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The Charter's Revolutionary Impact on Gay Rights in Canada

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The differing paces of gay rights progress around the globe, even between otherwise culturally and politically similar states, raises important questions regarding why this disparity occurs. Previous literature on the attainment of gay rights protections in Canada have highlighted the great impact had by the addition of the Charter of Rights and Freedoms to the Constitution Act, 1982. Additionally, comparative studies have argued that it is the entrenchment of the Charter which has made the crucial difference between the pace of gay rights in Canada as opposed to other states, such as Australia. This paper argues that, despite not having been explicitly enumerated as a protected ground, gay rights have in fact been progressed by the Charter in three ways.

This paper will first review the newly opened path for rights litigation brought forth by the Charter's empowerment of the courts. Secondly, the conflicting effects that the litigious approach had on the gay rights movement will be considered, with specific note of its effect on the question of gay liberation or assimilation. Finally, this paper will discuss the ways in which the Charter's impact is still of importance to ongoing and future gay rights cases concerning the balancing of opposing rights, particularly in its recognition of sexual orientation as having similar importance to other protected grounds.

Keywords

Canada, Constitution, Gay Rights, Gay Liberation Movement

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The addition of the Canadian Charter of Rights and Freedoms to the Constitution Act, 1982 presented a profound change in the approach to human rights and the freedoms afforded to individuals in Canada. The Charter entrenched "individual rights in the Canadian constitutional system… [allowing] the judiciary to protect individual rights from governmental interference" (Sedler, 1984: 1202), thus empowering the courts to deem legislation unconstitutional should it violate certain now-protected rights. Of particular significance is section 15 of the Charter, which concerns itself with equality rights and part of which states that all have "the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (Constitution Act, 1982). It will be argued that the rights of gay and lesbian Canadians have been aided by the entrenchment of the Charter and that, although this assurance of equal rights based on sexual orientation had not been explicitly stated in the text, it has directly contributed to the progression towards the achievement of gay rights. This will be examined by first reviewing the newly opened path for rights litigation brought forth by the Charter's empowerment of the courts, then by considering the conflicting effects that the litigious approach had on the gay rights movement, and finally by discussing the ways in which the Charter's impact is still of importance to ongoing and future gay rights cases concerning the balancing of opposing rights.

A Revolutionary Opportunity for the Rights of Gays and Lesbians

Section 15 of the Charter, while excluding any mention of sexual orientation, had been left sufficiently broad that it allowed for gay rights activists to push for litigation that then consequently led to sexual orientation being 'read into' the Charter. It will be argued that, in this way, the existence of the Charter opened up a new avenue for groups to pursue equality.

As well detailed in the works of Miriam Smith, the Canadian Charter of Rights and Freedoms "fundamentally altered the equation" (1999: 109) not only for gay rights and their legal protection but for the way in which rights claims and equality-seeking were addressed in the Canadian political system. This is due to the Charter's outlining of both the rights of individuals as well as the way in which those rights are to be ensured. Section 24, titled 'Enforcement', states that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances" (Constitution Act, 1867). The inclusion of this section was a dramatic change that provided for a new centralization of the protection of human rights and empowered the courts by equipping them with the ability for judicial review of decisions made by the legislative and executive branches, should they be seen to be in violation of the Charter's protected rights (Johnson and Tremblay, 2018: 139). It also allowed for Charter cases, in which individuals or groups may bring forward a case with the view that the government has violated one of their Charter-enumerated rights (Smith, 1999: 85). As will be explored shortly, it is these cases that forged gay rights in Canada.

Johnson and Tremblay, in their comparative analysis of Canada's and Australia's roads to gay rights, cite the Charter as one of the key factors contributing to Canada's earlier adoption of these rights and that "the lack of a Charter or Bill of Rights in Australia… ruled out the lesbian and gay movement predominantly pursuing litigious strategies and therefore made issues of political will even more important" (2018: 152). Australia, which lacked a bill of rights, did not allow activists a path to claim additional rights through the judicial system (Bernstein and Naples, 2015: 1232). Instead, and as Smith argues would have been the case for Canada had the issue not resided with the courts, "the most likely route of change… would have been through organizing

within the political parties in order to influence one of the (potentially) governing parties… or a broader-based lobbying and grass roots mobilization effort" (2005b: 346). Rather than subjecting gay interest groups to the task of taking on individual political parties and leaders in the hopes of passing sweeping pro-gay legislation, the Charter provided all interest groups the ability to "articulate their legal claims in the language of rights… [and] to use litigation as a proactive reform strategy" (Manfredi, 1993: 91), making it "the ultimate weapon of political outsiders" (93).

However, while the existence of the Charter allowed this possibility for enumerated rights, the definition of which characteristics fell under these rights was unclear and of contentious debate. Sexual orientation, although weakly petitioned for, was purposefully left out of the text of the Charter and was not explicitly stated as an enumerated ground (Smith, 2005b: 335).

For this reason, whether the named grounds were illustrative or restrictive was of crucial importance to whether rights claims could even be made by gays and lesbians. The case of *Damien v. Ontario Racing Commission* (dealing with the firing of an employee based solely on his homosexuality) is an example of one such case which was ruled against due to the Ontario Human Rights Code not containing specific provisions concerning discrimination on the grounds of sexual orientation (Bruner, 1985: 460). Numerous times, it was ruled that sexual orientation did not fall under the ambit of either sex, family status, or marital status by the courts under the respective human rights codes of the provinces (Lahey, 1999: 11-13). As expressed by Arnold Bruner in his 1985 essay, just as the jurisprudence of already existing anti-discrimination legislation had "little chance of succeeding without sexual orientation being named specifically" (462) so too did the newly introduced Charter. Bruner argued that in order for orientation to be recognized and protected, "it [would] have to be demonstrated that the section is broad enough to include sexual orientation despite… not [enumerating] the ground specifically" (463).

As Roach notes, the Supreme Court's ruling on the *Andrews* case, in which a claim of discrimination based on citizenship status was put forth, is of high importance to the question of which groups fall within the scope of section 15 (1993: 177). *Andrews*, as the first Supreme Court case dealing with section 15, was instrumental to future cases in its approach to the question of enumerated grounds, to which Justice McIntyre wrote that "the grounds of discrimination enumerated in s. 15(1) are not exhaustive [and that] grounds analogous to those enumerated are also covered" (Supreme Court of Canada, *Andrews v. Law Society of British Columbia*, 1989). Roach continues by arguing that by incorporating the constitutional rights talk into politics, public debate is enriched, and societally unpopular minorities will be treated more even-handedly (1993: 181-182).

Bruner writing in 1985, the year that section 15 came into practice, stated that "homosexuals, as a class, are singled out for unequal treatment as a principle of official policy" (466) but argued that "the Charter's section 15 has the potential for a profound change in this pattern" (466). Indeed, the mere existence of the Charter, as described above, had come to revolutionize the approach of individuals seeking their newly centralized and judicially backed rights and had made it the case that litigation was the path which presented the least political resistance. It is this approach to litigation, which will be examined in the following section, that was a catalyzing force behind the emergence of a gay rights community of legal activism.

The Shift in the Gay Rights Movement

With the introduction of the Charter and the growing legal successes for gay rights, the lesbian and gay communities saw a shift in focus from gay liberation to judicial equality. However, while this had created some ideological divides in the community, it had also managed to secure a structured foundation of activism as well as a gay identity within the heterosexual public sphere.

The entrenchment of the Canadian Charter of Rights and Freedoms was by no means the first step in Canadian politics towards the goal of ensuring the protection of human rights. In fact, many provinces took it upon themselves to establish provincial human rights codes and commissions throughout the 1970s, all of which addressed discrimination, although none other than Quebec had included sexual orientation as a prohibited ground (Smith, 2005c: 49).

However, the Charter, as well as the Supreme Court decision recognizing section 15's application to grounds analogous to those enumerated, spurred a great deal of successful litigation. Rights talk emerged as a way for activism to achieve social change (Smith, 1999: 109). The gay liberation movement of the seventies, as Smith describes, "had assumed that the defence of the rights of lesbians and gays… could best be achieved by the creation of lesbian and gay community and community institutions" (110). Yet with the emergence of the Charter's protective abilities, which in the *Egan* case were used to 'read in' sexual orientation into both section 15 itself and human rights codes, there was a fundamental shift from the consciousness-raising efforts of the seventies' rights movement to the eighties' drive for recognition and inclusion in the formal spheres of law and society (80). The slow, rarely successful litigious efforts of the gay movement had remained sluggish until courts began applying the equality guarantees of the Charter to sexual orientation (Lahey, 1999: 5). This revelation saw a growing view of rights as a tool for the strengthening of political identity and personhood before the law (Smith, 1999: 76).

This is not to propose that the core objective of fostering lesbian and gay community was lost but that the operations of activist elements had been realigned in pursuit of human rights at the cost of the original goals of liberation held by early gay and lesbian feminist groups (Smith, 2005b: 348). In fact, this shift worked to mobilize a stable structure of activists in the form of groups seeking legal rights. EGALE – one such organization focused on the Charter and the

attainment of gay rights – emerged as a key player in terms of using the Charter "as a political resource to mount lesbian and gay equality rights claims" (Smith, 2005b: 247).

There had grown a divide in the gay rights movement, as outlined by Warner, between those inclined towards liberationist and assimilationist objectives, the latter of which was greatly aided by the introduction of the litigious pathway towards calls for equality (as opposed to liberation) forged by the Charter and the growing number of Charter cases (2002: 215). This can be seen through the primary focus of organizations, such as EGALE, as evident from their stated objectives. EGALE described itself as seeking "equality for gay men and lesbians under Canadian law" (Warner, 2002: 217), lacking mention of gay liberation or the fight against oppression and homophobia. Furthermore, gay rights claims argued based on the relative disadvantage of lesbians and gays compared to their heterosexual counterparts with emphasis on the similarities of gays rather than what makes them distinct (Smith, 2005a: 84).

However, while the legal goal was the end of discrimination and the establishment of constitutionally backed equality, those advocating for liberation were still greatly vindicated, as homosexuality had broken through to the public fore (Smith, 2005b: 215). Additionally, while perhaps not appeasing to liberationists within the gay rights movement, an appeal to sameness was likely to better the chances of gay acceptance within the heterosexual public. Understandably this is directly opposed to the liberationist way of thinking, which, as argued by Smith in her analysis of LGBT collective action groups, viewed EGALE and similar litigious activism to have come under the control of neoliberalism which held the aim to "govern, manage, and defuse contentious collective action" (2005a: 79) and is used to encourage "institutions and individuals to conform to the norms of the market" (Larner, 2000: 12).

In this degree, the Charter had impacted the gay rights movement in its approach and objectives, which shifted from the goal of breaking free of norms imposed by the heterosexual establishment to redefining their movement within the terms of law and equality. In doing so, the movement presented an arguably 'friendlier' face to the generally opposed Canadian public through its appeals to sameness and thereby gradually gained both sympathy and support.

The Ongoing Balancing of Newly Equivalent Rights

The final point on which it will be argued that the Charter aided the advancement of the gay rights movement in Canada is its positioning of rights pertaining to sexual orientation as residing in the same class as other more established rights. In this regard, the Charter allowed for a new view which affirmed the importance of one's freedom to sexual orientation just as to the enumerated characteristics.

Although having successfully won numerous cases relating to discrimination against gays and lesbians as well as same-sex marriage having become the national law of the land since 2005 (Civil Marriage Act), questions on the limits of the Charter's protections of sexual orientation have continuously arisen and been challenged. And while the topics of employee firing based on sexual orientation have seemingly been left behind in the realm of controversial legal discourse and settled for good, more complex issues such as the interaction of competing Charter values have continued to take shape. These in turn have and will in the future challenge the Court to "change in its views of the content of rights and the acceptable limits to rights" (Swinton, 1992: 197).

One such example is the case of *E.T. v. Hamilton-Wentworth District School Board*, in which a man of Greek Orthodox faith alleged that, through the board's denial of his request for accommodations based on his religious "obligation to protect his children from 'false teachings'… including, but not limited to, moral relativism and issues around human sexuality" (Ontario

Superior Court of Justice, 2016), that his rights to freedom of religion had been infringed upon. In the lower court decision, Justice Reid held that while there had been an apparent infringement of E.T.'s section 2(1) right to freedom of religion, the board had proportionally balanced the relevant Charter rights and had favoured inclusion over isolation, which "[highlighted] the limits of an individual right to freedom of religion within a publicly funded education system" (Schuitema, 2017: 244-5). While Schuitema's analysis of this case did not thoroughly consider the influence of such a case on conflicting Charter rights, Epp's examination of it and the subsequent appeal case does. In the appeal decision, Justice Sharpe did not find an infringement of the Charter's right to freedom of religion and further asserted that a hypothetical acceptance of the requested accommodation by the board would have acted against the intended diversity and inclusive nature of the curriculum (Epp, 2018: 201). Epp states that this ruling "helps to outline the parameters of competing rights" (203).

In writing on the issue of conflicting Charter rights, Szurlej notes the distinction made by some between 'balancing' and 'reconciling' opposing human rights and specifically mentions a situation in which a same-sex couple's section 15(1) right to marriage without discrimination based on sexual orientation may be seen to infringe on the section 2(a) right to freedom of religion of a spiritually opposed marriage commissioner (2015: 182). While the question of the approaches to either balancing or reconciling Charter disputes lies outside of the scope of this discussion on the impact this has on gay rights, it is a helpful aid in understanding that the mere existence of section 15 (and the 'read in' addition of sexual orientation) have made it the case that such a question is a question to begin with.

Therefore, while the analogy between religion and sexual orientation, for example, may to some be objectionable, particularly to those of homophobic religious beliefs, the Charter has laid

these to be rights of non-hierarchical importance (Wintemute, 1995: 251-2). Thus, sexual minority groups such as gays and lesbians have been benefited by the Charter's adoption in that it has allowed for sexual orientation to be considered alongside other values, like religion, as of similar importance and therefore a matter for proportioned treatment under legal adjudication.

Conclusion

By recognizing the transformative nature of the Canadian Charter of Rights and Freedoms on the gay rights movement, it is difficult to reject its importance in advancing the constitutionally supported legal rights of gay and lesbian Canadians. Firstly, through its establishment of a path for gay rights litigation on the foundation of human rights claims, then followed by the effects on the reordering of the gay liberation movement into a more procedural and structured movement directly participating in the formal structures of politics and the law, and then through its securing of a position for sexual orientation protections among other recognized rights, the Charter has greatly evolved and advanced gay rights in Canada.

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