When *Bill 34, Security for Courts, Electricity Generating Facilities and Nuclear Facilities Act, 2012* was introduced early this year, the OBA was concerned that the legislation could, as it was then written, result in the breaches of privilege and compromise the openness of our courts. The OBA alerted other legal organizations to these concerns and, in order to ensure the necessary changes, an OBA team, including President Sweeny, Government Relations Chair David Sterns, constitutional expert Cheryl Milne and others, took action. They met with the Attorney General, other government officials and MPPs; undertook social media efforts; conducted interviews in the legal and main stream press; and presented both an oral and written submission to the Standing Committee on Justice Policy when that committee reviewed the Bill in April. When the Committee amended the Bill on May 31st, many of the OBA's suggestions, including an explicit recognition of privilege, were directly reflected in the amended Bill.

The amended bill that will now be considered by the legislature includes the following protection:

> (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 permit the review of documents containing such information.

This amendment is taken virtually *verbatim* from the OBA's submission in which we suggested the following:

> (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.

Regulation Making Authority

The OBA also suggested in our submission that a regulation-making authority be added to the bill in order to deal with some of the issues, like entry of officers of the court and the broad powers given in the bill that may require tailoring. The OBA submission advised:

> **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, [the schedule dealing with Court Security], 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 Committee reflected our suggestion in one broad regulation-making power (similar to those in the other schedules of the Bill, as we suggested). The Bill now provides:

> 141. The Lieutenant Governor in Council may make regulations governing the exercise of the powers conferred by section 138, including imposing restrictions, limitations and conditions on the exercise of those powers.

In addition, the Standing Committee added the following regulation-making authority:

141. (1) The Lieutenant Governor in Council may make regulations respecting the exercise of the powers conferred by section 138 for the purposes of safeguarding the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code and, without limiting the generality of the foregoing, the regulations may provide for the accommodation of persons on the basis of creed or disability.

Civil Liberties and Open Courts

In addition to privilege issues, the OBA also addressed issues concerning civil liberties and open courts. For example, the OBA articulated concerns about the broad search power including concerns that it could be used even when an attempt to enter a courthouse was abandoned. We advised that:

> **(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.

The committee did reflect our concern to some extent by adding a limitation on the vehicle search. The Bill now provides as follows:

> (ii) any vehicle that the person is driving, or in which the person is a passenger, <u>while the person is on, entering or attempting to enter the premises,</u> ....

In the name of open courts, the OBA objected to the requirement to provide identification. We outlined the following concerns in our submission:

> 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.

The amendment made to the Bill at committee unfortunately reflects only the first of these concerns. The provisions that formerly read:

> 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",

Now read:

> . Require a person who is entering or attempting to enter premises where court proceedings are conducted or who is on such premises,
>
> i. To identify himself or herself."

While the OBA did recommend that the requirement be eliminated, this amendment, at least addresses one of our concerns and also makes it less likely that court security measures will start to systematically include a routine ID check. As the new provisions are tested, it may be necessary to continue this debate and push for a limiting regulation (which is now possible under the amended bill, as outlined above).

Click here for our full submission and for a copy of the Bill as amended by the Standing Committee.