Foreword

ALTHOUGH THE PHRASE "ACCESS TO JUSTICE" is commonly invoked, its meaning, including the relative emphases placed on "access" and "justice," remains contested terrain. Over the past fifty years, the Osgoode Hall Law Journal (the Journal) has published several articles that have grappled with the meaning of access to justice, and with the many barriers confronted in translating its conceptualization into concrete and meaningful reforms. The contributions to this special issue continue this conversation; they illustrate the difference between the ease with which the phrase "access to justice" is spoken and its realization and, indeed, between the way it slips off the tongue and the more difficult task of achieving consensus on its meaning.

It might be argued that there are two paths of access: one to legal justice and another to social justice, which are overlapping but not synonymous. Writing in an earlier volume about the capacity of the *Canadian Charter of Rights and Freedoms* (*Charter*) to enhance social, economic, and other forms of justice, Louise Arbour and Fannie Lafontaine appear to distinguish these from "access to justice" as the ability to use the legal system to obtain other forms of justice.[1] Similarly, the articles in this issue tend to the notion that while concepts of justice that operate within a closed system (the system of law) are incapable of providing a more extensive substantive understanding of "justice," they must nevertheless be evaluated against substantive conceptions of justice. In other words, access in a narrow procedural sense should not be confused with access to justice, regardless of its outcomes.

Thus "access to justice" can be defined narrowly or broadly—it can refer to justice within the legal system or it can be read as incorporating a concept of "social" justice; it can be limited to process, or interpreted as encompassing substantive elements. The contributions to this special issue illustrate the elasticity of the concept, representing several ideas of what access to justice can and should mean. Each of the articles examines this theme within a particular site:

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1. Louise Arbour & Fannie Lafontaine, "Beyond Self-congratulation: The *Charter* at 25 in an International Perspective" (2007) 45 Osgoode Hall L.J. 239.

family law dispute resolution; the work of law commissions; youths and school discipline; and criminal defence representation. Exploring access to justice in these diverse settings illuminates how both our conceptualization, and the concrete policies and practices necessary to its realization, shift with context.

A centrally important component of access to justice has long been that of facilitating access to the legal system, and the funding of legal counsel through legal aid programs, the introduction of various forms of alternative dispute resolution, and an array of court reforms have been key elements of access to justice reforms. While taking care not to conflate access to justice with legal representation alone, Frederick Zemans and James Stribopoulos focus on the importance of the *quality* of legal representation to access to justice in the context of low income clients.

In "Peer Review in Canada: Results From a Promising Experiment," Zemans and Stribopoulos discuss an "experiment" they conducted using peer review to evaluate criminal lawyers in three Legal Aid Ontario staff offices.[2] Although this process involved legal aid lawyers, underlying it is the need to measure the competence of all lawyers in the services provided to their clients, whether services are provided through the various models of legal aid delivery or the private bar. The question of how to measure the quality of legal services has been the subject of much debate in the legal profession, specifically regarding the definition of "competence" and the jurisdictional authority to assess lawyers' competence after their call to the bar. The authors argue that peer review can overcome the rather "entrenched assumption that competency automatically flows from a lawyer's professional status" and that it provides a means of revealing problems that may otherwise have low visibility (because, for example, clients do not complain).[3] Access to justice requires that "the lawyers delivering [legal aid] services meet minimum competency standards," that is, if access is to lead to "justice."[4]

Different forms of dispute resolution have been a key strategy in increasing access to justice by providing more people with quicker and easier ways to have

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2. Frederick Zemans & James Stribopolous, "Peer Review in Canada: Results From a Promising Experiment" (2008) 46 Osgoode Hall L.J. 697.
3. *Ibid.* at 729.
4. *Ibid.* at 731.

their claims resolved. Previous articles in this journal have argued that access to justice may be enhanced by class actions[5] or by third party investors' funding of civil actions, for example.[6] In addition, several years ago a critical analysis pointed out that although mediation had been promoted as a way of increasing access to justice, it had not necessarily provided equitable access for women.[7] Continuing this exploration of the promise of alternative forms of dispute resolution, Wanda Wiegers's and Michaela Keet's article, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities," explores whether collaborative law (CL) has been able to provide equitable access to justice for women.[8] Collaborative law, designed as a response to the problems with litigation and mediation (itself a response to the disadvantages of litigation) as processes to resolve family disputes, is premised on "the emotional and participatory needs of … clients, the possibility of creative outcomes, … the interdependence of the parties," and the involvement of lawyers and clients in "open four-way sessions."[9] The involvement of lawyers is said to increase the potential of a more equal process, but as Wiegers and Keet point out, this will only be the case if lawyers develop the skills required to participate effectively in CL and if the screening of clients is carried out appropriately.

Whether CL increases access to family law justice for women depends on "its accessibility and cost-effectiveness, and its response to underlying inequalities in the bargaining process."[10] For Wiegers and Keet, CL has greater potential than mediation to increase access to justice because it has a greater capacity "to change the legal culture" through its expectations about how lawyers are to conduct their practices and may "mitigate the damage that can otherwise result when power differentials are obscured, for the sake of family harmony."[11]

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5. John C. Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 Osgoode Hall L.J. 817.
6. Poonam Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" (1998) 36 Osgoode Hall L.J. 515.
7. Michael Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 Osgoode Hall L.J. 625 at 627, 647.
8. Wanda Wiegers & Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) Osgoode Hall L.J. 733.
9. *Ibid.* at 735.
10. *Ibid.* at 770.
11. *Ibid.* at 772.

The guest editors of this issue—Patricia Hughes and Janet Mosher—tackle a broader notion of access to justice that moves beyond "access" to involve a substantive conception of "justice," albeit in very different ways. Their articles raise the distinction between a form of "justice" that relates to fair process and a form of "justice" that relates to substantive outcomes. Without directly discussing the role legal education plays in the formation of "justice" lawyers, the Journal has previously addressed this element of the debate with articles that indicate the difficulty of "changing the culture," as Wiegers and Keet phrase it, and provide the perspectives which frame the Hughes and Mosher contributions.[12]

Hughes discusses the concept of "access to justice" in the context of law reform commissions. In "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" she suggests that the role of law commissions can be concisely stated as developing recommendations that will enhance access to justice. [13] Hughes maintains that while this legitimately includes review of narrower, technical black letter topics that may benefit "have" communities, as well as issues of access to the legal system for those who do not have it, law commissions have an obligation to address broader, more socially-oriented issues that have a greater impact on realizing access to *justice* for vulnerable groups. In these latter topics, the conception of "justice" goes beyond access to the legal system, whether through enhanced legal representation or alternative dispute resolution methods, to encompass substantive forms of justice, whether social, economic, or political. Law commissions are not only particularly well-suited to carry out these broad projects, Hughes argues, but they fail in their mission if they do not pursue them to the extent possible, given the limitations of their resources and their specific statutory mandate.

In "Lessons in Access to Justice: Racialized Youths and Ontario's Safe Schools," Janet Mosher provides a case study about a broader conception of access to justice. As Mosher points out, "[l]egal professionals and access to justice reform projects often … focus narrowly on 'access,' rather than 'justice.'"[14] Drawing on

12. See *e.g.* Shelley A.M. Gavigan, "Twenty-Five Years of Dynamic Tension: The Parkdale Community Legal Services Experience" (1997) 35 Osgoode Hall L.J. 443; Margaret Thornton, "Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same" (1998) 36 Osgoode Hall L.J. 369.

13. Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46 Osgoode Hall L.J. 773.

14. Janet Mosher, "Lessons in Access to Justice: Racialized Youths and Ontario's Safe Schools"

interviews and focus groups with racialized youths from low-income neighbourhoods in Toronto about their experiences of school discipline and access to justice, Mosher concludes that accounts of access to justice that focus on access to the legal system have little resonance for the youths. The youths experience law not as "something that generates entitlements or protections; rather, it is invoked by those with power against those without."[15] Moreover, they describe a lived reality in which the police and school authorities appear to be unconstrained by law. Consequently, they have little confidence that the legal system is capable of yielding just results. As such, for the youths meaningful access to justice does not reside in access to the legal system. Mosher explains that the youths' experience of stereotyping and lack of connection with people who care about them, and who they really are, is "perhaps the most profound impediment to their ability to access something they might call 'justice.'"[16]

For "justice" to be achieved, the experiences of these youths suggest that we must be capable of holding power to account, of transcending difference and developing a better understanding of the reality of others, of moving beyond stereotyping to engage in practices of respect, and of believing in the capacity to learn from mistakes.

These articles all are grounded in domestic circumstances, but access to justice is not in reality bounded by national boundaries which a previous Journal author argues lead to a liberal standard of justice based on "them" and "us."[17] Craig Forcese's review essay, "The Myth of the Virtuous Torturer: Two Defences of the Absolute Bar on Torture," takes us beyond Ontario's and Canada's borders to a phenomenon that has global implications, and implications for our self-perception as ethical societies and "better" than those whose citizens we may be "forced" by circumstances to torture.[18] Justification for extreme torture is said to lie in "the ticking time bomb." The authorities know that hundreds of lives can

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(2008) 46 Osgoode Hall L.J. 807.

15. *Ibid*. at 812.

16. *Ibid*. at 848.

17. Catherine Dauvergne, "Amorality and Humanitarianism in Immigration Law" (1999) 37 Osgoode Hall L.J. 597.

18. Craig Forcese, "The Myth of the Virtuous Torturer: Two Defences of the Absolute Bar on Torture," Review Essay of *Why Not Torture Terrorists? Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* by Yuval Ginbar and *The Absolute Violation: Why Torture Must be Prohibited* by Richard Matthews, (2008) 46 Osgoode Hall L.J. 853.

be saved if they can elicit information from a terrorist in custody who has the information they need to defuse the bomb: should they use any means necessary to elicit this information or do ethical and pragmatic considerations restrict their methods?

There is nothing new in this ends-means dilemma, but its current manifestation tests our commitment to the values we claim define our society. Reviewing the evidentiary, practical, and ethical reasons the authors provide for not permitting torture, Forcese concludes that there should be an absolute ban on torture because torture can never be justified. Thus the "virtuous torturer," who tortures only because the consequences of not doing so are dire, must, nevertheless, be punished. Furthermore, argues Forcese, we should acknowledge that cruel, inhuman, and degrading treatment and punishment (*i.e.*, short of torture) raise the same issues of principle that torture raises, and ask why domestic criminal codes treat them differently.

The use of torture as a means of obtaining information may be criticized on pragmatic grounds (that it may elicit false information as the victim says anything to avoid more torture) or on ethical or access to justice grounds (that "justice" involves not only appropriate procedures and protections, but also how we treat people). Mosher's exploration of the treatment of racialized youth in primarily low income neighbourhoods in the context of schools and the discussion of the use of torture in the books Forcese reviews challenge us, in different contexts, to confront the consequences of the us/them dichotomy.

Sean Rehaag's review of Catherine Dauvergne's *Making People Illegal: What Globalization Means for Migration and Law,* like Forcese's essay, moves us beyond Canada's borders, here to consider "core samples" from around the globe of lessons immigration law may offer us regarding the role of the rule of law.[19] As Rehaag notes, Dauvergne's core samples are used to illustrate her central argument that substantive human rights norms have been largely ineffectual in ameliorating the injustices experienced by illegal migrants. By contrast, due process arguments have been more successful and of greater utility in advancing the justice claims of illegal migrants. Rehaag maintains that Dauvergne's conclusion is amply borne out in the Canadian context where substantive rights claims, and those based upon section 15 of the *Charter*, in particular, have been

19. Sean Rehaag, Book Review of *Making People Illegal" What Globalization Means for Migration and Law* by Catherine Dauvergne, (2008) 46 Osgoode Hall L.J. 871.

of "little use to non-citizens," and due process claims framed in both administrative and constitutional law terms have been more helpful. The conclusions of both Dauvergne and Rehaag underscore the importance of access to justice conceived as access to participation in institutionalized dispute resolution processes, and remind us of the integral connection between procedural and substantive justice.

The articles in this special issue echo themes that have appeared in earlier volumes of the Journal and in that respect illustrate the Journal's continuity in addressing access to justice issues. At the same time, they also feature some of the most challenging issues of the contemporary access to justice debates and in that respect illustrate the continued relevance of the Journal as it celebrates its 50th anniversary.

Patricia Hughes & Janet E. Mosher
Guest Editors