MÉMOIRE PAR ALLAN GOLD À LA

Commission spéciale sur la question de mourir dans la dignité

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Bon soir,

Madame Véronique Hivon, la présidente **de la Commission spéciale sur la question de mourir dans la dignité,** Honorables membres-députés de l'Assemblée Nationale du Québec, I**nvités, citoyens du Québec, mesdames et messieurs.**

Au début, je veux prendre l'opportunité de vous remercier pour me donner la chance de faire une soumission d'un mémoire envers à votre commission ainsi l'opportunité de faires des représentations orales.

Mon nom est Allan Gold, avocat en pratique il y a plus de 30 ans. Un de mes champs de travail est le droit des ainées. Je suis l'auteur du livre intitulé "ELDER LAW IN CANADA ELIC*", 3 volumes ayant 2,500 pages. Le premier volume étant dans le domaine médical à deux parties, le premier Senior Health et le deuxième, Mental Illness/Incapacity. Au surplus, je suis l'auteur d'un deuxième livre intitulé "ESTATE DOCUMENT PROFESSOR EDP*"

Au moment, je suis en train de compléter mon troisième, intitulé tel que projeté comme "PATIENT MEDICAL- LEGAL PROFESSOR* (Getting ahead of serious illness*)" – Ci inclus, tel que projeté est un autre livre intitulé "DOING RIGHT AT THE END OF LIFE* (a How-To for patients and family*"). Dans la passé, j'ai écrit des chroniques publié dans des publications périodiques, dont les lecteurs sont des médecins. Également, étant un conférencier, j'ai l'opportunité de donner un nombres des discours.

1. REMARQUES PRÉLIMINAIRES:

En débutant, j'ai trois commentaires

1.1 Première, je prends note que le mot prédominant du nom de votre commission, est 'mourir'. Donc, je commence avec le décès. À ce sujet, je veux dire…………0……..… Je n'ai pas parlé à cause, lorsqu'une personne est décédé, il n'existe plus en vie. (Je ne tiens pas compte des croyances religieuses.) Donc, au monde, on n'abouti à rien. À ce moment, on peut parler de la dignité mais seulement dans le contexte de la manière qu'on fait l'entreposage et l'enterrement du corps humain. La vie a pris fin!

1.2 Au contraire, lorsqu'une personne est en vie, on peut parler de la dignité dans le contexte humain, lequel contexte est plus pertinent pour votre commission. Le point que je faite est lorsqu'on parle de la dignité, on doit parler plus de la vie.

1.3 Troisième, je comprends que votre commission a le mandat de faire une étude et ce, afin d'assister notre Assemblée Nationale de faire les changements dans notre loi à ce sujet. Donc, logiquement, on doit commencer à regarder ou nous sommes - en d'autres mots, quel est le statut de notre loi à l'égard des sujets compris. Pour moi, ceux-ci comprennent les suivantes: DROIT À MOURIR; EUTHANASIE/ SO-CALLED 'MERCY KILLING' (DROIT À); DROIT À REFUSER DES TRAITEMENTS (INCL. RÉSURRECTION, SOUTIEN DE VIE, ECT.) SUICIDE (DROIT À); SUICIDE ASSISTÉ (DROIT À); SUICIDE ASSISTÉ PAR UN MEDECIN (DROIT À);

2. ANALYSE DU DROIT PRÉSENT

2.1DROIT À MOURIR

Statuts

Charte canadienne des droits et libertés

PARTIE I DE LA LOI CONSTITUTIONNELLE DE 1982[(80)]

Sanctionnée le 29 mars 1982

"GARANTIES JURIDIQUES

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale."

Donc, chaque personne a le droit à la vie NON à mourir.

JURISPRUDENCE

Sue Rodriguez

« Sue Rodriguez : lutter pour une mort digne

Atteinte de la maladie de Lou Gehrig, une maladie à l'issue fatale, Sue Rodriguez se lance dans une longue bataille juridique en novembre 1992. Elle revendique le droit de mourir dans la dignité en obtenant l'aide d'un médecin au moment où elle voudra mettre fin à ses jours. Sa requête est rejetée par la Cour

suprême du Canada, mais son histoire, fort médiatisée, ravive les débats sur l'euthanasie et le suicide assisté. »
(Source : http://archives.radio-canada.ca/societe/criminalite_justice/dossiers/1154/)

“**226.** (Sue) *Rodriguez c. C.-B. (P.G.)* ([1993] 3 R.C.S. 519): In Canada, it is against the law to help a person commit suicide. The key case on topic involves a British Columbia woman dying of Lou Gehrig's disease. She wanted to end her life and needed help due to the limitations imposed by her disease. She instituted proceedings, seeking an acknowledgement of her right to assisted suicide; the petition went all the way to the Supreme Court of Canada. However, five of nine high court judges upheld the law and ruled that the Charter did not include the right to doctor-assisted suicide. Some aspects do follow.
(a) Judgment: Hereinafter is an extract.
The appellant's claim under s. 7 of the Charter is based on an alleged violation of her liberty and security of the person interests. These interests cannot be divorced from the sanctity of life, which is the third value protected by s. 7. Even when death appears imminent, seeking to control the manner and timing of one's death constitutes a conscious choice of death over life...
Security of the person in s. 7 encompasses notions of personal autonomy (at least with respect to the right to make choices concerning one's own body), control over one's physical and psychological integrity which is free from state interference, and basic human dignity...Any resulting deprivation, however, is not contrary to the principles of fundamental justice. The same conclusion is applicable with respect to any liberty interest which may be involved.
...Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual. The respect for human dignity, while one of the underlying principles upon which our society is based, is not a principle of fundamental justice within the meaning of s. 7.
…Assisted suicide, outlawed under the common law, has been prohibited by Parliament since the adoption of Canada's first Criminal Code. The long-standing blanket prohibition in s. 241 (b), which fulfils the government's objective of protecting the vulnerable, is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This state policy is part of our fundamental conception of the sanctity of life.
Section 241(b) of the Criminal Code prohibits the giving of assistance to commit suicide. Appellant herein contended that this section was contrary to ss. 7, 12, etc. of the Charter, "...to the extent it precludes a terminally ill person from committing "physician assisted" suicide..."
(b) Analysis: The Court disagreed and rightly found this Criminal Code provision to be constitutional, valid and superseding the Charter protections, since the greater principle was to protect the vulnerable and respect the sanctity of life and not depreciate life. Hence, there was no violation of her liberty and assisted suicide by physicians or others remains unlawful. Accordingly, the law against helping a person commit suicide does not violate a dying person's constitutional rights.
(c) Epilogue: Sue Rodriguez ultimately took her life in 1994 with the help of an unidentified doctor. Days after, federal authorities promised to address the highly controversial issue of mercy killing and allow a free Commons vote on assisted suicide. However, on September 23, 1997, Anne McLellan, the then Justice Minister, indicated that the government had no immediate plans to honour said commitment. In the week of September 24, 1997, Svend Robinson, a parliamentarian from B.C. who supported Rodriguez's legal fight, expressed dismay on the death of another terminally ill constituent. Natverial Thakore died

in a Michigan motel room after committing suicide, reportedly with help from Dr. Jack Kevorkian, the U.S. right-to-die crusader (Bronskill, Jim (Southam Newspapers), "Liberals duck issue of mercy killing," *The Gazette, Montreal*, Wednesday, September 24, 1997, pg. A13)."
(Extrait du ELDER LAW IN CANADA ELIC* #1**)

2.2 EUTHANASIE/ SO-CALLED 'MERCY KILLING' (DROIT À)

STATUTS

Code criminel (L.R., 1985, ch. C-46)

« MEURTRE, HOMICIDE INVOLONTAIRE COUPABLE ET INFANTICIDE

Meurtre

229. L'homicide coupable est un meurtre dans l'un ou l'autre des cas suivants :
a) la personne qui cause la mort d'un être humain :

(i) ou bien a l'intention de causer sa mort,

(ii) ou bien a l'intention de lui causer des lésions corporelles qu'elle sait être de nature à causer sa mort, et qu'il lui est indifférent que la mort s'ensuive ou non;
b) une personne, ayant l'intention de causer la mort d'un être humain ou ayant l'intention de lui causer des lésions corporelles qu'elle sait de nature à causer sa mort, et ne se souciant pas que la mort en résulte ou non, par accident ou erreur cause la mort d'un autre être humain, même si elle n'a pas l'intention de causer la mort ou des lésions corporelles à cet être humain;
c) une personne, pour une fin illégale, fait quelque chose qu'elle sait, ou devrait savoir, de nature à causer la mort et, conséquemment, cause la mort d'un être humain, même si elle désire atteindre son but sans causer la mort ou une lésion corporelle à qui que ce soit. S.R., ch. C-34, art. 212 »

COMMENTAIRE GÉNÉRAL

"**206.** Simply put, this is about the death of a human, in whole or in part, wrought by man. There are the deeds of average citizens, being ordinary laymen. Then there are those of a medical doctor. The courts have come down hard on the former, but seemingly lightened up on the latter. There is equality under law and before the courts, but the role of a physician and the condition of the patient apparently provide an opening so that a distinction may be made." (Extrait du ELDER LAW IN CANADA ELIC* #2**)

JURISPRUDENCE

Robert Latimer

"En 1993, le Canada fait face à un des cas les plus controversés, celui de Robert Latimer. Ce dernier a tué sa fille, Tracy, handicapée et âgée de seulement douze ans. Il l'a placé dans la cabine de son camion et en y faisant passer les gaz d'échappement du moteur. Tracy, gravement atteinte de paralysie cérébrale, ne pouvait ni parler, ni marcher, ni

s'alimenter seule. Il fut condamné à la prison à perpétuité avec possibilité de liberté conditionnelle après dix ans.[19]"

(Source: Wikipedia the free encyclopedia) - http://fr.wikipedia.org/wiki/Euthanasie

(N.B. Après ayant permis de vivre à une maison de transition, la Commission nationale des libérations conditionnelles (CNLC) refuse d'accorder des congés de longue durée plus fréquents à Robert Latimer. Il aura droit à une libération conditionnelle complète le 8 décembre 2010.)

***R. v. Latimer* [1997] 1 S.C.R. 217**

"**207.** *R. v. Latimer* ([1997] 1 S.C.R. 217): Saskatchewan farmer Robert William Latimer said he believed a pending operation would only worsen the agony of his 12-year-old daughter, Tracy, born with severe cerebral palsy. She was tortured by chronic pain and suffered. Latimer, the so-called "Mercy Killer," said he killed his daughter out of love. In 1993, Latimer put her into the cab of his pickup with the motor running and subjected her to carbon monoxide poisoning. The accused admitted his acts but said that he wanted to put his severely ill child out of her misery. In the court of first instance, he was found guilty of having committed murder. His lawyers argued that the mandatory second degree murder sentence of life in prison with no chance of parole for 10 years would be "cruel and unusual" given the circumstances. The public had great sympathy and wondered what would become of Latimer. Along with an impending judgment on the law governing possession of child pornography, the Latimer case was among the court's most anticipated rulings (Bailey, Sue (Canadian Press), "High court is ready to rule in Latimer case," *The Gazette, Montreal*, Saturday, January 13, 2001, pg. A13). A case comment is below written.

207.1 Lower courts: In the lower courts, the defence argued that Mr. Latimer had been deprived of prompt information regarding Legal Aid and had been arbitrarily detained. On this basis, the defence attempted to render Latimer's statements inadmissible. The court of first instance and Saskatchewan Court of Appeal rejected this claim. Nevertheless, a new trial was ordered on a separate claim that the RCMP had interfered with the jury by administering to some prospective jurors a questionnaire regarding their beliefs on, among other things, euthanasia. It was on this basis that the Court of Appeal allowed Latimer's appeal.

207.2 Supreme Court: The court ruled as follows:

"...Held: The appeals against conviction and sentence should be dismissed. The defence of necessity is narrow and of limited application in criminal law. The accused must establish the existence of the three elements of the defence. First, there is requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided. Here, the trial judge was correct to remove the defence from the jury since there was no air of reality to any of the three requirements for necessity. The accused did not himself face any peril, and T's ongoing pain did not constitute an emergency in this case. T's proposed surgery did not pose an imminent threat to her life, nor did her medical condition. It was not reasonable for the accused to form the belief that further surgery amounted to imminent

peril, particularly when better pain management was available. Moreover, the accused had at least one reasonable legal alternative to killing his daughter: he could have struggled on, with what was unquestionably a difficult situation, by helping T to live and by minimizing her pain as much as possible or by permitting an institution to do so. Leaving open the question of whether the proportionality requirement could be met in a homicide situation, the harm inflicted in this case was immeasurably more serious than the pain resulting from T's operation, which the accused sought to avoid. Killing a person—in order to relieve the suffering produced by a medically manageable physical or mental condition—is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition...The mandatory minimum sentence for second degree murder in this case does not amount to cruel and unusual punishment within the meaning of s. 12 of the *Canadian Charter of Rights and Freedoms*. Since in substance the accused concedes the general constitutionality of ss. 235 and 745(c) of the Criminal Code as these sections are applied in combination, this appeal is restricted to a consideration of the particularized inquiry and only the individual remedy sought by the accused—a constitutional exemption—is at issue. In applying s. 12, the gravity of the offence, as well as the particular circumstances of the offender and the offence, must be considered. Here, the minimum mandatory sentence is not grossly disproportionate. Murder is the most serious crime known to law. Even if the gravity of second-degree murder is reduced in comparison to first-degree murder, it is an offence accompanied by an extremely high degree of criminal culpability. In this case the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality. In considering the characteristics of the offender and the particular circumstances of the offence, any aggravating circumstances must be weighed against any mitigating circumstances. On the one hand, due consideration must be given to the accused's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and T's extreme vulnerability. On the other hand, the accused's good character and standing in the community, his tortured anxiety about T's well-being, and his laudable perseverance as a caring and involved parent must be taken into account. Considered together the personal characteristics and particular circumstances of this case do not displace the serious gravity of this offence. Finally, this sentence is consistent with a number of valid penological goals and sentencing principles. Although in this case the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration, the mandatory minimum sentence plays an important role in denouncing murder. Since there is no violation of the accused's s. 12 right, there is no basis for granting a constitutional exemption....”

207.3 Sentence: Regarding sentence, the Supreme Court held that the 10-year mandatory minimum sentence for second-degree murder is not “cruel and unusual punishment.” The judges wrote:

Murder is the most serious crime known to law." Taking into account the accused's good character, his "tortured anxiety over Tracy's well being", and his "laudable perseverance as a caring and involved parent," it found that even these factors "do not displace the serious gravity of this offence...

207.4 Analysis: Accordingly, the Supreme Court gave a narrow reading to the common law defence of necessity. To be successfully invoked, the Court held that an accused must prove three conditions: i. Imminent peril or danger; ii. No lawful alternative; and iii. Proportionality between the harm inflicted and the harm avoided. First, the Court held that Mr. Latimer was not in peril or danger, nor was Tracy, who could have undergone

additional surgery. Second, Latimer had at least two other (admittedly unpleasant) and other pain management options, notably the placement in an institution or struggling on as before. Third, as regards proportionality, the Court left open the question whether it could ever be applied in a homicide case. In any event, it found that the harm inflicted was "immeasurably more serious" than his daughter's pain resulting from another operation, for which her father had consistently withheld his permission. Hence, the High Court expressed admiration for Latimer's devotion to his daughter during the harrowing years whilst she was alive, but it said his decision to kill her was a grave error in judgment that carries undeniable consequences. It clearly ruled that a so-called "mercy killing" is murder. The Supreme Court of Canada showed no mercy to Robert Latimer. It found unanimously that he must serve at least 10 years in prison for the murder of his severely disabled daughter. "Tracy's situation was not an emergency," the Court said in a seven to zero ruling. “The appellant can be reasonably expected to have understood that reality” (Makin, Kirk, “Latimer gets no mercy, Supreme Court upholds sentence for killing disabled daughter,” *The Globe And Mail*, Friday, January 19, 2001, pgs. A1, A5).

207.5 Epilogue: The heart-breaking Latimer case is very troublesome for our national psyche. There was much sympathy and understanding over the dilemma of the accused and his very human makeshift solution. It was hoped that once Canada's highest court would rule on the Latimer appeal, it would be over, but the discomfort remains and the debate continues. Robert Latimer has now served more than three years for the murder of his severely disabled daughter. He has been told that the application for clemency is the best hope for reducing his sentence. Nevertheless, he wants to clarify a top-court judgment. The Saskatchewan farmer blames “fabricated assumptions” for his 10-year prison term (Bailey, Sue (Canadian Press), “Latimer still refuses to seek clemency, Served one-third of 10-year term for killing disabled daughter; top court ruled he had other medical options,” *The Gazette, Montreal*, Monday, May 10, 2004, pg. A14). The Lerner case just added to the lament.” (Extrait du ELDER LAW IN CANADA ELIC* #3**)

***Herbert Lerner* (760-01-016454-008)**

“208. *Herbert Lerner* (760-01-016454-008): This tragedy is detailed as follows.

208.1 Facts**:** Lerner, 79, was charged with the first-degree murder (s. 235 *Criminal Code*) of Jenny Lerner, his wife of more than 50 years. He was accused of suffocating her on July 14, 2000 with a plastic bag at the Château Vaudreuil, a hotel just off the western tip of Montreal. Several hours later, he was found in an on-island motel in a comatose state, suffering from what police suspected were self-inflicted wounds. He later tried to kill himself while detained in Valleyfield, a town southwest of Montreal. His defence was that it was a mercy killing after Mrs. Lerner was diagnosed with Alzheimer’s disease. On July 17, 2001, he pleaded guilty to a reduced charge of manslaughter and received a prison term of five years.

2001 October 3: Herbert Lerner, 78, of Cote-St.Luc, Que, is sentenced to five years in prison for suffocating his 73-year-old wife Jenny with a plastic bag on June 12, 2000. Lerner plead guilty to manslaughter and claimed it was a mercy killing since his wife was diagnosed with Alzheimer's. Judge Pierre Laberge rejected the mercy killing defence noting that the woman was only at the earliest stages of Alzheimer's. Laberge said there was no evidence that Jenny Lerner was suffering nor were there any requests for her husband's aid in taking her life
(Source: Alliance for Life Ontario) - http://www.allianceforlife.org/euthanasia.html

208.2 Epilogue: He started serving his sentence at the Philippe Pinel Institute, a Quebec psychiatric hospital. In a report prepared for the National Parole Board, it was written that, "At the hearing, you said that you were not supposed to be alive because you attempted to end your life after killing your wife, so you regret your action and you have difficulty living with it, having nightmares very often." In mid-2002, while on day parole

at a halfway house, this “mercy killer” succeeded in his third suicide attempt (Montreal/Quebec, "78-year-old admits killing his wife," *The Gazette, Montreal*, Wednesday, July 18, 2001, pg. A9; "Briefs, Mercy killer commits suicide," *The Gazette, Montreal,* Friday, July 26, 2002, pg. A4).” (Extrait du ELDER LAW IN CANADA ELIC* #4)

DR NANCY MORRISON

“LE DR NANCY MORRISON, MÉDECIN DE HALIFAX ACCUSÉE en mai dernier d’avoir tué un patient, a été grandement soulagée d’apprendre la décision du juge qui a rejeté l’accusation de meurtre. La décision ne fera toutefois pas grand-chose pour dissiper les préoccupations des médecins à cet égard. Peter Singer, éthicien de Toronto, affirme qu’il n’y a qu’une seule façon d’agir pour les médecins : avec prudence » (Source : http://www.cmaj.ca/cgi/reprint/158/8/1071.pdf) Canada

R. v. Morrison [1998] S.H.No.147941

“211. *R. v. Morrison* ([1998] S.H.No.147941): With all of this having been said, consider the surprising *Morrison* case. In November 1996, Paul Mills, 65, afflicted with terminal cancer, was a patient in an intensive-care-unit of a teaching hospital forming part of Halifax's Queen Elizabeth II Health Sciences Centre. Dr. Nancy Morrison, a respirologist on duty, administered deadly potassium chloride by injection; the patient thereafter died. A peer-review committee interviewed Morrison and other medical personnel and said that she had acted "outside the bounds of established medical practice." As a result of this in-house inquiry, Morrison was suspended for three months. A number of her colleagues complained to hospital administrators that the matter should have been referred to an outside body such as the provincial College of Physicians and Surgeons. In a memo, Dr. Graeme Rocker wrote, "What happened in November, the use of intravenous nitroglycerine and when this failed the use of intravenous potassium to actively hasten and effect death, contravenes the laws of this land and is against accepted ethical principles." Within the next 10 days, Dr. Morrison left the hospital. In order to minimize the fallout, Dr. Richard Hall, medical director of intensive-care services, advised his department that she had resigned from intensive care and wrote, "Should anybody inquire as to the reasons for the resignation, I would ask you simply to state that Nancy has resigned for personal reasons. The details of this need not be explained to anybody and, in my opinion, can serve no useful purpose at this time. I trust I have your co-operation in this matter." The Halifax police next became involved once Dr. Arthur Macneil told investigators that, "We're there to preserve life and when we can't do that, to alleviate suffering. We're not there to terminate life...It is totally against the moral code of virtually everybody I know." In May 1997, Dr. Morrison was arrested. She was charged with first degree murder in the Halifax Regional Municipality and the case bore person no. 366372-1 (DOB 55-11-06), information no. 268102 and case no. 97-15568-720188. The Preliminary Inquiry was held on February 9, 10, 11, 16, 18, 27, 1998 before the Honourable Mr. Justice G.H. Randall. However, at this stage, the Court *discharged* the accused as she could not be convicted in accordance with the criminal law test. A detailed case profile is below set forth.

211.1 The charge (information): It read as follows: "the informant says that he or she has reasonable and probable grounds to believe and does believe that...Nancy Morrison, Halifax... between the 9th day of November 1996 and the 11th day of November, 1996 at or near Halifax, Halifax Regional Municipality in the county of Halifax, province of Nova Scotia, did... *unlawfully cause the death of Paul Mills and did thereby commit first degree murder contrary to section 235 (1) of the Criminal Code of Canada."*

211.2 The statute: Section 235 (1) & ff. provides, "235. (1) Classification of murder—Murder is first-degree murder or second-degree murder. (2) Planned and deliberate murder—Murder is first degree murder when it is planned and deliberate...(7) Second

degree murder—All murder that is not first degree murder is second degree murder." The charge was murder as the killing was seen as planned and deliberate. If convicted, she would have faced a substantial minimum sentence. This is in contrast to manslaughter, which is defined as unlawfully causing death without intent to kill; and the sentence therefore could have ranged from a suspended sentence to life.

211.3 The facts: In the review of the facts in his judgment, Mr. Justice G. H. Randall, J.P.C., stated that the patient:
…had his oesophagus removed due to cancer; underwent four surgical procedures while still in Moncton; underwent six more surgical procedures at V.G. in an attempt to join up the upper part of the oesophagus with his stomach by using portions of the large bowel and other means; and lost considerable weight and infection developed to the point where healing from all of his surgical procedures became irreversible; As well, the Court noted that due to the deteriorating condition of Mr. Mills, caused by the infection and lack of healing on Saturday, November 9, 1996, Dr. Berthune met with the patient's family and made them fully aware of his condition and the fact that everything medical that could be done, had been done; the dying process was allowed to proceed with the concurrence of the family; the nurses made an entry respecting the patient's desire to be off life support; and antibiotic medications for clearing up the infection were also stopped; The Court was told that on Sunday, November 10, 1996, family members visited the patient for the last time; and at their request, arrangements were made for him to receive the last rites from Monsignor Currie; Mr. Mills was extubated to room air at 12:30 P.M., and he continued gasping for breath through to approximately 2:30 P.M.; "*astronomical* amounts of Dilaudid and Morphine" were given by Nurse MacInnis as the behest of Dr. Barry Cohen in order to relieve pain; Dr. Morrison and Nurse MacInnis discussed the fact that large amounts of dilaudid, morphine and sedatives did not seem to be relieving his distress; Dr. Morrison departed and returned with a syringe of clear liquid, which she put into the patient's I.V.; Dr. Morrison told Nurse MacInnis that the liquid was Nitroglycerine and same was to lower blood pressure and to stop the suffering; the patient's pressure dropped to 50 transiently and then increased to 50-60; Nurse MacInnis blurted out that Mr. Mills was indestructible (given the drug intake once extubated), and asked (out loud) if it would take something like K.C.L. to end the suffering; after returning at 14:59 P.M., with a syringe containing 10 cc of a clear liquid, Dr. Morrison identified the contents as K.C.L. and injected it into the IV.; the patient was *asystole* (heart stopped) *within seconds.*

211.4 Judgment (law and findings): On the issue of evidence, Mr. Justice Randall ruled that the Quality Assurance Committee Report was inadmissible. In addition, he excluded the notes seized at the office of Dr. Morrison. As to the court's rationale, particularly regarding Crown disclosure, the judge referred to the 1976 case of *United States of America v. Sheppard* (reported at 30 C.C.C. (2d) 424) and said: "...This quote...must be read now having regard to the *Charter Of Rights and Freedoms Act* and the law of disclosure which has developed since 1982 whereby the crown are obligated to give the defence all necessary material in order that the defence is able to make full answer." The judge also acknowledged that at the preliminary inquiry stage, the crown prosecutors—but not the defence—have the burden to show their case; and that: "... the duty imposed upon a Justice under Section 548 is the same as that which governs a Trial Judge sitting with a Jury in deciding whether the evidence is sufficient to ensure that a case should be withdrawn from a Jury. Thus the accused should be committed for Trial where there is admissible evidence which could if believed result in a conviction." Mr. Justice Randall then discharged Dr. Morrison as he had the duty to eliminate "...those cases which are not worthy of being tried because an acquittal is a foregone conclusion" and "...where the evidence, viewed fairly and honestly in total, could not lead to a conclusion of probable

guilt..." and "...a Jury properly instructed could not convict the accused of the offence charged, any included offence, or any other offence..." This judgment is remarkable. While the foregoing does recite the "nuts and bolts" logic and law by which he came to this decision, it is necessary to delve deeper.

211.5 Case analysis: It could be argued that the Court came to its conclusions, this based on such reasoning as regards such topics as:
(a) Potassium Chloride (also known as K.C.L.): He determined i. that in an undiluted form, Potassium Chloride causes cardiac arrest; and it is even used in executions by lethal injection; ii. that in its concentrated form, it is usually diluted and mixed with other fluids; iii. that Dr. Morrison administered K.C.L. and nitro-glycerine by way of I.V.-push/injection by syringe into the I.V. and not in the usual diluted form in regular I.V. (as per Nurse MacInnes); iv. that the amount of K.C.L. then given to Mr. Mills by Dr. Morrison was *lethal*: and the dose of Dilaudid was also in the *lethal* range; (as per Dr. Barker); v. that within seconds, the patient was asystole; (heart stopped); vi. that Dr. Morrison thus injected K.C.L. in such a manner as to bring on death;
(b) Reasonable doubt: Such a doubt was raised regarding the cause of death, realistically from an act other than that of the accused. Hereinafter are some specifics.
(i). First, the deceased was a patient in a medical facility and was gravely ill. He was so sick that healing was not possible. The dying process had not only begun, but was proceeding to its fruition, and he had received his last rites, all *before* Dr. Morrison acted;
(ii). Second, it must be noted that, "Dr. Mackay's cause of death for Mr. Mills was surgical reconstruction which led to the irreversible infection." As well, Dr. Barker had said, "...that having regard to all of the medication being given to Mr. Mills, there was an increased possibility that the I.V. tip was dislodged..." and "...the amount of Dilaudid was increased on the day of Mr. Mills' death to 200." However—as per the report of the toxicologist, Tom Thompson from the RCMP Lab—"...there was no evidence of Dilaudid in the examination of the liver..." As a result, one may conclude that the Dilaudid was not getting through. This then raises a reasonable doubt as to whether the K.C.L. also got through and ultimately caused the death;
(iii). Third, there is the principle of the operative cause of death and specifically whether the actions of the accused constituted an operative cause of death and whether there was a reasonable doubt thereof. In the case at bar, the Court found that there were "...two realistic ways as outlined in the evidence of the Crown witnesses, and I emphasize Crown witnesses, by which Paul Mills could have died." As well, given the recognition of the above explanation by Dr. Barker, there was a cause of death not attributable to the fault/act of the accused. This can be likened to the situation of a five-man firing squad and no one knowing the identity of the sole shooter having the live ammunition;
(iv). Of course, an accused must be found guilty beyond a reasonable doubt, but such a doubt was raised herein. The mere possibility (of being the cause of death) is insufficient. In this regard, attention is called to the case of *R. v. Kitching and Adams* ([1976] 32 C.C.C., (2d) 159, [1976] 6 W.W.R. 697 (Man. C.A.)). As per the defence, once there was brain inactivity, the cause of death was the act of doctors in disconnecting mechanical devices (keeping his heart and other organs functioning) and the removal of kidneys. Matas, J.A., for four judges, held that the jury had been adequately instructed on the effects of ss. 207 to 209 [now ss. 224 to 226]. O'Sullivan, J.A., in a concurring opinion, pointed out that those sections extend liability in certain cases and do not effect

the principle that it is not necessary to prove that a criminal is the sole cause of his crime and that even if it could be shown that the actions of the doctors constituted an operative cause of death, that would still not exonerate the accused unless the evidence left a reasonable doubt that the accused's actions also constituted an operative cause of the deceased's death;

(c) Lack of mens rea (intent): It is a fact that Dr. Morrison did administer an allegedly lethal substance with a syringe. The police authorities believed that she had intentionally terminated life and charged her with murder in the first degree. Nevertheless, while it was unspoken, we are of the opinion that the Court did not find mens rea (intent). The victim died at the conclusion of the dying process. Mr. Mills was not just slipping away in a peaceful slumber, but rather was gasping for breath and dying an agonizing death. The Court was told by Nurse MacInnis, "…that she had never seen in her experience astronomical doses of Versed in combination with Morphine, and in combination with Dilaudid have no effect at all." Dr. Morrison was addressing the patient's pain and extreme suffering and acted with the sole purpose of controlling/reducing the same. She only turned to K.C.L. when the other drugs proved ineffective and she was not bringing comfort to the patient. Hence, it could be argued that K.C.L. was the natural progression therefrom. Although the side effect was death, her intent was not to kill and she was not guilty of a crime;

(d) A parallell can be drawn to abortion: We can learn from the legal situation of abortion. In the Hippocratic Oath, a doctor promises, " ...I will not give to a woman an instrument to produce abortion..." The code of 1892 provided that those convicted of performing abortions could face life in prison. In 1939, an English court determined that an abortion performed on a 14-year-old was medically necessary for a girl's mental health. In 1969, the *Criminal Code* was amended, thereby recognizing certain conditions under which therapeutic abortions could be performed legally in Canada. In 1988, the Supreme Court rendered the landmark ruling in the Dr. Henry Morgentaler case, therein striking down the *Criminal Code* provision and banning therapeutic abortions as unconstitutional. Since Ottawa has never replaced the impugned provision, this decision remains the law of the land. It is self-evident that as a society, we wanted the law on abortion to move and it did. Since abortions are still being performed, might we say that this prohibition was neutered by the courts?;

(e) Hippocratic Oath: A similar change may happen with another prohibition, also in the Hippocratic Oath, wherein a physician promises to "...follow that method of treatment which, according to my ability and judgment, I consider for the benefit of thy patients and abstain from whatever is deleterious and mischievous, I will give no deadly medicine to any one if asked, nor suggest any such counsel...";

(f) Routine pain management includes the use of drugs, even those with side effects. Dr. Nancy Morrison acted even with the likelihood that death might follow. Nevertheless, many people believed that Morrison acted rightly. There were petitions bearing 4,563 names and numerous letters supporting the accused. Prosecutors in the Morrison case were under tremendous pressure to reduce or drop the charge. This might indicate a change in popular opinion. The population may now be ready to tolerate the administration of medicine for pain control but which may cause death. The law may be catching up to society.

211.6 The case against Morrison stoked a heated debate on euthanasia across the country. Many of her fellow physicians felt she crossed a clear line by administering a medication intended only to cause death. Indeed, Jocelyn Downie, director of the Health Law Institute at Dalhousie University, said:

...The ethical line is anything but clear. Terminally ill patients in Canadian hospitals are regularly given potentially lethal doses of narcotics, just as Mills was. The argument is that the drugs are intended to relieve the patient's suffering; if death is hastened, that's an unfortunate side-effect. Potassium chloride, on the

other hand, has just one side effect: to stop the heart...Why is one OK and the
other not OK? ... One's simply slower than the other. That's the crux of the debate
we need to have...The case could be made that in some cases potassium chloride is
the more humane choice...If we're willing to accept that we may play a causal role
in ending life, then we have to take responsibility for that and set in place all kinds
of regulations and protective guidelines..."
(Extrait du ELDER LAW IN CANADA ELIC* #5**)

(N.B. After doing an Internet search, I found this interesting statement which serves as an epilogue. "The Nova Scotia College of Physicians and Surgeons merely reprimands Halifax respirologist Nancy Morrison for hastening the death of a patient in 1996 with a legal injection of potassium chloride. It also applauds her motives as being "in his best interests."

2.3 DROIT À REFUSER DES TRAITEMENTS (INCL. RÉSURRECTION, SOUTIEN DE VIE, ECT.)

***Nancy B. v. Hotel-Dieu de Québec* ([1992] 86 D.L.R. (4th) 385, 69 C.C.C. (3d) 450**

(Que. Sup. Ct.))

« **153.** *Nancy B. v. Hotel-Dieu de Québec* ([1992] 86 D.L.R. (4th) 385, 69 C.C.C. (3d) 450 (Que. Sup. Ct.)): Next, we cite the leading case of Nancy B. In this instance, a woman with an incurable disease brought an action "to establish her right to refuse further treatment, including the continued use of a respirator." The Superior Court of Quebec held that "the plaintiff was entitled to the injunction sought. Permission should be given to her physician to cease treatment with the respirator at a time chosen by the plaintiff. The physician was entitled to the assistance of the hospital. Use of a respirator to maintain life is a "treatment" and hence is something within the individual's control. By articles 19 and 19.1 of the *Civil Code of Lower Canada,* the person is inviolable except with the person's consent or legal authority and no one need submit to any treatment, examination or other intervention. The Court herein found that "her intellectual capacity and mental competence was unaffected" and that she was therefore capable; since consent was mandatory, permission was given "to her physician to cease treatment with the respirator at a time chosen by the plaintiff." Accordingly, a patient's directive to discontinue treatment was legal; and a physician's obligation of acting for the betterment of a patient's health had to give way to the desire of the patient to the contrary.
153.1 On this subject, Professor E.H. Emson wrote:
The Nancy B case in Quebec reaffirmed the right of the competent person of adult status to refuse treatment, with or without stated reason, even when this is certain to cause death…. The doctor's duty in face of such a requirement by a patient is quite clear. The patient's competence must be established, if necessary by psychiatric consultation. The concurrence of the team caring for the patient should be sought; this is no time or place for disagreements between team members. Any disagreement, objection or opposition by family members must be over-ruled, firmly but as tactfully, gently and charitably as possible. The institution's ethics service may be involved. The patient's suffering before and following termination must be obviated. The patient's requirement must be followed, and the events recorded meticulously in the chart. If the physician, by reason of personal belief and conscience, cannot accede to the patient's requirement, it is the doctor's duty to transfer care to another who can (Emson, H.E., *The doctor and the law, a practical guide for the Canadian physician,* Third edition, Butterworths Canada Ltd., Toronto, 1995, pg. 220)."

(Extrait du ELDER LAW IN CANADA ELIC* #6**)

***Schiavo v. Schindler* (Pinellas County, Florida *90-2908GD-003*)**

"165. *Schiavo v. Schindler* (Pinellas County, Florida *90-2908GD-003*): And then there is the law-making case of Terri Marie (Schindler) Schiavo. The tragic story played out in Pinellas Park and Tampa, Florida. It moved through the courts for more than 10 years. This extraordinary case was groundbreaking in how the players reacted and legal principles were tested in the courts. It thereby illuminates the way for all of us who come after. A rundown of events and decisions is hereinafter provided.
165.1 Facts: Shiavo, 39, suffered a heart attack when her heart stopped because of what doctors said may have been a chemical imbalance. This temporarily cut off oxygen to her brain. She was in a coma since 1990. She was provided life support. She left no living will or other written instructions, but according to her husband, Michael Schiavo, made remarks to the effect that she never wanted to be kept alive artificially in such a state. He has been trying to have the feeding tube removed since 1998. However, his in-laws, Bob and Mary Schindler, contended that she wanted to live. The parents fought Michael Schiavo because they believed Terri could recover. They believed that she was capable of learning how to eat and drink on her own. They also submitted that Michael Schiavo should not be his wife's guardian because he has long dated another woman. Doctors said Schiavo could die within two weeks if her tube was removed. In fact, Bob Schindler stated, "In our eyes, it is murder."
165.2 Litigation: Doctors have testified that the noises and facial expressions made by Terri are reflexes and do not indicate that she has enough mental capabilities to communicate. George Felos, a lawyer for Michael Schiavo, said the Schindlers were "still in denial" over Terri Schiavo's wishes not to be kept alive. The courts have accepted the proposition that before becoming comatose, Terri Schiavo had verbally expressed a preference for the withdrawal of life support. He has refused to divorce his wife, fearing that her parents would ignore her desire to die if they became her guardians. There has even been a guardian ad litem. Some of the highlights are as follows:
(a) Lower court: It ordered that the tube be taken out; and the U.S. Supreme Court refused to reverse this ruling. Then, in April 2001, the feeding tube was removed but a judge hearing a lawsuit from the Schindlers ordered the tube reinserted two days later.
(b) Judgment/First instance: In 2002, there was a decision by Circuit Judge, George W. Greer. The 2nd district Court of Appeals agreed with Michael Schiavo that his wife has no chance of recovering and ordered a judge to schedule the tube removal.
(c) Judgment/Appeal: On June 6, 2003, the Florida State Appeal Court found that Michael Schiavo could order the removal of the feeding tube, which had kept his comatose wife alive for more than a decade. Appeals Court Chief Judge Chris W. Altenbernd, writing for the three-judge panel, said Greer's ruling was supported by "competent, substantial evidence." The panel noted that three of the five doctors who examined Terri Schiavo testified that she is either in a persistent or permanent vegetative state. A state appeals court in Lakeland rejected motions by a lawyer for the Schindlers and as per their lawyer, their legal remedies were exhausted. Doctors removed the feeding tube at the Tampa Bay area hospice, where Schiavo, 39, had been living for several years. As per Jennifer Bard, an associate professor at Texas Tech University, Schiavo is not brain dead, but is in a permanent vegetative state.
165.3 Extra-judicial intervention/Post-appeal: Then, something very unusual happened. Just before the removal, it seems that politics became involved. Florida Governor Jeb Bush and the Florida Legislature "stood up for life," thereby playing up to the pro-life movement. The governor told Mr. And Mrs. Bob Schindler that he was instructing his legal staff to find some means to block the court order, which had allowed Michael Schiavo to end his wife's life. The brother of the woman said the family was heartened by the governor's last-minute effort. After the meeting with Bush, Bob Schindler Jr. said, "The family has not given up hope on Terri…We have spoken to the governor, and he

hasn't given up hope, either." He wanted a quick decision although he knew it may be unconstitutional. In so doing, the peaceful and painless death was interrupted and the death process was extended. The State opposed an act of a citizen, which it deemed repugnant. In October 2003, the legislature passed a law with a retroactive effect. It was called "Terri's law." The governor had himself declared Terri's guardian and signed the order to reattach the feeding tube and keep her alive. The law had allowed Bush to order the reconnection within days (of the disconnection) of Terri's feeding and hydration tube, which has kept her alive for more than a decade. Journalist Sheldon Alberts reported, "In the five days since doctors at Morton Plant Hospital in Clearwater, Fla., reinserted a feeding tube into Terri Schiavo's abdomen, flashes of colour have returned to the brain–damaged woman's face. She has been moved back to a long-term hospice and her father, Bob Schindler, says she is "out of harm's way." Journalist Elizabeth Nickson was against the husband and in support of Jeb Bush when he overturned the forced removal of Terri's feeding tube. She saw the governor's move as "…..allowing her parents another shot at taking care of her. The ACLU hooted and hollered, but most people looked at Terri's wide- boy husband spouting platitudes on Larry King about Terri saying she wanted to die when she was watching a movie once, and thought, this guy wants to go off and play happy families with his two kids by his new girl-friend and forget all this nuisance of feeding tube and visits. If her parents want her to live, let her live. If there's a chance, a tiny chance, that with rehab, she can eat by herself, let her be fed. When in doubt, choose life. …."

165.4 Postscript: Michael Schiavo next brought proceedings asking a court to strike down the law and the deeds of the governor. It alleged that the law (and gubernatorial action) were illegal and unconstitutional, inter alia, by virtue of its violation of the "rule of law," being after-the-fact, with particular application, in breach of the checks and balances, in suppression of the wish of a citizen in a private matter and enabling the performance of a surgical procedure against the will of the courts. It was widely expected that the court would undo these acts. And this then came to pass. On May 7, 2004, a Circuit Court judge ruled that the so-called "Terri's law" was unconstitutional. He estimated that it constituted an unjust interference by the State into the domain of individual personal rights. The governor's office then filed an immediate appeal. On September 23, 2004, the Florida Supreme Court ruled in favour of husband Michael Schiavo, declaring the subject law unconstitutional, retroactive and ruling that same was a violation of separation of powers and in breach of patient rights. The Court authorized the removal of life support for Terri Schiavo; and she died on March 31, 2005 at a clinic in Pinellas Park (Associated Press, "Husband can let comatose wife die," *The Gazette, Montreal*, Saturday, June 7, 2003, pg. A29; Chachere Vickie (Associated Press), "Feeding tube removed from comatose woman, 39-Year-Old Has Between 7 and 10 Days to Live, Parents, fighting to keep Florida woman alive, say husband shouldn't be guardian because he's dating," *The Gazette, Montreal,* Thursday, October 16, 2003, pg. A22; Alberts, Sheldon (CanWest News Service), "Florida woman's case back in court, Feeding tube reinserted, Brain-damaged woman's husband battles Jeb Bush," *The Gazette, Montreal*, Monday, October 27, 2003, pg. A21); Nickson, Elizabeth, "There is no dignity In our death culture," *National Post,* Friday, October 31, 2003, pg. A14; "Fasttrack, United States, Judge voids law to keep woman alive," *The Gazette, Montreal*, Friday, May 7,2004, pg. A16; AFP, "Floride: feu vert pour l'euthanasie d'une femme dans le coma depuis 14 ans," Le Journal de Montréal, vendredi, le 24 septembre 2004, p. 28).

165.5 Commentary: Attorney and Elder Law expert Carol Spainhour stated:

Those cases, from Karen Anne Quinlan to Nancy Cruzan to the current legal battle over Terri Schiavo, represent the outer limits of what the medical profession, legal profession, and the average citizen must address for themselves or their loved ones…Minus a prepared course, individuals, families, the hospital and the doctors have to work out what is best for the patient "without clear direction"…many of these issues are just now coming into focus for the general public."

According to Spainhour, each state has slightly different laws, and new part and full-time residents to North Carolina may want to start their approach by "re-examining any existing

documents in the light of North Carolina law," Without planning, the fact is you could "be at the mercy of medical or political agendas" like those that kept Nancy Cruzan laying in a coma with a feeding tube keeping her alive for years against the wishes of her entire family. Terri Schiavo, with no Advance Directive, sits in a hospital today with not only parents and husband but the Florida governor and legislature fighting over the end of her life (Tager, Miles, "Facing it, End of life Issues Coming to Fore For Baby Boom Generation, High Country*," The Mountain Times*, http:://www.mountaintimes.com/mtweekly/2004/0506/facingit.php3, Posted May 5, 2004, pgs.1-3).

165.6 Epilogue: On June 15, 2005, the autopsy report was released. Indeed, justice was done! The position of Michael Schiavo was validated. Terri Schiavo died from dehydration. She was found to having been incapable of autonomous norishment and drinking. Jon Thogmartin of medical legal services of the county of Pinellas spoke with the press. As per Thogmartin, Schiavo was in a persistent vegetative state and suffered irreversible cerebral lesions. No therapy or treatment would have overcome the massive loss of neurons (AP, "L'état de Schiavo n'aurait jamais pu s'améliorer. Le rapport d'autopsie de Terri Schiavo a confirmé hier qu'elle se trouvait dans un état végétatif persistant et souffrait de lésions cérébrales irréversibles," *Métro*, Jeudi 16 juin 2005, pg. 8)"
(Extrait du ELDER LAW IN CANADA ELIC* #7**)

2.4 SUICIDE (DROIT À)

"204. S*elf*-euthanasia: The bottom step is suicide, which, for the purpose of this study, we shall call s*elf*-euthanasia. It is contrary to the average wish to live and experience the beauty and fullness of life. Furthermore, it goes against the natural instinct of self preservation. Perhaps it is chronic pain during the dying process or terrible suffering which causes a person to want the ending of an intolerable existence. Maybe it is a question of mental state, which results in death at one's own hand. In the alternative, it could be an underlying unsoundness of mind. Suffering from delusions and thinking like someone all powerful, he or she sees no need to stay safe and live by the rules. Or struggling with heart-wrenching disappointments and losses (and defeatism), he or she is unable to continue and endure privation and succumbs. Whatever the cause, one thing is clear, there is a price to pay. While suicide could assuage the pain of the now dead, it probably would leave much heartache for the living. Closure might not be complete. There could be pangs of guilt. Or if the killing was in front of others, a witness may suffer from delayed response post-traumatic stress disorder. After witnessing such a horrifying event, he or she would need to be evaluated and treatment could include psychotherapy and medication (Mitchell, Kathy and Marcy Sugar, "Annie's Mailbox, Witness to suicide is still suffering," *The Gazette, Montreal,* Monday, August 16, 2004, pg. E16). Dr. Brian Mishara is a suicide expert. He believes that the government must do more to prevent suicide."
(Extrait du ELDER LAW IN CANADA ELIC* #8**)

2.5 SUICIDE ASSISTÉ (DROIT À)

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STATUTS

Code criminel (L.R., 1985, ch. C-46)

« Fait de conseiller le suicide ou d'y aider

241. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, selon le cas :
a) conseille à une personne de se donner la mort;
b) aide ou encourage quelqu'un à se donner la mort,
que le suicide s'ensuive ou non.

L.R. (1985), ch. C-46, art. 241; L.R. (1985), ch. 27 (1er suppl.), art. 7."

Charte Des Droits Et Libertés De La Personne (L.R.Q., chapitre C-12)

48. Toute personne âgée ou toute personne handicapée a droit d'être protégée contre toute forme d'exploitation.

Telle personne a aussi droit à la protection et à la sécurité que doivent lui apporter sa famille ou les personnes qui en tiennent lieu.

1975, c. 6, a. 48; 1978, c. 7, a. 113."

Donc, il y a une prohibition contre le suicide assisté. En ce qui concerne la jurisprudence, je vous réfère à mon paragraphe 2.1 de la présente en particulier sans limitation la cause de (Sue) *Rodriguez c. C.-B. (P.G.)* [1993] 3 R.C.S. 519.

Au surplus à Québec, il y a la **Charte Des Droits Et Libertés De La Personne** (L.R.Q., chapitre C-12), et en particulier Art. 48, qui oblige à toutes personnes de faire bon envers nos ainés, etc. Dans mon opinion, la personne qui rendre assistance au but de suicide fait une contravention de cet article.

2.6 SUICIDE ASSISTÉ PAR UN MEDECIN (DROIT À)

JURISPRUDENCE

R. v. Dr. Maurice Genereux **([1999] Ontario Court of Appeal, C29797; C29940)**

"**238.** *R. v. Dr. Maurice Genereux* ([1999] Ontario Court of Appeal, C29797; C29940): This is the case of 50-year-old Dr. Maurice Genereux, a Toronto AIDS specialist. Steven Minuk wrote about an assisted suicide in the magazine *Icon*. It involved McGinn's partner, Aaron McGinn, a 31-year-old Toronto man who had the AIDS virus. He explained that McGinn "didn't want to suffer anymore. He wanted to die with dignity." Police investigated Genereux after the death of McGinn. They believed that he also played a role in the overdose of Mark Jewitt, another carrier of the virus. Neither was physically ill but both were said to be mentally unstable and alcoholic. Genereux allegedly knew that the men were suicidal. Some specifics are as follows:
(a) Accusations: Genereux was charged with two counts of assisting a suicide during the years 1995 and 1996. In the instance of McGinn, Genereux allegedly prescribed 50 100-milligram capsules of the sleeping pill Seconal so that his patient could kill himself "...when the time was right." Once McGinn had swallowed the pills and while he was still alive, the accused was telephoned to intervene, but he said that, "they should honour Aaron's wishes and let him die." In addition, as per Minuk, after arriving at McGinn's house, Genereux altered the death certificate to say that McGinn died of "AIDS, pneumonia." He then explained that "it is better this way because when there is a suicide, police get involved and there will be an

investigation." McGinn thus died with Genereux's help and knowledge. Insofar as Jewitt is concerned, Genereux also allegedly prescribed a lethal amount of Seconal. While Jewitt took all the pills, he survived the dose. A friend found him unconscious and called 911. While Jewitt was in hospital being revived/treated and during a telephone conversation between Genereux and Leslie Hosler, the former asked, "Oh, is he dead yet?" (Court documents (and statements)).

(b) Position: In December 1997, the former Toronto AIDS doctor, then stripped of his license to practice, entered a plea of guilty to two counts of assisting suicide, making him the first Canadian physician convicted of this crime. With a maximum 14-year sentence for the charge, Crown lawyers requested a six-year sentence for Genereux, while the defence wanted a suspended sentence or conditional discharge. The Honourable Mr. Justice Charles Scullion of the Ontario Court handed him a jail sentence of two years less a day, plus three years probation. Neither side in the case was pleased with the ruling.

(c) Comments: Some notable commentaries are as follows:

(i). Hon. Mr. Justice Charles Scullion: Close to retirement, this jurist was quoted as saying, "I had great trouble with this sentence, which is one of the more difficult for me in 20 years on the bench."

(ii). Michael Leshner: The Crown prosecutor immediately condemned the precedent-setting sentence as too light, saying it failed to send a strong enough message to other doctors who might provide lethal doses of barbiturates to suicidal patients. As well, Leshner declared:

This case has absolutely nothing to do with mercy-killing...it has everything to do with a doctor not being a doctor, who basically pimped pills and gave lethal doses to physically healthy and emotionally flawed individuals...We're talking here about basically fast-food death-patients went to Genereux and said...I'll have a hamburger, fries and a lethal dose of Seconal, please.

(iii). Ruth Von Fuchs: Fuchs, of the Ontario chapter of the Right to Die Society, retorted, "Everyone knows doctors do this all the time. But there is a furtiveness about helping people to die...We're just not comfortable dealing with the fact that some people might feel death might be the best alternative."

(iv). Darien Taylor: Taylor, of the AIDS Committee of Toronto, somewhat wistfully stated, "…we are hoping that this sentencing acts as a catalyst for discussion on assisted suicide."

(v). Jakki Jeffs: Although the climate of public opinion might not allow it, Jeffs, of the group Alliance for Life, maintained that "Genereux should be given the maximum sentence...You just have to look at the Robert Latimer case to know that people are confused about death and dying."

(vi). Hugh Sher: Sher, of the Council of Canadians with Disabilities, was somewhat fearful. He said, "What it demonstrates to me is that if we were to legalize assisted suicide, even the most drastic breaches of medical ethics could become condoned and accepted."

(vii). Dr. Phillip Hebert: Hebert is a bioethics coordinator for the University of Toronto. He explained, "...Whatever the debate about euthanasia, the Genereux case gives the courts a chance to send a message to other 'rogue doctors' who fail to protect and properly advise suicidal or vulnerable patients..." (McCann, Wendy (Canadian Press), "MD guilty of aiding suicide," *The Gazette, Montreal*, Tuesday, December 23, 1997, pgs. A1, A2; Foot, Richard (Southam News), "Toronto ex-doctor jailed for helping patients die," *The Gazette, Montreal,* Thursday, May 14, 1998, pg. A15).

(d) Analysis: Accordingly, a doctor may not provide the means to commit suicide and avoid prosecution through wilful ignorance and an attempted cover-up. This guilty

conviction has become the benchmark. It also created a firestorm. Backers of mercy killing hoped that the case would prod the federal government to regulate euthanasia. Opponents chose the moment to discourage copycats.
(e) Caution: A physician must never over-prescribe medication so that a patient may take his or her life. However, even when the prescription is due and proper, there is always the danger of the intake of a higher dose, be it due to inadvertence, substance abuse or some other cause. As a precautionary measure, a doctor should be especially vigilant and inquire into how a dying patient is using prescription drugs."
(Extrait du ELDER LAW IN CANADA ELIC* #9**)"

CONCLUSION

"Should Canada Legalize Assisted Death?

240. Bottom line, the only answer is an unqualified "no."

SECTION 3—DOCTOR'S LATITUDE AT *END-OF-LIFE*

Introduction

304. This is about a doctor's somewhat enhanced room for manoeuvre when dealing with a dying patient. From the jurisprudence, particularly the *Morrison* case, it appears that a physician may go the closest to the line.

What May Now Be Possible In Law?

305. Hence, compassion does have limits. The law does not recognize an excuse based on intent to do good and be humane; and the same does not give rise to a defence to murder. This was the message clearly sent in the *Latimer* and *Lerner* cases. Nevertheless, Dr.
348
Nancy Morrison was discharged. In attempting to reconcile the *Morrison* case and although doctors may not kill or assist a suicide, it could be argued that in their legitimate role in managing/reducing the pain of dying patients, they may not be held accountable for a death which follows their proper administration of drugs. Herewith is the author's extrapolation of the special set of circumstances, which seemingly must exist. The situation could be described as one in which:

306. The patient:
(a) Is critically ill/injured, afflicted with numerous maladies;
(b) Suffers from pain. The International Association for the Study of Pain (IASP) defines pain as "an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage" (4 Merskey H. Bogduk N., eds, *Classification of Chronic Pain Syndromes and Definitions of Pain Terms,* 2nd edition, ISP Press, Seattle, 1994). This definiton does allow for the distinction between nociception, which represents a stimulus from a peripheral receptor, and pain, which is regarded as subjective and experimental in nature (Roccamo, Giovanna & John H. Hayden, *Medicine in the litigation process,* Carswell, Thomson Professional Publishing, Scarborough, 1999, pg. 807). More accurately, he or she suffers from *chronic* pain. As per the main diagnostic reference source of U.S. mental health professionals, this is a pain which does not go away. It lasts over a period of six months or beyond the usual time for recovery. There are different types of chronic pain, many of which are not clearly understood. Chronic pain may be associated with an illness or disability, such as cancer, arthritis or phantom limb pain. Pain could commence after an accident. Another arises as acute episodes, but then, like lower back pain, it becomes constant over time. With certain chronic pain (e.g., migraine headaches, etc.), the pain is recurrent rather than constant. Some other kinds are chronic postsurgical pain, fibromyalgia, temporomandibular disorders, etc. Sometimes, the cause of the pain is known, but in other instances, it is not clear why it persists. Pain medication is helpful in managing chronic pain, but the suitability of long-term use of medication needs to be considered in regard to the individual and the type of pain. Scientists are continuing to search for medications, which take the pain away without side effects, but also allow people to continue to function in their daily lives (The American Psychiatric Association,

“Diagnostic and Statistical Manual of Mental Disorders,” fourth edition (DSM-IV), Washington, D.C., 1994);
(c) Is in agony from severe uncontrolled pain;
(d) Is very far along in the dying process and death is imminent.
307. The attending physician:
(a) Is unable to revive the patient and return him or her to a reasonable quality of life;
(b) Intends to manage/reduce pain;
(c) Does not desire death for its own sake;
(d) Sticks to the standard of care and code of conduct. (Of course, they are complicated in practice);
(e) Is cautious. In order to prescribe medication and render pain management, it is essential that the pain be real and extreme. However, it does happen that although hearing moaning and groaning, a patient is not actually in pain. He or she might be experiencing a condition known as delirium.

Caution Due To Delirium

308. Delirium is somewhat common upon or near death. It is characterized by agitated behaviour, severe distress, hallucinations, loss of memory and an inability to communicate. In this regard, mention is made of Dr. Peter Lawlor, an Edmonton palliative-care physician. He is the primary author of a study published in the *Archives of Internal Medicine*, expanded upon in the *Journal of the American Medical Association* and reported in the press. As well, Lawlor presented the research at medical conferences across North America and Europe. He has stated that delirium can threaten people with any sort of mental illness but as well, it strikes cancer patients as "they are weaker, less well-nourished, functionally compromised and…may be bed-bound." In some instances, the condition may be caused by the disease itself and persist. Indeed, about 85% of patients in some stage of palliative care go through episodes of delirium. Lawlor declared that the "figure we came up with in the study was that 50% of episodes of delirium were reversed and the patients cleared."
309. The care of delirium in palliative care patients should always involve keeping them as comfortable as possible without aggressive or futile treatment. So said Dr. Jose Pereira, acting head of palliative-care facilities at Edmonton's Grey Nuns Hospital. Each case must be assessed individually. Sometimes, it may only require an adjustment of the medication for the treatment of an advanced cancer, (e.g., painkillers and treatment for high calcium levels in blood). This may clear the mind clouded by the drugs and bring patients out of the delirious state.
310. If managed well, delirium can be removed and what appears to be the pain will settle down. Sometimes, patients can regain the ability to talk comfortably with their families and even return to some of their preferred activities. The problem for physicians (and nurses) is to determine if it is the final exit or a reversible state. Common blood tests can reveal elevated calcium levels, infection, problems with pain medication, etc. In order to compound the problem, the attending physician must also deal with close family members and caregivers who are seeing the pain-like symptoms. The challenge is to explain that a loved one is not really suffering from pain. Concern over whether in actuality there is delirium instead of pain is an important countervailing factor, which must be considered by front-line attending physicians.
311. Dr. Anna Taube, an Edmonton palliative care doctor, got to the heart of the matter when she declared, "Many patients, if you asked them how important it is to have their thinking power preserved, they'd say it was very important" (Holubitsky, Jeff (Edmonton Journal), "Back from the brink, Causes of delirium treatable in half of palliative care cases: study," *The Gazette, Montreal*, Monday, January 29, 2001, pg. B6).”
(Extrait du ELDER LAW IN CANADA ELIC* #10**)

Conclusion

“**312.** The foregoing is by no means a proverbial "007" license to kill. In contrast, the

Morrison case is an indication that the law is in motion. The enhancement arises from a clearer comprehension of the legalities near death. A physician must add *some water to the wine,* and see the Morrison effect, if any, as simply a clarification of a murky area of practice. Treating the patient will never mean killing him or her. Rendering medical services has been, and shall continue to be, only for the betterment of the human condition, nothing less...nothing more. And staying on guard for the condition known as delirium, shall surely improve the care for the dying."
(Extrait du ELDER LAW IN CANADA ELIC* #11**)

DERNIÈRES REMARQUES

Je comprends la souffrance. Dans l'année 2010, mes deux parents, Harry Gold et Merle Corobow ont décédés. Au surplus, mon oncle, Peter Corobow, avec qui j'ai eu une très bonne relation, a décédé.

Je suis d'accord qu'il y a des améliorations à faire, par exemple, dans les médicaments, les traitements aux patients à la fin de vie, augmentation des institutions d'hospice, ect. Mais, je dis non à euthanasie, au suicide assisté et à suicide assisté par les médecins.

La question à être poser aux Québecois et Québecoises est-ce que le suicide assisté est approprié maintenant. En réponse, je dis NON.

Premier, c'est la vie pas le décès qui a de valeur. On doit le promouvoir, le défendre et la protéger. La vie est un des grands espoirs. Aux États-Unis, at the beginning it sought "life, liberty and the pursuit of happiness" (I note that it was not death, liberty and the pursuit of happiness.)

Deuxième, pour moi, «a good death » est seulement une ***mort naturelle***.

Troisième, en ce qui concerne la **dignité humaine,** je vous réfère à un extrait d'un article de Wikipédia, l'encyclopédie libre.

« Aller à : Navigation, rechercher
La notion de **dignité humaine** a des dimensions multiples, philosophiques, religieuses, et juridiques. Utilisée en particulier dans le champ de la bioéthique, elle fait référence à une qualité qui serait liée à l'essence même de chaque homme, ce qui expliquerait qu'elle soit la même pour tous et qu'elle n'admette pas de degré. Selon le philosophe Paul Ricœur, cette notion renvoie à l'idée que « quelque chose est dû à l'être humain du fait qu'il est humain »[1].
Prise en ce sens, cela signifie que tout homme mérite un respect inconditionnel, quel que soit l'âge, le sexe, la santé physique ou mentale, la religion, la condition sociale ou l'origine ethnique de l'individu en question.
L'équivocité de la notion de dignité conduit toutefois à d'importants débats philosophiques et juridiques concernant sa valeur opératoire en tant que concept heuristique"
(Source : Wikipedia the free encyclopedia) - http://fr.wikipedia.org/wiki/Dignit%C3%A9

Dans mon point de vue, la donation de l'aide à faire le suicide n'est pas en faisant plus et mieux afin de donner la dignité à une patient.

Fourth, I believe that while the status quo does not work perfectly, it works. Il y a le principe de consentement et le droit de refuser traitement. Au surplus, il y a le droit de faire « an Advance Medical Directive » et « Do Not Resuscitate (DNR) Directive ». À Québec, nous avons le mandat. Il y a des prohibitions dans la loi contre le meurtre et donner l'aide a quelqu'un qui veut faire le suicide. Lay (non-medical) people do not have the right to kill people nor to assist those who may want to die. But, I say that there is some give (In English, there is an expression,"some give") in the law and the system. Doctors have as part of their work the responsibility of comfort care. Secondary effects can and do happen. As a result, there is a delicate balance. I am afraid that a change would derail this delicate balance and we fall down the proverbial slippery slope to a bad place where death and killing is desired and permitted. I do not want that place for you and me and all of those who shall follow.

Dernière, au Québec, nous avons la devise *Je me souviens*. Je partage ce désir. Donc, je vous soumets que je me souviens :

- Les Québecois et Québecoises qui nous ont donné la Québec tel oeuvre d'art – I say that it is a grand experiment. Auparavant, il n'y a pas le droit à mourir, suicide assisté, etc. Nous, les citoyens d'aujourd'hui, sommes les fiduciaires qui doivent faire le nécessaire afin de promouvoir la Québec, la défendre et la protéger. Je veux que vous dites NON aux changements au droit à mourir, suicide assisté, etc.
- Les patients qui sont malade qui veulent vivre;
- Les patients qui sont si malades, ils ne pensent pas clairement à causes des souffrances. Donc, on doit les défendre.
- Nos ainés, à cause il y a la probabilité que les grandes maladies s'en vient.

I promise to do right by them! Je vous prie de faire la même chose.

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**Gold, Allan, *ELDER LAW IN CANADA (ELIC)*, Practitioners' Press. Inc., Canada, 2005)

ANNEXE I

1. « **COMMISSION SPECIALE SUR LA QUESTION DE MOURIR DANS LA DIGNITE - Competences Actuelles** En vertu d'une motion adoptée le 4 décembre 2009 par l'Assemblée nationale, une commission a été créée en vue d'étudier la question du droit de mourir dans la dignité. Une consultation générale se tiendra à ce sujet. »
(Source : http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/csmd-39-1/index.html)

ANNEXE II - Allan Gold BA BCL

Attorney, author, retirement counselor and lecturer

*** Attorney for over 30 years; practice areas: commercial-corporate, civil/elder law, litigation, etc.**

*** Graduate of McGill University, one of North America's leadinguniversities**

***Member of the Consultative Committee on Long-term Care
Centre de sante et de services sociaux (CSSS) Cavendish/
Health and social Services centre Cavendish
Montreal, Quebec, Canada.**

***Board member at the JULIUS RICHARDSON HOSPITAL FOUNDATION, Montreal, Quebec, Canada**

***Board member at the QUEBEC ASSOCIATION FOR ADULT LEARNING (QAAL) Montreal, Quebec, Canada**

***Passionate on the subject of life of those 45 and better;**

***Author of the ground breaking (2,500+ page) legal text, Elder Law in Canada ELIC* (published by Practitioners' Press Inc.), acquired by legal libraries, Bar Associations, and Law Schools. For testimonials, excerpts etc, or to order, please visit www.practitionerspress.com**

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***Speaker at SYNAGOGUE COUNCIL OF GREATER MONTREAL, Quebec, Canada, Dec, 2009;**

***Speaker at the "Transformation Through Lifelong Learning: a Path to Change" Conference of QUEBEC ASSOCIATION FOR ADULT LEARNING (QAAL) March 2009/ Montreal, Canada - Seminar: "45+ Learning: Why? And why now?*"**

***Presenter at the CANADIAN CONFERENCE ON ELDER LAW, November 2008/Vancouver, Canada - Paper: "Guardianship, the Good, the Bad and the Ugly*"**

***Speaker at MOUNT ROYAL SERVICES, November 2008/ Montreal, Canada - Seminar: "Retiring Successfully*"**

***Interviewed and featured in Mike Boone's column of the MONTREAL GAZETTE November 2008/Montreal, Canada**

Contributor (column: "GOLD'S LEGAL MINUTE*") to CANADIAN NATIONAL LAW REVIEW

***Featured in 2008 as regards Elder Law in Canada* in "Le Monde Juridique, le Magazine des Juristes du Québec"**

***Speaker at several workshops for near-retirees of BELL CANADA (organized by the Diane King Group), 2000/Montreal, Canada -Lecture: "Founding and operating a new small business"**

***Speaker at meeting of PADGETT BUSINESS SERVICES, an international accounting franchise, November 1999/Montreal, Canada -Lecture: "Unanimous Shareholders' Agreements"**

For more, please visit www.allanjgold.com

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