War Measures Act v Canada

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Abstract

This paper was originally written for Dr. Clare McGovern's Political Science 421W course *Rights, Equality, and the Charter of Rights and Freedoms*. The assignment asked students to write either a legal analysis of case-law or social science research on the political effects of the *Charter*. With approval from the professor, I submitted a counterfactual analysis. The paper uses APA citation style.

On October 16, 1970, Pierre Trudeau invoked the War Measures Act in response to the October Crisis, granting special powers to the government and garnering nationwide criticism over human rights abuses. Twelve years later, he ushered in a new era of the Canadian Charter of Rights and Freedoms, followed by the introduction of the Emergencies Act in 1988, replacing the War Measures Act. It remained untouched until 2022 when it was invoked for the first time by Justin Trudeau during the Freedom Convoy. Following in his father's footsteps, his invocation garnered criticism over such an extreme measure, and the Federal Court of Canada found that the special temporary powers unreasonably and unjustifiably violated Charter rights. The irony in Canada's emergency legislation history raises curiosity about the protection of rights during times of national crisis. In this paper, I explore Charter rights protection in times of crisis by determining how the Supreme Court of Canada would rule on the use of the War Measures Act during the October Crisis if the Charter had been in force at the time. I argue that the actions under the War Measures Act would be found to infringe on sections 2(b), 2(d), 7, 8, 9, 10(c), and 11(e) of the Charter and cannot be justified under section 1.

The following is an excerpt of my research paper. After this excerpt, my paper dives briefly into a counterargument that section 11(e) of the Charter could be argued to pass the *Oakes* test, before concluding with a reflection on the strengths of my research as well as areas for potential future work diving deeper into specific sections of the Charter as opposed to the broad scope that I take.

Historical Background: The War Measures Act

The War Measures Act (WMA), introduced in 1914 in response to the First World War, was a legislative avenue for the government to exercise special powers "in the event of War, Invasion, or Insurrection" (War Measures Act, 1927), bypassing the formal legislative process. The act gave leeway for government power to extend to censorship of communication, restriction of movement and detention of people within the country, trade and manufacturing, and control over people's property (War Measures Act, 1927). It also provided exclusive power over the enforcement of the given regulations. The purpose of the WMA was specifically for use during times of war and was invoked during both World War I and World War II (Lindsay, 2014).

The only time Canada saw the WMA invoked outside of times of war was in response to the October Crisis of 1970. The October Crisis erupted from the abduction of a British trade commissioner and a Quebec cabinet minister at the hands of the Front de libération du Québec (the FLQ), a separatist movement seeking Quebec's independence from Canada due to irreparable cultural and ideological differences. Invoking the WMA, Pierre Trudeau introduced the Public Order Regulations (POR) on October 16, 1970, listing specific measures responding to the internal crisis caused by the kidnappings. The FLQ were deemed "an unlawful association" (Public Order Regulations), and mere association with the group was now punishable by law. Any property belonging to FLQ members or those associated could be immediately seized (Public Order Regulations). Public communications painting the FLQ in any favourable light were censored, and police were given the discretion to arrest those they suspected of membership or association, without warrants or the possibility of bail unless decided otherwise (Public Order Regulations). These regulations extended nationally and were enforced in all provinces and territories, and would end once the government deemed the crisis to be dealt with.

Law Review: The Emergencies Act

The successor to the WMA, the Emergencies Act (EA) was introduced in 1988 to restructure Canada's national emergency response. After the criticisms over the human rights violations under the WMA (Clément, 2008), the new and improved EA details stricter conditions necessary to meet the requirements of a serious national emergency before enacting temporary emergency legislation. It categorizes four different types of national emergencies: public welfare, public order, international, and war emergencies (Department of Justice Canada). The act

restricts the government's freedom in creating temporary legislation by providing a detailed framework to follow when invoking, introducing, and enforcing special powers, as well as checks and balances to ensure that emergency powers are not overreaching their necessary and intended use. The reinvention of emergency legislation attempts to create democratic safeguards ensuring the government's actions under the EA continue to be held accountable to Charter Rights even in times of national crisis. The biggest focus of the act is to provide a better balance between security and the protection of Charter rights, including greater transparency and accountability of the government's actions through parliamentary voting, judicial review, and strict time constraints.

Methodology

I will conduct a counterfactual analysis to determine how the Supreme Court of Canada might rule on a case regarding the government's actions under the WMA during the October Crisis. I will use *Gagnon and Valliéres v. The Queen*, a Quebec Court of Appeal case from 1971, as the framework case that the Supreme Court of Canada is hypothetically looking at. *Gagnon* was an appeal brought by Pierre Valliéres and Charles Gagnon over their arrests and charges on FLQ membership. This is the only digitally accessible case from the period of the October Crisis, providing insight into the approach and mentality of the courts on government action and human rights pre-Charter. I will also be using academic papers and historical documents to provide more context to the POR that is not directly connected to the circumstances in *Gagnon*. Though trial courts regularly go beyond the narrow facts of a case to consider wider social, economic, and political implications, I feel that *Gagnon* does not provide enough context to the scope of the government's response to the October Crisis.

I will be comparing this case to *Canadian Frontline Nurses v. Canada (Attorney General) (2024)*. This is the Federal Court case in which the judge found that the invocation of the EA in 2022 unjustifiably violated Charter rights. As the EA has only been invoked once, this is the most recent and relevant example of a post-Charter Canadian court ruling on government actions in times of crisis. This specific case has not yet reached the Supreme Court, so I will consider the Federal Court judge's analysis and examination as comparable to that of the Supreme Court. I am specifically looking at the judge's analysis of the temporary measures created under the EA through the *Oakes* test developed in *R. v. Oakes* (1986).

My thesis will be supported by evidence showing that the Federal Court judge in *Canadian Frontline Nurses* analysed the special temporary measures in

favour of protecting Charter rights more so than deferring to the legislative and executive branches of the government, assuming the courts would take a similar approach on *Gagnon*. Alternatively, my thesis will be disproven if it is shown that the judge defers to the considerations of the legislative and executive branches of government. Other possible evidence could be found in academic articles and government reports that find the current pattern in the Supreme Court favours Charter rights protections over deferring to other branches of government.

My analysis will consist of exploring how a Supreme Court judge would apply the *Oakes* test to the special measures created during the October Crisis. I will go through each step of the *Oakes* test, testing the relevant Charter rights. Since the WMA no longer exists, I will continue to examine the special measures as coming from the WMA but also use the EA as a point of reference to how the government exercises emergency powers today.

Limitations in my research can be seen most prominently in the lack of available data on government actions in situations of nationwide social unrest. *Gagnon* does not discuss infringements on rights in the same depth that post-Charter cases do, and is limited in providing insight into what judges at the time thought about rights infringements. A second limitation is in the research design itself, as I focus on Charter violations on a broader scale, I am unable to go into a satisfying depth of analysis into each Charter violation. Hopefully, I can make up for this limitation by creating a pathway for further specialized research narrowing the focus on specific Charter violations.

Charter Breaches

Since the events of the October Crisis happened before the implementation of the Charter, there is no work comparing the government's actions during this time to the various Charter rights they might have abused. As such I will outline sections of the Charter which may be activated based on the POR created under the WMA.

Censorship immediately evokes questions of freedom of expression and freedom of association as outlined in sections 2(b) and 2(d) of the Charter. Censorship of public communication undeniably infringes on freedom of the press/media. Under the POR, mainstream media was persecuted for their coverage of the October Crisis, with many journalists and media personalities arrested or fired for their work (Clément, 2008, p. 168). Additionally, news media platforms were intimidated into censoring their work, threatening punishment for publishing the FLQ's manifesto (p. 168). Media censorship extended to local

university newspapers, with some publishers refusing to print articles on the subject of the WMA or the October Crisis, and many universities monitored by local authorities (p. 168). Hundreds of copies of student newspapers at the University of Guelph were confiscated by the police for publishing the FLQ manifesto (168). These punishments extended to individual expressions of belief and opinion, with some provinces enacting regulations on communication within their communities. B.C. banned instructors from "expressing sympathy with the FLQ" (p. 170).

Freedom of association was the crux of the regulations that extended beyond directly attacking members of the FLQ. Alongside censorship, authorities were granted leeway in deciding if a person was associated with the FLQ. Section 9.1 (a) of the Order states that authorities may arrest someone who they have "reason to suspect is a member of the [FLQ]", highlighting the blurry parameters that allow suspicion influenced by an officer's imagination (Public Order Regulation). Section 5 of the Public Order Regulation specifically targets people who may be acquainted with someone within the FLQ (Public Order Regulations). The Order's scope also extends to former members of the FLQ or those who have previously attended meetings or previously associated with the FLQ for any amount of time at any point before the implementation of the POR (s. 8).

The powers granted to authorities regarding their arresting, detaining, and prosecuting people activates multiple Charter rights. Section 7.1 of the Regulations expressly states those arrested for participation in the FLQ are not granted bail unless otherwise decided by the provincial attorney general. Section 11(e) of the Charter ensures bail is not denied without just cause. Bail may be denied if attendance in court is in question, if public safety is in jeopardy, or if confidence in the administration of justice is in question (Criminal Code, s. 515(10)). These parameters are not outlined in the POR; it cannot be assumed they followed the same logic in their denial of bail.

Gagnon brings up the dismissal of *habeas corpus* in the arrests and detentions carried out under the POR, directly connecting to section 10(c) of the Charter stating the necessity for validation of detention by way of *habeas corpus*. Similarly, section 9 of the Charter is activated when questioning the arbitrariness of detention under the Regulations. Immediate suspicion of association with the FLQ because of a person's weak connection to the group or people within the group, or through their personal opinions and beliefs on the October Crisis and the goals of the FLQ, leads to an argument of arbitrary detention as well as

unreasonable search and seizure of personal property as outlined under section 8 of the Charter. The methods of prosecution also lead to the question of the protection of life, liberty and security of the person as described in section 7 of the Charter.

The *Oakes* Test

When raising a Charter challenge, the courts must determine if the affecting actions to Charter rights falls under the scope of reasonable limits as set out in the first section of the Charter. Under this predicament in *R v Oakes* (1986), the Supreme Court of Canada developed the *Oakes* test as a series of guiding steps. The first step determines if the government had a pressing and substantial objective. The following steps consider a rational connection between the objective and the government's actions, the degree of impairment of rights, and the proportionality between the infringement and the objective.

A Pressing and Substantial Objective

When considering the pressing and substantial objective of the POR created under the WMA, judges would be quicker on this step to defer to the executive's reasoning. Lorian Hardcastle notes that very few cases fail this stage of the *Oakes* test (2020, p. 154). The pressing and substantial objective of the government during the October Crisis was, mainly, to respond to the kidnapping of two government officials, find them, and prosecute those who took part in the kidnapping. Former Prime Minister Trudeau assigned "rapid deterioration of the situation" and "the release of the hostages" as reasons for invoking the WMA (Trudeau, 1970, p. 194).

In *Canadian Frontline Nurses,* the judge understood the pressing and substantial objective of the Economic Order and Regulations in 2022 as attempting to bring an end to the Freedom Convoy after concerns about safety and security arose. He focuses less on analyzing the pressing and substantial objective due to a similar analysis he does earlier in the case in answering the question of whether the threshold was met to consider the Freedom Convoy and emergency as defined within the EA. While he did not find that the Freedom Convoy met that threshold, he agreed with the government's concern about the rise of unrest and dangers to the safety and security of people physically affected by the Freedom Convoy.

Similarly, the pressing and substantial objective of the POR would be met due to the status of the victims kidnapped by the FLQ, as well as the violent

events leading up to the kidnappings (Clément, p. 162). The kidnapping of the Quebec government official, with the intention of kidnapping him because of his status as a government official, expresses a direct attempt to attack the legitimacy of the government, creating social and political instability that threatens the foundation on which Canada, as a national body, stands on. Most notably, the kidnapping of the British trade commissioner creates an international relations crisis that puts pressure on the Canadian government to strengthen its exercise of power in the search for the trade commissioner.

Rational Connection

On the question of rational connection, Hardcastle finds a conflict between academic literature and the number of cases that fail at this stage of the test (Hardcastle, p. 154). She notes that consensus on the role of this stage finds it unimportant in comparison to the rest of the stages in the *Oakes* test, but data shows that a considerable number of cases fail to determine a rational connection between the objective of a law or government action and the consequent harm (p. 154).

In the case of the POR, I believe there is a rational connection to be found between the objective and the Regulations themselves. Censorship of communication in favour of the FLQ, specifically targeting the public distribution of the FLQ's manifesto, rationally connects to the objective of the government making efforts to find the kidnapped victims. One of the demands of the FLQ in their conditions for releasing the hostages was for their manifesto to be publicly distributed to gain attention to their cause. Though I will not discuss negotiation tactics in this paper, it can be assumed that the government did not want to give in to the group's demands as part of their strategy to bring back the kidnapped officials. Additionally, association with the FLQ might signal to the government that the kidnapping efforts are being aided both physically and ideologically, getting in the way of their rescue attempts. The searches, arrests, and detainments can be argued to rationally connect to the overarching objective of finding the kidnapped victims as it allows the investigation process to run much faster without having to answer to the red tape of warrants and protective measures. The pressing harm on the international relations between Canada and the United Kingdom could explain the incentive to override individual rights in favour of speeding up the investigation process.

Minimal Impairment of Rights

As Hardcastle points out, the minimal impairment stage of the *Oakes* test holds the heaviest weight in court rulings, and is the stage judges are most focused on analysing (p. 177). Even in cases where a law fails to pass either of the first two steps of the test, judges will continue to this stage of the test (p. 177). If the law passes the minimal impairment stage, but not the first two stages, judges will rarely continue to the last stage (p. 177).

Similarly, the judgement in the *Canadian Frontline Nurses* case scrutinizes the Economic Order and Regulations much more harshly at this stage of the *Oakes* test, where more favour is given to the Governor in Council for the first two stages. The basis of the Charter infringements comes from how Charter rights were infringed rather than why they were infringed. This judge found that the Economic Order and Regulations violated sections 2(b) and 8 of the Charter, only two of the five Charter rights considered. Using his analysis as a jumping-off point for the minimal impairment test in the analysis of the POR, the Charter rights infringements during the October Crisis do not pass this stage of the test.

In *Canadian Frontline Nurses*, the judge found section 2(b), freedom of expression, to be infringed by the overbroad scope of the regulations created under the EA (*Canadian Frontline Nurses v Canada*, 2024, para. 208-309). Though they were not the focus of enforcement efforts by police, the possibility that peaceful protesters may have been lumped together with those who were participating in the blockade based on the wording and definitions within the special regulations, as well as the nationwide application, caused an unjustifiable infringement on peaceful protester's freedom of expression in certain public spaces.

By targeting any expression of sympathy for the FLQ and moderating any public communications about the FLQ as to not allow growth in public sentiments of sympathy, the government created overbroad measures targeting more than support for the violence that the FLQ were conducting. Sympathy with the FLQ was not confined to explicit support for Quebec to separate from Canada, nor with the harm done to the kidnapped government officials or any of the previous violent acts they conducted prior to the FLQ Crisis. Sympathy with the FLQ also looked like sympathy for the disconnect that people in Quebec felt with the rest of Canada and, while they would not condone their actions, might have understood the emotions at the root of the FLQ. While the point of targeting sympathy with the FLQ was most focused on stopping the ideological spread of the FLQ, the censorship and persecution of people for expressing their beliefs, without any harmful actions, was overbroad. The generalized definition of

an FLQ member or associator under the special regulations allowed the authorities to categorize people as FLQ members too easily. The alternative action the government could have taken was to constrict their definition of persons they were targeting, so that their focuses were on the specific FLQ members that were taking part in the kidnapping event, as opposed to targeting the entirety of the FLQ and anyone that remotely sympathized with their cause.

On application of the minimal impairment stage of the *Oakes* test to the section 8 infringement in *Canadian Frontline Nurses*, the judge found that a failure for an objective standard to be defined and satisfied before freezing bank accounts caused the infringement that could not be saved by section 1 (*Canadian Frontline Nurses v Canada*, 2024, para. 341). The economic measure of bank account freezing was not minimally impairing because it affected innocent people connected to joint bank accounts and there were no initiatives to correct this overreaching power (para. 357). Additionally, as with the infringements on section 2(b), the judge found that there was no formal process or standard to determining who the special measures applied to, leaving it up to the informal judgements of individual authorities (para. 358).

The ability to search, seize property, and arrest people without warrants under the POR created underdefined and overbroad powers that unduly affected people disconnected from the actual kidnapping of government officials that started the Crisis. Similar to the judge's finding in *Canadian Frontline Nurses*, the lack of stringent definitions and standards for determining who was open to prosecution allowed for authorities' discretion to apply FLQ association broadly. This blanket categorization escaped the purpose of finding the kidnapped individuals and the perpetrators, instead punishing people for their beliefs and soft association. A more minimal impairment would have seen the POR targeting FLQ members specifically implicated in the kidnappings rather than the FLQ in general. The scope of association would also be limited in categorizing people unrelated to the kidnapping itself.

Proportionality

At this stage of the test, proportionality has already been considered throughout the previous stages. As Hardcastle notes, considerable number of cases do not even mention proportionality in their analyses (p. 186). Reflecting this sentiment, the *Canadian Frontline Nurses* case lacks an explicit discussion on the proportionality of the objective and the harm caused by the Economic Order and Regulations, though it is understood that the financial harm caused by the

Economic Order outweighs the benefit of reprimanding participants in the organization of the Freedom Convoy. It is also noteworthy that the scope of the emergency measures during the Freedom Convoy reached every corner of Canada, though the locations actively affected by the Convoy were constrained.

The POR follow this same national reach. The measures placed in response to the FLQ's actions were being enforced nationwide, punishing association and censoring communications of Canadians in all provinces and territories, as shown by the legislation on teacher bans in B.C. and the monitoring and punishing of university newspapers all over the country.

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