Bill 34, Security for Courts, Electricity Generating Facilities and Nuclear Facilities Act, 2012

Date: **April 19, 2012**

Submitted to: **The Standing Committee on Justice Policy**

Submitted by: **The Ontario Bar Association**

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

The Ontario Bar Association (the "OBA") appreciates the invitation from the Standing Committee on Justice Policy to address *Bill 34, Security for Courts, Electricity Generating Facilities and Nuclear Facilities Act, 2012* (the "Bill 34" or the "Bill").

We are very supportive of some of some essential features of the Bill, particularly: the repeal of the *Public Works Protection Act* ("PWPA"); the effort to tailor legislation specifically to court security requirements rather than leaving the matter to *ad hoc* arrangements; and narrower and more specific definitions of who can exercise extraordinary powers. The suggestions outlined herein relate to ensuring the Bill's provisions for court security do not interfere with the efficient administration of justice, including the constitutional imperative to ensure that courts are open to the public. In addition, we have provided a series of other suggestions that will assist in rendering the Bill more consistent with various constitutional principles that have been outlined by the courts in the context of court security.

The OBA

As the largest legal advocacy organization in the province, the OBA represents 18,000 lawyers, judges, law professors and students in Ontario. OBA members practice law in more than 30 different sectors. In addition to providing legal education for its members, the OBA has assisted government with several legislative and policy initiatives - both in the interest of the profession and in the interest of the public.

To ensure a broad range of perspectives, representatives of a number of practice areas contributed to this submission. Participants included members of the Constitutional, Civil Liberties and Human Rights; Criminal Justice; and Public Sector Law sections, as well as our Young Lawyers' Division. Members of these sections would include crown and defense counsel, private counsel who act for both individuals and large corporations, as well as in-house counsel who act for municipalities, public works and other public sector organizations.

INTRODUCTION

As outlined in his report, the Ontario Bar Association met with, and provided a submission to, the Honourable Roy McMurtry for his review of the PWPA (the "McMurtry Submission"). We have attached a copy of our McMurtry Submission to provide additional background.

(a) OBA Support for the Repeal of the PWPA

We congratulate the government on its decision to repeal the PWPA. As the OBA outlined in the McMurtry Submission, the PWPA

> fails to reflect a modern view of what constitutes a critical public work and, more importantly, fails to respect a post-*Charter* view of what is justifiable, or even acceptable, in terms of limits on civil liberties. The advent of technologies such as the Internet, and the emergence of principles such as minimal impairment and the need to prescribe rights' limitations as specifically as possible, render the PWPA anachronistic…. The PWPA's single security scheme - the ability to

> declare something a "public work"- is an awkward, blunt instrument in a world where more specialized tools are necessary.

(b) OBA Support for Legislating Court Security Measures

While the OBA addressed several areas that may require security legislation in its McMurtry Submission, we will focus this submission on the provisions for court security outline in Schedule 2 of the Bill.

We are very supportive of the decision to enact legislation that specifically outlines court security measures. As outlined in McMurtry's report:

> In its consultations with me, the OBA similarly stated that the existing nature of court security is necessary and is generally "well tolerated." At the same time, however, it submits that the security regime should not be "shoehorned" into the PWPA regime and that it would be preferable to provide a legislative framework tailored for the specific security requirements.

Few have a greater interest than lawyers in providing a safe court environment. As McMurtry pointed out in his report, where serious violent incidents have erupted in courthouses, lawyers have often been the victims. In addition, lawyers have a profound understanding of

> . . . the high social value that society properly attaches to assuring that a courthouse is a place in which rational reflection and disinterested judgment will not be disrupted by intimations of violence.[1]

(c) Principles to be Entrenched in Court Security Provisions

It is both critical and entirely feasible, however, for legislative provisions concerning court security to recognize the fundamentals of the business being conducted in courthouses. Court security must be undertaken in a way that:

(a) does not interfere with our open courts, which are mandated by the Charter of Rights and are a cornerstone of our advanced system of justice;

(b) does not interfere with the effective and efficient administration of Justice; and

(c) complies with Charter principles such as: protection from unreasonable search and seizure; the requirement that rights be impaired to the minimal extent possible to achieve critical goals such as safety; and the need to avoid vagueness in legislation, particularly in legislation that curbs fundamental rights.

---

[1] *Ryan v. County of DuPage*, 45 F.3d 1090 (7th Cir., 1995),at p. 1095, as cited in *R* .v. *Lindsay*, 2001 MBQB 226

A failure to recognize fundamental justice principles in providing court security is akin to providing security to power plants in a way that would limit their ability to produce and transmit energy. Court security arrangements must be designed to accommodate justice - the business of Ontario's courts - and the fundamental requirement that this business be carried on in a way that is open to public scrutiny.

Below you will find:

I- An outline of ways in which the Bill must be amended in order to avoid unnecessary interference with the efficient and open administration of justice;
II- A discussion way in which the Bill's would better accord with other *Charter* principles; and
III- Specific Recommended Amendments.

I - Interference with the Efficient and Open Administration of Justice

There are three respects in which the Bill fails to properly recognize and accommodate the business of the courts.

(i) The potential to require that people entering the courthouse produce identification;

(ii) The failure to recognize a client's right to confidentiality and privilege in both the search provisions and the provisions that contemplate a requirement to provide information when entering a courthouse; and

(iii) The failure to recognize that the efficient administration of justice requires properly identified officers of the court to enter the courthouse in a streamlined manner.

(i) The Requirement to Produce Identification

Lawyers are currently required to produce identification to by-pass security measures in courthouses. This is a fair and sensible requirement and we are not taking issue with it. Members of the public are currently required to submit to some type of a search upon entering a courthouse to ensure they do not have weapons or other dangerous items. This is also something that has been found to be constitutionally valid and with which we take no issue (provided there is some specificity in the measure that can be employed and proper notice (signage etc.) as discussed in more detail below). We submit, however, that where there is a search to determine the potential for danger, the court's safety does not require that state know the identity of people entering the courthouse. If someone possesses no weapons or means of effecting violence, his or her identity is irrelevant. Weighed heavily against this light and tenuous connection between the identification requirement and court safety are very serious concerns about the ways in which this provision undermines the functions of our courts, including:

a) The fact that someone does not have or has forgotten their identification should never be a bar to their ability to observe court proceedings. Courts are open to all;

b) There are times when the identity of a person is a privileged matter and cannot be required or disclosed. If, for example, counsel has a leading expert observing proceedings for the purpose of providing advice on the conduct of the case, they may wish to be anonymously present in the court and this is their right and the right of the those clients who use our justice system;

c) It is possible that those whose identity reveals that they are friends or associates of an accused could be excluded to prevent intimidation of witnesses. Of course, it is absolutely essential that witnesses feel free to testify truthfully but ensuring this is the job of the lawyers and the judge in the courtroom. The notion that an associate of an accused can be summarily excluded at the door of a courthouse is completely antithetical to our open court system. If those close to an accused person are denied the opportunity to observe the fairness of proceedings, our system will be fundamentally undermined. This is a very basic hallmark of advanced systems of justice; and

d) Basic privacy rights prevent the state from tracking the activities of citizens except in limited circumstances. Given the limited usefulness of knowing the identity of people entering a courthouse, this privacy intrusion is not justified in these circumstances.

Manitoba's *Court Security Act*, which has been successful at ensuring safety and has survived constitutional scrutiny, requires only that:

> **Weapons prohibited in court areas**
> 3 No person shall possess a weapon in a court area unless authorized to do so by regulation or by a security officer.
>
> **Security officer may screen before entry**
> 4(1) A security officer may screen a person for weapons before the person enters a court area.
>
> **Security officer may refuse entry**
> 4(2) A security officer may refuse a person entry to a court area if the person
> (a) refuses to be screened for weapons; or
> (b) is in possession of a weapon and is not authorized by regulation or by a security officer to possess the weapon in a court area.
>
> **Security officer may screen after entry**
> 5(1) A security officer may require a person inside a court area to move to a place – inside or outside the court area – where screening is routinely conducted, and may screen the person for weapons.
>
> **Security officer may evict**
> 5(2) A security officer may evict a person from a court area if the person
> (a) refuses to be screened for weapons; or
> (b) is in possession of a weapon and is not authorized by regulation or by a security officer to possess the weapon in a court area.

Manitoba's legislation is consistent with the successful court security practices that police services and others have implemented in Ontario's court for the last two decades. Current security screening involves metal detectors, baggage x-rays and very cursory searches of bags where necessary. The Bill goes well beyond these successful, constitutional and well-tolerated practices. While there is legislation in other provinces that provides for an identification requirement, there are none that combine the broad search powers of this Bill with an identity requirement. Given the extensive ability to determine whether someone poses a danger to the court, their identity becomes irrelevant and the requirement to provide it should be struck. We have suggested these amendments to the Bill in part III of this Submission.

(ii) Confidentiality and Solicitor/Client Privilege

The public's right to prevent disclosure of communication with, or certain work done by, their lawyers is considered "a fundamental civil and legal right" in Canada[2]. This right, called "privilege", exists to protect the public, not the lawyer. In fact, it also protects the proper operation of the legal system, commerce and the public sector. If individuals or organizations cannot be certain that their legal advice will be kept confidential, they may not seek crucial advice or be frank with their counsel. This would inhibit the effective operation of the justice system.

In the case of both the search provisions and the provisions requiring the disclosure of information upon entering the court, there is insufficient protection for privilege rights. As the matter now stands, those entering the courthouse could be required to reveal privileged information - either by virtue of having written material reviewed in a search or by virtue of having to reveal why they are entering the courthouse in order to satisfy the officer that they do not pose a security risk.

In order to ensure that privilege is protected, we suggest amending the Bill to add a provision similar to the one added to the *Broader Public Sector Accountability Act*, by the Standing Committee on Social Policy. It provides:

> **Solicitor-client privilege preserved**
>
> Nothing in this Act shall operate so as to require the disclosure of information that is subject to solicitor-client privilege, litigation privilege or settlement privilege.

This provision, with some changes to better accord with the particular context, appears below in the Recommended Amendments section.

[2] *Solosky* v. *Canada* (1980), 105 D.L.R. (3d) 745, at 760 (Supreme Court of Canada)

(iii) Entry by Officers of the Court

All lawyers called to the bar in Ontario- whether crown counsel, defense counsel or civil or family litigators- are, like judges, officers of Ontario's Courts. The fact that the courthouse is a place of business for lawyers and the fact that their presence is required for the efficient operation of justice cannot be denied. Particularly on days where there is a large public crowd to view high-profile proceedings, the business of the courthouse would grind to a halt if the entry of lawyers was delayed by large line-ups. Currently, jurisdictions employing routine security screening have *ad hoc* "courtesy" arrangements between the bar and police or other security services that allow the bar, with proper identification, to enter the courthouse in a streamlined manner. The bar has tremendous respect for, and enjoys good relationships with, local police services. We have every expectation that these good relations and the attendant courtesy arrangements will continue. However, if Schedule 2 of the Bill is, as it should be, a complete code for courthouse security, it needs to recognize the need, and preserve arrangements, for the provision of fast and efficient entry of "officers of the court." It may be necessary to make these arrangements explicit in the Bill or in regulations.

II- Other Constitutional and Legal Principles to Be Addressed

(i) Vagueness

One of the problems with the PWPA, from a constitutionality perspective, was that it contained terms such as "any approach [to a public work]" that were vague. As Mr. McMurtry wrote:

> ....vague laws offend two fundamental values of our legal system. Firstly, individuals are not provided with sufficient guidance as to what behaviour a law prohibits. Secondly, those in charge of enforcing the law are not provided with clear guidance as to how to enforce it. A vague law can lead to inconsistent and arbitrary enforcement.

The Bill contains similarly vague terms that require further definition in order to make the court security provisions compliant with constitutional principles and the rule of law. These provisions include those highlighted below:

> **138.** (1) A person who is authorized by a board to act in relation to the board's responsibilities under subsection 137 (1) or who is authorized by the Commissioner to act in relation to the Ontario Provincial Police's responsibilities under subsection 137 (2) may exercise the following powers if it is reasonable to do so for the purpose of fulfilling those responsibilities:
>
> 1. Require a person who is entering or attempting to enter premises where court proceedings are conducted or who is on such premises,
> ...
> ii. to provide information for the purpose of assessing whether the person poses a security risk.
>
> 2. Search, without warrant,

> i. a person who is entering or attempting to enter premises where court proceedings are conducted or who is on such premises,
> ii. any vehicle that the person is driving or in which the person is a passenger, and
> 4. Refuse to allow a person to enter premises where court proceedings are conducted, and use reasonable force if necessary to prevent the person's entry,
> ...
> 5. Demand that a person immediately leave premises where court proceedings are conducted, and use reasonable force if necessary to remove the person,

The term "premises where court proceedings are conducted" is similarly used in the arrest and offence provisions of Schedule 2 of the Bill.

(a) Information

The term "information for the purposes of assessing whether the person poses a security risk" provides absolutely no guidance to law enforcement and no protection for the privacy of the individual. For example, is the question "have you ever been committed a violent crime?" a question that it would be permissible to ask an accused or a member of the public at the door of a public courthouse?

(b) Premises

In the case of traditional single-use courthouses, the term "premises" may have an obvious meaning. Currently, however, many courts are held in shared facilities. Courts share buildings and parking facilities with municipal offices and even retail stores and restaurants. What is more, the 2012 Ontario Budget's capital plan set out the government's specific intention to partner with developers to build future court space in shared facilities. Given this context, the term "premises" becomes unclear. This is significant in that the term does not provide sufficient guidance as to when and where a person can be subject to the extraordinary intrusions of being searched and required by police to answer questions. As discussed, certain reduced expectations of privacy may well be justifiable for someone entering a court but not for someone entering a restaurant in a building that also houses a court or for someone parking in a shared parking lot. There needs to be further legislative guidance as to where the "court" perimeter would lie in shared multiple-use buildings.

(ii) No Requirement for Notice

The Ontario Court of Appeal reviewed the constitutionality of the current courthouse security arrangements in *R.* v. *Campanella*, 2005 CanLII 10880 (Ont. C.A.)("*Campanella*"). In determining that the warrantless searches currently conducted are constitutional, the court specifically mentioned the fact that clear notices, posted prior to screening areas, advised the public that:

(1) people wishing to enter would be subject to a security search;
(2) entry would be refused to anyone who was in possession of a weapon or dangerous article; and
(3) people with illegal articles would be subject to arrest

Similar notice should be required by either the Bill or regulations made under it.

(iii) The Abandoned Attempt to Enter

The Ontario Court of Appeal also outlined in *Campanella*, that, while a warrantless search is justified in the case of courthouse security, where the attempt to enter is abandoned, there is no justification for a search. In fact, the ability to abandon your entry attempt without being searched is one of the reasons the warrantless search was found to be justified. The Bill needs to be amended to foreclose the possibility of search where an attempt to enter is abandoned. The justification for the warrantless search ends when the safety of the courthouse is no longer in jeopardy.

Use of a Regulation-Making Authority to Assist with the Issues Identified

Given the need to better define vague terms in the Bill, the need to outline arrangements for entry by officers of the court and the need to outline the elements of proper notice, it is likely that the government will require some regulation-making authority. The schedules of the Bill that deal with security for other facilities provide such authority but Schedule 2 does not. The regulation-making authority in section 135 of the *Police Service Act* does not appear to cover the subject matters in Schedule 2 of the Bill. The constitutionally valid Manitoba legislation does have extensive regulation making authority. There are regulations in Manitoba that outline permissible screening procedures, define the premises that constitute "court areas" and detail the content and format of the notice designating restricted areas. It is recommended that a regulation- making authority be added to Schedule 2 to allow for:

(a) Arrangements for entry by officers of the court with proper identification;
(b) The content of the notice to people who will be subject to search and arrest;
(c) Further defining the information that may or may not be required to assess whether someone poses a security risk; and
(d) Specifying "premises where court proceedings are conducted" for the purpose of the Act.

Of course, in order to avoid the issues that arose around the G20 security regulation under the PWPA and in order to comply with the recommendations in the McMurtry Report, the Court Security Regulations should be posted for comment prior to being finalized.

III -Recommended Amendments

SCHEDULE 2
amendments to *Police Services Act*

1. Part X of the Police Services Act is amended by adding the following sections:

Powers of person providing court security

138. (1) A person who is authorized by a board to act in relation to the board's responsibilities under subsection 137 (1) or who is authorized by the Commissioner to act in relation to the Ontario Provincial Police's responsibilities under subsection 137 (2) may exercise the following powers if it is reasonable to do so for the purpose of fulfilling those responsibilities:

1. Require a person who is entering or attempting to enter premises where court proceedings are conducted or who is on such premises~~,~~

i. ~~to produce identification, and~~

to provide the prescribed information for the purpose of assessing whether the person poses a security risk.

2. Search, without warrant,

i. a person who is entering or attempting to enter premises where court proceedings are conducted or who is on such premises,

ii. any vehicle that the person is driving or in which the person is a passenger, and

iii. any other property in the custody or care of the person.

except that if the attempt to enter the premises is abandoned, no search will be conducted.

3. Search, without warrant, using reasonable force if necessary,

i. a person who is in custody and who is on premises where court proceedings are conducted or is being transported to or from such premises, and

ii. any property in the custody or care of the person.

4. Refuse to allow a person to enter premises where court proceedings are conducted, and use reasonable force if necessary to prevent the person's entry,

i. if the person refuses to ~~produce identification or~~ provide information under paragraph 1 or refuses to submit to a search under paragraph 2,

.....

Arrest

(2) A person who is authorized by a board or by the Commissioner as described in subsection (1) may arrest, without warrant, any person who,

(a) after being required to ~~produce identification or~~ provide information under paragraph 1 of subsection (1), enters or attempts to enter premises where court proceedings are conducted without ~~producing the identification or~~ providing the information;

(b) after being directed to submit to a search under paragraph 2 of subsection (1), enters or attempts to enter premises where court proceedings are conducted without submitting to the search;

(c) enters or attempts to enter premises where court proceedings are conducted, after a refusal under paragraph 4 of subsection (1); or

(d) does not immediately leave premises where court proceedings are conducted, after being demanded to do so under paragraph 5 of subsection (1).

....

Offences

139. (1) A person is guilty of an offence if,

(a) after being required to ~~produce identification or~~ provide information under paragraph 1 of subsection 138 (1), the person enters or attempts to enter premises where court proceedings are conducted without ~~producing the identification or~~ providing the information;

.....

No derogation Re judicial powers and Privilege

140. (1) Nothing in this Part derogates from or replaces the power of a judge or judicial officer to control court proceedings.

Re powers of persons providing court security

(2) Nothing in this Part derogates from or replaces any powers that a person authorized by a board or by the Commissioner as described in subsection 138 (1) otherwise has under the law.

(3) Nothing in this Part shall operate so as to require the disclosure of information that is subject to solicitor-client privilege, litigation privilege or settlement privilege or to allow for the examination of documents containing such information.

2. Subsection 135(1) of the Act is amended by adding the following paragraphs:

28.1 respecting arrangement for priority entry of officers of the court, court staff and other authorized persons;

28.2 Prescribing the types of information that can and cannot be required to assess whether a person poses a security risk;

28.3 Prescribing areas that constitute premises where court proceedings are conducted;

28.4 The format and content of the notice that persons will be subject to search before entering the premises and the circumstances under which they may be subject to arrest.

....

Conclusion

Once again, we appreciate the invitation to participate in the Committee's important work on this Bill and congratulate the Committee on undertaking the difficult task of finding the right balance on these critical issues. Please do have hesitated to contact us if we can be of further assistance. The OBA looks forward to further consultation on the areas to be more particularly defined in regulations.