



# The Advocates' E-Brief

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## Enhancing Access to Justice



**Benjamin Zarnett**

If someone were to ask me to summarize, in one sentence, the extensive literature on the professional responsibility of a modern advocate, I would be tempted to answer "To enhance access to justice -- the rest is commentary."<sup>1</sup>

Although this summary may not accurately encompass all of an advocate's responsibilities, it is certainly true that enhancing access to justice has moved to centre stage. Whether our justice system and the lawyers within it are performing adequately is measured today largely by the extent to which access to justice is provided or denied. Whether a change should be made to our justice system, or to the way lawyers practise within it, also is measured largely by whether the proposed change will enhance or restrict access to justice. The Advocates' Society has and continues to be engaged in important initiatives that have, as their goal, enhanced access to justice. Let me

outline some of them, and identify others where our work is continuing.

Barriers to access to justice can be financial; they can arise from the cost of legal services. The Society intervened in the case of *McIntyre v. The Attorney General for Ontario*,<sup>2</sup> in which the Court of Appeal for Ontario considered the permissibility of lawyers charging contingent fees. In determining that contingent fees were permissible, the court stressed that by allowing a lawyer to charge a contingent fee, access to justice is increased because lawyers are encouraged to take cases for persons who, absent a contingent fee arrangement, could not afford to pursue their claims.<sup>3</sup> Since the decision in *McIntyre*, the Society has worked closely with the Ministry of the Attorney General and the Law Society of Upper Canada in providing input into what now has become a legislative and regulatory framework designed to regulate, in the public interest, contingent fee arrangements.<sup>4</sup>

Fees charged by lawyers are not the only financial barrier to access to justice. Other costs can be obstacles. The Society intervened in the Divisional Court case of *Polewsky v. Home Hardware*,<sup>5</sup> in which the issue considered was the situation of an unrepresented person who could not afford to pay the fees levied by the court for filing and pursuing a claim. The Divisional Court held that the Rule of Law required access to justice for a person who could not afford to pay court fees, and the Divisional Court ordered the legislature to pass legislation providing for the waiver of court fees in appropriate cases. As a result, the Ontario government introduced, this year, amendments to the *Administration of Justice Act* and other specific regulations, providing for the waiver of court and enforcement fees for persons who cannot

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### The Advocates' E-Brief

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"The Advocates' E-Brief" is intended to be a forum in which members of The Advocates' Society can communicate with the board of directors and with each other. Submissions on subjects that are of widespread interest to the membership are welcome. Please contact the Editor:

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afford them -- legislation that Attorney General Michael Bryant has described as "designed to ensure that people have access to the courts regardless of financial circumstances." The Society continues to be involved in monitoring the implementation of that legislation and those regulations to see that their benefits accrue to those who need them.

The Society was recently granted leave to intervene in the case of *Duong v. Taalman Engineered Products Ltd.* in which the Divisional Court will be asked to consider another important access to justice issue, namely whether a party to litigation who cannot afford an interpreter is entitled to have one at public expense. The case is expected to be argued this year.

The Society has introduced a program, in conjunction with Pro Bono Law Ontario, to provide *pro bono* legal assistance to certain unrepresented parties in civil appeals in the Court of Appeal for Ontario. Efforts are underway which we hope will see the program expanded to proceedings in the Federal Court of Appeal and the Divisional Court.

The Society also has been involved in addressing systemic barriers to access to justice. The Society was recently involved in the initiatives that identified certain access to justice problems resulting from systemic delays and rising costs for cases being litigated under the case management system in the Toronto Region. The Society provided input and perspective on proposed changes to the case management system, which changes are now reflected in the Practice Direction for the Toronto Region that came into effect on December 31, 2004. The Society remains involved on the steering committee that has been established to oversee the implementation of the Practice Direction and to monitor its effectiveness. The Society also is involved in the planning and presentation of education programs to introduce the Practice Direction and to stress the responsibilities of advocates to provide cost effective and timely access to justice within its framework. Members of the Society also will be conducting pre-trial conferences for Simplified Rules cases in Toronto as part of a court-sponsored project to assist in the reduction or elimination of the backlog of Simplified Rules cases waiting for trial in the Toronto Region.

Not all barriers to access to justice are financial or products of the design or implementation of procedural rules. Physical barriers exist as well. The Society will be involved in a committee, formed at the direction of the Chief Justice of Ontario, with members of the Court of Appeal, the Superior Court, the Ontario Court of Justice, the Ministry of the Attorney General and other bar

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representatives, to consider steps that can be taken to make court services more accessible to persons with disabilities throughout the province.

Thanks are due to all of those who have worked on behalf of the Society in these efforts to improve access to justice. The goal of enhancing access to justice is important; the work involved enormous. The input of all members on these and on other initiatives that can enhance access to justice is, of course, always welcome.

**Notes:**

1. Paraphrasing the ancient scholar Hillel who, when challenged to summarize all religious thought while standing on one foot, is reputed to have answered "What is hateful to you do not do to others, the rest is commentary -- now go study."
2. (2002), 61 O.R. (3d) 257 (C.A.)
3. The Court of Appeal made a similar point in *Re The Christian Brothers of Ireland in Canada* (2003), 68 O.R. (3d) 1 (C.A.), holding that, in an appropriate case, a lawyer may be entitled to charge a premium where he or she has, by taking a case on terms which involve a risk of non-payment, provided access to justice to a party who would not otherwise have been able to afford to pursue its claims.
4. *Justice Statute Law Amendment Act, 2002* S.O. 2002 c.24 and O.Reg195/04
5. (2003), 66 O.R. (3d) 600 (Div.Ct.)■

**The Advocates' Society Mission Statement**

**The Advocates' Society is the professional organization for advocates in Ontario. As such, our mission is to:**

- be the voice of advocates in Ontario;
- promote ethical and professional practice standards for advocates;
- expand our leadership role in teaching the skills of advocacy;
- protect the independence of the bar and the judiciary, and
- foster collegiality among members

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