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Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

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• (1105)

[English]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): I call the meeting to order. The clock says 11, but it's never been properly set and apparently it's three minutes fast.

This is meeting 35 of the Standing Committee on Justice and Human Rights, pursuant to the order of reference of Wednesday, February 15, 2012, Bill C-309, an act to amend the Criminal Code.

Today we have two witnesses, one appearing by video conference. The other witness, Mr. Patrick Webb, is here with us. I think the witnesses have heard from the clerk that we accord them five to seven minutes for an opening address.

Mr. Stribopoulos, if you would care to begin, please go ahead. I'll let you know when you're down to one minute left in your time.

Mr. James Stribopoulos (Associate Professor, Osgoode Hall Law School School, York University, As an Individual): That's great. Thank you very much.

Good morning, and thank you for this opportunity to appear before the committee, especially for the accommodation to appear by video conference. I very much appreciate it.

I'm very pleased to be with you this morning to speak to you about concerns I have regarding the proposed legislation, Bill C-309. Let me begin by saying that I understand the motivation behind this legislation very well, and it is commendable. The concern that drives the proposal is undoubtedly the result of what we witnessed here in Toronto, for example, not so recently, but we've witnessed it on other occasions as well, where violence erupts in a public gathering, public order is called into question, and individuals who are bent on engaging in criminal acts of vandalism or violence directed at people or property employ a disguise or a covering to conceal their identity from view so they can act with impunity.

I obviously share the view that I'm sure is shared by most members of the committee that this is something that's completely unacceptable in a free and democratic society and something we should collectively deplore. Thankfully, however, I think we already do.

This is why I have concerns about proposed Bill C-309. In essence, it is this: this is a solution in search of a problem. There is no deficiency in the law that this proposed legislation needs to fix. I'm specifically making reference to an existing provision in the Criminal Code, which is routinely charged, and that is a provision found in subsection 351.(2) of the Criminal Code that makes it an

offence, and I quote now directly from the relevant and existing section of the code:

Every one who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

So there is already an offence that can be charged if someone is participating in a riot and covers their face with the intention of facilitating that participation. There is already an existing criminal offence that can be charged to get at that conduct. It's already unlawful. There is already this tool in place for the police to employ when confronted by those participating in a riot or violent tumult, as has been described in the case law, to charge those who cover their faces for the purposes of concealing their identities so they can act with anonymity in engaging in wanton damage of property and acts of violence.

Frankly, therefore, I don't see the need for the proposed amendment to the code. I also fear, and you might say in response, "Oh, what's the harm of adding a provision that's situated more closely to the riot provision and would become a subsection under section 65 so that you'd look at the one and look at the other." There are a number of problems with doing that. First, it creates confusion for the police officer in the field as to which offence to charge. There now appear to be two that would be relevant to the conduct they're dealing with. Police officers, not being lawyers, are rightly cautious, and they will tend, when there's more than one offence available, to charge them both. They'll err on the side of caution. They'll overcharge, in the words of commentators who are concerned about that very phenomenon and the impact it has on the criminal process.

Overcharging is something that does result in needless delay as participants come to terms with what ultimately should be the right charge and what offence the accused should plead guilty to or be found guilty of. At the end of a trial, for example, a jury or a judge would return a verdict of guilty for both offences, but then there would be a need for argument regarding the overlap, and the one offence would be judicially stayed. There's established case law; you can't essentially be convicted of the same offence twice. That's double jeopardy, and this would essentially be the same offence.

A common example is when the police sometimes charge theft and also charge possession of property obtained by crime for the very same theft. Obviously, the moment you steal something you possess property obtained by crime. Those two charges can't be sustained to completion. They overlap, and the Supreme Court has indicated as a result that one of the offences has to be stayed.

Why add complication to the code in this way? I would suggest you shouldn't, that we have a law in place to deal with this very kind of conduct, which I agree should be criminal, and thankfully it is.

I do have concerns as well in terms of the wording. I'm getting to my second reason for being concerned about the proposal, the wording of proposed subsection 65(2), versus what we already have in subsection 351(2).

Subsection 351(2) uses express *mens rea* language. I'm sure you're familiar with what that term means. It's the mental requirement for criminal offences, and it requires expressly that the person donned the mask with the intention of committing an indictable offence. That mental requirement is an important check on the scope and the breadth of the provision. It makes sure, for example, that only in situations where the person's purpose is truly to conceal their identity to facilitate the crime will their conduct be criminalized.

I worry that subsection 65(2) doesn't contain similar *mens rea* language, and that the language as proposed, "while wearing a mask or other disguise to conceal their identity", doesn't tie the unlawful purpose back to that action. You can imagine all sorts of circumstances where people are participating in public protests, demonstrations, where they might wear some kind of face-covering or a costume. A very common example of course are sports fans who wear paper bags over their heads in shame. Living in Toronto, I am rather sympathetic to that phenomenon. That's a pretty benign example, but obviously right across the board when you move into the public realm for the purpose of political dissent people sometimes cover their mouths, they tape their mouths, they do all sorts of things as a form of expression that is constitutionally protected by the charter. Section 2 of the charter protects our fundamental freedoms, including the fundamental right to freedom of expression, to peaceful assembly. I worry that an overly broad provision could have a chilling effect and dissuade people who were engaged in legitimate public protests and who have no desire to engage in acts of violence from employing all the tools in the rhetorical arsenal by, for example, donning costumes and the like for the purposes of making their expressive point.

I do worry about the language being a little bit too fluid, a little bit too ambiguous in the proposed provision. If you go back to subsection 351(2), which is already in the code, as I mentioned, there is none of that concern. It's only in cases where someone dons a disguise with the intention of committing an indictable offence that the conduct is criminalized. There is no such safeguard here. I note that it does make reference to "without lawful excuse", but it doesn't define what a lawful excuse is. It would be open to interpretation on the ground. Again, police officers aren't lawyers. The line between a legitimate protest and conduct that violates this prohibition might be left unclear to law enforcement on the ground. That kind of uncertainty could lead to unjustified arrest. It could have an unfortunate chilling effect on legitimate protest.

For all of these reasons, I think that this proposed amendment, although well-intended, is unnecessary and ill-advised.

That's all I have to say by way of introductory comments. I'd be most happy to answer any questions you have.

• (1110)

The Chair: Thank you.

Mr. Webb, if you have an opening address, please begin.

Mr. Patrick Webb (Former Member, Royal Canadian Mounted Police, As an Individual): Yes, thank you.

Good morning. I'm very pleased to be able to participate in this discussion about the changes. I will keep my remarks short and provide you with a view of this bill through the eyes of an experienced police officer.

I have just over 31 years in the RCMP. Most recently, I served as a media relations officer for K Division—that's the province of Alberta. I retired as a sergeant about two months ago. But I just want to stress to you today that I speak as an individual with policing experience and not as a representative of the RCMP.

During my service, in addition to general policing, I've been involved in several major events: the 1984 visit of the Pope to Alberta, the Calgary Olympics in 1988, two royal visits, several VIP visits, the G-20 finance ministers meeting in Ottawa in 2001, and two G-8s—the 2002 in Kananaskis and the 2010 in Ontario. I want to outline those experiences, because they have provided me with a pretty close look at the evolution of public protests with policing.

My greatest experience in major events came during the Kananaskis G-8. I was in charge of the RCMP public affairs communications team. Our focus was to provide the public with as much information as possible about all security aspects of the event, bearing in mind the need to ensure the safety of the venues and of the internationally protected persons who were attending.

As you will recall, the release of the Hughes report on the 1997 APEC summit and the 9/11 tragedy in New York both occurred during the planning for that G-8. Those two events caused our planning team to take great consideration of the public's right to protest versus the need for tight and intense security.

It became very apparent that our security planning had to include the greatest possible ability for public protest to occur, but also we had to be ready to react if and when criminal acts occurred. I'm pleased to remind this committee that the G-8 was considered very successful, as there was significant public protest but a minimum level of criminal acts and arrests. I think that came because of a high level of communication between legitimate protesters and the security personnel.

Research has found that at a major event there are essentially four groups of protesters. The first are citizens who would never consider committing, or even abiding by, a criminal act but are simply there to make their views known. The second is the largest group of citizens. They also want to express their views but simply would not interfere if a criminal incident were to take place in front of them. The third group essentially is also there to protest, but more seriously, and would likely encourage or perhaps even participate in some criminal activity.

I believe this legislation is focused on those who are members of the fourth group—those who have really little or no interest in making a point of view known but simply come to an event just so they can commit criminal acts, with little chance of retribution. These people come equipped with weapons, disguises, changes of clothing, masks, communication devices, but most importantly, an intent to get away with acts that on a normal day would result in detection, arrest, and a charge.

Recently it's become very apparent that the fourth group has become aware that they could be identified through closed-circuit TV and images captured by people on digital cameras or cellphones. This awareness has been noted through surveillance of those people. They arrive on the scene dressed in normal street clothing, change into other clothing—usually black—and then put on a mask to commit assaults and property damage. They then change back into street clothing, remove the mask, and blend into the crowd.

If these people know enough to recognize how important it is to put a mask on for success as a criminal, then I believe this legislation is just as important, as it will recognize their use of a disguise and hopefully impede their ability to conceal their identity.

I believe the right of free speech is a critical component of being a citizen of Canada. But I likewise believe that this right has been hijacked on occasion by a very small number of people who distract the public's attention from important points of view because of their criminal actions.

From a law enforcement point of view, the ability to make an arrest of a masked individual during a declared riot or unlawful assembly is very important, since that action, itself, is illegal. Enforcement, then, would not have to wait until they commit a further criminal act and only then try to identify the suspect.

The vast majority of protesters, in my experience, do not want to create or participate in a riot, but their wishes are lost when violence occurs.

• (1115)

The majority of people attending a protest do not wear masks, as they have no need or desire to do so. They are there to get their voices heard. It is generally only those with an intent to do a criminal act who come equipped with some form of disguise.

For a peace officer to use this proposed law, there must be specific circumstances occurring. Number one, obviously there has to be a declared riot or unlawful assembly. Number two, there has to be an individual wearing a mask or a disguise. And number three, there has to be no apparent lawful excuse for that person to be wearing that mask.

If a peace officer makes the decision to make an arrest, then their actions are certainly open to review by the justice system, and, if deemed unreasonable, there would be a dismissal of charges. Law enforcement personnel are very aware that the courts review their actions. I am confident that any unreasonable use of this proposed law would result in not guilty findings.

In conclusion, I believe these changes to the Criminal Code would be providing a tool to peace officers trying to quell riot situations and to identify and arrest those who are doing criminal acts. In addition,

most importantly, it would also strengthen the ability of the majority of protesters to have their voices heard through the arrest of those who distract and interfere with peaceful protest.

Thank you for your attention. I'll do my best to answer your questions.

The Chair: Thank you, Mr. Webb.

We'll begin our five-minute round with Madame Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chair. I'd like to thank the witnesses for being here this morning to help us study Bill C-309.

My first question is for Mr. Webb.

You said that people who usually wear a mask do not have good intentions. I'm not sure I agree with that because, increasingly, we are seeing people with all sorts of identifiers during demonstrations. For several years now, with what's been going on pretty much around the world, we've been seeing more and more demonstrations of all kinds. People come disguised in all kinds of ways.

I'm wondering because if it was as simple as that, if masked individuals were usually criminals—based on what you said—you would already have section 31 of the Criminal Code available to you. It allows officers of the peace or a police officers to arrest anyone they have reasonable grounds to believe is about to commit a criminal offence.

So you would already have the tools necessary since you would be able to see them right away in a crowd. I think the problem is more complicated than that. More and more, people are showing up with all kinds of disguises. It becomes difficult to know who has good intentions and who doesn't. That is what we are looking at. Could you please provide some clarification about what you mean when you say that people with criminal intentions are disguised.

• (1120)

[*English*]

Mr. Patrick Webb: Undoubtedly I agree, to some point, with what you're saying. There are so many people who come to a protest in various apparel simply to make a comment by what they're wearing.

Ms. Françoise Boivin: Exactly.

Mr. Patrick Webb: There is a point where police who are in attendance at those simply want to let the protest occur, to let it continue, as long as it's peaceful—the operative word being “peaceful”. If there are hundreds or perhaps thousands of people who are dressed in some manner that would express their views but who remain peaceful, then police officers are more than satisfied to let it just simply occur and everybody goes home at the end of the day.

The intent of those individuals is the most difficult part to determine. The intent of somebody who shows up with weapons in a bag, and a mask and gas mask, is not, in my view, to protest or make a statement: it is simply to do damage.

That's the difficult part to determine, who is doing which.

Ms. Françoise Boivin: I agree, and I think that's the name of the game we're faced with today.

I'm sure you've read Bill C-309.

Mr. Patrick Webb: Yes.

Ms. Françoise Boivin: As I read the bill as it's written, I don't see much difference from what is existing right away, what would change in your attitude as a police officer when you're faced with a situation where at the beginning everything is fine. It's always when it starts becoming "the riot", when it's the illegal assembly, that the problems occur.

I don't see much difference from what exists right now and how we could prevent the whole situation from happening altogether.

Mr. Patrick Webb: I agree.

I think the point is about the intent of people. In my experience, with a major event there is a very high degree of contact between protesters of all groups and security personnel. Everybody wants to be clear on what is going to happen. There is probably much more contact than the public realizes; that is, the negotiation and agreement on what will happen. If the vast majority of people realize that it would be illegal—if this act passes—to wear a mask, then the vast majority will not be wearing masks.

Ms. Françoise Boivin: I correct you.

It won't be illegal to wear the mask. It seems to be a running phrase in the population right now. It will be illegal to wear a mask if you're participating in a riot. To be totally perfect and not face those situations you would have to forbid the mask or disguise altogether, which will never happen in Canada because of our Charter of Rights. I don't think you disagree with the Charter of Rights and the freedom of expression as long as it's done in an orderly fashion.

Mr. Patrick Webb: From a policing point of view, there would have to be clarity with the protest group to have them realize that you're fine to wear a mask anytime, anywhere. If a riot is declared or an unlawful assembly is declared, then that mask has to come off or you're deemed illegal.

Ms. Françoise Boivin: But was that not done already because of section 351, as the professor just explained very well and as we've been stressing all along? With section 351, as soon as you declare a riot technically you could also say they could also be charged by virtue of section 351, so beware.

Mr. Patrick Webb: Exactly. But the intent is the important part of that, the intent to do a criminal act while wearing the mask. You have to wait until that masked person then commits a criminal act.

The Chair: Thank you, Madame Boivin.

Mr. Goguen.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Thank you, Mr. Chair.

Thank you to the witnesses who are appearing today.

I'd like to direct a question to the sergeant.

There's been some talk about section 351, and Madame Boivin has alluded to it. It's been suggested that subsection 351(2) of the

Criminal Code, the disguise with intent to commit an offence, should be sufficient to deal with the issue of a masked individual in riots.

In the case of the Vancouver riot the police department acted diligently and identified over 1,500 separate criminal acts involved in the riot. Also, a number of vandals were disguised. Yet of the 226 charges laid by the Vancouver police, only two charges have been laid under section 351. I'm not sure if there have been convictions. This suggests to me that the provisions of subsection 351(2) are difficult to apply, meaning there are evidentiary issues.

Can you expand on that? Can you explain why there are such difficulties, in your experience as a police officer?

• (1125)

Mr. Patrick Webb: The number one difficulty in every police action and every charge laid is when you appear in court you have to identify the accused individual. If someone is masked, generally speaking, their intent is to escape that identification. This happens all the time. On a normal basis someone runs away into the darkness, hoping to evade identification. In a riot situation, then, you have a large group of people. The only way to evade that identification is to wear a mask. The intent is the difficult part in the whole situation. That's what we have to prove under existing legislation: that the person simply wasn't just standing and wearing a mask but actually had the intention to continue and commit a criminal offence at that time.

I can't speak to the Vancouver situation. I have seen photographs, and I could imagine the difficulty in trying to identify groups of literally hundreds of people who are all masked and committing offences.

Mr. Robert Goguen: In your mind, there's a clear differentiation between subsection 351(2) as it stands and this bill as it is. There would be additional tools for the police to deter such unlawful assemblies or riots.

Mr. Patrick Webb: Speaking as an experienced police officer, there is a clear difference to me, in that you would not be able to get the same effect on existing legislation, as opposed to when this is passed. Then it would be mandated and a lot more people would not be wearing masks. The ability to identify those who do the acts would be greatly enhanced.

[Translation]

Mr. Robert Goguen: We feel that Bill C-309 provides additional tools.

[English]

You did talk about tools.

[Translation]

I'm talking about the additional tools that Bill C-309 will provide to police forces to, among other things, disperse crowds and identify the criminals.

Could you talk about that a bit more?

[English]

Mr. Patrick Webb: Of the tools that we use, number one is communication. This is in any event, regardless of whether it's a one-on-one contact between a police officer and an individual or a riot situation. If you are at a point where you have to resort to batons, weapons, or tear gas, then that communication has broken down and it's not as successful.

The communication we speak of is one where we would, prior to the event, impress upon all the participants who are planning to be there that it's necessary for them not to wear a mask at the time. That simply reduces the number of people who are masked. Then when it comes to the point of trying to identify who has committed the criminal acts it's a lot easier to get those people identified, arrested, and off the street. Hopefully that will reduce the amount of rioting and will renew the ability of peaceful protests to be heard.

Mr. Robert Goguen: Chief Constable Jamie Graham, who was I guess the chief in Vancouver at the time of the riot, testified previously and he commented that Bill C-309 would allow police officers to have the additional benefit of preventive arrest. Are you in agreement with that? Can you comment on that?

Mr. Patrick Webb: Yes, I am. During some of the planning I have seen for major events, preventive arrests are very important. I'm not speaking of hours and days ahead. That all depends on what the criminal activity is at the time.

Mr. Robert Goguen: Sure.

Mr. Patrick Webb: But at the time, if there is an individual who is committing minor offences, which you may have let slide at any other time, it's very important to get some of the ringleaders out of there, simply because then it takes away the possibility of greater rioting being directed by individuals. This would be one of those tools that we could use in that situation.

The Chair: Thank you, Mr. Goguen.

Ms. Murray.

Ms. Joyce Murray (Vancouver Quadra, Lib.): Thank you, Mr. Chair.

Mr. Webb, you talked about four different groups and you said that by far the biggest group is those who wouldn't interfere with a criminal act and who are out there in a demonstration to express themselves. Then you said that you see Bill C-309 as being targeted at the fourth group, those who come to commit criminal acts.

You also acknowledged that people come and do wear masks who don't intend to.... I mean, I've recently been at demonstrations with respect to perceived undermining of environmental assessments with respect to pipelines, where people are wearing salmon costumes or they're wearing sea mammal costumes, bird costumes, and costumes that look like an oil slick. So there are a lot of people who are out there expressing their dismay at the government's current legislative direction.

I guess my concern is that you're clear that this bill allows pre-emptive arrests of people with masks. Would you agree that it may well be people in category two and three, who don't have the intent to cause damage or break the law, who would be pre-emptively arrested?

● (1130)

Mr. Patrick Webb: I think the biggest word to bring out here is the word "discretion". In policing, with the RCMP we have community policing, which says that we could, if we had the budget and the numbers, put a police officer on every corner, every minute of the day, and crimes would still happen. So we depend so much upon community policing, working together.

Ms. Joyce Murray: The question is, do you see the potential for people in categories two and three, who have no intention of committing an offence, being pre-emptively arrested?

Mr. Patrick Webb: Theoretically, they could be arrested, but in reality I cannot see that as being an outcome, simply because there would be an illogical result of trying to arrest somebody and charge them if they're wearing, as you said, a salmon suit.

Ms. Joyce Murray: What I would like to ask of Mr. Stribopoulos is since there will be pre-emptive arrests of people who are not actually a risk.... And the members opposite may laugh at that, but Mr. Webb himself said that there will be, and it will lead to findings of not guilty.

Could you tell me what that does to the justice system in a province like British Columbia, where we are letting serious offenders off the hook because the justice system and the number of prosecutors can't keep up with the current charges? How will that affect our justice system when this net is cast so wide and people might be arrested pre-emptively at the discretion of police in a panicking and potentially urgent situation? Can you paint us the picture of what that does to our actual ability to apply justice?

Mr. James Stribopoulos: Well, I have sat quietly up until this point, listening to the questions. I have much respect for law enforcement. I don't know the witness, and I appreciate the challenges the police face, but I'm really troubled by what I'm hearing.

With regard to this notion that this provision as drafted would license preventative arrest before there's even a riot, firstly, that's not what it says. But secondly, this makes my point: I think it's open, as it's just been by the other witness, to be misinterpreted in this way.

It would cause the police, and wrongly, in my view.... If you read the language, it says someone engaged in a "riot". There already has to be a riot under way. You have to be participating in it, and you have to conceal your face.

This is the problem with the provision, though: it will lend itself to this kind of sweeping, overly broad interpretation that could cause the police officer, and wrongly, in my view, to conclude that they can engage in preventative arrest. It will result in legitimate protesters, people wearing salmon costumes and the like, to be swept up, potentially, based on a police officer's error in the exercise of their discretion.

I mean, the powers have to be as clear as they can be. This is the point in the process where they're made clear, at the legislative stage. It's not sufficient to just say, "Give us this ambiguous, open-ended grant of authority and trust us on the ground to sort out the good guy from the bad guy."

Many police officers can be trusted, to be sure, but younger police officers, police officers who aren't properly trained, will be overly inclusive in their exercise of discretion. They'll sweep up more people than they should. In the process, they might suppress legitimate dissent. Constitutionally protected rights to freedom of expression and freedom of assembly could be undermined. Other people could decide not to even bother coming out to exercise their political fundamental freedoms of protest for fear of being arrested in this misguided kind of way. And it will clog up our courts more so than they already are—

Ms. Joyce Murray: Can I have a second...?

•(1135)

The Chair: We're over the time limit.

Mr. James Stribopoulos: —with unnecessary charges.

The Chair: Thank you. We appreciate that.

Madam Findlay.

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Thank you, Mr. Chair.

Sergeant Webb, seeing as your testimony has just been misinterpreted now by both the member opposite and the other witness, I want to give you an opportunity here to clarify.

I assumed your response to be within the context of the bill, meaning you are talking about charges within a riotous situation. Is that not correct?

Mr. Patrick Webb: That is absolutely correct. My words were misinterpreted there.

As I mentioned in my preamble, it has to be a declared riot or an unlawful assembly before anything in this bill even comes into any possibility of consideration. Only at that point would this become important. As I mentioned, it has to be a masked person, it has to be an unlawful excuse to wear it, and only then could it be one of the tools used.

Ms. Kerry-Lynne D. Findlay: I have a son-in-law who I guess could be characterized as a young policeman. He's been on the police force for less than two years.

Is it not true that young police officers go through extensive training before they're actually hired and put into service?

Mr. Patrick Webb: That is absolutely true. In this type of situation, with a protest, when you are bringing in many members of the RCMP and municipal forces to a location, you're going to be putting the most experienced and the most trained ones in the front lines making the arrest. The rest are going to be there, but they're going to be, for want of a better term, "directing traffic". They're not given the responsibility. There's a possibility there—they have the right, the power—but there's not the expectation that they would be exercising that.

Ms. Kerry-Lynne D. Findlay: Thank you.

I'm aware of other democratic governments and other jurisdictions—I'm thinking of the United Kingdom, France, and New York, for instance—who have developed legislation that would either limit or prohibit the wearing of disguises.

In fact the New York legislation—and I'm sure that in a big city like New York, they're well used to both peaceful protests and riots and unlawful assemblies—it basically is a strict liability offence. I think you even have to register to be able to wear a mask in a peaceful protest there.

Do you think this bill fills a legislative vacuum that we have now?

Mr. Patrick Webb: I believe it does, simply because this is a tool that could be used in that type of situation. If it's a peaceful protest, as I've seen so many times in my experience, then law enforcement agencies are more than pleased to just stand back and let it happen, guide traffic, and make sure that everyone is safe and sound and goes home at the end of the day.

This is only a tool to be used in the most dire situations.

Ms. Kerry-Lynne D. Findlay: In fact, with a peaceful protest doesn't law enforcement often dialogue with those organizing it, and even walk along with them, and make sure that everything is in order? You want to protect those who peacefully protest in those situations, do you not?

Mr. Patrick Webb: That's absolutely true. I've had a lot of contact with people who are protesting. We are Canadian citizens as well. We want to be able to ensure they get their right to be heard. My experience is that the very few numbers of essentially anarchists out there to hijack it are making that voice concealed. They can't hear that voice at all.

Ms. Kerry-Lynne D. Findlay: I'm very mindful of what my colleague has raised, being a British Columbia member of Parliament, that of the so-far 226 approved charges, only two have been under subsection 351(2) in the Criminal Code.

We have heard testimony previously, for instance, of the severe beating of a law-abiding citizen during the recent Vancouver riots where all the individuals beating that law-abiding citizen were masked and disguised. As you've correctly pointed out, identification is a very difficult problem.

I'd like it if you would elaborate a little more on your own training regarding mob mentality, crowd management, security planning, and indicate the kinds of difficulties that arise. You've talked about some very high-profile events you've been involved in.

When you're trying to deal with events such as those dealing with masked individuals, can you give us an on-the-ground sense of what you're dealing with in those situations when they get out of hand?

•(1140)

Mr. Patrick Webb: The biggest difficulty in those situations is there's a very large number of people. We have found both prior to having discussions with protesters and then in subsequent discussions with protesters afterwards that the common theme on that is the majority of protesters got caught up into something they did not want to see happen. As I mentioned, that stifles their own ability to get their voice heard.

In addition, we also noticed.... As you're from B.C., you're familiar with a young man who apparently would never have participated in the actions he did, except he went along with all the other people around him who were doing violence and destruction. He's paid the price because he was identified.

The difficulty we have is you cannot proceed with a charge on any individual until that person is satisfactorily identified. In other words, you can go to court and make it absolutely crystal clear that that was the person who did those actions.

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott (Toronto—Danforth, NDP): Thank you, Mr. Chair.

I'd like to bring Professor Stribopoulos back in on two quick points.

Professor Stribopoulos, at one point Mr. Webb referred to the situation of when someone is "just standing and wearing a mask" after a riot or an unlawful assembly has been declared, that criminalizes them under this provision. Do you have any problems with the notion that simply by your being in the middle of a riot or an unlawful assembly, this provision would catch you? That's the first question.

Secondly, let me quote something from another police officer and ask you what you think about this. This is Chief Constable Graham of Victoria:

The challenge with this offence is that it demands an almost unattainable standard for effective, proactive policing. It requires the crown to prove the intention to commit one or more specific indictable offences. Although that would allow for the arrest of a masked person who participates in a riot once it has started,

—so he's already conceding that section 351 is adequate—

it does very little to prevent the riot from occurring in the first place. In contrast, Bill C-309, by creating a specific offence for wearing a mask while taking part in a riot or unlawful assembly, could allow for a pre-emptive arrest under the "about to commit" sections of the Criminal Code when an agitator "masks up", as we call it. This would help provide proactive arrest authority to remove these instigators before things get out of control.

Do you understand that language as allowing for pre-emptive arrests triggered by this proposed amendment?

Mr. James Stribopoulos: I'm really troubled that the quoted passage and what the witness has already said could lead to that conclusion. If this is the way it's being read by police, it's really disconcerting.

Mr. Craig Scott: It is indeed the way it's being read, presented, and talked about.

Mr. James Stribopoulos: Yes, well, I'm troubled by that, Mr. Scott.

Section 65 says that it's an offence to take part in a riot. That actually requires active participation, being engaged in a riot. Simply standing by as other people are engaged in a riot is not an offence. It's only an offence if the riot act is read, and those distinctions have been blurred by the other witness.

The riot act can be read at a certain point, and then that would obligate people to disperse. But that's not a precondition to a riot. A riot can take place without the riot act being read.

Someone is guilty of an offence if they take part in a riot. They have to actively engage in the violence and the tumult. Simply passively acquiescing, being on the perimeter because one is a lawful protester engaged in legitimate political dissent, doesn't make one guilty of a crime.

If this provision could be read so that a Muslim woman wearing a face covering at a public gathering that becomes violent on the part of a small cluster or clutch of anarchist protesters could be swept up and arrested, I'm really troubled by that. I fear that's the way this provision is being construed by its proponents.

We do not require a provision to allow the police to arrest masked rioters. Subsection 351(2) does that. The only reason that there have been simply two arrested from the Vancouver riot for that offence is that once you put on a mask, it's hard to figure out who you are. It's not a question of the law not creating the requisite offence. It's there in subsection 351(2). It's an enforcement problem, figuring out who the people are behind the masks.

This doesn't change that. We have what we need in terms of the legal tools. Why are we going to clutter the Criminal Code further with unnecessary offences? This document has grown and grown and grown. One of the biggest challenges for the people involved in the enforcement of the criminal law is figuring out which provision to charge, how to navigate the labyrinth. You're suggesting adding needlessly to the labyrinth.

I just don't understand, frankly. I apologize if I'm becoming emotional, but as a law professor, it's very frustrating to think that those who have the power to change the code in a constructive way ignore the reams of paper that are on the shelf in the Law Reform Commission of Canada from the 1980s to address real problems with this document that academics and experts have been studying for years and pronouncing about in their scholarship and in the Law Reform Commission reports. Instead we end up with this draft bill that tries to solve a problem that doesn't exist.

● (1145)

Mr. Craig Scott: Thank you, Professor Stribopoulos.

I will now just throw it to Mr. Webb to give him a chance to possibly clarify.

When you did say, Mr. Webb, that when someone is just standing wearing a mask after a riot or an unlawful assembly has been declared, did you really mean that that would be covered by this provision?

Mr. Patrick Webb: Theoretically, it is covered by that provision.

Mr. Craig Scott: So theoretically, you're relying entirely on discretion as the way to get out of this theoretical criminality.

Mr. Patrick Webb: Discretion is relied upon by policing everywhere, every time.

Mr. Craig Scott: Sure, but we don't normally criminalize and rely on discretion to keep people non-criminals who shouldn't be considered criminal.

Thank you.

The Chair: Thank you.

Go ahead, Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you.

I find the last exchange completely puzzling, because, among other things, the bill we're considering does not simply apply to riots or to participation in a riot; it applies to being a member of an unlawful assembly. And if one is a member of an unlawful assembly and masked, then the act imposes a prohibition. There are reasons for that, and there is nothing untoward about it.

I'd like to begin with Mr. Stribopoulos. I have a question for you, Mr. Stribopoulos, if you've managed to regain control of yourself again. I know you were a bit passionate a moment ago.

Regarding subsection 351(2), do you agree with me that in order to be found guilty of that offence, the disguise in question must be donned with the intention of committing an indictable offence?

Mr. James Stribopoulos: Yes, for sure, and if you try to create an offence that doesn't have a *mens rea* requirement—

Mr. Stephen Woodworth: I'm going to ask for your commentary on other matters in a moment, but for now I just want to make sure that we are in agreement that it is what is required under section 351.

Mr. James Stribopoulos: I agree with you, for sure, sir, most definitely.

Mr. Stephen Woodworth: Under the new act, would you agree with me that simply refusing or failing to remove a mask—whatever intent you had when you donned it—while participating in a riot or being part of an unlawful assembly is the only intentional act required?

Mr. James Stribopoulos: Unfortunately, the way proposed subsection 65(2) is drafted, you'll notice that it doesn't include any express *mens rea* language.

Mr. Stephen Woodworth: Just wearing the mask or refusing or neglecting to remove it is the only intentional act, if I can put it that way, while participating in a riot or being part of an unlawful assembly. That's the only intent required. Is that correct?

Mr. James Stribopoulos: No, sir, I can't agree with you. Unfortunately, the language you're adding isn't apparent on the face of the enactment. It says nothing about an obligation on someone when directed to remove a mask.

Mr. Stephen Woodworth: No, I haven't been talking about being directed to remove a mask. I'm simply saying that if you find yourself in an unlawful assembly and you do not remove your mask, you will potentially be found guilty under the new act. Isn't that correct?

Mr. James Stribopoulos: I'm sorry, just please clarify. When you say you find yourself in an unlawful assembly, how is it that you know that the assembly is unlawful? Is it because you've been told?

You see, in an unlawful assembly, there are certain elements that need to be satisfied in order for there to be an unlawful assembly. The fact that the police happen to be troubled by the presence of a collection of protesters doesn't make the assembly unlawful. It has to have gotten to the point where it's disturbing the peace tumultuously.

That language, as you find it in the code, has been read by the courts as requiring something—

• (1150)

Mr. Stephen Woodworth: Let me stop you there for just a moment. What I'm getting at here is that the heavy intent requirement, the specific intent requirement, of subsection 351(2) is not found in the bill before us. Is that correct?

Mr. James Stribopoulos: It would be read in, though, by the courts. You can't have a criminal offence without a *mens rea* requirement. That's the point I was trying to make before.

Mr. Stephen Woodworth: On that point, I guess we will have to agree to disagree, because I don't think the court needs to read in a specific intent to commit a criminal offence, any more than one would have to read in a heavier intent on the possession of stolen property charge.

I thought you had rather a good point when you compared this offence to the analogous situation of theft and possession, and you pointed out that indeed theft and possession both have some elements in common. One could not be convicted of both theft and possession of the same item. Yet you're not suggesting, because of that and because of the potential delay or double-charging or over-charging that would occur, that we should abolish the offence of possession of stolen property, are you?

Mr. James Stribopoulos: No, of course not, sir. But I have to say, I'm a law professor who teaches future lawyers about criminal law. I teach them about the established principles. The courts have made it crystal clear—our Supreme Court has—that no criminal offence can operate without a mental requirement. It can vary in its requirements, to be sure—

Mr. Stephen Woodworth: I agree.

Mr. James Stribopoulos: —but there will be a *mens rea* requirement read in. That's just a matter of statutory interpretation.

Mr. Stephen Woodworth: That's correct. For me, the requirement of intent to wear a mask is all that is necessary under the new act, just as the requirement of knowingly possessing property that is stolen is all that's required under the offence of possession of stolen property.

The Chair: Thank you, Mr. Woodworth. Time is up.

Mr. Jacob.

Mr. James Stribopoulos: You're forgetting that this isn't a free-standing offence. It's being added to subsection 65(1), which requires that you be participating in a riot, which has its own mental requirement. You have to know you're participating in a riot; you have to appreciate what's taking place around you. It has to be your intention to engage in positive acts—

The Chair: Thank you. We're out of time.

Mr. Jacob, please.

[Translation]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): I'll let you continue, Mr. Stribopoulos.

Bill C-309 affects several fundamental rights and freedoms guaranteed under the Canadian Charter of Rights and Freedoms, such as the freedom of expression and the freedom of association.

Also, in a letter sent to the committee on May 7, 2012, the Canadian Bar Association stressed that Bill C-309 seems to put the burden of providing a lawful excuse for concealing their identity on the accused individuals. So the CBA maintains that the proposed amendments could give rise to constitutional challenges.

What do you think the constitutional validity of Bill C-309 is?

[English]

Mr. James Stribopoulos: My answer depends on how one understands it. Based on the interpretation that's being put forward by some members of the committee and the other witness, I think it's constitutionally problematic on a number of fronts. It could run afoul of the prohibition on reverse onus, which is I think what the Canadian Bar Association is getting at in respect of proving a lawful excuse. But I also worry that it could run afoul of the right to freedom of expression and freedom of peaceful assembly. It could be interpreted as allowing for preventative arrest of people who have not engaged in riotous conduct, who have not actively engaged in acts designed to disturb the peace in a violent way, or in a way that's designed to occasion property damage.

I have no difficulty in criminalizing that kind of conduct, but it already is a crime. Subsection 351(2) makes that a crime. If a rioter puts on a mask to conceal his identity so he can perpetuate the riot, he's guilty of participating in a riot as well as wearing a disguise to commit an indictable offence. This proposed provision doesn't add anything to that. It just creates room for uncertainty that ensnares potentially innocent law-abiding protesters. As a result, I think it is susceptible to constitutional challenge for the reversal of the burden, as was identified by the Canadian Bar Association.

But I have to say I'm more troubled by how it's being understood by the people in the room. Frankly, I don't understand the desire to add this provision to the Criminal Code. I haven't heard anything from anyone that tells me why subsection 351(2) doesn't do the job. This provision will be read to include an intention requirement. You can't get around that. And if you try, the court will invalidate it as violative of the charter. You have to have a minimum *mens rea* requirement. Section 7 of the charter demands it, and the Supreme Court said as much in 1985 in the motor vehicle reference.

I hope I've answered your question.

• (1155)

[Translation]

Mr. Pierre Jacob: Thank you.

If, for instance, a demonstrator is wearing a mask with a political leader on it during a demonstration aimed at protesting against that leader's government, do you think that the bill would unconstitutionally limit the ability to take part in that kind of democratic activity if the demonstration later became an unlawful assembly?

[English]

Mr. James Stribopoulos: I think it could. As the provision is apparently being understood by law enforcement, once the declaration is made that there's a riot, just having a mask on and

not dispersing immediately would make you guilty of this further offence. It could be a mask of George Bush, the Prime Minister, or some world leader that's being worn for legitimate purposes of political dissent. I think once the declaration is read, if the person is wearing the mask and doesn't immediately disperse, he's guilty of not dispersing when directed as well as this offence.

The Chair: Thank you.

[Translation]

Mr. Pierre Jacob: Thank you, Mr. Stribopoulos

[English]

The Chair: Mr. Seeback.

Mr. Kyle Seeback (Brampton West, CPC): Thank you.

Mr. Webb, I'm hearing about confrontations that take place between police and supposedly peaceful protesters. Before that happens, I'm assuming your officers would have the opportunity to explain to people that if they choose to wear a mask during something that becomes an unlawful assembly or a riot there would be criminal sanctions. So I would suggest to you that people who are in those assemblies know full well that if things start to turn unlawful or riotous they should take those masks off. I take it that this would be part of the engagement your officers would have with the crowd.

Mr. Patrick Webb: That is absolutely true.

I was very impressed with how much engagement there is prior to an event. This engagement ensures that the enforcement, the security, and the protesters are all aware of what is going to be permitted and what is not, what is legal and what is not. We engage lawyers to go along and talk with them to explain every new nuance of those laws, so it's rare to have somebody there who's not clear on what is legal and what is not.

Mr. Kyle Seeback: I take it you can't see an example in which some poor person wearing a salmon costume is unknowingly walking around in the midst of a circumstance that has become unlawful or riotous, and that the police would choose to arrest that person. Do you see that as something that's going to happen, as has been suggested by other members of this committee?

Mr. Patrick Webb: I can't see someone in that type of situation ever being arrested, because that would be ludicrous to go before the courts with.

Mr. Kyle Seeback: Right.

Mr. Chair, I'm going to share my time with Mr. Woodworth.

The Chair: Be very brief. We're almost out of time.

Mr. Stephen Woodworth: Thank you very much.

I'll just say to Mr. Stribopoulos, then, that the fact is that the intent requirement is present in this act; however, it is a degree of intent that is much less culpable than an intent to commit an indictable offence. It is only an intent to wear a mask.

I will say that the reason we don't abolish the offence of possession of stolen property is that it would make thefts easier to commit if it were legal for everyone to possess property that has been stolen. In the same way, by making it prohibited to wear a mask in the circumstances noted in this act, we are helping to preserve public safety by removing the cover that the real wrongdoers will have, if they're surrounded by people who are all wearing masks.

I'm probably out of time at this point.

• (1200)

The Chair: You are out of time, absolutely, yes.

I would like to thank both of the witnesses. I think you've brought a great deal to the meeting, and I thank you for that.

We will suspend for a few minutes while we switch over to move to clause-by-clause examination of the bill.

• (1200)

_____ (Pause) _____

• (1205)

The Chair: I'll call the meeting back to order.

Everybody, don't run away when we finish this—if we do. We need about three minutes at the very end to deal with the budget on this particular issue.

On clause 2, I understand there is an NDP amendment.

[*Translation*]

Ms. Boivin, you have the floor.

Ms. Françoise Boivin: Thank you, Mr. Chair.

Clause 2 of the bill reads as follows:

2. Section 65 of the Criminal Code is renumbered as subsection 65(1) and amended by adding the following:

(2) Every person who commits an offence under subsection (1) while wearing a mask or other disguise to conceal their identity without lawful excuse is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

We suggest the following amendment:

That Bill C-309, in clause 2, be amended by replacing lines 10 to 13 on page 1 with the following:

(2) Every one who, with intent to commit an offence under subsection (1), has his or her face masked or coloured or is otherwise disguised is guilty of an...

It then continues with what is in the bill.

Bill C-309, a private member's bill, was tabled by the colleague here. I would like to thank him for taking this initiative. I think that violent demonstrations, like the recent demonstrations in Victoria-ville, Montreal and elsewhere in Quebec, the ones in Toronto during the G8 and G20, and even the riots in Vancouver after the Stanley Cup, are horrifying to almost all reasonable, law-abiding Canadians. The members of the official opposition, of the government and of all other parties in Parliament agree that we need to find ways to tackle this problem.

We understand the logic underlying this bill. Last weekend, the justice minister, the honourable Rob Nicholson, said that the government would support this bill. However, as a sidebar, I would like to say that this kind of bill, in the context in which we could even create new offences, should come from the government and not through the back door from a member. Having said that, I give full marks to the colleague who tabled Bill C-309 for his intentions.

It's obvious that the objective is to prevent people with bad intentions from wreaking havoc during demonstrations that are initially very peaceful and entirely lawful. This situation has become more and more frequent for a few years now. I am convinced that there will always be people with bad intentions, everywhere. Can the bill prevent that in its current state? The way several witnesses—even police force representatives—understand the bill indicates to us that there is a problem with how it's interpreted.

The way the bill currently is, the individual must at least intend to participate in a riot. We can refer to the Criminal Code and all jurisprudence that has been decisive in the case of section 65. But the arguments will be basically the same for section 66. Professor Stribopoulos told us earlier that there had to be criminal intent. In other words, we can't give police forces carte blanche.

Some people listening to us may think this bill will allow any police force to unmask everyone or remove their disguise simply because they are taking part in a demonstration that turns into a riot or an unlawful assembly. But I have the impression that the courts are going to set the record straight and that it may cause some problems.

In addition, the fact that the Criminal Code has similar provisions that are worded differently creates ambiguity. Again, I think Professor Stribopoulos spoke about this in his testimony.

• (1210)

More often than not, this ambiguity is used only by the defence. It is used to raise reasonable doubt, create confusion, mask, if I may use the word, what we are trying to unmask. That isn't the objective that the legislators want to attain. Our role is to use the best terms possible, words that don't leave room for interpretation. You may tell me that this is somewhat idealistic, and that may be. If that was the case, there would no longer be any trials and everything would be very clear. However, it is our duty to ensure that the legislation that we draft here, in Parliament, will be legally binding and beneficial for the people we represent and that they will respect all the legislation that can be applied in the circumstances.

The government has talked at length about what is being done in other countries, including England and Australia or in New York City, in the United States, and so on. We are all aware—and I imagine the government is too—that we have the Canadian Charter of Rights and Freedoms. I didn't call it the "charter of criminals". This charter, which is for all Canadians, stipulates that people have the right to express themselves without fear of getting beaten up for having a different opinion.

This committee recently passed a bill that removed hate speech to foster—and that was the government's argument—freedom of expression. Freedom of expression takes many forms, including how we dress and speak. Having said that, the objective is to ensure that there is as little confusion as possible. Clearly, there is the matter of burden of proof. Subsection 65(2) of Bill C-309 states: "Every person who commits an offence [so, who participates in a riot and intends to participate in one] while wearing a mask or other disguise to conceal their identity without lawful excuse...."

So it will have to be proven that this person tried to conceal his or her identity without lawful excuse. There is a burden of proof. Representatives from the Canadian Bar Association made that very clear to us. I encourage the members who did not read their brief to do so. We got it yesterday, May 7. I wish they could have come and met with us. I think the brief is fairly clear on that. The problematic issue of reversing the burden of proof may be challenged. This may lead to some problems relating to the constitutionality of the bill.

To stay within the specific context of Bill C-309, as I've said from the beginning, the tools already exist for police officers everywhere. The problem is often not that the Criminal Code provisions don't exist, but rather that there are many more people than expected and that there isn't much communication among the demonstration organizers. That should be one indication, by the way.

Let's take the students in Quebec as an example. Police chiefs said that, sometimes, they couldn't contact the people in charge of the demonstrations. If I was a police officer, knowing that a demonstration was going to take place, I would monitor things much more closely because a lack of communication is a sign that there will be problems. That would make me a little more cautious about what action I would take. I would add police officers or I would ask other police forces for help.

In addition, our bills shouldn't mask the fact that there is a real lack of police officers.

• (1215)

There aren't enough police officers or boots on the ground. This isn't the first time we've heard that. The government even made promises about that during the election campaign. So we shouldn't be hiding these gaps with bills that fool Canadians into believing that it won't ever happen again.

When people ask me that if Bill C-309 were to be adopted as is, could events like what happened last weekend in Victoriaville happen again, my answer has to be yes. Would the consequences be the same? If we are able to catch the instigators and the guilty parties, I say good luck. It isn't necessarily easy. It's not a panacea.

This is why we think that we aren't resolving the problem by having a text that is like one that already exists. We've been saying from the beginning that the section exists and that it has already been used. It has been used successfully more than once, according to some witnesses.

If we insist on creating two new offences, including in section 65 (2), we need to at least have wording that doesn't contradict another provision because then we will really cause a problem. Does it become a lesser and included offence? Is it a choice? Are these the two offences that police officers will be able to work with? While

here, it's clear. The clause says that everyone who, with intent to commit an offence under subsection (1), has his or her face masked or coloured or is otherwise disguised is guilty of an indictable offence.

So that remains faithful to what our colleague presented, meaning that an offence would be created. We think it already exists. So it's a little redundant. However, let's say that we are going to establish it specifically in the context of the section on riots and unlawful assemblies. This might eliminate some discussions that some people could potentially have about the provisions of section 351, which have more to do with offences like armed robbery and things like that.

If we insist on having this new type of provision, thinking that we're creating something new, at least let's do it in respect of the charters, of the right to assemble and to express ourselves, while ensuring that people who are arrested are prosecuted under the full extent of the law, but in accordance with the laws that exist here, in Canada.

As I just said, we think what's important is ensuring that this doesn't happen again. But if it does happen, what tools could the police have? What types of tools do they need to be able to tell the population that it's a problem if they take part in this type of event and wear a disguise.

By the way, this is more consistent with what was in section 351. If I was a defence lawyer and saw the words "while wearing a mask or other disguise to conceal their identity", while section 351 says "his or her face masked or coloured or is otherwise disguised", I would say that the latter seems clearer and more general. Using different expressions could pose a problem, as anyone who has practised criminal law knows. Every aspect of this type is used to try to raise various doubts, namely, whether this type of situation was intended.

When the bill was presented—I think it was back in October—the Quebec Bar also recommended an amendment in its letter to MP Blake Richards, who presented the bill. The last paragraph of the letter dated November 16, 2011 from Claude Provencher, the director general, clearly states that a democratic society cannot restrict the freedom of expression of its citizens who express themselves as part of peaceful demonstrations and who act in a peaceful manner.

So we cannot act preventively. That's perhaps our biggest concern because I don't think that anyone here around the table should claim in the media or to their constituents that the bill in question—Bill C-309—amended or not, will enable the police to arrest people preventively. This isn't the case under the bill. It may be the case in section 31 of the Criminal Code. It's possible because there is still a section that sets out other provisions.

●(1220)

Actually, under the Criminal Code, if a police officer suspects someone of wanting to commit a criminal offence, they can arrest that person. The concept of preventive detention exists, but in other sections. Bill C-309 is not going to help us with prevention. Get that out of your heads, because that is not what the bill says, neither in its current form or its amended form.

I would now like to quote the Barreau du Québec:

The Barreau du Québec submits that the objective of this legislative proposal would be achieved by using the wording of section 351(2) under the current Criminal Code. We propose that the offence specify:

“Every one who wears a mask with intent to...”

From a technical perspective, it is the same suggestion that the New Democratic Party made to the government to improve its bill in terms of penalties. We will surely go back to penalties when we debate the government's amendment.

To sum up, we are in favour of the idea. We understand the objective, but we feel that it is already included in subsection 351(2), at least for criminal offences, but not for summary offences. In light of the proposed amendment, we are ready to create that concept. A new offence would be included in subsection 66(2).

In addition, we propose that we use terms that are consistent with those used in the Criminal Code, which have already been reviewed and interpreted by the courts and which are in line with our charters. People have the right to express themselves freely and peacefully, the right to assemble peacefully and freely, without fear of being removed from a crowd for a yes or no, or because their message is not what others want to hear, as long as they do it lawfully, peacefully and in compliance with our legislation.

[English]

The Chair: Thank you.

Mr. Côté.

[Translation]

Mr. Raymond Côté (Beauport—Limoilou, NDP): Thank you very much, Mr. Chair.

I agree with my colleague. I would like to talk about the limited resources of our police forces. I have a great example from last week. Actually, I had the pleasure of speaking privately with Bernard Leary, President of the Fraternité des policiers de Québec. Among other things, he reminded me of something that I was probably already familiar with.

From a legal point of view, Quebec City has to have a minimum of 704 serving police officers, given the size of its population. After a drastic drop in the police force—as a result of the amalgamation of the former cities now part of Quebec City—the number is now at 714 police officers. That shows how narrow the margin is. As part of this committee's business, I would also like to take the opportunity to commend the police officers of Quebec City for their work and professionalism. Those police officers are doing a great job with law enforcement. As a result, Quebec City is quite a peaceful place with one of the lowest crime rates in Canada.

Let us talk about what we are seeking to achieve by introducing the amendments. Let's look at the first one. Without meaning to interpret the intentions of police officers, we cannot deny that various incidents have taken place across the country during demonstrations, which, unfortunately, ended up in riots. In a context of limited resources—lack of equipment, shortage of staff, or limitations in work methods for our police officers—we might question whether those police officers have all the necessary tools, in addition to legislative instruments, to do their job, often in situations of riots or demonstrations that become illegal. As an aside, let me mention the *Life on Mars* series, where you can see the difference in work methods in the UK between 1973 and today.

In terms of these limited resources, some members of the police force had a reaction in some instances. This is about testing the limits and even exceeding them when it comes to the provisions of the Criminal Code. It is one of the concerns that we are trying to address with this amendment. We are trying to avoid preventive arrests. We could even have an offence called the crime of expression.

That is why we have used so many examples of the use of masks. In some cases, it has to do with rallying crowds during demonstrations, where there is no criminal intent. So then they just want to be supportive of the protesters' enthusiasm and, in so doing, make their point. Unfortunately, when the situation escalates, boundaries are broken and demonstrations turn to riots. People wearing masks legally could be arrested at random, even abused.

I would like to mention a case where no masks were involved. That happened a few weeks ago in the riding of Beauport—Limoilou, at Cégep Limoilou. A philosophy professor wanted to teach a course on civil disobedience with the intent of showing support for the student strike. She made her intentions clear. But, as a result of a social media blunder, she was unfortunately accused of wanting to incite violence and of pretty much having criminal intentions. That stopped her from teaching her outdoor course, outside the walls of the CEGEP.

●(1225)

The day the course was supposed to be delivered, a group of CEGEP students, students from other schools and bystanders assembled to show their support for the professor. I would like to draw a parallel to the limited resources and the work of police officers. The Quebec City police took the appropriate precautions since they had been notified about the event well in advance. I can only commend those police officers for how prepared they were; they planned to have an RTC city bus on site in the event they had to make arrests. Arrests were in fact made under a municipal bylaw on the free flow of traffic on public roads.

I don't want to pass judgment on the work of police officers, given arrests are being challenged and, especially, the fines that were handed out during this police operation. I will just finish setting the stage. Seeing that the lecture was not being given, some of the people there spontaneously decided to march into the street, which was in violation of that municipal bylaw. I wouldn't be able to tell you if there were more, but, among the 49 people who were arrested, one of the Cégep Limoilou students was clearly against the student strike. If things had got out of hand, he might even have approved of the arrest of the protesters. He did not agree with the action, with the intent of the philosophy professor and, especially, with the strike action taken by his fellow colleagues.

We can always talk about the G20 summit in Toronto, or other unfortunate examples that show how difficult and demanding the work of police officers is. So we have to be very careful when we determine the legislative tools that we will give them under the Criminal Code. I completely agree with my colleague Ms. Boivin on that. She was very eloquent and is very knowledgeable about the issue. She described the situation well.

Our amendment is meant to be friendly, since we have the same goal, which is to prevent violence and illegal actions. My major concern is that, if we pass the bill as written without amendments, too many people in an illegal assembly or a demonstration could be arbitrarily and unfairly arrested for the simple fact that they are there. Through a series of circumstances, without being warned of the unlawful nature of the event, they could too easily be arrested and be caught in all the red tape of legal proceedings. As a result, their rights to express themselves, to demonstrate and to simply be present at a demonstration or in the area would be violated.

Let me go back to the G20 summit in Toronto. A number of the city's residents, mere bystanders to the demonstrations, were unfortunately arrested. My colleague Craig Scott could confirm that and provide you with more specific examples.

I am telling you this because one of my longtime friends is basically a professional activist in anything related to human rights and major societal issues. Ten years ago, one of the events that he organized was a peaceful demonstration in Quebec City, very far from the walls of the upper town, on the free trade area of the Americas. On a number of occasions, he told me how frustrated he was because rioters took down the fence, thereby obscuring the claims of a peaceful and legitimate demonstration taking place in the lower town, more than one kilometre away from the fence. He was one of the organizers of the demonstration. He also went to Toronto during the G20 protests, as an observer, among other things

●(1230)

On a number of occasions, he was able to acknowledge the work of experienced police officers who had avoided abusive arrests. He told me about experienced detectives or police officers who brought the more enthusiastic police officers back in line. They told them that, if they arrested the protesters, they would not be able to lay charges against them. That longtime activist described the situation well.

Let us go back to the purpose of my Conservative colleague's bill. For one thing, there is the intent to prevent acts of violence, and, for

another thing, there is the fact of wearing a mask to commit an offence.

That is why we want to talk about the intent. In full compliance and in line with what has been observed and recommended by the Canadian Bar Association and the Barreau du Québec. I feel it is key to avoiding arrests that could infringe on the right to freedom of expression, the right to demonstrate, the right to assemble and, ultimately, the right of association.

Mr. Chair, it would be a real shame to commit the resources of our courts to cases that, at the end of the day, would turn out to be illegitimate. We would then end up with case law that would force us to get back to working on finding a measure that works; unfortunately, this will only come after creating many victims.

Having mentioned all those aspects, I urge my colleagues opposite to give some serious consideration to our amendment. The purpose of our amendment is to address some of our fears and those of our neighbours both by avoiding people becoming victims and by not allowing people with criminal intentions to run riot anyway.

Mr. Chair, I am a historian by training. One of the oldest principles in military history has to do with fencing with a sword or shield. For every new move on the offensive, you have a new move on the defensive.

Unfortunately, I was not able to ask the witnesses about this, but we could perhaps assume that, despite passing Bill C-309, the groups of organized rioters with criminal intentions could adapt and get around the legislation easily. Meanwhile, this will hurt a lot of people who want to use the mask as a form of expression or to hide their identity and to avoid being harmed in their personal or professional activities. Several of our witnesses have said so.

It is very important to provide our police officers with the proper tools, but we have to make sure that this does not harm law-abiding citizens who exercise their rights.

Thank you very much, Mr. Chair.

●(1235)

[*English*]

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott: Thank you, Mr. Chair.

I'd also like to speak to our proposed amendment and ask that our colleagues on the committee consider seriously what the amendment is trying to do. It is trying to go to the very core of the examples we kept hearing from the witnesses about the real concerns that need to be addressed: the kinds of groups, the criminals who arrive, and people who are already arriving with criminal intent to engage in the kinds of tactics that several of the police witnesses described to us. In order to achieve that, we believe, frankly, that the existing provision is adequate.

Part of the problem is simply the problem of police enforcement, as our colleague Irwin Cotler spoke to last session. It's not at all clear if we're going to get very far beyond that and still stay true to the principles of both the Constitution and the general principles of criminal law, where intentionality is extremely important.

That being said, we're willing to move a little bit and accept that by moving our amendment on unlawful assembly there is some room for a mask or disguise provision that touches on non-indictable contexts. So please see our amendment not at all as obstructionism, but rather an attempt to get to where the concern seems to be from the witnesses who were called.

That being said, I am a bit concerned that we have a ships-passing-in-the-night problem in terms of at least some members of the committee and a couple of the witnesses—I think in particular of Chief Constable Graham—who have a very different idea of what these words should mean. They've been reading them in a way that just is not at all supported by the text of Mr. Richards' bill.

My concern is that if, after studying a bill with so few provisions, police officers are coming and referring to different things that this will allow them to do as tools, and which seem to go well beyond the text, we have real reason for concern. A refocus on intentionality as being at the centre of our criminal law is really needed.

Let me start now with a quick point on overbreadth. Mr. Richards, at one point in his presentation, said the following:

This legislation is clearly designed to deal with a criminal element who would try to take advantage of a large public gathering of some type in order to cause mischief, mayhem, and damage.

We heard quite a few references to the Black Bloc and to violence. This kind of activity is really what everybody is concerned about.

My concern is that this is not clearly designed to achieve that, especially when we add the kinds of interpretations we've been hearing. It is not well written at all to get after those elements, except with overly broad provisions. I'm going to, on a few occasions, explain the kinds of dangerous situations that will arise, or problematic situations that will arise to show that overbreadth.

Perhaps one of my biggest concerns, as presented by a couple of the witnesses and very close to this by Mr. Woodworth in his questioning, is that we're looking at something that's closer to a strict liability offence, in the way it's being interpreted, than to a traditional Criminal Code offence. At one point Mr. Richards said the following, referring to a riot or an unlawful assembly having been declared by the police: "That situation is declared and at that point it becomes illegal to be wearing a disguise."

We also heard from today's witness, Mr. Webb, about where someone is "just standing wearing a mask", the act becomes criminal and at that point it's a matter of discretionary policing to make sure that people who shouldn't be charged are not charged.

The thing is that's not substantiated by the text of Bill C-309, yet it's what is constantly being presented as what this actually means.

Mr. Richards' amendment to the Criminal Code has two elements that clearly imply serious intentionality standards. If it were to pass, I would ask the legal profession and the courts to come back to our

discussions and understand that not all of us agree with the interpretations we've been hearing.

• (1240)

First of all, there is a prefatory clause saying "Every person who commits an offence under subsection (1)". We already know that the case law makes it extremely clear that subjective elements are part of being chargeable as a member of a riot or an unlawful assembly. So that's the first intentionality.

The second one is the following. Mr. Woodworth kept focusing on the fact of wearing the mask, the intent to wear the mask, as being the intentional element. Well, that's not at all what this says. It says "wearing a mask or other disguise to conceal their identity". So there's a form of specific intent written into this. In French it's even clearer. This should have been written with something like "with the purpose of concealing their identity". In French it says,

[*Translation*]

"dans le but de dissimuler son identité".

[*English*]

So there are two clearly written intentional elements to this that keep getting glossed over in some of the justifications for this provision. The fact that these justifications are being made despite this clarity of language causes me great concern.

I think the chill problem is a real one. I know that members opposite maybe think it's being overblown. I think it's really important that we recognize that all the police witnesses are completely committed to the values underlying our free and democratic society—the right of freedom of expression and the right of free assembly making it possible, as one of the witnesses said, for families to come and demonstrate. This was one of his concerns. All of that's given. But there is a chill problem in the sense that if it's applied in the way the police want to apply it, for it to be effective it will actually have to chill the wearing of masks by everyone, and not just the criminal element they've been focusing on as being the core concern.

Mr. Richards said the following in his presentation: "Obviously, when someone has to think twice about facing penalties for being disguised, they'll think twice about being disguised..." He then went on to talk about engaging in the criminal acts that are the concern. That logic applies to everybody.

I can tell you right now that without an educational campaign and without factoring out the kinds of interpretations that we've been hearing from members such as Mr. Woodworth, the average citizen is going to think that the moment they are standing in the middle of a situation that's been declared a riot or an unlawful assembly, they are now engaging in criminal behaviour. What do you think that will do to people's willingness to actually wear a mask as part of their expressive activity? I think it will have a chilling effect. Absent an educational campaign that actually makes clear that Mr. Woodworth's interpretations are erroneous, then we have a serious problem of a chilling effect.

I'd also like to speak to this reliance on discretion. It is true, of course, that police and prosecutorial discretion is central to the way a healthy criminal justice system has to work. But we don't plan on discretion as being the way, for the majority of cases, for criminal law not to apply. Given the kinds of examples given by Mr. Woodworth and the last witness, of just being in the middle of a riot or an unlawful assembly being criminal if you're wearing a mask and you haven't taken it off, then the idea of saying yes, you're theoretically criminal, but rely on us, the police, is not the way to build a criminal justice system. It's not something that our traditions, especially as informed by the charter, easily accept. So this reliance on discretion has been overdone, I believe, and we have to make sure that a provision designed to achieve certain results is actually written in a way to achieve the results, at least in a way that the folks supporting it are all onside with what it means.

In the interest of time, I think it also is important to note that the words "tool" and "tool kit" have been used a lot in the testimony, that this would give the police a tool. Sure, but some of the examples of what that tool will allow them to do have been worrying.

I read out earlier the quotation from Chief Constable Graham, where he clearly thinks that once this passes he'll now be able to do something he couldn't do before, which is preventatively arresting people before a riot or an unlawful assembly starts, on the basis of the provision. He may well be right, interpretatively. If it turned out to be a crime to participate in a riot with a mask, then maybe there are preventative things you can do.

• (1245)

The point is that we can't hide the fact that the police want this for preventative reasons.

• (1250)

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Good point. It's prevention they want.

Mr. Craig Scott: Exactly, but the point is that it can't be dodged. That's one of the issues.

The other issue is investigation. Although one member, Mr. Rai, I believe, from the Vancouver police didn't say that was his concern, Mr. Richards and the chief constable did indicate that if people aren't wearing masks, it's going to be easier to identify them, that it's an investigative tool, and the deterrent issue of making sure people don't come with masks actually helps in police enforcement down the road.

I just don't think this has been written with any care towards this kind of tool kit. It's left far too up to the police to use this in these ways that have nothing to do with the idea of creating a new criminal offence.

Shifting the onus with lawful excuse—we just can't ignore it. I mean, we have to at least recognize that as a private member's bill, this has not been charter-tested by the Department of Justice. It's one of the dangers of private members' bills. The whole question of whether there is any kind of a reverse onus problem here, because the lawful excuse has to come from the defendant, we have to at least consider.

We also have to recognize that really it's not language that comes with ready-made interpretation. I gave a series of examples to the chief constable...or I can't remember which witness, I'm sorry. I gave examples with regard to whether or not this would constitute a lawful excuse, and of course they had a hard time saying for sure whether my examples would or would not constitute.

The point is that the ambiguity doesn't help. You have a reverse onus and ambiguity? It doesn't look good, I'm afraid, from a constitutional rights perspective.

I would end by only drawing attention to one big problem. This is a way of addressing something that would come up as a second amendment. The biggest concern here is unlawful assemblies, ultimately. If some of the interpretations we're hearing are applied to the threshold of unlawful assemblies, boy oh boy, the chilling effect is really serious, because the threshold for unlawful assemblies is very low.

Not only do the numbers have to be low, but the trigger of fear of people in the neighbourhood that something will occur that will become tumultuous is so low that you almost get to the point of wondering, well, if there's a certain kind of demonstration where people are wearing masks, the masks alone may create the fear among some people when you have an unlawful assembly. It is so low a threshold that if you don't have the safeguards I've been talking about, then....

It's in that area where we could have serious over-policing. The over-policing was brought up by Professor Stribopoulos. One understands it...but police will overcharge. Even if they know, as Mr. Webb said today, that it won't get through the courts, that doesn't prevent police from charging. The fact that you have a plausible charge allows for detention. It allows for arrest. That accomplishes the goal. Even if you know you have no serious ability to actually prosecute, you may say it's still worth your while to arrest or detain.

In sum, the intention is laudable, but I do believe it's largely unnecessary.

At the same time, with this amendment we're trying to work with the committee and with the sponsor of the bill. I would encourage the members opposite to take the amendment seriously.

The Chair: Thank you.

Ms. Murray.

[*Translation*]

Ms. Joyce Murray: Thank you very much, Mr. Chair.

I would like to add a few words. I am from Vancouver, and we often use the example of the Stanley Cup riot. I agree with Ms. Boivin that those unlawful assemblies during the Stanley Cup in Vancouver were disgusting and disturbing. In a society like ours, we must have the tools to prevent those actions and to react. The work of police officers is very important and we have to support them in a balanced way.

Just now, one of the witnesses told us that we have to find a balance between the right to participate in a demonstration and the need for security in our society for individuals and their property. I agree that we are all seeking that balance. However, from what I have heard today, I am concerned that we are not looking for balance, but for a way to make the work of police officers easier, at the expense of the rights of individuals and their right to express themselves, as they have always done in our western democratic society.

I asked our witness Mr. Webb about the possibility of innocent people being caught in the net of police officers because of Bill C-309. I am talking about people with no intent to be violent or to create a riot. He said that, if police officers arrest someone who does not intend to be violent or to break the law, it does not matter because they would be found innocent in court. A Conservative member then said that that was impossible because, when you participate in an unlawful assembly, you are not innocent, but that those who do not intend to create a riot will not be arrested. I do not agree with that, and that is the Gordian knot of the NDP amendment.

•(1255)

I would like to tell you a little story in relation to our current debate. I want to talk about the crowd that was out in the streets during the 2010 Winter Olympics. On the first night of the Olympics, hundreds of thousands of people were out on Georgia Street. There was a parade with celebrities. There were a lot of people. The crowd was not aggressive and it did not intend to create problems or to be violent.

Among those people, there were people from Vancouver and elsewhere. There was also a small group of masked people with black clothing. They were basically professional activists. They were there to create trouble. That is concerning, I agree.

At any rate, things happened during the night. I saw it on TV, like everyone else here. There were 20 or 30 young people dressed like that. They broke the windows of the Bay. That was violence against property. What did the police do? They watched them and did not arrest them. Nothing ever happened. No one else was involved in that...

[English]

Mr. Brian Jean: Point of order, Mr. Chair.

The Chair: Just a minute.

Mr. Brian Jean: I was just curious. I've only been here eight years, but is this a precursor to the Liberal-NDP amalgamation of parties? Because they're both filibustering with the same vigour, I was just wondering if this is the amalgamation of the left. Maybe they could answer that question.

Mr. Craig Scott: Point of order.

Ms. Françoise Boivin: That's insulting.

Mr. Brian Jean: For you or the Liberals?

The Chair: Listen, that's not helpful for the discussion.

Ms. Françoise Boivin: It's insulting to hear that type of comment. I think it's democracy, it's expression. Do you have a problem with that?

Mr. Brian Jean: You have the right.

Ms. Françoise Boivin: Do you have a problem with people expressing themselves?

The Chair: It's truly not helpful to the discussion. I think we're—

Mr. Brian Jean: I've been here 55 minutes already, and what they've said is not helpful and it's not going to change the vote.

The Chair: It's one o'clock. The meeting is adjourned.

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