



February 6, 2013

Via email: lcjc@sen.parl.gc.ca

The Honourable Bob Runciman, Senator
Chair, Senate Committee on Legal and Constitutional Affairs
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Senator Runciman,

Re: Bill C-309, *Criminal Code, An Act to amend the Criminal Code (concealment of identity)*

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section) regarding Bill C-309, *Criminal Code* amendments (concealment of identity).

The CBA is a national association of 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Members of the CBA Section include both prosecutors and defence counsel from every province and territory in Canada, as well as legal academics specializing in criminal law.

The CBA Section believes that the proposed amendments are not necessary, will do nothing to enhance public safety, and may in fact serve to hinder the fundamental constitutional and democratic right Canadians have to protest and participate in lawful assemblies. We sent our comments to the House Committee on May 7, 2012. We note that one amendment has been made. Indeed, the amendment made by the House of Commons at s. 2(2) would increase the maximum penalty from 5 to 10 years. The longer maximum penalty is, in our view, unduly punitive and will not increase deterrence.

Proposed Amendment

The Bill proposes to add two new offences to the *Criminal Code*. It would amend the existing sections 65 (Punishment of Rioter) and 66 (Punishment for Unlawful Assembly) by adding:

(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 of a term not exceeding five years.

The amendment to section 66 would add subsection (2) as above with the option of proceeding by way of indictment or summary conviction.

Discussion

The CBA Section believes that the proposed addition to section 65 is unnecessary, as the prohibition already exists. Section 351(2) of the *Criminal Code* already makes it an offence to cover one's face in the commission of an indictable offence¹. We can confirm that this provision is used on a regular basis and on conviction generally results in a period of incarceration, apart from a penalty imposed for another charge. Thus, for offenders who conceal their identity with the intent to commit an indictable offence, such as that set out at section 65, the measure is being used effectively and makes the amendments in Bill C-309 unnecessary.

We note that the new offence proposed in Bill C-309 would be especially prejudicial in its application to section 66 (Punishment for Unlawful Assembly), given the very broad definition in section 63(1) of the *Criminal Code*.

Definition of an unlawful assembly

An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighborhood of the assembly to fear, on reasonable grounds, that they (a) will disturb the peace tumultuously; or (b) will by that assembly needlessly and without reasonable cause provoke other person to disturb the peace tumultuously.

There is the risk that the offences proposed in Bill C-309 may be used inappropriately and applied to a group of individuals (an assembly of three or more persons) in such a way as to interfere with legitimate protesters who wish to remain anonymous. There are many legitimate reasons a person might wish to "conceal their identity". In some instances, what appears to be a disguise could really be an exercise of freedom of expression, necessary to ensure security of family or friends in another country, or have other innocent (including medical or religious) purposes.

Furthermore, to the extent that protesters do participate in unlawful assemblies, the fact of wearing a mask or otherwise disguising one's identity would already certainly be considered to be an aggravating factor on sentencing².

Finally, because the proposal appears to shift the onus to an accused to establish "lawful excuse" for concealing identity, the CBA contends that the proposed amendments could raise a constitutional challenge.

Conclusion

The rights to protest and participate in lawful assemblies are fundamental aspects of our constitutional and democratic rights. We are concerned that this Bill risks creating the appearance that some forms of peaceful protest or lawful assembly are being criminalized.

¹ **Section 351(2) of the *Criminal Code***
Everyone 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.
 Subsection 351(2) would not apply to an individual participating in an unlawful assembly, as S. 66 is a pure summary offence.

² S. 718.2 of the *Criminal Code* includes sentencing principles: *the Court that imposes a sentence shall consider any aggravating circumstances relating to the offence or the offender...*

Accordingly, it is the view of the CBA Section that this legislation is unnecessary, will not allow for more effective law enforcement and will not enhance public safety.

We thank you for this opportunity to provide comments and for considering our views.

Yours truly,

(original signed by Tamra L. Thomson for Dan MacRury)

Dan MacRury, Q.C.
Chair, National Criminal Justice Section