Constitutionality and the Charter
The Judiciary vs. Framer’s Intent

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For decades there has been controversy surrounding many of the Supreme Court’s judgments regarding equality rights, specifically those concerning sexual orientation. The debate stems from whether the Supreme Court has upheld basic civil and human rights through its interpretation of the Charter and the inclusion of sexual orientation leading to a more comprehensive and universal understanding of democracy, or whether this instance exemplifies a growing judicial tendency to define the Charter, rather than interpret it, moving Canadian society away from "framer's intent." In this sense, democracy is to be understood as the unilateral acceptance of civil rights, free from judicial discrimination and infringement by the political system and legal system. Since 1982, the Supreme Court has faced critics from all sides of the political spectrum, many claiming the court has weakened the Charter, and as a result, Canadian democracy. However, as this paper will examine, there is an overabundance of data disproving the framer's intent argument and justifies the legitimacy of the Court as the guardian of the Constitution. This essay will argue that the Supreme Court has upheld democratic universality through its modern interpretation of the Charter with regards to sexual orientation and equality rights, and that the Court has been an unbiased yet authoritative mediator between the ever-evolving Canadian society and the fundamental laws that govern it. Specifically, I argue that the analogous grounds of Section 15 justify the need for a modern interpretation of the Charter, and that judicial discretion simply allows for the protection of our modern society. As well, this essay finds that in most cases the Court’s use of its remedial powers has been in reaction to the shortcomings of the legislature, as seen in cases such as Vriend v. Alberta [1998]. Finally, we will examine the case of Egan v. Canada as an example of the Court upholding the fundamentals
of law and remaining unbiased while extending the definition of equality rights. In the latter case, the argument made is that while the Court determined that sexual orientation was equal rights issue, it remained definitive on the issue of spousal rights and upheld the legal precedence regarding the definition of a spouse. The Court will always face contention within our political system; especially from those who feel its decisions oppose their own political beliefs and argue that democracy is jeopardized by a powerful judiciary. However, we must understand that in the case of equality rights, specifically sexual orientation, the Court has been a frontrunner among the institutions willing to protect individual rights and freedoms, while ensuring that the Charter is both protected and protects the public equally.

The idea of “framer’s intent” has been brought up by many political critics. This is the belief that the ‘framers’ or creators, of the Charter of Rights created the doctrine with an underlying set of rules or basic principles that all forthcoming laws must abide by, and as such, Canadian society must also adhere to. This notion stems from the belief that laws should not be malleable or at the very least quite difficult to change given the political whim of whatever party is sitting in Ottawa. It can be agreed that our laws, for the most part, must not be easily changeable; if they were every political party holding a majority government could manipulate the laws to enforce their mandate. However, it must be noted that certain laws must not be absolute as well and that in many cases society's conventions are self-benefiting and may call for amendments to certain statutes. This argument of course refers to the inclusion of sexual orientation as part of the equality rights section of the Charter. While some may argue that the acceptance of conventions as laws would be detrimental to society, one cannot help but feel as though conventions are a product of society, much like the laws that govern us as well. The
acknowledgement of equal rights in general was based on societal evolution and the growing calls for the need to protect people from segregation and discrimination based on a variety of factors, and as a result it became law. The point here is not to generalize, however, one can make the argument that most of the laws governing us have grown out of society’s acceptance of certain norms and standards. Society plays a profound influence on Canadian law and it is hard for critics to suggest that our laws are set in stone and are being contorted by the court. Miriam Smith explains that prior to the Charter’s creation, despite their growth in numbers, gay and lesbian organizations had been unsuccessful in obtaining human rights protections.\(^1\) However, after the actual definition of equal rights through the Charter, these groups gained recognition and their numbers grew, eventually allowing them to advocate in greater numbers for legal protection.\(^2\) The constant modernization is evidence that people have become more accepting of former taboo issues, which in this case deal with sexual orientation, and as such the laws adapt to these new societal customs. The role of the Supreme Court is to oversee and ensure the constitutionality of these laws and adapt them accordingly, in an attempt to advance the state of unilateral democracy.

In the following section, I suggest that the concept of framer’s intent is inherently flawed. I refute the belief that the drafters of the Charter believed it should be a fixed document, closed to any interpretation. Section Fifteen of the Charter lists certain grounds for protection against discrimination, however the list is not absolute, and there exists what are known as “analogous grounds”, for which individuals may be protected as well. This suggests that when drafting the Charter, the framers may have listed key factors of equality, however, the list is inherently

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\(^2\) ibid.
incomplete and other factors may be added at a later time if deemed to be similar. These included, but are not limited to issues of equality, freedom from discrimination, marriage rights, and citizenship. As Anne Bayefsky has analyzed, “The legislative history of Section 15 reveals little positive conception as to the meaning of equality. What emerges is a picture of dissatisfaction with the past, a desire for change and few ideas on the part of the drafters as to what the future should hold”.³ The argument made here is that the very framers of the Constitution acknowledged that society would evolve and there would be a need for a modern interpretation of the laws. By leaving room for further interpretation it is an admission on the behalf of these individuals that the Charter is imperfect and would need to modernize with society eventually. Bayefsky goes on to state that “in [interpreting] section 15 it is important to probe the full potential of its language”.⁴ One can argue that the very creation of a Charter is evidence that society had progressed and many felt that there was a need to protect the rights or individuals through legislation, something that may not have been as pertinent an issue in the past. Therefore, the argument supporting framer’s intent and criticizing of the “living tree approach” is nullified by the fact that the framer’s version of the Charter recognizes certain analogous grounds and bestows remedial powers upon the judiciary (an issue to be discussed later). If the argument against this is that framers’ intent is being ignored, then one must wonder why the framers created the Charter as such, allowing for open-ended discussion, interpretation, and modernization. One must consider the reasoning behind the Court’s decision to incorporate sexual orientation as a protected ground under equal rights. As Anne Bayefsky has analyzed, one must consider which factors separate what should and should not be included under equal rights

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⁴ ibid
clause.\textsuperscript{5} She examines the nature of equality rights in Canada under the \textit{Charter}, and explains that while there are certain grounds that must be protected against discrimination, there are also a variety of factors that may not fall into this category. The Supreme Court helps define these characteristics. She explains that it is the role of the judiciary to define equality rights in the Charter, which, in fact, is one of its most difficult tasks.\textsuperscript{6} Miriam Smith wrote that, “the entrenchment of the \textit{Charter} in 1985, and, in particular, the coming into force of section 15 in 1985 – eventually attracted the mobilizing energies of the lesbian and gay communities… during this period, the lesbian and gay communities in Canada’s urban areas grew substantially and many more lesbians and gays chose to live their lives out of the closet”.\textsuperscript{7} She goes on to state that the cultural life of the numerous Canadian communities grew because of this.\textsuperscript{8} This analysis is evidence that not only did the Supreme Court enhance equal rights for these individuals, but the original \textit{Charter}, the one drawn up by the framers themselves, both responded to the society of the time but also led to its evolution. The evidence indicates that the \textit{Charter} was meant to ensure the equality of all persons, however, sexual orientation being a social taboo and not as accepted in society as today, was omitted at the time. This, however, does not mean it was never to be protected through section 15, which is why the role of the Supreme Court is to oversee and interpret the law, based on what civil and human rights, and in accordance to the just standards of law.

While the analogous grounds of Section 15 have allowed the Court to extend the definition of equal rights, it is important for us to analyze the actual powers allowing the Court to

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\item \textsuperscript{5} Bayefsky, \textit{Defining Equality}. 110.
\item \textsuperscript{6} Bayefsky, \textit{Defining Equality}. 106.
\item \textsuperscript{7} Smith, \textit{A Civil Society}? 73.
\item \textsuperscript{8} ibid.
\end{itemize}
do so. The following addresses the remedial powers of the Supreme Court and argues that in most cases, the Court’s use of these powers has been in reaction to the limitations the legislature has put on Canadians by refraining to include certain rights in their decision-making, notably that of sexual orientation. Under Section 24(1) of the *Charter*, those who feel their rights have been infringed upon may seek a remedy from the court.\(^9\) In certain cases, such as *Vriend v. Alberta* [1998]\(^10\) and *M v. H* [1999]\(^11\), the Supreme Court simply used its remedial powers to enhance the *Charter* both for the benefit of society and while remaining within its constitutional boundaries. When we are asked whether the Supreme Court has drifted away from framer’s intent by incorporating sexual orientation into the *Charter*, we must answer no because the court has only acted within the boundaries of framer’s intent, as it was the framers themselves who gave the courts the power to remedy instances of individual infringement. Mark MacGuigan has analyzed both judicial decision making and activism and states that, “in spite of the judge’s role as a legislator, justice must be administered according to law, not according to the judge’s individual sense of justice”.\(^12\) The point here is that the courts are not making laws according to their individual beliefs; they are working within the limitations placed upon them to advance the law and ensure its advancement.

For the framers to include such remedial powers would have to mean that these individuals knew that there would be future problems and instances of discrimination, therefore they placed the responsibility of rectifying these problems on the courts. One can argue that the interpretation of equality rights, specifically those concerning sexual orientation, is better off

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\(^9\) Canadian Charter of Rights and Freedoms, s. 24(1).
\(^12\) Mark R. MacGuigan, *Sources of Judicial Decision Making and Judicial Activism*. (Toronto 1987) 32-33.
sitting in the hands of the judiciary than the legislature. While the judiciary may be an appointed position, its judges are bound to the law and are mandated with ensuring the advancement of society and the settling of disputes within the confines of Canadian law. The legislature on the other hand, while also being confined to the law, is an ever-shifting collage of Canadian politicians with specific ideals and goals, bound to varying political ideologies. One can argue that sexual orientation would not have been as easily incorporated into the Charter had it been left up to the legislature, as this branch of government often takes much time and debate before coming to a clear decision, especially on such a controversial issue. Additionally, as opposed to the legislature, whose members are consistently running for re-election, the judiciary has little to gain from political intent and the politics of partisanship, including losing votes to unpopular decisions. Furthermore, the judiciary reacts only based on an increased demand or growth in public opinion. The Supreme Court will only take cases based on their relevance to the Canadian public, their precedence (if any), and their importance in the assurance of the fundamentals of justice. Therefore, one must conclude that the framers knew society would adopt new norms (hence the analogous grounds), and that the courts would be the most unbiased body for interpreting the Charter and applying it without anything to gain (hence the remedial powers).

Many pundits who oppose judicial authority have deemed the actions of the Court as somewhat of a hierarchal coup over Canadian law-making, however, as we will examine, the legislature often needs the judiciary to act as a “constitutional watchdog” in order to both advance and impose the law within Canada. Parliament may make laws that are inconsistent with the needs of society and the Court is simply there to ensure the protection of the people and the legitimacy of such laws. Nevertheless there are still those who feel as though the Court is simply
usurping the powers of the legislature. As Andrew Petter explains, “the politics of the Charter suggest that even a seemingly ‘liberalized’ attitude towards equality rights is unlikely to address the underlying causes of social inequality in Canada. At best, courts may lash out at the few remnants of government discrimination”. Petter’s argument outlines the contention faced between the courts and the varying critics of the Charter. His argument here is that the Court’s ability to modify the definition of equality, as per the Charter, still does not modify society’s view on certain issues, and although the Charter does protect homosexuals against discrimination legally, it does not prevent it socially. While he does have a relevant point considering the fact that the Charter does not apply to private relationships, one cannot help but question his reasoning. Extrapolating Petter’s reasoning, the courts cannot prevent discrimination, and thus, why make it illegal at all? This is simply an instance of the backwards thinking of those who feel contention towards the judiciary and take issue with its position as the referee of constitutional politics. In the case of equal rights, the Court may not have been able to protect every person discriminated against because of their sexuality, however, there is still a role for the federal government to create societal standards. Those who feel that this is the legislature’s job should ask themselves then why the legislature never took it upon itself to incorporate sexual orientation into the Charter through an act of Parliament. As well, in cases such as Vriend v. Alberta, why did it take a case going all the way to the Supreme Court for an amendment to be made on such an issue? As MacGuigan writes, “The judge’s legislative competence is narrower than that of the legislator. His/her role is to legislate between the gaps, to fill the open spaces in the law. Thus the rule of law is maintained”.

14 MacGuigan, Sources of Judicial Decision Making. 32.
While this essay has largely dealt with the Court’s ability to interpret the Charter, we have not yet examined the actual event that sparked the sexual orientation and judicial interpretation debate, which was born out of the Vriend case. Although society had become increasingly accepting of homosexuals since the time of the Charter’s inception, there had previously not been an instance where a homosexual person had successfully challenged a violation of their rights. In this instance, Delwin Vriend was fired from his position at a college in Alberta because of his sexual orientation. Vriend argued that this was a violation of his Charter rights, and under Section 15 it was illegal for the school to discriminate against him because of his sexual orientation. The case, which worked its way up to the Supreme Court was a fundamental one for Canadian law because, as previously mentioned, not only did the court agree with Vriend, it took it upon itself to rectify the error in Section 15 which did not include sexual orientation. As Mary Hurley has explained, “the purpose of section 15 is to prevent the violation of human dignity and freedom by the imposition of disadvantage, stereotyping or prejudice and to promote equal recognition at law of all persons as equally deserving”. Therefore, Section 15 forces the courts to ensure that it itself is upheld and that individuals are treated equally as per the Charter. Upon reaching a decision in this case, Justice Iacobucci explained that “groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time”. This reasoning is congruent with the previous assessment that while the legislature may be in charge of enacting laws, it often refrains from making such important decisions, or can take an overwhelming amount of time before deciding

15 Vriend v. Alberta
16 ibid
18 ibid.
to make a decision, especially when concerning the Charter. Margot Young examines the case and the Supreme Court’s position in advancing section 15, something many had been quite critical of prior to this case. She explains that “this conclusion [is] critical for the realization of the full substantive potential of section 15(1) itself”.\textsuperscript{19} She goes on to explain that the Court established positive state obligations as a result of its decision (being that the government was forced to comply with its decision) and had it not had the reasoning it did, the legislative response to such an issue would have been quite minimal.\textsuperscript{20} Therefore, it is important for the courts to step in and ensure that people, such as Mr. Vriend, are not taken advantage of, and that the Charter is not taken for granted. As a result, sexual orientation was not only acknowledged as equal rights issue, but it was now legally enforced, which led to some of the greatest social advancements in Canadian history. The argument that the Court’s decision drifts away from framers’ intent is false and the proof that the framers knew a situation such as Vriend’s was inevitable was when they decided to leave the Section 15 open-ended and gave the courts the power to deal with the issue whenever it came up.

Another case in which the Supreme Court fundamentally advanced the rights of homosexuals with regards to the Charter was M. v. H. In this case, the Court explained that, once again, under section 15 of the Charter, individuals who were in same-sex common law relationships must be treated with the same equalities and benefits of those who are in heterosexual relationships.\textsuperscript{21} Similarly to the Vriend case, some may claim the Court’s decision was an imposition on Canadian law. However, the court did not modify anything already written, and in fact upheld the current standards concerning marriage. In this case, the Court simply

\begin{footnotesize}
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\item ibid, 250.
\item M. v. H.
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explained that the exclusion of same-sex partners from benefits implying their inability to form intimate, economically interdependent relationships, and offending their human dignity was a violation of section 15.\textsuperscript{22} Nowhere in this decision does it modify the definition of marriage, which would have been a far greater amendment to the laws of Canada at the time and perhaps could be claimed as an infringement of power on the part of the court. Martha Bailey explains that in fact, while certain benefits have been granted to cohabitation couple in Canada, most are reserved for married couples.\textsuperscript{23} At the time of her writing (2004), same-sex marriage had not yet become universal within Canada, and she explained that certain decisions of the Supreme Court had advanced the protection of same-sex couples’ rights; however the court refrained from modifying legislation to allow gay marriage, which was the responsibility of Parliament.\textsuperscript{24} That amendment, in fact, did come through legislature in 2005, when Parliament realized that society had evolved and decided to invoke laws that represented these changes, something the courts had been doing for twenty-odd years, but as some say, better late than never. In this instance, Parliament took the initiative to react to a greater public demand of equal rights by tacitly allowing same sex marriage to become legal. This is evidence of the earlier argument that society inevitably modernizes and allows for the blurring of previously definitive lines with time. As such, the Supreme Court ensured that the change was constitutional and in the best interest of the Canadian people, thus following Parliament’s lead and using its role as \textit{Charter} interpreter accordingly.

The final issue to be argued is that when making \textit{Charter} decisions involving sexual orientation, the Supreme Court has done so in accordance with the principles of the law and

\textsuperscript{22} Hurley, \textit{Charter Equality Rights}.
\textsuperscript{23} Bailey, Martha, \textit{Regulation of Cohabitation and Marriage in Canada} (2004), 155.
\textsuperscript{24} ibid
fundamental justice. As previously explained, in the case of M. v H., the Court did rule that
same-sex couples were bound to the same protections as heterosexual couples, however it did not
give them the same rights as spouses, as the law clearly defines what benefits and privileges
spouses can receive as opposed to common-law couples. Perhaps the most infamous case
involving this scenario is that of Egan v. Canada, in which a same-sex common law couple was
claiming that one member should receive the pension benefits of the other. The Court held that
while the protection against discrimination and the benefits of the law apply universally to all
Canadians, the definition of the term “spouse” did not recognize those who were not entered in a
civil union of marriage. The court drew a line between marriage and cohabitation, explaining
that the latter does not justify the right to old-age security under Canadian law.

There have been both disagreements and praise on the outcome of this case from all sides
of the spectrum. Daphne Gilbert explains Justice Claire L’Heureux-Dubé’s reasoning on this
case, explaining that “her approach would de-emphasize the enumerated and analogous grounds
in section 15, focusing instead on historic disadvantage, social context, and the effects of
discriminatory practices”. She notes that Justice L’Heureux-Dubé came up with her own set of
guidelines for an appellant to follow when contesting an infringement of section 15: that they
demonstrate a “legislative distinction”, that the distinction results in the denial of one of the
equality rights on the basis that that person is part of identifiable group, and that the “distinction”
is discriminatory by the definition of section 15. As well, Diana Majury writes that, “It is not
clear what the Supreme Court reads into its definition of equality and discrimination…

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27 ibid, 6.
However certain cases suggest that the Court is defining discrimination in terms of negative impact or effects”. The point here is that while the Court has often seemed to neglect rights, it is evident that these justices are decisive and look for infallible reasoning when a case is presented. It is not as many make it seem, that the court is simply presented with a discrimination case and rules in favour of the infringed party. They look for concrete evidence, as well as apply the law to its full extent, and in many cases this has led to sexual orientation being identified as a possible discrimination factor, which is why it should be protected. Nevertheless, in the Egan case, the court remained frank that marriages differed from common-law relationships, and the benefits awarded to one group do not necessarily apply to another, which is a blatant legal standing, not an act of discrimination.

By upholding the definition of spouses regarding sexual orientation and government benefits, the Court demonstrated its unbiased approach, which was neither politically nor morally motivated. It remained frank, explaining that under the law spouses can only receive such benefits, and did not discriminate based on gender or sexual orientation. However, by acknowledging equal rights regardless of one’s sexual orientation, we can surmise that this was still somewhat of a social victory for same-sex individuals. As well, those who argue that the decision is flawed because same-sex marriage was not legalized at the time, see their arguments put to rest as this decision was one in a series which advanced same-sex couples’ rights and their voice within Canadian society. As such, one can argue that this inadvertently led to the 2005 legalization of gay marriage in Canada. However, with regards to framers’ intent, one must maintain the argument that the Court did not stray away from its powers and the official law

under the framers, and as for the eventual legalization of same sex marriage, the decision was
Parliament’s, and not that of the Court, which leads one to argue that contention between the two
should remain at a minimal level.

The political discussion of sexual orientation and equal rights has caused much
controversy and consistently led to great debates, from within the judiciary, between the Court
and Parliament, and among constitutional critics alike. The consistent belief that the Court has
quashed framer’s intent is inherently flawed because both political and societal evolution as well
as Charter definition disproves it. The fact that section 15 has remained open-ended with its
analogous grounds stipulation, as well as the remedial powers given to the court in the original
Charter refutes the belief that the Court has acted outside of its powers. As well, the legislature’s
refusal to clearly define equality rights and its ability to gain from enacting, or refraining from
enacting certain equality measures, proves that Parliament is perhaps more biased and politically
motivated when it comes to dealing with taboo legal issues. Finally, the Court’s ability to define
the law clearly, the rights of individuals, its continued dedication to the law and the Charter, and
its unbiased approach to decision-making proves that the judiciary is best suited to define and
maintain the continued protection of both the Charter and Canadian society. Therefore, one
cannot help but to reject both conclusions: that the Supreme Court is not flawed and that sexual
orientation is an equal rights issue. For to adhere to such an analogy while neglecting the needs
of an evolving society, is to contribute negatively to that very society and to go against the needs
of its people.
Bibliography


