Court File No. 35591

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

LEE CARTER, HOLLIS JOHNSON, DR. WILLIAM SHOICHET, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION AND GLORIA TAYLOR

APPELLANTS
(Respondents/Cross-Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant)

- and–

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Appellant)

FACTUM OF THE INTERVENER, THE CANADIAN HIV/AIDS LEGAL NETWORK AND THE HIV & AIDS LEGAL CLINIC ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I. OVERVIEW

1. The subjects of this appeal are persons who live with acute and intractable pain who wish to make their own end-of-life decisions. However, the Government of Canada (the "government") prohibits, upon pain of criminal penalty, those who cannot do so themselves from obtaining assistance to relieve their suffering. There is no such limit placed on able-bodied people. The impact of this prohibition is of the gravest possible import. The trial judge found as fact that some affected persons will commit suicide prematurely, while still able to do so unaided, rather than face the prospect of continued or even escalating suffering. This suffering is aggravated by affected persons' very inability to choose death freely and the serious affront to personal autonomy this represents. The current regime negates the autonomy of those unable to end their suffering without assistance. This cannot be constitutionally permissible.

2. The Canadian HIV/AIDS Legal Network ("Legal Network") and HIV & AIDS Legal Clinic Ontario ("HALCO") support the Appellants' position that sections 14, 21-22, 222 and 241 of the *Criminal Code*[1] (the "impugned laws") violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*[2] ("*Charter*") in light of their collective impact on people's fundamental choices concerning their own medical treatment and end-of-life decisions. Respect for personal autonomy permeates the *Charter* generally, including the rights protected by s. 7, the principles of fundamental justice and the values which underlie a free and democratic society.

3. In stark contrast, the government's criminal law response to assisted dying is based on a paternalistic set of values that is inconsistent with the foundational importance of autonomy to our society. Part of the constitutional problem stems from the fact that the federal criminal law power is a blunt instrument, ill-suited to the creation of a textured regulatory scheme of the kind that can protect vulnerable persons, while at the same time affording sufficient respect for the autonomy of those who have voluntarily made the decision to end their own life.

4. The deprivation of life, liberty and security of the person in this case is not in accordance with the principles of fundamental justice, both because it is overbroad and because its harms are grossly disproportionate to any identified government objective. This Court must not be

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[1] RSC 1985, c C-46.
[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

influenced by a particular (or any) religious teachings, precepts or claims when assessing the government's objective against these principles. Rather, the parameters of the criminal law must be defined by the secular nature of the Canadian state and the other norms protected by the *Charter*, which include freedom of conscience, the right to equality, and freedom from cruel or unusual treatment or punishment.

5. A law must be defensible entirely on secular terms in order to be valid constitutionally. To support a criminal law on the basis of claims rooted in any religion (or even ostensibly 'all' religions) amounts to state imposition of faith that is fundamentally at odds with *Charter* protections. This is particularly egregious where (as here) the impugned laws strike at the heart of personal freedom with the consequence of causing grave, avoidable suffering.

6. When considering the constitutionality of the impugned laws, this Court must take into account both the cruel and unusual impact they have on affected persons (both those needing assistance with dying and those facing imprisonment should they provide that assistance) (*Charter* s. 12), as well as the government's discriminatory denial of assistance to people with disabilities, which imposes the disadvantage of grave and avoidable suffering uniquely on persons with disabilities (*Charter* s. 15). The impugned laws not only infringe rights protected under s. 7, but do so in a way that trenches upon these other rights, which must further weigh in the balance in determining the impugned laws' excessive breadth and assessing their grossly disproportionate and deleterious impact.

7. Further, the impugned laws force affected individuals, their loved ones and their healthcare providers to choose between the rights to life, to liberty and to security of the person (on the part of the person in need of assistance with dying), and the rights to liberty and security of the person (on the part of any person providing assistance). State imposition of such an unconscionable choice erodes respect for the rule of law, and cannot withstand *Charter* scrutiny.

8. Finally, if this Court finds that the impugned laws are unconstitutional, then it should provide guidance on a constitutionally sufficient scheme to regulate assisted dying. The only compliant scheme would be one that does not unnecessarily or unreasonably delay or restrict access to assisted dying in appropriate cases. Otherwise, the very scheme itself could well exacerbate the harms it is intended to remedy. This would be a perverse and unacceptable result.

PART II. POSITION ON THE QUESTIONS IN ISSUE

9. The Legal Network and HALCO intervene with respect to the second constitutional question, and submit that the impugned laws violate s. 7 of the *Charter*. The Legal Network and HALCO adopt the Appellants' submissions that the impugned laws also infringe s. 15, and that none of these infringements can be justified under s. 1.

PART III. ARGUMENT

A. *Respect for Personal Autonomy Permeates the Rights to Life, Liberty and Security*

10. The trial judge correctly held that the impugned laws engage the *Charter* s. 7 rights to liberty and security of the person. These findings are unchallenged by the parties. The Legal Network and HALCO submit that the right to life under s. 7 is also engaged in this case, as affected persons may be compelled to commit suicide before they otherwise would when faced with the prospect of not being able to obtain assistance with dying later if required.

11. Although an unjustifiable infringement of any one of the three interests protected by s. 7 is sufficient to invalidate a law, in a case of this nature, it is also important to consider the aggregate impact of the criminal prohibition on the affected person's s. 7 interests, all of which are independently engaged. Taken together, the three interests protected by s.7 — life, liberty and security of the person — protect the fundamental right of all Canadians to make personal decisions about medical treatment, including, it is submitted, about assisted dying, something which the impugned laws negate for certain persons with disabilities.

12. This Court has recently recognized the "tenacious relevance in our legal system of the principle that competent individuals are – and should be – free to make decisions about their bodily integrity."[3] At common law, a patient's autonomy interest generally outweighs all other interests[4]. Under the *Charter*, a sphere of personal autonomy regarding one's body is similarly protected from state interference[5]. Respect for personal autonomy permeates all three s. 7 rights, including the right to life. As Justice Finch correctly held in dissent in the case at bar:

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[3] *A.C. v Manitoba (Director of Child and Family Services*), 2009 SCC 30 (CanLII) at para 39, Abella J, Book of Authorities of the Intervener, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario ("HALCO BoA"), Tab 1.
[4] *Cuthbertson v Rasouli*, 2013 SCC 53 (CanLII) at paras 18-19, McLachlin CJ, HALCO BoA, Tab 5.
[5] *R v Morgentaler*, [1988] 1 SCR 30 (CanLII) at 171, Wilson J [*Morgentaler*], HALCO BoA, Tab 13.

> Life's meaning, and by extension the life interest in s. 7, is intimately connected to the way a person values his or her lived experience. The point at which the meaning of life is lost, when life's positive attributes are so diminished as to render life valueless, when suffering overwhelms all else, is an intensely personal decision which "everyone" has the right to make for him or herself.[6]

13. This robust view of the right to life protected by s. 7 should be adopted by this Court.

14. Conversely, the Legal Network and HALCO submit that the right to life protected by s. 7 should not be treated as synonymous with, and should not be defined by, the "sanctity of life" concept articulated by Justice Sopinka in *Rodriguez*[7], and adopted by Justices Newbury and Saunders in the present case[8]. The sanctity of life principle is rooted in religious doctrine(s) that prioritize the notion that "human life is sacred or inviolable"[9] over respect for personal autonomy. That this hierarchy is accepted by more than one faith does not render it a secular or universal value, and hence does not render any such hierarchy constitutionally permissible or even relevant to the analysis.

15. This conception is also fundamentally at odds with the purpose of the *Charter*, which is in large part to protect a zone of personal freedom from government interference. The "sanctity of life" hierarchy would turn this protection on its head by limiting an individual's freedom to make a decision to end his or her own life on the basis of a putative state interest in preserving life at the cost of individual liberty. In the language of s. 7, perversely, the right no longer would belong to "everyone," but to the state. As Professor Lorraine Weinrib has argued:

> On his [Justice Sopinka's] reading of section 7, the State can affirm the principle of the sanctity of life even against an individual. The individual's right to life under section 7 is thereby transformed into society's right to prevent the individual from ending his or her life […] The right to life, thus refashioned into an instrumentality for the restriction of individual autonomy, becomes (along with liberty and security of the person) one of the three equipollent values entrenched in section 7.[10]

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[6] *Carter v Canada (Attorney General)*, 2013 BCCA 435 (CanLII) at para 86, Finch JA [CA Reasons], Joint Record of the Parties ("JR").
[7] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 585, Sopinka J [*Rodriguez*], HALCO BoA, Tab 14.
[8] CA Reasons at para 275, Newbury and Saunders JJA, JR.
[9] *Rodriguez*, *supra* note 7 at 585, HALCO BoA, Tab 14.
[10] Lorraine Eisenstat Weinrib, "The Body and the Body Politic" (1994) 39 McGill LJ 618 at 623-24, HALCO BoA, Tab 15.

16. To be clear: the Legal Network and HALCO do not submit that the protection of life is a trivial value, especially the protection of the lives of those most at risk of having their autonomy disrespected. To the contrary, the Legal Network and HALCO insist upon such protection, as it is fundamental to respecting autonomy, including of those at risk. But such protection is not rooted in any particular religious doctrine imposed via the criminal law power of the state and with unconscionably harsh effects. Rather, it is a manifestation of respect for human autonomy. By contrast, the "sanctity of life" hierarchy is incapable of flexibility, and therefore of respect for individual wishes and desires. It should be rejected by this Court.

B. *The Deprivation of Life, Liberty and Security of the Person Is Not In Accordance with Principles of Fundamental Justice*

i. The onus to establish inconsistency with the principles of fundamental justice is lower where the deprivation of life, liberty or security is greater

17. Although this Court has held that the onus under each part of s. 7 remains on the claimant,[11] the more serious the deprivation of life, liberty or security of the person, the easier it will be to show a departure from principles of fundamental justice. In *Chaoulli*, the Chief Justice captured this idea when she held (in the context of the principle of arbitrariness), that "[t]he more serious the impingement on the person's liberty and security, the more clear must be the connection [between the measure and the legislative goal]. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact."[12] The Legal Network and HALCO submit that the same logic applies to the principles of overbreadth and gross disproportionality.

ii. A valid government objective cannot be a religious one

18. In the case at bar, the principles of fundamental justice at issue (overbreadth, gross disproportionality and, in the Appellants' submission, parity) are to be assessed in light of the governmental objective underlying the impugned law[13]. However, it is submitted that any such objective cannot pass constitutional muster if it is defined by subjective religious standards. As this Court recognized in the context of a constitutional challenge to obscenity laws, to "impose a

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[11] *R v Malmo-Levine*; *R. v Caine*, 2003 SCC 74 (CanLII) at para 97, Gonthier and Binnie JJ, HALCO BoA, Tab 12.
[12] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 (CanLII) at para 131, McLachlin CJ and Major J, HALCO BoA, Tab 4.
[13] *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII) at para 123 [*Bedford*], HALCO BoA, Tab 2.

certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms."[14]

19. That an objective rooted in religion is also inimical to protection under s. 7 is clear when one considers that the principles of fundamental justice must capture "the basic values underpinning our constitutional order."[15] This Court has held that "[a]utonomy, equality and human dignity" are among the "fundamental value[s] reflected in our society's Constitution or similar fundamental laws."[16] By contrast, "individual notions of harm" or "the teachings of a particular ideology" are not[17]. An objective that departs from the basic values of our constitutional order in favour of a particular ideology cannot hope to justify a deprivation of life, liberty or security because it will be inconsistent with those same constitutional underpinnings.

20. When assessing a government's objective for infringing a person's rights to life, liberty and security of the person, this Court should be governed by secular values, such as respect for autonomy and human dignity, and should avoid the influence of a particular religious precept, such as the "sanctity of life" hierarchy. To allow any particular religious faith to dictate the parameters of the criminal law in a fashion that infringes the autonomy and dignity of each individual in Canada is to disregard the secular nature of the Canadian state and to harness the power of the state to impose religious teachings on non-adherents, contrary to, among other things, other *Charter*-protected freedoms such as freedom of conscience and the right to equality. In short, it is to allow the creation of a hierarchy of rights, which has consistently been rejected by this Court[18]. So, too, should it should be rejected in the case at bar.

iii. The impugned laws are overbroad and grossly disproportionate

21. The principles of overbreadth and gross disproportionality measure "the rights infringement caused by the law with the objective of the law."[19] In this case, the trial judge correctly held that the objective of the impugned laws is "to protect vulnerable persons from

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[14] *R v Butler*, [1992] 1 SCR 452 (CanLII) at 492, Sopinka J, HALCO BoA, Tab 9.
[15] *Bedford*, *supra* note 13 at para 96, HALCO BoA, Tab 2.
[16] *R v Labaye*, 2005 SCC 80 at para 33, McLachlin CJ, HALCO BoA, Tab 11.
[17] *Ibid.*
[18] *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 (CanLII) at 877, Lamer J, HALCO BoA, Tab 6.
[19] *Bedford*, *supra* note 13 at para 123, HALCO BoA, Tab 2.

being induced to commit suicide at a time of weakness."[20]

22. In addition to the Appellants' submissions (which are adopted), the Legal Network and HALCO submit that the impugned laws are overbroad and grossly disproportionate in part because of the nature of the federal criminal law power under which they were enacted. This Court has recognized that the criminal law is the most "powerful tool at Parliament's disposal"[21] and "should be used with *appropriate restraint*, to avoid over-criminalization" (emphasis in original)[22]. The impugned laws lack "instrumental rationality" (and are therefore overbroad and grossly disproportionate) because the chosen policy instrument (*i.e.*, an absolute criminal prohibition) is not an appropriate means through which to achieve the impugned laws' objective[23]. In the name of protecting the vulnerable, the impugned laws instead capture all those unable to end their lives without assistance, even those capable of making a voluntary decision to do so. In so doing, the current regime actually imposes additional suffering on those who are vulnerable in the sense that they are disabled and suffering intractable pain and who would otherwise choose to die.

23. It is also well-settled doctrine that "[a]ll *Charter* rights strengthen and support each other"[24]. In this case, both sections 15 and 12 are important to the interpretation of the assessment of the s. 7 interests at stake in light of the principles of overbreadth and gross disproportionality.

24. Although the constitutionality of the impugned laws has been directly challenged under s. 15, it remains important when performing the analysis under s. 7 to recognize that the burden of the impugned laws falls on persons with disabilities. The current regime is discriminatory because the impugned laws impose a serious disadvantage on persons with disabilities; namely grave and avoidable suffering. Persons with disabilities are uniquely impacted by virtue of their disability from relief from suffering which is available to others. This discrimination ought to

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[20] *Carter v Canada (Attorney General)*, 2012 BCSC 886 at para 1190 [Trial Reasons], JR.
[21] *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General*), 2004 SCC 4 at para 60, McLachlin CJ, HALCO BoA, Tab 3.
[22] *R v Hutchinson*, 2014 SCC 19 at para 18, McLachlin CJ and Cromwell J, HALCO BoA, Tab 10.
[23] *Bedford*, *supra* note 13, at para 107, HALCO BoA, Tab 2.
[24] *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 SCR 46 at para 112, L'Heureux Dube J, HALCO BoA, Tab 8.

inform the analysis of gross disproportionality, as the law specifically targets persons with disabilities and has a grossly disproportionate impact as a consequence of their disability.

25. Moreover, negating the authority of a person with a disability to choose assisted dying is not only an affront to that person's s. 7 rights, but also perpetuates prejudice towards and stereotyping of people with disabilities — namely, that unlike able-bodied people, people with disabilities are incapable of making fundamental personal decisions concerning their medical treatment. The impugned laws are, in this sense, overbroad, but also perpetuate stereotyping by creating a distinction based on irrelevant considerations (*i.e.*, that able-bodied people should be freer to make end-of-life decisions than disabled people). The impugned laws reinforce a view of disabled people as inherently vulnerable and incapable of knowing what is in their best interests.

26. In addition, the *Charter* protection against cruel and unusual treatment or punishment in s. 12 is an important societal norm that should inform this Court's analysis. It is obvious that the impugned laws have a cruel and unusual impact on persons in acute and intractable pain who seek to end their suffering as and when they choose, both in terms of elongating that pain and imposing mental suffering on these individuals by uniquely denying them the choice to end their own lives. The impugned laws also have a serious impact on physicians and other medical professionals who believe they have an ethical and professional obligation to assist affected persons, as well as on family members, friends and support people who feel an ethical obligation to help, but cannot.

iv. The impugned laws undermine respect for the rule of law

27. In addition to the principles of fundamental justice identified by the Appellants, the impugned laws also undermine respect for the rule of law, contrary to the state's obligation to obey and promote respect for the law[25]. The trial judge found that despite the criminal prohibition on assisted dying, some physicians still administer assisted dying[26], some individuals travel abroad to procure assisted dying[27], and others end their lives early out of fear that they will be unable to obtain assistance later[28]. These actions are the "inevitable consequences" of the

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[25] *Hitzig v Canada*, 2003 CanLII 30796 (Ont CA) at para 117 [*Hitzig*], HALCO BoA, Tab 7.
[26] Trial Reasons at paras 204 and 1370, JR.
[27] Trial Reasons at para 205, JR.
[28] Trial Reasons at paras 1322-1325, JR.

absence of a legal means of obtaining assistance to end suffering, an option available to those who do not need assistance[29].

28. Those who do not feel compelled to end their lives prematurely, or who lack the resources or ability to travel abroad, are placed in an irreconcilable dilemma. They are forced to choose between their security of the person (and even their lives) and the liberty and security of those persons who might offer assistance. Similarly, those family members, friends, loved ones and healthcare providers face a similar dilemma if asked to assist a person in need: they must choose between watching a loved one or patient suffer horribly and protecting their own liberty, given possible prosecution and imprisonment. Far from the classic formulation of the ethical duty to "do no harm", physicians and others who feel compelled to intervene are instead placed in the position of being able to relieve suffering, but only at the cost of their own liberty.

29. In short, some affected individuals are driven to commit unlawful acts in order to obtain, or assist in providing, an end to suffering, which not only devalues the dignity and autonomy of these individuals, but also brings the law into disrepute by placing them in this dilemma. This undermines the rule of law contrary to the government's obligation to promote respect for it.

C. *Any Remedy Must Not Unreasonably Delay or Restrict Access to Assisted Dying*

30. If this Court concludes that the impugned laws infringe the *Charter* rights of affected persons in a manner that cannot be saved by s. 1, then it should provide guidance on a constitutionally sufficient scheme that balances the *Charter* interests of affected persons while maintaining sufficient protections for those who are in fact vulnerable.

31. The only constitutionally sufficient scheme is one that will not unnecessarily or unreasonably delay or restrict access to assisted dying in appropriate cases. One risk of bureaucratizing access to assisted dying is that, as in the case of bureaucratic barriers to access to abortion services in *Morgentaler*, delays or insurmountable hurdles will exacerbate the impact on affected persons' *Charter* rights[30]. Delays will mean that affected people will be denied their constitutional rights and will live in intense pain longer than they choose to.

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[29] *Hitzig*, *supra* note 25, at para 118, HALCO BoA, Tab 7.
[30] *Morgentaler*, *supra* note 5 at 72-73, Dickson CJ, HALCO BoA, Tab 13.

32. Over-formalizing the process to access assisted dying may also lead to injustices where barriers to access exist in terms of financial or other resources. Many people who are in acute, intractable pain may not be able to navigate challenging, complex and potentially costly legal proceedings simply to vindicate their right to choose assisted dying voluntarily, and/or may lack the financial resources to retain legal representation. This would seriously hinder access to justice and contribute to avoidable suffering.

33. While the protection of vulnerable persons is a pressing and substantial objective, it should not be achieved in a manner that effectively (if not legally) denies people meaningful access to assisted dying, exposing vulnerable persons to suffering and a denial of autonomy and dignity, rather than empowering them to exercise their constitutional rights.

PART IV. NATURE OF ORDER SOUGHT CONCERNING COSTS

34. The Legal Network and HALCO do not seek costs, and ask that no costs be awarded against them.

PART V. NATURE OF ORDER SOUGHT

35. The Legal Network and HALCO request permission to make oral submissions at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON AUGUST 29th, 2014.

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PART VI. – TABLE OF AUTHORITIES

NO.	CASES	Cited at paragraph(s)
1.	*A.C. v Manitoba (Director of Child and Family Services*), 2009 SCC 30	3
2.	*Canada (Attorney General) v Bedford*, 2013 SCC 72	13, 15, 19, 23
3.	*Canadian Foundation for Children, Youth & the Law v Canada (Attorney General*), 2004 SCC 4	21
4.	*Chaoulli v Quebec (Attorney General*), 2005 SCC 35	12
5.	*Cuthbertson v Rasouli*, 2013 SCC 53	4
6.	*Dagenais v Canadian Broadcasting Corp*., [1994] 3 SCR 835	18
7.	*Hitzig v Canada*, 2003 CanLII 30796 (Ont CA)	25
8.	*New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 SCR 46	24
9.	*R v Butler*, [1992] 1 SCR 452	14
10.	*R v Hutchinson*, 2014 SCC 19	22
11.	*R v Labaye*, 2005 SCC 80	16
12.	*R v Malmo-Levine*; *R. v Caine*, 2003 SCC 74	11
13.	*R v Morgentaler*, [1988] 1 SCR 30	5, 30
14.	*Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519	7
	Other	
15.	Lorraine Eisenstat Weinrib, "The Body and the Body Politic" (1994) 39 McGill LJ 618	10

PART VII. – LEGISLATION

CANADIAN CHARTER OF RIGHTS AND FREEDOMS – PART I OF THE *CONSTITUTION ACT, 1982*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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.

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

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.