

Another Limited Bill: Gay and Lesbian Historians on C-75

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INTRODUCTION

Bill C-75, an Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, attempts to implement part of the Prime Minister's apology to LGBTQ2S+ people. The repeal of criminal offenses that have historically been used to unjustly target non-conforming sexualities is an important part of the apology process. However, Bill C-75 fails to adequately address the various provisions used to criminalize consensual sexual activities in Canada.

In C-75, the offense of anal intercourse is fully repealed, but the bawdy house law, indecent act, and vagrancy are merely altered, and remain intact. As in C-66, the reforms in Bill C-75 are based on a narrow interpretation of offenses that have been ruled contrary to the Charter of Rights and Freedoms. Several offenses are not covered in the bill, including indecent exhibition, obscenity, nudity, and laws used against sex workers. Finally, C-75 does not address the Criminal Code provisions unjustly used in cases of HIV nondisclosure.

The morality provisions in the Criminal Code were based on 19th century ideas about what was 'indecent,' 'obscene,' or 'deviant.' These continue to form the basis of many sections of the Code and must be repealed. In our view, only sexual practices that cause direct harm, as in assault, harassment, and abuse, should be criminalized. All sexual practices that are consensual and cause no form of harm to others must be entirely decriminalized.

This bill requires consultation with LGBTQ2S+ communities, as well as sex worker and AIDS organizations to ensure that all sections that criminalize consensual sexual practices are repealed.

SUMMARY OF RECOMMENDATIONS:

1. Expand the scope of offenses repealed under the bill.
2. Amend Section 75 of the bill to repeal the bawdy house law (Criminal Code, ss. 197, 210 and 211).
3. Amend Section 60 of the bill to repeal indecent acts (Criminal Code s. 173).
4. Amend Section 62 of the bill to repeal vagrancy (Criminal Code s. 179).
5. Amend the bill to repeal sex work provisions in PCEPA (Criminal Code ss. 213, 286.1-5).
6. Amend the bill to repeal other morality laws unjustly used against LGBTQ2S+ communities, including obscenity, immoral theatrical performance, indecent exhibition, and nudity (Criminal Code ss. 163, 167, 168, 174, 175(b)).
7. Amend the bill to limit the unjust use of Criminal Code provisions against people living with HIV.

1. EXPAND THE SCOPE OF REPEAL

Both C-32 and C-39 would have repealed anal intercourse (Criminal Code s. 159), but these bills did not proceed. Instead, this reform has been folded into a broader piece of legislation in C-75. Correcting such historic injustice should not be treated as a footnote in a larger bill, the criminalization of LGBTQ2S+ communities is more complex than this one offense. We support Section 56 of Bill C-75, which repeals anal intercourse. However, the government has not provided adequate justification for retaining other archaic provisions.

In May 2018, the Standing Senate Committee on Human Rights issued its report on Bill C-66, an act to expunge historically unjust criminal convictions. They expressed concern about “the absence of consultations surrounding the drafting of the bill,” and urged the government to work with “subject-matter experts to address other sections of the Criminal Code that were applied in a discriminatory fashion against the LGBTQ2 community.”

In 1982, the Standing Committee on Justice and Legal Affairs studied some of these offenses. Then Minister of Justice Jean Chrétien stated, “as a matter of principle, I believe that if sections of the Criminal Code have fallen into disuse or become obsolete, there was no reason to maintain them.” Unfortunately, these words were never implemented, but there is an opportunity in Bill C-75.

RECOMMENDATION #1: EXPAND THE SCOPE OF OFFENSES REPEALED UNDER BILL C-75.

2. REPEAL THE BAWDY HOUSE LAW

The Prime Minister’s apology to LGBTQ2S+ people included specific reference to the bawdy house law. From 1968 to 2004, more than 1,300 men were charged with this offense for being in a gay bathhouse. In some cases, this law was used to raid bars and private homes (see chart attached). It contains three parts: owning, operating, or being found in a common bawdy house (Criminal Code s. 210); transporting someone to a common bawdy house (Criminal Code s. 211); and Section 197 of the Code provides the definition of a bawdy house, which includes spaces for sex work, or in the case of bathhouse raids, spaces of indecency.

In the 2013 *Bedford* decision, the Supreme Court declared the bawdy house law unconstitutional as it applied to sex work. The resulting legislation, the Protection of Communities and Exploited Persons Act (PCEPA), altered Section 197 by removing “prostitution” from the definition of a bawdy house, but the reference to indecency remained. An “indecent” bawdy house was reinterpreted by the Supreme Court in the 2005 *Labaye* decision. In deliberations on C-66, Senator René Cormier was asked, “what is a bawdy house in 2018?” This was his response:

In the Labaye decision, the court clarifies the criteria of what constitutes an indecent acts offence, namely, physical or psychological harm caused to participants in the impugned activity, or conduct that perpetuates negative or demeaning images of humanity.

This new definition post-*Labaye* does not reflect the historic use of the law. A judicial test based on a community standard of morality has been replaced. This new test of indecency is based on a definition of harm that interferes with autonomy and liberty. In other words, a bawdy house is no longer a bathhouse or swinger’s club. It is a space that allows actual harm, as in assault, harassment, and non-consensual abuse.

Spaces that allow non-consensual physical or psychological harm should be prosecuted under more appropriate sections of the Criminal Code. Section 75 of Bill C-75 amends the bawdy house law to allow for the possibility of summary conviction. This lessens the penalty for a crime which has become a very serious offense. This law is anachronistic. According to Statistics Canada, only one person was charged in 2016 (none in 2015). By contrast, four were charged for anal intercourse in 2016 (five in 2015).

Although the law has not been widely applied, scholars and legal experts have expressed concern that antiquated notions of indecency could be used in the future to criminalize BDSM and other consensual queer sexual activities. The post-*Labaye* judicial test of harm and indecency includes conduct that “perpetuates negative or demeaning images of humanity.” This is vague and subject to changing interpretation by the courts.

Bill C-66 specifies that an offense must first be repealed before it can be added to the list of those that qualify for a criminal record expungement. The men convicted in the bathhouse raids depend on the repeal of the bawdy house law before they can apply to have their records cleared. Further delay would be an injustice.

RECOMMENDATION #2: AMEND SECTION 75 OF BILL C-75 TO REPEAL THE BAWDY HOUSE LAW (CRIMINAL CODE, SS. 197, 210 AND 211).

3. REPEAL INDECENT ACTS

Since the late 19th century, the offense of indecent acts has been used to arrest LGBTQ2S+ people in bars, clubs, parks, and washrooms. Police often used indecent acts instead of gross indecency or buggery because it was a lesser offense and was easier to prove in court. In Ontario from 1983-1985, targeted surveillance and arrests occurred in St. Catharines, Welland, Oakville, Oshawa, Mississauga, Guelph, Kitchener-Waterloo, and at the Orillia Opera House. The names of those charged were

released by the police to the newspapers, leading a man in St. Catharines to suicide. According to the Right to Privacy Committee, 369 men were arrested for indecent acts with other men in Toronto between July 1982 and April 1983.

Section 60 of Bill C-75 amends part of the indecent acts provision by removing the six-month maximum prison term for a summary conviction. This provision should instead be entirely repealed.

RECOMMENDATION #3: AMEND SECTION 60 OF BILL C-75 TO REPEAL INDECENT ACTS (CRIMINAL CODE S. 173).

4. REPEAL VAGRANCY

Vagrancy is a broad, ill-defined offence. It has historically been used against sex workers, but also to police people's gender-sexual expression. Those viewed as wearing the clothes and/or otherwise engaging in the self-presentation of the 'wrong' gender were charged under this offense. In the 1994 Supreme Court case of *R. v. Heywood*, vagrancy was declared unconstitutional and contrary to the Charter.

Section 62 of Bill C-75 removes part of the vagrancy law, but like bawdy houses and indecent acts, the offense otherwise remains intact.

RECOMMENDATION #4: AMEND SECTION 62 OF BILL C-75 TO REPEAL VAGRANCY (CRIMINAL CODE S. 179).

5. REPEAL PCEPA

The targeted use of morality provisions, police entrapment, and isolation caused by criminalization have created historic links between the struggles of the LGBTQ2S+ communities and those of sex workers. The provisions in PCEPA reconstituted many of the harms that were declared contrary to the Charter in the *Bedford* case. As a result, many sex workers fear the police and are exposed to targeted violence. In 2015, Minister of Justice Jody Wilson-Raybould declared, "I definitely am committed to reviewing the prostitution laws." Almost three years later, it is time to act.

- "Communicating" (Criminal Code, s. 213).

Like bawdy houses, part of the offense of "Communicating" was struck down by the Supreme Court in the *Bedford* decision, but it was otherwise maintained by PCEPA. This section continues to push sex workers to more isolated areas, increasing the risk of violence. As part of the Supreme Court's decision, they found the communicating offense "a grossly disproportionate response to the possibility of nuisance caused by street prostitution."

- "Obtaining sexual services for consideration" (Criminal Code, s. 286.1).

This offense similarly isolates sex workers. Clients are criminalized and so they must make efforts to avoid detection by police. This provision prevents sex workers from screening their clients and safely negotiating the terms of the requested services. It also criminalizes secure indoor workplaces because these are often under police surveillance and subject to frequent raids.

- “Material benefit from sexual services” and “Procuring” (Criminal Code ss. 286.2, 286.3)

These offenses have reconstituted the former “living on the avails” law. This criminalizes individuals who may work alongside sex workers, including those who provide security, administrative support, and client services. This forces sex workers to work in isolation, producing conditions for exploitation and harm.

- “Advertising” and “Material benefit and advertising” (Criminal Code ss. 286.4, 286.5)

The provisions on advertising prevent sex workers from interacting with potential clients remotely, which helps to avoid violence. Third parties are unable to provide services to assist sex workers in advertising. Sex workers are entitled to advertise their own services, but it remains unsafe while the purchase of sex is criminalized.

RECOMMENDATION #5: AMEND C-75 TO REPEAL ALL SEX WORK PROVISIONS IN PCEPA (CRIMINAL CODE SS. 213, 286.1-5).

6. REPEAL OTHER LAWS UNJUSTLY USED AGAINST LGBTQ2S+ PEOPLE

- Obscenity (Criminal Code, ss. 163, 168).

Obscenity was used to construct non-conforming sexual representations as more obscene and indecent than heterosexual ones. These offenses criminalized people working for gay/lesbian publications, and there were raids on the gay liberation newspaper, *The Body Politic*. Charges of obscenity were also used on bookstores, including Little Sister’s in Vancouver. In 1982 Kevin Orr was charged at Glad Day Bookstore in Toronto for carrying two gay publications. Glad Day was also convicted in 1992 for the lesbian sex magazine *Bad Attitude*. These laws have enabled Canadian customs officials to restrict LGBTQ2S+ publications being imported into Canada.

The definition of obscenity has been historically linked with indecency and the bawdy house law. Supreme Court judgements in *Butler* and *Labaye* have significantly altered the initial legislative intention behind these provisions.

- Immoral theatrical performance, indecent exhibition (Criminal Code, ss. 167, 175(b)).

Vague references to immoral performances in the Criminal Code have been used by police forces to target LGBTQ2S+ sexual expression. For example, in 1996 police in Toronto raided Remington’s, a gay strip club. 16 men, including 10 dancers, were charged under the bawdy house law. But the dancers were also charged for committing an immoral theatrical performance. It was a surprise for owner and operator George Pratt, as Remington’s had been operating on Yonge Street without incident for three years prior to the raid.

- Nudity (Criminal Code, ss. 174).

Nudity was first criminalized in 1931 as a response to naked protest marches by the Doukhobors. It was used in the 1970s to charge men who were nude sunbathing at Hanlan’s

Point on Toronto Island. These arrests were part of an undercover police operation that targeted gay men and was preapproved by Attorney General Roy McMurtry.

RECOMMENDATION #6: AMEND C-75 TO REPEAL OBSCENITY, IMMORAL THEATRICAL PERFORMANCE, INDECENT EXHIBITION, AND NUDITY (CRIMINAL CODE SS. 163, 167, 168, 174, 175(B)).

7. LIMIT OFFENSES USED TO CRIMINALIZE PEOPLE LIVING WITH HIV

The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario have raised concerns that areas of the Criminal Code are being used to unjustly criminalize those with HIV. There is no specific reference to HIV in the Code. However, various sections, including sexual assault (Criminal Code ss. 271 to 273) have been used to prosecute people in cases of alleged HIV non-disclosure.

Criminal prosecutions should be limited to cases of actual, intentional transmission of HIV. Criminal charges should never be used in certain circumstances, including cases where a person living with HIV engaged in activities that, according to the best available scientific evidence, posed no significant risk of transmission, including: oral sex; anal or vaginal sex with a condom; anal or vaginal sex without a condom while having a low viral load; and spitting and biting.

HIV non-disclosure should be removed from the reach of sexual assault laws. Prosecutions for sexual assault and HIV non-disclosure should be prohibited in the context of sex among otherwise consenting adults. The Criminal Code must be reformed to ensure that no other provisions are used to further stigmatize people living with HIV.

RECOMMENDATION #7: AMEND BILL C-75 TO LIMIT THE UNJUST USE OF CRIMINAL CODE PROVISIONS AGAINST PEOPLE LIVING WITH HIV.

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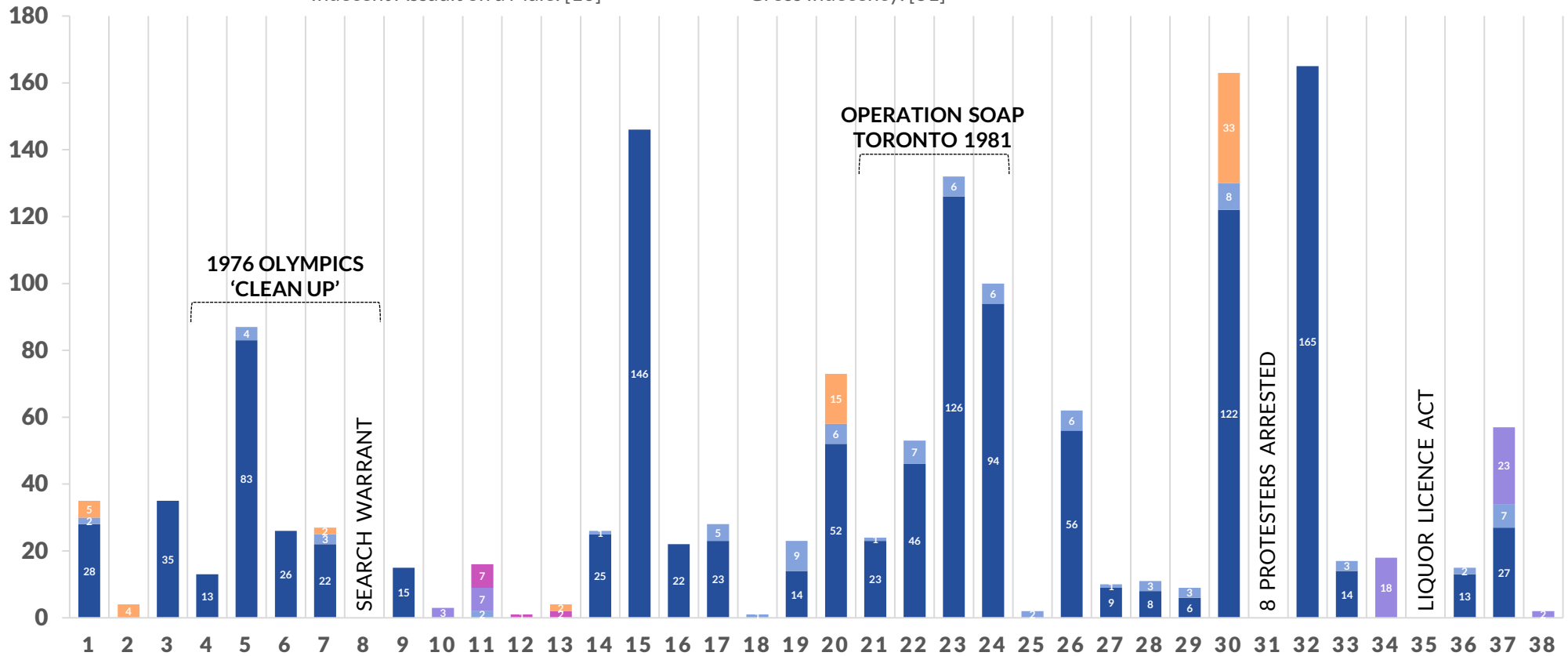
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BATHHOUSE RAIDS IN CANADA 1968-2004

OF CHARGES:

- Found In a Common Bawdy House: [1,213]
- Keeping a Common Bawdy House: [88]
- Indecent Act: [53]
- Indecent Assault on a Male: [10]
- Gross Indecency: [61]



[1] International (Toronto)	Oct 27, 1968	[11] International (Toronto)	March 11, 1977	[21] Barracks (Toronto)	Feb 5, 1981	[31] Sex Garage (Montreal)	July 15, 1990
[2] International (Toronto)	Aug 15, 1973	[12] International (Toronto)	May 30, 1977	[22] Club Baths (Toronto)	Feb 5, 1981	[32] KOX/Katakombes (Montreal)	Feb 17, 1994
[3] Sauna Aquarius (Montreal)	Feb 4, 1975	[13] Oak Leaf (Toronto)	June 1977	[23] Richmond St. (Toronto)	Feb 5, 1981	[33] Remingtons (Toronto)	Feb 19, 1996
[4] Club Baths (Montreal)	Jan 23, 1976	[14] Dominion Square (Montreal)	Summer 1977	[24] Romans (Toronto)	Feb 5, 1981	[34] Bijou (Toronto)	June 1999
[5] Sauna Neptune (Montreal)	May 15, 1976	[15] Truxx (Montreal)	Oct 22, 1977	[25] Home of Roy M. (Toronto)	April 23, 1981	[35] Pussy Palace (Toronto)	Sept 24, 2000
[6] Club Baths (Montreal)	May 20, 1976	[16] Dominion Square (Montreal)	Oct 19, 1978	[26] Pisces Health Spa (Edmonton)	May 30, 1981	[36] Goliath's Bathhouse (Calgary)	Dec 12, 2002
[7] Club Baths (Ottawa)	May 22, 1976	[17] Barracks (Toronto)	Dec 9, 1978	[27] International (Toronto)	June 16, 1981	[37] Taboo (Montreal)	May 9, 2003
[8] Club Baths (Toronto)	Aug 12, 1976	[18] Home of Don F. (Toronto)	June 6, 1979	[28] Back Door Gym (Toronto)	June 16, 1981	[38] Warehouse Spa (Hamilton)	Aug 3, 2004
[9] Sauna Crystal (Montreal)	Feb 4, 1977	[19] Hot Tub Club (Toronto)	Oct 11, 1979	[29] Back Door Gym (Toronto)	April 20, 1983		
[10] International (Toronto)	Feb 10, 1977	[20] Sauna David (Montreal)	April 23, 1980	[30] Chez Bud's (Montreal)	June 2, 1984		

Chart by: Tom Hooper, April 2018. Usage rights: CC-BY-NC-SA (for corrections/additions/inquiries please contact: tom@rtpc.ca) Bathhouse is defined as an establishment that facilitates queer sex, or an LGBTQ2 space raided under the bawdy house law. **Sources:** Don McLeod, *Lesbian and Gay Liberation in Canada: A Chronology*, Vols. 1 & 2 (1964-1981), Toronto: Homewood Books, 1996 & 2014. "Steam Bath Raided, 30 Face Morals Charges," *Toronto Daily Star*, October 28 (1968), 2; "Toronto Police Raid Bath," *Body Politic*, no. 10 (1973), 7; "Police Raid Clubs; Seeking Clues to Montreal's Rising Murder Rate?," *Body Politic*, no. 22 (1976), 4; Ron Dayman, "Olympics Clean-up Strikes Again," *Body Politic*, no. 23 (1976), 6; "87 Arrested in Raid on Montreal Sauna," *Globe and Mail*, May 17 (1976), 9; "Olympic Crackdown," *Body Politic*, no. 25 (1976), 1, 17; "City Gays Say Raid Was Garmes Cleanup," *Ottawa Journal*, May 25 (1976), 2; David Garmaise, "Ottawa Police Raid Toronto Bath's Offices," *Body Politic*, no. 27 (1976), 7; John Blacklock, "More Montreal Raids," *Body Politic*, no. 32 (1977), 8; George Hislop, "Toronto Update: Directions to Note," *Directions: For Gay Men*, no. 2 (1977), 5; "Spadina Steambath Allowed Sex, Trial Told," *Toronto Star*, February 23 (1979), A4; George Hislop, "Toronto Update: Directions to Note," *Directions: For Gay Men*, no. 4 (1977), 3; Ron Dayman, "Truxx Accused Organize Own Defence," *Body Politic*, no. 40 (1978), 12; "Heavy-handed Raid on Homosexuals," *Montreal Gazette*, October 26 (1977), 6; "Montreal Police Storm Tavern in Repeat of Truxx Raid," *Body Politic*, no. 48 (1978), 9; "Homosexual Baths: A Safer Place for Casual Sex," *Globe and Mail*, December 13, (1978) 5; "Charges May Invalidate Law on Adult Consent," *Globe and Mail*, June 16 (1979) 5; "Police Raid Gay Club Amid Jeering Crowd," *Globe and Mail*, October 12 (1979), 2; Stuart Russell, "Montreal Police Raid on Sauna David," *Body Politic*, no. 64 (1980), 9; "Heavy Hand of the Law," *Globe and Mail*, February 9 (1981), 6; "Rage!" *Body Politic*, No. 71 (1981); Tom Hooper, "Enough is Enough: The Right to Privacy Committee and Bathhouse Raids in Toronto, 1978-83," PhD Dissertation, York University, 2016; "More Charges in Bathhouse Probe," *Toronto Star*, April 23 (1981), A4; "Bawdy House Law", *Edmonton Journal*, June 2 (1981), A4; Ian Austen, "21 Arrested in Swoop on 2 Bathhouses," *Globe and Mail*, June 17 (1981), 5; "Back to the baths, back to the streets," *Body Politic*, no. 94 (1983), 9-10; Tom Warner, *Never Going Back: A History of Queer Activism in Canada*, Toronto: University of Toronto Press, 108; Richard Burnett, "Sex Garage raid a turning point in Montreal's LGBT activism," *Montreal Gazette*, June 27 (2015); Yves Lafontaine, "Descentes policières marquantes," *fugues*, July 26, 2012; Colin Leslie, "Cops bust gay strip bar," *Xtra!* February 29, 1996; Brenda Cossman, "Indecency is an easy trap," *Xtra!* August 25, 1999; Kirk Makin, "Police reach settlement over bathhouse raid," *Globe and Mail*, April 1 (2005); Patrick Brethour, "Calgary bathhouse raid angers gays," *Globe and Mail*, December 18 (2002); Maria-Belen Ordóñez, "Strippers need not apologize," *Xtra!* March 29 (2006); Tanya Gulliver, "Charged for bathhouse sex," *Xtra!* August 18, 2004.