Relations Between Police and LGBTQ2S+ Communities

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EXECUTIVE SUMMARY

The Independent Civilian Review into Missing Person Investigations commissioned this report on relations between police and LGBTQ2S+ communities, particularly Black and Indigenous people of colour, sex workers, trans people, people living with HIV, those who are homeless, and/or those who are undocumented.

The report finds that the Canadian state has a long history of using the criminal law to target LGBTQ2S+ communities. This is particularly true for those located at multiple axes of oppression. Canadian police also have a long history of failing to take investigations involving LGBTQ2S+ complainants, and other marginalized communities, seriously. This history continues to shape how LGBTQ2S+ communities experience contemporary forms of policing. The literature on policing and minority communities often refers to this widespread practice as over-policing and under-protecting: In the same moment that minority groups are targeted by the discriminatory practices of the police, their concerns are not taken seriously when they become victims of crime.

The report also finds that, over the past three decades, LGBTQ2S+ communities have successfully pushed for the introduction for formal human rights protections. These formal protections play an important role in regulating police — police are required to comply with human rights legislation and the *Canadian Constitution*, and services across Canada that have failed to do so have in some instances been sanctioned. Police have also made commitments to ensure the provision of "bias free" policing. While human rights protections have not been a panacea, legislative reform and the recognition of claims brought on the basis of "sexual orientation", "gender identity", and/or "gender expression" have played an important role in

bringing about concrete policy changes designed to realize the goal of substantive equality in Canada.

In its recommendations section, the report highlights the need to ensure that those who experience the brunt of over-policing and under-protection lead any reform efforts. With this overarching framework in place, the report recommends specific training measures to improve relations between police and LGBTQ2S+ communities, transparency initiatives (data collection and reporting; external evaluation and review), and the more effective use of police liaison committees to translate community concerns into concrete policies and procedures. The report ends by underscoring the urgent need to consider alternatives to the criminal legal system.

INTRODUCTION

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The report finds that the Canadian state has a long history of using the criminal law to target LGBTQ2S+ communities. This is particularly true for those located at multiple axes of oppression. Canadian police also have a long history of failing to take investigations involving LGBTQ2S+ complainants, and other marginalized communities, seriously. This history continues to shape how LGBTQ2S+ communities experience contemporary forms of policing. The literature on policing and minority communities often refers to this widespread practice as over-policing and under-protecting: In the same moment that minority groups are targeted by the discriminatory practices of the police, their concerns are not taken seriously when they become victims of crime.

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Structure of the Report

The report is organized in three parts. **Section I** (History of Relations Between Police and LGBTQ2S+ Communities) examines the Canadian state's history of using the criminal law to target LGBTQ2S+ communities, particularly those located at multiple axes of oppression. Section I also explains that Canadian police have a long history of failing to take investigations involving LGBTQ2S+ complainants, and other marginalized communities, seriously. This history continues to shape how LGBTQ2S+ communities experience contemporary forms of policing. The literature on policing and minority communities often refers to this widespread practice as over-policing and under-protecting.

Section II (The Emergence of Legal Protections on the Basis of Sexual Orientation, Gender Identity, and Gender Expression) analyzes the emergence of LGBTQ2S+ legal protections in the years that followed the 1969 *Criminal Code* reforms. While the growing number of legal protections have not been a panacea, legislative reform and the recognition of claims brought on the basis of "sexual orientation", "gender identity", and/or "gender

expression" have played an important role in bringing about concrete policy changes designed to realize the goal of substantive equality for LGBTQ2S+ communities in Canada. Section II also conducts a non-exhaustive survey of how LGBTQ2S+ claimants have, more recently, used these emerging legal protections in an effort to combat pervasive levels of discrimination in policing settings.

Section III (Recommendations) provides a series of recommendations designed to improve relations between police and LGBTQ2S+ communities. Most importantly, the section explains that any reform efforts should be led by LGBTQ2S+ people who have direct experience with the brunt of over-policing and under-protection, including Black and Indigenous people of colour, sex workers, trans people, people living with HIV, those who are homeless, and/or those who are undocumented. With this framework in place, other recommendations are canvassed, including improved training programs, transparency initiatives, and more effective use of police liaison committees. Section III ends the recommendations section by underscoring the importance of considering alternatives to the criminal legal system. These alternatives may take a variety of forms, including community organizing and other forms of accountability that go beyond the criminal legal system.

The Importance of Intersectionality

While the particular focus of this commissioned report is on sexual orientation, gender identity, and gender expression in the context of policing, the report attends to the complex relationships among and between various categories of identity and experience, including those set out in section 1 of the Ontario *Human Rights Code*.[1] These include: race, ancestry, place of origin,

[1] RSO 1990, c H 19 [*Human Rights Code*].

colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, and disability. For example, sexual orientation and race invariably work in concert with each other to form distinct modes of discrimination. Kimberlé W. Crenshaw coined the term "intersectionality" to describe the nature of these complex dynamics.[2]

The Independent Civil Review into Missing Persons Investigation's terms of reference make several explicit references to intersectionality. For example, they provide: "WHEREAS there are intersections of minorities within the LGBTQ2S+ communities, including South Asian, Middle Eastern, 2-spirited, other racialized individuals, as well as those who are either homeless or work in the sex trade that are particularly vulnerable and require an improved approach to policing relationships".[3]

The Ontario Human Rights Commission also notes the importance of adopting an intersectional approach to discrimination:

> Applying an intersectional or contextualized approach to multiple grounds of discrimination has numerous advantages. It acknowledges the complexity of how people experience discrimination, recognizes that the experience of discrimination may be unique and takes into account the social and historical context of the group. It places the focus on society's response to the individual as a result of the confluence of grounds and does not require the person to slot themselves into rigid compartments or categories. It addresses the fact that discrimination has evolved and tends to no longer be overt, but

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[2] Kimberlé W. Crenshaw, "Demarginalizing the Intersection of Race and Sex" (1989) U Chi Legal F 139. In a subsequent article, she defined intersectionality in the following terms: "In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color" (Kimberlé W. Crenshaw, "Mapping the Margins: Intersectionality, Identity, and Violence Against Women of Color" (1991) 43:6 Stan Law Rev 1241 at 1244-1245).

[3] City of Toronto, "Missing Persons Investigations Review Working Group – Review's Terms of Reference and Budget" (25 June 2018), online: City of Toronto <www.toronto.ca>.

rather more subtle, multi-layered, systemic, environmental, and institutionalized.[4]

As this report demonstrates, an intersectional approach is crucial to understanding the complex, dynamics between the police and LGBTQ2S+ communities Canada.[5]

[4] Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (Toronto: Ontario Human Rights Commission, 2001) at 3-4.

[5] For further discussion, see e.g. Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point: Fernwood Publishing, 2017).

SECTION I: HISTORY OF RELATIONS BETWEEN POLICE AND LGBTQ2S+ COMMUNITIES

Introduction

The Canadian state has a long history of using the criminal law to target LGBTQ2S+ communities. This is particularly true for those located at multiple axes of oppression. Canadian police also have a long history of failing to take investigations involving LGBTQ2S+ complainants, and other marginalized communities, seriously. This history continues to shape how LGBTQ2S+ communities experience contemporary forms of policing. The literature on policing and minority communities often refers to this widespread practice as over-policing and under-protecting: In the same moment that minority groups are targeted by the discriminatory practices of the police, their concerns are not taken seriously when they become victims of crime.[6]

The section proceeds in four parts. Part I provides a non-exhaustive survey of the historical *Criminal Code* offences designed to target LGBTQ2S+ communities either directly or indirectly. It also explains how current *Criminal Code* offences, along with by-laws, continue to be used to target LGBTQ2S+ communities and allow for over-policing. Part II examines the Supreme Court of Canada's 1967 gross indecency decision in *Klippert v. The Queen* and subsequent reforms to the *Criminal Code* in 1969. Part III tracks the aftermath of the 1969 reforms, where police across Canada targeted spaces such as bathhouses, parks, washrooms, and bars. Subsequent sections of this report explain that these dynamics continue to the present. Part

[6] For further discussion, see e.g. Angela Dwyer, "'It's Not Like We're Going to Jump Them': How Transgressing Heteronormativity Shapes Police Interactions with LGBT Young People" 11:3 Youth Justice 203; and Louis Kushnick, "'Over Policed and under Protected': Stephen Lawrence, Institutional and Police Practices" (1999) 4:1 Sociological Research Online 1.

IV analyzes the history of investigations involving LGBTQ2S+ complainants and other marginalized communities, along with how this history shapes contemporary dynamics.

1. History of Criminal Code Offences

Since its creation in 1892, the *Criminal Code of Canada* contained a series of prohibitions designed to target, both directly and indirectly, LGBTQ2S+ communities. The *Criminal Code* reflects Canada's colonial legal inheritances — it was modelled after similar legislation in the United Kingdom. While many of these offences have been repealed, current *Criminal Code* offences, along with by-laws, continue to be used to target LGBTQ2S+ communities and allow for over-policing. What follows below is a non-exhaustive survey of some of the most commonly used offences.

(a) Gross indecency

Historically, the offence of gross indecency was often used to target LGBT2QS+ communities. In its first iteration in 1892, the offence of "acts of gross indecency" set out in section 178 of the *Criminal Code* only applied to men: "Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person."[7] In 1953-1954, as part of a structural overhaul of the *Criminal Code,* the offence was amended to use gender-neutral language. Section 149 of the 1953-1954 version of the *Criminal Code* provided: "Every one

[7] *The Criminal Code, 1892*, SC 1892, c 29, s 178 [*Criminal Code, 1892*].

who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years."[8]

The offence provided no definition of what constituted gross indecency. This lack of definitional precision invited police, Crown prosecutors, and judges to make moralistic determinations about what types of acts would be criminally prohibited. In a 2007 decision, the British Columbia Court of Appeal suggested that, historically, the offence was designed to ask whether the sexual activities in question constituted a "marked departure from decent conduct expected of an average Canadian."[9] As discussed below, the 1969 *Criminal Code* exempted a narrow class of consensual sexual activities from the offence of gross indecency, but only when they took place in private, with two people over the age of 21.[10] Parliament repealed the offence of gross indecency altogether in the 1980s.[11]

(b) Buggery

Prohibitions against buggery, more commonly known today as anal intercourse, have existed in the *Criminal Code* since its inception in 1892. In the first version of the *Criminal Code*, section 174 provided: "Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature."[12] The wording of the provision made it clear that anal sex with a human and anal sex with an animal were treated the same. Section 175 of the *Criminal Code* also contained an offence entitled

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[8] *Criminal Code*, SC 1953-54, c 51, s 149 [*Criminal Code, 1953-54*].
[9] See e.g. *R v Sharpe*, 2007 BCCA 191 at para 14.
[10] *Criminal Law Amendment Act, 1968-69*, SC 1968-69, c 38, s 149A [*Criminal Law Amendment, 1968-69*].
[11] *An Act to amend the Criminal Code and the Canada Evidence Act*, RSC 1985 (3d Supp.), c 19, s 4.
[12] *The Criminal Code, 1892*, *supra* at 174.

"attempt to commit sodomy," which provided: "Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the next preceding section." Through a 1906 amendment, the offence was renamed "buggery".[13] In 1953-1954, the offence was renamed "buggery or bestiality", seemingly in an effort to add clarity about the underlying aims of the offence. Section 147 of the *Criminal Code* provided: "Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years."[14] As was the case with gross indecency, Parliament exempted a narrow class of activities from the offence in 1969 — that is, sexual activities between two consenting adults 21 years of age or older in private.[15] The offence, however, persisted in the *Criminal Code* until a series of reforms in the 1980s.

(c) Age of consent for anal intercourse

In 1987, buggery and bestiality were separated into two separate offences: anal intercourse (s. 154) and buggery (s. 155).[16] Section 154 provided an exemption for activities taking place in private between two adults 18 years of age or older. Yet the legislation continued to differentially treat the age of consent for anal sex and vaginal sex.[17] In a series of legal challenges brought across the country, the offence (which eventually became s. 159) was struck down, in part because of its potential to discriminate against LGBTQ2S+ communities.[18] In a

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[13] *Criminal Code*, RSC 1906, c. 146, ss 202 & 203.
[14] *Criminal Code 1953-54*, *supra* at s 147.
[15] *Criminal Law Amendment, 1968-1969*, supra at s. 149A.
[16] *An Act to amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24, s 3.
[17] Tim McCaskell, *Queer Progress: From Homophobia to Homonationalism* (Toronto: Between the Lines Publishing, 2016) at 246 [McCaskell, *Queer Progress*].
[18] *R v CM* (1995), 41 CR (4th) 134 (Ont CA); *R v Roy* (1998), 125 CCC (4th) 442 (Que CA); *R v Blake*, 2003 BCCA 525; *R v Roth*, 2004 ABQB 305; *R v Farler* (2006), 43 NSR (2d) 237 (CA); and *Halm v Canada (Minister of Employment and Immigration)*, [1995] 2 FC 331 (TD).

major recent overhaul to the *Criminal Code*, the so-called "zombie" provision was finally repealed altogether. The legislation received Royal Assent in June 2019.[19]

(d) Criminal sexual psychopathy laws

In 1948, the Parliament of Canada introduced another set of criminal prohibitions, this time designed to target the criminal sexual psychopath. Parliament designed these prohibitions to be used in concert with other *Criminal Code* offences such as gross indecency and buggery. Highly influenced by mid-century psychiatric discourses, the law permitted the indefinite detention of "a person who by a course of misconduct in sexual matters has evidenced a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person."[20] In 1953-1954 Parliament amended the *Criminal Code* to specify the underlying offences where the Crown could seek the criminal sexual psychopath designation. These offences included rape, carnal knowledge, indecent assault on a male or female, buggery or bestiality, and gross indecency.[21] This law was subjected to public scrutiny after the Supreme Court released its decision in *Klippert v. The Queen*[22] because it was interpreted as allowing for the indefinite detention of those engaged in consensual sexual activities with members of the same sex. The decision in *Klippert* will be discussed below.

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[19] *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 54 [*Criminal Code Amendment 2019*].
[20] *An Act to amend the Criminal Code*, SC 1948, c 39, s 1054A(8).
[21] *Criminal Code 1953-54*, *supra* at s 661(1).
[22] [1967] SCR 822, 65 DLR (2d) 698 [*Klippert*].

(e) Disorderly houses, bawdy houses, and prostitution laws

Prohibitions against so-called disorderly houses were first introduced through the *Indian Act*, and were designed by colonial powers to target Indigenous communities — especially Indigenous women.[23] In 1880, the federal government introduced *An Act to amend and consolidate the laws respecting Indians*,[24] which forbade bawdy house keepers from allowing Indigenous women engaged in sex work from entering the premises. Four years later, the federal government amended the *Indian Act* to clarify that both Indigenous men and women could be charged under the 1880 law.[25] In the years that followed, Parliament made a series of amendments to the *Indian Act* designed to target Indigenous women engaged in sex work. With the emergence of the full-scale *Criminal Code* in 1892, Parliament removed the provisions from the *Indian Act* and placed them into the *Code*. The government reintroduced the offence designed to prohibit Indigenous people from frequenting or being found in disorderly houses, but constructed the legislation to only apply to Indigenous women. This law remained on the books until Parliament introduced ta major overhaul of the *Criminal Code* in 1953-1954.[26]

In the 1892 version of the bawdy house offence set out in the *Criminal Code*, s. 196 defined a "common bawdy-house" as a place where acts of prostitution took place ("A common bawdy-house is a house, room, set of rooms or place any kind kept for purposes of

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[23] For further discussion, see e.g. Naomi Sayers, "Prostitution in the Indian Act and the Criminal Code" (10 July 2016), online: KWE Today www.kwetoday.com>; and Leslie Erickson, *Westward Bound: Sex, Violence, the Law, and the Making of a Settler Society* (Vancouver: UBC Press, 2012).

[24] *An Act to amend and consolidate the laws respecting Indian,* SC 1876, c 18.

[25] The 1884 version of the legislation stated that keepers of "tents and wigwams" were included within the law.

[26] Constance Backhouse, *Canadian Prostitution Law 1839-1972* (Ottawa: Canadian Advisory Council on the Status of Women, 1984).

prostitution").[27] Through a series of *Criminal Code* amendments, the offence was expanded to include so-called indecent acts. A 1917 *Criminal Code* amendment, for example, repealed earlier iterations of the offence and replaced it with the following provision: "A common bawdy-house is a home, room, set of rooms or place of any kind kept for purposes of prostitution or for the practice of acts of indecency, or occupied or resorted to by one or more persons for such purposes."[28] Armed with this amorphous offence, one that expanded over time to include a range of indecent activities, police used the bawdy house provision of the *Criminal Code* to target sex workers, LGBTQ2S+ communities, and other marginalized communities.[29] The offence tended to only be prosecuted if police took proactive steps such as undercover investigations, as individual complaints were rare. Accordingly, the bawdy house laws often became synonymous with the regularized over-policing of marginalized communities. As discussed below, in the aftermath of the 1969 *Criminal Code* reforms, police services across the country increasingly relied on this offence to target LGBTQ2S+ communities in spaces such as bathhouses and bars. They conceptualized those who attended these locations as being found-ins and keepers of common bawdy houses.

In the Supreme Court decision in *Bedford v Canada*, sex workers successfully challenged three *Criminal Code* offences that indirectly criminalized sex work: the bawdy-house provision (s. 210), living on the avails of prostitution (s. 212), and communicating for the purpose of prostitution in public (s. 213).[30] In 2014, in response to the *Bedford* decision, the

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[27] *Criminal Code, 1892, supra*.
[28] *An Act to amend the Criminal Code and the Canada Evidence Act*, SC 1971, c 14, s 3.
[29] For further discussion of the history of the bawdy house offence in Canadian criminal law, see J Stuart Russell, "The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law" (1982) 14:2 OLR 270.
[30] *Bedford v Canada (Attorney General)*, 2013 SCC 72 [*Bedford*].

federal government introduced the *Protection of Communities and Exploited Persons Act*, which recriminalized prostitution and introduced a new Preamble seemingly designed to forestall future constitutional challenges.[31] The new legislation criminalized purchasing sexual services (s. 286.1), advertising of sexual services by third parties (s. 286.5), materially benefitting from another person's work (s. 286.2), procuring sexual services (s. 286.3), and communicating in public places that are or next to school grounds, playgrounds, or daycare centres (s. 213(1.1)).

Many sex worker and LGBTQ2S+ organizations expressed strong concerns about the new prostitution legislation. For example, Monica Forrester, a sex worker and trans woman of colour who is a staff worker at Maggie's: Toronto Sex Workers Action Project, explained:

> Right now, if [sex workers] face violence, we can't call the police. I have never been able to call police for help, even after I was sexually assaulted. At the time, I'd been through mandatory diversion programs after an arrest for prostitution, and knew I faced incarceration if my sex work was discovered. So, I did not call police. Bill C-36 would not have helped me then, and it won't help me now.[32]

In 2019, the Parliament of Canada repealed the bawdy house laws as part of a clean-up to offences in the *Criminal Code* deemed unconstitutional.[33] The *Criminal Code* provisions introduced by the federal government in 2014, however, continue to remain intact.

(f) Vagrancy Laws

Historically, vagrancy laws have also been used to target street-involved people, including

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[31] *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, RS 2014, c 25. For discussion of the constitutionality of the new legislation, see e.g. Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54: 1 Alta Law Rev 69.
[32] Monica Forrester, "Bill C-36 won't help sex workers" (22 December 2014), online: NOW Toronto <www.nowtoronto.com>. See also Pivot Legal Society, "Bill C-36: A backgrounder" (6 November 2014), online: Pivot Legal Society <www.pivotlegal.org>.
[33] *Criminal Code Amendment 2019, supra* at s 69.1.

LGBT2QS+ communities. In particular, vagrancy laws have been used to target sex workers, trans people, the undocumented, and homeless people, along with the various intersections between these communities. While vagrancy finds its roots in the United Kingdom, legal historian Constance Backhouse traces the first Canadian instance of vagrancy to a law passed in Halifax, Nova Scotia in 1759.[34] The first instance of a comprehensive national vagrancy legislation emerged in 1869, when Parliament passed *An Act respecting Vagrants*.[35] The offence of vagrancy proceeded to form part of the first *Criminal Code* in 1892 (ss. 207 & 208). Section 208 provided: "Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both."[36] In 1953-1954, Parliament attempted to transform the offence from being one that targeted status (who a person was) to one that targeted behaviour (what a person did).[37] In the years that followed, the offence was regularly amended.[38]

(g) HIV non-disclosure

HIV non-disclosure laws have also been used to target a number of historically marginalized communities, including Black and Indigenous people of colour and/or LGBTQ2S+ people. The

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[34] Constance Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflections of a Discriminatory Society" (1985) 18 Histoire Sociale - Social History 387 at 389, citing *An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and houses of correction* & *An Act for regulating and maintaining a House of correction or Work-House within the Town of Halifax*.
[35] *An Act respecting Vagrants*, 1869, c 28, s 1.
[36] *Criminal Code, 1892*, *supra* at s 208.
[37] *Criminal Code, 1953-1954*, *supra* at s 164(1).
[38] For further discussion, see e.g. Prashan Ranasinhe, "Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48:1 OHLJ 55.

Criminal Code does not contain any specific offences related to the non-disclosure of HIV status. Instead, police, Crown prosecutors, and judges applied a range of different offences to target HIV non-disclosure, including common nuisance,[39] administering a noxious thing,[40] criminal negligence causing bodily harm,[41] sexual assault,[42] aggravated sexual assault,[43] and murder.[44] In two decisions, *Cuerrier*[45] and *Mabior*,[46] the Supreme Court of Canada sought to delineate the parameters of HIV non-disclosure.[47] In *Cuerrier* (1998), the Supreme Court held that people living with HIV had a legal duty to disclose their status to sexual partners when there was a "significant risk of serious bodily harm." In *Mabior* (2012), the Supreme Court tried to clarify this standard, explaining that the "significant risk of serious bodily harm" test ought to focus on whether there is a "realistic possibility that HIV will be transmitted."[48] The Court further explained that, in the context of penile-vaginal sex, the "realistic possibility" standard

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[39] *Criminal Code*, RSC 1985, c C-46 at s 180(1)(b) [*Criminal Code*].
[40] *Criminal Code*, *supra* at s 245.
[41] *Criminal Code*, *supra* at s 221.
[42] *Criminal Code*, *supra* at s 271.
[43] *Criminal Code*, *supra* at s 273.
[44] *Criminal Code*, *supra* at s 229.
[45] *R v Cuerrier*, [1998] 2 SCR 371 [*Cuerrier*].
[46] *R v Mabior*, 2012 SCC 47 [*Mabior*]. See also the Supreme Court's companion HIV non-disclosure case: *R v DC*, 2012 SCC 48.
[47] For further discussion on the criminalization of HIV non-disclosure, see e.g. Isabel Grant, Martha Shaffer & Alison Symington, "Focus: R v Mabior and R v DC: Sex, HIV, and Non-Disclosure, Take Two: Introduction" (2013) 63:3 UTLJ 462; Martha Shaffer, "Sex, Lies, and HIV: Mabior and the Concept of Sexual Fraud" (2013) 63:3 UTLJ 466; Alison Symington, "Injustice Amplified by HIV Non-Disclosure Ruling" (2013) 63:3 UTLJ 485; Kyle Kirkup, "Releasing Stigma: Police, Journalists, and Crimes of HIV Non-Disclosure in Canada" (2015) 46:1 OLR 127 [Kirkup, "Stigma"]; Emily MacKinnon & Constance Crompton, "The Gender of Lying: Feminist Perspectives on the Non-Disclosure of HIV Status" (2012) 45:2 UBC L Rev 407; Alana Klein, "Criminal Law, Public Health, and Governance of HIV Exposure and Transmission" (2009) 13:2-3 Int'l JHR 251; and Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-Disclosure of HIV" (2008) 31 Dal LJ 121.
[48] *Mabior*, *supra* at para 4.

would not be met if the accused person had a low viral count as a result of medical treatment and a condom was used.[49]

The federal government recently attempted to constrain the criminalization of HIV non-disclosure. In December 2018, former Attorney General of Canada Jody Wilson-Raybould issued a directive to the Director of Public Prosecutions. The Directive sought to limit prosecutions in Yukon, the Northwest Territories, and Nunavut. Among other things, the Directive instructs prosecutors in northern Canada to not prosecute people with suppressed viral loads or where condoms were used, which is a less onerous disclosure standard than the one the Supreme Court imagined in *Mabior*.[50] In the months that followed the Directive, the Standing Committee on Justice and Human Rights held public hearings and published a study entitled *The Criminalization of HIV Non-Disclosure in Canada*.[51] The Committee recommended the creation of a "specific offence in the *Criminal Code* related to the non-disclosure of an infectious disease (including HIV) when there is actual transmission, and that prosecutions related to such transmission only be dealt with under that offence".[52] It is unclear whether this recommendation will ever become part of the *Criminal Code*, as a federal election was called shortly after the Committee published its report.

HIV-related prosecutions disproportionately target Black and Indigenous people of colour and LGBTQ2S+ people, along with the various intersections between these communities.

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[49] *Ibid*.
[50] Attorney General of Canada, "Directive of the Attorney General Issued under section 10(2) of the Director of Public Prosecutions Act: Prosecutions involving Non-Disclosure of HIV Status" (8 December 2018), online: Public Prosecution Service of Canada <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch12.html>.
[51] Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, *The Criminalization of HIV Non-Disclosure in Canada*, 42nd Parl, 1st Sess, No 28 (June 2019) (Chair: Anthony Housefather).
[52] *Ibid* at 2.

For example, a 2017 study from the Canadian HIV/AIDS Legal Network tracking known HIV non-disclosure prosecutions in Canada found that, since the *Mabior* decision in 2012, almost half (48%) of all people charged where race is known were Black men.[53] The study also found that, since *Mabior*, 38% of men were charged in cases that involved male partners, and 4% of men were charged when sex with both male and female partners took place.[54]

(h) Use of liquor license and bylaw infractions

At the same time that police's use of morality-laden *Criminal Code* offences to target LGBTQ2S+ communities appear to have started to wane in recent years, liquor license and bylaw infractions appear to be increasing. Mariana Valverde and Miomir Cirak describe this emerging dynamic in the following terms:

> …[S]ome Toronto police have taken it upon themselves to use the antiquated machinery of the Liquor Licensing Act to continue enforcing moral codes that can no longer be easily enforced with the Criminal Code. Some might say that homophobia will find any legal tools to pursue its target; and indeed, much as been made in the local gay press of the discriminatory character of liquor-law enforcement within the boundaries of 52 division…But there is more here than simple discrimination. A look at police charge statistics for the past few years, for the downtown police stations, reveals that the Liquor Licensing Act is routinely used to govern street 'disorder'…The people caught by this antiquated legal machinery are much more likely to be the poor and the homeless than the respectable customers of gay businesses: governing through alcohol, while a useful strategy for homophobic police officers, is not unique to the gay village.[55]

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[53] Colin Hastings, Cécile Kazatchkine & Eric Mykhalovskiy, *HIV Criminalization in Canada: Key Trends and Patterns* (Toronto: Canadian HIV/AIDS Legal Network, 2017) at 4.
[54] *Ibid* at 5. For further discussion of empirical trends in contemporary HIV non-disclosure prosecutions, see e.g. Eric Mykhalovskiy & Glenn Betteridge, "Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-Disclosure in Canada" (2012) 27:1 CJLS 31.
[55] Mariana Valverde & Miomir Cirak, "Governing Bodies, Creating Spaces: Policing Security Issues in 'Gay' Downtown Toronto" (2003) 43 Brit J Criminol 102 at 117.

As discussed below, police have relied on liquor license and bylaw infractions — that is, not *Criminal Code* provisions — in cases such as *Pussy Palace* (2000) and *Marie Curtis Park* (2016). These cases illustrate the shifting nature of policing and LGBTQ2S+ communities, which now involves both *Criminal Code* offences as well as liquor license and bylaw infractions.[56]

2. The *Klippert* Case and the 1969 Criminal Code Reforms

(a) Klippert v. The Queen

Many of the harms of Canada's historic approach to criminalizing LGBT2QS+ communities are exemplified by the Supreme Court's 1967 gross indecency decision in *Klippert*.[57] The decision sparked intense public criticism and, in concert with the burgeoning LGBT2QS+ rights movement, played an important role in spurring Parliament to amend the *Criminal Code* two years later. Everett George Klippert is believed to be the last person in Canada to be convicted of gross indecency, deemed a criminal psychopath, and indefinitely placed in preventive detention — all for engaging in consensual sexual activities with other men.

As police were conducting an arson investigation at the mine where he worked, Klippert disclosed that he had engaged in sexual activities such as mutual masturbation with other men. He was charged and later pleaded guilty to four counts of gross indecency under s. 149 of the *Criminal Code*. While he was beginning to serve out his sentence in a federal penitentiary, the Crown brought an application under s. 661 of the *Criminal Code* to have Klippert declared a dangerous sexual offender and held in preventive detention for an indefinite period. The Crown

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[56] See also Elise Chenier, "Rethinking class in lesbian bar culture: Living 'the gay life' in Toronto, 1955-1965" (2004) 9:2 Left History 85.
[57] *Klippert*, *supra*.

argued that, because Klippert was, in the opinion of two psychiatrists, a so-called incurable homosexual, it was likely that he would engage in similar behaviour in the future. The judge agreed. The preventive detention issue eventually made its way to the Supreme Court of Canada, where the majority upheld the initial decision. Adopting a deferential posture, Justice Fauteux explained that it was Court's job to interpret the *Criminal Code*, not to make law.[58]

(b) The 1969 Criminal Code reforms

The public heavily criticized the *Klippert* decision. With the emergence of an increasingly visible LGBTQ2S+ rights movement, along with similar legislative reforms taking shape in the United Kingdom, the issue quickly became difficult for the Canadian government to ignore.[59] Standing in the House of Commons in November 1967, Justice Minister Pierre Trudeau indicated that the federal government would consider legislative reform.[60] Two years later, the government passed Bill C-150.[61]

The 1969 legislation exempted a narrow class of sexual activities from the offences of buggery and gross indecency. Individuals would not be targeted if they engaged in same-sex sexual activities, but only if they were 21 years of age or older and did so in private. The wording of the offence meant that it still applied to sexual activity involving more than two people. Section 147A of the amended version of the *Criminal Code* provided:

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[58] *Klippert*, *supra* at 836.
[59] For further discussion, see e.g. Gary Kinsman, *The Regulation of Desire*, 2nd ed (Toronto: Black Rose Books, 1996).
[60] Canada, House of Commons Debates (8 November 1967) at 4036-37, cited by David Kimmel & Daniel J Robinson, "Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949-1969" (2001) 16 CJLS 147 at 156-157.
[61] For further discussion of the legislative debates, see e.g. Tom Hooper, "'Queering' 69: The Recriminalization of Homosexuality in Canada" (2019) 100:2 Canadian Historical Review 255.

> (1) Sections 147 [buggery] and 149 [gross indecency] do not apply to any act committed in private between
> (a) a husband and his wife, or
> (b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act.
>
> (2) For the purposes of subsection (1),
> (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and
> (b) a person shall be deemed not to consent to the commission of an act
>
> (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or
>
> (ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or imbecile.[62]

It would be erroneous to suggest that the 1969 reforms decriminalized same-sex sexual activities, particularly for LGBT2QS+ people situated at multiple axes of oppression. Rather, the nature of policing LGBT2QS+ people began to shift following 1969, with a movement to target locations that could more readily be construed as public. With growing concentrations of LGBT2QS+ people in specific parts of major metropolitan centers (e.g. the Toronto Church-Wellesley village), police after 1969 used laws to target places known to be frequented by community members.

3. Policing Public Sex

(a) The 1969 aftermath

After the 1969 *Criminal Code* reforms and the passage of a narrow exemption for the offences of buggery and gross indecency, police continued to target LGBT2QS+ communities. Armed with a broad definition of what constituted public sex and a series of readily identifiable

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[62] *Criminal Law Amendment Act, 1968-69, supra*.

LGBT2QS+ villages in large Canadian cities, police escalated efforts to target sexual activities taking place in places such as bathhouses, parks, washrooms, and bars.

In the lead-up to the 1976 Summer Olympics in Montreal, for example, Montreal police and members of the Royal Canadian Mounted Police (RCMP) raided a series of bathhouses, parks, washrooms, and bars known to be frequented by members of LGBTQ2S+ communities across the city. As historians Gary Kinsman and Patricia Gentile explain, the raids were designed to "clean up" Montreal as it prepared for the global event. In February 1975, for example, police raided the Sauna Aquarius and charged thirty-five men with being found-ins in a common bawdy house. As discussed above, the *Criminal Code* defined a common bawdy house as any place used "for the purposes of prostitution or the practice of acts of indecency." Given that the *Criminal Code* provided no definition of what constituted an act of indecency,[63] the practical effect of the offence was to invite police, Crown prosecutors, and judges to make such determinations. As queer activist Tim McCaskell explained: "So anywhere [homosexual acts] took place could be considered a criminal establishment, and anyone found there could be arrested. It felt like we were falling down the rabbit hole…[The] earlier insistence that decriminalization did not mean that gay sex had become legal began to make more and more sense."[64] The Body Politic, a Toronto-based collective and LGBTQ2S+ newspaper, described the series of raids in the following terms: "For a lot of men in Montreal, their first experience of the great Olympic 'clean-up' was the sight of a policeman's axe crashing through the door of their room at the baths."[65]

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[63] For further discussion on the interpretation of the bawdy house offences, see *R v Labaye*, 2005 SCC 80.
[64] McCaskell, *Queer Progress*, *supra* at 99.
[65] Gary Kinsman & Patricia Gentile, "Resisting the Olympic Cleanup" (29 December 2009), online: Xtra! <www.dailyxtra.com>.

Similar policing patterns played out across Toronto. On December 9, 1978, the police raided The Barracks, a gay bathhouse. 23 men were charged as being found ins and two were charged as being keepers of a common bawdy house. Following the raid, community members formed what came to be known as the December 9th Defense Fund (this group was later renamed the Right to Privacy Committee (RTPC)). Members of the group provided legal information and advice to those who had been charged under the bawdy house offences.

(b) Toronto Bathhouse Raids and the Bruner Report (1981)

In February 1981, relations between LGBTQ2S+ communities and the police in Canada came to a boiling point. Over the course of a single evening, Toronto police raided four bathhouses and threw half-naked men out onto the street in the middle of winter. Over 300 men were charged with being either found-ins or keepers of a common bawdy house.[66] Given the history with police, it is perhaps unsurprising that the raids sparked outrage within LGBTQ2S+ communities. The night following the bathhouse raids, more than 3000 people gathered at the corner of Yonge and Wellesley and proceeded to march to 52 Division. Protesters were heard chanting "Gays fight back." When they arrived, the protesters encountered approximately 250 police officers, who had formed a human barrier in front of the station.[67]

As a direct consequence of the Toronto Bathhouse Raids, Reverend Brent Hawkes, pastor of Toronto's Metropolitan Community Church, organized a hunger strike to protest the police's discriminatory treatment of LGBTQ2S+ people. A few days after Reverend Hawkes announced his hunger strike, approximately 4000 individuals organized another protest, this

[66] McCaskell, *Queer Progress*, *supra* at 137-169.
[67] McCaskell, *Queer Progress*, *supra* at 137-169.

time with the support of the Metro Labour Council, the Canadian Civil Liberties Association, and local politicians. Speakers at the protest included Lemona Johnson. In 1979, Toronto Police killed Johnson's husband, Albert, a 35-year-old Black man, in front of their family. The officers were eventually acquitted on all charges.[68] In speaking at the event, Johnson underscored the importance of recognizing how vulnerable communities — particularly those situated at multiple axes of oppression — collectively experienced violence, discrimination, and harassment at the hands of the police.[69]

Following the 1981 raids, the RTPC, which until then had been a relatively small organization emerging out of the bathhouse raids at The Barracks, grew to become one of the largest LGBTQ2S+ organizations in Canada. Rather than pleading guilty, organizers understood challenging the charges in open court as a rights mobilization strategy.[70] With the help of the legal defence fund, judges eventually threw out most of the charges.[71] Following the Toronto Bathhouse Raids, the RTPC also worked with Black and South Asian organizations, as well as the Law Union of Ontario, to establish the Citizens' Independent Review of Police Actions (CIRPA). Understanding the ways marginalized communities collectively experienced policing,

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[68] For further discussion, see e.g. "Justice for Albert Johnson" *The Jean Augustine Political Button Collection*, online: York University <http://archives.library.yorku.ca/exhibits/show/pushingbuttons/social-activism/justice-for-albert-johnson>; and Warren Gerard, "To serve and protect and sometimes shoot and kill" *Macleans* (24 September 1979), online: Macleans <http://archive.macleans.ca/article/1979/9/24/to-serve-and-protect-and-sometimes-shoot-to-kill>.

[69] Tim McCaskell, "Black Lives Matter versus Pride Toronto" *Now Toronto* (12 July 2016), online: Now Toronto <www.nowtoronto.com> [McCaskell, "Black Lives Matter"].

[70] Joshua Meles, "Harnessed Anger" *Daily Xxtra!* (1 February 2006), online: Daily Xtra! <http://www.dailyxtra.com>.

[71] Nicki Thomas, "Thirty years after the Bathhouse Raids" *Toronto Star* (4 February 2011), online: Toronto Star <http://www.thestar.com>.

the groups came together to found Toronto's first independent police oversight organization.[72] The organization ran a hotline, which allowed the public to report acts of racism, sexism, and homophobia, and to receive advice on potential avenues for legal redress. The organization also kept data on the calls it received, and presented the data at Toronto City Hall in an effort to advocate for police accountability.[73]

After considerable public pressure related to the Toronto Bathhouse Raids, Mayor Art Eggleton retained Arnold Bruner, then a law student at the University of Toronto and a former journalist, to investigate relations between police and LGBTQ2S+ communities. Given that charges were still before the courts, Bruner was instructed not to study issues arising out of the Toronto Bathhouse Raids. On September 24, 1981, Bruner released his report entitled *Out of the Closet: Study of Relations Between Homosexual Community and Police* (the Bruner Report),[74] which was reportedly produced in sixty days with a budget of $22,500.[75]

The Bruner Report made a total of sixteen recommendations about improving relations between Toronto police and LGBTQ2S+ communities, namely:

1. The establishment of a gay-police dialogue committee that would meet regularly to discuss issues related to the policing of sexual minorities.[76]
2. That the Chief of Police make it clear to police that the gay community "constitutes a legitimate minority within the community" and is "entitled to the same rights as other minorities and, whose individual members are entitled to the

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[72] McCaskell, "Black Lives Matter", *supra*.
[73] Tim McCaskell, "Why one gay activist isn't happy with Toronto police's apology" *Xtra* (28 June 2016), online: Xtra <www.dailyxtra.com>.
[74] Arnold Bruner, *Out of the Closet: Study of Relations Between Homosexual Community and Police* (Toronto: City of Toronto, 1981) [*Bruner Report*].
[75] McCaskell, *Queer Progress*, *supra* at 153.
[76] *Bruner Report*, *supra* at 159-160.

same respect, service, and protection as all law-abiding citizens."[77]

3. That the Chief of Police issue a directive on the use of abusive language. In particular, the Bruner Report notes that commonly used police terms such as "homosexual murder", "homosexual rape", and "known homosexual" implied an unfounded association between the gay community and criminality.[78]
4. That the undercover surveillance of consensual sex in washrooms be discontinued and that a moratorium on arrests related to consensual sex in parks be issued.[79]
5. That "leaders of gay community organizations urge upon the gay community a moderate stance toward the police, law officials and government in keeping with an atmosphere of dialogue."[80]
6. That a policy on policing in the context of consensual sexual relationships be developed.[81]
7. That the recommendation on the policing of consensual sex (recommendation 6) be expressly applied to entrapment techniques, such that they be "discontinued in cases involving adult participants in sex acts conducted in private."[82]
8. The creation of a "gay awareness" training program in consultation with gay

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[77] *Bruner Report, supra* at 160-161.
[78] *Bruner Report, supra* at 161-162.
[79] *Bruner Report, supra* at 162-163.
[80] *Bruner Report, supra* at 163-164.
[81] *Bruner Report, supra* at 163-164.
[82] *Bruner Report, supra* at 164-165. Until the Supreme Court's 1988 decision in *R v Mack*, [1988] 2 SCR 903, 44 CCC (3d) 513, the defence of entrapment had not been recognized in Canadian criminal law. Even after *Mack*, the defence of entrapment continues to provide broad discretion in the context of police investigations, including *bona fide* inquiries into areas known for crime.

community members be developed. The Bruner Report envisions new recruits taking the program and more experienced police officers being required to take the program at least once.[83]

9. That the Toronto Police develop a long-term program to increase the education levels of police officers, particularly those in the middle and upper ranks.[84]
10. That the Chief of Police and Senior Officers "co-operate in a joint community program to recruit gay men and women into the police force."[85]
11. That the Mayor's Working Sub-Committee on Policing (part of the Mayor's Committee on Community and Race Relations) include the gay community in its terms of reference and membership, and that it participate fully in the proposed joint community program. The Bruner Report also recommended that the police "hold a series of public hearings to determine the problems experienced by individual groups with respect to policing."[86]
12. That relevant legislation be amended to change the composition of the Board of Commissioners of Police to provide for "a woman member…and for representation from ethnic and cultural groups, which may from time to time include the gay community."[87]
13. That the Toronto Police "follow the example set by the City of Toronto eight years ago and prohibit discrimination of hiring on the grounds of sexual

[83] *Bruner Report, supra* at 165-167.
[84] *Bruner Report, supra* at 167-168.
[85] *Bruner Report, supra* at 168-169.
[86] *Bruner Report, supra* at 169-170.
[87] *Bruner Report, supra* at 170-171.

orientation."[88]

14. That the provincial government amend the Ontario *Human Rights Code* to prohibit discrimination on the basis of "sexual orientation."[89]
15. That members of the gay community, particularly those in the business sector, ensure the provision of "care and guidance" for homeless gay youth. The Bruner Report also envisions the police gay liaison committee treating the issue of gay youth as a "special area of concern".[90]
16. That a strategy be developed to recruit and retain members of the gay community into the Toronto Police.[91]

The Bruner Report was groundbreaking, particularly for its time. In calling for a new approach to the police's interactions with a "legitimate" community, the prohibition of offensive language used by police, and the addition of "sexual orientation" in the Ontario *Human Rights Code*, the Bruner Report constituted a serious effort to improve relations between members of LGBTQ2S+ communities and the police. Indeed, the Bruner Report sought to provide concrete recommendations on ways to address longstanding issues of over-policing, which had been embodied by the Toronto Bathhouse Raids in 1981. The Report was less clear, however, on how to address issues of under-protecting, such as a series of unsolved murders (discussed below).

LGBTQ2S+ community members did not agree with all aspects of the Bruner Report. As discussed below, there is longstanding tension among members of LGBTQ2S+ communities

[88] *Bruner Report, supra* at 171.
[89] *Bruner Report, supra* at 172.
[90] *Bruner Report, supra* at 173.
[91] *Bruner Report, supra* at 174.

between those attempting to reform the police and those seeking to more radically reimagine systems that go beyond the current criminal legal system. Indeed, some writers suggest that we should move away from the carceral state altogether.[92] As McCaskell notes, the Bruner Report's recommendation that community members adopt a more moderate stance in relation to police (Recommendation 5) was particularly controversial among LGBTQ2S+ people. Indeed, many community members viewed the recommendation as a form of victim blaming. Shortly after the release of the Bruner Report, for example, activist Chris Bearchell stated: "We've already taken a moderate stance toward the police. We haven't taken the law into our own hands like some of them have. It's like expecting a rape victim to sit down and have dialogue with a rapist."[93]

Some members of the Toronto Police were also skeptical about many of the reforms proposed by the Bruner Report; the majority of the recommendations were significantly delayed, or altogether ignored, by Toronto Police. For example, the creation of a gay-police dialogue committee (Recommendation 1) took a decade to develop. As the 2016 Marie Curtis raids — where Toronto police conducted an extensive undercover sting operation targeting men having sex with men in Marie Curtis Park[94] —illustrate, the recommendation that undercover surveillance of consensual sex in washrooms be discontinued and that a moratorium on arrests related to consensual sex in parks be issued (Recommendation 4) has never been followed.

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[92] For further discussion, see e.g. Joel L Mogul, Andrea J Ritchie & Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011) [*Queer (In)Justice*].
[93] McCaskell, *Queer Progress*, *supra* at 154.
[94] See e.g. Andrea Janus, "Some charges dropped in 'Project Marie' Etobicoke park sex sting" *CBC News* (30 October 2017), online: CBC <www.cbc.ca>.

4. Police Investigations

At the same time that Toronto police were targeting LGBTQ2S+ communities in public spaces such as bathhouses, parks, washrooms, and bars, another parallel history was unfolding. Throughout the 1970s, Toronto was home to a series of murders perpetrated against gay men. In November 1978, for example, police were called to investigate the death of William Duncan Robinson, who was found stabbed to death in his apartment. Robinson was the 14th gay man who had been murdered between 1975 and 1978 in Toronto. Seven of these cases remain unsolved to this day. As queer historian Tom Hooper explains, "At the time of the investigations, potential witnesses were reluctant to speak to police because they were concerned about how they might be treated. They were also worried if they came forward with information, they themselves might be charged with some sort of offence, or that they might be publicly outed. And members of the community had good reason to worry about that."[95] This perception likely came from multiple sources, including reports of over-policing in the local gay press, and conversations in community hubs in and around Toronto's Church-Wellesley village.

At the same time, there has been a longstanding perception among members of LGBT2S+ communities that, when incidents of hate-motivated violence are brought forward to police, they will not be taken seriously. Writing about hate-motivated violence, Douglas Victor Janoff summarizes the current dynamic in the following terms:

> There has been a history of tension and mistrust between police and the queer community in Canada. Police engage in homophobic behaviour by discriminating against their queer colleagues and by adhering to traditional notions about what constitutes a 'legitimate' hate crime. Since 1990, Canadian police have arrested hundreds of men and some women for being found in locations associated with same-sex sexual activity: public toilets, bathhouses, parks, and gay nightclubs. Police sometimes entrap men and then humiliate them by releasing their names to the press; by not

[95] Tom Hooper, "The gay community has long been over-policed and under-protected. The Bruce McArthur case is the final straw" *CBC* (16 April 2018), online: <www.cbc.ca>.

> following through on the charges, police engage in a very effective form of social control.[96]

With the ascendance of community-based policing in the 1990s, including efforts designed to address the needs of LGBTQ2S+ people, police have attempted to improve relations and reduce instances of discrimination.[97] However, there is a clear and longstanding relationship between the experiences of LGBTQ2S+ communities at the hands of the police (over-policing) and individuals' fear about coming forward as witnesses and ending up becoming targets (under-protecting). This history continues to shape the perceptions that LGBTQ2S+ communities have about the police into the present.

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[96] Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) at 198.

[97] On recent efforts to build better relationships with LGBTQ2S+ communities, see Ontario Association of Chiefs of Policing, *Best Practices in Policing and LGBTQ Communities in Ontario* (Toronto: Ontario Association of Chiefs of Police, 2013) [*Best Practices in Policing*].

SECTION II: THE EMERGENCE OF LEGAL PROTECTIONS ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION

Introduction

In the years that followed the 1969 *Criminal Code* reforms, along with the ongoing police targeting of communities in public spaces and a series of compromised investigations, LGBTQ2S+ communities successfully pushed for the introduction of formal human rights protections. These formal protections play an important role in regulating police — police are required to comply with human rights legislation and the *Canadian Constitution,* and services across Canada that have failed to do so have in some instances been sanctioned. Police have also made commitments to ensure the provision of "bias free" policing.[98] While human rights protections have not been a panacea, legislative reform and the recognition of claims brought on the basis of "sexual orientation", "gender identity", and/or "gender expression" have played an important role in bringing about concrete policy changes designed to realize the goal of substantive equality in Canada.

The section proceeds in three parts. Part I examines the emergence of rights protections on the basis of "sexual orientation", "gender identity", and "gender expression" in Canadian law. Part II tracks the treatment of "sexual orientation", "gender identity", and "gender expression" in the *Canadian Constitution*. Part III analyzes *Criminal Code* reforms, particularly in the area of hate crimes. Part IV surveys a series of recent cases where LGBTQ2S+ claimants in Canada have invoked these relatively new rights protections in the context of policing.

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[98] See e.g. Toronto Police Service, "Equity, Inclusion & Human Rights", online: Toronto Police Service <www.torontopolice.on.ca/diversityinclusion/>.

1. Human Rights Protections on the Basis of "Sexual Orientation", "Gender Identity", and "Gender Expression"

Beginning in the 1970s, legislatures at the federal, provincial, territorial, and local level started to introduce formal anti-discrimination protections for LGBTQ2S+ communities — for the most part, this took shape through the addition of "sexual orientation",[99] and later "gender identity" and/or "gender expression", to a variety of legal instruments across the country.[100] What follows below is a brief survey of these legal developments.

In 1973, Toronto became the first city in Canada to adopt a formal anti-discrimination policy on the basis of "sexual orientation". The City of Toronto bylaw provided: "Employees of the City of Toronto are to be in no way discriminated against in regards to hiring, assignments, promotions or dismissal on the basis of their sexual orientation. 'Sexual orientation' is understood to include heterosexuality, homosexuality, and bisexuality."[101] This anti-discrimination protection applied to those employed by the City of Toronto. In the years that followed, Ontario cities including Ottawa (1976), Windsor (1977), and Kitchener (1982) introduced similar "sexual orientation" anti-discrimination bylaws.[102]

In 1977, Quebec became the first jurisdiction in Canada to add "sexual orientation" to a human rights instrument when it amended its *Charter of Human Rights and Freedoms*.[103] The same year, the Ontario Human Rights Commission recommended the addition of "sexual

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[99] Philip Girard, "Sexual Orientation as a Human Rights Issue in Canada 1969-1985" (1986) 10 Dal LJ 267.
[100] Kyle Kirkup, "The Origins of Gender Identity and Gender Expression in Anglo-American Legal Discourse" (2018) 68:1 UTLJ 80 [Kirkup, "Origins"].
[101] Girard, *supra* at 275-276.
[102] Girard, *supra* at 276.
[103] SQ 1977, c 6.

orientation" in the Ontario *Human Rights Code*.[104] This change occurred in 1986.[105] In the years that followed, provincial and territorial governments made similar legislative amendments to their respective human rights codes. At the federal level, the Canadian Human Rights Commission first recommended that "sexual orientation" be added as a prohibited ground of discrimination in the *Canadian Human Rights Act* in 1979. However, the Parliament of Canada did not pass legislation adding "sexual orientation" as a protected ground of discrimination until 1996.[106]

More recently, governments at all levels (federal, provincial, and territorial) have added the terms "gender identity" and/or "gender expression" to their respective human rights codes.[107] While trans people had, since at least 1982,[108] successfully claimed that they were protected by existing grounds such as "sex" and "disability", legislatures began expressly recognizing trans people in their human rights codes in 2002. The Northwest Territories was the first jurisdiction in Canada to expressly protect trans people when it added "gender identity" to its *Human Rights Act*.[109] Ten years later, in 2012, Ontario amended the *Human Rights Code*[110] to include both "gender identity" and "gender expression" as prohibited grounds of

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[104] Ontario Human Rights Commission, *Life Together* (Toronto: Ontario Human Rights Commission, 1977).
[105] *Equality Rights Statute Law Amendment Act, 1986,* SO 1986, c 64.
[106] *An Act to amend the Canadian Human Rights* Act, SC 1996, c 14, s 1. See also *Haig v Canada* (1992), 16 CHRR D/226 (Ont CA), which found that the omission of "sexual orientation" from the *Canadian Human Rights Act* constituted discrimination.
[107] On the emerging human rights recognition of "gender identity" and "gender expression" in Canada and other jurisdictions, see Kirkup, "Origins", *supra*.
[108] *Quebec (Commission des droits de la personne) v Anglsberger* (1982), 3 CHRR D/892, 1982 CarswellQue 358 (CP).
[109] *Human Rights Act*, SNWT 2002, c 18, s 5(1).
[110] *Human Rights Code*, *supra*.

discrimination.[111] As of 2017, every jurisdiction in Canada (federal, provincial, and territorial) had amended their human rights codes to introduce explicit anti-discrimination protections for trans people.[112]

Both "gender identity" and "gender expression" remained legally undefined in human rights codes across the country. This has meant that human rights commissions have emerged to provide initial interpretive guidance on the meaning of these terms. The Ontario Human Rights Commission (OHRC)'s *Policy on preventing discrimination because of gender identity and gender expression* defines "gender identity" as "each person's internal and individual experience of gender. It is a person's sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex."[113] The OHRC defines "gender expression" as "how a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender. Others perceive a person's gender through these attributes."[114] Ultimately, provincially-regulated entities, including the police, are legally required to comply with the Ontario *Human Rights Code,* which includes protections on the basis of "sexual orientation", "gender identity", and "gender expression."

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[111] *Toby's Act (Right to be Free From Discrimination and Harassment because of Gender Identity or Gender Expression)*, SO 2012, c C-7 [*Toby's Act*].
[112] Kirkup, "Origins", *supra*.
[113] Ontario Human Rights Commission (OHRC), *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression* (Toronto: OHRC, 2012) at 7 [OHRC *Policy*].
[114] OHRC *Policy*, *supra*.

2. The Canadian Constitution

While not expressly recognized in the *Canadian Constitution*, "sexual orientation" and, more recently, "gender identity" and "gender expression" have emerged, or are emerging, as newly-recognized grounds — this development promises to shape the future of LGBTQ2S+ policing in Canada.

In 1982, the federal government patriated the *Canadian Constitution*[115] and introduced the *Canadian Charter of Rights and Freedoms*.[116] Three years later, the *Charter*'s equality rights guarantee (s. 15) came into force. Section 15(1) provides: "Every individual is equal before and under the law and has the right to equal protection and 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."[117] While the provision does not expressly include "sexual orientation", "gender identity", or "gender expression", its open-ended wording opened up space for the framing of new constitutional rights claims.

In its *Charter* jurisprudence, the Supreme Court recognized "sexual orientation" as an analogous ground of discrimination for the first time in 1995.[118] Analogous grounds are defined as "immutable or changeable only at unacceptable cost to personal identity".[119] This recognition was important because it paved the way for claimants to be able to use the *Canadian Constitution* to challenge discrimination on the basis of "sexual orientation". The Supreme Court's preferred approach under the *Charter* is described as "substantive equality." In *Kapp*,

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[115] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[116] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[117] *Charter*, *supra* at s. 15(1).
[118] *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan*].
[119] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 at para 13 (SCC).

the Court explained that "the concept of equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality".[120] While the Supreme Court heard a series of important cases over the past three decades that played an important role in issues such as the federal recognition of same-sex marriage in 2005,[121] these cases have not dealt squarely with discrimination and norms of substantive equality in the domain of the criminal law.[122]

To date, the Supreme Court has not heard a case where a claimant has argued that "gender identity" and/or "gender expression" are analogous grounds of discrimination under s. 15(1) of the *Charter*. Lower courts have, however, recently started to grapple with this issue.[123] In the near future, it seems likely that the Court will hear a case where the claimants successfully argue that "gender identity" and/or "gender expression" are protected under s. 15(1) of the *Charter*. Such as development is likely, as it is in keeping with the large and liberal approach to rights-conferring instruments preferred by the Supreme Court. Accordingly, the *Canadian Constitution* may also be used to regulate the practices of police services, and their relationships with LGBTQ2S+ communities.

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[120] *Kapp* at para 15, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 165; see also *Withler v Canada*, [2011] 1 SCR 396 at para 39.
[121] See, in particular, *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554; *Egan*, *supra*; *Vriend v Alberta*, [1998] 1 SCR 493; and *Little Sisters Book and Art Emporium v Canada*, 2000 SCC 69.
[122] For further discussion on the limited impact of s. 15(1) of the *Charter* in the criminal law context, see Rosemary Cairns Way, "Attending to Equality: Criminal Law, the Charter and Competitive Truths" (2012) 57 SCLR (2d) 39.
[123] See e.g. *CF v Alberta*, 2014 ABQB 237.

3. The Criminal Code of Canada

Despite pervasive discrimination in the criminal legal system, parts of the *Criminal Code* now formally recognize LGBTQ2S+ communities. Parliament first included "sexual orientation" (1995), and later "gender identity" and "gender expression" (2017), in the hate crimes provisions of the *Criminal Code*. In 1995, as part of a major overhaul to Canada's sentencing regime, Parliament introduced s. 718.2(a)(i). To rely on this provision at sentencing, the Crown must demonstrate beyond a reasonable doubt that the accused person was motivated by bias, prejudice, or hate on the basis of one of the enumerated identity categories, including "sexual orientation", or any other similar factor.[124] When the legislation was introduced, the inclusion of "sexual orientation" in s. 718.2(a)(i) proved controversial for some lawmakers and members of the public.[125]

More recently, Parliament amended the hate crimes provisions of the *Criminal Code* to include "gender identity or expression".[126] The legislation amended the definition of "identifiable group" set out in s. 318(4) to include "gender identity or expression".[127] This amendment makes it clear that the offences set out in s. 318(1) (advocating genocide), s. 319(1) (public incitement of hatred), and s. 319(2) (wilful promotion of hatred) all apply in cases where an individual or group is targeted because of their "gender identity or expression". The 2017 legislation also amends s. 718.2(a)(i) to include "gender identity or expression." In its current

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[124] *Criminal Code, supra* at s 724(3).
[125] For further discussion of hate crimes and "sexual orientation", see e.g. Sean Robertson, "Spaces of Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R. v. Cran*" (2005) 50 Crim LQ 482.
[126] *An Act to amend the Canadian Human Rights Act and the Criminal Code,* SC 2017, c 13 (assented to 17 June 2017).
[127] *Criminal Code, supra* at s. 318(4) provides: "In this section, identifiable group means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability".

formulation, s. 718.2(a)(i) instructs sentencing judges to treat "evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor" as an aggravating factor at sentencing.[128] While the *Criminal Code* now formally recognizes "sexual orientation", "gender identity", and "gender expression", this does not necessarily translate into police implementation on the ground. Instances of both over-policing and under-protecting continue to stymie relations between police and LGBTQ2S+ communities.

4. Anti-Discrimination Cases in Policing Settings

Having surveyed the recognition of "sexual orientation", "gender identity", and "gender expression" in human rights law, the *Canadian Constitution,* and the *Criminal Code,* what follows below is a non-exhaustive survey of recent human rights cases brought by LGBTQ2S+ claimants alleging discrimination in Ontario policing settings. These cases have raised a series of complex, intersectional issues and have often resulted in systemic remedies, including policy changes and the creation of LGBTQ2S+ training for police officers. The analysis proceeds chronologically.

(a) Pussy Palace raid (2000-2003)

Almost twenty years after the Toronto Bathhouse Raids and the subsequent publication of the Bruner Report in 1981, the Toronto Police raided the Pussy Palace, a bathhouse that permitted

[128] *Criminal Code, supra* at s. 718.2(a)(i) [emphasis added]. For thoughtful a thoughtful critique of hate crime legislation, see Florence Ashley, "Don't be so hateful: The insufficiency of anti-discrimination and hate crime laws in improving trans well-being" (2018) 68:1 UTLJ 1.

women (whether cisgender or trans) to enter.[129] Initially, two female police officers performed an undercover investigation at the location. Later that night, five male plain-clothes officers entered into what the female officers had told them was a "highly sexualized" environment,[130] purportedly in search of violations of the establishment's liquor license. The organizers were subsequently charged with a series of liquor license offences. Ultimately, the Court held that because the event was only open to women, the act of male officers entering Pussy Palace was analogous to a strip search. The Court therefore used section 24(2) of the *Charter* to exclude the evidence gathered by the male officers about the alleged liquor license infractions. Without the male officers' evidence, the charges were stayed.[131]

After the liquor license charges were stayed, a group known as the Women's Bathhouse Committee launched a human rights complaint against the Toronto Police Service. In 2003, the Women's Bathhouse Committee and the Toronto Police Service entered into a settlement agreement, which included the following terms:

1. The Toronto Police Service agreed to provide its personnel with LGBTQ2S+ training.
2. The Toronto Police Service agreed to create a policy on the safe lodging on trans people in custody.
3. The Toronto Police Service agreed to begin compiling and publishing statistics on: (1) the number of times per year officers enter "women's only" spaces; and

[129] The case is reported as *R v Aitcheson*, 2002 OJ No 1170, 93 CRR (2d) 261, 53 WCB (2d) 275 [*Aitcheson*].
[130] *Aitcheson*, *supra* at para 5.
[131] *Aitcheson*, *supra* at paras 20-25.

(2) the number of trans people they strip search each year. These statistics are to be made available on the Toronto Police Service's website.[132]

4. The five male officers agreed to write apology letters to the Women's Bathhouse Committee.
5. The Toronto Police Service agreed to pay the Women's Bathhouse Committee $35,000 to cover their legal expenses.[133]

Indeed, while the Bruner Report had recommended the development of LGBTQ2S+ training in 1981, the Toronto Police Service was slow to act on these recommendations. The Pussy Palace liquor license charges, along with the Women's Bathhouse Committee's subsequent human rights complaint, suggested that human rights law could be harnessed to achieve public interest remedies for discrimination experienced by LGBTQ2S+ communities at the hands of the police.

(b) Rosalyn Forrester complaint (2006)

Many of the experiences of trans women, especially Black and Indigenous women of colour, in policing contexts are demonstrated by the case of *Forrester v. Peel (Regional Municipality) Police Services Board*.[134] In this case, Rosalyn Forrester brought an Ontario *Human Rights Code* complaint against the Peel Police Services Board, alleging repeated acts of discrimination. Forrester, a Black trans woman, argued she had been questioned, mocked, incarcerated, and inappropriately strip-searched following a series of arrests. While Forrester repeatedly asked

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[132] For more recent efforts to advocate for the Toronto Police Service to collect and report race-based data, see Ontario Human Rights Commission, "Written Deputation to the Toronto Police Services Board re: Policy on Race-Based Data Collection, Analysis and Public Reporting" *Ontario Human Rights Commission* (19 September 2019), online: OHRC <www.ohrc.on.ca>.
[133] Julia Garro, "Pussy Palace Settlement Bears Fruit" *Daily Xtra* (16 March 2006), online: Daily Xtra <http://www.dailyxtra.com>.
[134] *Forrester v Peel (Regional Municipality) Police Services Board*, 2006 HRTO 13 [*Forrester*].

that female officers conduct the searches, her requests were denied. During two searches, male officers conducted the search alone. On another occasion, both male and female officers performed what they called a "split search" (where male officers searched the lower part of her body and female officers searched the upper part of her body).

In 2006, the Ontario Human Rights Tribunal issued its decision, finding that police should be required to offer trans people three options prior to performing a strip search. These options are:

1. A male officer(s) only search;
2. A female officer(s) only search; or
3. A split search (male and female officer(s), depending on the area of the body being searched).[135]

The Tribunal also dealt with a series of other issues, including the process for when police conducted a strip search on a trans person and how to resolve cases where there was a dispute about whether male or female officers should conduct the search. The Tribunal also ordered that the police produce a training video on trans policing issues. Following the decision, a number of police services throughout the province and across Canada proactively amended their strip search policies and training programs to better accord with the *Forrester* decision.[136]

(c) HIV non-disclosure press release (2010)

In 2010, the Ottawa Police Service arrested and charged a 29-year-old gay man living with HIV with several offences, including aggravated sexual assault. After his arrest, with Ottawa Police

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[135] *Forrester*, *supra* at para 476.
[136] For further discussion of *Forrester*, see Kyle Kirkup, "Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law" (2009) 24:1 CJLS 107.

Service released his photo to the public, as well as his name, details of the sexual encounters, and his personal health information. An extended press release, sent via email to the Ottawa Police Service's GLBT Liaison Committee, referred to the accused person as a "sexual predator." For many, the case harkened back to long-standing conflation between LGBTQ2S+ communities and criminality. Initially, the Ottawa Police Service defended its decision to issue the press release. Staff Sergeant John McGetrick, for example, explained: "A lot of thought when into this decision, and ultimately the release of the photo was a necessity for public safety…We have reason to believe [the accused person] has knowingly failed to disclose details to multiple persons in the community, and we felt it was paramount to notify the public to seek proper medical attention."[137] After significantly community outcry, the Ottawa Police Service admitted that it should have reached out to members of Ottawa's LGBT2S+ communities and service organizations prior to issuing the press release.[138]

After the Ottawa Police Service issued the press release, the media picked up the story, recounting the details of the case in ways that stigmatized people living with HIV and LGBTQ2S+ communities. The *Ottawa Sun*, for example, ran the story of the front page of the newspaper and included a colour photo of the accused. The online version of the story used the following headline: "Have You Had Sex with This Man? If so, Police Say You Need to See Your Doctor."[139]

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[137] Aedan Helmer, "Courting HIV confusion", *Ottawa Sun* (15 May 2010), online: Ottawa Sun <www.ottawasun.com>.
[138] Marcus McCann, "Unacceptable", *Daily Xtra!* (22 July 2010), online: Daily Xtra! <www.dailyxtra.com>.
[139] Kenneth Jackson, "Have You Had Sex with This Man? If so, Police Say You Need to See your Doctor" *Ottawa Sun* (7 May 2010), online: Ottawa Sun <www.ottawasun.com>.

Public health experts were highly critical of the police's approach in this case. Dr. Patrick O'Bryne, a public health researcher at the University of Ottawa, explained:

> As a warning to HIV-prevention authorities who work with criminal and public health laws that resemble those in Canada, therefore, it is advisable to proceed with caution when making decisions about the use of mass media publications during HIV criminal investigations. The chances that beneficial HIV prevention outcomes might occur are slim, and this suggests that alternative strategies might be preferable.[140]

The Ottawa Police Service's decision to publish the press release without community consultation also undermined its relationship with LGBTQ2S+ community organizations. For example, Bruce House, an organization designed to care and support people living with HIV, refused to accept donations from the Ottawa Police Service's annual Pride breakfast because of the handling of the case.[141] This case underscores not only the potential discriminatory application of HIV non-disclosure offences in the *Criminal Code*, but also the importance of building and maintaining relationships between police and LGBTQ2S+ communities.

(d) Boyd Kodak complaint (2014)

When police arrested Boyd Kodak, a trans man from Toronto, he told them he was a 58-year-old male. The officers then took him to an unspecified downtown police facility and told that he would be strip-searched. The officer's stated reason for conducting the search was to ensure Kodak did not have any weapons on him.[142] At this point, Kodak provided the police with

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[140] Patrick O'Byrne, "The Potential Public Health Effects of a Police Announcement About HIV Nondisclosure: A Case Scenario Analysis" (2011) Policy, Politics, & Nursing Practice 55.
[141] Kirkup, "Releasing Stigma", *supra* at 151.
[142] The Supreme Court set out the parameters of lawful strip searches in the 2001 decision of *R v Golden*, 2001 SCC 83 [*Golden*]. The Court explained that strip searches may be justified under the common law power of search incident to arrest. However, because of their highly intrusive nature, especially for women and minorities, strip searches cannot be conducted as a matter of routine policy (*Golden*, *supra* at para 90). Instead, police must have reasonable and probable grounds to believe that the strip search is necessary (*Golden*, *supra* at paras 98-99). There is

government-issued identification, which identified him as a male. Officers then asked whether he wished to be searched by a male officer or a female officer. Kodak initially indicated that it did not matter, but later said he would prefer to be strip searched by a woman.

After two female officers conducted the strip search, administrators placed Kodak in a segregated cell in the women's area of the facility. Given his legal sex and self-identification as a man, Kodak asked the officers why they were placing him in the women's area of the facility. For reasons that remain unclear, police subsequently moved Kodak to another police facility. Despite never having been out of police custody, Kodak was strip searched again upon admittance to the new facility. Following the strip search, Kodak was taken to a segregated cell in the women's area of the facility, where he remained until his first court appearance. He was subsequently taken back to the same cell and eventually transferred to the Vanier Centre for Women in Milton, Ontario. Upon arrival at the Vanier Prison for Women, Kodak was strip searched again by female officers. At this point, officers questioned Kodak about what was in his underwear. He explained that he uses a penile prosthesis, a device that supports his gender expression. The officers then took the prosthesis, passed it around to each other, and then confiscated it. After completing the strip search, officers forced Kodak to put on women's underwear and women's prison wear.

The next morning, a male officer came to retrieve Kodak from his cell, instructing him that he would again be taken downtown for a bail hearing. At this point, Kodak requested that they return his prosthesis and male clothing. Later that day, Kodak attended the bail hearing in

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growing evidence to suggest that, almost two decades after *Golden*, police in Ontario have a poor record of complying with the decision and routinely perform strip searches in the absence of reasonable and probable grounds. For further discussion, see Gerry McNeilly, *Breaking the Golden Rule: A Review of Police Strip Searches in Ontario* (Toronto: Office of the Independent Police Review Director, March 2019).

women's clothing. Following the bail hearing, police released Kodak from their custody. Kodak was forced to return to the Vanier Center for Women to obtain his clothing and prosthesis. As a result, he had go out in public dressed as a woman. A few months later, the Crown withdrew the charges against Kodak.

Based on this series of events, Boyd Kodak filed a human rights complaint against the Toronto Police Service and Ontario's Ministry of Community Safety and Correctional Services in January 2014. In June 2016, on the eve of the start of the tribunal hearings, Kodak settled his human rights complaint with both the Toronto Police Service and the Ministry. Among other things, the parties agreed to develop and revise polices and training for "interaction with trans people". The parties also agreed that the training would be developed and implemented by members of the trans community, along with the Ontario Human Rights Commission.[143]

(e) Marie Curtis Park (2016)

In 2016, shortly after Black Lives Matter's protest of uniformed police officers in Toronto's Pride parade,[144] the Toronto Police Service organized an undercover 'sting' operation at Marie Curtis Park. Dubbed "Operation Marie," police sought to target late night park sex. In the first phase, uniformed officers patrolled the park. The second phase involved an undercover sting operation. Officers dressed in plain clothes strolled through the park after dark. When men approached the undercover officers to solicit sex, they were charged. Officers handed out approximately 100 citations. Most were bylaw infractions, including "lewd behaviour", "being in park after hours",

[143] Nicholas Keung, "Toronto police, province settle transphobia complaint amid Pride Month" *Toronto Star* (3 June 2016), online: Toronto Star <www.thestar.com>.
[144] See e.g. Alex Migdal, "Toronto police chief explains LGBTQ-outreach efforts to Pride organizers" *The Globe and Mail* (3 August 2016), online: The Globe and Mail <www.theglobeandmail.com>.

and "trespassing." While police expressly claimed that they were not targeting LGBTQ2S+ community members, almost all of the targets were men accused of having sex with men. Many of the men targeted by police were racialized newcomers living ostensibly heterosexual lives with wives and children. The consequences of the bylaw infractions were, therefore, particularly acute. In the third phase, the Toronto Police Service invited residents (excluding those who had been charged) to 'reclaim' the park. The officer responsible for organizing the event, which managed to attract upwards of 50 people, told participants to "walk the trails, spend time with your families, deter this behaviour — because the more legitimate users we have in the park, the less room there is for the illegitimate ones."[145] Following public outcry and the creation of a legal defence group called *Queers Crash the Beat*,[146] many of the charges were withdrawn in 2017. Citing Supreme Court cases such as *Westendorp v The Queen*, which involved a woman who successfully challenged the imposition of a Calgary municipal bylaw infraction related to her status as a sex worker,[147] lawyers also questioned the constitutionality of the use of bylaws in this case.[148] As lawyer Marcus McCann, one of the legal defence organizers, explained: "In terms of the legal defences, the lesson here is the same as it has been for 30-plus years: that those who choose to fight these types of morality raids tend to be vindicated."[149]

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[145] Declan Keogh, "Panic in Marie Curtis Park" *Now Toronto* (23 November 2016), online: Now Toronto <www.nowtoronto.com>.
[146] For further information, see "Queers Crash the Beat", online: <www.queerscrashthebeat.com>.
[147] *Westendorp v The Queen*, [1983] 1 SCR 43, 144 DLR (3d) 259.
[148] Alex Robinson, "Constitutionality of police bylaw use questioned" *Law Times* (5 December 2016), online: Law Times <www.lawtimesnews.com>.
[149] Jacques Gallant, "Tickets withdrawn after 'morality raids' in Etobicoke's Marie Curtis Park" *Toronto Star* (29 October 2017), online: Toronto Star <www.thestar.com>.

For many members of LGBTQ2S+ communities, Project Marie bore a striking resemblance to the Supreme Court's gross indecency decision in the *Klippert*[150] in 1967 and the Toronto Bathhouse Raids in 1981. Like the creation of the RTPC in the aftermath of the raid of The Barracks bathhouse in 1978, the event also spurred LGBTQ2S+ community members to form new advocacy organizations, such as *Queers Crash the Beat*.

[150] *Klippert*, *supra*.

SECTION III: RECOMMENDATIONS

Introduction

In view of the forgoing analysis in this report, there are a number of concrete measures that can be implemented to decrease anti-LGBTQ2S+ bias in policing, and ultimately ameliorate the experience of over-policing and under-protection. Section I begins by underscoring the idea that any reform efforts be led by those who experience the brunt of over-policing and under-protection, including Black and Indigenous people of colour, sex workers, trans people, people living with HIV, those who are homeless, and/or those who are undocumented. With this framework in place, Section II considers specific training measures that could implemented, Section III examines transparency initiatives (data collection and reporting; external evaluation and review), and Section IV proposes the more effective use of police liaison committees. Section V ends the recommendations section by underscoring the urgent need to consider alternatives to the criminal legal system.

1. Led by Those Who Experience the Brunt of Over-Policing and Under-Protection

This report demonstrates that, in the contemporary moment, Black and Indigenous people of colour, sex workers, trans people, people living with HIV, those who are homeless, and/or those who are undocumented continue to experience both over-policing and under-protection at the hands of the police. A number of recent cases discussed in earlier sections of the report support this conclusion, including police raids such as Pussy Palace, the use of press release in HIV non-disclosure cases, trans police discrimination cases such as *Forrester* and *Kodak*, and undercover sting operations such as Project Marie.

Before delving into recommendations, it is important to highlight the need to ensure that those who experience the brunt of over-policing and under-protection lead any reform efforts. As a starting point, the Toronto Police Service may consider organizing a series of town halls led by experienced facilitators with intersectional lived experiences, who are trained in dispute resolution and restorative justice principles. These town halls could be used to identify ongoing issues experienced by Black and Indigenous people of colour, sex workers, trans people, people living with HIV, those who are homeless, and/or those who are undocumented. Community organizations should also be permitted to submit written materials documenting the nature of ongoing issues with police, given the potential for significant power imbalances between police and town hall participants. Without meaningfully considering community experiences from a variety of intersectional perspectives, it is highly unlikely that any efforts to improve relations between LGBTQ2S+ communities and police will prove successful.

2. Training

As discussed above, the Toronto Police Service introduced new LGBTQ2S+ training in 2006 after entering into a settlement agreement with the Women's Bathhouse Committee following the 2000 Pussy Palace Raid. While the Toronto Police Service has, from time to time, updated its LGBTQ2S+ training, the learning objectives have remained relatively static. Past learning objectives for the training have included: a better appreciation of the issues currently facing the LGBTQ2S+ community, a better understanding for the history between the Toronto Police Service and the LGBTQ2S+ community, a better understanding of the proper terminology used to identify members of the LGBTQ2S+ community, a better understanding for issues facing trans persons, and an opportunity to reflect upon their feelings, attitudes, and behaviours. Key

topics in past training sessions have included: the importance of bias-free policing, the history of LGBTQ2S+ communities and the Toronto Police Service, use of proper LGBTQ2S+ terminology, and selected topics, including information on changing one's gender and strip search procedures. The training session has often ended with what the trainers call a "coming out exercise", where participants reflect on their own perceptions and experiences.[151]

To better ensure the provision of effective LGBTQ2S+ training, the implementation of a series of changes should be considered, namely: receiving input and training from members LGBT2S+ communities, making references to specific policies; and including active scenarios that address both over-policing (e.g. sex in public parks) and under-protection (e.g. missing persons investigations).

First, police training programs should be developed and presented by members of LGBT2S+ communities, particularly those with intersectional lived experiences. Community members should be remunerated fairly for their time and expertise in contributing to training sessions. This practice may help to better ensure that the training is tailored to responding to the longstanding experiences that LGBT2S+ communities have in policing contexts. As an example of a promising practice, the Greater Sudbury Police Service recently sought to improve relations with members its trans communities. In 2012, members of the Sudbury Transgender Group TG Innerselves delivered a presentation on gender identity and gender expression to the Greater Sudbury Police Service's Inclusion Team. In 2013, members of TG Innerselves developed a training session for all employees of the Greater Sudbury Police Service. The training focused on the specific barriers faced by trans communities and how the police could better respond to

[151] *Best Practices*, *supra* at 37-38.

them. This training model could be adapted in the development and implementation of future LGBTQ2S+-related trainings within the Toronto Police Service.[152]

Second, police training programs should make reference to specific policies. Given the complexity of policies affecting LGBTQ2S+ community members, particularly those situated at multiple axes of oppression, it is imperative that training programs make concrete references to these governing frameworks and highlight the dangers of both over-policing and under-protection. Unfortunately, past training programs offered by Canadian police services, including the Toronto Police Service, have tended to focus primarily on terminology and language. While these topics may constitute a useful starting point, they are not a substitute for substantive discussions of law and policy. Superficial training programs that focus too heavily on terminology and language do little to provide police with specific guidance about how LGBTQ2S+ policies are designed to operate on the ground.

Third, and in a related vein, LGBTQ2S+ training programs should include active scenarios related to over-policing and under-protection. Active scenarios could be used to proactively address community concerns, including those identified in future town halls and in this report. For example, police officers could be presented with an active scenario involving a trans woman who is carrying a driver's license that legally identifies her as male and includes a male name. While it goes without saying that improving the quality of LGBTQ2S+ training is not a panacea, it would constitute a step in repairing existing relations.

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[152] *Best Practices*, *supra* at 33-37.

3. Transparency Initiatives

In *Human Rights and Policing: Creating and Sustaining Organizational Change*,[153] the Ontario Human Rights Commission describes the importance of monitoring and evaluating human rights initiatives undertaken by police services:

> All change efforts need to be evaluated. The two basic components are evaluating the change efforts and the impact of these efforts. Evaluating the impact shows the real benefit of change efforts, and can help to identify future needs. Ideally, evaluation should be built into initial planning. Evaluating for impact works best when you identify indicators for success early, set clear benchmarks and identify goals for change. Such evaluation requires research skills that police services may not have. Partnerships with academics or other better resourced police organizations may be cost effective ways to do the evaluation. Having a neutral third party do the evaluation can add credibility to findings. Even where resources are scarce and partnership opportunities are limited, simple internal methods of evaluating impact will be valuable.[154]

What follows below is a survey of potential LGBTQ2S+ police transparency initiatives, including data collection, reporting, and external evaluation and review.

(a) Data collection and reporting

As part of the Women's Bathhouse settlement, the Toronto Police Service now records and publishes statistics on the number of trans individuals that officers strip search each year, along with the number of times police attend locations occupied solely by women in a state of partial or complete undress. Other police services throughout the province compile similar kinds of statistics, including incidents of hate-motivated violence.

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[153] Ontario Human Rights Commission, *Human Rights and Policing: Creating and Sustaining Organizational Change* (Toronto: Ontario Human Rights Commission, 2011) [OHRC, *Human Rights and Policing*].
[154] OHRC, *Human Rights and Policing*, *supra* at 29-30.

The most recent publically available Annual Statistical Report published by the Toronto Police Service (2017 Annual Statistical Report) contains the last three years of data on the total number of trans people the Toronto Police Service strip-searched:

- 63 trans people strip searched in 2015.
- 57 trans people strip searched in 2016.
- 76 trans people strip searched in 2017.[155]

Further LGBTQ2S+-specific data collection that may relate to over-policing (e.g. number of trans people taken into custody) and under-protection (e.g. incidents of hate-motivated violence) could be used to support a number of human rights initiatives. Among other things, data may be used to guide decisions about which parts of the city should first receive any new LGBTQ2S+-related anti-discrimination training and where infrastructure investments (e.g. provision of gender-neutral facilities), should be prioritized. Data may also be used to determine crime patterns, including those related to reports of missing persons and anti-LGBTQ2S+ violence. The Toronto Police Service should also improve efforts to make data it currently compiles easily accessible to the public, including through the regular and timely posting of Annual Statistical Reports.

(b) External review

The Toronto Police Service should consider building external evaluation and review into any future LGBTQ2S+-related policies and practices. In particular, the Toronto Police Service may consider appointing neutral third parties to evaluate and report on the effectiveness of any

[155] Toronto Police Service, "2017 Annual Statistical Report", online: Toronto Police Service <www.torontopolice.on.ca>.

revised and newly introduced LGBTQ2S+-related policies and practices. The third party could be housed in an academic research unit, and have an advisory board reflecting the diversity of Toronto's LGBTQ2S+ communities. In addition, the Toronto Police Service may consider including a time limit (e.g. every two years) on when the findings of reports will be published. The Toronto Police Service may also consider making the report available to the public through its website. Such external oversight could help to better ensure accountability, and improve the relationship between LGBTQ2S+ communities and the police.

4. Liaison Committees

In Canada, liaison committees designed to improve relations between LGBTQ2S+ communities and police have existed since the 1970s. While such committees vary in terms of their structure, degree of engagement, frequency of meetings, and overall purposes, they can be used to reduce incidents of bias in policing contexts and better ensure that community concerns are meaningfully addressed.

In 1975, Vancouver became the first city in Canada to create such a committee.[156] Following the death of Alain Brosseau, a man killed in 1989 because his attackers assumed he was gay,[157] the Ottawa Police Service became the first police service in Ontario to create an LGBTQ2S+ police liaison committee. The committee brings community concerns forward to

[156] Becki Ross & Rachel Sullivan, "Tracing lines of horizontal hostility: How sex workers and gay activists battled for space, voice, and belonging in Vancouver, 1975-1985" (2012) 15:5/6 Sexualities 604; and Ann-Marie Field, "Counter-Hegemonic Citizenship: LGBT Communities and the Politics of Hate Crimes in Canada" (2007) 11:3 Citizenship Studies 247.
[157] See e.g. Andrew Duffy & Marie-Danielle Smith, "Death by hate: The life, power and symbolism of Alain Brosseau" *Ottawa Citizen* (15 August 2014), online: Ottawa Citizen <www.ottawacitizen.com>.

the police during its monthly meetings.[158] After the Ottawa Police Service's creation of the first LGBTQ2S+ community consultative committee in the province in 1991, a number of other police services throughout the province followed suit. As discussed above, the Bruner Report recommended in 1981 that the Toronto Police Service create such a committee. Since its creation in the 1990s, the Toronto Police Service's Community Consultative Committee meets regularly to discuss community concerns.

While LGBTQ2S+ community consultative committees serve useful functions in bringing community concerns forward to police, they can be far less effective in bringing about concrete human rights changes. *Best Practices in Policing and LGBTQ Communities in Ontario* notes, for example, that there is often a perception that consultative committees are more invested in improving police services' public image than actually ameliorating the over-policing and under-protection experienced by LGBTQ2S+ communities:

> Throughout the consultation process, a number of LGBTQ community organizations noted the importance of this type of community-based approach to policing. They also noted that liaison committees are only effective when they have the authority to bring about concrete policy and procedural changes within the organization. Police services are strongly encouraged to reach out to community organizations to proactively respond to local concerns and to develop a structure within their service that allows the LGBTQ liaison committee to bring about meaningful change. Otherwise, as a number of LGBTQ community organizations noted during the consultation process with the OACP, LGBTQ liaison committees may be perceived as being more interested in changing their public image than actually reforming policies and procedures within their organizations.[159]

This report recommends that an evaluation of the effectiveness of its LGBTQ2S+ Consultative Committee in bringing about concrete changes to policies and procedures be undertaken. In particular, consultative committees tend to be more effective in translating

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[158] Ottawa Police Service, *Heard for the First Time* (Ottawa: Ottawa Police Service, 2002).
[159] *Best Practices*, *supra* at 21-22.

LGBTQ2S+ concerns into concrete policy outcomes based on their organizational proximity to the Chief of Police — the longer the chain of command is, the less likely that consultative committees will actually be able to bring about meaningful change. As an example, the York Regional Police's Diversity and Cultural Resources Unit, which includes a mandate to bring LGBTQ2S+ community concerns forward, reports directly to the Chief of Police. From an organizational perspective, the proximity of the Diversity and Cultural Resources Unit to the Chief of Police may help facilitate specific changes to policies and procedures.[160] This report also recommends greater transparency measures within the Toronto Police Service's LGBTQ2S+ Community Consultative Committee, including the publication of names of current and past members, minutes from past meetings, a schedule of future sessions, and any specific measures that have been developed as the direct result of the Committee.

5. Alternatives to the Criminal Legal System

Given its nature as a commissioned study, this report has been asked to consider a variety of strategies that may be used to improve police-LGBTQ2S+ relations. The report should not, however, be read as suggesting that the edges of the criminal legal system can simply be tinkered with in order to better ensure bias-free policing. Rather, there is a growing body of Anglo-American LGBTQ2S+ literature considering alternatives to the criminal legal system altogether.[161]

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[160] *Best Practices*, *supra* at 22-23.

[161] See e.g. Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011); Sarah Lamble, "Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment" (2013) 24:3 Law & Critique 229; *Queen(In)Justice*, *supra*; Maynard, *supra*; Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2010); and Sarah Lamble, "Unknowable bodies, unthinkable sexualities: lesbian and

In particular, this body of literature considers a number of ways of thinking beyond policing and corrections. Dean Spade, for example, highlights the work of organizations seeking to support the survival of LGBTQ2S+ communities, particularly those located at multiple axes of oppression, in carceral contexts. These groups are organizing letter-writing campaigns for incarcerated queer people, and providing them with supports as they re-enter society upon the completion of their sentences.[162] Spade also examines the need to "dismantle the systems that put queer and trans people into…dangerous and violent situations". This may include advocating for the decriminalization of sex work and HIV non-disclosure, along with the end of racial profiling.[163] Spade also points to the work of organizations engaged in building alternatives to systems that criminalize certain types of conduct. For example, Spade highlights the work being done to eradicate violence within communities and familial structures — these versions of accountability may not necessarily involve resorting to systems of policing and imprisonment at all.[164] Such approaches may help to remedy, at more structural level, instances of over-policing and under-protection.

In short, for many LGBTQ2S+ communities (especially Black and Indigenous people of colour, sex workers, trans people, people living with HIV, those who are homeless, and/or those who are undocumented), another way to improve relations with police is to become less reliant on the criminal legal system altogether.

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transgender legal invisibility in the Toronto women's bathhouse raid" (2009) 18 Social & Legal Studies 111.

[162] Spade, *supra* at 170.

[163] Spade, *supra* at 171.

[164] Spade, *supra* at 171.

SELECTED FURTHER READING

Florence Ashley, “Don’t be so hateful: The insufficiency of anti-discrimination and hate crime laws in improving trans well-being” (2018) 68:1 UTLJ 1.

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Kimberlé W Crenshaw, “Mapping the Margins: Intersectionality, Identity, and Violence Against Women of Color” (1991) 43:6 Stan Law Rev 1241.

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Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point: Fernwood Publishing, 2017).

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Ontario Human Rights Commission, *Human Rights and Policing: Creating and Sustaining Organizational Change* (Toronto: Ontario Human Rights Commission, 2011).

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