are sometimes started to help people negatively affected by the law. The Underground Railway helping slaves escape from the American South was one such example. Here the intention is to correct an injustice, illegally, and hope that at some point the law catches up with the need for this correction. Illegal assisted deaths were carried out by some courageous Canadians, as will be publicly revealed in the near future. To protect those involved, however, I cannot reveal more details at this time.

**Palliative Sedation**

Doctors do not always, as it turns out, sit passively by while dying patients suffer. There is a largely unspoken pact between doctors and the justice system that permits the administration by doctors of potentially lethal doses of sedatives, sufficient at least to render the patient unconscious through his or her last stages of suffering.

The controversial aspect concerns the fact that in some cases this treatment not only renders the patient unconscious but also hastens death and is, therefore, a form of assisting death. For one thing, an unconscious patient cannot eat or drink, so unless measures are taken to nourish the patient, as well as sedate him, then the patient's decline is very likely to be accelerated. This is sometimes referred to "slow euthanasia" – in effect, intentional ending of a life, but not so quickly as, say, by a lethal injection.

There is also the possibility that in some cases the dose of the sedative, usually morphine, will be sufficient in itself to hasten death. It is difficult to know precisely what the dose of the drug should be – enough to put the patient to sleep, not enough to kill them. It is very likely that some doctors, out of kindness, err on the latter side.

Some doctors I have spoken to and others I have read about are fiercely defensive about this procedure, largely on the ground that if they do hasten death it was not their intention to do so. They claim that their intention is to relieve pain, not cause death. This is known as the "double-effect" argument: there are two consequences of an action but I only intend one of them; therefore I am not responsible for the second. Without going into it in detail, it is fairly clear that this a problematic argument. While I applaud their actions in providing palliative sedation to patients, I do question the logic that has permitted it, while denying other forms of assisted death.

It should be noted that palliative sedation, if it does accelerate death, is not physician-assisted suicide but is actually active, voluntary euthanasia; it is death caused by a doctor's action, at the request of the patient (although it is likely that some doctors apply this procedure, without permission, to very sick patients who have no hope of recovery). Active euthanasia is taking direct action to cause death, say by lethal injection; passive euthanasia, which is accepted in Canada, is letting someone die without intervening to save them. Many philosophers have pointed out that there is really no moral difference between physician-assisted suicide and active voluntary euthanasia; the agent causing the death sought by the patient is the same in both cases: the doctor. However, some people continue to see these as radically different matters; even the recent Canadian Supreme Court decision condones only the former and not the latter.

**Charter Challenges**

Since 1982, with the advent of our new Constitution, we have had the device of *Charter* challenges to deal with unjust laws. It is now possible to launch a suit against government, arguing that a particular law violates our *Charter of Rights and Freedoms*, which stands as the overriding legal document to which all our laws must conform.

This, of course, is how we finally made progress on changing the laws prohibiting assisted death. The first serious attempt to declare Section 241b unconstitutional was in the famous 1993 case of Sue Rodriguez. She was dying from ALS, but had a young son and wanted to stay with him as long as possible. However, she wished to end her life after she became completely paralyzed. At that point, however, she would be physically incapable of doing it herself. Her central argument was that the law prohibiting assisted suicide was discriminatory in that she was being denied a right held by able-bodied Canadians – the right to commit suicide. Rodriguez lost her case at the Supreme Court of Canada by a vote of 5 to 4. The Court allowed that the law was probably discriminatory, but the majority felt it was too dangerous to legalize any form of assisted suicide – they thought it would put disadvantaged people at risk.

This unfortunate decision meant that almost 20 years would go by before another serious challenge to the law was brought forward in 2012, this time by the BC Civil Liberties Association and three other plaintiffs. Even then there was resistance to reopening the matter; a legal principle known as *stare decisis* says that what's settled is settled. This is especially true of high court decisions – it is not easy to get them to revisit issues. The narrow 1993 Rodriguez decision could have stood indefinitely! Fortunately the Court was persuaded that enough had changed since 1993 to warrant looking at the matter again.

The new suit was first brought in 2012 to the BC Supreme Court. Presiding over the Court was the estimable Lynn Smith, who made a thorough, penetrating and highly insightful analysis of the vast amount of evidence presented in the case, and who came to the considered decision to break the prohibition on assisted suicide and make it legal under certain circumstances. The BC Court of Appeal then sent the case to the Supreme Court of Canada. This time it was no contest, with a 9 to 0 decision upholding the BC Court ruling by Justice Smith.

Section 241b of the Criminal Code – prohibiting assisted suicide – was deemed unconstitutional, and on February 6, 2015, the federal government was given one year to make a legislative change.

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So what will happen now? What if the politicians still do nothing? It is not entirely clear what that would mean. If there is no new law, then 241b might be struck down as of next February and, as when the law against abortion was struck down in 1988 and the government could not come up with a replacement, we might just have no law on the matter. Or, 241b could just be left in place, with the understanding that physician-assisted suicide will be allowed in situations specified by the Supreme

Court (a competent adult with a terminal illness).

It is even possible that the federal government will accept its responsibility to provide new legislation, although it is doubtful that Steven Harper's Conservatives will do so. But they may be ousted in the October 2015 federal election and another party may well seek to pass a new law on assisted suicide.

This would not help someone, like Sue Rodriguez, who wished to die only after she had become completely paralyzed.

In any case, come February 6, 2016, it is very likely that some form of assisted suicide will be permissible, and our country will have become better for it – a little more civilized, a little more humane. This will vindicate the efforts of so many people who fought so hard, for so long, for the right to die with dignity.

But is it enough? It is not. The new permissiveness will likely allow only physician-assisted suicide, meaning the dying person must take the final action, not the doctor. This would not help someone, like Sue Rodriguez, who wished to die only after she had become completely paralyzed. At that point such patients require more than assistance; they need someone to do the act for them. Their need is for voluntary euthanasia.

So the new law will likely not solve all of our end-of-life problems. Interestingly, the new assisted death law that Quebec is trying to bring into that province does allow for both assisted suicide and voluntary euthanasia. Ideally all of Canada would follow the lead of that Province, which always seems to be ahead of the rest of the country in seeking progressive legislation.

Even the Quebec law, though, would not help with the very challenging problem of involuntary euthanasia. It is very easy to dismiss this as being too fraught with difficulties - how can we countenance ending a life without the permission of that person? Normally it is unthinkable. But what about cases like that of two-year-old Christopher Ramberg, with tumours pressing against and destroying his brain? Do we just dismiss such a case as too difficult to deal with? Do we just let such a child continue to suffer through a horrendous death?

We have made great progress in Canada with the Court's decision on assisted suicide. But the work – the work of seeking mercy for desperately suffering fellow humans – is not done.•

***Gary Bauslaugh**'s book on assisted suicide and euthanasia in Canada is expected to be out in the spring of 2016, published by James Lorimer and Co., Toronto. Previous books include* Robert Latimer – A Story of Justice and Mercy *(2010) and* The Secret Power of Juries *(2013), both also published by Lorimer. Bauslaugh, who was Editor of* Humanist Perspectives *from 2003 to 2008, also edited an anthology of essays,* Voices of Humanism*, which was published in 2015 by Rocketday Arts, Victoria.*