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Chair

Mr. Dave MacKenzie

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● (1105)

[*English*]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): This is meeting 36 of the Standing Committee on Justice and Human Rights. The orders of the day, pursuant to the order of reference of Wednesday, February 15, 2012, are Bill C-309, An Act to amend the Criminal Code (concealment of identity).

We are resuming debate on amendment NDP-1 to clause 2.

I have Madame Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chairman.

I will be brief, because I presented all my arguments last Tuesday. I would simply like to add one thing with respect to the NDP's first proposed amendment to Bill C-309. We used only one hour to express our views, after hearing from witnesses. I was therefore surprised to hear government members claiming that we were being obstructionist, as that is not at all the case.

It is important for me to address this question in the context of the committee's work. I can assure you that the only time you will see us filibustering is when you impose time restrictions on us. Otherwise, people will simply be expressing their opinion about what they heard and, as far as I know, that is what democracy is all about.

My colleague, Brian Jean, may disagree with me. We can disagree with one another without being rude. This amendment is not frivolous. It is not completely out of touch with reality. On the contrary, it is supported by a number of witnesses. It seems the people of Canada don't have a clear understanding of this bill's impact. Some people believe—and we see this in polling results or in what some media have been saying—that, once this bill has been passed, it will no longer be possible for anyone to take part in a peaceful and lawful demonstration while wearing a mask or disguise.

That being the case, we will end up with some problems, whether we're talking about Bill C-309, as currently worded, or Bill C-309, as it could be amended to make it more consistent with the Criminal Code and existing charter legislation in Canada.

I am going to stop there, because I simply wanted to point out that we are not filibustering. We are expressing our views with respect to the amendment in a democratic manner.

Thank you, Mr. Chairman.

[*English*]

The Chair: Thank you, Madame Boivin.

Mr. Goguen.

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

Obviously we're talking about NDP amendment one, and I'll start with the obvious: freedom of expression and the right to assembly are constitutionally guaranteed.

It's my take that Bill C-309, once enacted, will operate as a further protection of those rights. We had witness Chief Graham, who at the time of the Vancouver riots was the police chief, and Sargeant Webb, a policing expert in crowd control, both testify. They have explained the extent of the measures police authorities take to ensure that peaceful assembly is protected. There are ongoing communications with the crowd; there's direction of traffic to permit movement. They go to no end to make sure that peaceful assembly is a well-respected constitutional right.

They have also explained how peaceful assemblies can quickly escalate to an unlawful assembly and/or worse, a riot. They explained that those who protest can be categorized into four categories. At one end of the spectrum are those who are expressing a point of view or trying to make their point peacefully.

On the other end of the spectrum there are the anarchists—the Black Bloc, as they are known—whose sole objective is to create mayhem, disruption, and violence. The whole objective of Bill C-309 is to deter the wearing of masks and the disruptive activities that the Black Bloc would undertake. Deterring such activity is a protection of the rights of those who want to peacefully assemble and make their point of view known, as they properly can per the charter.

There has been some talk about section 351 of the Criminal Code, which we're told is sufficient, and that Bill C-309 as it stands is basically not necessary. We had Chief Graham tell us that of all the charges laid in the Vancouver riots, a grand total of two were laid under subsection 351(2). The reason was that it was difficult to identify people. Why? They were wearing masks.

In a sense Bill C-309 is in addition to section of the Criminal Code, and I have stated what I believe its purpose is.

With regard to the current activities that are going in Montreal, it's very timely that this bill is being brought forth. We know this from watching the news about the mayhem going on there. Obviously some of the students are protesting for very valid reasons; others are there to create havoc. It's hard to tell them apart.

Mr. Blake Richards received an email from Alain Cardinal, who is the

[*Translation*]

Chief of Legal and Internal Affairs for the City of Montreal.

[*English*]

Mr. Cardinal was telling us this:

> I saw in the newspaper this morning that the Minister of Justice will support your Bill. If you need testimony from the SPVM (Montreal Police Department), it will be our pleasure to appear before any House Com[m]ittee.

Obviously we won't need his testimony at this point because we have concluded that part of the committee.

Also, I saw there was an article in *La Gazette de Montréal* where the mayor, Gérald Tremblay, was reported as saying at a news conference that demonstrating was a democratic right but that the citizens had the right to protection from rock-throwing vandals—the Black Bloc section, the anarchists—those disrupt traffic and commit acts of violence. He said:

> When demonstrations repeatedly lapse into violence and acts of vandalism, not only are Montrealers made to pay the price, but the image of the city is tarnished as well.... We're not talking here about the Santa Claus Parade, the Carifiesta or [the] Just for Laughs festival.

It's no laughing matter, in any event.

With regard to NDP amendment one, we will be voting against this amendment because in our mind it basically guts the entire intent of the bill. My comments will also hold for NDP amendment two. Number one deals with unlawful assembly and the other deals with the riots. The first amendment deals with the riots.

The NDP motion would create a specific intent offence. This would increase the burden of proof. It would essentially require the crown to adduce evidence from which the court could infer that the accused intended to take part in a riot and disguised him or herself for the purpose of participating in a riot.

In contrast, Bill C-309 only requires that the crown prove the accused participated in a riot and while doing so was disguised. At that point the burden of proof would shift to the accused to prove there was some lawful excuse for concealing his or her identity.

The NDP amendment does not provide the accused with an opportunity to raise a defence that there was some lawful excuse for concealing his or her own identity. This defence would ensure that criminal liability does not attach to persons who wear a mask or other facial coverings for a lawful purpose, such as for religious or cultural reasons, or to protect health or safety.

● (1110)

Lastly, the inclusion of “coloured” in the NDP amendment could be intended to address face painting. This would already be captured by Bill C-309's basket phrase “or other disguise”.

I also note in the Criminal Code the annotation that the terms by the Supreme Court of Canada as having a lawful excuse were upheld because there is a presumption of innocence. I would like to ask the specialists on this—

The Chair: The officials.

Mr. Robert Goguen: —the officials, thank you, to comment on the issue of the burden of proof that the NDP amendment would impose upon the crown. Are they here today?

The Chair: Yes.

Would the officials come forward, or an official.

Mr. Robert Goguen: She's not wearing a striped sweater, Mr. Chair.

The Chair: I want to thank you for being here. I hope you heard the question.

Before you begin, if you would identify yourself for the purpose of the record, we'd appreciate it.

Ms. Carole Morency (Director and General Counsel, Cabinet and Legislative Agenda, Criminal Law Policy Section, Department of Justice): Good morning. My name is Carole Morency. I'm general counsel with Department of Justice, criminal law policy section.

I believe the question was to explain or address the issue about the specific intent aspect of the amendment NDP-1. Is that correct?

Mr. Robert Goguen: It would create a specific intent offence. How would this increase the burden of the crown to prove the offence?

Ms. Carole Morency: I understand the NDP-1 is taken from subsection 351(2). In that section, and as worded in the motion, there would be a requirement for the crown to prove that the accused had the specific intent of committing an offence, in this case the offence under either the riot or the unlawful assembly offence for that purpose, with the specific intent of doing that, and had a mask on toward that end.

In general, specific intent offences are more difficult to prove. They are not the norm; they are more exceptional in the Criminal Code. The crown would have to lead evidence specifically to show that the accused, in that instance, was intending to commit the offence, by participating in a riot or participating in an unlawful assembly. If you look at the case law under subsection 351(2), the courts have been very clear in saying that there has to be that specific intention, and absent that, the case is not made out.

So there is a distinction between the approach proposed in the amendment and the approach proposed in Bill C-309. It is an added element. It is one that can be made out in some cases, but it's an additional thing that the crown has to prove and it does make it more difficult to make out the offence in this case.

● (1115)

Mr. Robert Goguen: And in Bill C-309 the intent that it will be necessary to prove would be what?

Ms. Carole Morency: In Bill C-309, the way the bill is proposed, the offence that would be committed is first the offence of riot or unlawful assembly. Then the crown would have to show that the person wore the mask to conceal their identity.

There were some questions, I understand, from looking at the transcripts of the earlier committee meetings, about the approach taken here. The committee might be interested to know that section 255 of the Criminal Code has a similar approach, which is the impaired driving offence. You have a section in that model. If there's an impaired driving offence, it's one penalty, but if the impaired driving causes bodily harm or death, you have a higher penalty that applies. I would suggest this is a similar approach.

Mr. Robert Goguen: Of course, there is the lawful excuse defence also. I wonder if you could comment on that.

Ms. Carole Morency: As your remarks indicated, the distinction between the NDP amendment, which would not provide the accused with the defence of a lawful excuse, and Bill C-309 is that the lawful excuse defence is provided for in the bill. I understand, from looking at the comments made in previous committee hearings, that examples have been given. Wearing a facial covering for religious purposes would be a lawful excuse. It could be for a health reason. It could be otherwise.

But the way it would work is that in the situation where it's made out that the accused was wearing a mask and the crown leads evidence to indicate that it's for the intent of concealing their identity, then the accused could point to evidence. The burden is not on the accused. All the accused has to do is to point to some credible evidence to show that there was reason, and then it shifts back to the crown to prove that it was not a lawful reason in the circumstances.

Mr. Robert Goguen: Thank you.

The Chair: Thank you.

We'll go to Mr. Woodworth.

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

I'm only going to speak, unfortunately, because my name was referenced in some of the comments made at our last meeting by one of the members opposite.

There is an old lawyer's practice whereby, in fact, we generally try to “anonymize”, if that's a word, counsel. We even go to the point of wearing robes in important cases. We do that because in a court of law, when we're discussing legal concepts, what's important are the issues, the evidence, and the principles, not the names and personalities of those involved. Of course, Parliament is not composed of lawyers only, and Parliament does not operate on the rules of courtesy extended in a courtroom. But I will extend that lawyerly courtesy to the member opposite and not mention that member by name.

I quite readily accept anyone who wants to disagree with the legal interpretation I've made. I don't mind that at all. I will say that it's true that in my remarks I did not specifically refer to the fact that the new act would require the wearing of a mask to conceal identity. However, where I think the member opposite erred, in calling my remarks incorrect, was in thinking that it makes any difference and that somehow, the reference in the new act to an intent to conceal identity does not make this an offence of general intent.

Now, I had to stop and think, because it's been about 40 years since I underwent the joys of introductory criminal law. But I'm sure that at that time I was taught a legal principle of interpretation—and it's only an interpretation—saying that there's a presumption that people intend the natural consequences of their acts.

I had occasion last night to check with a member of the bench who is very close to me to inquire whether that person was aware of whether the principle had been overturned or in some way undone by our courts. That member of the bench was not aware that the principle had been overturned.

When I see that this bill makes it an offence to wear a mask, I think there is a presumption that people wear masks to conceal their identities. I'm not saying that it's a presumption that cannot be rebutted. But certainly, the intent in wearing a mask presumes or subsumes an intent to conceal identity, unless that presumption is rebutted.

I think part of the problem that the members opposite have is that again they may not be aware of another old lesson from introductory criminal law, which distinguishes between intent and motive or intent and excuse. The reasons people do things don't necessarily refer to their intent. What makes something intentional is its distinction from being accidental.

My remarks to the effect that the new offence is one of general intent rather than specific intent remain, in my view, quite correct. All one requires to be convicted under the new offence is an intent to don a mask and to keep the mask on while participating in a riot or an unlawful assembly. Quite frankly, I regard that to be a much less culpable intent than the intent required under subsection 351(2), which makes someone much more culpable, because when that person puts on a disguise he or she has to actually be planning to commit an indictable offence. Under the new act, no such planning or foresight is required.

● (1120)

If anything, one could be convicted for the stupidity of failing to take off a mask when you find yourself participating in a riot or part of an unlawful assembly. That's why I would be much happier if this offence that we're considering did maintain a lower penalty than the offence in section 351, because of the difference in the culpability required.

To put it another way and to use more modern language than my first-year law from 40 years ago, this new offence does not require a nexus of intention between the intent to put on a mask and the intent to commit another offence. When one intends to put on the mask or when one intends to keep the mask on, one does not have to do so with any intent to participate in a riot or become a member of an unlawful assembly. There is no nexus of intent.

The only nexus required under this offence is one of circumstance, that is, of time and place. One must have the mask on when one is participating in a riot or is part of an unlawful assembly. The provision under section 351 on the other hand requires the much higher nexus of intention between the intent to don the disguise and the intent to commit, I think, an indictable offence.

Here's an interesting point, Mr. Chair. The fact that the NDP, the opposition, has moved this amendment to import a specific intent discloses that all of their arguments to say this offence already required a specific intent were not really seriously made. If they were actually seriously arguing earlier that Mr. Richards' offence already required a specific intent, they would not feel the need to introduce an amendment to import a specific intent. Or to put it the other way, if they really believe Mr. Richards' bill does require in itself a specific intent, then their introduction of this amendment purporting to introduce a specific intent is totally redundant, superfluous, and disingenuous.

You can take your pick. Either way, this amendment does not commend itself to me, so I will be opposing it.

Thank you.

● (1125)

The Chair: Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: Our colleague may have misunderstood what is behind this amendment. It is clear that more is needed than what he seems to think, even in Bill C-309. From the outset, our main argument has been that the riot offence already exists. Mr. Chairman, section 351 of the Criminal Code will still be around after this bill has been passed.

I raised my concern right from the start. I am worried that by using different terminology, we could end up with interpretation issues when the time comes to present the indictment to a court of law. The defence lawyer will stand up and say that he doesn't understand why his client is being charged. The fact is that this is a specific offence involving participation in a riot while wearing a mask or other disguise to conceal identity. I think we have to go back to what Mr. Richards was aiming to do when he introduced his bill.

We have tried to use the same terminology. Basically, we agree with the government when it comes to hoodlums, thugs and criminals taking part in demonstrations which are otherwise peaceful and lawful. People are going to make their views known, something which is not illegal in Canada, thanks to the Canadian Charter of Rights and Freedoms and rights such as freedom of expression and freedom of assembly. We wanted to be sure that there would be a specific offence for these kinds of individuals.

Let's look at what the initial purpose of the bill was. The idea was to create an offence related to wearing a mask or other disguise to conceal one's identity while participating in a riot or an unlawful assembly. We can get into a big debate about the semantics surrounding specific intent, but one fact remains. I heard what the official from the Department of Justice was saying earlier. She explained the differences between the two. I don't think she will contradict me on this point, but the Crown has to show that the individual participated in a riot. Participating in a riot does not just mean that you have both feet on the ground where the riot is occurring. People should put that completely out of their mind, because other factors can be involved.

After that, we're saying that the individual will stand up and say that he or she had a lawful excuse. Even the bill states that there must be the intent to disguise one's identity. It will not be the accused having to prove that his intent was to conceal his identity. The Crown will also have to prove that. Imagine a case where someone is taking part in a demonstration against a political leader, any political leader—you can choose whomever you like. That person is well intentioned and, in fact, a lot of people there are wearing a mask portraying the face of this particular political leader. However, at some point the demonstration turns into a riot. That particular individual had no intention whatsoever of participating in a riot and was actually wearing a mask, not to conceal his identity, but rather to express a point of view.

There were clarity issues in that regard. I repeat, the purpose of the amendment is to retain the same terminology, so that it reflects the way the courts are used to interpreting section 351. It is intended to ensure that what we are doing is creating an additional offence. That is my understanding. We are in favour of creating an additional offence—namely, wearing a mask with the intent of participating in a riot or an unlawful assembly. Thus two additional counts would be available to police. The NDP has no objection to that, as long as the provision is properly drafted and people's fundamental rights are upheld. It's a question of how it reads and how it's worded.

I'd like to come back to some of the statements made by my colleague, Mr. Goguen, regarding events in Montreal. It is clear—if you turned on your television this morning, you will know that what is going on there now is not very pretty—that no one accepts that kind of criminal and unacceptable behaviour, which cannot be tolerated in a free and democratic society such as ours.

● (1130)

Unfortunately, as the Quebec Ministers of Public Safety, Justice and Transport were saying, these petty criminals behind the smoke bomb attacks in the Montreal subway are taking advantage of a particular cause to try and impose their anarchist vision on people. That is, first and foremost, what we need to target and try to stop.

We deplore what is happening in Montreal, and we obviously sympathize with the people who are affected by this. Yet how can we arrive at the desired result while still showing respect for our laws and what Canada is all about? I do not think that a piece of legislation in and of itself, including Bill C-309—as currently worded or modified through our amendments—will succeed in changing that kind of attitude.

The idea behind this bill is to ensure that people who want to express themselves will be afraid to do so, and that concerns us. I think it's important to repeat that point. We are talking about deterrence here. When dealing with criminals, I believe that is the purpose that should be served by a law. A person who commits murder, for example, is subject to a given penalty or sentence. That is the very basis of our Criminal Code. It lets people know what will happen to them if they commit this or that crime. That is what the purpose of a Criminal Code should be, as opposed to preventing innocent people from engaging in lawful activities.

Was this bill drafted in the unavowed hope that it would serve the good citizens of Canada, the people for whom the Conservative Party has so much respect that it has removed legal remedies for hate propaganda, under the Charter of Rights and Freedoms, in order to support freedom of expression? People with a good reason to demonstrate, who do so appropriately, who express themselves by wearing a mask, painting their face or maybe even wearing some kind of disguise, may be so afraid of being caught in this kind of situation that they will stop expressing their views. That is my concern, and I believe that people on this side of the table share that concern. I only wish that were so for members on the other side.

In order to prevent people from committing crimes, appropriate measures need to be put in place, as opposed to punishing innocent people. You will say that this may be justified in a free and democratic society. In the City of Montreal, for example, they could decide to ban the wearing of a mask under their bylaws. It is not up to me to tell a municipality what it should or should not do. However, as a lawyer, I question some of this. I believe this was proposed earlier but was struck down by the courts for being too broad a limitation for which there was no justification.

Does the somewhat higher concentration of violence we have been witnessing recently justify violating people's right to freedom of expression? We'll see. Personally, I don't think we're there yet. Witnesses made the point that during the Olympic Games and at other major events, things had gone very well because proper communications were in place. The people who organized these events had their own security staff because they wanted to be sure their cause would not be highjacked by criminals and other individuals for whom we don't have an ounce of sympathy.

In our opinion, the way the bill is drafted will create problems, so much so that, where sections 65 and 66 are concerned, there are as many opinions about what they mean as people around this table.

● (1135)

So, imagine you're in a court of law facing a smart defence lawyer who starts to raise all sorts of questions about specific intent. One could cite the words of our colleague opposite, Mr. Woodworth, in a speech that I found to be absolutely brilliant, talking about whether the intent is specific or not, and so on. You can imagine the kind of debate this would give rise to.

So when in doubt, what happens? The accused is always acquitted. If that is our objective, let's use wording that does not work, could cause confusion and will ensure that we do not achieve the desired goal. In the opposite case, let us instead rely on a provision that has already proven itself. That provision may be difficult to access, but it would act as a deterrent. People would know that if they took part in a riot, not only would they be subject to a given penalty, but if they did so while wearing a mask or face paint or any other disguise, they would be guilty of an indictable offence.

It is directly creating an additional offence to the current offence of participating in a riot, which is subject to a penalty. If the provision is properly drafted and the offender is subject to a five- or ten-year prison term, that may make sense. However, when the provision is vague and subject to interpretation or is confusing, that is a problem. At some point, the accused will get up and say that he had absolutely no such intent. That would be the case even if there had to be proof of intent and the Crown had proven its case in that regard. The fact that a person never removed his or her mask while participating in a riot or deliberately causing damage, well, all of those things are considered to be aggravating factors by the courts in setting the sentence. Now we are making it an offence in the strict sense of the term in relation to the other alleged offence. In my opinion, that meets all the criteria and avoids a lot of additional discussion. It is a serious offence that would be severely punished through the maximum sentences that are provided for. That was the intended goal. Our job is not to show how smart we are, but rather to find wording that reflects what can be found in the Criminal Code and which has already proven its usefulness.

I understand the point raised by Ms. Morency, who referred to section 255. I can conceive of that type of wording being in the Criminal Code, but given Mr. Richards' main objective, as he explained it to us here, and considering what we are aiming to do, this is not so much about bringing in the notion of a lawful excuse as it is about creating a completely separate offence in order to punish this kind of illegal and criminal behaviour. We are talking about someone taking part in a riot and hiding his or her identity with the intent of participating in a riot, as opposed to simply expressing a viewpoint. Let's not focus on the lawful excuse part of this. Let's focus instead on what we are really trying to accomplish, which is to create a second offence relating to rioting and unlawful assembly.

[*English*]

The Chair: Thank you, Madame Boivin.

Ms. Morency, you were mentioned a couple of times in the intervention. I don't know if you have any comments.

Ms. Carole Morency: I didn't take any of the remarks to be questioning anything I had provided to the committee. I'm here to serve as an aide, if I may, in terms of further explanation, if that's appropriate.

The Chair: That's fine.

Mr. Scott.

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

I do appreciate the fact that you're here, Madame Morency. When we're dealing with private members' bills, one of the biggest problems we face is not knowing how well they have been vetted from a legal angle, and perhaps having an adviser like this, even in the form of a witness, much earlier in the process for private members' bills would help all of us. I certainly welcome the fact that you're here now.

The second point—and I may continue to do this with respect to the member opposite, Mr. Woodworth—is that the use of names in this kind of context is often necessary for clarity of the record, because we're referring compendiously to an argument or series of arguments where it's much easier to say what Mr. Woodworth was arguing so that people will know where to go in *Hansard*.

This is not a court of law where from genteel reference to the member opposite, or other counsel, it's obvious whom you're referring to, or even in the House. As you acknowledge yourself, this is not a court of law, and I much prefer that people be identified for the arguments they make than necessarily be cloaked in anonymity. You can refer to me as Mr. Scott or Craig, whatever you want. You can refer to me as much as you want.

Third, I also don't want to get into comparing who can remember their introductory criminal law course better. Mine was more recent, but my memory may be worse than yours, so it may all wash out in the end.

Finally, when one concludes that the side opposite is being disingenuous purely on the basis of one's faith in one's own legal analysis and logic, the conclusion that the other side is being disingenuous is only as strong as your logic. To the extent that you're wrong, it's a real leap of faith to be calling people disingenuous.

That's all I would say.

In terms of the point brought up by Mr. Woodworth about concealing identity as being in some respects superfluous, that alone would be a cause of concern, the fact that there's wording in the provision that doesn't need to be there, that in effect it is a general intent offence, where to conceal identity is simply assumed, or is a strong presumption.

I would ask, Madame Morency, do you think that the words—and perhaps this is going to cause more confusion—"to conceal their identity", especially in light of the French, where it says "*dans le but de dissimuler son identité* ", have any work to do in the clause?

● (1140)

Ms. Carole Morency: Again, to come back to my earlier remarks, the proposals in Bill C-309 would only kick in if the offence of rioting or committing or participating in an unlawful assembly have already been made out.

The offence is there. The question is that in the facts of the case, did the accused actually wear a mask or other disguise to conceal their identity, so it becomes a question of the facts in the case. The crown would be looking to lead evidence to indicate the intention, to prove the intention. They still have to prove that they were wearing it for the purpose of concealing their identity.

Mr. Craig Scott: For the purpose of concealing identity.

Ms. Carole Morency: The accused can point to, as I mentioned earlier.... It's not a reverse onus, but they would look for some credible evidence, or point to some credible evidence as to the reason why they might have been wearing a mask, or disguise, whatever. Then the burden is still on the crown to prove, in that situation, that it was not for a lawful purpose.

Mr. Craig Scott: I am not in any way criticizing, but in some senses you have collapsed or integrated the proof of concealing, the purpose of concealing identity, and the offering of a lawful excuse. This raises another issue but I only wanted to be clear that you're saying that it's not simply proving the most general "you intended to wear a mask" but it's that "you intended to wear a mask with the purpose of concealing identity". That would have to be proved, is that correct?

Ms. Carole Morency: That would be a common sense interpretation of the words proposed by Bill C-309.

Mr. Craig Scott: Right. And we wouldn't likely treat words there with that common sense as being there for no purpose, or that they're superfluous. Thank you.

Ms. Carole Morency: There's a distinction between the amendment and the bill in terms of their approaches to the disguise.

Mr. Craig Scott: Yes. My purpose here is simply to show that in fact there is a multitude of interpretive disagreements and challenges in the provision as it stands. It's far from a clean text. You referred to how the purpose of concealing identity and lawful excuse can blur a little bit in terms of, if you have a lawful excuse, perhaps that means you don't have the purpose of concealing identity. Is that part of what you were saying might be the interaction between those two clauses?

Ms. Carole Morency: That's correct. The words "without lawful excuse" are not exceptional here. They appear elsewhere in the Criminal Code. Prosecutors, defence attorneys, and courts are well accustomed to interpreting that phrase in the context of each case as it appears before them.

● (1145)

Mr. Craig Scott: Great. Part of our concern, especially in the context of the kind of conduct that we're considering here, is that the front-line interpretation is actually being done by law enforcement officers and does involve judgment calls about whether people get detained before prosecutors even get involved in making their decisions, let alone before a court gets involved.

It's a bit of a concern if lawful excuse is something that in this kind of context is not quite clear from the beginning. I asked Chief Constable Graham some questions about what might be considered to be lawful excuse. He said that we should talk to a lawyer about that, and I understand his answer.

From your perspective is it clear—and if it's clear all the better—that if a woman, for example, is wearing a veil or somebody is wearing bandages for medical reasons, two examples that Mr. Richards has given, and the event becomes a riot or an unlawful assembly, continuing to wear either would be a lawful excuse?

Ms. Carole Morency: Again, you have to go back to the starting point, which is that the accused—

Mr. Craig Scott: —is participating.

Ms. Carole Morency: —has been convicted of having committed the offence. At the same time, if they are wearing a mask to conceal their identity, that's the additional part. You can't ignore the first step.

Mr. Craig Scott: Right. So it's if you are participating in a riot.... Good. I think you're absolutely right.

So if you are participating in the riot, in the way that the law requires—and I will come to this in a second—degrees of intentionality to be participating in a riot, and not just that you're happening to be standing in the middle of the riot, you would actually be required to remove that face mask if you didn't want to be criminalized?

Ms. Carole Morency: No, because if they have a lawful excuse—

Mr. Craig Scott: That's what I was asking.

Ms. Carole Morency: —that would be why they're wearing it.

Mr. Craig Scott: That's why they're wearing it, but does it extend to the point at which, if they're actually participating in a riot and wearing it, do they have to remove the veil in order not to be subject —at least, in theory, in criminal law—to that added offence?

Ms. Carole Morency: I can only assist the committee by looking at the plain language of the words used in the proposal before the committee, which is "wearing a mask or other disguise to conceal their identity without lawful excuse". It's all relevant. If an individual, in the example that I think has been posed, is wearing a veil for a religious reason, there is a lawful reason for that.

Mr. Craig Scott: Absolutely.

Ms. Carole Morency: It's not to conceal their identity in that context. It's for a religious purpose.

Mr. Craig Scott: Okay. In that answer you've done a lot of work with the words "to conceal identity", and I note that. It shows that those words could be very helpful. Thank you.

With respect to a peaceful demonstration context, Mr. Goguen, I think, did very well to remind us how the police, as witnesses have emphasized, view their role as being to enhance constitutional rights to peaceful assembly, especially to protect the space for those who want to demonstrate peacefully. I've mentioned this before. Even the example of families wanting to know they can demonstrate safely was brought up by one witness.

In that context, I don't think there's any issue around certain kinds of masking, right? Lots of examples have been given about how people wear masks for expressive reasons. But I want to ask you about the reason for anonymity and how that might interact with concealing identity. If somebody—a member of a diaspora, for example—wears a mask because they fear that a foreign state may have photographers on the side of a demonstration; or others for justified or unjustified reasons, worry that our own state services may on occasion photograph peaceful demonstrations and they therefore want to be anonymous; or somebody thinks that certain employers may scan video of demonstrations to see whether any of their own employees might have been participating, these are all reasons for anonymity.

In the middle of a peaceful demonstration nobody has any issue with that. Does there come a point—again, you've indicated the predicate clause of "after committing an offence"—when you are involved in an unlawful assembly or riot that the anonymity reason is no longer a lawful excuse, so if you're caught in the middle of something you would then have to take off your mask, if your reason for wearing the mask is to be anonymous?

● (1150)

Ms. Carole Morency: You're asking me to speculate how a court might turn its mind to it in a specific case?

Mr. Craig Scott: I'm asking how the police would have to do it before we even get to the courts.

Ms. Carole Morency: It's not unusual for the police in this situation or in any other situation to have to bring their judgment and expertise to bear on the facts that present to them. This committee has heard lots of evidence already from some police witnesses about their experience in this area and how they routinely exercise discretion in these situations.

I can only suggest to the committee that the language "without lawful excuse" is one that all players in the criminal justice system are familiar with and, ultimately, if it proceeded to that level, a court would look at all the facts and circumstances and have to make a decision. Was there a lawful excuse in that situation for that accused who has committed either the offence of participating in a riot or unlawful assembly and has persisted in wearing the disguise for the purpose of concealing their identity? All that would be before the court.

All I can say, as I've already indicated, is that when the police appeared before this committee, I think they indicated that they exercise discretion quite a bit in these types of situations. My understanding of how Bill C-309 is proposing to address the law here is that you're dealing with a situation that is no longer a lawful assembly, a lawful gathering, but has transgressed into a riot or an unlawful assembly. I think those factors are before the police.

Mr. Craig Scott: I find that very helpful. Thank you.

I just have one last question. Emphasizing that our amendment requires specific intent, it's an intent to commit an offence, which itself requires intent. I'm not sure how the two interact in any way that makes that meaningfully specific intent, but we'll leave that to one side and ask the following. I could be wrong, but my understanding is that the courts have imported at least some elements of subjectivity to the crimes of participating in a riot or an unlawful assembly; it's not simply being caught in either of those that criminalizes it. Is that correct?

I ask because this could prove to be extremely important if this does pass, to make sure that it's clear that the predicate condition involves some form of intention to be part of a riot or an unlawful assembly. Do you know whether or not some elements of intention are part of those offences?

Ms. Carole Morency: I believe the committee has heard some evidence to the effect of how the existing offences work now on riots and non-lawful assembly. Committing either of those offences is not being changed by Bill C-309.

Mr. Craig Scott: Exactly.

Ms. Carole Morency: Bill C-309 is not changing the elements that must be proven in either case.

There is a distinction in terms of what must be shown, obviously, for either offence. The unlawful assembly offence in section 66 is a summary conviction offence; it's a lower-level type of offence. You still have to prove all of the conditions of that offence before one can be convicted of it, including a gathering of three or more persons, etc. But it is possible under that offence for somebody to be convicted, if all of those conditions are present and they are aware of the situation and choose to remain passively acquiescent; there is case law to that effect.

What's important for the committee to recall is that Bill C-309 is not changing the fundamental operation of either of those offences. Rather, it concerns what penalty is to be imposed when a person who has committed one of those offences is also wearing a mask to conceal his or her identity without lawful excuse.

Mr. Craig Scott: Great. Thank you.

You've clarified that the subjective element is knowledge or awareness that something has become a riot or an unlawful assembly, and choosing to stay would be a rough summary of the intentionality, the *mens rea* dimension.

● (1155)

Ms. Carole Morency: Well, there is an objective and a subjective component for it.

Mr. Craig Scott: Of course. And so, that would be the subjective element.

Ms. Carole Morency: Yes.

If, knowing that all of those factors were present, and you have three or more persons present with an intention to carry out a common purpose—and that's assessed on an objective basis—and the actions become tumultuous in the circumstances and those people choose to stay in that assembly for whatever reason, and they have been found to have committed the offence.... Bill C-309 is not changing any of that.

Mr. Craig Scott: Good. Thank you. I find that very helpful. It clarifies and puts us all on the same page. I honestly believe we were already on it, were it not for some testimony that seemed to suggest that the mere objective fact of there being an unlawful assembly or a riot could subject you to this mask offence.

So thank you so much.

I have no other questions.

The Chair: Thank you.

Mr. Côté.

[*Translation*]

Mr. Raymond Côté (Beauport—Limoilou, NDP): Thank you, Mr. Chairman.

When I'm confronted with a difficult problem, I try to use plain old common sense and I especially like using very vivid images to illustrate it. It has to do with the fact that I believe in God. I always try to follow Christ's example. We all know that, in the Scriptures, he used parables to denounce completely unacceptable social realities, in order to make them understandable to the people listening to him.

In my other life, I worked for Ameublements Tanguay for 12 years. I met an enormous number of people during that time. I learned a lot about life. As I listened to my colleague, Françoise, I was reminded of one person I met there. A security guard, who was taking very advanced training to become a security consultant, so that he wouldn't have to be just a salesman selling security systems and equipment, had developed an integrated security concept based on available means and a specific configuration. Working with his client, he saw what it could look like. That man, who also worked at Ameublements Tanguay, pointed to the Frost fence surrounding the warehouse transfer yard, which had barbed wire at the top. He told me it was a way of preventing honest people from inadvertently entering private property.

That example, which may seem ridiculous at first glance, was a very strong image. When it comes to public safety and security, the main problem is that the means used to prevent people from committing a crime have to be balanced. The purpose is perfectly legitimate, as is the case for our colleagues opposite. But we need to avoid security systems that are overly sophisticated, massive and brutal that end up placing tremendous restrictions on individual and collective freedom. People have to be able to move around, assemble and express themselves in public.

Colleagues opposite are poised to reject my colleague's amendment. They want to hide behind a false sense of security by putting up a Frost fence that will considerably limit the freedom of expression of honest people, and the legitimate right of assembly and the right to express one's views in public. That is very disappointing.

I am going to reverse what could be called the burden of proof. No one among the colleagues who have spoken this morning or the witnesses we heard in previous days—and I do mean no one—has been able to assure members of this committee that honest people attending a demonstration which unfortunately gets out of hand and turns into a riot, or who involuntarily end up in an unlawful assembly, will not suffer considerable harm as a result of the provisions of Bill C-309.

Unfortunately, we are not lacking even very recent examples of massive arrests made using the tools currently available under the Criminal Code. I cited the example of 49 arrests made at the Cégep de Limoilou in Beauport-Limoilou at a gathering of three people. That is a terribly high ratio of arrests for a gathering that was intended to be peaceful, yet where excessive means seemed to have been used. I won't make any predictions as to the results of future court summons. An enormous number of people were arrested, including one student who is totally opposed to the strike and is now forced to challenge a fine of about $500. I also reminded the committee of the assemblies, indeed, all the unfortunate events that occurred during the G-20 Summit in Toronto.

● (1200)

I did not intend to go on at length about this and provide a demonstration. I believe my examples were quite eloquent.

Unfortunately, the bill, in its current form, is far more likely to cause harm to honest people than allow our police to legitimately prevent people from committing crimes during unlawful assemblies or riots. What is truly unfortunate is that we are creating a public space that will increasingly be an obstacle course—a space that will be very difficult to access if you are someone wanting to express your opinion, assemble freely and exercise your legitimate right to live your life as a citizen. That is very worrisome. I will conclude on that note.

Thank you.

[*English*]

The Chair: Thank you.

Mr. Jacob.

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Thank you, Mr. Chairman.

Personally, I am in favour of the amendment. No one wants to see people committing offences or engaging in criminal activities. Mr. Champ stated in his testimony that Bill C-309 would limit the right to freedom of expression, privacy, the presumption of innocence and freedom of association. There have been a number of Charter challenges relating to similar pieces of legislation.

I would simply like to point out that, last Tuesday, Prof. Stribopoulos stated that there was some confusion about sections 309 and 351. He also said that this would make the operation of the judicial system more cumbersome. Out of a concern to ensure consistency with principles of legal interpretation and in order to clarify things—in the unamended wording, the scope of these principles is too broad—I intend to support the amendment moved by Françoise this morning.

Thank you, Mr. Chairman.

[*English*]

The Chair: Thank you.

Seeing no other interventions, I shall put the question.

Shall amendment NDP-1 pass?

Mr. Robert Goguen: Could we register the vote, Mr. Chair?

The Chair: Call the roll.

(Amendment negatived: nays 6; yeas 5)

The Chair: We now have a government amendment to clause 2.

● (1205)

[*Translation*]

Mr. Robert Goguen: The amendment reads as follows:

That Bill C-309, in Clause 2, be amended by replacing line 15 on page 1 with the following:

exceeding ten years.

[*English*]

We're asking that Bill C-309 in clause 2 be amended by replacing line 15 on page 1 with the following: exceeding 10 years

Bill C-309, Mr. Chair, provides a maximum penalty of five years for the offence of taking part in a riot while wearing a mask to conceal identity without lawful excuse. The purpose of the amendment is to ensure that the penalty for this new offence is consistent with the penalty provided for an existing provision of the Criminal Code that addresses similar conduct, and that's subsection 351(2).

Subsection 351(2) of the Criminal Code is a provision of general application and creates an indictable offence punishable by a maximum penalty of 10 years for any person who wears a mask or disguise with the intent of committing an indictable offence. Taking part in a riot is an indictable offence, and therefore an accused who is convicted pursuant to subsection 351(2) of the code of wearing a mask while taking part in a riot is liable to a maximum penalty of 10 years.

So we would be moving it from five to 10 years to keep it consistent with subsection 351(2).

There are two new offences. By raising the maximum penalty to 10 years in proposed subsection 65(2) of the code, the amendment would avoid creating different penalties to punish similar conduct. Notwithstanding that being a member of an unlawful assembly is a precursor to taking part in a riot and is therefore a less serious offence, the penalty in Bill C-10 on indictment for the two new offences is five years. Thus, by raising the maximum penality in subsection 65(2) to 10 years, the amendment would improve the bill by reflecting the fact that taking part in a riot while wearing a mask to conceal identity is more serious than wearing a mask to conceal identity as a member of an unlawful assembly.

The Chair: Thank you.

Madame Boivin.

[*Translation*]

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

I don't have much to say about this amendment. I actually find the logic behind it somewhat unusual. On the one hand, our colleague tells us that a similar offence already exists, which I have been repeating over and over throughout these hearings on the bill, to the point of exhaustion. However, finally we can at least agree on something. Yet this cannot be considered a similar offence. An expert from the Justice Department told us that there were differences in terms of intent. Furthermore, we also heard all the comments made by government members in that regard.

With Bill C-309, we are creating a provision which is incredibly vague from a legal standpoint. In my opinion, this bill will, unfortunately, generate more problems than it does solutions, in terms of what we are all trying to do, for the reasons I already explained at great length, partly on Tuesday, and partly this morning. There is an attempt here to impose a 10-year sentence, supposedly because they are similar offences.

At the very least, we should ensure that the Crown will not have to determine which indictment to proceed under or whether it is pertinent to rely on subsection 351(2) or subsection 65(2) because of the different sentences. I, personally, thought it was more similar. However, I noted that fact that our colleague, Mr. Goguen, considers the two offences to be very similar.

Unfortunately, because of the way section 65 is drafted, imposing a 10-year term of imprisonment does not necessarily do justice to the goals we are trying to achieve here.

[*English*]

The Chair: Thank you.

Mr. Côté.

[*Translation*]

Mr. Raymond Côté: Thank you very much, Mr. Chairman.

It is really unfortunate, in light of the defeat of our amendment, to see that we are now stuck with this amendment which, in my opinion, will impose a tough sentence and, in particular, create an obvious illusion of security. The idea of imposing tough sentences as a deterrent has given rise to much debate for a very long time now.

As a matter of fact, I had a chance to look at a study entitled "*Punir ou réhabiliter les contrevenants? Du* Nothing works *au* What works *(Montée, déclin et retour de l'idéal de réhabilitation*", written by Mr. Pierre Lalande, research officer at the Quebec Correctional Service under the Ministry of Public Safety. That study showed, firstly, that when it comes to punishment or rehabilitation, this is a complex subject that is not only difficult to understand, but also one where it is difficult to arrive at a simple position or simple conclusions. Ultimately, the conclusions that can be drawn are as complex as is the human reality. At the same time, he pointed out that some great thinkers, like Robert Martinson and Pierre Landreville, a leading expert on criminology and the study of criminal policy and practices, believe that what could be called the Quebec school of thought or Quebec practices in terms of punishing criminals or taking them through a process of rehabilitation, has yielded extremely convincing results. At the very least, we should not be ignoring that accumulated expertise, which in fact shows that Quebec society has one of the lowest crime rates.

I am still just as amazed by this, and it's too bad. Unfortunately, our amendment was defeated. That might have given a different direction to my comments with respect to the maximum 10-year sentence. But based on the same arguments I made previously—in fact, at the last meeting and again recently—with respect to the amendment that was moved, we are potentially imposing prison sentences of up to 10 years on people who may legitimately have been a victim of circumstances—people who were present to express their opinion but had no criminal intent. That is really appalling.

My colleague, Françoise, made the point a number of times—as did I— about deterrence, drawing a parallel to the means, other than legislative, that can be deployed to counter crime.

When we heard from the chiefs of police, who have expertise in controlling crowds that can get out of hand and degenerate into uncontrolled rioting, the question of means came up several times.

We can also talk about police methods. They have evolved to such an extent that police now have many more tools available to them than they did previously, when they had to be satisfied with using a baton. There are means available now that are, not only less brutal, but more respectful as well of the unfortunate presence of people who are nothing more than witnesses or participants, with no criminal intent. That is already a good thing.

But to use another vivid image, in terms of available means, I think we can all agree that, in order to control excessive speed on our highways, we impose pretty hefty fines. And yet one may wonder which approach has the greatest disincentive effect. Is it the hundreds of dollars in fines and the demerit points the offender will be facing or is it a police presence on our highways?

Let me give you an example. As I was driving to the general council meeting of the Quebec City branch in Drummondville, I was passed on Highway 20 by the owner of a recent model Volvo S70—in other words, a pretty expensive vehicle—driving very fast, who hypocritically applied the brakes as soon as he saw two QPP police cars. I don't think he did that because of the amount of the fine. At least I assume that the amount of the fine was probably not the greatest deterrent, because that individual had the means to own that kind of car. The much greater deterrent was the risk of being stopped by police and being delayed for some time to the point of losing patience.

● (1210)

I'd like to come back to my example of the Frost fence. What is unfortunate is that we will be imposing on many people who have never engaged in criminal behaviour the obligation to show that they had a legitimate reason for wearing a mask. We will be exposing people to very tough prison sentences without any kind of assurance that this will reduce crime in the context of a riot or unlawful assembly. One of the unhappy consequences of that is that our police could end up with a false sense of security by having the means to control crime. That is the reason why I intend to vote against this amendment.

I come back to the example of my friend who attended several demonstrations. Before going to Toronto, he informed me of his last wishes in case the situation got completely out of control. As I said, he is highly experienced. He has taken part in a number of always peaceful demonstrations, in order to express his views in a public space and fully cooperating with police and other authorities to ensure that things would not get out of control. A number of times, he expressed his frustration at seeing rioting thugs highjacking perfectly legitimate demonstrations. One role that I am very proud to play within this committee involves giving authorities the means to ensure that my friend will not be exposed to harm or become the innocent victim of rioting hoodlums, thus requiring me to honour his final wishes.

It is really a shame that we have hit a wall with our colleagues opposite. We are really not creating solutions; rather, we are creating a whole host of problems.

Thank you.

● (1215)

[*English*]

The Chair: Thank you.

Ms. Sgro.

Hon. Judy Sgro (York West, Lib.): Thank you very much, Mr. Chair. I am filling in for Mr. Cotler this morning and following this discussion.

I have to tell you that in my opinion this is nothing more than overkill. I have no sympathy for a bunch of hoodlums who go out there and tear apart our cities and cause massive damage, without question.

There's always that balance that we as legislators are supposed to be looking for. Most of the time it is a bunch of young people who are out voicing their objection to whatever. A few of them end up out there creating the kind of crimes, and so on and so forth.

Again, you know what? They are at a particular point in their life; they get carried away. We saw what happened in Vancouver.

To suggest that you give them up to 10 years for wearing a mask when the actual penalty for participating in the activity would probably be much less, I really think is overkill.

I'm not surprised because I think it fits with the government's agenda. I would much rather focus on how to make sure that people who are going to participate in these kinds of activities know that there are strict penalties, that they are going to be held to account and that they will be pursued. Also, given the fact that we are closing Kingston Penitentiary and a few other prisons that are very old in this country, and that if we continue on with this extensive crime agenda here, they will probably have to take a number or wait in line because there won't be a space for them in jail if we're going to turn around and look at these kinds of severe penalties.

It's nothing short of overkill and I will not be supporting it.

The Chair: Thank you.

Seeing no other interventions, I will call the question.

Shall G-1, the government amendment to clause 2, carry?

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Can we record the vote?

(Amendment agreed to: yeas 6; nays 5)

The Chair: Shall clause 2 as amended carry?

(Clause 2 as amended agreed to)

The Chair: In clause 3, we have NDP-2 amendment.

Madame Boivin.

● (1220)

[*Translation*]

Ms. Françoise Boivin: Thank you.

You will not be surprised by what I am about to say, but I do not intend to make a long speech. It is just to show you that there was no filibustering here; people were simply exercising their right to express their views on this bill. Every single amendment was proposed in a spirit of both pragmatism and respect for Canadian law. Those are the same arguments, word for word, that were made. I will say nothing more on this.

[*English*]

The Chair: Are you done?

Ms. Françoise Boivin: I am done.

The Chair: Seeing no other interventions, shall NDP-2 carry?

Ms. Kerry-Lynne D. Findlay: Can we record the vote, please?

(Amendment negatived: nays 6; yeas 5)

The Chair: Shall clause 3 carry?

(Clause 3 agreed to)

The Chair: We're now at clause 1.

Ms. Kerry-Lynne D. Findlay: I guess I have to ask each time for a recorded vote, do I? No, it's fine.

The Chair: Shall clause 1 carry?

(Clause 1 agreed to: yeas 6; nays 5)

The Chair: Shall the title carry?

Ms. Françoise Boivin: On division.

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

(Bill C-309 as amended agreed to: yeas 6; nays 5))

The Chair: Shall I report the bill as amended to the House?

An hon. member: On division.

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill?

An hon. member: On division.

Some hon. members: Agreed.

The Chair: Thank you.

Ms. Françoise Boivin: Chair, does it mean that if you're not in the House, I have to report that bill?

The Chair: Oh, yes, maybe.

Ms. Françoise Boivin: Don't do that to me.

The Chair: I will report the bill to the House on Monday.

Ms. Françoise Boivin: That's not nice.

The Chair: We have some committee business to attend to.

Does everyone have a copy of the budget for this particular bill?

Can someone move approval?

Ms. Françoise Boivin: I so move.

The Chair: Thank you.

Those in favour?

It's carried.

[*Translation*]

Ms. Françoise Boivin: We already have witnesses. That's great.

[*English*]

The Chair: The clerk will call witnesses for Bill C-299 on Tuesday.

Seeing no further business, the meeting is adjourned.

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