

This is a brief  
submitted by  
Peter Maloney, as an individual,  
to the  
Standing Senate Committee on Human Rights  
for their consideration  
in their study of  
Bill C-66

*An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts*

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The Bill before you has several significant gaps which need to be closed in order to achieve the intended result of dealing with historically unjust convictions of members of the LGBTQ community resulting from discrimination on the basis of sexual orientation, i.e. same-sex sexual offences.

This brief is submitted in an effort to assist your Committee in improving the Bill by pointing out some of those gaps. The submissions are based on years of experience in legal practice in the Toronto gay community.

I was the first openly gay lawyer in Toronto, called to the bar on April 15, 1981, just two months and 10 days after police raided several gay male bathhouses in Toronto, conducting what was then the largest mass arrest in Canada since the invocation of the *War Measures Act*.

In those circumstances, gay community demand turned what was intended to be a general practice into an almost exclusively criminal law practice, dealing mainly with sex-related cases: Gross indecency, buggery, indecent act, indecent assault male, bawdy house found-in, bawdy house inmate or keeper, etc.

### **Expungement: Effects**

The first gap I would point out is in section 5(1) which reads:

5 (1) If the Board orders expungement of a conviction in respect of an offence listed in the schedule, the person convicted of the offence is deemed never to have been convicted of that offence.

The section refers only to convictions. The Ontario Court of Appeal, in *Danson*, determined early on in the history of discharges as a sentencing alternative, that a discharge following a finding of guilt was not a conviction.

So, for example, the law permits employers and others to include the following question on various sorts of application forms: "Have you ever been convicted of an offence for which you have not received a pardon?" Thus, if a person were found guilty of an offence but was granted a conditional or absolute discharge, they could answer "no", truthfully and lawfully.

Nonetheless that person's finding of guilt and the charge and disposition would be part of a criminal record, and would be searchable through the CPIC (Canadian Police Information Centre) data base, because the charging police force would have submitted that information.

Other agencies, including border services in other countries, may ask more broadly inclusive questions of arriving Canadian visitors, such as: "Have you ever been arrested?"; "Have you ever been charged with a criminal offence?"; "Do you have a criminal record?"; "Have you had a criminal record?".

This section of the Bill could be strengthened by having all of those instances dealt with in the deeming provision in section 5(1), e.g. "If the Board orders expungement in respect of an offence listed in the schedule, the person who was charged with that offence is deemed never to have been arrested, charged, pled guilty, tried or found guilty, or convicted of that offence, or ever to have had a criminal record in respect of that offence."

## **Destruction and Removal**

While the RCMP maintains the CPIC data base of criminal records, there are many other data bases and records containing information about charges, trials, findings of guilt etc. Those include provincial and municipal police forces, provincial and federal court record systems and files, and provincial, territorial and foreign agencies with which information is shared. While there may be a jurisdictional issue in mandating destruction and removal by those record keepers, it might have made sense to create a federal, and possibly a criminal offence, prohibiting storage or communication of the contents of those records in cases where expungement has been ordered.

## **Schedule**

There are gaps with respect to the content of the Schedule. I recognize that these could be cured later by a subsequent Regulation but that regulation-making power is severely restricted by requiring that the activity no longer constitute an offence under an Act of Parliament. That means that, although an activity might still constitute an offence, it might also be discriminatory, and an amendment to the statute rather than a regulation would be required. It would be better to get it right from the beginning by amending the Bill.

### **Counselling to Commit and Conspiracy to Commit**

First, although the Schedule includes both the offence and an attempt to commit the offence, it fails to include conspiracy to commit the offence, and counselling to commit the offence. I have never forgotten the story told to me by an elderly client who saw me in my first year of practice. He said that he had been living in London, Ontario in the late 1950s. He was a working man with a family. He had asked a man, who turned out to be an undercover police officer, to engage in sexual activity. He was arrested and charged with *counselling to commit gross indecency*. The local news media published the charges and his identity. He went to jail, lost his job and his family – just for asking.

During my days as a criminal law practitioner I acted as defence counsel with respect to a number of counselling to commit an indecent act cases. There will be people alive today who have criminal records for counselling to commit gross indecency, buggery and similar offences.

The Schedule should include both conspiracy to commit and counselling to commit the various offences listed.

### **Negotiated pleas**

Section 606(4) of the *Criminal Code of Canada* currently reads:

(4) Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty and, if the plea is accepted, the court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the court.

Gross Indecency and Buggery were indictable offences punishable by up to 5 years in jail and up to 14 years in jail respectively. Because they were indictable offences, accused persons could opt for a

preliminary hearing followed by trial in a superior court with a judge alone or with a judge and jury. As a result, plea bargaining could often lead prosecutors to agree to a plea to “indecent act”, a summary conviction offence. Such a plea limited the maximum sentence to 6 months in jail or a relatively small fine. As time went on, such pleas could result in conditional or even absolute discharges.

The Schedule could be improved by including the situation of individuals who might have “pleaded down” from Gross Indecency or Buggery or Anal Intercourse.

In particular, it could be greatly improved by including the offence of “Indecent Act” in the Schedule.

### **Bathhouses/Bawdy Houses**

The government’s recent apology to the LGBTQ community delivered by the Prime Minister in the House of Commons included the following statement:

“Discrimination against LGBTQ2 communities was quickly codified in criminal offences like ‘buggery,’ ‘gross indecency’ and bawdy house provisions.

Bathhouses were raided, people were entrapped by police.”

The Bill before you does not deal with the offences charged with respect to bathhouses nor the charges arising from entrapment, nor intrusive surveillance activities by police.

Gay Bathhouses are principally a gay male institution, although there have been instances of women-only nights at some bathhouses. Bathhouses are places with facilities such as showers, saunas, whirlpools, steam rooms, pools, exercise areas, coffee shops, lounges etc. Gay bathhouses also have a large number of relatively small, private rooms with beds, lockers and lockable doors. Bathhouses generally admit only male persons, for a fee for a fixed number of hours, with attendants screening for age to keep minors from entering. They are discreet places for men to meet, including men who are not “out” or publicly known to be gay. Men might bring a partner or meet someone while they are there, and engage in consensual same-sex sexual activity.

Section 197(1) of the *Criminal Code of Canada* reads, in part:

common bawdy-house means, for the practice of acts of indecency, a place that is kept or occupied or resorted to by one or more persons;

Section 210 reads as follows:

210 (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

Our courts have, for many years now, used a test of indecency that examines an activity to determine whether Canadians would be willing to tolerate others engaging in that activity.

It seems clear now that the activity in gay bathhouses no longer would be considered illegal. Indeed, it has been many years now since police have laid bawdy house charges against the owners, managers, employees or customers of gay bathhouses.

In the 1981 bathhouse raids in Toronto, the police not only did a lot of damage to the physical premises and arrested a huge number of people, they also “threw the book” at owners, managers, employees and customers.

They charged the customers as “found-ins”. Police called school boards to let them know the identity of teachers who had been charged.

Police charged the owners, managers, and employees with offences such as “keeping” a common bawdy-house, as well as “conspiracy to receive the proceeds of crime”, the alleged crime being operating the bathhouse, and the proceeds being the fees paid by the customers. If any gay magazines were found, the owners were also charged with possession of obscene publications.

I acted as counsel to many men charged with being found-ins. It was a humiliating and traumatic experience for them to be attacked in what they thought of as a safe space where they were entitled to privacy.

The Bill before you would go a lot further to redress wrongs committed against the gay community by including a provision with respect to the charges laid and any findings of guilt or convictions related to bathhouses.

### **Entrapment**

The apology also referred to entrapment by police. There were large numbers of cases on which I acted as defence counsel in the 1980s, where men acted in a manner they were led to expect another man wanted them to act, and then were arrested and charged by the other man, who turned out to be an undercover police officer.

Typically those situations involved two types of charges: indecent act, or indecent assault male or sexual assault. The accused/defendant had been in a place typically frequented by men cruising for other men to engage in sexual activity. The undercover officer would behave in a manner that would lead the person eventually charged to believe that the other person was a gay man looking for a sex partner. The accused/defendant would have responded by either exposing himself to the other person, or by touching the other person. Exposure alone would result in an indecent act charge, whereas touching would lead to an indecent assault male, or sexual assault charge, depending on the offence as it appeared in the statute at the time.

The Bill and its Schedule should deal with these types of situations as well.

### **Pardons and Expungement more generally**

I would hope that the Committee would undertake a study of pardons and expungements more generally in the not-too-distant future with a view to returning the law to an earlier state.