IN THE SUPREME COURT OF FLAVELLE

(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

DAVID THOMAS

Appellant

- and -

FLAVELLE (ATTORNEY GENERAL)

Respondent

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A. OVERVIEW

1. A constitution is a paradox: it empowers a government to act, and it dictates the limits of all state action. Our Constitution is a paradox: it robustly protects rights and freedoms essential to living in a democracy and yet provides an allowance for legislatures to compromise certain of those rights and freedoms: the notwithstanding clause. However, this uniquely controversial constitutional feature does not, and cannot, override the *Charter*'s rights-protecting purpose nor the values that constitute our free and democratic society.

2. This spectre of governmental overreach is bound in two dimensions: formal and substantive. Formally, for rights and freedoms within its scope, an invoking government must expressly declare the constitutional protections it means to suspend. This is meant to ensure that a government takes seriously the significant consequence of wielding this dull axe. Substantively, some rights, essential to constituting our national community, are situated beyond its grasp.

3. The *Firearms Safety and Accountability Act* breaches each of these limits. Though never used before in a criminal context, Parliament invoked the notwithstanding clause to enable a novel punishment preventing offenders from driving across provincial borders. This was an unjustifiable reaction to a justified concern.

4. Parliament opted not to include the right to liberty in its invocation. Given the preciousness of what is at stake, criminal law requires us to read legislation carefully and strictly: only according to what was expressly declared. The impugned punishment offends the still-operative right to liberty, in trapping the appellant within the province. It offends the principles of fundamental justice in overreaching its legitimate purpose. Its limitation of the s. 6 right to mobility, untouched by the notwithstanding clause, is unjustifiably infringed by the restriction on interprovincial travel.

B. STATEMENT OF FACTS

5. In 1982, the *Charter* was enacted to enshrine the rights and freedoms necessary to a free and democratic society, along with a clause to enable legislation to operate notwithstanding certain of those rights and freedoms. In 2022, the federal government made the unprecedented decision to invoke that clause to expand its criminal law power. For the first time, the notwithstanding clause ("NWC") was used to violate *Charter* protections that engage principles of fundamental justice.

6. The *Firearms Safety and Accountability Act* ("FSAA") was intended to reduce gun violence and trafficking in Flavelle. To that end, it created a new criminal offence of unauthorized possession of a firearm in a motor vehicle. On indictment, it is punishable by a maximum of ten years imprisonment or, on summary conviction, by a driver's licence suspension of 30 days and a subsequent minimum three-year prohibition on driving in or through any province where the offender does not legally reside (the "interprovincial driving ban").

7. David Thomas is a truck driver. He owns and operates TruckPro Inc., a trucking company, and drives many of its delivery routes. He lives in the province of Falconer, but the headquarters of TruckPro Inc. are in Bloor, a mere 25-minute drive by the Trans-Flavellian Highway. Prior to his arrest and summary conviction, he crossed the border 4-5 times a month, on delivery. Responding business challenges, as well as Flavelle's volatile job market, Mr. Thomas made sure to visit TruckPro headquarters each time he crossed the provincial border.

8. Personal reasons also require Mr. Thomas to drive into Bloor. Many of his close friends and family live in the province, and he regularly takes his truck to visit them. Mobility across the provincial border is central to his family and social life.

9. Mr. Thomas is not a gun trafficker; Mr. Thomas is a good friend. On June 27, 2022, he lent his truck to Ms. Sellinger, a close friend who happens to be a licenced gun owner. When Mr.

Thomas picked up his truck from his friend on July 1, 2022, Ms. Sellinger accidentally left her hunting rifle in the flatbed. It was obscured by a tarp.

10. While driving home from Ms. Sellinger's residence in Bloor, Mr. Thomas was pulled over. Officer Wu noticed the rifle peeking out from the under the tarp. Despite Mr. Thomas' explanation that the firearm was mistakenly left by his friend who had borrowed the truck, Officer Wu arrested him. Mr. Thomas was subsequently charged with unauthorized possession of a firearm in a motor vehicle, under s. 94(1) of the *Criminal Code*, the new FSAA offence.

C. JUDICIAL HISTORY

i. The Falconer Court of Justice

11. The Crown prosecuted the offence as a summary conviction, pursuant to *Criminal Code* s. 94(2)(b). The trial judge found that Mr. Thomas violated s. 94(1) of the *Criminal Code* and sentenced him to a licence suspension of 30 days followed by a 4-year prohibition from driving in provinces in which he does not have a valid driver's licence.

ii. The Superior Court of Justice for Falconer

12. Mr. Thomas challenged (1) the formal propriety of the s. 33 invocation for the interprovincial driving ban, and (2) the constitutionality of the interprovincial driving ban itself.

13. Gardner J held that Parliament's invocation of the notwithstanding clause did not meet its formal requirement: to "expressly declare" each of the rights and/or freedoms notwithstanding which the legislation is intended to operate. Reference to the section was sufficient, but Parliament omitted liberty from the rights specified. What was not expressly declared could not be presumed.

14. Given the improper declaration, the right to liberty was engaged. Gardner J found the deprivation of liberty in the interprovincial driving ban was both arbitrary and overbroad, as prohibiting Mr. Thomas from driving outside of the province bore no relation to the legislation's purpose of preventing gun trafficking. Accordingly, the provision violated s. 7 of the *Charter*.

15. The Crown conceded that, if Mr. Thomas' right to liberty was infringed in a manner that did not accord with the principles of fundamental justice, it could not be justified under s. 1. Gardner J agreed and, in *obiter*, stated that suspending a driver's licence was not rationally connected to the purpose of the legislation, and its deleterious effects far outweighed its salutary benefit, regardless of Parliament's pressing objective.

16. Gardner J further held that the interprovincial driving ban infringed Mr. Thomas' s. 6(2) right to pursue a livelihood in any province and, as the ban was not minimally impairing, could not be saved by s. 1. In so holding, she found that it would be inappropriate for the court to scrutinize Mr. Thomas' employment, to assess the effect of the sentence.

iii. The Falconer Court of Appeal

17. The Crown appealed each of these holdings to the Falconer Court of Appeal. The court split on s. 33 and s. 7 of the *Charter* but was unanimous on s. 6.

18. Farrell JA held that Parliament's invocation of the NWC met its formal requirements. He found that the phrase "and all other rights and freedoms therein" included the right to liberty, though it was elided from the express declaration. Given the legislature's purpose of precenting gun trafficking, it was neither arbitrary nor overbroad to prohibit an offender caught by the provision from being able to travel across provincial borders.

19. Farrell JA also held the ban did not violate s. 6. Section 6(2)(a) was not engaged, as Mr. Thomas was not barred from travelling to take up residence by other means such as train or air. Similarly, s. 6(2)(b) was not engaged, as the purpose of the act was to restrict gun trafficking, and there was no differential treatment between residents and non-residents of Bloor.

20. In dissent, Jain JA opined that, in invoking s. 33, the Federal government ought to be subjected to a higher level of scrutiny, and this invocation was deficient. The NWC was intended

to protect *provincial* legislative capacity within a newly robust constitutional system of rights and freedoms. The Federal government was not its intended beneficiary, and thus its invocation should be afforded less deference. Jain JA affirmed the Superior Court's ruling that the invocation was deficient and that Mr. Thomas' s. 7 right to liberty was violated.

PART II – STATEMENT OF ISSUES

21. There are three issues on appeal:

Issue 1: Does s. 94(5) of the *Criminal Code* constitute a proper invocation of s. 33 of the *Charter*, enabling the legislation to operate notwithstanding the right to liberty?

No. Parliament lacked the requisite "express declaration." In referring to s. 7 but specifying only the rights to life and security of the person, Parliament ought not be presumed to intend the legislation to operate notwithstanding the right to liberty.

Issue 2: If s. 94(5) of the *Criminal Code* does not properly invoke the notwithstanding clause, does s. 94(2)(b) violate the liberty interest protected by s. 7 of the *Charter*?

Yes. The use of criminal legal power to constrain a person's ability to move through or occupy space engages the liberty interest. In catching those not involved in gun violence or trafficking, s. 94(2)(b) exceeds its purpose and is thus overbroad.

Issue 3: Does s. 94(2)(b) of the *Criminal Code* violate s. 6 of the *Charter* in a manner that is not justifiable under s. 1?

Yes. In restricting Mr. Thomas' ability to cross the provincial border, the interprovincial driving ban violates the s. 6(1) right to remain in Flavelle and the s. 6(2)(b) right to pursue the gaining of a livelihood in any province. The ban is arbitrary, overbroad, and disproportionate, and thus cannot be saved under s. 1.

PART III – ARGUMENT

A. THE INVOCATION OF S. 33 DID NOT MEET ITS FORMAL REQUIREMENTS

22. Parliament's omission of the right to liberty from the rights it specified in FSAA s. 94(5) constitutes an absence of the express declaration that the notwithstanding clause requires. In s. 33(1) of the *Flavellian Charter of Rights and Freedoms*,[1] it provides that, in making the exceptional choice to suspend a *Charter* protection, a legislature must "expressly declare" which right or freedom it intends to suspend. The Supreme Court has characterized this as the NWC's "essential requirement of form."[2] In Parliament's impugned invocation, it provides,

> Subsection (2) is valid and operative notwithstanding ss. 7 and 12 of the *Flavellian Charter of Rights and Freedoms*; the rights pertaining to life and the security of the person, the right not to be subject to cruel and unusual punishment, and all other rights therein.[3]

Simply put, Parliament expressly declared the impugned provision would operate notwithstanding the rights to life and security of the person, and the right not to be subject to cruel and unusual punishment. It opted not to include the right to liberty in that express declaration. The principle cited in the earliest NWC jurisprudence ought to apply here, as well: "the question is not what may be supposed to have been intended, but what has been said."[4]

1. <u>On the Notwithstanding Clause's own terms, it should be construed strictly</u>

(a) The NWC's formal requirement of "express declaration" mandates a strict approach

23. Section 33 of the *Charter* is exceptional. Unlike the provisions that guarantee the rights and freedoms essential to a "free and democratic society",[5] the NWC allows a legislature to enable a law to operate notwithstanding certain of those rights and freedoms, including those deemed

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[1] *Flavellian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Flavelle Act 1982* (UK), 1982, c 11, s 33(1) [*Charter*].
[2] *Ford v Quebec (Attorney General),* 1988 CanLII 19 (SCC) at para 33 [*Ford*], TOA Tab 1.
[3] Official Problem, Appendix B, s 94(5).
[4] *Alliance des Professeurs de Montreal c Quebec (Attorney General)*, 1983 CanLII 2912 (QC CS) at para 34, TOA Tab 2.
[5] *Charter, supra* note 1, s. 1.

"fundamental". This tension is mirrored in the *Charter* overall, as it balances between a constitution that dictates the "limits of all state action"[6] and one which enables legislatures to act. However, the inclusion of this extraordinary power does not, and cannot, override the sovereign norm that undergirds a constitutional democracy, that laws are presumed to be consistent with the Constitution.[7] The NWC provides a precise mechanism to displace that presumption: an express declaration. This Court, as a "guardian of the constitution", cannot "fill in the details" of any NWC invocation;[8] it must interpret it strictly, to ensure that fundamental *Charter* protections are suspended only where there is absolute clarity of Parliament's intention to do so.

24. There is substance to the NWC's strictly formal requirements.[9] In *Ford*, the Court stated clearly that s. 33 of the *Charter* "lays down requirements of form only", and a court can review it only on those formal grounds.[10] The express declaration mandated by the NWC implies the precision and exactitude expected of a legislature, in making the exceptional choice of overriding constitutionally guaranteed rights or freedoms.

25. The power the NWC grants, and the preciousness of what is at stake, mandate legislative care and precision. A Quebec appellate justice captured this dilemma and directive precisely,

> [T]he use of the notwithstanding provision… is not a trivial matter. It entails a suspension of citizens' fundamental rights, hard-won rights that guarantee the freedoms we cherish as a society and country. A derogation from fundamental rights has serious and significant political and legal repercussions. One must tread very carefully when invoking such extraordinary powers.[11]

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[6] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 56, TOA Tab 3.
[7] *Manitoba (AG) v Metropolitan Stores Ltd*, 1987 CanLII 79 (SCC) at para 26, TOA Tab 4; *R v Hamilton*, 2005 SCC 47 at para 75, TOA Tab 5; *R v Sharpe*, 2001 SCC 2 at para 33, TOA Tab 6.
[8] *Hunter, et al v Southam Inc,* 1984 CanLII 33 (SCC) at 169 [*Hunter v Southam*], TOA Tab 7.
[9] Lorraine Weinrib, "Learning to Live with the Override" (1990) 36 McGill LJ 541 at 568 [Weinrib, "Learning"], TOA Tab 66.
[10] *Ford* at para 33, TOA Tab 1.
[11] *Hak c Procureure générale du Québec*, 2019 QCCA 2145 at para 150, TOA Tab 8.

The Superior Court of Ontario subsequently objected to this framing, seeing in it an impermissible departure from the strictly formal limitations built into its terms.[12] This is a mischaracterization. The care that a legislature must take in exercising this exceptional power is born out in the formal requirements provided in the Clause: The NWC's "essential requirement of form" obligates the invoking legislature to be precise in its drafting, to ensure it considers seriously the weight of what it undertakes. That is, it is only where there is express language indicating which rights or freedoms are to be suspended that a court can deem the invocation valid.

(b) The NWC's rights-suspending function cannot override the* Charter*'s purpose of protecting the individual from the state

26. To interpret the NWC purposively requires us to construe its invocation strictly. The NWC's ability to override certain rights and freedoms places it in tension with its constitutional setting, which protects those rights and freedoms. *Hunter v Southam* directs a court to interpret the *Charter* more generously than it would an ordinary statute. As a "purposive document", it is to be construed liberally and with an "eye to the future."[13] Facially, one might be tempted to apply the same generous hermeneutical principle to s. 33, as, after all, it remains a *Charter* provision. However, the purpose of the *Charter* is to "guarantee and protect… the enjoyment of the rights and freedoms it enshrines." The Court has expressly declared that, unlike earlier constitutional acts, the *Charter* is not "an authorization for governmental action."[14]

27. The *Charter's* purpose of protecting an individual's rights and freedoms *from* the state informs the interpretation of all of its statutes; this necessarily includes s. 33. A legislature may utilise s. 33 to enable legislation to operate notwithstanding certain rights and freedoms, but this allowance is dependent on the very *Charter* it seeks to override. The NWC, exceptionally, does

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[12] *Working Families Coalition (Canada) Inc v Ontario*, 2021 ONSC 7697 at para 15, TOA Tab 9.
[13] *Hunter v Southam* at 155-156, TOA Tab 7.
[14] *Ibid*, TOA Tab 7.

facilitate "governmental action inconsistent with those rights and freedoms",[15] but its placement within the *Charter* implies that said authorization cannot derogate from its overarching purpose: protecting individuals from government power. The only way to reconcile a robust, rights-protecting *Charter* and the Notwithstanding Clause it contains is to construe its invocation strictly, ensuring that only where the formal requirements are expressly met can a right or freedom be suspended.

2. The omission of the right to liberty implies it was intended to be excluded

28. Parliament's omission of the right to liberty while expressly declaring that FSAA s. 94(2) operate notwithstanding the rights to life and security of the person can only be interpreted as an intention to exclude the right to liberty. Legislatures are presumed to be intentional in their drafting, such that what is included was intended to be included, and what is excluded was intended to be excluded. This is the canon of construction *expressio unius est exclusio alterius,* and it applies where "there is reason to believe that if the legislature had meant to include a particular thing… it would have referred to that thing expressly."[16] Or, as expressed in Laskin JA's oft-cited dictum, "legislative exclusion can be implied when an express reference is expected but absent."[17]

29. Despite the invocation's constitutional nature, a strict approach is appropriate. Courts have been hesitant to apply *expressio unius* to the *Charter*, as it is inconsistent with the purposive approach described above.[18] Indeed, the "modern approach" to all statutory interpretation

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[15] *Ibid*, TOA Tab 7.
[16] Ruth Sullivan, *The Construction of Statutes,* 7th ed (Toronto: LexisNexis Canada, 2022) at §8.09 [Sullivan, *Construction*], TOA Tab 67.
[17] *University Health Network v Ontario (Minister of Finance)*, 2001 CanLII 8618 (ON CA), at para 31, TOA Tab 10.
[18] *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* 1990 CanLII 135 (SCC) at 470, TOA Tab 11.

prioritizes purpose.[19] The centralization of intent ensures that courts do not frustrate the provision of rights that the statute was designed to achieve and that the *Charter* ensures.

30. The effect of invoking the NWC, however, is to *derogate* from the rights and freedoms guaranteed by the *Charter*. Further, we must not confuse the means (invoking the NWC) with the FSAA's purpose, preventing gun violence and trafficking. We can never presume that a legislature's purpose is to contravene a constitutional right without the requisite express clarity the NWC itself demands; strict construction provides the most apt interpretation of the provision.

31. While merely invoking the numbers of *Charter* sections is sufficient to meet the NWC's formal requirements, Parliament's undertaking to name specific rights within those sections implies that only those specified should be read as included. In *Ford,* the Court held that an invocation is "sufficiently express if it refers to the number of the section" intended to be suspended. However, if only a part of the section was intended to be suspended, there must be a "sufficient reference in words to the part to be overridden."[20] As s. 33 expert Lorraine Weinrib persuasively wrote, an invoking legislature would be presumed to refer to the entirety of a *Charter* section only if it referred to the numbered section alone.[21]

32. Specifying some, but not all, of a *Charter* section's protections implies the legislature contemplated suspending only those specified rights. In the impugned invocation, which enumerates only two s. 7 rights, a reader would reasonably expect Parliament to include the last. Indeed, the right to liberty is the middle of a series of three, making its absence conspicuous. The provision's departure from a general reference to s. 7 and opting to specify only life and security of the person implies that only those expressly declared rights were intended to be overridden.

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[19] *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) at para 21 [*Rizzo Shoes*], TOA Tab 12; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26 [*Bell ExpressVu*], TOA Tab 13.
[20] *Ford* at para 33, TOA Tab 1.
[21] Weinrib, "Learning" at 557 n 50, TOA Tab 66.

33. Similarly, the invocation's concluding reference to "all other rights therein"[22] does not undo Parliament's undertaking to specify expressly which rights the declaration included. Taking the general invocation to negate the specified rights expressly declared implies the imperfection of the enacted text. "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain."[23] In the impugned provision, it begins by citing the intended sections of the *Charter* and then specifies only some "rights therein". If the concluding phrase negates the specification, then those words are rendered mere "surplusage".[24]

34. The only interpretation remaining, in which each clause contributes to the provision's meaning, must refer to judge-recognized rights provided by the principles of fundamental justice. Section 7 "does not catalogue the principles of fundamental justice to which it refers", and the Court has characterized them as attaching to each protected interest within the section.[25] Accordingly, the "other rights therein" must refer to the principles of fundamental justice that protect an individual from being deprived of their life or security of the person.

3. As a provision within the *Criminal Code*, any residual ambiguity in the invocation must be construed with the presumption of liberty and in favour of the accused

35. If this Court does not find that s. 33's formal requirements ground an implied exclusion of the right to liberty, the invocation's enactment within the *Criminal Code* requires a court to interpret it according to principles governing criminal law. Pursuant to interpreting a criminal provision in light of its context of purpose, any remaining ambiguity must be construed in favour of the accused. In the impugned invocation, the successive general reference to s. 7 and the

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[22] Official Problem, Appendix B, s 94(5).
[23] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 38, TOA Tab 14; citing Sullivan, *Construction* at §8.02[5], TOA Tab 67.
[24] *R v Proulx*, 2000 SCC 5 at para 28, TOA Tab 15.
[25] *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 71-72 [*Carter*], TOA Tab 16.

particularization of only life and security of the person leaves the right to liberty ambiguous. The provision must be interpreted to maintain the liberty of the accused and all other Flavellians.

(a) The federal government's invocation of the Notwithstanding Clause within the Criminal Code *means interpretive principles proper to criminal law should be applied*

36. The federal government's exclusive criminal law power colours its invocation of the NWC, when used in that context. The FSAA invocation is Parliament's first use of the NWC, and it is the first time it has enabled a criminal offence to operate notwithstanding constitutional principles of fundamental justice. We respectfully disagree with Jain JA, that the federal government, as such, should be held to a stricter standard when invoking the NWC, on the basis of constitutional convention.[26] Despite its origins as a bargain to ensure (western) provincial coöperation in the new constitutional order,[27] the text of s. 33 expressly contemplates Parliament's use. However, Parliament is unique in being endowed with power over criminal law; it is for that reason and in that context that an invocation of the NWC ought to be construed strictly.

37. The text of s. 33 requires that a legislature "expressly declare *in an Act of Parliament or the legislature*,"[28] implying that its invocation can only manifest as a legislative act. Regarding the rights overridden, the NWC's formal requirements apply uniformly, but the regulative principles proper to the invocation's legislative context must also apply. Criminal law is presumed to contain no inadvertent omissions.[29] The lawful deprivation of a person's liberty must be according to a provision's "express terms, and not, at most, by implication."[30] Accordingly, this court must interpret Parliament's declaration strictly, construing any ambiguity in favour of the accused.

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[26] Official Problem at para 40.
[27] Peter Lougheed, "Why a Notwithstanding Clause" (1998) 6 *Points of View* 1 at 2, TOA Tab 68.
[28] *Charter,* s. 33(1).
[29] *R v RJH*, 2000 ABCA 111 at para 16, TOA Tab 17.
[30] *Marcotte v Deputy Attorney General (Canada) et al*, 1974 CanLII 1 (SCC) at 115 [*Marcotte*], TOA Tab 18.

38. Criminal law's uniquely intrusive effect into liberty has led courts to require the utmost caution and care in its interpretation.[31] This principle was captured aptly in *McIntosh*,

> The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests.[32]

The preciousness of what is at stake, what criminal law uniquely can touch, renders individuals uniquely vulnerable in their relation to criminal law. While breach of any legislative provision can give rise to a penalty, it is only violation of a criminal provision that can lead to one's liberty being infringed. The preciousness of liberty for an individual and its primacy in our society mandate that courts construe criminal provisions strictly, in favour of the person whose liberty is at stake.[33]

39. While the doctrine of strict construction originally ensured that all criminal provisions were interpreted strictly and in favour of the accused,[34] today it is applied wherever there is "true ambiguity" in a penal statute.[35] Despite its penal character, the *Criminal Code* is today deemed "remedial" and thus "given such fair, large and liberal construction."[36] However, the Court still holds that, after a criminal provision has been read contextually and purposively,[37] if doubt remains as to the "meaning or scope of the text of the statute", it must receive a strict construction.[38] Our "commitment to individual liberty" mandates that courts use the "most restrictive" interpretation

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[31] *R v Paré*, 1987 CanLII 1 (SCC) at 106, TOA Tab 19.
[32] *R v McIntosh*, 1995 CanLII 124 (SCC) at para 39, TOA Tab 20; cited in *R v Ichim*, 2013 ONSC 6156 at para 40, TOA Tab 21.
[33] *R v Mac*, 2001 CanLII 24177 (ON CA) at para 23 [*Mac*], TOA Tab 22.
[34] Glanville Williams, *Criminal Law: The General Part,* 2nd ed (London: Stevens Press, 1961) at §188, 591-592 [Williams, *Criminal Law*], TOA Tab 69; Stephen Kloepfer, "The Status of Strict Construction in Canadian Criminal Law" (1983) 15 *Ottawa L Rev* 553 at 556-560, TOA Tab 70.
[35] *R v Hasselwander*, 1993 CanLII 90 (SCC) at 476-477 [*Hasselwander*], TOA Tab 23.
[36] *Interpretation Act*, RSC 1985, c I-21, s 12, TOA Tab 71; *Bell ExpressVu* at para 26, TOA Tab 13.
[37] For examples of the modern approach applied to criminal law, see, *inter alia, R v Gladue*, 1999 CanLII 679 (SCC) at para 25, TOA Tab 24; *R v Araujo*, 2000 SCC 65 at para 26, TOA Tab 25; *R v Clark*, 2005 SCC 2 at para 43, TOA Tab 26; *R v Lavigne*, 2006 SCC 10 at para 7, TOA Tab 27; *R v Ahmad*, 2011 SCC 6 at para 28, TOA Tab 28; *R v Conception*, 2014 SCC 60 at para 88, TOA Tab 29. However, it should be noted that the above examples cited do not largely engage with offence provisions. Indeed, in some cases the purposive approach is applied specifically to protect the interests of the accused.
[38] *Hasselwander* at 413, TOA Tab 23; *Bell ExpressVu* at para 28, TOA Tab 13.

of an ambiguous criminal provision, to ensure liberty is deprived only where there is no doubt as to Parliament's intent.[39] The impugned invocation's general references to s. 7 and "all rights and freedoms" alongside its express declarations of life and security but omission of liberty, result in the necessary "true ambiguity" to justify a strict construction in favour of the accused.

(b) Since the invocation enables the offence to operate notwithstanding Mr. Thomas' constitutional protections, strict construction in favour of the accused is required

40. Since a liberal construction of the impugned invocation would enables the provision to deprive Mr. Thomas of his liberty, it must be construed strictly in his interest. The purpose of strict construction of penal statutes is to ensure that one is protected from the unique threats to liberty that criminal law alone poses. As Dickson J (as he then was) held,

> It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.[40]

Any ambiguity in a statute with the potential to affect one's right to liberty must be interpreted strictly, in the favour of the person whose right is made vulnerable to the state's power. Here, the invocation poses a direct threat to Mr. Thomas' liberty and anyone else caught in its net and thus must be interpreted to ensure that liberty is protected.

41. Narrowing the strict construction principle to offences ensures that it is applied to aspects of criminal legislation that pose a threat to an accused's rights. In his treatise on the general part of criminal law, Glanville Williams specified that strict construction "applies only to the part of the statute creating the crime."[41] To be exempted were "defences accorded by statute" and other

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[39] *Mac* at paras 26-27, TOA Tab 22.
[40] *Marcotte* at 115, TOA Tab 18.
[41] Williams, *Criminal Law* at §188, 591-592, TOA Tab 69.

provisions that *already* protect the interest of the accused. To construe those strictly would both frustrate the purpose of the statute and disadvantage the one subject to criminal penalty.

42. The ambiguity at the heart of Parliament's invocation of the NWC in *Criminal Code* s. 94(5) threatens the liberty of Mr. Thomas and all those living in Flavelle. A liberal construction would override the right to liberty, and a strict construction would not. Where a criminal provision affects the liberty interest, and two interpretations are available, one more favourable to the accused and one which is not, a court is obligated to adopt the more favourable interpretation.[42] In interpreting offences, a court must exhibit restraint, to avoid the "overreaching and uncertainty" that offends the principles of fundamental justice.[43] More threatening to liberty than a criminal penalty is a court that assists Parliament in taking it away.

B. THE INTERPROVINCIAL DRIVING BAN VIOLATES S. 7 OF THE *CHARTER*

1. Criminally penalizing Mr. Thomas by prohibiting him from driving outside of the province engages his liberty interest

43. Courts have regarded the exercise of a driver's licence to be a privilege, not a right, but for a privilege as essential as driving to be withdrawn by dint of a criminal sanction engages s. 7 of the *Charter*. One's liberty interest is impaired wherever the state, in exercising its criminal law power, interferes with a person's "free movement".

(a) A criminal penalty interfering with a person's free movement engages the liberty interest

44. One's liberty interest is engaged wherever the state uses its criminal law power to constrain a person's movement. In criminal law, one's liberty interest is classically engaged by the prospect of imprisonment, but s. 7 is also engaged when the state uses its power to interfere with a person's movement. Pre-trial custody or bail conditions which restrict the "free movement of the individual

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[42] *McIntosh* at para 29, TOA Tab 20.
[43] *Mac* at para 30, TOA Tab 22.

imposed" have been found to engage the liberty interest.[44] The liberty interest is engaged where a person is extradited,[45] that is, removed by the state and disallowed to remain within political borders. Analogously, the liberty interest is engaged where the state uses its coercive power to keep a person *within* political borders. While Mr. Thomas can leave the province, he is not able to drive himself, as the state has curtailed his autonomy with the threat of criminal sanction.

45. Penalizing Mr. Thomas by keeping him from engaging in the core societal activity of driving constitutes state coercion that engages his liberty interest. Courts have recognized that being prevented from driving seriously interferes with the living of one's life.[46] In discussing the coercive nature of suspending a driver's licence, the Supreme Court stated, "Driving is unlike other activities. For many, it is necessary to function meaningfully in society. As such, driving often cannot be seen as a genuine 'choice'".[47] Unlike other licenced activities, which are volitional and opted into, becoming licenced to drive is a "necessity of life".[48]

46. For Mr. Thomas, driving across provincial borders is not a choice. Mr. Thomas lives close to the Flavelle/Bloor boundary. While he technically lives in the former, necessity takes him over the border. Driving between provinces is a structural feature of his life, given his family and friends live on the Bloor side of the border.[49] Suspending his ability to drive across the boundary whittles Mr. Thomas' life down significantly. Impeding Mr. Thomas' ability to spend time with those he loves interferes with the "fundamental personal choices" the *Charter* protects.[50]

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[44] *R v Rahey*, 1987 CanLII 52 (SCC) at para 21, TOA Tab 30; *R v Godin*, 2009 SCC 26 at para 30, TOA Tab 31.
[45] See, e.g., *Schmidt v The Queen*, 1987 CanLII 48 (SCC) at paras 42-55, TOA Tab 32.
[46] *Sahaluk v Alberta (Transportation Safety Board)*, 2017 ABCA 153 at para 92 [*Sahaluk*], TOA Tab 33.
[47] *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 56 [*Moloney*], TOA Tab 34.
[48] *R v White*, 1999 CanLII 689 (SCC) at para 55 [*White*], TOA Tab 35.
[49] Official Problem at para 12.
[50] *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 at para 54, TOA Tab 36; *Carter* at para 64, TOA Tab 16.

(b) Criminal sanctions that withdraw an essential privilege, such as driving, engages s. 7

47. Even if driving, in its own right, is not a protected activity, the sanction of licence-suspension through the imposition of criminal punishment engages s. 7. Courts have concurred that the use of a driver's licence is not a right but a privilege,[51] but it is a valuable privilege central to one's freedom within a nation as spacious as Flavelle. As the Alberta Court of Appeal recently stated, "Driving a motor vehicle in and of itself may not be a liberty interest, but being sanctioned for one's conduct does engage protected interests."[52] It is in being made the focus of criminal legal attention that a privilege engages the right to liberty, made vulnerable by dint of state's power to deprive it precisely through the criminal process.

48. Withdrawing the privilege of driving has a punitive effect and is intended to result in deterrence. In *Ladouceur*, characterized enforcement and the potential for criminal saction as essential to the purpose of licence suspension, since its intended effect is to keep the affected party from driving.[53] It has a deterrent effect, curtailing the liberty of those at risk of further criminal penalty by dint of noncompliance. FSAA s. 94(2)(b), which mandates banning an offender from driving outside of their province of residence for at least three years, clearly shows Parliament's punitive intent.

(c) Criminal punishment must be distinguished from regulatory infringement

49. Recent jurisprudential consensus that licence suspension does not engage the liberty interest must be distinguished from the present case. A number of courts have come to the position that "the *Charter*'s guarantee of liberty does not apply to… suspension of driver's licences."[54] This

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[51] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 98, TOA Tab 37; *Buhlers v British Columbia (Superintendent of Motor Vehicles)*, 1999 BCCA 114 at paras 109-110 [*Buhlers*], TOA Tab 38.
[52] *Sahaluk* at para 94, TOA Tab 33.
[53] *R v Ladouceur*, 1990 CanLII 108 (SCC) at 1284 [*Ladouceur*], TOA Tab 39.
[54] *Sigurdson v British Columbia*, 2002 BCSC 945 at para 9, TOA Tab 40; Also see *Horsefield v Ontario (Registrar of Motor Vehicles)*, 1999 CanLII 2023 (ON CA) (unpaginated) [*Horsefield*], TOA Tab 41; *Buhlers* at paras 109-110,

statement lacks context, since in all cited cases, the suspension at issue has been due to regulatory offences. In that context, suspending a licence is nothing more than removing the ability to exercise the privilege of navigating within the statutory regime.

50. *Sahaluk* is the only case on record assessing the constitutionality of suspending a licence by dint of the *Criminal Code*, and it grounds its finding of the liberty interest being engaged squarely in the uniquely punitive character of criminal law.[55] There, the Alberta Court of Appeal drew on an established distinction between regulatory offences and sanction pursuant to criminal law. In *Goodwin*, the Supreme Court characterized a policy intended to remove impaired drivers through licence suspension as distinct from a criminal "offence."[56] Administrative matters "instituted for the protection of the public in accordance with the policy of a statute" are qualitatively different from criminal proceedings, which "may lead to a true penal consequence".[57] Provincial offences are constrained in scope and effect,[58] but the far-reaching and invasive nature of criminal punishment engages s. 7's protection of liberty.

2. The interprovincial driving ban is overbroad and thus does not accord with the principles of fundamental justice

51. Given the legislation's purpose of reducing interprovincial gun trafficking,[59] the appellant concedes that the driving ban is neither arbitrary nor grossly disproportionate. However, in applying this punishment to Mr. Thomas, whom the facts show was not a trafficker but merely

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TOA Tab 38; *DeMerchant v British Columbia (Superintendent of Motor Vehicles)*, 2019 BCSC 505 at para 46, TOA Tab 42.

[55] *Sahaluk* at paras 92, 94, 112; TOA Tab 33.

[56] *Goodwin v British Columbia (Superintendent of Motor Vehicles)* 2015 SCC 46 at para 39 [*Goodwin*], TOA Tab 43.

[57] *Ibid* at para 40, TOA Tab 43; *Sahaluk* at para 93, TOA Tab 33.

[58] The common term for a regulatory suspension is 90 days. See, e.g. *Horsefield* (unpaginated), TOA Tab 41; *Goodwin* at para 8, TOA Tab 43.

[59] Official Problem; Appendix A, Commentary; Appendix B, Preamble.

careless in neglecting to check the bed of his truck,[60] the provision is shown to be overbroad and thus violates s. 7 of the *Charter*.

(a) Penalizing a party arrested for accidental possession of an unlicensed firearm does not further the object of preventing gun trafficking

52. In assessing overbreadth, a court asks if the means chosen by the state are broader than necessary to achieve its purpose.[61] While an arbitrary law bears no connection to its stated purpose, overbreadth signifies that the law is rational in some cases but "overreaches in its effects in others."[62] This offends the "basic values"[63] enshrined in the principles of fundamental justice, which ensure that the severe penalty of being deprived of one's liberty is applied only where it is strictly necessary and can be justified.[64] Given the severity of the state's punitive power, it is a "well-established principle of fundamental justice that criminal legislation not be overbroad."[65]

53. Criminally punishing Mr. Thomas, convicted under the FSAA for illegal possession while occupying his truck, does not further its objective: preventing gun trafficking. The test for overbreadth was set out in *Appulonappa*: "[t]he first step… is to determine the object of the impugned law. The second step is to determine whether the law deprives individuals of… liberty… in cases that do not further that object."[66] The FSAA's purpose is expressly stated in its Preamble: to prevent gun trafficking.[67] Punishing Mr. Thomas, whose conviction was due to carelessness in lending his truck to a friend, does not further that object. It deprives him of his liberty for no justifiable reason.

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[60] Official Problem at paras 19-20, 23.
[61] *R v Heywood*, 1994 CanLII 34 (SCC) at 792-793 [*Heywood*], TOA Tab 44.
[62] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 113 [*Bedford*], TOA Tab 45.
[63] *R v Appulonappa*, 2015 SCC 59 at para 26 [*Appulonappa*], TOA Tab 46.
[64] *R v Khawaja*, 2012 SCC 69 at para 35 [*Khawaja*], TOA Tab 47.
[65] *R v Demers*, 2004 SCC 46 at para 37 [*Demers*], TOA Tab 48.
[66] *Appulonappa* at para 27, TOA Tab 46.
[67] Official Problem, Appendix B, Preamble.

54. It is overbroad to punish unlicensed gun-possession in the same manner as gun trafficking, merely due to the former having occurred in a car. "The overbreadth analysis turns on the relationship between the objective of the law and the effects flowing from the means which the law adopts to achieve it."[68] Under FSAA s. 94(2)(b), those who merely possess an unlicensed firearm in their vehicle are punished in the exact same way as those arrested for trafficking guns across borders. "Blanket and universal restrictions on liberty, applied to every accused regardless of circumstance"[69] are overbroad and thus offend the principles of fundamental justice.

55. The disconnect between the statute's purpose and its punitive means is sharpened when applied to the appellant's conduct. Mr. Thomas was careless in recovering his truck after lending it to a friend, who happens to be a licensed gun-owner.[70] Bringing a friend's firearm across provincial borders does not a trafficker make. Granting Parliament a margin of appreciation in its choice of means, it was not "reasonably necessary"[71] to restrict the liberty of those whose impugned conduct is unrelated to the statutory objective.

(b) It is overbroad to apply a punishment meant to prevent gun violence to a non-violent offender

56. Besides trafficking, the Preamble to the FSAA clearly states that its purpose is to reduce gun violence.[72] The factual record established at trial reports that Parliament was motivated by the rampant growth of gun violence in Flavelle.[73] In imposing the same punishment to both violent and non-violent offenders, the FSAA creates a "blanket prohibition [that] sweeps conduct into its ambit… unrelated to the law's objective."[74] While it may be more efficient for the state to penalise

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[68] *R v Moriarity*, 2015 SCC 55 at para 27 [*Moriarity*], TOA Tab 49.
[69] *Sahaluk* at para 122, TOA Tab 33.
[70] Official Problem at paras 19-20.
[71] *Bedford* at para 101, TOA Tab 45; *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 24 [*Safarzadeh-Markhali*], TOA Tab 50.
[72] Official Problem, Appendix B, Preamble.
[73] Official Problem at paras 6-7.
[74] *Carter* at para 86, TOA Tab 16.

every unlawful possessor of a firearm as equivalent to a party to gun violence, "practicality is no answer" to the fundamental principles of justice.[75]

57. Punishing those with no relation to gun crime does not further the FSAA's purpose of preventing further gun violence. The Act's focus on gun violence scopes the bounds of its lawful effect to those connected with the use or distribution of firearms for the purpose of harm. As made clear in Mr. Thomas' case, the provision catches persons it simply did not intend to catch: those who pose no threat to public safety. In *Safarzadeh-Markhali,* the Court reviewed a provision requiring a bail endorsement for multiple offenders, regardless of their offence. While constraining the right to bail was reasonable for those who posed a risk to the public, infringing the liberty of non-violent offenders did nothing to further that objective and was thus overbroad.[76]

58. The FSAA's purpose of preventing gun violence and trafficking should lead the Court to read down the impugned provision to exclude those whose conduct is unrelated to that mischief. In *Khawaja,* the Court reviewed the terrorism provisions of the *Criminal Code*, which caught all "participation in or contributions to the activities of a terrorist group… for the purpose of enhancing [its] ability… to facilitate or carry out terrorist activity."[77] The scope of the offence was interpreted to exclude conduct "that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group."[78] The FSAA's purpose of preventing gun violence should lead this Court to read down the impugned provision to only catch conduct that could be reasonably construed as contributing toward the scourge of gun violence. Only by tailoring the punishable conduct to its legislative purpose can the FSAA avoid undermining the principles of fundamental justice.

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[75] *Bedford* at para 101, TOA Tab 45.
[76] *Safarzadeh-Markhali* at para 53, TOA Tab 50.
[77] *Khawaja* at para 41, TOA Tab 47.
[78] *Ibid* at para 62, TOA Tab 47.

C. THE INTERPROVINCIAL DRIVING BAN UNJUSTIFIABLY INFRINGES S. 6

1. The interprovincial driving ban breaches Mr. Thomas' s. 6(1) right to "remain in" Flavelle

59. The interference with Mr. Thomas' ability to drive across provincial borders constitutes a violation of s. 6(1). This section protects the right of every citizen of Flavelle to "enter, remain in and leave Flavelle."[79] Under a purposive interpretation of the *Charter*, s. 6(1) protects the right to travel between provinces[80] and can be violated by interference with a specific means of travel.[81]

(a) Section 6(1) protects the right to travel between provinces

60. Section 6(1) includes the right to travel between provinces and territories as part of the right to "remain in" Flavelle.[82] To be clear, this is a right only to *move* between provinces, as opposed to the specific s. 6(2) rights to residence and livelihood. This interpretation, as laid out in *Taylor v Newfoundland*, is consistent with the purpose of s. 6, the focus on movement that underpins mobility rights in Flavelle, and international law. It should be adopted by this court.

61. The purpose of s. 6(1) is to preserve the "correlatives" of citizenship and nationhood.[83] One of the core components of Flavellian citizenship and national community is the freedom to travel between provinces; this freedom prevents the union from being disrupted and "converted into a number of enclaves."[84] Indeed, *Skapinker* held that the heading "Mobility Rights" evinces an intention to protect the right to "move about, within and outside the national boundaries."[85] As Burrage J pointed out in *Taylor*, "we would regard the right to come and go from one's home, and to remain in it, as surely including the right to wander freely from room to room."[86]

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[79] Official Problem, Appendix C, s 6.
[80] *Taylor v Newfoundland*, 2020 NLSC 125 at para 339, TOA Tab 51 [*Taylor*].
[81] *Brar v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1168 at paras 85-86, TOA Tab 52 [*Brar*].
[82] *Taylor* at para 339, TOA Tab 51.
[83] *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 21, TOA Tab 53 [*Divito*].
[84] *Black v Law Society of Alberta*, 1989 CanLII 132 (SCC) at 611, TOA Tab 54 [*Black*].
[85] *Law Society of Upper Canada v Skapinker*, 1984 CanLII 3 (SCC) at para 25, TOA Tab 55 [*Skapinker*].
[86] *Taylor* at para 353, TOA Tab 51.

62. Mobility rights in Flavelle grant protection to a person's positive freedom to move as they choose. The right to *enter* and *leave* Flavelle in s. 6(1) describe choices of physical movement,[87] as does the s. 6(2)(a) right to "move and take up residence."[88] Further, s. 6(2)(b) protects the individual's choice to work in different locations.[89] In contrast, the pre-*Taylor* reading of the "right to remain" was restricted to a protection against coerced movement out of the country.[90] Reading the right to remain as including movement between provinces harmonizes its protections with s. 6's overall focus on positive movement.

63. An interpretation of the right to remain that includes a distinct mobility right to travel between provinces is also consistent with Flavelle's international human rights obligations. The *International Covenant on Civil and Political Rights*, which is binding on Flavelle,[91] forms the "minimum level of protection in interpreting the mobility rights under the *Charter*."[92] It includes "the right to liberty of movement" within the territory of the state.[93] Liberty of movement within the state necessarily includes crossing provincial borders.

(b) Interference with a specific means of travel violates s. 6(1)

64. The right to movement requires a level of protection for means of movement. Until recently, the courts have not had the opportunity to consider whether restrictions on the *manner* of movement can engage s. 6(1). In *Brar*, the Federal Court found that "[i]n contemporary Canadian society . . . part of the equation may have to involve the way by which these movements are given effect."[94] In *Brar*, the court held that Mr. Dulai's s. 6(1) right to leave Canada was infringed by

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[87] *Taylor* at para 343, TOA Tab 51.
[88] *Skapinker* at para 26, TOA Tab 55.
[89] *Ibid* at para 28, TOA Tab 55.
[90] *United States of America v Cotroni*, 1989 CanLII 106 (SCC) at 1481, TOA Tab 56.
[91] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 39, TOA Tab 57; *Divito* at para 25, TOA Tab 53.
[92] *Divito* at para 25, TOA Tab 53.
[93] *Ibid*, TOA Tab 53.
[94] *Brar* at para 85, TOA Tab 52.

the government's restriction of his ability to fly. It found that though he had access to other methods to leave the country, "in Canada, flying is currently the most popular mode of transportation to most foreign destinations" and thus air travel "has become an essential part of modern life."[95]

65. Driving plays a similar role in travel *within* the country. It has been recognized as a "necessity of life" by the Supreme Court since *White* in 1999, when it held that driving is not truly "freely undertaken."[96] The Alberta Court of Appeal elaborated on this concept in *Sahaluk*: "Our society and economy are structured in ways that are heavily reliant on the automobile . . . For many, it is necessary to function meaningfully in society."[97]

66. For Mr. Thomas, driving is the key to his interprovincial mobility. He lives less than 25 minutes from the border and routinely uses the Trans-Flavellian Highway to get to work and to see his family in Bloor. Though there are other ways to move through provinces, "railways and airlines"[98] are not practical alternatives for Mr. Thomas to meet these needs, much as "sailing" would not have been for Mr. Dulai in *Brar*. Thus, the inability to drive interprovincially means his s. 6(1) right is "for practical purposes rendered impotent."[99]

67. Including protections for the manner of travel under mobility rights is consistent with a functional approach to rights protection that focuses on practical impacts. *Black* explicitly warns against allowing rights to become "realistically precluded."[100] Focusing only on the nominal ability to travel, at the expense of considering how the movement may be achieved, fails to preserve s. 6(1) rights for those Flavellians who may only have realistic access to certain modes of

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[95] *Brar* at para 100, TOA Tab 52.
[96] *White* at para 55, TOA Tab 35.
[97] *Sahaluk* at para 92, TOA Tab 33.
[98] Official Problem at para 34.
[99] *Black* at 619, TOA Tab 54.
[100] *Ibid* at 618, TOA Tab 54.

transportation. For Mr. Thomas and others who rely on driving as a primary means of giving effect to their mobility rights, the ban therefore violates the s. 6(1) right to move between provinces.

68. To be clear, a finding that Mr. Thomas' s. 6(1) right is violated by the inability to drive would not create a constitutional right to a driver's licence. Driver's licences may be—and often are—validly suspended. Nevertheless, suspensions may attract *Charter* review in certain circumstances. In *Sahaluk*, the suspension struck at the heart of s. 11 due to the "absence of procedural safeguards."[101] Here, *Charter* review is triggered, not by the condition placed on the licence, but the direct and immediate impact on Mr. Thomas' s. 6(1) mobility rights.

2. The interprovincial driving ban breaches Mr. Thomas' s. 6(2)(b) right to pursue the gaining of a livelihood in any province

69. The interference with Mr. Thomas' ability to engage in his chosen livelihood of trucking in Bloor on the basis of his residence in Falconer constitutes a violation of s. 6(2)(b). Sections 6(2)(b) and 6(3)(a) jointly protect a citizen or permanent resident's right to gain a livelihood in any province without discrimination based on their province of residence.[102] Section 6(2)(b) is infringed by government action that (1) impacts a non-resident's ability to earn a livelihood, (2) through differential treatment of residents and non-residents attempting to gain their livelihood in a specific province, (3) if that differential treatment is primarily based on province of residence.[103]

(a) Mr. Thomas' right to gain a livelihood in another province is engaged

70. The interprovincial driving ban interferes with Mr. Thomas' ability to gain his livelihood. He is no longer able to drive the routes that took him to Bloor at least once a week. He is also unable to attend the head office of the company he owns and operates, which he used to visit on

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[101] *Sahaluk* at para 90, TOA Tab 33.
[102] *Canadian Egg Marketing Agency v Richardson,* 1997 CanLII 17020 (SCC) at para 54, TOA Tab 58 [*CEMA*].
[103] *Ibid* at paras 71, 74, 76-78, TOA Tab 58.

each route that took him to Bloor. Driving a truck in Bloor and owning an office there meet the *CEMA* standard for gaining a livelihood: "any attempt to create wealth in another province."[104]

71. Though he meets the broader *CEMA* test, Mr. Thomas is protected under s. 6(2)(b) based on physical mobility alone. In his regular deliveries and visits to the office in Bloor, he exemplifies a "transprovincial border commuter" who "commute[s] across a provincial boundary to engage in regular work." *Skapinker* held that such a person would be protected by s. 6(2)(b).[105]

72. The degree of impact on Mr. Thomas' livelihood is sufficient to engage his s. 6(2)(b) right. Mr. Thomas is not required to make his living entirely in Bloor. In *Black*, the Supreme Court held that the right should be approached broadly, as it would be "an impossible task" for courts to "superintend precisely how much interprovincial movement an individual should engage in in order to be protected by s. 6(2)(b)."[106] In that case, "[t]he infrequent visits to Alberta of the Toronto [lawyers]" were sufficient to trigger the protections of s. 6(2)(b).[107] The Supreme Court confirmed this holding in *CEMA*, finding that the magnitude of the impact on livelihood had no bearing on the s. 6 analysis and was best left to justification at s. 1.[108]

73. The interference with Mr. Thomas' rights is analogous to *Brar*, where the court found that Mr. Dulai's inability to fly interprovincially engaged s. 6(2)(b) because it impacted his Punjabi-speaking television channel business.[109] In particular, Mr. Dulai was barred from continuing his monthly visits to his newly established studios, causing them to struggle financially and eventually close.[110] Mr. Thomas' inability to perform his normal functions as driver and owner significantly impacts the practical functioning of the company, which has been undergoing financial hardship

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[104] *CEMA* at para 72, TOA Tab 58.
[105] *Skapinker* at paras 27-29, TOA Tab 55.
[106] *Black* at 620, TOA Tab 54.
[107] *Ibid*, TOA Tab 54.
[108] *CEMA* at para 85, TOA Tab 58.
[109] *Brar* at para 107, TOA Tab 52.
[110] *Ibid* at para 103, TOA Tab 52.

since November 2021. The ban obliges him to hire a replacement driver for the interprovincial routes and prevents him from attending his main place of business for four years.

74. Given that Mr. Thomas' livelihood of choice is interprovincial truck driving, it is inappropriate for the courts to demand he adapt his career to avoid the impact of driving restrictions. *Black* is clear that the applicant's choice of livelihood guides the s. 6(2)(b) analysis:[111] "[d]enying non-residents access to some fields cannot be condoned. . . by the fact that some job positions are still left open to non-residents."[112] In *Brar*, the court considered partial alternatives to the applicant's livelihood of choice—teleworking or moving to another province—but found that the ban still created sufficient obstacles to undermine the right to work unconstrained by provincial boundaries.[113] For Mr. Thomas, even these limited solutions of teleworking or moving to Bloor are infeasible because they would not enable him to continue his inherently interprovincial business. Thus, the driving ban engages his right to gain a livelihood in any province.

(b) The interprovincial driving ban discriminates on the basis of residence

75. In preventing those with a Falconer licence from driving in Bloor, while permitting those with a Bloor licence to drive in Bloor, the FSAA discriminates on the basis of residence. Under *CEMA*, differential treatment is determined by comparing a resident and a non-resident, each attempting to pursue the same livelihood in the destination province.[114]

76. The appropriate comparison is between Mr. Thomas (a resident of Falconer) and a resident of Bloor, each holding a provincial driver's licence and attempting to carry on a trucking business in Bloor under the FSAA. In Flavelle, driver's licences are inextricably tied to residence. Residents can only possess one driver's licence, and it must be in their province of residence. Thus, the two

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[111] *Black* at 618, TOA Tab 54.
[112] *Ibid*, TOA Tab 54.
[113] *Brar* at para 104, TOA Tab 52.
[114] *CEMA* at paras 74-75, TOA Tab 58.

Flavellian citizens are treated differently in Bloor under the FSAA: Mr. Thomas cannot drive in Bloor, while a resident of Bloor may still drive in Bloor.

77. Farrell JA erred in comparing licence-holders in Falconer to non-licence-holders in Bloor. The assumption underlying the comparisons in past cases is that both comparison groups were equally qualified outside of the legal restriction; this approach fulfils the instruction in *Black* to defer to individuals on their choice of livelihoods. For instance, in *MacKinnon*, a Nova Scotian fisherman was prohibited from fishing in the waters off the Newfoundland coast; the court compared him to a Newfoundland fisherman.[115] It would have been absurd to compare a fisherman from Nova Scotia to a non-fisherman from Newfoundland, or—in the case of *Black*—a lawyer from Ontario to a non-lawyer from Alberta. Similarly, the appropriate comparison here is between the holder of a Falconer licence (like Mr. Thomas) and the holder of a Bloor licence.

(c) The discrimination is "primarily" on the basis of residence

78. The driving ban discriminates primarily on the basis of residence because it prevents Mr. Thomas from working outside of his province of residence. A law can violate s. 6 either due to its purpose or to its effects; effects that have a sufficiently severe impact on the exercise of the right can displace even a valid purpose.[116] Because the effects of the FSAA disproportionately impact out-of-province workers like Mr. Thomas and interfere with his gaining a livelihood in provinces other than his province of residence, they constitute a violation of s. 6.

79. One characteristic of laws whose severe effects displace the purpose of the provision is a disproportionate effect on out-of-province workers. In *Black,* the court held that the rules affected "those that want[ed] to develop and maintain interprovincial connections" most severely.[117] Here,

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[115] *CEMA* at para 74, TOA Tab 58.
[116] *Black* at 625, TOA Tab 54; *CEMA* at para 77, TOA Tab 58.
[117] *Black* at 626, TOA Tab 54.

Mr. Thomas' ability to develop and maintain his interprovincial business similarly suffers disproportionately to those who maintain a business within a province. In general, the FSAA disproportionately penalizes workers whose job requires them to drive across provincial borders. This factor suggests that its effects are discriminatory.

80. Another characteristic is an effective prohibition on work. In *CEMA*, the court held that where a law creates both a legal and practical prejudice amounting to an effective prohibition, it discriminates based primarily on residence.[118] In that case, the quota system's legal effect precluded the applicants from marketing eggs in other provinces because they could not obtain a quota. However, the court found there was no practical prejudice because the applicants failed to show that they were excluded from obtaining a quota in provinces where new, resident producers could also obtain a quota.[119] In contrast, both the legal and practical effects of the prohibition fully prevent Mr. Thomas from trucking interprovincially. Legally, he cannot drive outside of Falconer. Practically, the licencing system prevents him from being able to drive in multiple provinces. Unlike the producers in *CEMA*, Mr. Thomas is not on the same footing as unlicensed residents of Bloor: he has no possibility of acquiring a Bloor licence without becoming resident there. Since the legal and practical effects amount to an effective preclusion of out-of-province work, the effects of the FSAA are sufficient to constitute discrimination primarily on the basis of residence.

81. In determining the effects of the provision, the focus must remain on the resident/non-resident comparison even in the context of federal legislation. The driving ban creates barriers between provinces, where non-residents are treated differently from residents in each province. To decide that discriminatory federal legislation is permissible because it discriminates against every province equally would be to give the federal government a free pass to violate s. 6.

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[118] *CEMA* at para 101, TOA Tab 58.
[119] *Ibid* at para 100, TOA Tab 58.

3. The breaches of ss. 6(1) and 6(2)(b) are not justified under s. 1

82. The purpose of preventing gun violence and trafficking is pressing and substantial. However, the interprovincial driving ban is not rationally connected, minimally impairing, or proportionate to this purpose. The government has failed to meet its burden of adducing "cogent and persuasive" evidence that would prove the constituent elements of the s. 1 inquiry.[120]

(a) The mandatory 3-year ban for possession is not rationally connected to the objective of preventing gun trafficking

83. The interprovincial driving ban lacks internal rationality, which is the "minimum" requirement for rational connection.[121] The situation here mirrors *Oakes*, where the purpose of the law is to target trafficking, but it punishes only for possession. There is no evidence to suggest that Mr. Thomas' reckless possession of a licenced gun supports an inference of gun trafficking. Since the law catches the offenders beyond its purpose, it is overinclusive and "def[ies] rationality."[122]

84. In addition to failing to punish the correct harms, the mandatory minimum approach is not rationally connected to the objective of deterrence. As the court found in *Nur*, "mandatory minimum sentences do not deter more than less harsh, proportionate, sentences."[123] In *Nur*, the rational connection was saved by denunciation and retribution, which—while relevant to the legislative purposes of sentencing in *Nur*—do not apply here in the context of Parliament's targeted purpose of *preventing* gun crime.

(b) The ban is not minimally impairing because the objective of preventing gun trafficking could be achieved equally effectively by less intrusive means

85. The appropriate standard for minimal impairment is the "least drastic means," not a "range of reasonable alternatives." This is a criminal context, where the state is acting as the "singular

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[120] *R v Oakes*, 1986 CanLII 46 (SCC) at para 68, TOA Tab 59 [*Oakes*].
[121] *Ibid* at para 77, TOA Tab 59.
[122] *Ibid* at para 78, TOA Tab 59.
[123] *R v Nur*, 2015 SCC 15 at para 114, TOA Tab 60 [*Nur*].

antagonist," and thus requires no deference from the court.[124] The court should not defer to Parliament on the basis that the legislation deals with social policy. Though criminal legislation engages social issues, its interpretation is well within the expertise of courts and therefore requires no deference.[125] Deference in this context would set a dangerous precedent that protection of *Charter* rights is attenuated under any firearm or trafficking law.

86. Even on a deferential approach, the court cannot abdicate its essential role of scrutinizing Parliament: "[t]o accept[] Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."[126] The government had two options to reduce the impairment on s. 6 rights while preserving the efficacy of its objective. It has not met its onus of demonstrating why these "significantly less intrusive and equally effective measure[s were] not chosen."[127]

87. Firstly, Parliament could have enacted something less than an "complete ban" on interprovincial driving, which was held in *RJR-Macdonald* to be more difficult to justify than a "partial ban."[128] The driving ban, like the advertising ban placed on tobacco manufacturers in that case, restricts one form of exercise of the right in question entirely. In *RJR*, the ban was not minimally impairing because there was no reason to capture informational advertising in the scope of the ban to further the objective of protecting the public;[129] similarly, here, there is no reason to prevent Mr. Thomas from crossing the border. Nothing in the Royal Commission report suggests that punishing offenders with his level of blameworthiness would further the objective of the law.

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[124] *Irwin Toy Ltd v Quebec (Attorney General),* 1989 CanLII 87 (SCC) at 994, TOA Tab 61 [*Irwin Toy*].
[125] *Ibid*, TOA Tab 61.
[126] *RJR-MacDonald Inc v Canada (Attorney General),* 1995 CanLII 64 (SCC) at para 136, TOA Tab 62 [*RJR*].
[127] *Ibid* at para 160, TOA Tab 62.
[128] *Ibid* at para 163, TOA Tab 62.
[129] *Ibid* at paras 164-165, TOA Tab 62.

88. Parliament had options that did not needlessly deprive such offenders of their interprovincial mobility rights. It could have prohibited movement only for those convicted of gun trafficking, which would have impaired the rights of fewer people and tied the impairment more closely to the objective. It also could have shifted the focus of the prohibition from movement to guns by enacting a ban on gun ownership for those who have been convicted only of unauthorized possession. Either of these alternatives would have reduced the movement of guns across borders without wholly foreclosing the only realistic possibility for Mr. Thomas to cross the border.

89. Secondly, Parliament could have lowered or removed the mandatory minimum sentence. A minimally impairing law must have a "close correspondence between conduct attracting significant moral blameworthiness . . . and the mandatory minimum."[130] Mr. Thomas' sentence lacks this correspondence: the mere mistake of driving with his friend's gun in the car, with no intent to traffic, cannot justify a four-year effective prohibition on work. In enacting "a sweeping law that includes in its ambit conduct attracting less blameworthiness,"[131] Parliament failed to minimally impair the right.

90. Though licence suspensions having impacts on livelihood were held to be minimally impairing in *Hutterian Brethren*, the court should not import that analysis to this case. First, the court took a more deferential approach in *Hutterian Brethren* given the regulatory context and complex social issues at stake,[132] which should not be applied here. Second, that law's national safety purpose had only incidental effects on the exercise of religion.[133] Here, the law is a direct and intended impairment on the right to move interprovincially.

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[130] *Nur* at para 117, TOA Tab 60.
[131] *Ibid*, TOA Tab 60.
[132] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at para 53, TOA Tab 63 [*Hutterian Brethren*].
[133] *Ibid* at para 93, TOA Tab 63.

(c) The ban's deleterious effects far outweigh its marginal or speculative salutary effects

91. The interprovincial driving ban creates severe harms to Mr. Thomas, both professionally and personally. On a professional level, he is unable to earn his livelihood because he cannot visit his head office in a time of financial distress and can no longer drive routes for TruckPro Inc. He will need to decrease his business' delivery capacity or hire another driver, who may be expensive or difficult to find given Flavelle's volatile job market. Should his business fold, as Mr. Dulai's did in *Brar*, the evidence suggests that this punishment will decrease his chances of obtaining another position as a truck driver by 25%. On a personal level, it will be much harder for Mr. Thomas to visit his friends and family across the border. It also undermines his liberty and autonomy to participate as a full member of society[134] and a citizen of Canada.[135]

92. The benefits of the driving ban are "marginal and speculative."[136] Parliament has adduced no specific evidence to connect the prohibition to a decrease in gun violence or trafficking or to show that preventing Mr. Thomas from driving across the border would achieve its objective. The Royal Commission only suggests a general increase in gun violence and trafficking, without linking it to driving. As the court held in *KRJ*, a rationale that could apply to a broad range of crimes cannot justify an infringement under s. 1.[137] Finally, the lack of internal rationality between possession and trafficking is relevant to the proportionality analysis as well:[138] catching those who are merely possessing does little to advance Parliament's objective.

93. The government has an obligation to "*demonstrably* justif[y]"[139] violations on rights. Given the clear and extensive harms to Mr. Thomas and the very limited evidence presented by the

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[134] *White,* at para 55, TOA Tab 35.
[135] *Black,* at 615-616, TOA Tab 54, quoting *Malartic Hygrade Gold Mines Ltd v Quebec* 1982 CanLII 2870 (QCCS) at para 40.
[136] *R v KRJ,* 2016 SCC 31 at para 92, TOA Tab 64 [*KRJ*].
[137] *Ibid* at para 94, TOA Tab 64.
[138] *R v Laba*, 1994 CanLII 41 (SCC) at para 34, TOA Tab 65.
[139] *KRJ* at para 91, TOA Tab 64.

government supporting its assertions, the *Firearms Safety and Accountability Act* is not justified under s. 1 of the *Charter*.

PART IV – ORDER SOUGHT

94. We respectfully request that the appeal be allowed and the decision of the Superior Court of Justice for Falconer be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2024.

PART V – TABLE OF AUTHORITIES

JURISPRUDENCE (in order of appearance)

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1	*Ford v Quebec (Attorney General),* 1988 CanLII 19 (SCC)	22, 24, 31
2	*Alliance des Professeurs de Montreal c Quebec (Attorney General)*, 1983 CanLII 2912 (QC CS)	22
3	*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65	23
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9	*Working Families Coalition (Canada) Inc v Ontario*, 2021 ONSC 7697	25
10	*University Health Network v Ontario (Minister of Finance)*, 2001 CanLII 8618 (ON CA)	28
11	*Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* 1990 CanLII 135 (SCC)	29
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13	*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42	29, 39
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32	*Schmidt v The Queen*, 1987 CanLII 48 (SCC)	44
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37	*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37	47, 90
38	*Buhlers v British Columbia (Superintendent of Motor Vehicles)*, 1999 BCCA 114	47
39	*R v Ladouceur*, 1990 CanLII 108 (SCC)	48
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42	*DeMerchant v British Columbia (Superintendent of Motor Vehicles)*, 2019 BCSC 505	49
43	*Goodwin v British Columbia (Superintendent of Motor Vehicles)* 2015 SCC 46	50
44	*R v Heywood*, 1994 CanLII 34 (SCC)	52
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46	*R v Appulonappa*, 2015 SCC 59	52-53
47	*R v Khawaja*, 2012 SCC 69	52, 58
48	*R v Demers*, 2004 SCC 46	52
49	*R v Moriarity*, 2015 SCC 55	53
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51	*Taylor v Newfoundland*, 2020 NLSC 125	59-62
52	*Brar v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1168	59, 64, 73-74
53	*Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47	61, 63
54	*Black v Law Society of Alberta*, 1989 CanLII 132 (SCC)	61, 66-67, 72, 74, 78-79, 91
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56	*United States of America v Cotroni*, 1989 CanLII 106 (SCC)	62
57	*Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32	63
58	*Canadian Egg Marketing Agency v Richardson,* 1997 CanLII 17020 (SCC)	69-70, 72, 75, 77-80
59	*R v Oakes*, 1986 CanLII 46 (SCC)	82-83
60	*R v Nur,* 2015 SCC 15	84, 89
61	*Irwin Toy Ltd v Quebec (Attorney General),* 1989 CanLII 87 (SCC)	85

62	*RJR-MacDonald Inc v Canada (Attorney General),* 1995 CanLII 64 (SCC)	85-87
63	*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37	90
64	*R v KRJ,* 2016 SCC 31	92
65	*R v Laba*, 1994 CanLII 41 (SCC)	92

SECONDARY SOURCES (in order of appearance)

Tab	Scholarly Work	Citation
66	Lorraine Weinrib, "Learning to Live with the Override" (1990) 36 McGill LJ 541	24, 31
67	Ruth Sullivan, *The Construction of Statutes,* 7th ed (Toronto: LexisNexis Canada, 2022)	28, 33
68	Peter Lougheed, "Why a Notwithstanding Clause" (1998) 6 *Points of View* 1	36
69	Glanville Williams, *Criminal Law: The General Part,* 2nd ed (London: Stevens Press, 1961)	39, 41
70	Stephen Kloepfer, "The Status of Strict Construction in Canadian Criminal Law" (1983) 15 *Ottawa L Rev* 553	39

CANADIAN LEGISLATION

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FLAVELLIAN LEGISLATION

Firearm Safety and Accountability Act ("FSAA")

Preamble

Whereas the Parliament of Flavelle is committed to reducing gun violence and the frequency of firearms trafficking and other offences in Flavelle.

Unauthorized Possession in a Motor Vehicle

94 (1) Subject to subsections (3) and (4), every person commits an offence who is an occupant of a motor vehicle and knowingly possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless:

(a) in the case of a prohibited firearm, a restricted firearm or a non-restricted firearm,

(i) the person or any other occupant of the motor vehicle is the holder of

(A) a licence under which the person or other occupant may possess the firearm, and

(B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it,

(ii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was the holder of

(A) a licence under which that other occupant may possess the firearm, and

(B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction and is subject to the following:

(i) driver's license suspension for a term of 30 days; and

(ii) when the suspension term expires, is prohibited from driving in or through a province for which they do not hold a valid provincial license, for a further period not less than 3 years.

Exception

(3) Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm, weapon, device or ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.

Exception

(4) Subsection (1) does not apply to an occupant of a motor vehicle when the occupant or any other occupant of the motor vehicle is a person who came into possession of the firearm, weapon, device or ammunition by the operation of law.

Operation notwithstanding

(5) Subsection (2) is valid and operative notwithstanding the rights pertaining to life and the security of person, and the right not to be subject to cruel and unusual punishment, and all other rights and freedoms therein, enumerated in ss. 7 and 12 of the *Charter of Rights and Freedoms.*

Flavellian Charter of Rights and Freedoms

Reasonable limits

1. The *Flavellian 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.

…

Mobility rights

6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:

a. to move to and take up residence in any province; and

b. to pursue the gaining of a livelihood in any province.

…

Life, liberty and security of the person

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.

…

Cruel and unusual treatment or punishment

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

…

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Falconer's *Highway Traffic Act*

35(1)(e) No person shall… apply for, secure or retain in his or her possession more than one driver's licence.