

Homophobia and Homonationalism: LGBTQ Law Reform in Canada

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journals.sagepub.com/home/sls**Miriam Smith***York University, Canada***Abstract**

This article explores the tensions and contradictions between the recognition of same-sex relationships and the development of legal prohibitions against discrimination on the one hand versus the ongoing symbolic and actual criminal regulation of gay sex on the other hand. I describe these tensions as they have unfolded over the last 40 years through the most recent attempts by the Liberal government of Justin Trudeau, elected in 2015, to reform the criminal law, to expunge the record of past criminal convictions for same-sex behavior, and to apologize and compensate lesbian, gay, bisexual, transgender, queer (LGBTQ) communities for past discrimination. I argue that this bifurcated pattern of public policy change and legal reform demonstrates the persistence of political homophobia alongside of homonationalist celebration of queer normativity. By considering the federal government's long-standing failure to reform criminal laws that encapsulate formal-legal inequality of LGBTQ people, the article highlights the persistence of homophobic public policy alongside homonationalist policy discourse and genuine progress in the legal recognition of queer rights. I conclude by considering the implications of this mix for theorizing homophobia and homonationalism in law and policy.

Keywords

Anal sex, apology, Canada, expungement, homonationalism, homophobia, LGBTQ law reform

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Introduction

In recent years, lesbian, gay, bisexual, transgender and queer (LGBTQ) people have emerged into the limelight of politics and policy in Canada as elsewhere. Whether debates over same-sex marriage or the current Canadian Prime Minister (Justin Trudeau) marching in Pride parades, 'gay rights' has become an international signifier of Canadian diversity and tolerance. Yet, as this article will show, Canadian progress in the legal recognition of LGBTQ rights has been accompanied by homophobic public policy that sanctions the symbolic and actual criminalization of anal sex. This article explores the tensions and contradictions between the recognition of same-sex relationships and the development of legal prohibitions against discrimination on the one hand versus the ongoing symbolic and actual criminal regulation of gay sex on the other hand. I selectively describe these tensions as they have unfolded from the 1969 (partial) decriminalization of homosexuality through the most recent round of LGBTQ law reform by the Liberal government of Justin Trudeau, elected in 2015. I argue that this bifurcated pattern of public policy change and legal reform demonstrates the persistence of legal homophobia alongside homonationalist celebrations of queer inclusion. I then consider the implications of this analysis for contemporary theorizing about queer politics and law.

Much discussion of contemporary LGBTQ politics in countries such as Canada emphasizes the role of homonormativity and homonationalism. In this view, advances in LGBTQ rights recognition privilege same-sex couples who are just like straights except for their sexual orientation. They are thus 'normative' but 'homo' and, hence, 'homonormative'. Some discussions of homonormativity also emphasize the link to neoliberalism, seeing the domesticated same-sex couples as contributing to neoliberal values of responsibilization and privatization (Duggan, 2002). Discussions of homonationalism have emphasized the ways in which mainstream LGBTQ politics has linked the pursuit of rights to the celebration of national tolerance in contrast to the racialized other, especially Muslims in the wake of the war on terror (Puar, 2007). Other work has emphasized the racialized nature of mainstream LGBTQ political and legal activism in cases such as Canada's, including the overwhelming dominance of Whites in the movement and the ways in which the movement appropriated the rhetoric of US civil rights in the pursuit of marriage equality (Lenon, 2005, 2011). In the North American context, a number of scholars have recently considered the impact of settler colonialism for the politics of queer movements, exploring the ways in which queer movements have perpetuated the legacies and ongoing practices of colonialism (Morgensen, 2010; Smith, 2010).

In contrast, this article follows in the footsteps of recent scholarship emphasizing the political persistence of homophobia, even in what Browne and Nash (2014: 332) call 'the places where we have won'. By considering the federal government's long-standing failure to reform criminal laws that encapsulate formal-legal inequality of lesbians, gay men, and bisexuals, compared to straights, the article highlights the persistence of homophobic public policy alongside homonationalist policy rhetoric and genuine progress in the legal recognition of LGBTQ rights. I conclude by considering the implications of this mix for theorizing homophobia and homonationalism in law and policy. The concept of homonationalism excludes systematic consideration of legal homophobia and

yet cases such as Canada show how both homonationalism and legally encoded homophobia can coexist. This suggests that more theoretical and empirical attention needs to be paid to the enduring role of legal homophobia even in countries such as Canada that are thought to be exemplars of the unalloyed recognition of LGBTQ rights.

Homonationalism, Homophobia, and Legal Change

The term homonationalism, originating in Puar's *Terrorist Assemblages* (2007), has become a catchall term for activist strategies and government policies that vaunt the acceptance of queer citizens and LGBTQ rights recognition at the expense of racialized others. Writing in the aftermath of 9/11, Puar is particularly concerned with the Muslim other and with the civilizational rhetoric of the Bush administration in undertaking the 'war on terror'. In Puar's terms, LGBTQ legal reform becomes bound up in the normalization of White middle-class same-sex couples, who are viewed as the same as straight couples, and thus deserving of full citizenship and recognition. The racialization of the mainstream movement in the United States and elsewhere is particularly important; through the lens of homonationalism, the mainstream movement is seen as White-dominated and exclusionary, marginalizing the experiences of people of color, migrants, trans people, and the economically disadvantaged. Homonationalism thus serves as a critique of mainstream movement activism and of demands for simple legal equality in countries such as the United States.

The development of the term homonormativity forms an important backdrop to the current dominance of the concept of homonationalism. Schotten's (2016) article points out that the term homonationalism was formed by the merger of the terms homonormativity and nationalism and highlights the work of the late 1990s and early 2000s by Berlant and Warner (1998) and Duggan (2002) on hetero and homonormativity. Schotten retrieves the political context of Duggan's original intervention, pointing out that Duggan used the term homonormative to describe the political stance of right wing gay men in the United States such as columnist Andrew Sullivan who put forward the view that same-sex couples were the same as straights, except for their sexuality, and that they were part of the privatized consumer culture of US life. Lenon (2005, 2011) applies this critique to the same-sex marriage movement in Canada, highlighting its highly racialized presentation, both in terms of the dominance of White same-sex couples in the litigation and in terms of the deployment of the symbolism of the US civil rights movement as an analog for the equality struggles of same-sex couples. While, as Schotten points out, Berlant and Warner (1998) argued that the term homonormative was an impossibility as homosexual life could never be normative in a straight society and while Duggan developed the term homonormativity specifically to refer to the political claims of gay conservatives in US politics, in the years since, homonormativity has emerged as a shorthand for queer assimilation.

In addition to the terms homonationalism and homonormativity, recent scholarship has also focused on the term pinkwashing, which is a political strategy to wash away the bad acts of states by pointing to the positive ways in which they treat their LGBTQ population (Gentile and Kinsman, 2016). As Schotten (2016) highlights, this is linked to a shift in the meaning of homonationalism in Puar and Mikdashi (2012)'s recent work

which, in Schotten's words (2016: 360), 'names a generalized western sexual exceptionalism, wherein the West and/or imperial powers are ascendant because of and in order to further their ostensible protection of gay rights'. The word ostensible points to the problem in using a homonationalist and homonormative lens to understand cases in which there is a mix of types of legal and policy change, some of which continue to stigmatize LGBTQ communities while others celebrate LGBTQ belonging to the nation. This resistance to reforming gay sex laws might be read as reflecting a homophobic approach to law and public policy in which there is continuing stigmatization of queer life. As Zanghellini (2012: 358) explains, 'certain uses of the discourse on homonationalism unnecessarily discredit gay rights discourse and activism' and thus make it difficult to challenge homophobic laws.

A number of scholars draw on the concept of homophobia to describe contemporary political struggles over LGBTQ rights. Bosia and Weiss (2013) coin the term political homophobia to describe a situation that is the obverse of pinkwashing, namely, the use of homophobic attacks on queers as a means of shoring up political support for national governments. However, the use of the term homophobia to describe public policy and law has also been contested. For example, Chamberland and Lebreton (2012: 27) view homophobia as 'a spectrum that encompasses hate and violence but also fear and discomfort . . . toward homosexuality or in the presence of a homosexual person' (translation mine). Therefore, they argue that the term is inadequate to describe the stigmatization of LGBTQ people because it locates the problem as existing within the attitudes of people. Instead, they argue for the use of the term heterosexism as more accurately suggesting the social hierarchy of sexuality, rather than the problem of individual attitudes. Another option is provided by the work of Browne and Nash who trouble the idea of transnational dissemination of LGBTQ rights models by highlighting the opposition to LGBTQ rights in places 'where we have won' (e.g. the United Kingdom and Canada). In their comparison of Australian and Canadian campaigns for same-sex marriage, Johnson and Tremblay (2018) emphasize the lack of political will of politicians in failing to address the legal inequality of same-sex relationships.

Indeed, the long delay in reforming Canadian criminal law to expunge the last traces of discriminatory treatment of gay sex may be taken to reflect a resistance to the full acceptance of LGBTQ people as citizens. Whether it is termed resistance and lack of political will or conceptualized as homophobia or heterosexism, it is clear that such phenomena coexist alongside the homonationalist celebration of LGBTQ rights. A law that specifies a different age of consent for some forms of sexual activity (anal sex) than for others encodes legal discrimination against gay men. I use the term legal homophobia to refer to this type of legalized discrimination. The focus on homonationalism should not be used to obscure the persistence of homophobic public policies or to underestimate the concrete effects of legal change, both in terms of the achievements demarcated by the recognition of LGBTQ legal rights and in terms of the consequence of the failure to obtain legal change. Aside from normative debates on the positive and negative effects of LGBTQ legal reform, the case of Canada demonstrates that, in empirical terms, opposition to LGBTQ rights is not dead, despite the celebrations of diversity and inclusion. Homonationalism and homophobia coexist in the same legal spaces, as the following discussion will illustrate.

Canadian LGBTQ Rights Controversies

Canada is often considered to be in the forefront of LGBTQ rights in the world. In 1969, homosexuality was partially decriminalized, as Criminal Code provisions on gross indecency were amended to permit such acts in private between two consenting adults, 21 years of age and over. In 1977, Quebec became the first jurisdiction in Canada to ban discrimination based on sexual orientation, incorporating this prohibition into its provincial human rights legislation. In 1982, Canada underwent a major constitutional revision, mainly designed to defuse the rise of the Quebec sovereignty movement (Russell, 2017: 353–391). This revision included a constitutional bill of rights, the Charter of Rights and Freedoms (henceforth, Charter), which prohibited discrimination on a range of grounds including sex, race, national origin, disability, age, and others. From the 1980s, there were debates over including sexual orientation under the rubric of the Charter's antidiscrimination clause. In 1995, this occurred as the result of the Supreme Court's ruling in the *Egan* case, a precedent that was followed through subsequent Supreme Court rulings. As a result, discrimination based on sexual orientation was prohibited in all Canadian jurisdictions, federal, provincial, and territorial. While gender identity was included under the rubric of sex in the early period, gender expression and gender identity are now specifically recognized as prohibited grounds of discrimination in most Canadian jurisdictions. In addition, relationship recognition and parenting rights for same-sex couples have been established across Canada, with same-sex civil marriage becoming law in 2005 (Wintemute, 2005).

These policy changes construct LGBTQ people as rights-bearing citizens, able to enforce their constitutional rights under the Charter. This constitutional protection is amplified by the Charter's quasi-mythic status in both English-speaking Canada and in Quebec (Smith, 2007). In English-speaking Canada, the Charter is associated with Canadian nationalism while, in Quebec, it is viewed as an illegitimate federal imposition on Quebec's powers to control language and education policies that protect francophones. Nonetheless, contemporary policy debates demonstrate the extent to which homophobia is still expressed in public policy at the federal level. In recent years, these debates have included the reform of antiquated sex laws, the government's 2017 apology for past discrimination, and the expungement of past criminal records (Salerno, 2018a). These policy debates occurred in the wake of the election of the Liberal government led by Justin Trudeau in 2015. The Trudeau Liberals were viewed as a gay-friendly party and their election was viewed as an opportunity to eliminate remaining areas of legal inequality as well as providing an opportunity to redress past wrongs. Current policy depicts the problems as that of past discrimination while ignoring the ongoing stigmatization entailed by Criminal Code provisions. The solution to the policy problem of past conduct is to apologize and to expunge the record. However, the emphasis has been on symbolic gestures while full Criminal Code reform was long delayed. In this way, the homonationalist celebration of Canadian diversity is carried on while underlying homophobic policy legacies remain.

The Failed Reform of Criminal Law, 1969-2015

In Canada, criminal law is in federal jurisdiction and is governed by the federal Criminal Code while the administration of justice is the responsibility of the provinces. The

Criminal Code has long been a key mechanism of the regulation of queer sexual conduct. Like many other countries of the former British Empire, Canada incorporated provisions of the Victorian sex laws wholesale into its own laws including laws against gross indecency, buggery, and the bawdy house, among others. The 1969 (partial) decriminalization of homosexuality was carried out by creating an exception within the Criminal Code section on gross indecency for acts between consenting adults, 21 years of age or over in private. However, the reform did not alter the overall structure of the provision on gross indecency, which remained in place. The 1969 debates in the House of Commons clearly identified homosexuals as suffering from a medical condition that caused them to differ from the norm. The Liberal government's 1969 rhetoric on decriminalization emphasized in part that religious values should not dictate public policy, that public policy should be made in light of medical science, and that Canada should follow the model set by Great Britain following the *Sexual Offenses Act* (1967) which provided for decriminalization in the United Kingdom. None of these arguments moved LGBTQ people from the deviant category. As many scholars have pointed out, these changes marked a partial decriminalization of homosexuality, clearly confining same-sex sexual behavior to the private realm (Kinsman, 2013; McGhee, 2000).

Further changes to the Criminal Code were debated in the following years. In 1981, the Pierre Trudeau government considered removing buggery and gross indecency from the Criminal Code, and replacing them with a provision on anal sex, and reducing of the age of consent from 21 to 18; however, these changes were not implemented. Upon the election of the Progressive Conservative government of Brian Mulroney in 1984, the government held a parliamentary committee hearing on the coming into force of the equality rights section (section 15) of the recently entrenched Charter. This committee recommended a range of measures for eliminating discrimination on the basis of sexual orientation, including the establishment of a uniform age of consent (Canada, 1985: 32). In 1987, the Criminal Code was amended by the Mulroney government to remove the offense of gross indecency. Buggery was renamed anal intercourse and remained banned except between married people or two consenting adults in private with the age of consent set at age 18 in section 159 of the Criminal Code (Hooper, 2014; Nicol, 2017).

However, these legal inequalities did not go uncontested in the courts. From 1995 to 2006, several cases have dealt with the constitutionality of section 159. In the key case of *R. v. C.M.* (1995), the Ontario Court of Appeal ruled that section 159 violated the Charter. In that case, an unmarried heterosexual couple had anal sex when the woman was under age and the man was prosecuted under section 159. All three justices agreed that the provision violated the Charter, with two arguing that it did so on the grounds of age, while the third, future Supreme Court Justice Rosalie Abella, ruled that it violated the Charter on the grounds of sexual orientation (*R. v. C.M.* [1995]). Abella's ruling explicitly dealt with the inequality between anal sex and other forms of sex and considered the significance of the singling out of anal sex for different treatment under the Criminal Code. Abella constructed her argument by comparing the position of unmarried 14-year olds who choose to have anal sex with the position of unmarried 14-year olds who wish to have other forms of sex. In the former case, the law forbids it until they are 18 or until they marry while, in the latter case, heterosexual intercourse is not prohibited

for unmarried people and may be freely chosen at age 14. By constructing the case in this way, Abella highlighted the fact that anal sex had been singled out for different treatment under the law. She then considered the meaning and significance of this, pointing out that sexual orientation was a prohibited ground of discrimination under the Charter and that lesbians and gay men were a historically disadvantaged group in Canadian society. The anal sex provision of the Criminal Code specifically affected gay men, given that anal sex was 'a basic form of sexual expression for them', in the words of Abella's ruling. They were thus singled out for discriminatory treatment, contrary to the Charter.

A number of other cases came to the same conclusion. In *Halm v. Canada*, a federal court ruled that section 159 discriminated on the basis of sexual orientation and on the basis of age as the age of consent was otherwise 14 at the time. This was followed a few years later by an important Quebec case, *R. c. Roy*, 1998, which reached the same conclusion. A man had been charged with having anal sex with a man under the age of 18 contrary to section 159. In that case, the defendant argued that section 159 was unconstitutional because it discriminated on the grounds of age, marital status, and sexual orientation. The trial court judge denied the defendant's constitutional argument, arguing that he would have to prove to the court that he was actually gay in order to avail himself of the constitutional test of sexual orientation discrimination. This contradicted the constitutional arguments in *R. v. C.M.* in which the accused man was charged with an offense under section 159 after having anal sex with a woman under 18. The Quebec appeal court ruled that there was no such burden on the defendant to prove his sexual orientation to the court in order to claim that the law in question violated the Charter's provisions (*R. v. Roy*, 1998; see also Corriveau, 2011: 143–144).

Several other cases in Ontario (*R. v. S (A)*, 1998), Alberta (*R. v. Roth*, 2002), BC (*R. v. Blake*, 2003), and Nova Scotia (*R. v. F*, 2006) had a similar outcome. In Ontario, in 2001, an accused charged under section 159 brought a civil case against the Attorney General arguing that section 159 should have been repealed given that 'the continued publication of s. 159 in the Criminal Code would subject gay men to arbitrary state action' (*Lucas v. Police Services Board*, 2001). The Ontario Superior Court of Justice ruled these claims as nonjusticiable, given that the failure of a legislature to act did not constitute a tort and that the plaintiff could not claim to have had his Charter rights violated given that section 159 had already been declared unconstitutional (*Lucas v. Police Services Board*, 2001). Most recently, in 2006, the Nova Scotia Court of Appeal noted that charges under the old 'buggery' provision of the Criminal Code, the antecedent to section 159, were unconstitutional as of the date that the Charter's equality rights section (section 15) came into effect on April 17, 1985 (*R. v. F*, 2006).

While the ruling in *R. v. CM* was a victory for Charter rights and, with regard to Abella's minority ruling, a victory for the right of sexual expression of gay men, no other court followed Abella in making the connection between anal sex and the rights of sexual expression. Instead of focusing on the rights of gay men and the prohibition of discrimination based on sexual orientation under the Charter, the arguments in other cases described at length the stigma associated with the Criminal Code provisions on sodomy, buggery, and gross indecency, and the moral opposition to homosexuality. For example, in *R. v. Roth*, the judge explained that:

[t]he offence of anal intercourse has its origin in the offence of buggery that in turn is predicated on the biblical sin of sodomy. It is an offence which had carried its own particular stigma and for which consent was no defence. Its antecedent or related offences of buggery and sodomy were of a different type or order than the other sexual offences. (cited in *R. v. Roth*, 2002: s. 23)

In the *Halm* case, the court did consider whether or not the violation of sections 7 and 15 rights would be saved under section 1 of the Charter, that is, whether or not restrictions on the right to liberty and security of the person (section 7) and equality rights (age discrimination and sexual orientation discrimination under section 15) would be ‘reasonably justified in a free and democratic society’, in the wording of section 1. The court ruled that:

[i]n a free and democratic society, it is not justifiable to make an activity criminal merely because a segment, indeed maybe a majority, of the citizenry consider it to be immoral. The reinforcement of moral precepts and the inhibition of homosexual youth from acknowledging their sexual orientation at an early age are not purposes which can support making the activity in question a Criminal Code offence. (*R. v. Halm* [1995])

While the provision is ruled unconstitutional, the ruling acknowledges the opposition to homosexual sexual behavior and recognizes that some see it as immoral. Through this acknowledgement, the ruling reinforces the stigma against queer sexuality as does the judge in the *Roth* case in describing the historical injunction against sodomy. In contrast, Abella’s ruling in *R. v. C.M.* recognizes the fundamental importance of sexual expression to gay men and, in so doing, counters the traditional stigma against homosexuality, even though the three cases reach the same legal conclusion.

In commenting on these rulings, Casswell (2004: 224–228) noted that the failure of Parliament to repeal section 159 violated the Charter rights of gay youth, created different legal regimes for anal sex across the provinces (with courts having struck down section 159 in some jurisdictions and not others), and permitted jurisdictions in which the law had been struck down to continue to charge people from lack of knowledge of the relevant rulings as in the case of *Lucas v. Toronto Police Services Board* (2001). While the government amended the Canadian Human Rights Act to include sexual orientation in 1996 in accordance with court rulings and legislated same-sex civil marriage in 2005 in response to Charter decisions, it refused to change the Criminal Code. By the time same-sex marriage was passed in 2005, the government was proclaiming that Canadians’ attachment to the Charter rights of LGBTQ Canadians was fundamental to national identity (Smith, 2007). Apparently, this was not the case with respect to section 159.

Because of the failure of the federal government to amend the Criminal Code, the only other route to eliminating section 159 would have been through a Supreme Court of Canada ruling. The fact that lower courts across the country had struck down the law suggested that the Supreme Court would do likewise. However, the federal government declined to appeal the rulings on the unconstitutionality of section 159, therefore leaving the law in place. If the federal government had appealed the decisions of lower courts to the Supreme Court, this would have opened the door to a ruling that would have struck

down the law once and for all. However, successive federal governments declined to appeal or to legislate the change to the Criminal Code, hence leaving the law in place, despite the lower court rulings.

This policy approach continued under the Conservative¹ government of Stephen Harper, elected in 2006. Over its multiple terms in office from 2006 to 2015, the government engaged in homophobic, transphobic, and homonationalist policies at the same time. On the one hand, the party did not attempt to reopen the issue of same-sex marriage, even though many of its members had opposed the measure (Rayside, 2017). The government selectively deployed Canada's positive LGBTQ rights record in the service of foreign policy goals, beginning with the 2009 condemnation of Uganda's Anti-Homosexuality Act (Epprecht and Brown, 2017: 72–75). However, the government strongly opposed the amendment of federal human rights legislation to include gender expression and gender identity. Not only did the Harper government refuse to institute a uniform age of consent, it raised the age of consent from 14 to 16 for heterosexual intercourse in 2008 while maintaining the age of consent at 18 for anal sex. Several queer organizations appeared before the parliamentary committee considering the proposed changes and emphasized the problematic nature of section 159 to no avail (Coalition for Lesbian and Gay Rights in Ontario (CLGRO), 2008; Hunt, 2009).

In addition to section 159, the Criminal Code also contains a range of other provisions that were used historically to regulate queer sexuality. Of these, one of the most important is the bawdy house laws. While these have not been challenged in court by LGBTQs, they have been challenged in other cases such as the *Bedford* case on sex work and the *Labaye* case concerning a Montreal swingers' club; in both cases, parts of the bawdy house law were found to be unconstitutional. Therefore, like section 159, there is reason to think that the Supreme Court would rule these sections of the Criminal Code as unconstitutional (Canada, 2018a: 8).

The Liberal Apology and the Move to Legal Reform, 2015–2018

The 2015 election of the Liberal government, led by Justin Trudeau, opened the door to a renewed policy agenda for LGBTQ legal reform. One of the first acts of the new government was to respond to the long-standing political mobilization of the trans community around the reform of federal human rights legislation to explicitly include gender identity and gender expression (Canada, 2017). While complaints of discrimination on these grounds in federal jurisdiction had been accepted by the Canadian Human Rights Commission since at least 2000, this explicit inclusion had been long sought and was the first measure on LGBTQ rights that was taken by the new Liberal government (for an overview of trans issues, see Kirkup, 2018). One year after their election, the government appointed a special advisor on LGBTQ affairs, MP Randy Boissonnault (Canada, 2018b). However, the Liberals' approach to the criminal regulation of sexuality and the expungement of past convictions demonstrate the persistence of the stigmatization of the LGBTQ communities.

In the most recent round of debates on law reform, Canada's mainstream LGBTQ political organization, Egale, partnered with legal experts to issue a call for reform of sex laws, along with a series of other demands for recognition of the legacy of past

discrimination against LGBTQ people. Egale's massive report on existing inequality is entitled *The Just Society Report* (Elliott, 2016), a reference to the Liberal Party slogan during the era of Prime Minister Pierre Trudeau (Prime Minister Justin Trudeau's father) that recalls the 1969 Criminal Code reform, instituted under the Pierre Trudeau government. The Report specifically called for reform of section 159 and the bawdy house laws along with an apology, the expungement of the record of past convictions, and compensation for past discrimination. Because the Report was aimed at the federal government, not the provinces, it demanded compensation for federal government workers and members of the armed forces. In addition, LGBTQ activists as well as those directly affected by the federal government's past security campaigns and purges of the armed forces and federal civil service formed the We Demand an Apology Network (We Demand Network) to work for apology and expungement (Kinsman and Roy, 2016; see also Robertson, 2016a, 2016b).

The Liberal government has moved in each of these areas. In 2016, the government introduced a bill to reform the Criminal Code. In 2017, the government apologized to LGBTQ Canadians and settled a large class action lawsuit, which had been brought by former federal public servants and former members of the armed forces. In June 2018, the government passed a bill that in part expunged the past criminal records of those convicted for consensual same-sex relations under the Criminal Code. In 2018, the House of Commons considered a bill that would remove the unequal age of consent for anal sex. Each of these events will be examined in turn.

The government's odyssey to change section 159 of the Criminal Code on anal sex demonstrates the persistent stigmatization of the LGBTQ communities, despite the Prime Minister's rainbow socks, marching in Pride in cities from coast to coast, and repeated proclamations that 'Canada is united in . . . standing up for LGBTQ rights' (cited in King, 2016). The first attempt at criminal law reform occurred in 2016, when the government introduced Bill C-32, which would have removed section 159 of the Code and ensured that charges could not be laid against people based on the older Criminal Code provisions (Canada, 2016; see also Nicol, 2017). The legislation advanced no further and was then reintroduced as Bill C-39 in early 2017, which, with similar provisions, passed second reading before it stalled in the House of Commons. Bill C-75, an omnibus bill with the same provisions, reached the committee stage as of June 2018 but failed to pass before the session ended. Although all three versions of the bill deleted section 159 on anal sex and provided for a uniform age of consent, the bills did not amend or remove any of the other provisions of the Criminal Code such as the bawdy house laws that had been used to criminally regulate queer sexuality. In October 2018, the bill was considered again in the House of Commons and the Standing Committee on Justice and Human Rights supported the call of some queer critics of the legislation to strike the bawdy house provisions from the proposed law. However, the legislation has not yet passed.

While the government has not reformed the law, a small number of men continue to be charged under section 159, even in provinces where an appeal court has ruled. Ninety-eight people were charged in 2013–2014, with seven convictions, while, in 2014–2015, 69 were charged, with no convictions. In 2016, one person was convicted in Quebec, even though, as we have seen the Quebec appeal court ruled on constitutionality in 1998.

The accused accepted the conviction as part of a plea bargain (Nicol, 2017: 5; see *R. c. D.G.* [2016]).² Given that the Liberals have a parliamentary majority, the failure to pass this reform or to address the bawdy house laws or the long-standing concerns with the intense criminalization of HIV nondisclosure signals a foot-dragging by the government that has led to criticism from within the LGBTQ community (e.g. Salerno, 2018a). This points to what Johnson and Tremblay (2018) term a lack of political will in addressing LGBTQ rights issues. This reluctance to reform the law encapsulates an ongoing legal homophobia, that is, a formal-legal inequality in which homosexuality is treated as different from and inferior to heterosexuality.

While the government made slow progress on reforming the Criminal Code, it moved ahead with its 2016 commitment on apology, expungement, and compensation for past discrimination. The use of apologies for past misconduct originated in Truth and Reconciliation processes such as that of South Africa in the postapartheid period. This practice has been used in several countries following democratic transitions and, increasingly, in relation to settler-indigenous relations and acknowledgement of past discrimination. In Canada, as part of the Truth and Reconciliation Process with Indigenous peoples, an apology was offered in 2008 by the federal government for the residential schools' policy, which saw generations of indigenous children taken from their families and incarcerated in brutal conditions in residential schools. In addition, in 1988, the federal government apologized to Japanese Canadians for the World War II internment as part of a compensation package for the harms inflicted as part of that process.

Two LGBTQ activist organizations, the We Demand Network and Egale, pushed hard for action from the Trudeau government in this area. The We Demand Network drew on the research of Kinsman and Gentile, which had provided extensive documentation of the purges against LGBTQ people in the postwar period and, in particular, during the Cold War (Kinsman and Gentile, 2010). The We Demand Network included Kinsman, among other spokespeople, and reflected the stories and experiences of those affected who participated in the public campaign (Gentile et al., 2017; Kinsman, 2015). The 2016 Egale report included extensive discussion on the need for restitution for past injustice, including an apology for past discrimination against LGBTQ Canadians. As the report puts it, '[s]ubstantive equality is impossible without honouring the full truth of historical queer injustice' (Elliott, 2016: 12).

Expungement or pardoning of past convictions, some with and some without apologies, has been undertaken in other jurisdictions including Germany, the United Kingdom (England, Wales, and Northern Ireland) (United Kingdom (UK), 2017), Scotland, Ireland, and the Australian states. Germany seems to have been the first to debate the expungement of past criminal convictions against gay men, setting aside Nazi-era convictions starting in 2002; however, in 2017, Germany formalized the policy in legislation that overturned all convictions under an 1871 law that criminalized sex between men, a law that had been enforced with 10-year sentences in prison or concentration camp during the Nazi era (BBC, 2017; Shimer, 2017). The bill included a small amount of compensation to those convicted under the old law, which had been eliminated from the books in 1994, an amount that was challenged as insufficient by the German Lesbian and Gay Federation (Shimer, 2017). In the United Kingdom, the debate over pardons for men convicted under British law was given force by the discussion over mathematician and

World War II code-breaker Alan Turing's pardon. A British activist campaign to have Turing pardoned led to a wider debate about pardons and the overturning of convictions for past criminal acts. Turing received a posthumous royal pardon in 2013 while the United Kingdom's 2017 *Policing and Crime Act* included a provision for automatic pardon of those cautioned or convicted for same-sex offenses under old laws.

In the period from 2013 to 2018, a series of expungements took place in the Australian states, some with and some without apologies. South Australia (2013), New South Wales (2014), Victoria (2015), the Australian National Territory (2015), Queensland (2017), Western Australia (pending, 2018), the Northern Territory (2018), and Tasmania (2018) have expunged criminal convictions, accompanied by an apology in the cases of Western Australia and the Northern Territory (Jackman, 2018; Queensland Law Reform Commission, 2016). In turn, New Zealand offered an apology to the criminally convicted in 2017 and passed a national expungement bill in April 2018 (International Gay and Lesbian Association (ILGA), 2018; New Zealand Herald, 2017). Some of this legislation has been criticized for limiting or prohibiting compensation and for excluding expungement for those convicted under the older (higher) age of consent (e.g., in Queensland, see Sanders, 2017). In 2018, Scotland passed similar legislation while Ireland offered an apology (Bardon, 2018; BBC, 2018).

Both the We Demand Network and Egale referenced the changes in other jurisdictions as potential models for a Canadian apology as well as for expungement and compensation, citing both the example that the apologies set for Canada, on the one hand, but also some of their limits on the other hand. The Egale report referred to the fact that several of the expungement measures in the Australian states specifically prohibited compensation and created barriers to expungement for affected people. The report urged the federal government to avoid this path (Elliott, 2016: 91–96). In late 2016, the debate over compensation came to a head when a class action lawsuit was filed against the federal government by former members of the armed forces and federal public servants who had been fired or discriminated against on the basis of sexual orientation and/or gender identity. Through the filing of the suit, the questions of expungement and compensation were separated as those criminally convicted were not included in the class action, which addressed only those formerly employed by the federal government directly or through the armed forces. This forms a contrast to the German expungement legislation, which included limited compensation for victims of past criminal convictions. In November 2017, the federal government settled the class action, tabled expungement legislation, and apologized to the LGBTQ community for past discrimination (Harris, 2017). Canada seems to be the only case in which the government has apologized and paid compensation for employment discrimination against LGBTQ people in federal government employment and in the military.

The expungement legislation, which was tabled in late 2017 and passed by Parliament in June 2018, provided a process through which an individual could apply to the Parole Board of Canada for expungement of a criminal conviction for consensual same-sex activity under the Criminal Code provisions of gross indecency, buggery, and anal intercourse. The legislation also gave the government the right to add additional Criminal Code provisions to the list. Where the Parole Board granted the expungement, the record of the conviction would be destroyed (Canada, 2018c).

While the government put a celebratory face on the bill, passing it during Pride 2018, and linking it to the apology and settling of the class action suit that had taken place the previous autumn, the legislation was rushed through the House of Commons without meaningful debate. The appointed upper chamber, the Senate, held several days of committee hearings on the bill in which there was extensive criticism from scholar activists and from organizations such as the Criminal Lawyers Association (Canada, 2018a, 2018d). One of the key points of critique echoed some of the Australian criticisms of expungement, namely, that the legislation encodes continuing discrimination against LGBTQ youth by applying an unequal age of consent to past acts. While, in the case of Queensland, for example, the concern was with the fact that the old (higher) age of consent was applied, preventing those who were younger at the time of their conviction from applying for expungement, Canada is unique among jurisdictions that have passed expungement legislation in having an unequal age of consent. In the committee hearings before the Senate, groups such as the Criminal Lawyers Association objected to the government reaching into the past to apply today's age of consent. While, in Queensland, the age of consent for homosexual activity had been higher in the past, preventing those who were younger at the time of their conviction from applying for expungement, Canada's age of consent ranged from 18 to 21 in different periods, leading to even more capriciousness in eligibility for expungement. While today's age of consent (18) is lower than the age of consent established in 1969 (21), it is higher than the age of heterosexual consent (14 prior to 2008 and 16 after 2008). As the Criminal Lawyers' Association explained in its brief, this would mean that youth of 15 having anal sex in 2007 would be ineligible for expungement while youth of 15 having heterosexual intercourse in 2007 would not have been charged. The Criminal Lawyers' Association argued that:

[t]he bill should, at a minimum, be amended to allow expungement in all cases where the sexual activity would have been lawful but for the party's sexual orientation or gender identity. Without such an amendment, the bill perpetuates a devastating myth about the LGBTQ community, that same-sex sexual activity is dangerous, devastating and damaging to young people in a way that equivalent heterosexual activity is not, and that young LGBTQ people need to be protected from their sexual activity in a way that their heterosexual peers do not need to be protected. (Cited in Canada, 2018a: 2; for further discussion, see Salerno, 2018b)

Another critique of the expungement legislation is that it applied only to past charges of gross indecency (the main provision under which, prior to 1987, same-sex sexual behavior was criminalized), buggery (eliminated from the Criminal Code in 1987), and anal sex. Other charges such as being found-in a bawdy house would not qualify for expungement. Historian Tom Hooper presented data to the Senate showing that 1200 people were convicted under the bawdy house laws between 1968 and 2004. Similarly, Ross Higgins, speaking for the Quebec Gay Archives, pointed out that going out to have a drink in a bar in Montreal in the 1970s could have led to a criminal conviction for being found in a bawdy house, as this was the main provision used to police gay men at that time (Canada, 2018a: 3–4, 22). The Prime Minister's apology in the House of Commons had included specific reference to the bathhouse raids and to the bawdy house provision.

Yet, convictions under the bawdy house laws were not eligible for expungement under the legislation (Canada, 2018a: 3–4). Gary Kinsman pointed out that expungement for conviction under indecent acts provisions and obscenity were also not included in the bill; the former charge was often used to threaten people to name other gay and lesbian people in the armed forces and civil service so that they could be fired. The obscenity charges were used to prosecute queer cultural institutions such as bookstores and the newspaper *The Body Politic* (Canada, 2018a: 4).

Further questions arose over the proposed implementation of the bill, especially compared to the UK legislation (UK, 2017). Unlike the United Kingdom, the bill did not automatically expunge the convictions of deceased persons. Further, it required an onerous burden of proof of the conviction, as compared to the UK legislation which required only that the applicant provide the time and place of conviction. In contrast, the Canadian legislation required that the applicant prove that the sexual activity was consensual and that both parties were 16 or subject to the close-in-age exemption provided for by the contemporary Criminal Code (Canada, 2018e). In addition, the Canadian Lesbian and Gay Archives, the Quebec Gay Archives, and the Canadian Historical Association expressed concern over the proposed destruction of records that was included in the bill (Canada, 2018a: 5–6). In return, the government argued that it had restricted the Criminal Code grounds for expungement to those laws that had been struck down as unconstitutional. As the use of the bawdy house laws against queers had not been specifically ruled unconstitutional, the government had declined to include it. The government pointed out that the bill authorized the government to add other grounds in future, thus suggesting that the bawdy house laws might be added to the expungement provisions (Canada, 2018d: 3). Despite the reservations and resistance from scholar activists, the bill passed in the Senate and became law in June 2018.

The campaign for apology and expungement epitomizes the complexities of homophobia and homonationalism. On the one hand, the activist campaign sought to rectify past injustice through naming the bad acts of government in discriminating against federal public servants and members of the military and in criminally prosecuting consensual same-sex conduct. In other words, the campaign called out some of the worst examples of homophobic state action, actions that had resulted in substantial and, in some cases, life-threatening damage to LGBTQ people over many years. On the other hand, some of the voices in the campaign for apology and expungement, especially that of long-established lobby group Egale, engaged in nationalist and even partisan discourse highlighting the role of past Liberal leaders in instituting gay-friendly laws such as the 1969 Criminal Code revision and the 2005 same-sex marriage law (e.g. Elliott, 2016). This partisan rhetoric seemed clearly aimed at convincing the current Liberal government to follow in the footsteps of past Liberal Party leaders, most notably the Prime Minister's own father who was responsible for the 1969 legislation. Egale's campaign for apology and expungement emphasized the importance of LGBTQ inclusion, a concept that is packaged and sold by Egale in the form of training programs for corporations and professionals (Egale Human Rights Trust, 2018). On the one hand, Egale celebrated Canada's progress on LGBTQ rights, even giving the Prime Minister an award for his LGBTQ advocacy (Bresge, 2018). On the other hand, Egale's training services, conferences, and technical resources for LGBTQ inclusion in education and the workplace suggested that everyday homophobia

was still an issue for queer communities. As Steven Maynard (2017) argues, the apology and expungement had the air of homonationalist celebration of the government's commitment to LGBTQ rights and homonormative celebration of privatized queer life. Nonetheless, homophobic elements of public policy remain encoded in the expungement legislation, both in terms of the lacunae in the expungement legislation and in terms of the ongoing failure to reform section 159 and other sections of the Criminal Code.

Conclusions

Homonationalism and homophobia are key concepts in socio-legal understandings of LGBTQ rights. While homonationalism sheds light on the political uses of LGBTQ rights by governments and stakeholders for their own political ends and to the racialized forms of inclusion that are encapsulated in policy and organizing, the concept risks underestimating the value of legal change for LGBTQ communities and ignoring the persistence of homophobic opposition to the political incorporation of LGBTQ citizens. As a number of scholars have highlighted, resistance to LGBTQ rights' recognition is widespread, even in 'the places where we have won', as Browne and Nash (2014) put it. While Canada is widely considered to have decriminalized homosexuality in 1969 and, indeed, it was decriminalized for two adults 21 years of age or over in private, this legalization existed as an exception in the criminal law prohibition outlawing gross indecency. While this law was transformed from gross indecency to anal sex in 1987, the age of consent was set at 18, while the age of consent for heterosexual intercourse was 14 before 2008 and 16 after 2008. The lack of a uniform age of consent and the fact that a few people were charged under the law every year, even after it was struck down as unconstitutional under Canada's constitutional Charter of Rights demonstrates the persistence of legal homophobia. The government's inability and unwillingness to change the law entails an ongoing stigmatization in which gay sex continues to be singled out for criminal regulation, even though the law has repeatedly been found to be unconstitutional. This alerts us to the idea that, even in jurisdictions that can be considered homelands of queer progress, homophobia remains. Homonationalist celebration coexists with the ongoing encoding of second class legal status for queers.

While this persistent homophobia endures in criminal law, the government's apology to LGBTQ people, along with the settlement of the class action law suit and the passage of legislation expunging the criminal records of some of those convicted of sex-related offenses, suggests that discrimination and criminal regulation of sexuality are problems of the past, not the present. The government celebrates its atonement for past actions, while leaving laws on the books that perpetuate the criminalization of gay sex. The celebration of Canada's progress in the recognition of LGBTQ rights represents the homonationalism of which Puar (2007) writes, as rights' recognition is linked to nationalism. As Canada is a multinational state, there are multiple forms of nationalism and both Canada and Quebec have vaunted the recognition of gay rights as linked to the progressiveness and tolerance of their respective national communities (Stychin, 1998; Smith, 2007). In the case of the federal government, the apology and the expungement were cast as needed steps to address the bad actions of the past, positioning the government of the present as representing the positive values of diversity and rights recognition. Canada's commitment to LGBTQ rights

is repeatedly emphasized by the current Liberal government. As Maynard (2017) points out, the apology and expungement policies represent a top-down homonationalist celebration of political liberalism and homonormative family life. The rhetoric on the apology and settlement for the class action lawsuit emphasized that the lesbian and gay victims were otherwise normal people who wanted to lead regular family lives and contribute to society. At the same time, the ongoing stigmatization of gay sex through the unequal age of consent and its inclusion in the expungement bill continues to signal the lesser status of homosexuality. In this way, persistent homophobia coexists with the homonationalist celebration of legal reform.

The dominance of the concept of homonationalism in current discussions of LGBTQ socio-legal issues marginalizes and underestimates the extent to which legal inequality is a persistent challenge for LGBTQ communities. Our theoretical and conceptual lenses should encompass our care both for the harm of racialized homonationalism and for the harm of formal-legal discrimination against queer sexuality. The challenge to formal-legal inequality should not be dismissed as mere homonationalism but, rather, taken seriously as a project to eradicate legal homophobia. Understanding both homonationalism and legal homophobia as phenomena that coexist together in the same legal and political spaces is centrally important in an era of populist and right-wing backlash against LGBTQ legal rights.

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Notes

1. The federal Progressive Conservative Party dissolved itself and merged with the Canadian Alliance (formerly the Reform Party) to establish the Conservative Party of Canada in 2003. Provincial parties with the name Progressive Conservative endure such as, for example, the Progressive Conservative Party of Ontario, which has formed the government on numerous occasions, most recently, in June 2018.
2. Under the gross indecency provision of the Criminal Code, in effect until 1987, women were charged on some occasions but only after the Divorce Act of 1968 introduced homosexuality as one of the grounds for at-fault divorce. Prior to that, women were not prosecuted for same-sex conduct under gross indecency (Pearlston, 2017), although some lesbian women might have been prosecuted under liquor laws or other criminal or municipal bylaws that governed public meeting spaces (e.g. bars) (Chenier, 2004).

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