

**THERAPEUTIC JURISPRUDENCE REVISITED:  
THE EXPERIENCE OF CRIMINAL JUSTICE  
AND TREATMENT  
IN TORONTO'S DRUG TREATMENT COURT**

by

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## **ABSTRACT**

This thesis enlists therapeutic jurisprudence theory to evaluate programming at the Toronto Drug Treatment Court (TDTC). Through interviews with 17 TDTC professionals and observations of court proceedings, the study examines the roles and responsibilities of staff members, the relationship between the legal system and drug treatment initiatives, and the relevance of therapeutic jurisprudence to the operations of court personnel. The research shows support for the therapeutic jurisprudence perspective. According to the TDTC professionals interviewed, despite difficulties in reconciling the imperatives of treatment and control, both workers and participants benefited from the program's criminal justice-drug treatment partnership, and from the therapeutic aspects of the court process. A therapeutic jurisprudence analysis of drug treatment courts like the TDTC must take into account the justice-treatment relationship, the implications of this relationship for assessing the 'well-being' of 'drug-addicted' offenders, and the challenges of merging these two paradigms to address addiction-motivated crime.

## **DEDICATION**

To my parents, Carolyn and Paul Edwards, for their support and encouragement.

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# CHAPTER ONE: INTRODUCTION

## Introduction

The social meaning of drug addiction in Canadian society has changed across time. Many perceptions of the ‘drug problem,’ and concepts and styles of reasoning about drug addiction, have emerged through the years in this country, as elsewhere. While social, political, and cultural transformations have brought about new ways of interpreting substance abuse, current debates continue to be based on traditional understandings of the issue. The beliefs and justifications of past prohibitionist movements, such as the temperance movement, opium prohibition and the ‘War on Drugs’ campaign, continue to influence current Canadian drug strategies.

Despite the attention accorded to illicit drug use in Canadian society, the problem remains monumental and seemingly insurmountable. For instance, after a period of decline in the 1980s and early 1990s, the rate of police-reported drug offences in Canada increased by 42% between 1992-2002 (Desjardins and Hotton, 2004).<sup>1</sup> Further, approximately 79% of Canadian offenders have substance abuse problems (CSC, 2004). The association between drugs and criminal behaviour has been studied extensively, but is often complicated by a number of factors such as varied definitions of substance use and intoxication; a difficulty linking criminal behaviour to drug history; and the diversity

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<sup>1</sup> In 1992, the rate of drug offences reported by the police was 207 (58,881 total drug offences). In 2002, the rate of drug offences reported by the police was 295 (92,590 total drug offences). Rates are calculated on the basis of 100,000 population. Desjardins and Hotton (2004) caution that “changes in the rate of drug offences reported by policed do not necessarily mirror changes in the number of drug users in Canada, nor are they an accurate measure of the number of the individuals involved in the trafficking, import/export or production of drugs. The number of recorded drug crimes is sensitive to police resources available for enforcement and detection, as well as local police priorities” (3).

of populations under study. Indeed, as Lyman and Potter (1998) note, the relationship between drugs and crime is difficult to establish: “A definitive but complex correlation exists between drug crimes and other types of crime, but the nature and extent of the link ... are far from being understood” (175).

Addressing illicit substance abuse has been an important matter for policymakers and researchers. The widespread search for remedies to the drug problem has spawned many innovative strategies and schemes. In 1989, heralded as an alternative to incarceration and an efficient and effective approach to treatment, the first Drug Treatment Court (DTC) program in North America was initiated in Miami, Florida. The movement towards specialized drug treatment courts in the United States began in response to rising rates of drug-related court cases, as well as the inability of traditional criminal justice sentences to effectively address the issue. Drug treatment courts are predicated on the belief that addiction-motivated crime stems from underlying social and health problems, and therefore cannot be exclusively considered a legal concern. Accordingly, the DTC model provides an alternative to the regular criminal court process for non-violent individuals who commit addiction-motivated offences that serve their “... multiple needs ... because of the potential bridge [it] represent[s] between the criminal justice and broader health services systems” (Wenzel et al., 2001: 243). In 1998, the first Drug Treatment Court in Canada was implemented in Toronto, Ontario. Modelled after its American predecessors, the Toronto Drug Treatment Court (TDTC) was designed to address the unique needs of the local drug offender population, and to reflect the specific context of the court system in Canada (Luedtke et al., 2000).

The DTC model originally developed without any particular governing theoretical framework (Rottman, 2000). Recently, however, some observers (Rottman and Casey, 1999; Hora et al., 1999) have begun to establish a link between the DTC (and other specialized courts) and the ideas of therapeutic jurisprudence – a legal reform theory that has come to be embraced by many judges operating within these innovative contexts. Therapeutic jurisprudence considers the impact of the legal process (i.e. legal rules, legal procedure, roles and behaviours of legal actors) on the emotional and psychological well-being of those individuals who have come into conflict with the law. Further, it proposes that we examine the therapeutic and anti-therapeutic consequences of the law, and that we seek to improve the functioning of the legal system, with specific regard to the consequences for the people whom the legal system impacts. A therapeutic jurisprudential perspective supports a drug treatment court’s emphasis on addressing drug addiction through treatment and intensive court supervision: “[A drug treatment court] can be seen as taking a therapeutic jurisprudence approach to the processing of drug cases inasmuch as its goal is the rehabilitation of the [drug] offender and it uses the legal process, and the role of the judge in particular, to accomplish this goal” (Winick and Wexler, 2003: 107).

## **Research Objectives and Rationale**

Given that drug treatment courts have only recently been implemented in Canada, there has been little research analyzing the impact of therapeutic jurisprudence on DTC programs in this country. This thesis represents an effort to fill this void. In what follows, I explore how the theory and practice of therapeutic jurisprudence unfold in the Toronto Drug Treatment Court program. Informed by ideas pioneered by Winick,

Wexler and their colleagues, the study is concerned with how criminal justice and treatment imperatives intersect in responding to problems of drug abuse. By focusing on the TDTC, this thesis will add a vital dimension to the existing body of drug treatment court research, while simultaneously offering a uniquely Canadian perspective on this important and timely subject. Specifically, through the enlistment of qualitative interviews and participant observation methods, I aim to shed light on the prevailing relationship between criminal justice and treatment in the TDTC; to gauge the extent to which therapeutic jurisprudential ideals are incorporated and practiced in this hybrid context; and to determine the implications of bringing therapeutic jurisprudence principles to bear upon the judicial processing and treatment of Canadian drug offenders.

To these ends, the thesis project has three primary research objectives. First, I endeavour to canvass the unique roles and responsibilities of TDTC staff, including the adjustments required from both criminal justice practitioners and treatment providers to fulfil their respective duties in the TDTC. To date, the research on Drug Treatment Courts has succeeded in capturing only a limited understanding of these transformations or the degree to which they influence program delivery and impact the experiences of participants. In this research, I aspire to fill the gap in the literature by examining the roles of TDTC staff in the context of program objectives.

Second, I examine the relationship between treatment and the court processes in the TDTC, and assess the extent to which this partnership is informed by a therapeutic jurisprudence perspective. Despite a long history of both criminalizing and treating drug use, there is a surprising lack of information on the implications of establishing drug treatment services within a criminal justice framework. While treatment is viewed as a



key component of the TDTC, and is linked to the problem-solving approach adopted by many specialized courts (Rottman, 2000), critics assert that drug treatment courts represent a kind of coercive treatment regime rooted in addiction control and characterized by punishment (Boldt, 1998; Boyd, 2001; Fischer, 2003). From the point of view of treatment and criminal justice personnel, therefore, I investigate the degree to which the TDTC is proportionately guided by criminal justice and treatment perspectives respectively.

Third, this research seeks to identify and document key components of the TDTC proceedings which exemplify a therapeutic jurisprudence approach. For instance, much of the literature has indicated that the Drug Treatment Court judge's interactions with participants are structured to reduce the harmful effects that the court process may have on them. Current research on drug treatment courts has linked various principles of psychology and the behavioural sciences with therapeutic jurisprudence to explain how the court process is able to enhance the physical and psychological well-being of individuals affected by the law (Winick and Wexler, 2003). This study explores these issues in the context of the TDTC.

Much of the research on drug treatment courts has been quantitative in nature. For instance, evaluative studies have sought to quantify program effectiveness by measuring retention and recidivism rates following intervention. To date, evidence on the success of drug treatment courts in reducing drug use and associated criminal activity remains quite inconsistent and inconclusive (Fischer, 2003). Moreover, many of the drug treatment court evaluations that have been completed to date are fraught with methodological problems (Goldkamp et al., 2001; Hoffman, 2000). Accordingly, this

thesis strives to add a qualitative dimension to drug treatment court research that could provide a point of focus from which to consider broader evaluative criteria.

## **Chapter Outlines**

**Chapter 2** presents a detailed survey of existing literature and research on drug addiction and crime; recent drug addiction interventions; and the Drug Treatment Court model in Toronto. This chapter contextualizes the research for the reader, and highlights important topics that are addressed in the study. First, the issue of drug addiction is presented, with reference to both historical perspectives and the present-day ‘drug problem’ in Canada. Second, an account of addiction control is summarized, with specific emphasis on the role of law and medicine in recent interventions, including the compulsory drug treatment approach. Lastly, Toronto’s Drug Treatment Court is introduced.

**Chapter 3** addresses the theoretical framework and method guiding this research. The background and content of therapeutic jurisprudence theory, as well as its applicability to the law and specialized/problem-solving courts are discussed. This chapter also introduces the research participants, and outlines the research objectives and design, including research questions, data sources and collection, and data analysis techniques. In addition, this chapter addresses the strengths and weaknesses of my research method.

**Chapters 4 and 5** centre on the findings and their implications in terms of the therapeutic jurisprudential perspective guiding this project and the research questions outlined in the thesis. Chapter 4 begins by introducing the research participants, and outlines their roles and responsibilities in the TDTC program. Drawing on the responses from the interviewees, this chapter centres on the altered positions of TDTC personnel,

and the relationship between the court and treatment teams. A comparative analysis of the two participant groups is present throughout the chapter. Chapter 5 examines the TDTC proceedings as they relate to therapeutic jurisprudence. While both chapters incorporate the dominant themes and patterns found in the interview data, Chapter 5 focuses on the court observation work in particular.

**Chapter 6** summarizes the key findings of the study, and assesses the possible implications and significance of this research. The chapter also highlights some of the possible contributions this investigation might make, and presents recommendations for future research in the area.

## **CHAPTER TWO: DRUG ADDICTION AND RECENT INTERVENTIONS IN CANADA**

### **Introduction**

This chapter reviews the existing literature on substance abuse in Canada. First, I establish various understandings of drug addiction. Second, I offer some insight on the historical perceptions of illicit drug use in Canada, as well as an account of the current 'drug' problem in this country. Third, I present the social control of drug use, with a focus on recent interventions. These approaches include legal enforcement, treatment, public health and harm reduction. Fourth, the strategy of compulsory drug treatment is introduced, with particular emphasis on conditional sentencing and the Drug Treatment Court initiative. Fifth, Toronto's Drug Treatment Court model is briefly described.

### **Drug Addiction Defined**

Martindale and Martindale (1971) define drug addiction as a state of physiological dependence in which an individual is compelled to continuously use the drug in question. Conceptions of drug addiction have been marked by a number of overlapping interpretations, from the biological, to the psychological, to the sociological. Some theories of drug addiction hold the drug user accountable in varying degrees while others do not. For instance, a free will model holds the drug user solely responsible for his/her drug using behaviour, while some biological theories remove the onus from the user completely. The boundaries for interpreting drug addiction are often blurred; however, two traditional conceptions of drug addiction have been central to the issue through the

years: the disease model and the 'sin' model. In contemporary society, however, the tenets of both models have changed slightly. The disease model is often referred to more generally as the medical model while the sin model is now most often viewed in terms of criminal activity.

The basic ideas of the disease model of drug addiction originated from the moralistic rhetoric of the Temperance Movement, and later from other drug prohibition movements. Supporters of these movements drew upon the disease model of addiction to explain their anti-drug position. While some of the physiological effects of drug addiction have never been proven, the very notion that it is a disease has served to persuade others to control or oppose the sale, purchase and consumption of alcohol. E.M. Jellinek, a 20<sup>th</sup> century American alcohol scientist, is credited with having been the first to label drug addiction, in this case alcoholism, as a disease (AODA, 2001). Following the disease model, he posited that an individual who uses drugs displays certain physiological effects, and suffers from an illness that results in erratic behaviour or a loss of control. As two more recent authors have articulated this model: "...the individual suffers from a preexisting biological disorder or imbalance. Once exposed to a drug of abuse, the user quickly adapts to its effects and rapidly develops a biological need, or craving, for more" (Fishbein and Pease, 1996: 80).

The most important difference between earlier versions of the disease model (consistent with the Temperance and past prohibition movements) and later conceptions is the attributed source of addiction. In the past, alcohol was viewed as an inherently addicting substance, somewhat as heroin is today. More contemporary thought identifies the source of addiction in the individual body. In addition, while some versions of the

disease model suggest that individuals are powerless to control the harmful effects of drugs, more contemporary versions of the medical model advocate drug treatment and, in conjunction with medical treatment, place most of the onus on the individual to change his/her drug using behaviour. Such treatment may involve, for example, individual and group therapy, methadone maintenance programs, and residential treatment programs. However, in general, contemporary medical models of drug addiction are still well within the paradigm first established by earlier thought.

As a 'sin', drug addiction can be explained as a result of moral failure, weakness of will, and self-indulgence (Blackwell, 1988). Individuals are responsible for actively choosing to behave immorally (i.e. using illicit drugs), "... a free will choice of this lifestyle over all others available to them" (Fishbein and Pease, 1996: 80). Some argue that drug users are inherently 'evil', and freely choose to commit crimes to support their drug habit: "... the acting person may at any moment pay more attention to such thoughtless behaviour ... All such voluntary human action is ultimately under conscious control" (Schaler, 2000: 8). However, according to others, explaining the 'sin' model as simply the result of a conscious choice is a limited definition, and ignores other underlying factors. Some contend that circumstances outside the individual drug user's desires must be examined: "... many addicts commit crimes out of desperation ... many use drugs to relieve physical or psychological pain ... Users then become marginalized, alienated from friends and family, forced into risky circumstances, and isolated from health services and positive support" (MacPherson, 2001: 18). In this sense, substance abuse is not only understood as a physiological addiction to drugs, but also must be

linked to an individual's lifestyle, and the inability to satisfy his/her health and social service needs.

Today, many experts suggest that in addition to examining objective biochemical effects, drug addiction must be understood in terms of social, political, economic and cultural context. Following this line of thought, the relationship between biological, psychological, and sociological influences is essential to explaining drug addiction. While no one single comprehensive theory of addiction has been accepted, many so-called experts in the field recognize the importance of an all-encompassing theory of addiction:

... we do know that no one set of influences stands alone ... We also emphasize the importance of individual differences in each of the theories ... Consistent observations of users suggest that some are more susceptible to abuse due to a complex interaction of psychological, social, economic, familial, biological, and environmental influences (Fishbein and Pease, 1996: 80).

In line with this thinking, social context influences drug definitions, drug effects, drug-related behaviour, and the drug experience: "Drugs only *potentiate* certain kinds of experiences – they do not produce them ... It is the situation, the social definition surrounding use – not simply the drug's objective biochemical effects – that determines the experiential dimension" (Goode, 1972: 8). Indeed, contemporary thought has merged ideas of moral attribution and pathologization to suggest that we must place most of the onus on the individual to change his/her drug using behaviour through treatment.

## **The Canadian Context**

### ***A Historical Perspective***

A historical perspective is necessary to offer some context for considering the differing perceptions of illicit drug use in Canada. While it is beyond the scope of this discussion to address the many historical factors which have influenced perceptions of drug addiction over time, a brief review of selected events will offer some insight on how social and cultural factors continue to determine political, legal, and medical responses to illicit drug use.

In Canada and in the United States, drugs have not always been the subject of close scrutiny and legal controls. For example, prior to the 19<sup>th</sup> century, drugs were not viewed as a cause of concern, and were usually not associated with violence and crime. This was particularly the case with alcohol: “The abundant drinking establishments were often the centre of community life and there was little public outrage about alcohol and few attempts to control it ...” (Alexander, 1990: 25). Indeed, the concept of being addicted to alcohol was virtually unheard of: “With very few exceptions, colonial Americans did not use a vocabulary of compulsion with regard to alcoholic beverages” (Levine, 1979: 1).

At the turn of the 19<sup>th</sup> century, there were a number of social problems in Canada associated with industrialization, such as drinking, gambling, and prostitution. These problems sparked a number of debates. As in the United States, an anti-alcohol or Temperance Movement brought the issue of drug prohibition to the forefront of the Canadian political scene: “[The Temperance Movement] popularized the idea that ... social problems can be controlled by attacking a particular drug, namely alcohol” (Alexander, 1990: 5). In Canada, guided by religious beliefs, the Social Service Council



of Canada and the Social Gospel Movement were two leading groups who supported the Temperance Movement: “The two groups agreed on the evil effects of personal vices ... liquor was the dominant and most durable issue ...” (Giffen et al., 1991: 47). Leaders of the Temperance Movement claimed that the need to compulsively drink alcohol was the result of a disease, and a natural consequence of the moderate use of alcoholic beverages. Current perceptions of drug addiction – including the uncontrollable experience of the drug abuser, the loss of control of using drugs, and the desire for abstinence – originated from the ideologies of the Temperance Movement.

At the end of the 19th century, temperance ideology began to shift toward a concern with prohibition, which ultimately led to a formal policy of legally prohibiting alcohol in Canada between 1919 and 1933. Concurrently, racism raised uneasiness over drug addiction, and fuelled a movement towards the prohibition of opium. During the mid-19<sup>th</sup> century and beginning of the 20<sup>th</sup> century, Chinese immigration was viewed as a major threat to White Canadian society by many religious groups, particularly by Protestant missionaries. Because the Chinese were viewed to be more durable workers than the White majority, rumours circulated about a Chinese takeover of the workforce. Further, the Chinese were accused of influencing women and children with their drug habits, and as a result, were subjected to racial hostility: “The growth of anti-Oriental sentiment was related to the white population’s perception of a threat to the economic security of some of them and, more fundamentally, to the survival of white British ethnic domination, seen as a threat by a great many of them” (Giffen et al., 1991: 53).

As some point out, leaders of past prohibitionist movements were interested in gaining social and political status (Gusfield, 1963; Conrad and Schneider, 1980), and thus

their ideas were guided by personal motives: "... status politics is a form of interest-oriented politics. The enhancement or defense of a position in the status order is as much an interest as the protection or expansion of income or economic power" (Gusfield, 1963: 175). Accordingly, drug enforcement tended to focus disproportionately on the lower social classes: "By persuading the public to associate narcotics use with disenfranchised minorities, lobbyists laid a foundation for legislative prohibition" (Hagan, 1988: 182). With the subsequent implementation of drug controls, the attribution of the drug problem to marginalized groups served as a basis for the stigmatization of illicit drug use and drug users.

### ***The 'War on Drugs' Campaign***

During the 1980s, the 'War on Drugs' initiative emerged in the United States, and continues to exert an important influence on Canadian drug control legislation. In the years since, the issue of drug abuse has essentially come to be framed in terms of American national security. As a radical drug control policy, in response to the large influx of cocaine in United States, the 'War on Drugs' campaign targets the production, shipment, and distribution of drugs. It is based on a militant prohibitionist attitude towards illicit drugs, and is characterized by expanded drug laws (e.g. mandatory minimum sentences), increased police powers, greater enforcement budgets, and the prioritization of punitive measures (Drug War Facts, 2003). The drug strategy includes criminal prosecution and intensive anti-drug propaganda.

Studies evaluating the 'War on Drugs' effort show that enforcement strategies have placed a heavy burden on the courts by subjecting more individuals to arrest and conviction, thus overloading courts and correctional systems with a marked increase in

prison and jail populations (Burdon et al., 2001). Similar to both the Temperance Movement and other past drug prohibition ideologies, the 'War on Drugs' has emerged as a strategy to allegedly curb contemporary social problems of all kinds: "Why was there growing prostitution, thievery, violence, sickness, depravity, despair, weakness, corruption? ... For more and more Americans the answer to such questions became simple – drugs!" (Alexander, 1990: 17).

Alexander (1990) attributes public support of the 'War on Drugs' to propaganda about an impending drug epidemic. He argues that drug use was higher in the United States during the 18<sup>th</sup> century than in the 19<sup>th</sup> and 20<sup>th</sup> centuries, when temperance and prohibition movements were being established. In addition, he links the emergence of the 'War on Drugs' to the many groups who had, and still have, a vested interest in seeing such policy through. For example, the policy has expanded the auspices of both the medical profession and law enforcement agencies. The physiological effects of 'targeted' drugs could thus be labelled a medical problem, while at the same time, law enforcement could be expanded to monitor an allegedly ever-increasing drug problem. In sum, the 'War on Drugs' campaign has been using drugs as a scapegoat for social problems, and as a means of supporting special interest groups.

### ***The Current 'Drug Problem' in Canada***

Illicit drug use is seen to impose overwhelming burdens on contemporary society. The sensitivity of the 'drug problem' in Canada is an example of this ongoing perception. In 1998, Vancouver, British Columbia, often regarded as Canada's most drug-filled city, was estimated as having approximately 11,700 injection drug users and 194 deaths due to drug overdose, the latter being primarily associated with illicit substances (Department of

Justice, 2001). In general, the rate of police-reported drug offences per 100,000 population in Vancouver is 468, second only behind Thunder Bay (571) among Canadian Metropolitan areas (Desjardins and Hotton, 2004). In Toronto, Ontario, Canada's largest city, illicit drug use is much less of a measured 'problem'. For instance, the rate of police reported drug offences per 100,000 population in Toronto is significantly lower than Vancouver at 211 (Desjardins and Hotton, 2004). Since the 1980s, drug use in Toronto has remained relatively stable. While poly-drug use is common, (crack) cocaine is the most widely used drug.<sup>2</sup> Further, in 1998, cocaine and heroin accounted for 63 of 155 drug-related deaths in Toronto (RGDU, 2001).

A large percentage of drug users in Canada live on the streets or in temporary housing. Moreover, several communicable diseases are associated with drug use, thus escalating the severity of the problem: "Infectious diseases including hepatitis, tuberculosis, sexually transmitted diseases, and HIV/AIDS are related to behaviours involved in acquisition of the drugs, disinhibiting effects of the drugs, and the means of administering the drugs" (McBride and Inciardi as cited in Wenzel et al., 2001: 242). Despite the enormity of the problem of drug misuse, in most areas of the country, there is often insufficient treatment for drug dependency and little expansion of drug addiction services. For example, MacPherson (2001: 41) lists six problems related to treatment in Vancouver which limit the possibility of establishing a connection between health and treatment services, a connection he refers to as a "continuum of care":

- lack of availability of treatment and long waiting lists;
- poor evaluation of existing programs and the tendency to throw more money into programs that don't work;

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<sup>2</sup> In 2000, there were approximately 360 cocaine seizures, compared to only 138 heroin seizures.

- lack of early intervention, even though studies have shown that this is crucial to preventing a lengthy and harmful problem with drugs or alcohol;
- fragmented service structures;
- current treatment programs do not provide service for the most difficult street-involved addicts who continually remain isolated and marginalized from the treatment system;
- lack of user involvement in evaluating programs.

Moreover, the few services and programs that are provided have unrealistic goals and requirements: “In addition to long waiting lists, many programs require abstinence before an addict is granted entry. Often there is a cost involved, which users must pay out of their own pockets. And if someone has a relapse, they are kicked out of the program and have to wait again before they are allowed to re-enter some programs” (MacPherson, 2000: 14-15). Indeed, residual punitive and moralistic overtones characterize many existing treatment programs.

## **The Social Control of Drug Use**

### **Law and Medicine**

Both law and medicine exercise a significant amount of social control over the social construction of drug addiction, and both institutions claim the legitimacy to be addressing this issue.

Legal responsibility for drugs did not begin until the beginning of the twentieth century. Enacted by governments and enforced by legal apparatuses of the state, drug laws represent moral judgments designed to protect the well-being of society: “Without penalties to deter drug use, it is thought that crime, violence, personal injury and eventually social chaos will occur ... Criminalizing drug use thus reinforces moral

feelings and protects a moral code increasingly under attack” (Zinberg and Robertson, 1972: 164).

Based largely on conflicting moral values, and characterized by ideologies of punishment, current drug laws prohibit the distribution and recreational use of narcotics such as heroin and cocaine, while other drugs such as tobacco and alcohol are readily available for public consumption. Goldstein (1994) suggests that dichotomizing drugs as either illegal (harmful) or legal (safe) is problematic: “Our society makes artificial distinctions among addictive drugs, fostering the false impression that because nicotine and alcohol are legal, they must somehow be less dangerous and less addictive than the illicit drugs” (2). Szasz (1985) contends that political, legal, and medical decision-makers control the legitimacy of these categories.

How do changing delineations of licit and illicit drugs affect drug users? Conrad and Schneider (1980) observe that after laws are enacted to ostensibly combat drug addiction, a drug user can give up his/her habits and suffer greatly from withdrawal, or he/she can procure his/her drugs through illegal channels, and face the possibility of being punished. The consequence of legal prohibition is that an ‘addict’ subculture forms, and drug users are faced with unfortunate circumstances: “The drugs’ illegality and subsequent scarcity inflate[s] their price and ma[kes] it nearly impossible for addicts to work at conventional jobs to support their habits. Many addicts therefore ha[ve] to turn to crime as the only way to finance their addiction” (Conrad and Schneider, 1980: 127). Accordingly, some argue that drug law, characterized by wide discretionary powers invested in enforcement agencies, has in effect created a new category of crime by criminalizing certain drug-related activities (Erickson and Cheung, 1992). However,

as Erickson and Cheung (1992) go on to note, the law has consistently failed to address the root causes and conditions of substance abuse. Further, these authors question why the law remains a primary instrument for the control of drugs:

The evidence reviewed about the actual practices associated with efforts to suppress drug use and distribution in a prohibitory scheme illustrates ... considerable non-compliance with the law, divergent viewpoints on its appropriateness, and associated high levels of individual and social costs. Why is the law more effective in shaping behaviour in this particular area? (258)

For its part, the institution of medicine had an early influence and continues to play a significant role in defining drug addiction. Foucault (1975) writes about changes in thinking that occurred at the end of the eighteenth century in Western societies when medical explanations of deviance, such as mental illness and drug abuse, became more and more popular, progressing towards what was perceived to be an ever more extensive and objective storehouse of knowledge about illness, its origins and prevention. Conrad (1992) cites a number of social factors which have provided the context for a greater reliance on medical explanation: "... the diminution of religion, an abiding faith in science, rationality, and progress, the increased prestige and power of the medical profession, the American penchant for individual and technological solutions to problems, and a general humanitarian trend in western societies" (213). How has medicine's expanded role in society affected our perceptions of drug addiction?

As mentioned above, according to the medical model of drug addiction, an individual becomes 'addicted' when his/her behaviour is under the control of a chemical substance, and s/he is seen to be incapable of changing without treatment. Medical discourse creates a false impression that drug addiction can be isolated through the objectification of drug users, and eventually treated. Similar to punishing drug addiction

through the law, some argue that the move towards medicalizing drug addiction places more emphasis on social control, albeit under a guise of treatment: “Medical intervention as social control seeks to limit, modify, regulate, isolate, or eliminate deviant behaviour with medical means and in the name of health” (Conrad and Schneider, 1980: 29). For instance, Goode (1972) points out that treatment regimes exercise a large amount of power and control, and that ideological, moral, and political considerations are always part of the therapeutic process. Generally, ‘medicalization’ is a process whereby social problems, such as drug addiction, fall under the jurisdiction of the medical field:

“Medicalization consists of defining a problem in medical terms, using medical language to describe a problem, adopting a medical framework to understand a problem, or using a medical intervention to ‘treat’ it” (Conrad, 1992: 211). While drug addiction typically remains under the auspices of the criminal justice system, medical explanations of drug addiction have become increasingly accepted, and are reflected in responses to substance abuse.

### **Recent Drug Addiction Interventions in Canada**

Perceptions of drug addiction are shaped by dominant ideologies and fluctuating beliefs which construct certain meanings and assertions about drugs. Accordingly, responses to drug addiction in Canada are based on the fundamental values and assumptions that prevail in this country. *Legal enforcement, public health, treatment and harm reduction* represent four main categories of recent policies and practices regarding the drug addiction ‘problem.’ Each approach integrates elements of law and medicine, and differing goals often coexist in ideologies, policies and practices aimed at addressing substance abuse.



### ***Legal Enforcement***

Beginning with the *Opium Act of 1908*, drug legislation in Canada has progressively placed more and more emphasis on the central role of law – criminalization and enforcement – in an attempt to expand restrictions on drug use in Canada. During the mid-twentieth century, the government of Canada expanded the scope of drug control through the use of increased enforcement powers and procedures, greater judicial authority, and stiffer court sentences. As a result, the number of criminalized drug users rose substantially. In 1969, in response to concerns over illicit drug use and distribution, the Le Dain Commission<sup>3</sup> recommended less use of criminal sanctions against drug users. However, in 1987, Canada's Drug Strategy was formed, and was responsible for drafting the current *Controlled Drugs and Substances Act* of 1996 (which replaced the *Narcotic Control Act of 1961*). This statute represents a culmination of efforts to regulate drug use. It lists various drug offences related to the possession, production, import/export and sale of drugs. Sentencing options vary by the type of drug(s), by the quantity of drugs involved, and by past convictions for drug offences (Desjardins and Hotton, 2004). While demonstrating some less restrictive measures, such as reduced maximum sentences for certain offences, the Act increased police powers of search and investigation and failed to authorize the medical use of cannabis (Dion, 1999). As a result, according to Dion (1999), the new provisions embodied by this Act are drawing more and more individuals into the criminal justice system.

In a study of 8,600 offenders in Canadian federal institutions between 1993 and 1995, Brochu et al. (2001) determined that 44% of offenders were either addicted to a

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<sup>3</sup> The Le Dain Commission was appointed to examine the non-medical use of drugs. The report by the Commission, published in April 1970, marked a turning point in official North American thinking about psychoactive drugs in general, and about marijuana in particular.

psychoactive substance or intoxicated at the time of their most serious offence. Based on revelations such as this, the past few years have witnessed a challenge to the idea of incarceration as an effective measure to change offender substance use. The Canadian government has been criticized for having few effective substance abuse treatment programs designed for correctional inmates. In addition, once placed into a prison environment, an inmate may start or continue to use drugs as a result of being exposed to substance use inside that institution. James and Sawka (2002) argue that when discharged from a prison, drug-using offenders confront an enhanced probability of being readmitted: “In particular, the rate of readmission to custody (for release violations or a new offence) was significantly higher among offenders with more serious alcohol and/or other drug problems” (129). In light of this evidence, one must question whether law enforcement, and especially incarceration, should be a primary recourse for addressing addiction- motivated offences.

### ***Treatment***

In general, following the medical model of drug addiction, treatment is an intervention designed to move drug users from a drug using to a drug-free state, or at least to free them from the compulsion to use drugs (Goldstein, 1994). Its supporters describe drug treatment as being ‘caring’ or ‘compassionate,’ embracing the objective “... to alleviate the suffering of drug-dependent people and to prevent further suffering” (Smart, 1983: 195). As legal controls of drug use were continuing to increase in the mid-twentieth century, a treatment impetus began to emerge. Instead of criminally punishing drug addicts, the exponents of this movement called for mandatory treatment and the use of a therapeutic environment instead of incarceration. However, this latter alternative was

never put into practice by legislators because of “a substantial social resistance against the established patterns of the drug user” (Fischer, 1999: 198), supported by the re-emergence of a prohibitionist milieu in general.

Nevertheless, in the late 1950s, treatment agencies began to appear across the country. By the 1980s, treatment services had become more diverse and focused on satisfying the needs of various target groups. In many treatment programs, drug users follow a program that fits their individual needs: “The general approach to addiction treatment can be described as breaking a big task into manageable bits, each tailored to the needs of the individual patient” (Goldstein, 1994: 218). Most addiction experts agree that changing established addictive behaviour is a complex task, which goes well beyond merely treating the physiological effects of drug use alone:

The needs of drug abusers – whether they are offenders or not – extend far beyond treatment for drugs to a broad array of other problems, often including physical and mental health, housing and family assistance, job training and placement assistance and living skills ... Some of these needs may be causes and others consequences of substance abuse (Wenzel et al., 2001: 242).

Accordingly, many contemporary treatment programs follow a biopsychosocial model for addressing substance abuse. This model takes a holistic approach, focusing on the physiological effects of drugs, the individual personality traits of users, and their wider social circumstances. For instance, users are taught how to exist on a day-to-day basis without drugs, and are given access to practical skills, such as job training and education, legal assistance, counselling to restore troubled family life, attention to neglected medical conditions and so on (Goldstein, 1994).

Goldstein (1994) argues that the success of drug treatment is generally assessed in terms of the individual responsibility of the drug user. He cites many positive and

negative factors that could determine a person's level of motivation towards getting treatment: "Some kind of pressure brought them to the treatment facility – perhaps insistent urging by family ... perhaps trouble with the law, perhaps health concerns, perhaps dissatisfaction with self. But counterpressures are also hard at work – craving the next smoke, injection, snort, or drink ... being depressed just thinking about a future with never another taste of the drug" (Godstein, 1994: 217).

### ***Public Health***

In the 1960s and 1970s, in the context of a growing public health impetus, medical and psychological treatment became highly regarded as the appropriate means by which to address drug use in Canada (Alexander, 1998: 28). Under the influence of this expanding medical model, the criminal justice system came to play a secondary role to drug treatment. A public health approach attributes the problem not to drugs, but to restrictive social and public policies, and the general inaccessibility of basic health care, both of which factors primarily influence members of the less privileged strata of society. This perspective calls for educating the public about the health risks of drug use, highlighting the general inaccessibility of basic health care to disenfranchised groups, learning how to use drugs responsibly, and identifying the social controls needed to prevent substance abuse.

A public health approach works towards addressing a drug-related health crisis by reducing harm to communities and individuals; by increasing public awareness of addiction as a health issue; by working to limit communicable diseases, illicit drug overdose deaths and the number of persons with drug problems; and by providing

services to groups at risk of substance abuse such as youth, Aboriginal persons, and the mentally disordered.

### ***Harm Reduction***

In the 1990s, as part of a wider treatment-oriented approach, interventions referred to as 'harm reduction' began to take precedence over previous models (Alexander, 1998: 28). Roe (2003) notes that harm reduction is not a new idea, but is rather an "umbrella term" based on various social, medical and political responses to the current perceived 'drug problem' associated with addiction and disease. Further, he states that harm reduction has redirected the implementation of drug policy, from prohibition and abstinence principles to medical and epidemiological ones. The concept focuses on diminishing the negative consequences of drug use: "Analyses of harm reduction are generally couched in terms of effectiveness as a *medical intervention* in relation to diseases prevention or addiction's treatment, and frequently in terms of its role in the *social reform* of drug users and drug legislation" (Roe, 2003: 7). Harm reduction strategies address an array of patterns of drug use and associated problems. They have also been accepted as a means by which individuals can take control of their drug use; a strategy for imposing forms of moral regulation on specific risk behaviours; and a way to save money on health care (Roe, 2003). Examples of harm reduction strategies include methadone maintenance, needle exchanges, detoxification centres, and housing for those individuals who become ill from excessive drug use (Alexander, 1998).

As mentioned at the outset of this section, these interventions have differing goals and methods of reducing substance abuse, and are associated with diverse and fluctuating belief systems: "Overlap and competition among these 'paradigms' are apparent over

time, but they provide, nonetheless, distinct perspectives and images for constructing deviant reality” (Conrad and Schneider, 1980: 27). Noticeable among the different interventions described above is their ideological emphasis on either punishment or treatment. This issue will be discussed in the next two sections on compulsory drug treatment.

## **Compulsory Drug Treatment**

As discussed earlier, official responses to addiction-motivated offences are typically characterized by either criminal sanctions or treatment. Many think of treatment as a non-coercive type of social control, relying on the motivation and cooperation of the patient; however, as a relatively new and popular strategy, ‘compulsory’ or ‘coercive’ drug treatment programs require patients to participate in drug treatment, usually as part of their sentence in court. There is much controversy about using the criminal justice system as a means of providing access to treatment, given that this strategy “creates the strange circumstance of someone needing to get arrested to get treatment” (Drug War Facts, 2003: 1). Furthermore, there exist many differences in the practices and objectives of various treatment programs. Some insist on immediate abstinence, while others advocate a slow reduction of drug use in conjunction with other supports, such as counselling.

Compulsory drug treatment proposes to integrate criminal justice and treatment approaches. As a strategy of social control, it is used to ensure that individuals with substance abuse problems receive clinical attention (Wild et al., 2002). However, some addictions scholars argue that responses which invoke criminal justice (embodying a free-will concept of the offender) and treatment (where addiction is considered a

deterministic or pathological state) together are inherently contradictory (Fischer, 2003). Moreover, research (Hartjen et al., 1982; Platt, et al., 1988; Rosenthal, 1988) has deemed compulsory drug treatment to be an ineffective solution to addiction-motivated crime on the grounds that treatment can be effective only if a 'drug addict' is motivated to change his/her drug using behaviour. Other authors (Anglin and Maugh, 1992; Salmon and Salmon, 1983) have argued that external motivation, such as legal coercion, is necessary to treatment retention. Two relatively recent empirical studies (Anglin et al., 1998; and Wild et al., 2002) illustrate that while compulsory drug treatment may facilitate program retention and compliance, it is not necessarily effective in reducing criminal behaviour and substance use. These studies call for future research, especially in the area of clients' individual perceptions of their treatment experience.

Despite the uncertainty surrounding the effectiveness of compulsory drug treatment, drug treatment programs continue to be used by the criminal justice system to address addiction-motivated crime. In Canada, the roots of compulsory drug treatment can be traced back to 1927, when 'drug addicts,' believed to have mental illnesses, were first placed in institutions for the purposes of treatment (Fischer et al., 2002). In 1952, the *Committee on the Prevention of Narcotic Addiction* initiated plans to use civil commitment procedures for the purposes of incarcerating drug users and ordering treatment (Fischer et al., 2002). In 1961, the federal government tried to introduce a compulsory drug treatment clause – the indefinite detention for treatment in a special institution – to the *Narcotic Control Act*. This proposal represented “the formal synthesis of the ideas of punishment, coercion and treatment in Canadian drug law” (Fischer et al., 2002: 62). After lengthy discussions and much resistance, the proposed amendment died

on the order table. As a consequence, ideas of treatment and punishment advanced separately until around the end of the twentieth century.

Conditional sentencing and drug treatment courts are two recent approaches which integrate principles of treatment and punishment, and attempt to effectively address addiction-motivated crime.

### ***Conditional Sentencing***

In 1996, the conditional sentence was introduced in Canada to provide courts with a sentencing alternative to incarceration. The conditional sentence allows offenders to serve their sentence in the community under strict conditions, rather than in custody. In addition, judges have the power to order completion of a treatment program as part of an offender's conditional sentence. If the conditions of the sentence are breached, an offender may be required to finish serving the term in prison. To be eligible for a conditional sentence, an offender must not pose a threat to the community, and the offence for which the offender is convicted cannot carry a minimum sentence. The sentence is applicable to many different crimes,<sup>4</sup> and seems to be particularly appropriate for many drug offenders,<sup>5</sup> as long as other requirements are met. As Chiodo (2001: 61) observes, "... the conditional sentence permits a more restorative and community-based response to drug-addicted offenders."

Conditional sentencing has not been without controversy. It has been criticized as being too soft on offenders, and no different than probation. Additionally, there is some evidence that incarceration rates have actually risen since the start of conditional

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<sup>4</sup> Between 1996-2001, Fischer et al. (2002) report that almost 100,000 conditional sentences had been imposed in Canada.

<sup>5</sup> In Ontario, Canada's most populated province, treatment was imposed as a condition in 45% of conditional sentences (Fischer et al., 2002).



sentencing. Some critics claim individuals who would have received probation are being given conditional sentences, rather than those facing incarceration. Finally, there is a perception that, by conditionally sentencing drug offenders, the courts could be stretching drug treatment resources that are already operating at full capacity, in the absence of any substantial influx of funding (Fischer et al., 2002).

### ***Drug Treatment Courts***

In the late 1980s, touted as an alternative to incarceration and an efficient and effective approach to treatment, the Drug Treatment Court model was introduced to North America with the initiation of one such venture in Miami, Florida. Subsequently, two courts have opened in Canada (in Toronto and Vancouver, respectively), while internationally, similar types of courts exist in Australia, Scotland, Ireland, England, Wales, Bermuda, and Jamaica.

In Canada, the goal of a drug treatment court is to increase public safety, and reduce the number of substance related crimes by limiting drug addiction through treatment. The focus is on community-based public health and social services (NCPS, 2004). The rationale behind the Drug Treatment Court model is that individuals who are addicted to drugs suffer from an addiction and biopsychosocial problems, and are not deterred from using drugs by traditional criminal justice sentences, such as jail time, probation and fines. As an alternative, the Drug Treatment Court represents a strategy by which the criminal justice system can be used to move individuals with substance abuse problems towards drug treatment. Accordingly, most drug treatment courts consist of a court component and a treatment component, which work together to assist participants in overcoming their substance abuse problems. The court monitors participants' progress

and treatment in the program, while treatment addresses specific issues related to participants' drug addiction.

There is evidence in the United States to suggest that, in comparison to other community-based treatment programs, drug treatment courts are successful at lowering drug use and criminal activity among substance abusing offenders (Burdon et al., 2001; Wenzel et al., 2001; James and Sawka, 2002). Quantitative studies show that drug treatment courts are able to retain offenders longer in the program, and reduce drug use among participants following program graduation. In the case of the Drug Treatment Court of Toronto, participants have shown improvements in their physical and psychological health, and a general decrease in substance use (Gliksman et al., 2003). However, research has yet to be conducted in Canada on long-term effectiveness.

There are many advocates and opponents of the philosophy behind, and operation of the Drug Treatment Court model. One major strength is that it assumes a highly integrated and client-centred model: "Contemporary drug courts adopt a team approach to working with drug-using offenders, involving judges, prosecutors, defense attorneys, probation officers, and treatment providers in a coordinated case-management approach and holding offenders accountable through graduated sanctions for program rule infractions" (Olson et al., 2001: 173). It is understood that offenders will not change overnight, and that many will relapse. However, it is also believed that each offender will be honest and accountable for his or her conduct under the supervision of the Drug Treatment Court. This approach to the drug offender represents "...a paradigm shift away from a predominantly punitive orientation to one of treatment, human potential, chances, and restoration" (Goldkamp et al., 2001: 28). Further, drug treatment courts

serve as a crucial point of contact: "... the multiple needs of substance abusers, because of the potential bridge they [drug courts] represent between the criminal justice system and broader health services systems" (Wenzel et al., 2001: 243). The program facilitates partnerships between the various criminal justice practitioners, treatment providers, and other social services. Other advantages include a non-punitive treatment approach to rehabilitation, and a more effective structure to address drug addiction through judicial monitoring and the structured nature of the program (NCPS, 2004).

Yet at the same time, drug treatment courts are perceived to have many weaknesses. They exercise a large amount of formal social control over participants, and thus can still be characterized to embody a punitive model of response to drug consumption:

... an offender is required, on a daily basis: to attend addiction treatment; to attend counselling sessions; to attend and report to the DTC [Drug Treatment Court]; and to provide randomly assigned urine-tests screening for drug use ... [They] are typically required to improve their housing and engage in education, and obtain employment ... All of these measures ... are imposed by the coercive powers of the court and leave no room for individual choice or resistance ... While traditional or explicit forms of punishment may have disappeared as the primary form of intervention, the DTC presents an instructive illustration of a dispersed, yet comprehensive and pervasive regime of behavioural 'discipline' acting upon the offender from many sides (Fischer, 2003: 237).

Indeed, one must be careful to scrutinize the potential regulatory effects of treatment, and its dynamic relation with policies and practices of punishment.

It is also difficult to assess whether participants become motivated to change during their time in a drug treatment court. This dilemma is further complicated by the fact that many participants in these programs are underprivileged – suffering from such circumstances as poverty, a broken family, mental health issues, lack of employment

opportunities, inadequate housing, or a combination of these factors – and thus are disempowered and possibly non-motivated to complete the program. Other disadvantages of the Drug Treatment Court model include: more people being arrested and processed for substance related offences (i.e. net widening); the perception of creating a separate justice system for drug offenders; a lack of many long-term evaluations on program effectiveness; and difficulties in preserving legal safeguards (e.g. due process) and harmonizing legal objectives (e.g. deterrence, separating offenders from society) with offender needs (e.g. rehabilitation, treatment).

Many stakeholders have a vested interest in supporting a drug treatment court. These groups include substance abusers; various government agencies at the municipal, provincial, federal levels; local police departments; city residents; the regular courts (in consideration of their existing backlogs); the jails and prisons; a number of community organizations; and the various social programs (e.g. methadone maintenance, needle exchanges) which address substance abuse. It must be noted, however, that while all of these groups may support a drug treatment court, they may do so for different reasons. There may not be a single dimension along which advocates align themselves. For example, the police and some court officials may emphasize the crime control or legalistic aspects of the program, while harm reduction initiatives and other community-based services may support the program for the compassion it shows towards substance abusers.

### **The Toronto Drug Treatment Court**

In 1998, the first Canadian Drug Treatment Court opened: the Toronto Drug Treatment Court (TDTC). Funded by the National Strategy on Community Safety and Crime

Prevention Centre, the TDTC initiative is a collaborative effort involving the Ontario Court of Justice, the Department of Justice, the Government of Canada's National Strategy on Community Safety and Crime Prevention, the Centre for Addiction and Mental Health, Toronto-based representatives of the criminal justice system, the Toronto Police Service, the City of Toronto Public Health and Healthy City Office, and various community-based service agencies (Bindman, 2003).

Recognizing that offenders engaging in addiction-motivated crime were constantly entering the criminal justice system through a 'revolving door' – and that drug addiction is often linked to social and health problems such as unemployment, homelessness, violence, family conflict, psychiatric disorders and general distress – these organizations collaborated to initiate the TDTC. As an alternative to regular judicial processing, the TDTC diverts non-violent, drug-dependent individuals, who are involved in the criminal justice system, into drug treatment. Similar to most drug treatment court programs in the United States, the TDTC contains certain core elements: immediate intervention; a non-adversarial adjudication process; an individualized treatment-oriented approach; clearly defined rules and structured goals for participants; and teamwork between criminal justice practitioners, treatment providers and other staff. To better fit the profile of Canadian drug offenders, the TDTC focuses on non-violent individuals charged with possession or trafficking in small quantities of crack/cocaine and/or heroin under the *Controlled Drugs and Substances Act*, who engage in criminal activity to support their own drug addiction (Luedtke et al., 2000).

The selection process is initiated with an application by Duty counsel or Defence counsel on behalf of the applicant. Potential participants are accepted into the program

following a screening process involving the federal Crown. Factors considered during the screening process include other current criminal charges against the person, the potential for risk to the community, and the seriousness and circumstances of the offence (including whether it was committed near places frequented by minors) (Luedtke et al., 2000). Once accepted, potential participants can enter the TDTC program on one of the following 'Tracks' (Simpson, 2001: 2):

- **Track 1:** Those who have little or no criminal record and are charged with simple possession are eligible to enter Track 1 prior to entering a plea (pre-plea). If they complete the program, the charge is withdrawn or stayed. Those whose offences normally would be punishable by more than three months' imprisonment are excluded from Track 1.
- **Track 2:** Offenders with more serious records, or who are charged with trafficking are eligible to enter Track 2, and they are required to plead guilty to the charges before entering the program (post-plea). If they complete the program successfully, they receive non-custodial sentences.

Each participant accepted in the TDTC program is released on bail with conditions to appear in court and participate in drug treatment. Once released from custody, he/she is subject to a 30-day probationary or assessment period (Gliksman et al., 2003). At the end of this period, depending on program compliance, he/she is granted formal acceptance into the program. The program may last anywhere from eight to fifteen months, depending on the progress of the offender. A graduation ceremony is held in the courtroom for every participant who successfully completes the program.

Unsuccessful Track 1 participants, who decide to withdraw or are discharged from the program, are returned to the normal court process. Similarly, Track 2 participants can have their guilty plea struck, if they withdraw or are expelled from the program within the 30-day period, and return to the normal court process. However, if

Track 2 participants withdraw or are discharged after the probationary period, they are sentenced (Simpson, 2001).

## **The Drug Treatment Court Process**

As previously mentioned, the TDTC program consists of two separate, yet complementary bodies: court and drug treatment.

### ***The Court***

The court component of the program provides the legal authority for operation of the TDTC. Similar to a regular court setting, a provincial court judge (i.e. the Drug Treatment Court judge) provides judicial oversight; and a Crown and Duty counsel are present, as are other court personnel (i.e. court clerks, officers). As the arbiter, in addition to making decisions on the disposition of cases, the judge is responsible for monitoring participants' progress and program compliance. Analogous to their positions in a traditional court process, the role of the Crown is centred on defending public interests, while the primary responsibility of Duty counsel is protecting the rights of participants during the court process (Luedtke et al., 2000). Every active TDTC participant, unless otherwise excused, must attend the court twice a week.

### ***The Pre-Court Meeting***

Although the judge has final say on these matters, decisions rendered are often based on the input and recommendations of the entire court team.<sup>6</sup> To facilitate well-informed decisions pre-court meetings are held twice a week, prior to every court session, to review each participant's progress. The court liaison workers provide the necessary

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<sup>6</sup> While not part of the court team, a therapist/case manager is sometimes involved in the pre-court meetings.

information to the judge and other players about the current situation of each participant in treatment. While not usually involved in the court process, the probation officer is primarily responsible for communicating information about those individuals who apply for or enter the program with an existing probation supervision order, as well as for the supervision of those who graduate and are placed on probation. Other issues discussed in the meetings usually pertain to a participant's general well-being, such as housing, employment, education and social service needs (e.g. welfare, unemployment insurance). For the most part, the court proceedings are influenced by the discussions and decisions made in the pre-court meetings (Gliksman et al., 2000).

### ***Sanctions and Rewards***

The court component of the program also uses sanctions and rewards, meted out by the judge, as part of the treatment process. Some examples of sanctions issued for treatment non-compliance include: verbal admonishment and warnings, increased court appearances, community service hours, having to 'sit up front' in court, and bail revocation (i.e. jail time). Rewards include: verbal praise and encouragement, applause, reduced court appearances, being on the early leave list<sup>7</sup> and certificates for accomplishing treatment milestones (usually presented in court).

### ***Treatment***

The treatment component serves in the coordination and delivery of the treatment services that are offered to TDTC participants. The Centre for Addiction and Mental

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<sup>7</sup> Participants on this list are called at the beginning of court and permitted to leave immediately after reporting to the judge.



Health (CAMH)<sup>8</sup> in Toronto is responsible for administering treatment, using highly structured programs for both cocaine and heroin addiction. Based on a harm reduction philosophy – using such strategies as methadone-maintenance for heroin users – treatment is administered in five phases (Assessment, Stabilization, Intensive Treatment, Maintenance, and Continuing Care), with the ultimate goal being abstinence from using illicit drugs (Gliksman et al., 2000). In addition, the CAMH uses random urine testing on participants to monitor program compliance. Currently, under the supervision of the treatment program manager, six therapists/case managers provide individual and group therapy to program participants. In addition to their therapeutic work, as case managers, they are also responsible for addressing participant needs (e.g. housing, finances, employment), and assisting with access to community-based treatment (e.g. residential treatment) where required (Simpson, 2001). The program manager’s role is to direct the treatment component of the TDTC, including some aspects of program operations; to implement treatment protocols; and to coordinate treatment staff. Like the court team, the treatment team – consisting of therapists/case managers, the program manager and the court liaison workers – hold case conference meetings twice a week, the day before each court session, to discuss each participant’s progress in treatment. The two court liaison workers conduct initial assessments, bring treatment information to the Court, and inform treatment staff of any actions or recommendations of the Court (Gliksman et al., 2000).

### ***Community Advisory Committee***

Chaired by the community coordinator of the TDTC, The Community Advisory

Committee (CAC) links the TDTC with its community partners. Close to 40 community

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<sup>8</sup> The CAMH was formed in 1998 as a result of the merger of the Clarke Institute of Psychiatry, the Addiction Research Foundation, the Donwood Institute and Queen Street Mental Health Centre. It is an internationally recognized addiction and mental health teaching hospital.

agencies are involved with the TDTC. These agencies help support participants during and after the program. Representatives from various community groups, treatment agencies/services, graduates of the TDTC, and special guests participate in the CAC meetings. Accordingly, the CAC affords the TDTC a continuum of health initiatives, with multiple points of contact involving various social services and health agencies (Gliksman et al., 2000).

### ***Honesty and Accountability***

The TDTC requires that all participants be honest and accountable. Relapse is anticipated in the program as part of the recovery process, and participants will not be reprimanded for continued drug use as long as they disclose it to treatment staff and the court.

As one of the Drug Treatment Court conditions, participants must submit to random urine testing. This is done primarily to assess participants' improvement over the course of the program. Random urine testing is also used to monitor whether a participant is honestly reporting his/her drug use. If participants are found to be dishonest about their drug use, unmotivated, or non-compliant with program requirements, the Crown will hold these individuals accountable by requesting various court sanctions, including program expulsion in some cases.

This chapter has only briefly touched upon some of the important issues surrounding drug addiction. After surveying some of the literature available on the topic, the concept of drug addiction has been the subject of much debate throughout time, shaped by social, cultural, and historical processes, which have influenced how society has perceived and responded to drug addiction at different times. Grounded in interest-

oriented politics, past prohibitionist strategies, and alongside more contemporary movements, past reactions to substance use have provided the basis for understanding the origins of present explanations and responses to drug addiction, as well as the foundation for current debate.

Contemporary responses to drug addiction and associated criminal behaviour are influenced mainly by legal and medical thought and practice. By enforcing laws, and subjecting drug users to criminal sanctions, legal responses act as a dominant system of social control. Similarly, medical interventions, primarily in the form of treatment, have increasingly been given the legitimacy to 'treat' the problem of illicit drug use. Compulsory drug treatment merges criminal justice and treatment paradigms, and is premised on coercion. The Drug Treatment Court model in Toronto is an example of Canada's most recent attempt to address the issue of drug addiction and crime.

Following from this chapter's review of drug addiction, and the interpretations and responses associated with this construct, in Chapter Three I will present a detailed description of therapeutic jurisprudence – a legal theory that has been recently associated with drug treatment courts, as well as outline the research methodology used in this study.

## **CHAPTER THREE: THERAPEUTIC JURISPRUDENCE AND RESEARCH METHODOLOGY**

### **Introduction**

The first part of this chapter establishes the theoretical framework guiding this research. The chapter begins by defining therapeutic jurisprudence in the context of mental health law. Second, its applicability to other legal areas is discussed. Third, the relationship between therapeutic jurisprudence and specialized courts, with the former serving as the theoretical underpinning of the latter, will be addressed. The section will conclude with a brief description of the interpretive approach to this research.

The second part of this chapter outlines the methodology employed in the study. Specifically, it addresses the research objectives and design, including data sources and collection, as well as data analysis techniques.

### **Definition and Background**

The concept of therapeutic jurisprudence emerged in the late 1980s, largely through the work of David Wexler and Bruce Winick, in response to general concern among legal scholars in the United States over the protection of the personal rights and individual needs of mental health patients in the field of mental health law (Wexler, 1991).

Therapeutic jurisprudence addresses the ways in which knowledge, theories, and insights about the mental health and related disciplines, consistent with principles of justice, help shape the development of law (Wexler, 1991). The concept has impacted such mental health legal areas as civil commitment, the insanity defense, and

incompetency to stand trial in the United States. Specifically, this perspective focuses on how mental health law often fails to help people recover or achieve mental health, despite its stated intentions. While the idea of therapeutic jurisprudence was initially associated with mental health law, it has since penetrated many social and legal areas such as corrections, domestic violence, tort reform, contract law, the criminal court system, homelessness, comparative international law, preventive law, and family law.

Therapeutic jurisprudence can be used to study the extent to which a legal rule or practice promotes or imperils the psychological and physical well-being of the people it affects (Slobogin, 1995). It focuses on the sociopsychological ways in which legal rules, legal procedures, and legal actors (such as lawyers and judges) affect individuals involved in the criminal justice system. Accordingly, the approach is oriented towards understanding therapeutic or antitherapeutic effects as they are perceived by the individual (Nolan, 2001). As such, it offers a fresh perspective on questions regarding the law and its applications: “Therapeutic jurisprudence analysis will generally reveal important and previously unrecognized considerations on legal issues ... we can identify the potential effects of proposed legal arrangements on therapeutic outcomes” (Hora et al., 1999: 6).

According to the exponents of therapeutic jurisprudence, it is important to focus on humanizing the law – that is, we must be concerned about the human, emotional and psychological side of law and the legal process. Identifying ways in which the law and legal system can change to maximize therapeutic aspects and minimize anti-therapeutic aspects of an individual’s experience with the criminal justice system is significant to therapeutic jurisprudence theory. Ultimately, such a perspective seeks to arrange the law

in a progressive manner, providing that other values, such as justice and due process, can be fully respected.

Some criticize therapeutic jurisprudence on account of its potential conflict with the normative premises of the law – such as individual rights, the integrity of the fact-finding process, and public safety – which are found in legal doctrine (i.e. the rule of law), and in legal statutes such as the *Criminal Code* of Canada and the *Canadian Charter of Rights and Freedoms*. For instance, recognizing that it may be therapeutic for a drug addict to plead guilty to drug charges in order to be accepted into a treatment program must be carefully weighed against arguing a possible Charter violation, such as unlawful search and seizure. As Slobogin (1995) states: “...the excitement of recognizing that a rule is therapeutic for some must not blind them toward its potentially negative impact on others” (13). Wexler (2003a) is careful to state that researchers in the field of therapeutic jurisprudence are suggesting only that we think about these types of issues and determine whether they can provide some guidance for legal reform. However, as Winick (1997) asserts, a therapeutic jurisprudence examination “is not the neutral, value-free mode of scholarly inquiry that law and psychology and social science in law often try to be” (188). It views law with a particular normative orientation, one that aims to increase the welfare or ‘psychological well-being’ of individuals affected by the law.

For some, therapeutic jurisprudence has created controversy. Some concerns and questions have been raised about its identity, definition and approach. For instance, critics suggest that the concept is vague, and no different from other systems of legal analysis (e.g. legal realism, law and economics, feminist theory) (Slobogin, 1995). While

therapeutic jurisprudence theory emphasizes improving the lives of individuals, using such terms as therapeutic, anti-therapeutic, well-being and health, it does not explain how and by who these terms are defined. Further, there is some debate as to whether a therapeutic jurisprudence analysis is able to consistently predict what is therapeutic. For example:

...whereas choice may improve the psychological well-being of some it may be harmful to others; similarly, a fault-based tort system may be therapeutic for some plaintiffs but may cause anxiety for those who do not like the stress of litigation, and a broader unconscionability doctrine may teach self-esteem in some cases but produce a loss of self-esteem in others (Slobogin, 1995)

While questioning what constitutes a therapeutic outcome is an important concern, Fischer (2003) considers the application of therapeutic jurisprudence theory to be particularly problematic. He suggests that therapeutic jurisprudence theory is primarily concerned with social control, using the “coercive potentials of the law in conjunction with methods of rehabilitation and treatment” (2003: 229) to achieve ‘therapeutic outcomes.’

Given these ambiguities surrounding therapeutic jurisprudence, some argue that the perspective has only served to bolster an expanding therapeutic state, serving the interests of government bureaucracy, legal authorities and health professionals rather than helping those individuals in need. For example, Petrila (1993) criticizes the application of therapeutic jurisprudence from an individual rights perspective. He questions whether making policy decisions about people’s lives, such as encouraging their participation in treatment plans and persuading them to make choices and commitments, is therapeutic.

He suggests that individuals in need should be active participants in any discussion about what is best for them.

In response, Wexler (1995) maintains that therapeutic jurisprudence is "... a mere lens or heuristic for better seeing and understanding the law" (221), and therefore the concept should not be confined by a strict definition. He explains that such an open-ended approach allows for a healthy debate and discussion with room for conceptual growth. Further, he states that therapeutic jurisprudence theory emerged from academic circles (i.e. researchers, scholars), and not from legal-political decision makers. What ultimately is regarded as therapeutic, Wexler reminds us, is determined by socio-political decision-makers and not by the internal content of therapeutic jurisprudence. A therapeutic jurisprudence perspective seeks only to identify laws, legal procedure, and legal roles that promote well-being in various legal situations, but is not necessarily concerned with resolving these issues. This pragmatic and limited mandate may explain why therapeutic jurisprudence has become widely accepted and practiced by many judges (Carson, 2003).

Winick (1997) remarks that a therapeutic jurisprudence interpretation of the law consistently emphasizes the benefit of individual autonomy and self-determination. Similarly, Madden and Wayne (2003) describe principles of therapeutic jurisprudence as being consistent with social work and social justice, where "[i]ndividual needs are recognized, disproportionate harm to vulnerable populations is suspect, and change efforts can be instituted with large systems or policies, as well as with individual actors" (345). For example, criticizing the labelling of individuals with mental illnesses as incompetent; supporting the right to refuse treatment; proposing that mental illness be



defined narrowly for purposes of civil commitment and involuntary treatment; and criticizing the incompetency to stand trial doctrine are all examples of applying therapeutic jurisprudence while strengthening individual autonomy. This is in sharp contrast to the aspirations of a therapeutic state: "...the thrust of much of the existing therapeutic jurisprudence work is that the individual's *own* views concerning his or her health and how best to achieve it should generally be honoured" (Winick, 1997: 192, emphasis added). Accordingly, the focus of therapeutic jurisprudence is mostly on benefiting the life of the individual, rather than on moral obligations toward others.

In the past, therapeutic jurisprudence was principally concerned with examining substantive legal rules and legal procedures; however more recently there has been much interest in how legal actors – implementers, enforcers, and administrators of the law – perform their everyday functions. Winick (1997) suggests that lawyers, judges and their colleagues have a significant impact on how legal consumers adapt to the requirements of law. Accordingly, there is a need for these practitioners to recognize the benefit of their roles in helping others. For instance, Wexler (2003a) notes that the way a judge behaves at a sentencing hearing can actually, in and of itself, influence how an individual complies with conditions of probation. Another example involves judicial behaviour during the plea process. While some judges may address the lawyers and limit interaction with defendants, other judges may engage in lengthy exchanges with the latter. How do these different approaches affect defendants? As Ericson and Baranek (1982) assert, defendants are typically silenced during the regular court process because they "lack organized means of altering their dependant position, in the face of an organization of criminal control that is very large and powerful in its own right" (216).

While therapeutic jurisprudence theory does not necessarily provide answers to these and other questions, it “sharpens the debate” (Wexler, 2003a) and underscores the need to consider these types of issues: “Therapeutic jurisprudence proposes to use a therapeutic interpretive lens to make sense of and ultimately change a wide range of legal practices, behaviors, and rules” (Nolan, 2001: 185).

Some have criticized therapeutic jurisprudence’s apparent inability to precisely measure the impact of legal rules and practices on the individual. For instance, Slobogin (1995) highlights the lack of a complete knowledge base among the social sciences, and specifically identifies the challenges of measuring therapeutic (or anti-therapeutic) consequences within a socio-legal context, what he describes as a necessary step in evaluating therapeutic jurisprudence. He claims that ‘true experimentation’ in legal contexts, which requires randomization, is hampered by ethical and constitutional considerations surrounding human participants.

Winick acknowledges this weakness, but maintains that social scientific research is still of benefit to the law: “The perhaps inevitable indeterminacy of such research does not vitiate its usefulness; it merely requires caution in its use ... Decisions ... often need to be made in the face of uncertainty, and frequently are made based on available knowledge” (1997: 196). In line with this, it is the responsibility of researchers from various disciplines to identify laws, systems, and procedures that promote general well-being. For instance, in Senjo and Leip’s (2001) empirical study of a Florida drug court, their findings indicate that therapeutic jurisprudence theory does have explanatory power for understanding how the drug court processes positively and negatively impact offender behaviour change. Their research demonstrates the importance of a social scientific

study in understanding how the law is better able to promote effective legal results by identifying the perceived consequences of various legal arrangements.

The literature on therapeutic jurisprudence has revealed the implications of having judges assume a therapeutic role in the regular court system. Casey and Rottman (2000) quite perceptively remark that the concept and practices of therapeutic jurisprudence have never been completely foreign to the criminal justice system: "Courts have implicitly adapted procedures and judges have reached case decisions using the basic logic of therapeutic jurisprudence. Practices with long histories and wide acceptance among judges and lawyers, particularly in the areas of mental health, family, and juvenile law, are consistent with therapeutic jurisprudence principles" (1). For instance, before therapeutic jurisprudence theory emerged, Hoffman (2000), a critic of therapeutic jurisprudence, admits that in traditional court, he had "sprinkled some social tinkering" into his judicial activities, "regularly imposing as conditions of felony probation such requirements as finishing high-school, getting a Graduate Equivalency Diploma, getting a job, or even ... completing a drug treatment program" (1478).

Because therapeutic jurisprudence is concerned with legal outcomes and effects, proponents state that it goes beyond a mere commonsensical approach to justice, and therefore has further applicability to legal thought and reform. The next two sections discuss the role of therapeutic jurisprudence theory in a number of different legal areas. Following this discussion, I will then turn to the rise of 'specialized courts' or 'problem-solving courts,' and how they represent a practical application of therapeutic jurisprudence in the criminal justice system.

## **Legal Implications of Therapeutic Jurisprudence**

Although therapeutic jurisprudence arose from mental health law, it has since expanded, and is relevant to numerous legal fields which address various health, social and psychological problems such as drug addiction, sex offending, juvenile delinquency, domestic violence, child abuse, tort injury, victims of crime, employees suffering from job-related injuries, lawyers suffering from occupational stress, and people afflicted with disabilities and other medical problems (Winick, 1997). Other criminal justice issues fit within the realm of a therapeutic jurisprudence analysis, and some examples of these include the sentencing process, setting conditions of probation, accepting guilty pleas, and addressing offender rehabilitation in the court process (Winick, 1997, Merrigan, 2000). This section will describe how therapeutic jurisprudence is applied to the law in dealing with some of these issues.

Much of what therapeutic jurisprudence theorists advocate is based on the psychology of procedural justice and behavioural science research in general. Birgden and Ward (2003) describe 'pragmatic psychology' as providing a conceptual framework for therapeutic jurisprudence: "... the ontological, epistemological, methodological, and normative commitments associated with pragmatic psychology are thought to warrant the basic assumptions of therapeutic jurisprudence" (342). In this sense, underlying principles of psychology are used to determine ways in which the law can enhance the well-being of individuals (i.e. more therapeutic) who experience the law (Birgden and Ward, 2003). For instance, previous work on the psychology of procedural justice has demonstrated that if individuals suffering from health and social problems are treated

with dignity and respect at court hearings, they will experience greater satisfaction and will be more willing to accept the outcomes of court proceedings.

Birgden and Ward (2003) state that individuals in trouble with the law are more receptive to change depending on how they respond to their distress. Accordingly, the criminal justice system plays an important role in this process: “In our view, aspects of the criminal justice system should capitalize on such ‘therapeutic moments’ in order to maximize the beneficial effects of the law and minimize resistance to change” (Birgden and Ward, 2003: 334-335). According to Winick and Wexler (2003), this is precisely the goal of therapeutic jurisprudence – namely, individuals are given the ability to tell their story; they are given the feeling that what they have said has been taken seriously by court officials; and they are generally treated in ways that they consider to be fair (129). For instance, Clark (2003) suggests that drug treatment court staff who consistently show empathy towards participants, through such techniques as ‘reflective listening,’ increase the chances of creating and maintaining positive relationships between staff and participants. Other external factors that could positively influence an individual’s experience in the court process are acceptance, warmth/self expression, hope and expectancy, conveying an attitude of hope without minimizing the problem, and becoming future-focused (Clark, 2003). Accordingly, individuals affected by the court process are less likely to believe that they are being treated unfairly (i.e. coercion in the legal process), and they will be more likely to accept or choose various rehabilitative programs as part of their sentence if they are given the option. As a result, there is a greater likelihood for individual participation (e.g. in the court process and in

rehabilitative programs), and greater potential for treatment success (Wexler and Winick, 2003).

According to therapeutic jurisprudence theory, the court process – the law, legal procedure and the roles of legal actors – will invariably affect how individuals comply with court decisions. During court, much of what legal actors say and do is clearly influenced by the law and legal procedure. While therapeutic jurisprudence theory acknowledges this fact, it asks us to further explore how this relationship could possibly impact an individual's perception of his/her court experience. Rottman (2000) states that therapeutic jurisprudence can be analysed and practiced on many different levels, and that such an inquiry is possible in many types of legal environments. He identifies the judge-offender interaction as an example of the most basic level. Winick (2003) describes this interaction:

Even though judges may strongly disapprove of the individual's conduct, they must strive in the judge-offender dialogue to be supportive, empathetic, warm, and good listeners. These are highly sensitive conversations and offenders will be less likely to recognize their problems and resolve to deal with them effectively if they perceive the judge to be cold, insensitive, or judgmental ... Just as physicians need to develop their 'bed-side manner', judges need to develop what can be termed their 'bench-side manner' (5-6).

Other levels of analysis include a specialized court environment, connections to providers of social and other services, and changes to legal statutes, court rules, and policies.

Accordingly, a therapeutic jurisprudence perspective can be applied to many different types of legal cases. It is beyond the scope of this section to address them all; however, three examples from the literature are particularly instructive and merit further discussion: labelling someone incompetent during civil commitment cases; accepting 'no

contest' pleas in sex offence cases; and examining the role of preventive law. In addition, 'specialized courts' or 'problem-solving courts' are an example of a recent development where therapeutic jurisprudence puts its theory into practice.

### ***Incompetency to Stand Trial***<sup>9</sup>

In criminal trials in the United States, the issue of defendants' competency may be raised if at any time in the criminal proceedings they appear mentally ill.<sup>10</sup> If the court finds the defendant incompetent, it suspends the criminal proceedings, and remands the defendant for treatment to restore competency (Winick, 1996).<sup>11</sup> When the court is satisfied that the defendant is competent, criminal proceedings resume. Winick (1996) states that judges must be wary of conducting civil commitment hearings<sup>12</sup> in a manner that presumes an individual to be incompetent. He states that "labelling an individual incompetent and thereby depriving them of the opportunity for self-determining behaviour induces feelings of helplessness, hopelessness, depression and low self-esteem" (1996: 37). For instance, the rationale for any treatment recommendations by the judge or an expert

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<sup>9</sup> I am referring to the "incompetency to stand trial" doctrine in the United States rather than the Canadian "unfit to stand trial" determination since therapeutic jurisprudence has only been related to the former in the literature. To be found unfit to stand trial in Canada, the individual must, on account of mental disorder, be unable to conduct his/her defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so. In particular, the unfit individual must be unable to understand the nature or object of the proceedings, the possible consequences of the proceedings or communicate effectively with counsel (sec. 2, *Criminal Code* of Canada). According to sec. 672.23(1) of the *Criminal Code*, "Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried." The main objective of fitness hearings in Canada is to restore fitness in order that the criminal trial can proceed. Please refer to sec. 672 of the *Criminal Code* of Canada for a detailed description of the Canadian standards on this issue.

<sup>10</sup> All American jurisdictions deem defendants incompetent to stand trial if, as a result of mental illness, they are unable to understand the nature of the proceedings or to assist counsel in making a defense. A court will typically appoint several clinical evaluators to conduct a formal assessment of the defendant's competency. These clinical evaluators examine the defendant and then submit written reports to the court (Winick, 1996).

<sup>11</sup> If such restoration is thought to have been achieved, a new round of evaluations and hearings will occur.

<sup>12</sup> In the United States, civil commitment is the process in which a judge decides whether a person who is alleged to be mentally ill should be required to go to a psychiatric hospital or accept other mental health treatment.

witness should be explained clearly and directly to the patient. Further, a sense of optimism should be communicated to the patient with regard to his/her treatment (Winick, 2003). Because of the potential 'antitherapeutic' effects of the incompetency label, Winick (1996) recommends that legal decision makers " ... redesign legal standards, procedures, and the roles of counsel, judges, and other legal actors in ways that are calculated to avoid or minimize ... damaging effects ... Incompetency should be narrowly defined and competency should be presumed ... the terminology of incompetency labels should be redesigned to reflect the limited and context-specific nature of individuals' impairment" (57).

### ***'No Contest' Plea***

In sex offence cases in the United States, because of busy court dockets, it is common for judges to accept 'no contest' or *nolo contendere* pleas<sup>13</sup> in order to expedite court processing of cases. In the law, a plea of 'no contest' means that a defendant will accept the consequences of a conviction without admitting guilt (Wexler, 2003b). A 'no contest' plea reduces the possibility of a lengthy trial; allows the defendant to avoid pleading guilty; and precludes the possibility of future legal action. While initially this outcome may seem beneficial to the offender, therapeutic jurisprudence scholars look more deeply into the issue. Allowing a defendant to plead 'no contest' could be considered anti-therapeutic: defendants may be more likely to remain in denial and resist successful treatment, placing them at a higher risk of reoffending (Bibas, 2003). Much of therapeutic jurisprudence literature suggests that, when confronted with the facts, offenders should acknowledge their own guilt and take responsibility of their actions to

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<sup>13</sup> In Canadian law, the 'no contest' or *nolo contendere* plea does not exist, and there is nothing equivalent.



facilitate positive change. While abolishing the ‘no contest’ plea in the law may facilitate this process, La Fond and Winick (1998) argue that judges should be more vigilant in declining to accept the plea when given the discretion. Faced with overwhelming evidence of guilt, the insistence on a guilty plea may render sex offenders more willing to accept responsibility and receive treatment.

### ***Preventive Law***

In the United States, preventive law is a future-focussed approach to legal principles and practice that seeks to anticipate and avoid legal problems so that legal consumers are not presented with unnecessary legal problems or take needless risks. Winick (1999) writes that therapeutic jurisprudence is integrated in practice with preventive law, and specifically in preventive lawyering. Preventive lawyers act more like ‘therapeutic agents,’ with enhanced interpersonal skills, and a solid knowledge base of their clients’ psychological and emotional needs. In line with therapeutic jurisprudence, preventive lawyers recognize the importance of the lawyer-client interaction on the emotional well-being of both parties (Winick, 1999). While formal training in psychology and social work is not required in preventive law, preventive lawyers working in the field have a basic understanding of some principles of psychology: “Just as a basic understanding of the principles of economics can improve the functioning of an antitrust lawyer or business lawyer generally, an understanding of psychology can increase the effectiveness of the preventive lawyer” (Winick, 1999). For instance, in the context of criminal law practice, Wexler (1999) looks at how the behavioural science literature on rehabilitation and relapse prevention can be used by criminal defence lawyers and their clients to

propose plausible probationary dispositions.<sup>14</sup> In line with a therapeutic jurisprudence/preventive law perspective, he discusses how the legal system might be restructured to facilitate rehabilitation through the process of offender reasoning:

If courts require the preparation and submission of [relapse prevention] plans as a prelude to considering conditional release, lawyers can be expected to quickly acquire a familiarity with the area ... By engaging the client to think through his or her behaviour patterns that lead to criminality, by engaging the client to devise ways both to avoid high-risk situations and also to cope with such situations should they arise, a criminal lawyer in essence is engaging the client in the cognitive-behavioural change process of relapse prevention planning. If such action leads to more (and more successful) probationary sentences, this sort of lawyering may come to constitute a highly challenging and rewarding form of criminal law practice (Wexler, 1999: 1032-1033).

While some observers view preventive lawyering as analogous to traditional lawyering, stating that preventive lawyering is what lawyers do already, supporters of the therapeutic jurisprudence/preventive law perspective suggest that it takes on a more holistic approach, whereby lawyers can help their clients address a variety of other problems, and prevent the possibility of future legal ones.

### **Specialized or Problem-Solving Courts**

In the past decade, specialized or problem-solving courts have appeared in response to rising caseloads and continued frustration over traditional approaches of processing many cases characterized by ongoing social and health problems. Bakht (2004) expresses the source of this frustration: “The adversarial nature of the traditional criminal justice model cannot effectively handle the complexity of certain human and social problems, where failing to deal with fundamental causes almost guarantees re-offending” (1). To address

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<sup>14</sup> Recent studies in rehabilitation indicate the relative success of cognitive-behavioural models involving relapse prevention planning. Most successful programs involve persons who are already in prison or on probation (Wexler, 1999).

the 'revolving-door' of addiction-motivated criminal activity, the Dade County Drug Court in Florida was implemented in 1989 as the first modern specialized court in North America. Since the Florida Drug Court began operation, numerous types of other specialized courts, with a problem-solving orientation, have arisen. Mental health courts, domestic violence courts, community courts, Aboriginal courts, teen/youth courts, reentry courts and others are currently in existence in North America. In Canada, two drug treatment courts, one mental health court, one domestic violence court, and one Aboriginal court began as a result of judicial initiative and an increase in community expectations of the court system (Bakht, 2004: 5). Berman and Feinblatt (2003) identify seven general trends that have contributed to court specialization: changes among social and community institutions that traditionally addressed social and health problems; the struggles of governments in dealing with these problems; a dramatic rise in incarceration populations; trends emphasizing accountability of public institutions and technological innovations; advances in therapeutic interventions; shifts in public policies and priorities; and rising caseloads resulting in an increased frustration by both the public and other system players (76). In part, this demonstrates that while specialized courts were initially created in response to practical concerns (i.e. increased efficiency in case processing), a more effective approach was needed, within the court process itself, to specifically address the underlying health and social problems associated with crime.

Indeed, as Wexler and Winick (2003) purport, specialized courts transform many aspects of the court process, particularly the role of the judge. Table 3.1 provides a comparison of the traditional and altered court process, the latter being typical of a specialized court. Considering the nature of these transformations, it is not surprising

why some regard therapeutic jurisprudence as a theoretical foundation for specialized courts.<sup>15</sup> Some of the main principles of therapeutic jurisprudence used in specialized courts are integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behaviour, multidisciplinary involvement, and collaboration with community-based and governmental organizations (Winick, 2003: 4). It is important to note that specialized courts emerged separately from therapeutic jurisprudence. Moreover, as specialized courts continue to be implemented, many judges still may not be familiar with therapeutic jurisprudence, because as Nolan (2001: 190) explains, what motivates specialized court judges “are not theoretical quandaries but pragmatic concerns ...”

**Table 3.1: A comparison of transformed and traditional court procedures**

<b>TRADITIONAL PROCESS</b>	<b>TRANSFORMED PROCESS</b>
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim- or case-oriented	People oriented
Rights-based	Interest- or needs-based
Emphasis placed on adjudication	Emphasis placed on post-adjudication and alternate dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent-based	Planning-based

<sup>15</sup> In “Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?”, Rottman (2000) discusses the necessity of having specialized courts as a practical application of therapeutic jurisprudence theory. From an operational and organizational perspective, he lists ways in which specialized courts both encourage and hamper therapeutic outcomes. Rottman fails to make any firm conclusions, but he does suggest that “[t]he fate of therapeutic jurisprudence as applied in the courts today is linked closely with the future of the new special court forums” (26).

<b>TRADITIONAL PROCESS</b>	<b>TRANSFORMED PROCESS</b>
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective

Source: Warren, Roger K., "Reengineering the Court Process," Madison, WI, Presentation to the Great Lakes Court Summit, September 24-25, 1998.

In a specialized court setting, the "traditional views of justice recede in importance" (Nolan, 2001: 204). In these new courts, some question whether it is possible to uphold traditional legal principles such as separation of powers, due process, judicial impartiality and equal justice under the law. Christean (2002) argues that entrenched legal doctrine is being compromised for the sake of perceived therapeutic objectives. Further, many critics, including some judges, oppose this modification of the traditional judicial role: "It poses serious threats to the judicial process because this court 'intervention' distorts the judicial process and the role of judges in it" (Christean, 2002). Hoffman (2000) warns that given "the awesomely enforceable nature" of judicial powers, it is a hazardous endeavour to encourage judges to go beyond their expertise: "I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to 'do good' rather than to apply the law" (1479).

In response to these criticisms, Rottman (2000) contends that, given the frustrations judges were experiencing, the style of judging was changing even before specialized courts came into existence. Indeed, there was interest, among all stakeholders, in addressing the social and/or health problems of individuals affected by the law; and therefore, specialized courts are intentionally biased towards an individual's specific circumstances and his/her rehabilitation. Legal principles, like separation of

powers, judicial impartiality and equal justice under the law, become irrelevant in a specialized court environment. Accordingly, many therapeutic jurisprudence and specialized court enthusiasts support fundamental role and procedural changes to the court process, as they “appea[r] comprehensively to reshape the very essence of criminal adjudication and fundamentally to redefine the meaning of justice in the process” (Nolan, 2001: 192).

The growth of therapeutic jurisprudence and specialized courts occurred around the same time and they both have similar goals. A realization that the two were compatible provided the impetus for this study of therapeutic jurisprudence in the context of the Toronto Drug Treatment Court.

### **Interpretive Approach to the Research**

For the purposes of my thesis, therapeutic jurisprudence is defined as a social scientific and legal theory that examines the relationships between legal and therapeutic arrangements and their outcomes. To better understand whether the Toronto Drug Treatment Court is subscribing to a therapeutic jurisprudence approach, the theoretical framework for this study draws upon principles of therapeutic jurisprudence in order to examine the relationship between court and treatment communities. As demonstrated in previous discussion, therapeutic jurisprudence scholars focus primarily on the therapeutic transformations of the legal system. However, as described in the previous section, treatment also experiences major changes. Accordingly, a therapeutic jurisprudential analysis of any drug treatment court must examine the dynamics of the relationship between treatment and the legal system. Identifying court monitoring strategies, sanctions and rewards, treatment components, as well as the perspectives of both criminal

justice practitioners and treatment providers is essential to the study of a drug treatment court in a therapeutic jurisprudence context.

In order to understand the application of therapeutic jurisprudence theory to the Toronto Drug Treatment Court, my analysis will specifically take into account the perceptions of interviewees and the human experience of courtroom proceedings. I will access these phenomena by generating grounded theory from data that have been systematically gathered and analyzed through the research process (Strauss and Corbin, 1998). Grounded theory is inductively developed, and emerges through a constant interaction with the research data which comprise a starting point, or tool, for theoretical thinking. As Strauss and Corbin emphasize, “[g]rounded theories, because they are drawn from data, are likely to offer insight, enhance understanding and provide meaningful guide to action” (1998: 12).

In addition to assuming a therapeutic jurisprudence perspective, my research inquiry is “human-centred” (Palys, 1997). A phenomenological outlook asserts that humans actively control their living experience: “...to understand human behaviour [one] must take into account that humans are cognitive beings who actively perceive and make sense of the world around them, have the capacity to abstract from their experience, ascribe meaning to their behaviour and the world around them, and are affected by those meanings” (Palys, 1997: 16). As Palys (1997) argues, a study following a phenomenological perspective must focus its research on human perceptions: “... if perceptions are real in their consequences, and a major determinant of what we do, then clearly we must understand them and their origins” (17). Accordingly, one of the primary goals of this research is to understand the relationship between therapeutic

jurisprudence and the TDTC program, and how this relationship is perceived by each interviewee; that is, how it functions and exists from the point of view of TDTC workers. For this project, therapeutic jurisprudence will combine with grounded theory and a phenomenological perspective to conceptualize my research data.

### **Research Questions:**

My review of existing literature, court observation data, and interview work on therapeutic jurisprudence and the TDTC will address three key questions:

- 1. How have the roles of both criminal justice practitioners and treatment providers changed with the introduction of the TDTC?**
- 2. What is the nature of the relationship between criminal justice and treatment in the TDTC, and what does this relationship reveal about therapeutic jurisprudence?**
- 3. How might the court proceedings specifically embody therapeutic jurisprudence in the TDTC?**

### **Research Design**

#### **Research Objectives and Overview**

Given that drug treatment courts have only recently been implemented in Canada, and that therapeutic jurisprudence literature is primarily of American scholarship, there has been little research analyzing the implications of therapeutic jurisprudence on drug treatment courts in this country. Overall, the literature is bereft of qualitative analyses assessing therapeutic jurisprudence in the context of specialized courts. The present research focuses on the first Drug Treatment Court in Canada – the Toronto Drug



Treatment Court (TDTC) – and adds an exploratory and qualitative dimension to drug treatment court research.

The primary goal of this study is to apply a therapeutic jurisprudential analysis to the TDTC. To add a qualitative dimension to drug treatment court research, I am interested in gaining some insight on therapeutic jurisprudence as it pertains to the perceptions and experiences of TDTC workers. The qualitative nature of this project is a major strength. Qualitative research aims to generate experiential knowledge by describing multiple realities from the perspectives of participants and by generating in-depth information about the TDTC experience. Indeed, as Silverman (2000) espouses, using a human-centred methodology like qualitative research “... can provide a ‘deeper’ understanding of social phenomena than would be obtained from purely quantitative data” (8).

Having surveyed existing literature on therapeutic jurisprudence in the context of drug treatment court research in North America, I will link the conceptual features of therapeutic jurisprudence to the three research questions stated above, examining the experiences and perceptions of the TDTC staff, as well as focussing on the court process itself.

First, information about the varied roles of TDTC staff is examined by drawing from the accounts of my research participants. In particular, I will explore how the roles of criminal justice practitioners and treatment providers in the TDTC have been altered to accommodate a fundamental shift in thinking about drug treatment in the criminal justice system. Included in this section is a demographic description of the interviewees, the

strengths and challenges of their positions, and the overall impact of these new roles on their work.

Second, drawing from the accounts of TDTC professionals, I will describe the relationship between criminal justice and treatment in the program. The dynamics of this partnership are examined by engaging participants in discussions around the effectiveness of the program, and how the interaction between criminal justice and treatment has influenced the program in general.

Third, I will look at how TDTC court proceedings embody therapeutic jurisprudence. In particular, I will focus on the judge-participant interaction. One innovative project undertaken by Petrucci (2002) uses a therapeutic jurisprudence perspective to describe the process of a specialized domestic violence court in the United States, focussing on the judge's role, and on identifying the main components of the court. Based on observations over a six-month period, and 29 open-ended interviews with professionals involved in the court, Petrucci uses a therapeutic jurisprudence model of analysis. Her work is the first of its kind, and is particularly useful to the present study.

Lastly, I will determine how therapeutic jurisprudence, as a concept, is perceived by the TDTC staff. Specifically, I will examine their knowledge of the term, as well as assess their general understanding of its applicability to the TDTC.

It is my hope that this investigation will generate valuable knowledge and make a substantive contribution to the Drug Treatment Court concept, as well as add to the development of therapeutic jurisprudence theory. From the standpoint of the various stakeholders, the ability to clearly define the therapeutic process in the TDTC may be a

determining factor in gauging the scope and practical application of therapeutic jurisprudence.

By engaging with the perceptions of TDTC staff, as well as observing the relationships and interactions of individuals involved in the court process, this study has the potential to advance our knowledge of a unique approach to addressing substance-using behaviour.

### **Data Sources and Collection**

The primary research method selected for this qualitative exploratory study involved face-to-face interviews with the TDTC staff. As a supplementary part of the study, I also undertook court observation. By engaging in a two-pronged analysis of this kind, I am able to "... obtain a better, more substantive picture of reality; a richer, more complete array of symbols and theoretical concepts; and a means of verifying many of these elements" (Berg, 1989: 4). Further, this type of design allows me to apply the two data sources either separately or in tandem to different research questions.

Data collection began in March 2004, following ethics approval from Simon Fraser University. The research was undertaken in Toronto, Ontario. Initial contact with the TDTC program was by way of an introductory e-mail, followed by a telephone call to the program manager, the presiding full-time judge, and the community coordinator. In the letter and phone calls, I briefly outlined the proposed research, and within two weeks, I received approval from these individuals to conduct my research.<sup>16</sup>

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<sup>16</sup> While I received general approval to conduct my research, the program manager and judge cautioned that it would be the decision of each staff member to participate in the study.

### *Face-to-Face Interviews*

Using a non-probabilistic procedure of purposive sampling, with assistance from the program manager and community coordinator, I highlighted eighteen professional staff who were appropriate for my research. With this sampling method, “people or locations are intentionally sought because they meet some criterion for inclusion in the study” (Palys, 1997: 137). For the purposes of my research, the individuals selected for interviews were eligible because they worked directly in the program, having extensive knowledge of TDTC operation, and specifically of the court process itself.<sup>17</sup> Six therapists/case managers, four lawyers, three judges, two court liaison workers, one probation officer, one program manager, and one community coordinator were approached for an interview, and all but one therapist/case manager agreed to participate.<sup>18</sup> Accordingly, I was able to conduct seventeen interviews for my research.

When I arrived in Toronto, I contacted each potential interviewee either by email or telephone, and requested their participation in my research. It was at this point that any questions potential participants had were answered openly, providing full disclosure of the research objectives and specifications. If an individual agreed to be involved in the study, I arranged a specific time and interview location at the participant’s convenience during a telephone conversation. Finding a time to conduct interviews proved to be somewhat challenging given that most of the individuals had demanding workloads affording them limited time for involvement in research projects.

In preparation for the interview, each participant was given an information study sheet to look over. This sheet outlined the major objectives of the research. In addition,

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<sup>17</sup> As Palys (1997) states, a limitation of this method of sampling is that choices of interviewees “may indirectly reaffirm rather than challenge” our understanding of the phenomenon of interest (137).

<sup>18</sup> One therapist/case manager declined to participate because she was too busy.

each interviewee was asked to sign a consent form (see Appendix A), which outlined privacy issues, assuring participants complete confidentiality. The interview questions (see Appendix B) were shaped by the research questions and themes outlined earlier, as well as by other areas of interest to drug treatment courts more generally.

In qualitative research of this kind, the interview process has many advantages over other methods of inquiry: “Face-to-face interviews tend to be longer and more detailed, tend to seek greater depth of response, and tend to be more open-ended in their construction...” (Palys, 1997: 155). These interviews comprised an excellent means of elaborating respondent knowledge and opinions on key questions, and of clarifying any outstanding issues about how the Drug Treatment Court operates. In addition, the interview process assisted me in developing a strong measure of rapport with the interviewees, which correspondingly could have long-term benefits for future research. Some limitations to conducting face-to-face interviews are the time, energy and depth of response needed, availability of the participants, and other conditions that may influence the collection of interview data (Strauss and Corbin, 1998; Palys, 1997).

The interview schedule for the TDTC staff consisted of approximately 30 questions; however, the number of questions asked varied among the participants.<sup>19</sup> All of the interview questions were semi-structured and open-ended. Sixteen out of the seventeen interviews were tape-recorded using a dictaphone.<sup>20</sup> During the interviews, I also took notes to help with the transcription process. The interviews took an average of

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<sup>19</sup> Although I directed many of the same questions to all the interviewees, there were questions which were applicable only to some. For instance, asking a therapist whether he/she is a ‘therapeutic agent’ is tautological, and of little benefit to the research. In addition, the interview schedule for the judges is longer because of the vital role they play in the court process.

<sup>20</sup> One of the judges asked not to be tape-recorded. As an alternative, I took detailed notes of this interview.

1¼ hours to complete, ranging in length from 40 minutes to 2½ hours. Due to their busy schedules, I had to meet with four individuals over the course of two days to finish their interviews.

All of the interviewees were pleased to answer my questions, offering detailed accounts of their experiences and perceptions of working in the TDTC. However, due to participants' busy schedules, some of the interviews were rushed (especially those with the judges). As a result, in a few instances, selected responses could not be fully explored and all questions were not asked.

### ***Court Observation***

As a supplemental part of my research, I engaged in an observational study of two pre-court meetings<sup>21</sup> and 14 TDTC courtroom proceedings. Due to the limited time that I was staying in Toronto (i.e. two months), I used convenience sampling, observing the maximum number of proceedings possible. Observational study is concerned with behaviour in its real-world context, allowing researchers to examine various phenomena as perceived by the participants themselves (Berg, 1989). A major strength of participant-observation is that it helps the researcher “discover the everyday, commonplace, nonverbal behaviours by which we unconsciously express cultural rules” (Del Balso and Lewis, 1997: 203). On the other hand, a disadvantage of observational work is that it tends to yield a large amount of data, comprising a diversity of descriptions, which makes it complicated and time consuming to analyze (Del Balso and Lewis, 1997).

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<sup>21</sup> As an external researcher, I was only permitted to observe two pre-court meetings.

The two pre-court meetings occurred in a conference room at Old City Hall before court, and each lasted around 45 minutes.<sup>22</sup> All of the court observation data collected came from one courtroom at Old City Hall in Toronto. Court proceedings began at 3:00 pm on Tuesdays and Thursdays and usually lasted about two hours.<sup>23</sup> Court observation took place over a seven-week period from March to May 2004. Close to 300 individual progress reports were observed, where more than 20 participants could appear before the judge each day. Using a 'passive' method of participant-observation (Spradley, 1980), not taking on a role specific to the setting, I sat in the body of the court (usually towards the back) with TDTC participants and other observers from the public. From this position, I saw and heard everything that was going on in court, watched and discreetly took notes during the court proceedings. I maintained confidentiality in my notes, never using first and last names of participants. It is also important to note that informal conversations with both participants and staff occurred during the research process. This contact was recorded in my field notes. Focussing on place, actors, and activities (Spradley, 1980), I was particularly interested in the legal and medical discourse employed during court hearings, the roles assumed during the process, and the social interaction that unfolded among the various participants.

## **Data Analysis**

I transcribed all of the interviews in their entirety, and compiled the notes taken from court observations. Strauss and Corbin (1998) note the process of 'conceptualizing' as the first step of analysis. For the interview data, the interview questions (where thematic

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<sup>22</sup> It is important to note that a different judge and Crown counsel were present for each pre-court meeting.

<sup>23</sup> However, between 2:00-3:00 pm, the TDTC judge often dealt with individuals in custody who applied to (re)enter the program (i.e. remands). Observation of these proceedings (when they took place) was also part of my research.

classifications were determined prior to data collection) helped establish initial categorizations and themes. Using *QSR NVivo*,<sup>24</sup> interview and court observation data were organized into these manageable categories or themes. According to Kirby and McKenna (1989), the generation of such 'manageable data' involves "... the constant comparison of data items with other data items until sections that 'go together with' or 'seem to help describe something' can be identified and located together ..." (130).

Data were analyzed to identify similarities and differences of responses to questions. In addition, I compared themes drawn from previous literature and research examined with the data to determine thematic applicability and consistency. However, as respondents often gave multi-dimensional answers to questions, many other themes emanated from the data. I attempted to group similar or related sub-themes into broader themes or categories, thus establishing a connection between various sub-themes. Participant responses to each interview question were grouped together to form a framework for analysis. Often, because questions were open-ended, a response to a particular question would answer several other questions. As a result, this preliminary analysis had to be reorganized several times. Also, there were often many different responses to questions, which further complicated the categorization process. As Kirby and McKenna (1989) observe, this is often the case when analyzing qualitative research data.

A second analysis was conducted by outlining the research findings pertaining to themes and issues embedded in the research questions and interpretive approach guiding the research. This analysis involved a process of 'open coding.' Strauss and Corbin

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<sup>24</sup> *QSR NVivo* is a qualitative computer program which made the coding process faster and easier; however, the program was solely used as an organizational tool, and not for data analysis.



(1998) describe 'open coding' as the opening up of text and the resulting exposure of embedded thoughts, ideas, and meanings. My 'open coding' operations comprised *whole sentence and paragraph* coding for my interview data, and *line-by-line/word by word* coding for court observation data. Examining data in these ways helped to reveal the meanings behind discourse and the possible effects of these meanings. Strauss and Corbin (1998) describe this coding procedure as particularly valuable: "This approach to coding can be used at any time but is especially useful when the researcher already has several categories and wants to code specifically in relation to them" (120). Data were then analyzed by formulating well-defined issues and themes that emerged (i.e. thematic analysis). Kirby and McKenna (1989) label this step as 'analyzing the data': "... multiple bits of information, ideas and notes are grouped together according to the constant comparative method. The bibbits you have identified are coded and then placed with similar bibbits of data" (138). Themes that emerged from the interviews and court observation were pieced together to form a comprehensive picture of collective perceptions and meanings, while taking into account individual experiences and perspectives. By critically analyzing data and highlighting themes and categorizations, it was possible to establish the application of therapeutic jurisprudence theory to the TDTC.

*Discourse analysis* of interview and court observation data was also used to assess the relevance of findings to my research. Discourse analysis is concerned with examining text and speech in order to understand how meanings are produced (Ristock and Pennell, 1996). Discovering how language is used, through such methods as interviewing and court observation, was integral to my research. For example, analysing discourse in interview and court observation data can determine how social relations in

the TDTC court proceedings are perceived by defence and Crown counsel, and whether these perceptions are consistent with the views of the therapists/case managers.

By undertaking discourse analysis, through such strategies as ‘open coding’ and constant comparison, the opportunity for grounded theorizing emerged. Grounded theory is “theory [that can be] derived from the data, systematically gathered and analysed through the research process” (Strauss and Corbin, 1998: 12). So conceived, grounded theory contributed to the formulation of thematic coding.

Lastly, in preparation of writing, I considered how I wanted to approach the data. What themes, issues, and ideas emanating from the data needed to be addressed? Kirby and McKenna (1989) note that reflection is an important stage of the research before the writing process: “This is clearly a time for reflection on the data, the analysis and the destination of the research” (150). It was important for this study to highlight those results that best addressed the research questions outlined above, following the interpretive approaches used in this study.

Chapters Two and Three have presented a general review of the literature, theoretical framework and methods guiding this study. Chapters Four and Five will detail the major findings and discuss them in the context of the research questions.

## **CHAPTER FOUR: RESULTS AND IMPLICATIONS I – The Place of Criminal Justice and Treatment in the TDTC**

### **Introduction**

This and the following chapter consist of a two-part analytic presentation of research findings from my interview and court observation work. Both chapters present responses offered by criminal justice practitioners, treatment providers and other staff from my interviews, followed by a comparative overview of the responses where applicable. In addition, these chapters relate the results to the research questions in the context of a therapeutic jurisprudential framework that guides this project.

This chapter begins by outlining a demographic description of the interviewees involved in the study. The body of the chapter is then organized into two sections in order to provide a clear representation of findings in relation to the first two research questions addressed in this study.<sup>25</sup> The first section addresses the redefined roles of the TDTC staff and, in particular, staff perspectives concerning the implications of these transformations. Next, I review staff perceptions of criminal justice and treatment and how they relate to the constituent members' experiences in the program. Findings from this section shed some light on how each interviewee views the impact of this partnership on the TDTC program. In addition, this section will outline the broader association between treatment and control, and the extent to which this relationship influences our understanding of therapeutic jurisprudence.

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<sup>25</sup> The first two research questions are: 1) How have the roles of both criminal justice practitioners and treatment providers changed with the introduction of the TDTC? 2) What is the nature of the relationship between criminal justice and treatment in the TDTC, and how does this relationship impact our understanding of therapeutic jurisprudence?

## Demographics

### Interviewees

In terms of general experience and knowledge, the seventeen research participants,<sup>26</sup> with one exception,<sup>27</sup> have all worked in a related field for a substantial amount of time (ranging from 3 to 27 years) prior to joining the TDTC. They all claimed a good understanding of the issues pertaining to their respective fields. Before starting their present positions, both court liaison workers had been therapists in the program, and the Program Manager and Community Coordinator have had extensive experience working in many drug treatment related capacities.

Two of the criminal justice practitioners talked about their past involvement with treatment prior to the TDTC. Immediately after graduating from law school, one of the judges had worked in a community clinic, where many issues related to drug addiction were discussed with lawyers, doctors and social workers. Similarly, one Crown Counsel had been involved in children's mental health, addictions, and psychiatric crisis intervention.

While the TDTC is still fairly new, there has been some turnover in personnel throughout its six-year existence. Staff ranged in their experience working for the program. Among the eight criminal justice practitioners, one Crown Counsel, one Duty Counsel and all three judges had the longest involvement in the program, ranging from 2.5 to 7 years. While the Probation Officer had 1.5 years experience in the TDTC, one Crown and one Defence Counsel had commenced their current positions only 6 weeks

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<sup>26</sup> For convenience, I refer to the judges, lawyers and probation officer as criminal justice practitioners; and the therapists, court liaison workers, and program manager as treatment providers. The community coordinator is described separately.

<sup>27</sup> One Duty Counsel was called to the bar a year ago.

and 3 months prior to the interviews. Among the eight treatment providers, the Program Manager (at 5 years) and court liaison workers (at 5 and 7 years) had had the most experience in the TDTC, while one of the therapists had worked 4 years in the program. Three of the therapists had 3 years of experience, but another Therapist described herself as “the new babe,” having worked only 3 months. Finally, the Community Coordinator had just completed his second year on the job.

When asked about their training for the program, all of the participants explained that there was no formal instruction provided. Many described their preparation as “self-learning” or a brief orientation that consisted of reading literature, “observing,” “learning on their own,” “on the job” and “being thrust in.” Attending staff meetings, pre-court meetings, retreats, conferences and sitting in the Drug Treatment Court also played an important role when they started. Additionally, both Crown counsel and all three judges stated that they already had some experience working in a specialized or problem-solving court environment.<sup>28</sup>

When asked about their motivation to work in the TDTC, one lawyer and one judge responded that they were interested in a court process that was making an effort to limit criminal activity by reducing people’s drug dependence. Two of the judges noted that a new approach was needed to change traditional court practices, which were

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<sup>28</sup> They had all worked in the Gladue (Aboriginal Persons) Court and/or Mental Health Court. The Gladue Court derives its name from the 1999 decision of the Supreme Court of Canada – R v. Gladue – which provided the Supreme Court’s first interpretation of s. 718.2 (e) of the *Criminal Code* of Canada. This section was part of a comprehensive series of amendments made in 1996 to the sentencing law in Canada requiring that judges consider sentencing options other than incarceration, particularly for Aboriginal offenders. The Gladue Court’s goal is to make the judicial system more responsive to the personal and historic circumstances of Aboriginal Canadians. The Toronto Mental Health Court was designed to more effectively address non-violent offenders who are deemed mentally ill (but not insane) and fit to stand trial. The court operates in the early stages of the criminal justice process when the accused has a bail hearing. It is the only Mental Health Court in Canada. Both the Gladue Court and Toronto Mental Health Court are examples of specialized or problem-solving courts.

continuing “to fail both the offender and the community.” Other reasons given by the practitioners were related to staffing considerations; that it was “interesting,” “different,” “impressive,” “a nice marriage of previous work experience,” and “had potential for accomplishments.” The Probation Officer indicated that, prior to working at the TDTC, she had been very sceptical about joining the program, but had been later motivated to work there from her educational studies, and was now very happy to have become involved.

The treatment providers and Community Coordinator cited similar reasons for coming to the TDTC. Four providers and the Community Coordinator indicated that there was not much change from what they had been doing before. For instance, while some found the program “innovative,” “different,” “wonderful,” “interesting,” “fascinating” and had heard good things, two therapists, the Program Manager, and the Community Coordinator described their role as a continuation of previous work. One Court Liaison Worker and one Therapist expressed an interest in working with drug-addicted clients, while another Therapist highlighted that it was an empowering position to be working within an institutionalized system, such as a court.

### **Altered Roles and Responsibilities**

*“Either you accept the Drug Treatment Court or you don’t ... The whole thing is different to me and not too judge-like” (Judge)*

From the perspective of the research participants, this section explores the altered roles of TDTC staff, and examines the significance of these changes from their perspectives.<sup>29</sup>

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<sup>29</sup> The court liaison, manager, and community coordinator positions are unique to the TDTC, and therefore have no traditional functions with which to compare. However, these individuals commented on the distinctiveness of their roles.

When discussing their primary role, many of the interviewees identified more than one, and some listed key differences when comparing their TDTC function to a traditional treatment/criminal justice position.

## **Judges**

Perhaps the perspective of the judge best reflects the transformation of professional roles in a drug treatment court setting. As noted earlier, drug treatment court judges play a critical role in the program. However, in the case of the TDTC, the three judges were not prepared to speculate on the relative importance of their own role in the program.

During the interviews, the three judges observed that not every judge would be comfortable working in a drug treatment court. When asked to describe their role in the TDTC, they identified significant differences between their TDTC responsibilities and those of regular court judges. Consistent with the literature on drug treatment courts, the three respondents understood that certain aspects of traditional law did not apply. For instance, recognizing that the TDTC is post-adjudicative – that is, participants plead guilty as a precondition for entering the program – the judges viewed their role in the TDTC as being primarily one of supervision. One Judge depicted his role as “slotted” or very focused, different, and “not too judge-like,” stating that he has little discretion on bail conditions, and much less to judge generally in the Drug Treatment Court. Because participants plead guilty, he explained, there is no finding of fact or credibility.

Another Judge asserted that when making a determination of guilt or innocence in traditional court, he may not hear from the defendant at all during the proceedings, and usually his final contact with a defendant is during sentencing, when he is just “handing an individual’s case over to a probation officer.” Indeed, in the regular criminal court

process, the accused plays a passive and dependant role, and is treated more like an object that is acted upon rather than a voluntary participant in his/her trial (Boldt, 1998; Ericson and Baranek, 1982). Moreover, as an agent of the state, the regular court system takes control of an accused's case, and ultimately decides what is going to happen. In effect, as Christie (1977) writes, the accused and his/her conflict become property of the state.<sup>30</sup>

Conversely, in the Drug Treatment Court, after a guilty plea, the defendant is in regular contact with the judge until he/she is sentenced. In general, all three judges recognized that they have more interaction with participants in the program than occurs in regular criminal courts, and that their mandate is primarily to support these individuals in treatment. Traditional legal responsibilities, while still present, are limited because the DTC judge assumes more of a social service role. One Judge summed it up best: "... you're acting as an agent of change. You're looking at what the problems are and trying to assist in the future. So it's prospective. And trying to encourage, cajole, assist in getting people to admit, first of all, that they have a problem and then trying to assist them in finding solutions."

The judge's position in a drug treatment court is characterized as an interdisciplinary approach, heavy involvement in a participant's rehabilitation, and the explicit use of authority to facilitate positive change among individuals affected by the law. As Senjo and Leip (2001) point out, in a drug treatment court context, judges use support, guidance and the influence of the bench rather than harassment and intimidation

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<sup>30</sup> In "Conflicts as Property" (1977), Christie describes crime as an injury to personal relationships that belongs to those individuals involved (i.e. victim, offender, community). He argues that the state, represented by the courts, functions as a barrier by preventing the offender and victim from addressing the issue(s) that led to the criminal act.



to change the behaviour of program participants. Judges participate in a constructive, positive effort to help drug offenders change their lifestyles and drug using behaviour. Their role allows them to develop a continuous working relationship with participants through honesty and familiarity (Hora et al., 1999). DTC judges are responding to people whose crimes are motivated by drug addiction. They understand that certain aspects of traditional law may not apply. Accordingly, these judges have been described by some as 'agents' or 'facilitators' of treatment.

When the judges were asked if they would consider their function in the TDTC as one of treatment, criminal justice or both, and whether they would describe themselves as a 'therapeutic agent,' responses varied. One Judge held very different views from those of the other two judges on this issue. He stated that on an "obvious level" and in a "more superficial sense," he is contributing to an individual's treatment because the Drug Treatment Court model calls for a judge to facilitate access to treatment in a court setting. However, he explained that although he "may speak how a therapist might speak," "say what a therapist tells him to say" or show "minimal empathy" to participants in court, he did not consider himself a therapeutic agent, and saw his role strongly as being aligned with criminal justice imperatives:

I think there's a court in Drug Treatment Court. In practice, I think the model is a little weighted towards the treatment part of Drug Treatment Court ... I hear and have to accept the advice and input of other persons, most of whom are not lawyers, that's different ... It's all with treatment's view that these are just symptoms of the problem. They're to be expected. Relapse is to be expected. Deeper problems are just a bigger challenge ... But I'm probably more towards trying to maintain the formal structure of a court and application of the Criminal Code ... (Judge).

Interestingly, the Judge noted that his colleagues on the bench might disagree with him on this particular characterization of their respective positions in the DTC. Indeed, the

other two judges described themselves as therapeutic agents. Both judges were more willing to acknowledge the importance of their treatment responsibilities. For example, one Judge conceptualized his role in terms of his relationship with the treatment providers, stating that the latter do all the work, and that as a therapeutic agent, he approves whatever treatment is necessary providing it is legally appropriate.

Each judge also expressed a different level of comfort with working in the TDTC. One Judge was “quite comfortable,” having assumed an interactive role with defendants even before the DTC was in operation. He considered his redefined position in the DTC as a new paradigm that he is trying to “infuse” into the criminal justice system. The others, however, expressed some uneasiness with the role. One Judge confided that “[t]he new shoes still sort of rub,” while the other Judge found the role-playing aspect “a lot of effort,” “not natural” and “parent-like.” Despite expressing some discomfort, both judges claimed that their experience of working in the Drug Treatment Court has had a positive impact on their role in regular court. In particular, both stated that they see sentencing situations more from a perspective of root problems and potential treatment. For example, since working in the DTC, one Judge mentioned that he has shown far more interest in defendants’ criminal records. He stated that he questions defendants about their life situations during the gaps of time in their records, something he was less likely to do before joining the Drug Treatment Court. However, the two judges suggested that the use of therapeutic interventions in court has always been an important consideration in their work. Both interviewees were quick to declare that as judges, they are already required to look at the circumstances of defendants as part of general sentencing, especially when a conditional sentence might be appropriate.

## Lawyers

The ethical dimensions of practicing law in the TDTC must also be considered. All four lawyers stated that their responsibilities in the TDTC are similar to those in regular court. For instance, while securing a conviction is a given in the DTC, both Crown counsel stated that they still advocate for penalties during the court process, with an intent to reduce criminal activity and illicit drug use. However, the main distinction in the Drug Treatment Court, according to one Crown Counsel, is in their general prosecution practice, which involves their “giving people a leg up”:

To a certain extent, people’s actions are not their own when they’re under the compulsion of an addiction. I mean, their actions are their own in the sense that if it’s a regular drug prosecution, they’re still responsible for their actions, but obviously this program concentrates on the powerful motivating force of addiction and tries to deal with that directly rather than, sort of indirectly by the deterrent model.

In this sense, the interviewee realized that traditional punishment-oriented goals of the Crown are not compatible with drug treatment. However, both Crown counsel respondents did acknowledge that a balance should still prevail between the needs of the individual ‘addict’ and those of the public.

In general, all of the lawyers noted how the DTC benefited their work. One common response among the lawyers was that they had gained a better understanding of drug addiction, treatment, and the struggles of substance abusers from their close contact with participants in the DTC. In addition, from working closely with the other practitioners, a Duty Counsel said that she is better able to understand the perspectives of the other players involved in the program, citing a greater appreciation of both the Crown and judicial positions on certain matters.

One Crown Counsel stated that he has more discretion in the DTC to devise different kinds of responses, a strategy he said he tries to apply to his activities in regular court:

I think working in the Drug Treatment Court has made me feel as though I have permission to do that because I've had the discretion to work and come up with plans that would be otherwise unheard of in the regular court system. And because I've had that discretion in the Drug Treatment Court, I take that with me and apply it sometimes in the regular courts. So somebody will come by, and they'll say, "you know, I want this guy in Drug Treatment Court." And I look at his record and say, "this guy's not appropriate for Drug Treatment Court," for whatever exclusionary reason, whether it's violence or something else. I said, "well I recognize that he needs treatment, so if you can set up something, I'm willing to join you in a conditional sentence even though this is a case that's totally inappropriate for a conditional sentence, but you can set up something strict and a good plan, and we'll look at it."

From his work in the TDTC, this Crown prosecutor appeared to have become more favourably disposed to accepting new approaches to sentencing, and generally assuming a more appropriate and effective prosecution practice in regular court.

Respondents also mentioned the importance of establishing familiarity with participants. One Duty Counsel stated that she acted sometimes like a lawyer, therapist, big sister or mother, depending on the situation or issue. Similarly, the other Duty Counsel said that working in the Drug Treatment Court feels more like having 'clients' because he is consistently interacting with the same set of people: "I usually, you know certainly try to ... before court starts and that, say hello to everybody and kind of hang out a bit." Both Duty counsel observed that a defence lawyer is already involved in social work to a certain degree, but that this function is further pronounced in the DTC.

Likewise, both Crown noted the importance of getting to know the participants and their personalities. Such intimate knowledge helped them to focus on the care and

treatment programs of individual accused persons who come before the court. Indeed, one Crown Counsel admitted that he sometimes oversteps his mandate to be “the even-handed player,” and talks to participants if he thinks they are going to get themselves in trouble. Similarly, the other Crown Counsel underscored the importance of interacting with TDTC participants:

It’s not that common for me to pat them on the back or say yeah we’re very pleased with what so and so has accomplished ... but there was one participant recently, who we all agreed was just on the verge of struggling, and really needed some support. I made a point of staying behind after court that day and just speaking to her individually. Mindful of the fact that because ... I’m the hard line guy, there might be a kind of an extra boost to that, to me sticking around and just offering a few words of encouragement myself. So I think that’s there and it’s available ...

When asked about their role in treatment, similar to one Judge, the four lawyers talked about having primarily criminal justice responsibilities. They reported having little direct participation in the treatment aspect of the court. All of the lawyers stated that they do assist in the overall therapeutic court process; however, only one Duty Counsel accepted, somewhat hesitantly,<sup>31</sup> the term ‘therapeutic agent’ to describe his function in the DTC.

Both Crown described their role in terms of a carrot-stick analogy. For instance, if treatment is viewed as the ‘the carrot’ and court as ‘the stick,’ they identified themselves more with the latter. At the same time, however, they acknowledged being integrally involved in the treatment goals of the Drug Treatment Court: “I am probably more on the side of criminal justice ... but I could see how my role has some benefits to an individual’s treatment because that’s what’s going to hold their feet to the fire to see whether or not they’re going to comply” (Crown Counsel). While unwilling to accept

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<sup>31</sup> The Duty Counsel stated that he was unsure of the term’s meaning.

having direct involvement in treatment, there was still recognition by the interviewees that their role in the TDTC assists participants in supporting therapeutic arrangements.

For the most part, these four interviewees declared themselves to be to be fairly comfortable with working in the DTC. However, for one Duty Counsel this was not always the case. This interviewee said she initially had some difficulty accepting her clients being jailed in the program:

... I remember one time, one of the judges ... saying to me, "you are getting better able to deal with this," and I thought that was interesting, and so I said, "what do you mean?" ... And he said, "well I used to watch your face when you first came in the program, and when we would be arguing issues in court," like in particular, things that were going to affect a person's liberty ... He said, "I used to watch your face sometimes and you would take it very hard." And he said, "I saw that change over time." And I think he's right, I would never have necessarily noted that myself. But I think there was a change in what I originally thought was my role when I went in there, which was to be strictly the defence kind of lawyer person, you know, and I had to always be in that mode and always thinking that this was, a person could never go to jail, and a person could never have this happen or have these kinds of conditions put on their bail or something like that ... this person chose to be in this program, and they chose to be in this program because they wanted help. And so that sometimes means that there are issues that are going to come up that you have to look at it from a more treatment-oriented perspective ... I became comfortable and knowledgeable enough in my role to know when you fought very hard for something, and when you had to understand that there was another purpose for what was being suggested.

This individual admitted that it was still difficult to see participants go into custody, but for the integrity of the program, she realized this was sometimes necessary. In contrast to a defence lawyer's traditional role, the DTC defence lawyer may have to forgo legal defence tactics, counsel a participant to disclose continued drug use in order to facilitate effective drug treatment, and distance him/herself from the participant during the judge-participant interaction to ensure program completion (Hora et al., 1999).

Having worked for only six weeks in his position, one TDTC Crown discussed his hesitancy to “play-act” in court. Because he is the relatively less sympathetic player in the process, he stated that there is a danger for members of the court team to assume an assigned role in court. For example, he explained that as the dedicated Crown counsel in the TDTC, he wanted to ensure consistency between the decisions in a pre-court meeting and what he says in open court:

... what I don't want to do is stand in the Drug Treatment Court and play-act. I don't think it's proper to agree to one thing behind closed doors and then go into Drug Court and pretend I'm asking for something else when I know that's not going to happen ... So there can be a kind of, I don't even want to call it a temptation, but it's almost structurally built in that even though the team is reaching a consensus behind closed doors, we then come out into the open court room and take these sort of archetypal roles. You know, I'm the one asking for something really awful to happen to this person. So if I take the position in the pre-court meeting that I think someone's bail should be revoked, and it's been made clear to me in the pre-court meeting that [the judge] is not going to revoke the bail, then I don't think I can just go into that courtroom and say I want this bail revoked because that's just play-acting ... somebody in our office, in a different context, had characterized you know, agreeing to one thing in chambers and then saying another thing in court as in effect a fraud on the public. That's absolutely important to me not to do that, to perpetrate that (Crown Counsel).

## **Therapists**

Not surprisingly, the five therapists all viewed their roles in the TDTC as varied, but primarily concerned with treatment. According to the therapists, they served many official and unofficial treatment functions, most of which consisted of case management (i.e. housing, finance, employment etc.), facilitating group and individual psychotherapy, advocating for participants, monitoring and assessing behaviours, giving feedback, supporting, organizing, educating, being compassionate and patient, showing empathy, building trust, and keeping participants motivated.

While clinical providers manage the treatment issues of participants outside the courtroom, their unique function in a drug treatment court program is having regular contact with the criminal justice system. Four providers commented on how the court component has impacted their regular treatment roles. They listed several key differences including: seeing participants on a more frequent basis, being more technical, specific, and exact on court reports, preparing participants for court, having a knowledge of rewards and sanctions,<sup>32</sup> being more strict with participants, and offering opinions or recommendations regarding court responses (i.e. rewards, sanctions, expulsion, program admission and graduation).

Treatment providers in a drug treatment court program frequently interact with the criminal justice system, updating the court on various issues related to a participant's progress in treatment, and consulting with criminal justice practitioners about various therapeutic interventions: "The expertise and advice of treatment providers enable the DTC to use the coercive power of the court in an effective, therapeutic manner" (Hora et al., 1999: 36). However, when discussing their comfort as therapists working in the TDTC, all of the interviewees stated that they had initially been worried about working with the criminal justice system. One Therapist said that, at the beginning, she had been fearful of making any mistakes in her reports to the court because often judicial decisions are based on the information she provides: "You have to be very specific, you have to make sure you've covered all of the [drug] use. Especially when a client reports a use, because that goes on their file and it goes to court. So you have to be really exact, so that they don't get any sanctions because of you making mistakes."

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<sup>32</sup> One Therapist specifically mentioned that it was important to find out the circumstances surrounding the placement of a participant into custody.



In a drug treatment court program, treatment providers are no longer the 'gatekeepers' to treatment. The court ultimately decides program entry and discharge, and is responsible for sanctioning participants. Two therapists conceptualised their role in the program as being two-fold, encompassing a primary treatment role to their clients, and a secondary responsibility to the court. However, both individuals reported having struggled with the court's expectations of participants. While their focus was on helping to meet the needs of participants, they stated that sometimes, in trying to fulfil the overall requirements of the court, they took a rigid or structured approach to their clients. One Therapist attributed this privileging of organizational over client needs to an overall concern for the "optics" or "big picture" of the program.

### **Other TDTC Staff**

When asked to compare and contrast her TDTC position with her regular role in the criminal justice system, the Probation Officer did not indicate many substantive differences. For instance, similar to her normal duties as a probation officer, this individual stated that she is required to address offender behaviour, and comment on various legal and treatment issues. She cited her participation with other stakeholders in the implementation of the TDTC program as her only new responsibility. However, she explained that many TDTC functions were consistent with the regular role of a probation officer, but she outlined differences in the way they are fulfilled. For example, she stated that as a probation officer, she is a trained counsellor and legal official whose mandate is to provide information, such as risks and needs assessments, to judges, lawyers and other interested parties in the criminal justice system. However, she noted that such tasks are not usually carried out during (pre-court) meetings, nor in court with other criminal

justice practitioners and treatment providers. She accepted being labelled a ‘therapeutic agent’ despite questioning what the term meant,<sup>33</sup> and described her role more as contributing to change among the offenders with whom she works.

The court liaison, program manager, and community coordinator positions are exclusive to the TDTC program. While these specific titles did not exist prior to the implementation of the TDTC, the four individuals employed in these jobs had expertise in the addictions field, and thus were familiar with many of the therapeutic issues in the program.

The two court liaison workers characterized their roles in the program as involving both criminal justice and treatment features. One Court Liaison Worker explained that there are times when she leans more in one direction than the other, depending on the circumstances. For example, she indicated that she had a good understanding of both judicial and treatment objectives in the program, and as a result, often plays ‘devil’s advocate’ during case conferences:

I think that if you’re strictly therapist and not open to discussing things with the court team and taking their opinions into consideration, and the Crown’s concern for public safety, and probation’s concerns for what happens when they were institutionalized, if you’re not open to listening to all that, you’re not going to be able to do the client any justice. And I think that in order for the client to be accurately represented, we have to be able to incorporate both opinions (Court Liaison Worker).

Both court liaison workers stated they were comfortable with their positions in the TDTC program. They declared that a treatment perspective or therapeutic mindset was extremely helpful for their work. For instance, one Court Liaison Worker maintained that she is better able to understand how her communications and exchanges with

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<sup>33</sup> I declined to provide a definition of ‘therapeutic agent,’ and suggested that she offer her own interpretations of the term.

participants could affect their treatment. In the same way, the other Court Liaison Worker said that she is better able to predict how a therapist might react to a particular court outcome, such as jail:

I think one of the strengths for both of us ... having worked in the program as a therapist, we have that little bit of extra insight, in terms of knowing how a therapist might react to something that happens at court. So we can almost, what's the word, 'massage' certain areas so that things aren't kind of as big as they could be. And I think that's one of the sort of benefits to having had the therapist experience before going into this role.

As an intermediary between court and treatment, this interviewee stressed her involvement with participants' treatment, particularly in assessments and treatment/court meetings. She also highlighted the importance of having active and meaningful input into what happens to participants in the program, as opposed to simply "parroting" information back and forth between court and treatment. However, in contrast to her colleague, and despite her involvement in the treatment process, she initially did not consider herself to be a 'therapeutic agent' when she first started working in the TDTC program. She later changed her opinion, and stated that she likely has some impact therapeutically on participants. However, she cited the importance of being objective in her role, and in particular, distancing herself from having close relationships with participants. Such self-imposed detachment, she claimed, ultimately benefited her work.

Both the Program Manager and the Community Coordinator described their responsibilities in the TDTC as being primarily administrative. The Program Manager listed many tasks common to any managerial position, such as organizing program resources, hiring, performance managing, and supervising employees. Similarly, the Community Coordinator explained that he was responsible for getting resources, building connections with both internal and external agencies, sitting on various committees

within the community, working on program policy, and engaging in public relations. However, both interviewees also cited duties unique to the TDTC program. In particular, they both suggested that an important part of their work is to enhance the relationship between the criminal justice system and the treatment community. The Community Coordinator spoke about this partnership in the context of bridging the TDTC program with the community at large, while the Program Manager focused more on supporting the mutual collaboration between the court and treatment in achieving program objectives. Specifically, the Program Manager emphasized the need to promote the importance of the court to the treatment team, while at the same time advocating for treatment in the program. In general, he characterized his role in the program as being one of treatment, but in the context of a partnership with the criminal justice system. Despite having no direct clinical involvement with program participants, perhaps influenced by their treatment background, both interviewees enthusiastically accepted being considered a 'therapeutic agent.' The Program Manager emphasized his responsibility to familiarize court staff with the role of treatment, and specifically the process of recovery.

### **Link to Therapeutic Jurisprudence**

A therapeutic jurisprudence approach requires that legal actors and others undergo certain role transformations in order to promote the psychological and emotional well-being of individuals in trouble with the law. Consistent with this mandate, all of the TDTC interviewees – and in particular, criminal justice practitioners – reported experiencing certain transformations which have impacted their regular work. In general, they all conveyed gaining a better understanding of substance abuse issues. While Crown counsel talked about now being more capable of formulating appropriate sentences in

regular court, two of the judges spoke about a tendency to view sentencing situations from a problem-solving perspective. Further, both Duty counsel emphasized the cooperative nature of the TDTC, characterized by a non-adversarial working environment, as contributing to a greater respect in general among criminal justice practitioners. Indeed, in the context of addiction-motivated crime, their responses seemed to indicate that a fundamental shift in thinking about justice has evolved among these practitioners. Moreover, as Chase and Hora (2000) observe, the Drug Treatment Court process is designed to have a therapeutic effect on the criminal justice players themselves. Their study on therapeutic jurisprudence reveals practitioners reporting positive attitudes, high job satisfaction and happiness while working in a drug treatment court program.

Therapeutic jurisprudence theory also suggests that the very roles of legal actors constitute social forces that can produce therapeutic outcomes. As demonstrated in the previous section, four out of eight practitioners, the two court liaison workers, the Program Manager, and the Community Coordinator characterized themselves as 'therapeutic agents' in the TDTC. They viewed their respective roles in terms of facilitating treatment and contributing to participant change. Both court liaison workers also emphasized the importance of assuming a treatment perspective. The other practitioners, however, rejected being labelled therapeutic agents. Despite acknowledging that they function within the treatment model of the program, they stated that they play no direct clinical role. While two of the practitioners (one Duty Counsel and the Probation Officer) were uncertain about the meaning of 'therapeutic agent,' most of the other practitioners seemed to have a consistent understanding of the concept,

clearly recognizing the impact of their role on participants with respect to treatment. For instance, all of the lawyers were aware of the potential therapeutic impact of having repeated close contact with participants.

In the context of a drug treatment court, the therapeutic environment of the proceedings requires fundamental role transformations for the major court actors involved in the proceedings: “DTCs [Drug Treatment Courts] shift the paradigm of the court system; therefore judges, prosecutors, and defense counsel must change their outlook and conduct to allow DTCs to function effectively” (Hora et al., 1999: 26). However, perhaps equally as important are the adjustments being made by representatives of the treatment in the TDTC. Indeed, as demonstrated by the interview findings, the traditional position of treatment providers also changes drastically in this environment. In particular, the providers highlighted how the TDTC has affected them, citing other responsibilities related to the requirements of the program. In general, however, they communicated less of an appreciation for these changes than did criminal justice practitioners. The practitioners, while expressing some uneasiness with certain facets of their positions (such as the role-playing aspect of their work and the departure from traditional criminal justice responsibilities), were generally less concerned than treatment providers about their overall role in the program. The latter, in particular, mentioned the pressure and difficulty of balancing the requirements of the court with the individual needs of their clients.

Having established how treatment providers and criminal justice practitioners perceived their individual roles in the TDTC, I will now examine their mutual relations and effects in the context of the Toronto Drug treatment Court Program.

## **The Court and Treatment: Impacting Each Other**

*“Putting these two teams together is a marriage that makes for strange bedfellows in some ways” (Therapist)*

Using principles of therapeutic jurisprudence, drug treatment courts address substance abuse and associated criminal behaviour, as well as a variety of other individual problems. Foremost among these principles and inherent in the structure of any such milieu is the integration of two very different institutions – the criminal justice system and drug treatment. Therapeutic jurisprudential analysis must consider the nature of this partnership when considering the therapeutic impact of a drug treatment court on its participants. Yet there has been little research to date examining the unique relationship between criminal justice practitioners and treatment providers working in these hybrid environments.

A major theme emanating from my research is how representatives of the TDTC – from both the court and treatment communities – perceived their relationship with one another, as well as its potential effects on program participants. Using different types of interview questions, I asked respondents to comment on this partnership. Not surprisingly, many different sub-themes emerged from the resulting data.

In general, research participants conceptualized the court-treatment union in a consistent manner. Both practitioners and providers were aware that they were alike in some ways, but that some fundamental differences in perspective and approach still existed in terms of addressing illicit drug use. Despite these disparities, the interviewees generally described the alliance as positive, using such terms as “cooperative,” “healthy” and “symbiotic” to convey their general attitudes. Many respondents agreed that both parties ultimately sought to achieve the same goal – namely to reduce or eliminate drug

use and related criminal activity. However, some respondents also perceived the relationship as being in constant flux, where issues were continuously being revisited, thus re-establishing ideological divisions between the two groups. When asked to describe the relationship between the court and drug treatment in the TDTC, one Judge offered this interpretation of the partnership:

It's just one entity. They're intertwined ... it's completely blended; one can't be without the other. And if such an institution had just cropped up, no one would be interested in unfolding the different parts of it ... it's really different from month to month, and not necessarily a progressive line ... we repair, we discuss, we toss out, and we come back to where we were.

A Court Liaison Worker illustrated the interaction between court and treatment in the context of a staff retreat in a similar manner:

So I think we're court and treatment, and sometimes I think they're one in the same. We had a retreat when we first started, where we looked at are we one team or are we two teams working towards a common goal. I think we all like to think that we're one team, and eventually months pass and issues arise and we become two teams working towards a common goal. And then we have another retreat and another discussion and go back to that sort of one team process, so it's interesting.

My research findings confirmed that criminal justice practitioners and treatment providers in the TDTC program were constantly impacting and reacting to one another. A comparison of their responses revealed three specific areas of inquiry pertaining to this issue that warrant further examination. These areas are: a mutual benefit from working together, fundamental differences in perspective and approach, and ongoing tensions.



## **A Mutual Benefit from Working Together**

Much of the literature on drug treatment courts suggests that the combined efforts of treatment and criminal justice personnel can assist and encourage participants to accept help for their drug addiction and improve their lives. Findings from my interviews supported this belief. Many respondents described the organized collaboration between treatment providers and criminal justice practitioners as a major strength of the TDTC. In particular, four specific areas emerged from the interview data: learning from one another, changing to enhance the relationship, establishing an effective system for participants, and teamwork.

*Learning from one another.* When asked to describe their relationship with each other, both practitioners and providers mentioned several advantages of working together. In general, most of the interviewees highlighted the significance of having both the criminal justice and treatment side involved in the decision-making process. As mentioned in an earlier section, criminal justice practitioners appreciated learning about issues of addiction and treatment from clinical professionals. Consistent with therapeutic jurisprudence theory (Winick and Wexler, 2002), interdisciplinary involvement was thought by practitioners to be critical in meeting the problem-solving needs of participants in a drug treatment court. For instance, one Crown Counsel asserted:

... what you've got is the criminal justice system from parole to the Crown to defence to the judges working with treatment providers and so I think that interdisciplinary approach has a much better chance of working than a simple approach with the treatment providers working with them in treatment ...

A few of the respondents highlighted the importance of cross-educating one another. For instance, one Duty Counsel mentioned that she had had several opportunities to observe

treatment case conferences, and was later able to follow up on some of the treatment issues with providers. In general, all of the interviewees described this type of contact as being helpful in understanding the other's perspective when discussing various issues or concerns related to the treatment and criminal justice process. A few of the practitioners acknowledged having developed a better understanding of participants' behaviour in court. For example, a Judge noted that treatment had taught him how to detect participants "working him over." He said that treatment personnel had advised him to question program participants more rigorously because they were only saying what he wanted to hear in court: "... there is an aspect to this show, you can look for this from the tips that treatment providers advise me about."

Likewise, many treatment providers recognized the court's positive impact on participants, as well as the general importance of maintaining a legal perspective in the program. One Therapist stated that when she first started working in the program, she really struggled to understand how the court component could actually help participants. After some time in the program, however, she described her change in attitude:

I think I was quite critical of the court system, of the legal system and even of drug treatment courts when I was in it ... And then I saw these really funny things happening with people. People screaming and crying and kicking and being miserable at the thought of going into custody, or dealing with some of the sanctions. And then this transformation when they came out or when they worked through the sanctions and were successful in coming out the other end. And I guess I began to develop much more admiration for what was happening within the courts, and a better understanding of what their role was, and how I could fit and work with that (Therapist).

For many of the treatment providers, gaining a better understanding of what the court was capable of doing also translated into developing a greater appreciation for the judge's role in the program. While some of the therapists disagreed with the judge's decisions in

certain cases, they still respected him for his open-mindedness when making judgments.

As a Therapist remarked:

... there are times when he's made a decision I haven't agreed with, and I have to step back and go, oh you know, he really made it from a clear place. And I wasn't so clear, I have their childhood in my head, I have this in my head, I have that in my head. And at the end of the day, he says you made this choice, and these are the consequences ... he's not trying to necessarily understand the meaning of all the other stuff ...

*Changing to enhance the relationship.* Practitioners and providers demonstrated an awareness of how treatment and court personnel have changed to better their relationship with one another in the TDTC. While the treatment providers spoke more about this adjustment, some of the practitioners also described the positive effect treatment had on their work. For instance, because treatment is involved with them in the program, the two Crown counsel stated that they felt more confident about the various types of decisions they have to make in the TDTC. As one Crown Counsel affirmed:

I think I can have a lot more faith in my judgment to do things I wouldn't otherwise do like releasing a person on a bail, extending curfews or doing things I wouldn't otherwise do. I mean these are people that if they came to me just before bail court, I would be asking for detention orders and I would not be consenting to releases for the most part. And so, what treatment does, is they develop a closer more intimate relationship with the individual. So when they come to me and say, listen this person, we want to change the curfew, we want to remove the curfew or we want you to allow them to do this, then I have a lot more faith in that because what they've provided is a lot more intimate contact with the individual that allows me the ability to take more risks ...

In this sense, treatment's more direct involvement with participants in the program serves as a support in the Crown's decision-making process.

Having been in the program for some time, the majority of treatment providers claimed that they have developed a more positive view of working with the court. One

Therapist stated that when he first started working in the TDTC, he “really didn’t want to have anything to do with the courts because [he] just thought they were full of shit.” Not all of the treatment providers were so forthcoming, but five of them talked about feeling some apprehension in collaborating with the court, especially given some of the experiences their clients had gone through in the criminal justice system. Yet all of the providers indicated that they have since changed their perspective. For instance, they have become more comfortable working in a criminal justice context, and more willing to accept the decisions rendered by the judge. Two therapists even talked about some of the new approaches they have used with their clients during therapy to address the court component of the program:

I’ve learned to adjust [to the court] in a way that works for me and works for the client. And it’s being straight up with them right from the beginning, “this is what I have to know just so you know that,” so they know that they’re not afraid to say things to me. That they do need to know these are what I will have to tell. So it’s not a surprise when I do that.

I know that I’m at a point right now where I’ve learned how to phrase things with clients so that they know what to expect when they go to court. I really try to not let my clients go to court and be blindsided. So, I have developed ways of warning clients without actually warning them.

All of the treatment providers portrayed the legal practitioners, particularly the judge, as extremely attentive and open to the recommendations of treatment, as well as to the needs and struggles of the participants. In particular, some of the providers recognized the court’s departure from its traditional approach of dealing with cases (e.g. consistency, immediacy etc.). A Court Liaison Worker gave this example:

You know that the judge is willing to, for example yesterday, delay sanctioning somebody for not disclosing use, until next week because the treatment team didn’t have an opportunity to discuss it. In other

situations, a judge would have said, this is an honesty issue, there's no need to discuss. The sanction is ... the sanction is ... No, he put it over so that we had an opportunity to talk about it as a team.

This excerpt shows how others clearly recognize the judge's willingness to include treatment in the decision-making process. The Program Manager explained that the court is less concerned about exerting its power over participants, and more prepared to assume a participant-centred approach in dealing with cases, indicative of a treatment perspective:

I think that the court team has become much more willing over time to take things on a case by case basis ... And so I think that's kind of a treatment perspective ... I think they become knowledgeable about addictions and make great suggestions ... I think the court has restrained its power to a remarkable degree, judiciously and intentionally ... and I think that's positive.

Many of the practitioners, and even some of the providers, also observed that the treatment team was changing, adapting to practices of the court. For instance, a Therapist reported "seeing some therapists take maybe a more structured or rigid approach in terms of how they deal with clients." In addition, many respondents talked about treatment's involvement in recommending sanctions, sometimes even jail time and program expulsion, to the court team. While one Therapist stated that he did not feel comfortable doing this, most of the other therapists defended their involvement in sanctioning, stating their desire to participate as much as possible in the decision-making process. The Program Manager agreed:

So we wanted to be able to say this is what the sanction could be, but we don't think it's merited in this situation for example. Or this might be useful for a client in another situation that involves us in something that theoretically was a court-ordered kind of thing. So we decided to be involved in that, and so it's happened that we make recommendations

about sanctions. We know there's going to be a sanction. So we say ok, we think it should be this and not this.

Interestingly, the Program Manager claimed that it was the court which had asked for more direct involvement in sanctioning on the part of treatment professionals. He identified the court's position as representing a "quasi-therapeutic approach."

As an outside observer having no direct participation in treatment and the court process, perhaps the Community Coordinator's assessment best captures the transformations that court and treatment personnel have undergone in their relationships with each other, and with the TDTC program:

I think what's happened here is that they've taken on some of each other's idiosyncrasies and roles ... So [treatment] found that they could exert more influence. So they slowly started recommending sanctions more and more. And on the other hand, court became more likely to take a more progressive softer role. There were times when treatment would be saying, "well you know we really think this person should be expelled from the program." And court would be starting to say, "well we think they deserve another chance, we're looking at their other behaviours, they've done well, they've been making it to all their appointments. This is a person who used to fail to appear all the time, we're seeing some real improvement here." And treatment saw them as being difficult. So there's been this kind of, it's almost like some kind of weird little contagion ... I think the two of them have learned to work well together, to police each other, to complement each other and I think both sides have benefited from it ultimately.

*Establishing an effective system for participants.* When discussing the effectiveness of the TDTC, all of the interviewees indicated that the structure of the program was particularly beneficial to participants. For instance, one Judge mentioned that the combination of court and treatment is superior to each one invoked individually. Consistent with principles of therapeutic jurisprudence, the expertise and advice of treatment providers enable the TDTC to use the coercive power of the court in an

effective, therapeutic manner (Hora et al., 1999). Indeed, many respondents commented on the advantage of a court-monitored drug treatment program that is able to connect participants to other social service resources. Moreover, a Therapist noted that the TDTC is capable of providing a portion of the criminal population with “a sense of success” in addressing their drug addiction for the first time.

Supporters of court-mandated treatment, like the TDTC, argue that coercing individuals into these types of programs will eventually engage them with drug treatment. Consistent with this view, some of the practitioners and providers involved in this study cited the intensive monitoring aspect of the program as being particularly helpful to participants. The majority of practitioners viewed this supervisory component as an important tool for addressing and responding to non-compliant behaviour more quickly.

As two judges revealed:

They're the most supervised people in the system, bar none, save and except for people who are in jail ... they're far better supervised than they are if they're on a conditional sentence or if they're on a suspended sentence for the period of probation. So absolutely, I think if there are any issues of course of non-compliance, we'll know about it immediately. Whereas, if the person's on probation, it may be months before the probation officer finds out or the supervisor under a conditional sentence order.

In the very busy Toronto Court, a person doesn't appear on a non-violent offence or for an offence that isn't very notorious where we see a lot of publicity, and that can include drug trafficking. From the time the judge pronounces a warrant for an arrest from the bench until the time that the police start to look for the person, if at all, can be a very long time. Whereas, we have a system [in Drug Treatment Court] ... There's an immediate response. The arrest warrants are broadcasted to the police and get into the CPIC almost immediately. We had a case here where a person was arrested before court ended (laughter).

Similarly, a Crown Counsel viewed the monitoring aspect of the program as particularly helpful in facilitating treatment for participants:

So I think because the criminal justice system is so far reaching and so vast and so powerful, we get to take control of a lot of their lives, where they live, when they live, when they get to live, when they get to go out, who they get to associate with. And we can impose all kinds of things on them that other people wouldn't otherwise be able to do. That gives us control over a lot of their lives, and there I think, gives us a lot better chance at treatment.

One Therapist agreed:

So in terms of what I see with the Drug Treatment Court clients, I think the supervision by the court, the fact it's fairly heavily monitored ... I think that on a really positive side, you keep people engaged in the treatment process, if they disengage for whatever reason, it will probably more quickly bring them back as opposed to if the court wasn't sort of supervising that process. So I think there are some real benefits there.

Further, as an external motivator, a few of the respondents also acknowledged that the TDTC is capable of instilling participant change. Both practitioners and providers viewed the partnership between the court and treatment as a powerful motivator for participants to do well: "We're getting the individual participant's take on what's happening in treatment. We're also getting treatment's take on what's happening in treatment, and because the participant knows that we're going to hear from treatment, that's an incentive for them to abide by the honesty requirement of the Drug Treatment Court" (Crown Counsel).

Finally, as discussed earlier, drug treatment courts represent a fundamental shift in the way the court and treatment have traditionally responded to illicit drug use. In the regular justice system, many drug offenders have repeated contact with the courts, and as consequence, they develop feelings of mistrust and contempt towards the criminal justice



system. The Program Manager speculated that participants might experience a change in mindset with respect to the Drug Treatment Court initiative:

This might sound a little strange. I think it changes the nature of the relationship that clients have had with systems including the treatment system and criminal justice system in a more positive direction, especially with the criminal justice system. So I think that pays off in a number of ways down the road. I think it has an effect on attitude ... I think a positive effect is that sometimes clients feel acceptance where they've never felt it before ...

**Teamwork.** In the TDTC, the court and treatment teams share a common goal of reducing drug use and its associated behaviours. The National Association of Drug Court Professionals (NADCP) (2000) states that achieving this goal requires a team approach, including cooperation and collaboration among various criminal justice and treatment personnel, giving rise to a non-adversarial working environment. All of the interviewees cited teamwork as being essential to the TDTC program. The Program Manager talked about the importance of teamwork in a context of shared information between treatment and court personnel:

I think in terms of the forms, the progress reports, and the verbal reporting that the court liaisons do ... I think it's absolutely essential because it gives the court team a complete picture of what's happening with the client ... that their decisions are going to be wise decisions or wiser decisions ... it's both up to the minute information, it gives a sense of the larger picture and it's a record that can be referred to. I think it's really good that way ...

The information that the judge and the rest of the court team obtain from the treatment team impacts on their ability to reach informed decisions about participants. In this connection, respondents uniformly identified pre-court meetings, team retreats, case conferences and reporting from court liaison workers as being critical activities in the TDTC program. A Duty Counsel mentioned that she had had several opportunities to

observe treatment conferences, and was able to follow up on some of the treatment issues with providers. In similar terms, one Crown Counsel specified the purpose of team retreats: “Ultimately we end up having a retreat where we have a lot of discussions and then we try to come to some terms, where we try to broker concessions and broker I think also agreement among the whole group so that everybody feels like you know, ok we can live with this.” Pre-court meetings were also considered a constructive approach of negotiation. All of the interviewees described these meetings as predominantly cooperative, with the result that consensus was reached more often than not on particular issues. In instances where differing opinions arose and compromise could not be reached, a Judge observed that members “... actually had to have a vote, and that’s what [they’ve] done, [they’ve] just voted. And whatever the majority wants is done.” While this process applied to many of the issues raised in the pre-court meetings, all three judges clearly stated that deciding the loss of an individual’s liberty (or not) was determined in open court by the judge.

Some respondents also mentioned other means of solving problems. For instance, if a particular case warranted the involvement of treatment in the decision-making process, I learned that therapists were given the opportunity to participate directly in pre-court meetings. Further, should either treatment or the court require the other’s assistance, all of the interviewees commented on how staff were readily available and willing to help one another. For instance, one Judge explained that often providers will assist him by speaking up in pre-court meetings or in court if he is missing the necessary information required to make a decision. In fact, many of the treatment providers noted

that they have become quite comfortable with approaching practitioners, especially the judge, about various issues. As one Court Liaison Worker remarked:

... all of the judges are open to direction, and as I've become more comfortable in my role, I'm very comfortable providing that direction and saying you know it would be helpful if this is the way you would approach this and you know, rather than asking the client this, it might be helpful if you ask this, you know. And I do that sort of stuff in pre-court which wasn't done [before] ... but I know that they're open to that, you know, and I have that type of relationship with them that I feel comfortable doing that.

Although TDTC staff members all have their own specific roles and perspectives, it was apparent from the interviews that each worker respected and trusted the opinions of others. The Probation Officer remarked that both providers and practitioners have recognized their ability to positively influence participant behaviour by working together effectively. She described the situation specific to her role in probation:

I think [the TDTC] has enhanced relationships. Specifically I think with treatment. Because it is my opinion that probation is not generally viewed as a counselling role and I think by us working in this program, I feel it has made others aware. So the response time increases by participating and being aware ... it has improved response time which makes service delivery to the client efficient. It's beneficial to the clients so I find that it is an effective way ... It's providing that continuity of service and therefore service is delivered more effectively.

One Therapist talked about the practical implications of establishing a strong relationship with the court team. She explained how participants benefit from the efforts of treatment and court personnel working together:

I'm just kind of thinking of a week ago working with a client and really, really having a hard time. She was really going through a lot. A lot of the issues she was struggling with were just horrendous, and maintaining clean time and going to meetings ... trying to do a lot of other things with me, and just being run ragged. And really just getting depleted and depleted. So I voiced my concerns to the court liaisons in our meeting, and I asked them if they would speak with [the] [j]udge ... to see if he

would maybe look at this and provide a few words of encouragement because I thought that would be helpful. He did that, and she came in the next day, and she was just blown away. So it's like, "I couldn't believe that [the] [j]udge even spoke to me today about you know not tiring and slowing down" ... So when they see something like that happens, it's almost like they're starting to trust I think a little bit more in the system.

## **Fundamental Differences in Perspective and Approach**

As previously mentioned, the Drug Treatment Court concept requires that the two systems of criminal justice and drug treatment combine to effectively address substance abuse and its associated criminal activity. Not surprisingly, while sharing the overall goals of the program, practitioners and providers revealed a number of differences in perspective and approach. Specifically, my research findings uncovered disparities in defining success in the TDTC, understanding the role of treatment in a criminal justice setting, and interpreting the use of sanctions and rewards.

*Defining success in the TDTC.* Since working in the TDTC, and in some cases even before its implementation, all of the criminal justice practitioners felt they had a relatively good understanding of drug addiction. In general, both groups of interviewees shared a realistic expectation concerning the possible impact of the TDTC program on participants. However, when asked how they would define program success, criminal justice practitioners were more likely than treatment providers to recite the markers for graduation, such as decreased recidivism, four months of abstinence, stable housing, gaining employment or attending school, and general reintegration back into the community. However, like the treatment providers, five of the six criminal justice practitioners also conceptualized success beyond the stated program requirements. The practitioners appreciated that many participants can be regarded as successes even when

they are not able to fulfil their obligations to the program. As one Crown Counsel and one Judge pointed out:

The narrow [definition of success in the TDTC] is someone who graduates, gets their four months clean, their employment, their secure housing, graduates gets sentenced, completes their probation and remains drug-free. *But there can be other kinds of successes ...* somebody who comes into the program and maybe they're not quite ready, so they're not successful in the sense that they don't even graduate, they're expelled or they withdraw at some point, but they've gotten a taste for treatment, and maybe two years from now when they're a little bit more mature or their motivation is a little stronger, that gives them a leg up to successfully complete some treatment (Crown Counsel).

[Success is] having experienced a drug free life as a positive experience, ideally cured or drug free. *But if that can't happen*, just some sustained experience of a positive existence closer to what the rest of us call normal. Not driven by the addiction. So the feeling of dignity, able to earn their own living, feeling of responsibility towards their children if they have any or of a relationship that doesn't turn on drugs. Just to have experienced it so that if there's another relapse, they'll have something which they can identify with other than the hole that they're in. Because when they come in, they can't remember normality in their lives. So I would accept that (Judge).

While the practitioners identified other types of accomplishments, some of the treatment providers asserted that there is a need for the program to better recognize these successes. For instance, four providers remarked that much of the research on and evaluation of the TDTC is based on quantitative measures – using frequencies of graduation and rates of participant retention as primary measures of success, for example – and thus is limited in scope. They cited the need for these types of studies to account for success in the qualitative sense. In the words of three providers:

I think a lot of the contact that we see after the fact, that isn't measured, really speaks to the success of the program" (Court Liaison Worker).

... sometimes success is measured or effectiveness is measured in the fact that a client comes in here for an assessment, and it's their first time ever

in a treatment centre, and they only last a week and a half, but at least they've made it into a treatment centre. And six months down the road, they come back on their own and they register to a program. Now we don't have that as part of our stats because they're no longer in Drug Court, but it's a success because they got through the door. Some of them make it for two or three months ... they manage to get a month clean. It's the first time in their drug history that they've had a month clean. That's success. So when we look at our numbers ... If we were looking at the numbers, then I should probably be fired because my success rate in terms of graduation is very low. But if we look at individual clients and the gains that they make in their lives then I say we're doing a lot of good work (Therapist).

... sometimes, it's two, three, four years down the road that people are back reengaged in treatment. Now were those people not successful or the fact that they're back in treatment four years after their Drug Treatment Court experience and doing well, does that mean that they're now successful but weren't? ... I never liked the sort of one year, X number graduates are the successes and everyone else is not successful. I think it's a fluid thing. It's a continuum rather than an absolute (Therapist).

***Understanding treatment in a criminal justice setting.*** While most of the criminal justice practitioners demonstrated a good understanding of the treatment objectives, especially in relation to their own roles, some of the treatment providers identified certain practices, attitudes and qualities in the program as representative of a criminal justice perspective. Six providers considered actions taken by practitioners as being more 'cut and dry,' immediate, consistent and rigid; whereas they viewed treatment practices as being more process-oriented, individualized, gradual, and compassionate. A Court Liaison Worker explained the difference of approach in these terms:

Court is very black and white, and in treatment there are 17 billion shades of grey, and we need to work with those 17 billion shades of grey and meet the client where they're at so to speak. And I think that that's one of the sort of challenges ... is that getting the court to sort of see those shades of grey and see that things can't always be consistent, and some things need to be done on an individual basis, on a case by case basis ... I can't tell you how many times I heard [from the practitioners] the consistency,

immediacy and accuracy as the three, you know, important things that needed to happen.

Along with the Program Manager, she noted that trying to incorporate the two approaches continues to be an ongoing problem in the program:

I think the thing that most often comes up ... things need to be consistent, they need to be immediate and they need to be accurate and I think that that isn't always the case in drug treatment. I think that things can't always happen immediately and we may kind of not always be accurate, you know. And may not always be consistent, and I think that that is one of the struggles because when a recommendation is made to the court with respect to how a certain person is going to be handled, the court's responsible, and says, ok, this person has the same situation, and we're doing something totally different. So how can that be consistent right, so that's always a concern. The same thing with the immediacy piece. So the person misses a urine screen, and the court wants the piece to be dealt with the following day or the next court date following. And we want to delay it for some reason or another. So, that's the thing that I think for me that sort of just jumps out as being tricky (Court Liaison Worker).

Respondents recognized that the merging of legalistic and therapeutic perspectives (and approaches) has posed a number of problems for professionals concerned with continued substance use in the TDTC. Two treatment providers talked about the court's impatience with the length of time sometimes needed for treatment. One Judge confirmed their assertion: "... you see continued use 9 months, 12 months into the program. I think we show a lot of tolerance for it; however, I don't know much about treatment ...". A Therapist pointed out that while court practitioners are educated about drug addiction, they often resort back to a limited criminal justice understanding of the issue, looking for a 'quick fix' to address drug using behaviour. For example, he observed that the court continues to misuse residential treatment and 12-step meetings in the program:

... that's the answer, you know, they always think that residential treatment is the answer, the big cure ... that's kind of the last step. There's other things I prefer to try with my clients and work with them

before sending them off somewhere where they may get 3 weeks clean, but as soon as they come back, they're faced with all the same difficulties and they're back using ... usually it's not a court order, usually it's a strong suggestion, but we kind of get the message ... Another thing that we have some trouble with is that the judge will often order clients to go to 12-step meetings. 12-step meetings are supposed to be anonymous and they're supposed to be voluntary. So in treatment, we can work with a client over the space of a couple months, 2 months, 3 months, to try and get them to go to a meeting and check it out, and usually they like it. They go to court, and the judge sees that they're struggling and sees that they need some more support, and he'll just order them to go to a meeting. And that's not quite the way that those meetings are supposed to go (Therapist).

In addition, three treatment providers explained that it is unhelpful when the judge focuses solely on a participant's drug use in court. Two of the providers described the problem:

... when all the judge wants to focus on in court with the client is the drug use, I'd say that's pretty ineffective at a certain point in their treatment ... I sometimes think that a judge misses the issue. I don't care about drug use. It's a symptom of all the other stuff (Therapist).

So he tries to be therapeutic and he tries to ask therapeutic questions. They often don't come out right. And so clients get stuck in front of him not knowing how to answer it. And he sits there waiting for them to answer and repeating the question, and it's a really bad question. You know, one of the questions he often asks is: So why did you use? You know, the client doesn't know what to say next. If he phrased that differently like: What were some of things that influenced you to be triggered towards using? (Therapist).

With the exception of the Program Manager and Community Coordinator, all of the criminal justice practitioners and treatment providers have repeated contact with participants in the TDTC. There was clearly a difference in perspectives between practitioners and providers concerning the importance of having close contact with participants. For instance, in a regular treatment program, clinical staff influence change by developing a therapeutic relationship that respects and builds on the client's autonomy



and, at the same time, makes the treatment clinician a partner in the change process. However, in the context of a drug treatment court program, with the court's emphasis on program compliance, therapists are required to take on more of a supervisory role with clients. As a result, the therapeutic relationship can be compromised, resulting in participants acquiring a negative perception of treatment, and conceiving their therapists in some cases as agents of the court. All of the therapists interviewed recognized this as a problem. Two of them were particularly frustrated about the issue:

And I often say that by the time clients get to maintenance, I say we'll do a check, and you've got to report your drug use because we need to report that to court. And then let's get on with the business of healing, right, like what's really going on (Therapist).

One of my challenges that I had to overcome or open my mind to a little bit more was before I worked with the criminal justice piece, Drug Court, a client came up to me and talked about pretty much anything, it wouldn't go anywhere unless it's going to hurt self, hurt the child or hurt others. Those are the things that I have to report. But with Drug Court, it's a little different. Because you have to report if they're in high-risk situations, if they break their curfew, if they're out of their boundaries ... That didn't feel comfortable ... I was like hmm, do I really care about boundaries? I could care less, but I have to care because it's in the program (Therapist).

Both court liaisons and a few criminal justice practitioners also indicated that when providers develop too close of a relationship with participants in the program, they occasionally forge divisions between treatment and the criminal justice system. For instance, providers are sometimes unwilling to accept certain court decisions that go against their own preferences because they believe they know what is best for their clients. But as one Court Liaison Worker said, providers need to remember that participants are under the authority of the criminal justice system: "The client is here by

virtue of their charge. If they weren't here, they would be in jail or somewhere else. So, let's work together."

*Interpreting sanctions and rewards.* The Toronto Drug Treatment Court imposes sanctions and rewards to demonstrate to participants that there are consequences attendant to their compliance or non-compliance with program requirements. As part of this study, I presented each interviewee with two lists: one of possible sanctions, and the other of possible rewards one could receive in court.<sup>34</sup> I then asked each respondent to comment on their individual effectiveness. The sanctions comprised of having to sit 'up front' while in court, warnings, admonishment, writing an essay to the court, having to stay in court until all participants have talked to the judge, increasing the number of days at the treatment clinic, increasing the number of court appearances, community service, giving and/or adding curfew and boundary conditions and being sent to jail for a short time (i.e. bail revocation). The list of rewards consisted of being placed on the 'early leave list,' encouragement and praise from the judge, applause, removing curfew, reducing the number of days at the treatment clinic, and reducing the number of court appearances.

Four respondents disagreed with the composition of each list. Three providers cautioned against portraying more treatment as a sanction, and less treatment as a reward, stating they did not want participants viewing treatment as punishment. According to Glaser (2003), the boundaries between treatment and punishment become increasingly blurred when treatment is either implicitly or explicitly a component of punishment.

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<sup>34</sup> The items on the lists had originated from my reading of the literature on Canadian drug treatment courts.

One Judge viewed the ‘early leave list,’ the removal of a curfew, the reduction of treatment, and the reduction of court appearances as the normal progress of a successful participant in the program, and not necessarily as rewards.

When asked if they thought having the judge give out rewards and/or sanctions in Court was a good idea, thirteen interviewees responded that this practice was appropriate in the context of a drug treatment court. Interestingly, all of the providers and three practitioners preferred the use of rewards to sanctions in the program; however, these respondents all recognized that sanctions were needed in order to maintain the integrity and credibility of the program.

As a group, the respondents expressed mixed opinions concerning the perceived effectiveness of rewards and sanctions in the TDTC. A few individuals talked about the difficulty of measuring their impact, given the varied circumstances and situations of participants. Despite this complexity, the majority of interviewees cited receiving praise and encouragement from the judge, and being placed on the ‘early leave list’ as having some value to participants. Likewise, many respondents thought that warnings and admonishment from the judge, and the threat of incarceration were useful sanctions. Interestingly, four interviewees felt that removing a reward, such as being taken off the ‘early leave list’ or increasing court appearances after they had previously been reduced, was more effective than imposing sanctions.

## **Ongoing Tensions**

All of the respondents recognized that there was some disagreement between practitioners and providers, stemming from their differences in perspective and approach. In particular, some of the respondents explained how these disparities frustrated efforts to

make important decisions in the TDTC, and determine the relevant importance of treatment and the court in the program.

***Conflict in the decision-making process.*** Both legal practitioners and treatment providers observed the dissatisfaction of the latter with the court's sanctioning practices in the program. Conflict arises most often, interviewees explained, when a sanction is needed after there has been a clear breach of bail conditions or program expectations. Some of the respondents reported that on occasion after a therapist has recommended a particular sanction, the court will sometimes impose, much to his or her dismay, a different and more severe sanction. One Therapist expressed frustration over this situation with respect to having possibly negative effects on her clients: "It's like you've made what I feel is a decision that is going to forever alter this person's treatment perspective. This was a really critical time in treatment, it really needed to move in this direction, it really moved in that direction, that really sucks." Interestingly, both court liaison workers, with a background in drug treatment, defended the court's use of sanctions. A Court Liaison Worker suggested that treatment personnel sometimes forget that the court holds the final authority with respect to sanctioning:

... you know treatment might recommend an afternoon in custody, and the court gives the client two days. And so one of the things that we've struggled with in the court liaison position is saying to treatment look you can make recommendations for sanctioning, but ultimately it works this way, the Crown puts his position on the record, the Duty counsel will speak on the client's behalf, treatment will give their input, but the judge will decide. What we would sometimes see, and much to my frustration at times, is treatment providers going, "but I only recommended X amount of sanction," and then you have to explain, "yes, but this is how it works. The judge considers everything involved and makes his decision."

While there might be some confusion with the decision-making process, it also seems that treatment providers are not completely willing to accept the authority of the court, especially with respect to sanctioning in the program. The Program Manager talked extensively about this issue. He explained that there has always been a general reluctance and concern, within drug treatment circles, to cooperate with the criminal justice system. He later remarked that it is ultimately harmful to those individuals seeking help in the program for providers to continue to harbour this negative perception of the court:

Having worked so long as a front-line therapist, I know that I, and a lot of my colleagues, really wanted to keep at arms length anything to do with the criminal justice system. If a client had charges, I mean we got nervous and we just felt like that was something separate from treatment. You know, clients should go deal with that. And I think they were often left hung out to dry ... And so we didn't take opportunities to advocate on behalf of a client ... we looked at clients' criminal behaviour, I think in kind of a naïve way. That's too bad they have a problem and they're being persecuted for it, and that's as far as it went. But now the criminal behaviour, I think, is as much of a clinical issue as any other issue. And it might be part of a client's reality and you can't just pretend that it doesn't exist (Program Manager).

Three interviewees explained that the problem is often compounded by a lack of proper communication between treatment and court personnel. One Crown Counsel alluded to situations where therapists have made certain recommendations about individual cases, which later seemed unreasonable from the perspective of the court team:

So often they will have a very extended and difficult case management meeting where they will spend half of it discussing a particular client that just like rats their hair out and finally come, alright this is finally what we're going to be doing, we want this person expelled. So then comes the court meeting the next day. You've got the court liaison saying, "The team had a very long discussion about this, but in the end, after some long hard discussion, there is a real sense that this person should be expelled." And any one of us on the team will say, "well what? This is out of the

blue. What's this about? What's going on?" And then we have this big long protracted discussion, and in the end, our decision may be, I'm not doing this. I'm not asking for his expulsion. And therefore, now you've got this tension and this difficulty ...

One Judge also mentioned that there have been instances where miscommunication between treatment and the court – what he referred to as a “broken telephone” – has posed problems. He explained that sometimes the court liaison workers have disagreed with treatment’s recommendations concerning specific cases. While they are obliged to report this information to the rest of the court team, the judge stated that, on occasion, court liaison workers have framed the recommendations in such a manner that the others received an erroneous impression of the case. Further, he said that court decisions were sometimes incorrectly reported back to treatment. According to the Judge, this type of miscommunication has often led to conflict or tension between the two teams.

As mentioned earlier, most of the providers commented on some of the problems associated with having treatment directly involved in the court-monitoring aspect of the program. Five of them specifically highlighted the potentially negative consequences for clients when their treatment providers are involved in monitoring. One Therapist mentioned that sometimes she has had to question where her responsibilities rest: “So whose needs am I meeting? Sometimes it feels like court ... And who gets lost, but the individual clients at times.”

Some related research on court-mandated treatment reports that participating health workers “... welcomed the enforceability” of the courts because “... the threat of breach and a custodial sentence seemingly provides an impetus for their patients in the early, crucial stages of treatment” (Barton, 1999: 149). However, one Therapist

mentioned that, while he had used the court in the past as a means of ensuring that participants were adhering to treatment, he later recognized that this was wrong:

... after a while, I found myself using the court as leverage to get my clients to do the things that I wanted. And when I realized that, I had to take a look at my role as a therapist ... I realized that I was using the court as a way of getting clients to comply with treatment expectations because it was easy to do. And I then had to take a look back and re-examine some of my own therapeutic skills because without Drug Court, I had been able to get clients to comply. And, you know, it's taken longer and it's been a harder road, but then all of a sudden I had this court that will back me up, and I start using it rather than my own skills.

The Program Manager warned that it is important that participants not view the treatment providers as agents of the court because they might think treatment was not looking out for their best interests: "... they may feel like treatment hasn't advocated for them or has given information to the court that got the client in trouble. And they resent that."

While the practitioners recognized treatment's more direct involvement in the court-monitoring component of the program, and specifically in the decision-making process, they expressed some concern with how treatment providers formulated some of their recommendations. Two of the judges claimed that sometimes the providers were impatient with the requirements of the law, and the opinions of legal actors. A Duty Counsel talked about a circumstance where treatment felt they could no longer assist a participant in the program, and as a consequence, recommended that the court expel the individual from the program. From a legal defence perspective, she said, this course of action was not appropriate:

... treatment says, "we don't want them in the program anymore, they should go." And I would continue to vigorously argue against that. And their perspective has always been that if we don't think we can deal with this person anymore, then we shouldn't have to keep them in the program. Whereas my perspective would be this person gave up a lot of rights to

come into this program, they've entered guilty pleas. If they leave the program now, they're going to get sentenced by the judge and it ought to be darn hard, for lack of a better term, for the court to have to be able to get rid of them (Duty Counsel).

She added that this issue is equally frustrating from the perspective of the Crown prosecutor:

Crown has said to treatment, if I'm going to be able to make an argument as to why a person should no longer be allowed to continue in the program, I need concrete documentation so it can't just be after this person's been involved for eight months, treatment coming and saying we can't work with them. There has to be some kind of pattern or history that can be shown, that the Crown can use what's documented, that this was an issue, and this was an issue, and this was an issue, so that if he's going to have to make that argument, he's got stuff that he can use as evidence or as reasons why that person shouldn't continue (Duty Counsel).

In fact, one Crown described an embarrassing situation where treatment had initially requested that he ask for a participant's expulsion from the program in the pre-court meeting, but later changed their mind during court, after he had followed-up on their recommendation:

... I've had some difficulties with treatment where they came to me to ask for somebody's expulsion. So I stand up and I do my thing, I'm like I hear ya, I'll support ya, I'll do my thing. So I stand up, I do my thing, boom, boom, boom, boom, I want his expulsion. And all of a sudden ... I got essentially undermined by treatment. So they were like well, we're not sure about that. Maybe we should do this. And I was just like, you know what, you just asked me, you asked me ... So without me knowing a lot about it, I stood up and said fine, this is what we do, and now you undermine me.

*The importance of treatment vs. court.* When asked to comment specifically on the importance of each component in the TDTC, six interviewees (three practitioners and three providers) believed that both treatment and the court were equally valuable to the



program. One Crown Counsel explained that he found it difficult to determine their relative importance:

... in some ways, court's more important because these people are being charged criminally with an act. They are facing jail sentences. The court system is essentially providing a way for them to be supervised ... So in some ways, I want to say that's the more important part. But on the other hand, I also think well, treatment's the part that's going to do the real work with the people, who sits down and does the real reviews and the real interactions and the real connection on issues. And clearly without treatment, the criminal justice system part of it would fail. Because if the criminal justice system could fix it, it would have fixed it a long time ago ... So clearly the treatment part is more important because it's the part that actually gets the work done. It's the part that actually gets them connected. It's the part that actually gets them to buy into the recovery. So they're both important (laughter).

Two judges asserted that the treatment component is more important to the program. One Judge said that his role in the Drug Treatment Court could not exist without treatment, stating that “[he] basically do[es] nothing. The service providers do everything.” He talked about the benefits of changing the structure of the court to fit the needs of drug treatment, and did not seem to mind taking on what he perceived as a less involved role in the program. In contrast, another Judge seemed less comfortable about treatment's influence on the structure of the court:

But now has the court accommodated treatment? Umm, well I'd say almost entirely. It just depends where you want to start. A court is a long-standing fixed institution. No one speaks in it except the judge, the lawyers, and witnesses, or students at law in restricted circumstances. Here you walk in and you have, it looks like a piano, a keyboard, with people bouncing up to speak to the judge ... You know, Drug Treatment Court is in [courtroom] 116, so when you're presiding in [courtroom] 117 in a serious criminal case, and all of a sudden you hear loud applause (laughter), it's very strange (laughter). And sometimes an explanation is required for the audience or the participants in that court.

He further described the court as having less power in the TDTC program than a regular court. As a consequence, he claimed that participants showed less respect for his position in the program:

Well they see me as a judge, but not as the real focus of power ... after a short while, they see how it works ... once the rhythm is established, and they've seen you and you've see them for a few months, I don't think the pomp or the symbolism of the court, of the gown, and the raised bench has the same effect as say in another court ... (laughter) You just become like a pair of old shoes. Have you not observed that? The hello and how are you, they're very comfortable (laughter). They catch on fast (Judge).

He later expressed concern and frustration over this issue, and passionately argued:

I'm determined not to let the court follow the culture of the participants. But rather to impose with all its deficiencies, the responsible honest structure of the court, or what the court symbolizes in society rather than facilitating, moving to meet them because they're in such trouble. So maybe that's a conservative or a harsh point of view, which isn't necessarily consistent with my views as a judge, my political views, the views of the law. So in that sense, I resist accommodating them in any way. And I stand up, and I don't accept weak excuses easily... (Judge).

While most of the providers regarded the court and treatment as equally important to the program, they identified the court as having more power. Three providers explained that both components are necessary, but that the court is generally recognized as being more influential. Two providers stated that the court is more widely praised than treatment for the changes and contributions it has made to the program:

... it felt like court was more important because it's like a giant size head in the sky. This is what you have to do and it's the lord of the land ... before when there were researchers here, when they did the research papers, they would show it to us and they would talk about clients like this about court, clients like this about the judge, clients like this, always about the court system. And that annoyed me because I felt like hmm, but treatment, we see these clients every week. Did the research ask the questions? Were they swayed? Did they ask the questions like, well how was it in treatment? Did they even ask that, because there's never been

anything about treatment. So that was frustrating. And I guess sometimes we need those kudos. And I didn't feel like I got them (Therapist).

I think within the context of this program, they are both important. Do I think they are both equally valued? No. When I first came into the program, I kept calling it Drug Court, you know. And I was corrected, it's Drug Treatment Court and don't forget the Treatment part. It's like that was really important. And at the same time, there are moments where that feels like lip service. Because, at the end of the day, the judge is going to make the decision, not me as a therapist who works with somebody anywhere from three to four days a week at times. But the judge is going to make that decision in five minutes; based on a report ... I know I've certainly had a big reaction at times to some of the research that comes out about the program. It talks very little about the therapeutic relationship. ... It talks a lot more about the advancements in the criminal justice system, right? And it's like, that wouldn't be possible without certain kinds of things happening from a treatment perspective. And what are those things? What is meaningful? And what makes it effective? And I think it's not that clients aren't talking about it, it's that the questions aren't being asked the right way in research (Therapist).

With so much programmatic focus on the court, perhaps it is not surprising that both practitioners and providers thought participants were most influenced by the judicial component of the TDTC experience by their encounters with the court and its personnel: "There's just something about the whole set-up that they adhere to ... They may miss group in some instances, you know, for some clients ... they will miss urines, but they'll never miss court" (Court Liaison Worker). Some of the providers attributed this effect to the appreciable level(s) of control that the court wields over participants in the program. They described how this influence could sometimes be an impediment to the treatment process, especially since participants are already used to dealing with judges and the criminal justice system: "I think that the negative impact is in situations where it sort of will trigger previous instances of difficulty dealing with people in positions of authority" (Court Liaison Worker). Some of the providers attributed this reaction to the participants' focus on the external pressure being imposed by the court, which might have

the effect of obstructing their efforts to engage with treatment. A Therapist described the problem in terms of the underlying power differentials between the court and treatment in the program:

... as a social worker ... I work under the concept of 'shared power.' And the court works under the concept of 'power over,' right? And to try and bring those things together is very difficult. So with my clients here, you know in group and individually, we work together and it's very seldom that I will tell them that they have to do something on that level. And then they go to court, and it's a totally different thing because it's all coming from the top ... in their minds, the court has always been antagonistic, you know they've always been on the other side. It's hard for them, especially at the beginning, to see the court as being on their side now.

Similarly, another Therapist explained that the criminal justice professionals exercise the only genuine power in the program, and that she has no real control over participants:

So, you often hear, "oh, I don't want to disappoint the judge," you know, and people will walk to court where they will not make it for treatment here, right. Now part of that is the consequences, again right, what are they gonna get from me ... What are they going to get from the judge, "you're going to jail," right? (laughter), a little different ... they're used to the punitive model. So I can't put them in jail, nor do I want frankly that power. But at the end of the day, if I can't take away their freedom, the person who can is much more of an important player in their life.

In response to these power imbalances, according to the Program Manager, the TDTC treatment providers have taken steps to increase their power over participants relative to that being wielded by the court. For example, they have introduced clinical sanctions, such as community service hours and treatment contracts (see Appendix C), to encourage participants' compliance with treatment requirements:

There's severe penalties for not attending court. You're just not showing up. Basically custody ... So at some point we're saying in treatment, so we don't want court to be seen as so much more important, or treatment to be seen as less important than court. So we want to emphasize that if you just no show to treatment, you don't call, you don't cancel, that's not ok. So we felt there should be a penalty for that kind of non-attendance as

well. And that's where community service hours, that approach was implemented (Program Manager).

## **The Court-Treatment Relationship and Therapeutic Jurisprudence**

In identifying many practical benefits of combining justice with treatment in the TDTC, the findings reviewed in this chapter offer much support for the therapeutic jurisprudence perspective. All of the respondents characterized their working relationship with one another as being generally cooperative. Consistent with principles of therapeutic jurisprudence identified in problem solving courts (Casey and Rottman, 2000; Winick and Wexler, 2003), interdisciplinary education, teamwork, mutual respect, close contact, and assisting one another in the work environment seemed to contribute toward a shared understanding of the values, goals, and functions of the TDTC program. For instance, the information sharing process between practitioners and providers in pre-court meetings, retreats and case conferences, and the cooperative use of a system of rewards and sanctions were recognized as vital programmatic components. Court personnel related how they had gained knowledge about drug problems and treatment, while the providers conveyed an appreciation for the positive effects of the court and its personnel. Both practitioners and providers indicated that they were comfortable working together, and some of the respondents even observed how each group had incorporated the perspectives and approaches of the other in their collaborative work.

Treatment and criminal justice interviewees also thought that the TDTC structure provided a facilitative environment for program participants. This view is consistent with what many advocates of therapeutic jurisprudence and drug treatment courts have written: "A DTC's therapeutic orientation compels the court and its participants to pursue

and utilize relationships, methods, and ideas which will reinforce and support the goal of getting the individual to stop using drugs” (Hora et al., 1999: 28). Criminal justice practitioners, in particular, recognized the court’s unique ability to persuade participants to enter and remain in the TDTC.

But along with the above-mentioned positive aspects of the treatment-court alliance in the TDTC, there were equally negative implications. Respondents identified differences in perspective and approach, and related tensions among legal practitioners and treatment providers. While the former voiced a need for better communication between the court and treatment teams, the latter expressed concern about taking on an enforcement position in the program, which they believed contributed to the punitive effects of the criminal justice system on program participants.

In the past, as indicated by the Program Manager and a few of the therapists, the treatment professions have traditionally enjoyed a great deal of professional autonomy, and most members of this community consider themselves to be experts in treating substance abuse. However, the TDTC effectively removes this control over client care – clinical representatives no longer serve as the proverbial ‘gatekeepers’ to therapy. Providers of treatment are compelled to submit their work to the scrutiny of court personnel.

Despite a noticeable effort on the part of the court system to accommodate the treatment component, many of the providers insisted that a criminal justice perspective and approach still prevailed in the TDTC program. For instance, while legal practitioners shared treatment’s view that program success should be measured by individual progress, the former were more inclined to refer to program prerequisites (e.g. four months

abstinence, reduced recidivism, employment etc.) when talking about success. Moreover, while ongoing drug use is anticipated from participants in the program, providers still observed that practitioners (particularly the judges) occasionally exhibited impatience with the treatment process. For example, providers noted that, during court sessions, the judge seemed to phrase his questions to program participants in an unhelpful manner. Further, they noted the court's tendency to use residential treatment and 12-step meetings improperly. According to some of the providers, these problems reflected a criminal justice penchant for trying to find the 'quick fix' to continued drug-using behaviour. Finally, at times, providers also disagreed with the court's sanctioning practices. Many believed that sanctions were sometimes too severe, and conflicted with what was best for treatment. On the other hand, a few of the practitioners, as well as both court liaison workers, suggested that providers' disagreement with court decisions reflected their failure to understand or accept the involvement of the criminal justice system in the program.

In general, the majority of respondents felt that both court and treatment were equally vital to the program; however, a few of the practitioners, including two judges, insisted that treatment was the more important component. Despite differences in opinion, the majority of practitioners and providers thought that the court played a key role in ensuring program compliance. Some of the providers believed, however, that the court was disproportionately recognized for its contribution to the program. They insisted that the court's external pressure on participants could ultimately disrupt the treatment process in the program.

These findings provide valuable insights into the potential advantages and dangers attendant to the TDTC's efforts to 'treat' the problem of drug addiction within a criminal justice structure that is ordinarily designed to assign guilt and mete out punishment. In general, the interviewees indicated that they generally work well together. They all recognized that the TDTC model has the potential to assist participants. However, the treatment providers seemed to be more aware than were the legal practitioners of the conflicts and tensions inherent in the relations between court and treatment. Clinicians recognized and expressed reservations about the court's powerful position in the TDTC.

Their feelings highlight a fundamental ideological conflict, observed in similar contexts elsewhere (Fischer, 2003), when rehabilitation projects combine treatment with punishment to address illicit drug use. With its perceived focus on treatment, the TDTC represents an effort to challenge the criminal justice dominance to this social problem; however, like other professional groups that specialize in addressing criminal behaviour, drug treatment assumes a secondary position behind the more powerful criminal justice system with respect to addiction and crime control (Ericson and Baranek, 1982).

As the literature indicates, the Drug Treatment Court model is first and foremost a criminal justice response to substance abuse and related criminal activity. Fischer (2003) reminds us that the "... DTC is a *court* run by a judge, and not a hospital or treatment programme run by a doctor or a counsellor" (240). Indeed, the roles and responsibilities of treatment undergo significant modification in order to assist with criminal justice accountability issues and court operations. Treatment providers in the TDTC are required to be an integral part of the program's enforcement mandate, monitoring participant responses to treatment/punishment on an ongoing basis. By implication then,



providers acquire an identity as ‘officers of the court,’ a position they believe sometimes compromises their advocacy and therapeutic role. Treatment providers face the ethical dilemma of balancing their responsibility to the court with the needs of their clients. This problem is further intensified when they involve themselves in the actual administration of punishment. Like earlier rehabilitative initiatives, Fischer (2003) maintains that drug treatment courts re-establish the hegemony of punishment over treatment: “... since the boundaries imposed on treatment practically leave very little room for sovereign decisions on what is ‘best’ for the patient, and more or less all treatment components ... are tied to punitive ends ...” (241).

This discussion is significant to therapeutic jurisprudence theory. These interviews reveal fundamental differences in perspective and approach between practitioners and providers, leading to inevitable tensions which could impinge on the judge’s ability to maintain control of a particular case. For example, a treatment provider could withhold information from the court in order to prevent his/her client from being ‘inappropriately’ sanctioned. As a result, “... the judge may lack the requisite information to withdraw court support from a treatment program, modify an individual’s program, or terminate someone’s participation in the program” (Hora et al., 1999: 74). More importantly, and of concern to therapeutic jurisprudence, these tensions could negatively affect participants’ experiences in the program. In stressing a problem-solving orientation through a court-treatment partnership, therapeutic jurisprudence focuses on perceived ‘therapeutic’ and ‘anti-therapeutic’ outcomes in court. However, as mentioned earlier, therapeutic jurisprudence has been criticized for its inability to clearly delineate who defines these outcomes, and how. Understanding the dynamic relationship between

criminal justice practitioners and treatment providers is vital not only to the overall effectiveness of the program, but also in determining the progress of participants. In the context of the TDTC, a therapeutic jurisprudence perspective must consider the nature of this relationship, in order to properly assess how outcomes are determined in court.

Following from this chapter's review of the transformed roles of TDTC judicial and treatment personnel, and the ideologies and practices associated with this reorganization, in Chapter Five I will proceed to examine how therapeutic jurisprudence can be applied to the TDTC court process.

## **CHAPTER FIVE: RESULTS AND IMPLICATIONS II – Therapeutic Jurisprudence and the TDTC Process**

### **Introduction**

This chapter comprises the second half of the research results, and includes data from both interview and court observation work. The chapter is structured into three sections primarily addressing various elements related to the TDTC process. The first section examines certain legal and ethical considerations relevant to therapeutic jurisprudence in the TDTC. The second section, which draws largely from my observation work, discusses the main components of the TDTC court proceedings which embody therapeutic jurisprudence, focusing specifically on activities and interactions in the courtroom. Finally, as a culmination of sorts, the third section investigates staff perceptions of therapeutic jurisprudence and considers the implications of applying therapeutic jurisprudence to the TDTC program and beyond.

### **Legal Considerations in the TDTC**

*“ ... if you assess [TDTC applicants] on ... the law’s limited tool of past behaviour being the best method of predicting future behaviour, they wouldn’t even be accepted, or they’d be thrown out. It’s all with treatment’s view that this behaviour is just a symptom of the problem” (Judge)*

The legal system provides a framework within which the Toronto Drug Treatment Court is able to operate. In the context of the TDTC, the role of the law itself is significantly altered by the structure of the program. For instance, the TDTC follows a post-adjudicative model – that is, defendants must voluntarily plead guilty in court, thus

waiving certain legal rights. According to exponents of therapeutic jurisprudence, this process is justified because drug treatment courts are ultimately using the law as an instrument for helping people (Winick, 2003). At the same time, they suggest that using legal procedures for therapeutic purposes should in no way trump "... other considerations which stand at the foundation of other parts of our criminal justice system" (Hora et al., 1999: 71). However, from the perspective of TDTC criminal justice practitioners, achieving therapeutic outcomes in the program may indeed undermine fundamental principles of justice. Specifically, they question the legal appropriateness of using certain practices to facilitate drug treatment.

The interview data revealed three specific areas related to this issue in the TDTC: fulfilling principles and purposes of sentencing; the ambiguous conditions surrounding Drug Treatment Court bail and the unconventional use of bail revocation in the TDTC; and concerns from a defence perspective.

**Sentencing.** Toronto Drug Treatment Court participants are processed within the criminal justice system. Therefore, provisions of the *Criminal Code* of Canada and other relevant legal principles apply. As part of the structure of the Drug Treatment Court, sentencing is delayed until participants have completed (or been discharged from) the program. Some of the literature on drug treatment courts has highlighted this practice as controversial, given that section 720 of the *Criminal Code* of Canada requires that "a court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed."

The idea of postponing a sentence for the duration of rehabilitative treatment, referred to in the past as "therapeutic remand" and "therapeutic adjournment" (Chiodo,

2001), has been debated by Canadian courts for quite some time. Two of the judges talked briefly about section 720 and its legal implications. One Judge explained that the section does not completely prohibit the TDTC from delaying a participant's sentence:

... no one could say that we're breaking the law by not sentencing them right away, and if you look at it, like anything in law, "a court shall soon as practicable, after an offender's been found guilty, conduct *proceedings* to determine the appropriate sentence to be imposed." It doesn't say imposed sentence ... so even this [Drug Treatment Court] is an intermediate step. But we're stretching it.

However, another Judge did say that the Court of Appeal does not want judges delaying sentences to "run therapy sessions." In this sense, both judges hinted that postponing sentencing in the TDTC possibly encroaches on an individual's right to a trial within a reasonable time.<sup>35</sup> Chiodo (2001) asserts that, in general, delaying sentencing for the purposes of promoting good behaviour cannot be legally justified because the notion of indeterminacy is itself contrary to the rule of law. For instance, such a delay could potentially have a detrimental effect on those individuals waiting to be sentenced: "... the very uncertainty of an indeterminate sentence, particularly when release decisions are highly discretionary and difficult to predict, constitutes a kind of psychological harm" (Boldt, 1998: 1230).

In a number of Canadian legal cases, judges have outlined their reasons for allowing or rejecting delayed sentences for the purposes of treatment (Chiodo, 2001). Judges rationalized their willingness to postpone sentences where there was a definite need to protect the public by treating the social and/or health problems which had motivated offenders to commit their offence(s) (Chiodo, 2001). Indeed, this rationale underlies the very origins of specialized/problem-solving courts (Winick, 2003).

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<sup>35</sup> Please refer to section 11(b) of the *Canadian Charter of Rights and Freedoms*.

Although much debate rages over the issue, Chiodo (2001) suggests that Canadian drug treatment courts have been successful at delaying sentences because of their unique structure and clearly defined objectives: “Until the Supreme Court of Canada rules on this issue, it appears the DTC in Toronto may still be able to function as a ‘new’ sentencing alternative, albeit one that is exceptionally analogous to the therapeutic remand” (90). Therapeutic jurisprudence is concerned with arranging the law in a productive manner. In line with this, legislating certain amendments to section 720 could perhaps clarify this ambiguous situation by providing exceptions in cases where participation in the TDTC (and other like treatment programs) would assist an individual to overcome his/her drug problem and related criminal behaviour.

For all intents and purposes, an individual’s performance in the Toronto Drug Treatment Court helps determine the course of sentencing, and his/her time in the TDTC is considered part of the sentence if he/she successfully completes the program.<sup>36</sup> One Crown Counsel commented on the sentencing disparities that can occur involving participants who have been previously discharged from the TDTC:

... after people fail out of the program, they get a sentence that’s as light and sometimes lighter than they’d get if they completed the program. And to me, it really undermines, I think, the idea that the program is solid ... So I think it’s a disincentive for people to continue sometimes. One guy got kicked out, he’d only done 30 days, he had a good lawyer who came in on a pitch, “this guy’s got a college degree, a university degree, and he’s had a rough life.” And the judge felt sorry for him and gave him time served. And this was somebody who had an association with another person in the Drug Treatment Court, who asked me what happened. And I said he got time served. And she was like, “time served?” And I could see the look on her face because here she’d been working hard for close to

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<sup>36</sup> This situation applies mainly to Track 2 participants, who have pleaded guilty in order to enter the TDTC. One Judge informed me that the majority of participants who enter the program are admitted via the Track 2 stream. I later confirmed this assertion by consulting the most recent program evaluation document: “Toronto Drug Treatment Court Evaluation Project: 2003 Interim Evaluation Report,” (Gliksman, et al., 2003).

a year, and when she graduates, she's going to walk away with six months probation on top of her suspended sentence where she spent some time in jail.

This respondent's sentiments seemingly typify the failings of the regular criminal court system in dealing effectively with the drug offender's underlying problem of addiction. Therapeutic jurisprudence does not necessarily support all actions that may be regarded as pro-treatment (Winick and Wexler, 2003). However, an individual's experience of receiving a lighter sentence in regular court following his/her failure in the DTC – with, most likely, less focus on the underlying problems associated with his/her criminal behaviour – can certainly be considered anti-therapeutic from a therapeutic jurisprudence perspective.

When sentencing offenders, courts generally try to achieve a host of objectives. All of the interviewees were asked whether they thought it was possible to satisfy the general purpose and principles of sentencing under section 718 of the *Criminal Code* of Canada (see Appendix D), while addressing the treatment needs of non-violent, drug dependent offenders. Not surprisingly, the criminal justice practitioners were more familiar with section 718 than were the treatment providers. A Crown Counsel explained that the provisions in Section 10 of the *Controlled Drugs and Substances Act*<sup>37</sup> apply most directly to the sentencing of drug offenders, and that they act within, or in addition to, section 718 of the *Criminal Code* of Canada. Further, a Judge stated that no sentence is expected to fulfil all six principles of sentencing enshrined in the *Criminal Code*: “The section says one or more of the following ... they're inherently contradictory. But that's

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<sup>37</sup> Section 10(1) of the *Controlled Drugs and Substances Act* provides that, “[w]ithout restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.”

recognized by ‘both one or more of the following’ and the case law.” Both of these interviewees asserted that for every case, some principles are stressed over others. For instance, the Crown Counsel explained that “... some sentences for high level trafficking will emphasize the denunciation and general deterrence ... The more street level crimes, the kinds of drug crimes conducted primarily to support someone’s addiction ... the treatment side, the rehabilitation side, that’s going to get more emphasis ...”

In general, while there were no systematic differences between treatment providers and legal practitioners, much individual disagreement was manifest over the Drug Treatment Court’s ability to satisfy the various sentencing principles of the *Criminal Code* of Canada. However, all of the interviewees did agree that section 718(d) – “to assist in rehabilitating offenders” – was the main purpose of the Toronto Drug Treatment Court. One Crown Counsel suggested that the Drug Treatment Court “has the ability to focus on that side or that aspect of sentencing in the way that a traditional criminal court doesn’t.” Similarly, while two judges mentioned that they already have the ability to promote rehabilitation outside of the Drug Treatment Court, they suggested that the TDTC is more focussed in this respect: “... it slows things down. There’s resources, there’s time for everybody” (Judge). In this sense, respondents viewed the TDTC as taking a therapeutic jurisprudence approach through the rehabilitation of the addicted drug offender, and the use of the legal process to accomplish this goal (Winick, 2003).

Some of the interviewees talked extensively about the meaning of rehabilitation. In general, there was no consensus about the meaning of this concept. Criminal justice practitioners and treatment providers conceptualized the term differently – as either an



end or in terms of the treatment process itself. One Judge equated rehabilitation with treatment: “I don’t see the distinction between treating a drug addict and rehabilitating them. Because if treatment is successful, the crime stops. These aren’t career criminals who make their living like that. It’s always to get money to get the drugs.” A Crown Counsel described the criminal justice and treatment perspective of rehabilitation somewhat differently:

I think [rehabilitation] is *the* function. The criminal justice function. There’s obviously a treatment function which is to help these people recover from addictions and rebuild their lives and so on. I think rehabilitation is probably the criminal justice term that we use for the same thing. Looked at through the treatment lens, it’s kind of a different thing that’s occurring than looked at through the criminal justice lens ...

Concomitantly, the other Crown Counsel asserted that the criminal justice system has a limited view of rehabilitation:

Let me find my *Criminal Code* (searching for definition of ‘rehabilitation’ in *Criminal Code*). Well, I’m not surprised I can’t find a definition. I don’t see rehabilitation I guess as an end point. I think like anything else, rehabilitation, recovery, it’s a process. So in my view, the Drug Treatment Court is just part of that process. I mean if rehabilitation is the end point, well what does that mean, that the person doesn’t offend anymore? Well in the criminal justice system, I guess it does mean that. So what if we have a cocaine and heroin addict who we send him through treatment, and they remain addicted to cocaine and heroin, but they have somehow found a way to feed their habit without committing any further offences or without getting caught. Does that mean that person is rehabilitated? I don’t think so ... I think it’s all a process.

One treatment provider agreed with this appraisal, and likened the treatment process to everyday life:

I don’t know if we’re just talking semantics now in terms of different, you know different language. I think whether we talk rehabilitation or treatment, I mean to me rehabilitation implies an end, I mean we can use different words ... I think like any change process, you know. If I engage in a change in my behaviour in terms of starting an exercise program, I never get to a point where I say ok I’m there, I’ve done it, you know, it’s

ongoing, it's ongoing attention paid to your fitness, paid to your nutrition and so on ... (Therapist).

***TDTC bail and bail revocation.*** To the benefit of the TDTC program and its participants, Section 518(2) of the *Criminal Code* of Canada<sup>38</sup> allows a judge to release an individual on bail until he/she is sentenced. However, as one Defence Counsel stated, the court requirements of the TDTC program (see Appendix E) are “more demanding than a lot of conditional sentences. [They have] more conditions ... a drug treatment court bail has way more conditions that a defendant is required to follow than any conditional sentence order [she] ha[d] ever seen ...” While all three judges appreciated the level of control and amount of supervision the court has on TDTC participants, two of them noted the contradiction of having participants abstain from using drugs [condition (e)] while also having them report prior drug use [condition (g)]. One Judge explained that these conflicting imperatives are troublesome because he has to “... impos[e] a bail condition in one breath,” and then order participants “to report when they break it in the next.” According to the requirements of the court, participants are technically in breach of their bail if they have used drugs, but action is not taken if they have reported the use to both treatment and the court. While the law acts in a therapeutic manner by allowing the TDTC to release participants for the purposes of receiving treatment; these contradictory bail conditions may confuse participants about the requirements of the program. In line with the principles of therapeutic jurisprudence, both judges stated that the program needed to better articulate the conditions of bail.

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<sup>38</sup> Section 518(2) stipulates that “where, before or at any time during the course of any proceedings under section 515, the accused pleads guilty and that plea is accepted, the justice may make an order provided for in this Part for the release of the accused until the accused is sentenced.”

Most drug treatment court studies show that participants have found the programs more intense, more demanding and more difficult to complete than a regular jail sentence. Fischer (2003) writes that it is common for many drug treatment court participants to face “an unforeseeable duration of judicial sanctions” (240), including several periods of short-term incarceration. If participants fail to comply with conditions of bail without an acceptable excuse, they are subject to a breach of recognizance charge and a revocation of bail application under section 524 of the *Criminal Code* of Canada, resulting in jail time. Those participants who have their bail revoked, but are not discharged from the program, are usually held in custody for an interim period of a few days at which time they are released and continue with the program.

Many legal practitioners clearly view the repeated use of ‘shock incarceration’ as a problem-solving strategy in support of program objectives. At the same time, much of the Drug Treatment Court research considers the revocation of bail as a form of punishment. In this connection, one Judge was uncomfortable about labelling bail revocation as a program sanction. He explained that while he can send an individual to jail during the sentencing stage and for breach of bail, he is careful not to refer to bail revocation in the TDTC as punishment, because he has no jurisdiction to send participants to jail: “I will never say, ‘you are going to jail.’ We can’t call jail a sanction, we can’t use this language.” He later expressed a wish that other TDTC staff would be more careful in this regard. While another Judge stated that a judge can revoke someone’s bail legitimately for non-compliance in the TDTC, he did speculate that there is a potential ethical problem involved with repeatedly jailing participants for short

periods of time – what he called “revoking the revoking of bail” – but he did not comment further on the subject.

From a therapeutic jurisprudence perspective, the bail revocation tool could motivate participants to comply with the program. However, as both judges recognized, from a legal standpoint there is a potential concern with repeatedly using bail revocation. The practice could seem like an abuse of the legal process. For instance, it may look as though participants are being set up to revoke their bail.

*Concerns from a defence perspective.* As mentioned in an earlier section, the majority of defendants who are eligible for the TDTC must plead guilty in order to enter the program, and thus forfeit important legal protections. Many of the interviewees stressed that participants *voluntarily* decide to enter the program. For example, when I referred to TDTC participants as ‘clients’ during an interview, one Judge interrupted me and said: “I don’t have clients. So, I think you should be careful about the term ... I call them participants, okay? ... They voluntarily come in, and they voluntarily participate. So that’s why I call them Drug Treatment Court participants.” In the same way, one provider described a conversation she had with a participant after the court sanctioned him. Like the judge, she also emphasized the voluntary nature of the program:

And I just point out to him that he has a *choice*. That you *chose* to come and do this program. You don’t have to do it. You can go and do your jail time. You have that *choice*. But to know and to teach them that they always have *choice* with everything they do. I don’t let them feel like they don’t. So he sits and, I said you can moan about it. Moan as much as you want. But just so you know, there’s *choice*. So he gets to moan and there is *choice* (Therapist).

While many interviewees shared a similar perspective concerning this issue, the two duty counsel expressed some discomfort with the admission process. Surprisingly, both interviewees revealed that they had no problem with the requirement of having

participants plead guilty. However, they did mention that they occasionally felt concern about the reasons why defendants enter the TDTC program. One Duty Counsel suggested that sometimes defendants want to enter the program when it might not be legally prudent to do so:

And it's really difficult, because as a Defence lawyer, you have an obligation to instruct these people that beneficial program or not, they should not be entering guilty pleas to come into this program when they have valid defences, or they have valid Charter arguments. It's actually very difficult, and I can say that there have been times where I have had to tell people that you can't do this program. It would benefit you, it would help you, but you have a case here and you need to fight this.

Another Duty Counsel added that this situation is particularly challenging because there is an obvious benefit for drug-addicted offenders to gain easy access to treatment:

The difficulty that we have as duty counsel, if somebody says, "well you know, I didn't do it, I just want to plead guilty to get out of jail." Well, we can't help them. You know, it's unethical to do that. And I don't. But in Drug Treatment Court ... it's kind of unfortunate that you know a person who might have a defence to a charge who really can't get in because, you know, they very well might need the program, but if they can't admit to all the elements of the offence, they can't plead guilty and therefore can't get into the program.

Both duty counsel appeared to perceive a degree of coercion inherent in the admission process. While entry into a drug treatment court program has all the appearances of 'voluntariness,' a potential participant is most often influenced by more immediate consequences – that is, spending time in jail or not. In this sense, the process is the punishment, and the easiest way to avoid the full impact of possible punishment is to avoid as much of the process as possible (Ericson and Baranek, 1982). An obvious way of doing this is pleading guilty to be released from custody in order to enter a DTC program. Further, as Ericson and Baranek (1982) write in the context of the regular court

process, “ ... the power imbalance is typically so great [between the court and defendant] that it is a distortion to characterize any discussion between accused and [legal] agent, and subsequent decision [e.g. to enter a DTC program] as negotiated, and more accurate to conceive it as manipulated and/or coerced” (4). While exponents of the Drug Treatment Court model argue that judges and other Drug Treatment Court staff are providing individuals with a choice that would not otherwise exist in a regular court (Bentley in Chiodo, 2001), program participants can be viewed as the “conscript clientele” (Friedenberg, 1975)<sup>39</sup> in the DTC process.

As therapeutic jurisprudence theory asserts, being given choice in the court process represents a form of self-determination, which is essential to promoting psychological health:

... if individuals who make their own choices perceive them as non-coerced, they will function more effectively and with greater satisfaction ... An individual who decides to accept diversion to a drug treatment or other problem solving court, or to plead guilty and accept treatment...is making a legally voluntary choice ... (Winick, 2003: 7).

Boldt (1998) maintains that a defendant’s decision to enter a drug treatment court program must be reached with a significant understanding regarding his/her options: “... a setting in which addicted defendants are given genuine choice, are helped to understand the likely consequences of competing alternatives, and are held responsible in a predictable and rational fashion for the decisions they make, likely serves both a therapeutic function and a dignity-enhancing purpose” (1287-1288).

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<sup>39</sup> In his discussion of ‘service’ bureaucracies, Friedenberg (1975) contends that their ‘clients’ are members of ‘conscript clienteles’ who “ ... are not regarded as customers by bureaucracies that service them, since they are not free to withdraw or withhold their custom or to look elsewhere for service. They are treated as raw material that the service organization needs to perform its social function and continue its existence” (2).

On the other hand, if participants perceive their decision to enter a DTC program as having been coerced, their attitude, motivation, and opportunity for success in the treatment program will weaken. Winick (2003) concedes that a drug treatment court participant may indeed experience a degree of psychological coercion during the admission process. Moreover, even if a participant makes the choice to enter a drug treatment program, his/her future actions become significantly curtailed for the duration of the program. Requirements such as agreeing to attend a drug treatment program, remaining drug-free, and submitting to random drug-testing place a great deal of pressure on participants. Indeed, the participant has little choice once in the DTC program, and must accept decisions from others (i.e. treatment and court). However, according to the proponents of therapeutic jurisprudence, this type of pressure is “constructively harnessed to enhance motivation and engagement” (McGuire, 2003: 115).

Traditionally, a defence lawyer is not allowed to disclose information gained in the course of representing her/his client, unless permitted to do so by the latter. This restriction is intended “... to safeguard the unity of purpose between advocate and the client and to facilitate the lawyers’ partisan efforts on their clients’ behalf” (Boldt, 1998: 1247). In this connection, two judges and one duty counsel expressed some uneasiness about participating in pre-court meetings, and discussing the cases of participants (or potential participants) in their absence.<sup>40</sup> While one Judge stated that there is “wiggle room” because a defence attorney is present, a Duty Counsel mentioned that it is sometimes difficult to determine what information about a participant should be disclosed to the rest of the court team: “... it’s tough for defence counsel because there are some

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<sup>40</sup> Section 650 of the *Criminal Code* of Canada states that “... an accused, other than an organization, shall be present in court during the whole of his or her trial.”

aspects you want to share with [other members of the court team] because it could be beneficial to the client in either keeping them in the program or not. But there's other information that may come up that's obviously privileged and you know, could harm or affect their stay." Clearly, an important responsibility of the TDTC defence lawyer is to make certain that the participant will stay in the treatment; however, there still are questions surrounding the ethical implications of conducting such meetings, given that the defence counsel collaborates with the judge and Crown counsel, and has certain obligations to the TDTC program itself.

This dilemma perhaps reflects a concern with the overall position of defence counsel in a drug treatment court program.<sup>41</sup> Despite the perceived benefit of providing illicit drug users the opportunity to address their drug addiction and associated criminal activity, the potential sacrifice of defence protections may ultimately be anti-therapeutic. The TDTC may be setting participants up as program failures, resulting in the reinstatement of original charges or sentences.

## **A Redefined Court Process**

*"[In the TDTC] you walk in and you have, it looks like a piano, a keyboard with people bouncing up to speak to the judge" (Judge)*

This section identifies the key components of the Toronto Drug Treatment Court proceedings which embody a therapeutic jurisprudence perspective. A therapeutic jurisprudence understanding of the court process is guided by the assumption that the activities in the courtroom, as well as the interactions between the various players involved, exert an impact on the psychological well-being of program participants.

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<sup>41</sup> Refer to Chapter Four for a discussion on the altered position of the TDTC Defence counsel.



Accordingly, in what follows, I identify the key components of the TDTC that relate to this process. While my court observation work forms the main basis for this discussion, I also incorporate findings from TDTC staff interviews.

In the TDTC, most key issues of legal adjudication are determined, by virtue of a participant's guilty plea, in advance of the actual court proceedings. Accordingly, the activities comprising the court process itself are less centred on fulfilling legal objectives, and more concerned with facilitating the drug treatment aspect of the program. However, therapeutic considerations still influence the court's processing of a given case, as well as how legal actors conduct themselves and interact with participants, court liaison workers, and other legal practitioners.

Three sub-themes emerged from my observational work on the Toronto Drug Treatment Court process: the uniqueness of the TDTC setting; the highly-organized structure of the courtroom activities; and the central role of the judge-participant interaction. In the following sub-sections, I address each of these sub-themes in turn.

### **A Unique Courtroom Setting**

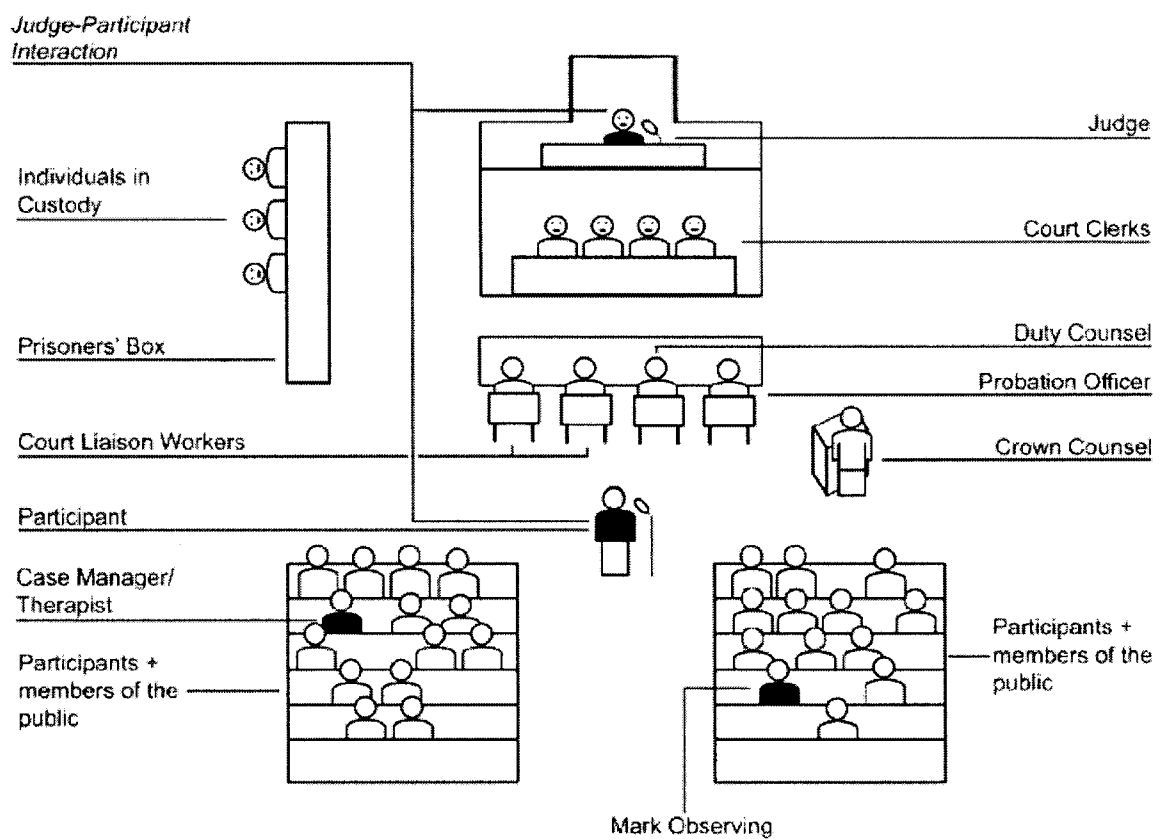
The specific layout of the TDTC courtroom confers an overall therapeutic tone upon the proceedings. At Old City Hall in Toronto, courtroom 116 is bright with several windows, and not too large. Despite being a court of law, the atmosphere seemed less formal than expected. Prior to each Drug Treatment Court session, participants gathered in the courtroom seated, and awaited the appearance of the judge.<sup>42</sup>

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<sup>42</sup> The court clerks were often present in the courtroom well before the court proceedings began, whereas the other members of the court team (lawyers, court liaison workers, probation officer) always appeared a few minutes in advance of the judge.

Figure 5.1 depicts the typical courtroom layout of the TDTC, including the positions of all the key players during the proceedings. The *judge* was seated on a raised bench at the front of the courtroom. Facing everyone else, wearing a traditional gown, he conveyed the appearance of presiding over a regular court. To his left, a large calendar hung on the wall within easy viewing distance of everyone assembled. He used this calendar to schedule progress reports while participants were present. Prior to, and intermittently throughout the proceedings, court officers escorted to the prisoners' box individuals who were either potential participants, or had been picked up on a bench warrant, or were facing (a) new charge(s). The *Crown counsel* was located on the right side of the courtroom, standing in front of a podium and facing the Judge during the

**Figure 5.1: Typical layout of TDTC courtroom**



entirety of the court session. One unique duty of the TDTC Crown was to go through the court docket and call upon each participant to come to the front of the court.<sup>43</sup> The *duty counsel*, *court liaison workers*, and *probation officer* were seated together at a table directly opposite the judge. Each participant appeared before the judge, while the other participants and members of the public, seated in the body of the court, looked on. On two occasions, a therapist attended the proceedings as an observer.

Before and after every court session, most of the participants appeared to be in good humour, conversing with one another and with the staff. For example, before one session, a participant arrived in the courtroom, and asked others present (including staff) whether they had seen her on television. This casual demeanour seemed to express a certain degree of comfort and camaraderie with the others present. In much the same way, TDTC staff looked relaxed, often talking with each other and with participants before the judge emerged. For instance, one of the court clerks regularly joked around with two of the participants prior to the commencement of proceedings. Whenever the two participants attempted to sit at the back of the courtroom, the clerk told them to sit closer to the judge: “Why are you guys seated at the back ... You know Judge [Last Name] likes to see your handsome faces close to the front.” Despite being the enforcers in the program, both Crown counsel also seemed comfortable around participants, briefly talking to them on occasion before court began. The court liaison workers, duty counsel

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<sup>43</sup> The Crown was also responsible for directing the court to address new participants and other individuals who were in custody.

and probation officer often circulated around the courtroom, offering any information or advice they could to participants, and generally checking up on them.<sup>44</sup>

## **Well-Organized Activities**

Many different activities took place prior to and during TDTC court sessions. Most of them were initiated by the judge, and unfolded both consistently and efficiently. Indeed, the judges were able to manage the various proceedings in an orderly manner. In line with the observations of several interviewees, the judges showed strong leadership skills in all court-related endeavours. They appeared to be involved in all facets of the proceedings, and were particularly concerned with including participants/defendants in the court process. They displayed fairness in their decision-making; gave their complete attention to the proceedings; and showed respect and concern towards participants. Further, their demeanour and work ethic in court seemed to have an impact on the other members of the court team. They also appeared to be respectful and fair-minded in their interactions with participants, as well as proficient in their duties.

Good organization and communication between the court, participants and other staff were also apparent. For example, participants received written reminders about when to appear for their next progress reports. Further, record keeping seemed to be comprehensive in case files. This attention to detail afforded staff members the opportunity to quickly find and present information in court. The information reported included, for example, urine screen results, attendance at the Centre for Addiction and Mental Health, and contact recording with various social services. Moreover, an open

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<sup>44</sup> Duty counsel was primarily concerned with individuals who breached their bail, and potential participants who were in custody (i.e. individuals in the prisoners' box).

sharing of information was also evident among the various players in court, reaffirming the importance of teamwork in the program. For example, in order to keep the court docket moving, both Crown and Duty counsel often checked with court clerks and court officers about the number of individuals who were in custody, and whether they could be brought to the courtroom. In addition, during progress reports, the judge, Crown and Duty counsel and court liaison workers assisted one another by contributing any information that was needed for a particular case.

Based on my observations, it was possible to group the formal activities of the TDTC into the following four phases: pre-court meetings, the entry of new participants, progress reporting, and graduation.

***Pre-court meetings.*** I observed two pre-court meetings, both of which were attended by all members of the court team: the judge,<sup>45</sup> Crown<sup>46</sup> and Duty counsel, two court liaison workers, a probation officer, and one court clerk. Decisions rendered were often based on the input and recommendations of the court team.<sup>47</sup>

Conversations took place primarily between the judge and the court liaison workers, with the latter providing the necessary information about the status of each participant in treatment. However, many other issues pertaining to participants' general well-being were discussed in the meetings, such as housing, employment, education and social service needs (e.g. welfare, unemployment insurance). The other members of the court team listened carefully to the judge and court liaison workers, interjecting

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<sup>45</sup> The full-time DTC Judge was present for the first pre-court meeting, and one back-up DTC judge was present for the second.

<sup>46</sup> The full-time DTC Crown counsel was present for the first pre-court meeting, and the back-up DTC Crown counsel was present for the second.

<sup>47</sup> The Program Manager told me that a therapist/case manager, while not part of the court team, periodically attends the pre-court meetings.

periodically in some instances. Crown and Duty counsel spoke mostly about the legal status of potential participants (e.g. current charges, program admission and discharge), and sanctioning (e.g. whether bail revocation was appropriate). Crown counsel was primarily concerned about ensuring that participants were complying with program requirements, while Duty counsel focussed on protecting the interests of participants in the program. The probation officer conveyed details about individuals who had applied for or entered the program with an existing probation order, and offered information concerning the supervision of graduates who were had been placed on probation.

The judges listened closely to others speaking in the meetings, and were careful not to interrupt them as they spoke. However, on a few occasions, the judges would ask the others about a participant's legal status or history in the program. The full-time judge took a more active role in the discussions than did the back-up judge. The latter seemed to be more willing to let others make decisions, perhaps because he spent less time working in the program, and as a result, was not as familiar with the situations of participants in the program.

For the most part, the discussions and decisions made in the pre-court meetings determined how court proceeded.<sup>48</sup> On occasion, the court liaison workers asked the judge and/or Crown counsel to convey their satisfaction or displeasure with participants in court. For example, after one participant failed to show up on time for his initial assessment at the Centre for Addiction and Mental Health,<sup>49</sup> one court liaison asked the Crown counsel to take issue with the participant's behaviour and desire to be in the program. This was later visible in court. The Crown clearly displayed his

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<sup>48</sup> However, the full-time judge explained that the decision of whether or not to jail an individual was always made by the judge in open court.

<sup>49</sup> Refer back to Chapter Two for a description of the CAMH.

disappointment by verbally admonishing the individual's conduct in the program, warning him that future non-compliant behaviour would result in program expulsion.

*Admitting new participants.* Potential TDTC participants were usually dealt with before Drug Treatment Court began.<sup>50</sup> From jail, they were escorted to the prisoners' box in the courtroom, and remained there until the judge was prepared to address them. When ready, the judge directed individuals to stand in front of the microphone facing him. He greeted them and initiated a discussion about the various circumstances surrounding their drug use. He asked the same types of questions to every new participant whom I observed. The following represents some examples of questions:

*"How old are you?"*

*"How long have you been a drug addict?"*

*"What drugs do you use? ... Do you use marijuana and alcohol as well?"*

*"What other drug treatment programs have you tried?"*

*"What's your relationship with your family?"*

*"Were you using in the house?"*

*"Do you have children ... What are their ages?"*

*"Who do your children live with ... Do you see them? ... Are you under a court order?"*

*"When you are not in jail, where do you live?"*

The judge also asked participants why they wanted to be in the TDTC, and briefly outlined the requirements for successful completion of the program, clearly stating that it was ultimately their choice to enter. After this preliminary discussion, a court clerk read the specific charge(s)<sup>51</sup> and asked how the defendants would plead, at which time they uniformly said "guilty." The Crown counsel then outlined the details of charge(s) (i.e.

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<sup>50</sup> On occasion, potential participants were dealt with through the course of the DTC proceedings.

<sup>51</sup> Defendants were charged under section 4 and/or 5 of the *Controlled Drugs and Substances Act*.

location, type(s) and amount of drugs, and circumstances of the arrest). The judge asked the defendants whether they agreed with the synopsis of the crime, to which they all answered “yes.” After ensuring that participants had safe housing available, the judge directed them to go to the Centre for Addiction and Mental Health for a scheduled assessment. He emphasized the intensive and intrusive nature of the program, and informed participants about the potential consequences of not complying with program requirements. The clarification of court expectations for program completion through direct communication between the judge and participants, and subsequent follow up during progress reporting were two key elements of the TDTC admission process.

The judge then asked Crown counsel to state his intended sentence<sup>52</sup> should the participants not succeed in the program. Before asking participants to sign their bail, the judge verified that they had signed the program waiver<sup>53</sup> with defence counsel and read out the court conditions (see Appendix E). Finally, after signing their bail, the judge directed participants to find a seat in the body of the courtroom, and instructed them to observe the entire Drug Treatment Court proceedings for that day. At the end of court, the judge reviewed the program’s expectations with new participants, and addressed issues of honesty and accountability.

***Progress reporting.*** The Drug Treatment Court proceedings mainly involved the presentation and discussion of participants’ progress reports.<sup>54</sup> Approximately 20 progress reports took place during each court session, with individual cases ranging from two to ten minutes in duration, depending on the circumstances involved. Progress

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<sup>52</sup> This intended sentence comprised the amount of jail time that the Crown would request in regular court for the crime in question.

<sup>53</sup> The TDTC waiver allows participants to enter the program by forgoing certain legal protections.

<sup>54</sup> The full-time judge informed me that Drug Treatment Court actually starts at 3:00 pm. He explained that between 2:00 pm and 3:00 pm, he deals with remands – that is, people coming into or leaving the program.



reports served as a time for the judge to confront participants directly about their drug addiction and treatment. During the progress reports, the judge repeatedly emphasized the need for good attendance and active participation (i.e. showing up for and participating in treatment and court sessions) in order to successfully complete the treatment component of the program. Moreover, the judge stressed the potential positive or negative consequences that were contingent on the participant's behaviour. The judge's response to participants during progress reporting could range from praise/encouragement to bail revocation resulting in jail time.

At the commencement of each progress report, the Crown summoned the participant to present him/herself before the court, where the judge engaged them in a direct discussion.<sup>55</sup> Generally, the exchange began with the judge determining whether the participant had used drugs. Not surprisingly, some participants responded in the affirmative. In these instances, the judge often requested that participants repeat their admission.<sup>56</sup> He then asked about the type and amount of drugs consumed, as well as the circumstances surrounding the use. When the judge was satisfied with a participant's response, he usually offered some words of encouragement, and then addressed various issues related to the requirements of the program such as attendance, treatment, urine test results, housing, employment, and education. By conducting these progress reports, the judge focused his attention on the specific situation of each participant, and ensured that he/she was clear on the expectations of the court. The two court liaison workers also

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<sup>55</sup> Both lawyers (Crown and duty counsel) rarely participated in regular progress reports, unless participants were not adhering to program requirements or were in breach of their bail (by being late for court, missing treatment appointments or urine screens, etc.). The judge-participant interaction will be examined more closely in the next section.

<sup>56</sup> In most cases, the judge was already aware of any drug use from the pre-court meeting.

assisted in the process, by providing any relevant information to the judge regarding an individual's participation in the treatment component.

Participants who had abstained from drug use for an interim period of time (usually around two weeks or more), and who demonstrated a willingness to follow program requirements, earned a place on an 'early leave list,' which the court team updated during each pre-court meeting. Those participants placed on this list were summoned at the beginning of court, and were permitted to leave immediately after reporting to the judge. In addition to rewarding those individuals who were doing well in the program, the early leave list served another purpose, according to one of the judges: "We want those people [on the list] to be seen by everybody else because we want to encourage people to get on the early leave list, and motivate them." Not incidentally, a few interviewees mentioned, and my court observations confirmed, that participants would often stay for the entire court session despite being placed on the early leave list. The Community Coordinator attributed their enthusiasm to the therapeutic nature of the Drug Treatment Court:

I think the vast majority of people on the early leave list don't leave early, why is that? And that speaks to the therapeutic thing that's happening there for them. That they're getting something from this ... And I think most of them are becoming insightful enough to realize that being in the court is a positive experience for them. And it makes them feel good, that's why they're staying.

When the judge determined that it was necessary to impose sanctions on participants, he invoked a variety of problem-solving strategies (e.g. delayed sanctions, community service) rather than relying on incarceration alone. Further, as one Court Liaison Worker explained, the judge sometimes allowed continuances or delayed sanctioning until the treatment team had an opportunity to discuss the case. "In other

situations,” she asserted, “a judge would have said, ‘this is an honesty issue, there’s no need to discuss. The sanction is, the sanction is.’ No, he would put it over so that we had an opportunity to talk about it ...” (Court Liaison Worker).

While the judge applied a wide range of sanctioning options, non-compliance was taken very seriously in the TDTC. The court’s procedure for determining an appropriate sanction followed a consistent sequence of events among key players, regardless of the severity of the infraction(s). First, the Crown counsel described the nature of a participant’s non-compliance, and often admonished him/her for lack of effort in conforming with program requirements. While expressing sympathy in some cases, he generally took a hard line and requested that a sanction be imposed. The judge then asked the participant whether he/she had anything to say concerning his/her non-compliant behaviour. In many cases, defence counsel spoke for participants,<sup>57</sup> requesting leniency from the judge, and contextualizing the participant’s behaviour.<sup>58</sup> Finally, the judge determined an appropriate sanction based on certain key factors such as the nature of the infraction(s), the participant’s history in the program, and the circumstances surrounding the non-compliant behaviour. The judge usually commented on the seriousness of the infraction(s) so that participants understood why they were being sanctioned.

***Graduation.*** In order to graduate from the TDTC program, participants needed to fulfil a variety of requirements, such as decreased recidivism, four months of abstinence, attaining stable housing, securing employment and/or attending school. I observed the graduation of one TDTC participant during my research time in Toronto. The ceremony

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<sup>57</sup> However, in some cases, participants spoke for themselves, or in addition to defence counsel.

<sup>58</sup> This intervention by defence counsel often involved negotiating for a lesser sanction, such as a delayed sanction instead of bail revocation.

took place in another courtroom at Old City Hall. This courtroom looked much different than courtroom 116. The room was larger, and had a balcony. It was a more formal setting. As one Therapist explained, it was *the* courtroom.

Before the ceremony began, participants who were active in the program, the graduate's family, members of the public<sup>59</sup> and most of the TDTC staff filed into the courtroom. Both Crown counsel and the Duty counsel were situated at the front. The graduate was seated next to his therapist, at the front left side of the courtroom close to a microphone, while the other individuals occupied the body of the court, including many TDTC staff members who were intermingled with everyone else.

The ceremony began when the judge entered the courtroom. He welcomed everyone to what he referred to as "this special session of court." He talked about the process of achieving graduation in the TDTC, congratulated the participant and then asked the graduate's therapist to say a few words. Facing the body of the court, the therapist stood up and talked briefly about the participant, reciting a poem in his honour. She concluded her remarks by congratulating him on his success, at which point everyone in the courtroom (including the judge) applauded. The judge then directed an alumnus of the program to speak. Having experienced success in the program, the alumnus talked about the struggles of drug addiction and the benefits of having access to the TDTC. He concluded by congratulating the graduate, and presented him with a t-shirt, at which time the audience again clapped.

The judge then requested that Crown and Duty counsel state their positions on sentencing. Reiterating much of what the other speakers had said, both lawyers agreed on a suspended sentence and a short period of probation. The graduate was then provided

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<sup>59</sup> One therapist also mentioned that politicians and other special guests are sometimes present.

with the opportunity to speak. After agreeing to the proposed sentence, the judge concluded the ceremony with an eloquent speech about the graduate's progress and success in the program. He then stepped down from the bench, and shook the graduate's hand, presenting him with a certificate for program completion. At this point, the ceremony ended with a round of applause, and all of the TDTC staff members present went over to offer their congratulations.

### **The Central Role of the Judge-Participant Interaction**

From a therapeutic jurisprudence perspective, Petrucci (2002) contends that it is important to consider the impact of the judge-defendant interaction in relation to the other activities taking place in the courtroom, as well as within the context of the court environment. In her study of one domestic violence court in the United States, Petrucci identifies various types and sequences of statements that transpire between a judge and participants. Similar kinds of statements were present in judge-participant dialogues during progress reporting in the TDTC. Equally important were the relationships that developed between the judge and participants as a consequence of these hearings. These unique relationships were visible in the behaviour of both parties, and their mutual interactions in court.

*Statement types for progress reporting.*<sup>60</sup> A careful analysis of what was said by the judge and participant revealed a series of statement types which may represent a therapeutic jurisprudence approach in practice. The identification of statement types is a methodological device used to break down specific ideas within the conversational

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<sup>60</sup> While other players (i.e. lawyers, court liaison workers) could also be involved in progress reports, the discussion between the judge and participant is considered the defining component of this activity.

exchanges (Petrucci, 2002). This section addresses how the judge and participant typically communicated with each other in court.

The following three progress reports depict statement types found in three familiar cases: a participant doing well; a participant struggling with drug use, but compliant; and a participant being non-compliant. Each sentence delineates a single statement type.

This progress report exemplifies a case where the participant was doing well, and as a result, was placed on the early leave list:

*1) Judge greets Participant by first name*

*Judge talks about how impressed he is with Participant for continually being on the early leave list (He counts the number of times Participant has been placed on the list)*

*Judge states: "You're looking a lot better, and the negative urine screens are confirming that"*

*Judge notes that Participant has had another clean urine test and a good report from the treatment centre*

*Judge asks if Participant has used drugs*

*2) Participant answers "No"*

*3) Judge asks participant how he is able to stay clean, and what he is doing to keep himself busy*

*4) Participant cites reasons for progress*

*5) Judge asks Participant if he has had any high-risk situations to report*

*6) Participant answers "No"*

*7) Judge says Participant is "doing very well"*

*Judge suggests that Participant's court time be reduced*

*Judge asks Participant if this adjustment will present a problem*

*8) Participant says "No."*

*9) Judge is satisfied, and encourages him to "keep up the good work"*

*Judge asks Participant to take a reminder slip and states that he will see him in a week*

The above interaction is representative of a case in which all is going well with the participant. The judge confirms the status of the participant at the beginning of the progress report, provides some praise later on, and then negotiates a reward with the participant for doing well.

When participants were struggling, the judge took more time talking to them. The following outline illustrates a situation where a participant consistently used drugs, despite being in the program for some time:

- 1) *Judge greets Participant by first name*  
*Judge asks Participant if he has had any drug use*
- 2) *Participant reports cocaine and marijuana use*
- 3) *Judge asks Participant about this use (how much, where, when, and with who drugs were used)*
- 4) *Participant responds that he was in a high risk situation*
- 5) *Judge asks why Participant would put himself in a high risk situation*  
*Judge states that Participant has been in program for two months, and has had very little clean time*
- 6) *Participant claims he is having a problem with structure, particularly on weekends*
- 7) *Judge says "Well, that's a first step, identifying something you need"*  
*Judge tells Participant to talk with his therapist about this problem*  
*Judge repeatedly asks Participant if he understands that he needs to take this step*
- 8) *Participant finally nods his head*
- 9) *Judge also recommends that Participant attend a 12-step meeting with a program alumnus (who is sitting in court). Judge asks alumnus to stand up*
- 10) *Participant agrees to do better*
- 11) *Judge encourages Participant*  
*Judge asks Participant to take a reminder slip and states that he will see him next Drug Treatment Court day*

Notice how the judge confronts the participant about the drug-using situation, and later decides that the participant needs better daily structure. The judge shows concern towards the participant by proposing two strategies (talking to his therapist and attending 12-step meetings) to address the problem. Finally, at the end of the interaction, the participant makes a verbal commitment to the judge that he will try to do better.

A final example illustrates a more serious case, where a participant's non-compliance was discovered in court:

- 1) *Judge greets Participant by first name*  
*Judge notes that Participant has had a good report from treatment*

*2) Participant admits to drug use, but states that he had not reported this to treatment*

*Participant explains to Judge he had good reasons for his non-disclosure*

*3) Judge reads past letter written by Participant about making an effort in the program*

*4) Participant asks Judge if he can say something about the letter*

*5) Judge says, "No, I don't think so"*

*Judge states that Participant has lied once before*

*Judge underscores the importance of honesty in the program*

*Judge reminds Participant he could be facing one year in jail if expelled from TDTC and sentenced*

*Judge acknowledges that the program is difficult for some, but emphasizes again the importance of honesty*

*Judge says, "I am very disappointed in you"*

*Judge states that he is unsure about what to do with him, but explains to participant that he is in breach of his bail*

*Judge revokes bail, and places him into custody until the next Drug Treatment Court day*

In this example, after finding out about the participant's non-disclosure, the judge is quick to deal with the infraction. Further, while acknowledging the difficulty of the program, the judge communicates the gravity of the situation to the participant, as well as to others in the courtroom, through his explanations, warnings and admonishment, and then ultimately by sending him to jail.

These examples of statement types underscore the meaningful communication that appeared to be taking place between the judge and participant in the courtroom. The judges held participants directly accountable for their behaviour. In some cases, they encouraged and praised participants for making positive progress, while in other instances, they admonished and confronted them for failing to comply with the program requirements.

***Judicial behaviour in court.*** All three judges spoke clearly to participants during the court proceedings, and talked loudly enough to be heard by all those present in the courtroom. However, there were differences in court demeanour between the full-time



judge and the two back-up judges. The latter appeared less comfortable with their role in the proceedings than did the former. For instance, one back up judge showed less eye contact with participants who spoke to him, looking down at his files or notes often. In contrast, the full-time judge's attention was always with the speaker. Further, neither back-up judge spent as much time speaking to participants during progress reporting in general. The full-time judge, in contrast, always tried to engage in a substantive discussion with each individual. Despite these discrepancies, however, the three judges generally behaved similarly in court, and followed a common routine during all phases of case processing.

When initiating a progress report, the judge referred to program participants by first name rather than using the words 'defendant' and 'participant,' reflecting a more personal and less formalized approach. Interestingly, when I asked one Judge what techniques he used to interview participants, he was quick to respond that he does not "interview" participants, but rather "has a discussion with them" about everyday life, rather than focussing solely on their drug use. He explained that the Drug Treatment Court changes the dynamics of the traditional relationship between the judge and defendant:

I mean they're used to dealing with judges, because of course, many of them have long criminal records, but they're not well used to dealing with judges on the one on one that happens in the Drug Treatment Court, in which the judge really knows them. And knows from the history of what's going on, talks to them on a first name basis, tries to be respectful to them as possible, but on the other hand, challenges them to keep them honest, and to focus and to follow through on their promises ... I'll talk to them about their personal life a little bit, about their family, their children, you know, what they're doing on the weekend. Are they going to a movie ... You know, try to be a little bit personal with them (Judge).

During all of the court sessions, the judges exhibited genuine interest and concern for participants' well being. Another Judge observed, for example, "[i]f therapy gives you something that's important to them [participants] or if you know something about where they are or what they're doing, or if you happen to remember a fact in their history," he "throw[s] it in so that they don't think they're just a figure on [his] list."

The judges also appeared to be sincere in court. Demonstrating unusually extensive knowledge of each participant, they frequently conveyed a message of care, concern, and interest. They had a realistic perspective of individuals' progress in the program as well as a good understanding of the realities of drug addiction. For example, during progress reporting, when participants had relapsed in the program and reported the situation to the judge, the judges often thanked them for their openness, and acknowledged this 'slip' as part of the process of recovery.

In addition, the judges evinced genuine interest in what participants had to say. They were careful not to rush participants when they spoke; participants were given the opportunity to vocalize their thoughts, and the judges rarely interrupted them. They provided highly directive and well-informed advice to participants regarding the course of action that should be taken at any particular juncture of cases. Moreover, to avoid any miscommunication, the judges regularly asked participants if they had any questions, or needed further instruction on particular issues.

At the same time, the judges were prepared to use methods of coercion when they deemed them necessary. For instance, if participants started to be resistive in the TDTC, they confronted participants on their behaviour and attitude, reminding them about the consequences of not following through with the requirements of the program. For

example, the full-time judge was often heard saying in court, “If you don’t want to be in this program, I’m happy to sentence you.” Participants did not get away with any excuses or inconsistent information.

***Participant behaviour in court.*** Most of the participants appeared to be engaged with the court proceedings and, in particular, with the judge and his reaction to them. For instance, during a few of the sessions, I heard participants trying to guess how the judge would respond to their particular circumstances of the day. Indeed, the judge seemed to have an effect not only on the individuals appearing before him, but also on those participants seated in the body of the court.

During progress reports, participants exhibited some variation in how they spoke and reacted to the judge. The speech and tone of participants indicated their level of interest, or at least attentiveness, toward the judge. Some participants appeared to be quite comfortable when interacting with the judge, and talked about various issues at length. Perhaps not surprisingly, participants on the early leave list looked more relaxed than others in court, and their level of comfort increased further as the progress report continued. Conversely, other participants seemed nervous, provided brief responses, and talked quietly and/or rapidly. When participants admitted drug use, for example, or had not followed program requirements, they seemed ashamed and remained fairly quiet. These individuals were evidently aware of the types of consequences they could receive in court for their actions.

From their experience of working in the TDTC, many of the interviewees, particularly treatment providers, were able to describe participants’ views of the judge. Not surprisingly, they reported that individuals who were doing well in the program

viewed the judge more favourably than those who were struggling. In general, however, participants' perceptions of the judge were characterized in mostly positive terms. While respondents believed that participants sometimes felt intimidated, nervous, and worried, they also felt that these individuals had respect for the authority of the judge. One Crown Counsel described their high opinion of the judge in this way: "I think they [participants] appreciate that this is a man who makes a decision about them being in or out of custody, and about holding them accountable and being responsible for what they do and that ultimately the buck stops here. It's going to be with the judge. I think they all appreciate that ... I think they know he knows it, and they know he's tough." According to the interviewees, program participants also considered the judge to be compassionate, supportive, and committed. As one Therapist stated, "a lot of people have never had the experience of going before someone like [the full-time judge] and being talked to in a manner of respect." Similarly, one Duty Counsel thought that participants viewed the Drug Treatment Court judge as a regular person who lent "a human face to the criminal justice system."

Because the judge personally performed therapeutic interventions in the TDTC, he was able to establish a functioning therapeutic relationship with each participant. Eight interviewees (primarily treatment providers) characterized this relationship as being paternalistic in nature. A few of them described the phenomenon as a kind of 'transference' reaction<sup>61</sup> with participants displacing their feelings towards a particular person in their lives, most often their father, onto the judge. A Therapist outlined the process in this way:

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<sup>61</sup> Transference is a Freudian concept which refers to "a patient's 'transferring' tightly held attitudes (beliefs) and emotional dispositions forged in childhood onto new individuals in their lives ..." (Boldt, 1998: 1263).

He becomes a father figure almost to them by partway through the program. And so his approval becomes really important. And so if they've done stuff that they think he should be proud of, and he doesn't mention it, they're hurt and sometimes ... we'll highlight that on the report and say, you know, commend the client for this or that. Because it's important, many of them have lacked that father figure in their lives because of their upbringing.

## **The Effect of the TDTC Process and Therapeutic Jurisprudence**

Therapeutic jurisprudence theory is concerned with assessing the therapeutic (or anti-therapeutic) impact of legal process, and how that process is experienced from the perspective of individuals in conflict with the law. A therapeutic jurisprudence perspective focussing on the court process and its relationship to outcomes is consistent with the available literature on court effectiveness (Petrucci, 2002). George Cole's (1993) analysis of court performance measures<sup>62</sup> demonstrates the importance of looking at several of the issues raised in this study. Cole stresses the importance of examining the quality of interactions between legal actors and other participants. He defines "local legal culture" as those norms shared by members of a particular courtroom community (judge, lawyers, clerks etc.) with respect to case handling and participants' behaviour during the judicial process. When evaluating court performance and outcomes, he suggests that it is important to look at "court workgroups," and specifically to examine the reciprocal relationships, the level of group cohesion, and the type of leadership informing courtroom activities. Similarly, in her study on drug treatment courts, Satel (1998) highlights certain key variables which may have a positive impact on Drug Treatment Court participants, such as proximity of the offender to the bench and lawyers, presence of the offender throughout the court session, tone delivery, eye contact, the use of language, and the

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<sup>62</sup> These performance measures include outcomes in addition to what transpires in the courtroom.

judge's familiarity with the offender's history. Both studies highlight the need to analyze the major components of the court process such as the environment, the activities and practices that take place, and the communications that transpire between court staff and participants.

Following the work of Cole and Satel, my interview and observational findings revealed a number of features of the Toronto Drug Treatment Court that are consistent with the principles of therapeutic jurisprudence. Instead of being detached and neutral, the TDTC setting appears to contribute to the overall therapeutic nature of the court process. Attitudes and practices are expressly contoured to create a therapeutic environment for participants. For instance, program participants seemed to benefit from having a regular judge, Crown and defence counsel, court liaison workers and probation officer who used procedures and practices on a consistent basis, and employed an effective system of information sharing. In this sense, participants' familiarity with TDTC staff and the court process appeared to promote a therapeutic milieu in the courtroom.

Another key feature of therapeutic jurisprudence that prevailed within the TDTC was the public nature of the court process. Progress reports, new participant admissions, and graduation ceremonies are all conducted in open court. Most of the respondents commented on how this motivational group environment impacted positively on program participants. The public forum in which TDTC activities occur appeared to promote vicarious learning and enhance individuals' self-efficacy (see Bandura, 1986), affording participants the opportunity to observe how the judge handled other individuals at different stages in their recovery. As a Duty Counsel explained, there is an expectation

that participants will profit from the experience of actually watching the court process. “[I]t’s hoped,” she asserted, “that people who are struggling or people that are new in the program will listen to what other people are dealing with, will listen to issues that other people have, and that it will benefit them and that they’ll learn from it ...” For example, I observed instances where the TDTC judge appeared to ‘put on a show’ when conferring a sanction (particularly in the case of bail revocation), perhaps hoping that the reiteration of program expectations and the use of immediate consequences would have an effect on those participants watching and listening in court. On the other hand, when participants came in with good progress reports, others present in the courtroom could hear the judge’s positive comments. They could see that successful completion was possible by viewing the others’ accomplishments.

Progress reporting is the most important component to the TDTC process. It also appears to be the most obvious venue for the deployment of therapeutic jurisprudence techniques, because it is primarily dominated by interaction between judge and participant. In the context of a domestic violence court, Petrucci (2002) describes this relationship as “a series of ‘little things’ that occur between the judge and defendant” which “... appear to be the building blocks that produce a relationship of shared respect ...” (231). An earlier analysis of ‘statement types’ during progress reporting confirms this depiction.

How does the quality of this experience in the TDTC process influence participants’ compliance with the program? Over the two-month period of observational work, most of the participants who originally appeared uninterested in the judge and the

court process demonstrated varied degrees of improvement each week.<sup>63</sup> While some participants continued to use drugs, for the most part, attitudes seemed to change for the better in court with many individuals appearing more receptive to the judge, and more attentive to the court process.

The interviewees attributed the court's positive effect on participants to many different factors. Some respondents believed that having participants listen repeatedly to the requirements of the program through numerous court sessions, and observe both positive and negative outcomes on a consistent basis, facilitated their progress through the program. One Duty Counsel and the Community Coordinator likened a participant's experience in court, given the public nature of the proceedings, to a form of group treatment therapy. However, other respondents characterized the process differently. For instance, most of the criminal justice practitioners identified the authoritative nature of the court and the immediacy of its responses as having the most important influence on participants. A Crown Counsel asserted that "... because of the grandeur of the court, because of the importance of the court, because the implications and consequences are much more severe," it did, in his opinion, "invite much more of a rigorous standard on honesty and on openness."

Along with one Judge and the Probation Officer, the majority of treatment providers described the court process more in terms of its ability to address problems and promote behavioural change. As two providers explained:

... it's therapeutic in the sense that it's geared towards solving issues, solving particular problems. And I think it's therapeutic in the sense of considering the client as a whole and considering the range of behaviours

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<sup>63</sup> However, participants' improvement could have also been a result of their treatment, and not necessarily a product of the court component exclusively.



and needs that are related to the problem a client came in with (Program Manager).

I guess you have to broaden the definition of therapeutic, right? That it's not therapy per se. Does it have some healing or corrective capacity? Absolutely (Therapist).

On the other hand, some of the interviewees, particularly those affiliated with treatment, believed that the open forum milieu of the court could also have a negative or harmful effect on participants. One Therapist felt, for instance, that the obligation of having to report drug use repeatedly in open court could lead some participants to feel disdain toward the judge, and frustration over the entire process. The requirement could therefore hamper treatment efforts, and set some participants up for program failure.

Writing from a therapeutic jurisprudential perspective, and based on Meichenbaum and Turk's work on adherence to health-care, Winick (2003) lists a number of health-care compliance principles that can be used to achieve program completion in a drug treatment court setting. These principles include: carefully instructing the individual about her obligations relating to participation in the treatment program and court; being concerned toward participants rather than distant; giving participants undivided attention during conversations; affording participants an opportunity to speak; and generally treating people with respect. On the strength of my interviews and observational research, all of these principles appeared to be present in the TDTC court process. In this sense, participants' positive experiences in court may have enhanced their perceptions about the fairness of the court proceedings. Given the opportunity to tell their story, participants are likely to conclude that their words and feelings are being taken seriously, and as a result, they may derive greater satisfaction with the court process and willingness to accept court outcomes.

According to the latest evaluation of the TDTC (Gliksman et al., 2003), the overall rate of participant retention in the program is at 19%;<sup>64</sup> and retention steadily improves the longer participants stay in the program.<sup>65</sup> While my research cannot pinpoint therapeutic jurisprudence techniques or the specialized court process as the basis for any successful outcomes in the TDTC,<sup>66</sup> it does offer promising evidence and support for further study. For example, in one of the few empirical studies on therapeutic jurisprudence and drug treatment courts, Senjo and Leip (2001) look at court monitoring, drug treatment, and courtroom procedures to empirically assess the court's therapeutic impact on first time, non-violent felony drug offenders. Their findings show that a therapeutic jurisprudence practice of supportive court monitoring enhances the therapeutic effects of one drug court's procedures. The authors determined that, overall, offenders may be more responsive to a court that uses positive reinforcement rather than traditional methods of crime control. This current study provides encouraging results on this point, and impetus for future research.

## **Perceptions of Therapeutic Jurisprudence**

*"I think therapeutic jurisprudence should be on the wall above the judge, personally"*  
(Community Coordinator)

At the end of the interviews, I asked the interviewees a series of questions to probe their understandings of and responses to the therapeutic jurisprudential aspects of their work.

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<sup>64</sup> At this time, 351 individuals were admitted to the TDTC.

<sup>65</sup> The TDTC evaluation proposes that a 'cooling off' period be taken into account when determining program retention, which suggests that individuals are not 'true participants' until they have had 'sufficient exposure' to the program. For instance, over the first three months of participation, retention rates increased from 25% to 33% to 39% (Gliksman et al., 2003).

<sup>66</sup> There are a multitude of variables to consider when determining program effectiveness, including participants' involvement in both the treatment and court phases of the program. It is beyond the scope of this study to determine the relative importance of therapeutic jurisprudence principles in assessing program efficacy.

Initially, I wanted to know whether they were familiar with the term, and if so, I requested that they comment on what it meant to them. Eleven respondents<sup>67</sup> offered their own unique interpretations of therapeutic jurisprudence (see Appendix F). The majority of these interviewees viewed the concept as the guiding philosophy behind specialized courts – that is, a catalyst for providing individuals the opportunity to address their underlying problems, such as drug addiction and mental health issues, which have propelled them towards criminal activity. In this respect, one Crown Counsel explained, “... it’s still a court process, but the emphasis is less on ... conviction and sentencing and retribution and denunciation and deterrence and more on kind of ferreting out what the root causes are and addressing those to the same end.” Consistent with this, specialized courts apply the principles of therapeutic jurisprudence by transforming aspects of the traditional court process in order to achieve therapeutic goals.

One Judge described therapeutic jurisprudence as a paradigm shift in the criminal justice system, signifying a new understanding of how the court process impacts individuals in trouble with the law. Other respondents identified specific characteristics of the court proceedings which potentially could have a therapeutic impact. For instance, both Duty counsel and a Crown Counsel highlighted the public forum aspect of progress reporting as a defining part of the therapeutic process, while a Judge and Therapist identified the judicial role as being particularly influential.

Further, in the context of the TDTC, most of the interviewees thought that therapeutic jurisprudence was compatible with the program’s overarching goal of addressing the root causes of drug addiction through intensive court monitoring and drug treatment. Many respondents felt that the court component was needed primarily to

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<sup>67</sup> Seven criminal justice practitioners, three treatment providers, and one community coordinator.

facilitate the treatment process: “ ... there is a certain element to that whole being held accountable in a court for both the things that you do right, as well as the things that you don’t do right while you’re trying to get help for your addiction problem that has a very very big impact on these people” (Duty Counsel).

Recognizing that drug treatment courts represent an obvious application of therapeutic jurisprudence, a few of the respondents intimated that therapeutic jurisprudence should be incorporated into the regular criminal court process. One Therapist explained:

So I think it’s important that this [therapeutic jurisprudence] is brought to light in the law, and all of it. Not just Drug Treatment Court. I think it’s critical. What happens, I find from what I’m exposed to, is in the criminal justice system, they will go up before the judge and say, “Yeah I did a B and E [Break and Enter]” and the judge says, “that’s fine, two years less a day.” And they’re gone. But at the time of the crime, nobody knows if their parents were killed in a car accident. Or nobody knows what emotional issues, what happened in their life. And sometimes, you just want to hear, be able to tell their story. And that, the law in itself is therapeutic, to tell the story.

As mentioned in Chapter Three, therapeutic jurisprudence arose from mental health law and has expanded its application to numerous other legal fields. This Therapist’s comments seem to suggest that therapeutic jurisprudence theory is particularly valuable as a set of criteria against which the regular criminal court system can be assessed.

I showed all of the interviewees a formal definition of therapeutic jurisprudence (see Appendix G), and asked them what role the concept plays, if any, in the TDTC program. After reading the definition, most respondents agreed that therapeutic jurisprudence had a place in the TDTC. Some, like one Therapist, maintained that the program had incorporated principles of therapeutic jurisprudence from its very inception. In the latter’s words, “I just don’t know if we called it this [therapeutic jurisprudence] or

if it was formally written down. So I don't think it's something we just kind of saw happening as the program evolved. I think we knew it was there.”

One Crown Counsel and a Judge perceived the rise of TDTC primarily as a practical response to the criminal justice system's failure to effectively address addiction-motivated crime:

I'm not much into the jargon ... Listen, we've got a program, it helps people and we work with others and it's multidisciplinary ... this Drug Treatment Court program, you got people who are going into jail who are now getting help and they're not going into jail as much, it works. They used to be a burden on the healthcare system and on welfare and now we've found with a certain number of our people ... they're now in better health and they're working, it works (Crown Counsel).

I don't think that's what we're doing in the Drug Treatment Court ... There's a need, there's a failure in sending drug addicts to prison, and there's a response. (Judge).

Twelve respondents supported the idea of having principles of therapeutic jurisprudence explicitly spelled out in some form of policy – whether in a mission statement, a policy and procedures manual, a website, program guidelines, or the law itself. As one Crown Counsel stated, “I think that makes a lot of sense. I think if people have in their minds at the outset this idea of the law itself as a social force that can provide us these therapeutic or anti-therapeutic consequences, it provides an intellectual framework for people to do work like this.” However, he later surmised that it would be a difficult task to formalize the notion of therapeutic jurisprudence into any type of criminal justice policy. Two other respondents shared this opinion, adding that such an initiative would have a difficult time gaining political acceptance:

I think within the criminal justice system, within the Federal Prosecution Service, having that kind of catch phrase or that kind of term, as a way of justifying, would be a hard sell. In this section, you have a lot of 'the law

is the law' kind of people. Like it's our job to prosecute, and I think that kind of jargon or terminology would be a barrier for people to really accept, well this is what we're doing, we're working on therapeutic jurisprudence here. And I think it would be seen as just a lot of psychobabble, mumbo-jumbo (Crown Counsel).

I think this is hard enough to sell in our current legal system ... It certainly feels like this happens, this feels like what we're doing, but it isn't what we say we're doing. And, should it be stated explicitly? I think there is a danger ... Would drug treatment courts be an acceptable component of the criminal justice system if it was framed in this way? I think there would be a lot of resistance from the legal system and from politicians ... I think that within that system, they still have to look like courts and sound like courts and all that stuff. We can know the secret over here in treatment (laughter) (Therapist).

This chapter highlights the need to examine legal arrangements, courtroom environment and activities, and other specific components of the court process in assessing the role of therapeutic jurisprudence in a drug treatment court. The TDTC court components range from the general to the specific, covering everything from how the courtroom players interact with one another, to the specific activities that characterize the day-to-day court process, to the broader organizational factors of the court environment. Similar to other work on court effectiveness, this study's focus on court setting, court activities, and the behaviour of legal actors and participants reveals how the TDTC process operates and its potential relationship to court outcomes and program compliance. Therapeutic jurisprudence provides a theoretical base from which to examine these various components in practice, and in particular, exposes potential therapeutic and antitherapeutic consequences of TDTC arrangements. In particular, findings from this study reveal the importance of recognizing how the law operates in a treatment context; how the spatial display and relative positioning of various actors in the courtroom influence court proceedings; the effect of the public forum aspect on program

participants; the significance of the judge-participant interaction in the TDTC process; and the common dynamic of judicial and participant behaviour in the courtroom. Lastly, most of the interviewees were familiar with therapeutic jurisprudence, and they acknowledged its applicability to the TDTC. However, some of them viewed the connection differently than others based on their interpretation of the concept, their understandings of the TDTC mandate, and their experiences working in the program.

Following from this chapter's detailed account of the TDTC proceedings, Chapter Six will address the major findings of the study, and examine the implications of conducting subsequent work in the area.

## CHAPTER SIX: CONCLUSION

### Introduction

This final chapter contains a summary of key research findings from this study, with particular focus on how therapeutic jurisprudence operates in the Toronto Drug Treatment Court. The findings are further discussed with respect to the implications of conducting this research. In light of what was learned during the course of this research undertaking, suggestions for future work in similar settings are also made.

### Summary and Implications of the Key Findings

Kirby and McKenna (1989) define *conceptual baggage* as “a process by which you can state your own personal assumptions about the topic and research process” (32). Looking back, I must concede that I harboured a number of expectations going into this research. My initial assumptions about this study were a product of my work in the evaluation of the Drug Treatment Court of Vancouver<sup>68</sup> (DTCV); my interaction with DTCV staff and participants; and my exposure to the literature on drug treatment courts and therapeutic jurisprudence. During my work on the DTCV, I came to believe more and more that drug treatment courts work and that they make sense. While this ‘conceptual baggage’ was clearly a factor in my early research choices, at the same time I avoided concentrating exclusively on results which supported my preconceived ideas about the phenomena under study. As evidenced by my findings and discussion, I analyzed all the data collected, whether they supported or refuted my initial assumptions.

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<sup>68</sup> In December 2001, the Drug Treatment Court of Vancouver opened as Canada’s second Drug Treatment Court.



By conducting in-person interviews with seventeen TDTC staff members, and observing fourteen court proceedings and two pre-court meetings, this qualitative investigation yielded some evocative findings, and raised important issues with respect to therapeutic jurisprudence theory, and its applicability to the Toronto Drug Treatment Court and similar programs elsewhere.

With emphasis on the criminal process itself, much of the socio-legal literature on drug treatment courts has focussed overwhelmingly on the redefined roles of legal personnel.<sup>69</sup> This thesis has revealed equally significant transformations among treatment providers and criminal justice practitioners working in the TDTC. The legal practitioners in this study acknowledged the benefit of assuming a clinical perspective and contributing to the therapeutic model, while many of the treatment providers were less comfortable with their court-related functions in the program. Accordingly, this research has added to the existing literature on drug treatment courts by capturing a broader understanding of the altered positions of DTC personnel from the perspective of the workers themselves.

In general, both criminal justice practitioners and treatment providers characterized their multiple partnerships with one another as being mutually beneficial. All of the interviewees highlighted positive aspects of their collaborative working environment, such as cross-education, teamwork, understanding and accommodating one another's needs, and the ability to positively influence the lives of participants through interdisciplinary collaboration. However, they also identified traditional differences in

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<sup>69</sup> See Hora et al.'s (1999) seminal piece, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," as an example.

perspective and approach, and related tensions which sometimes compromised their respective capacities to address illicit drug use in the program. A few of the criminal justice practitioners acknowledged the importance and impact of administering treatment to drug offenders, but were less inclined to perceive their own role in the TDTC as being a therapeutic one. On the other hand, the majority of treatment providers asserted that a criminal justice paradigm figured prominently in their work. As a consequence, these treatment professionals recognized that some measure of conflict prevailed between themselves and judicial authorities in relation to ongoing power differentials between the judicial and treatment components of the TDTC program. Ericson and Baranek (1982) contend that professional groups jointly involved in crime control, like drug treatment and the court system in a DTC program, have “... shifting patterns of relationships and influence among [them, which] make it difficult to specify the connection among intentions, actions, and outcomes. This creates problems for evaluating their contributions, for judging which group has the most substantial influence in particular areas and how this is accomplished” (233). Accordingly, these findings reveal a need to further explore the phenomenon of addiction control, with specific attention to the effects of combining treatment with punishment in addressing illicit drug use.

This thesis also demonstrates that a therapeutic jurisprudence analysis of any drug treatment court must consider how its constituent members perceive their unique positions in the program. The research shows that examining the relationship between court and treatment teams is a prerequisite to assessing the nature of participants’ experiences and court outcomes in a drug treatment court – and for determining whether the effects on drug offenders are either therapeutic or anti-therapeutic. For instance, if

tensions arise between treatment and court personnel, a therapeutic jurisprudence analysis must consider the extent to which these conflicts might negatively affect participants' experiences in the program – and how such adverse effects might be avoided and remedied. By implication then, it is essential for therapeutic jurisprudence exponents to examine how legal and clinical professionals act in concert with one another to identify and promote perceived therapeutic values in a drug treatment court program.

As exemplified by this investigation, therapeutic jurisprudence provides a theory-based approach from which to explore legal arrangements, courtroom settings and activities, interactions between individuals involved in the proceedings, and other defining components of the TDTC court process. My focus on certain key elements of the courtroom proceedings highlights the need to consider how the TDTC process unfolds, and the potential relationship of courtroom activities to program outcomes.

The physical setting of the court, the rules of procedure, the discourse, the implicit and explicit instructions of court officials all bring the TDTC participant closer to the proceedings and promote his/her active role in the court process. For instance, interview and observational findings suggested that the public forum environment in general, and the judge-participant interaction in particular, have exerted a critical impact on TDTC participants. Among other findings, the study revealed how therapeutic jurisprudence might provide a framework for exploring how the court process can contribute to the achievement of participant compliance. In future work deploying a therapeutic jurisprudence standpoint, these effects must be further studied with the objective of enhancing the physical and psychological well-being of program participants.

At the same time, this investigation also raised key questions about the appropriateness of using a therapeutic jurisprudence model to structure alternative court programs like the TDTC. While the advocates of therapeutic jurisprudence insist that fundamental legal values should not be compromised for the sake of therapeutic outcomes, many of the legal practitioners interviewed in this study hinted that such an erosion of legal process might indeed be happening. While at a formal level the TDTC focuses on treatment, in practice program participants experience a variety of pressures – both before and during the program – which can function to compromise both their legal rights and treatment needs. As such, therapeutic jurisprudence theory must recognize that drug treatment courts, and other similar rehabilitation projects, are premised on coercion as much as they are on therapy. A thorough analysis of legal and other rules which are part of the reality of control in a DTC must be considered with respect to how they are practiced in the program.

Finally, the majority of interviewees were familiar with the ideas of therapeutic jurisprudence, and understood the concept as being analogous to the problem-solving orientation guiding the TDTC and other specialized court environments. While a few of the respondents identified specific aspects of the TDTC proceedings as being ‘therapeutic,’ most of them regarded the TDTC process in its totality to represent a practical application of therapeutic jurisprudence theory. Others suggested that the TDTC had been implemented as a common-sense response to the social problem of addiction-motivated crime. All of these viewpoints are consistent with much of the extant literature on drug treatment courts and therapeutic jurisprudence (see James and Sawka, 2002; Wenzel et al., 2001; Nolan, 2001; Casey and Rottman, 2000; Hora et al.,

1999). Further, the majority of research participants supported the idea of articulating principles of therapeutic jurisprudence directly into some form of policy, although a few of the interviewees cautioned that this would be a difficult task given the present volatility of the political climate surrounding drug offending in Canada.

### **Suggestions for Future Research**

By providing an overview of the Toronto Drug Treatment Court, and determining the extent to which therapeutic jurisprudence principles are incorporated into the TDTC program, it is hoped that this research will stimulate further studies on perceptions of drug treatment courts, their implementation in other locations, and their overall function in reducing substance related crimes. Through the identification and the problematization of prevailing relationships between legal arrangements and therapeutic outcomes, we might come to learn how the orientation, structure, and procedures of new and existing drug treatment courts might be better arranged to provide court ordered treatment for their participants.

By addressing therapeutic jurisprudence in the context of drug treatment courts, innovative research programs on this topic may come to play an important role in shaping social and legal policy related to substance misuse and antisocial behaviour. This thesis, for example, has succeeded in identifying a number of strengths and weaknesses of the TDTC as a treatment-oriented initiative. As I have shown, these findings have implications for the policy framework within which the program is constituted. In this capacity, my research has the potential to stimulate discussion about the extent to which the concept of therapeutic jurisprudence should be incorporated into drug policy and practice in Toronto and elsewhere. Further, knowledge generated from this study may

offer insights into the quality of education and training afforded to individuals working within criminal justice and treatment circles. As Casey and Rottman assert, “By continually describing and discussing these issues, practitioners will begin to increase their awareness of and sensitivity to therapeutic problems and potential strategies” (2000: 13).

At the same time, this project was subject to a number of time and resource constraints. Among other limitations, the research focused on the staff and court of one program only. Accordingly, I cannot confidently generalize my findings from the interviews with TDTC members about their positions in the program, relationships with others, and program operations to other drug treatment courts across North America. Additionally, since this study was confined to the TDTC full-time staff only, I was unable to survey the many representatives from various community agencies (e.g. police services, community groups, treatment agencies/services) that are affiliated with the TDTC. The unique perspectives of these adjunct members would have contributed to the depth of this project.

This research would have also greatly benefited from including the voices of the program participants themselves. Unfortunately, time constraints and unforeseen difficulties in obtaining access made interviewing this group impossible. It is imperative that future research on therapeutic jurisprudence and drug treatment courts consider program participants’ perspectives on the dynamic relationships that prevail between drug therapy and the criminal justice system. These individuals, who are subject to legal rules governing conditions and terms of treatment, and monitored by clinical and criminal justice professionals, are in the best position to provide information about what is in their

best interest (Petrila, 1993). The experiences and views of these individuals will be an invaluable asset in assessing the therapeutic and anti-therapeutic effects of legal/therapeutic relations in drug treatment courts and like programs.

Finally, in establishing how legal and treatment arrangements might better serve individuals who come under their jurisdiction, future therapeutic jurisprudence research on drug treatment courts must take into account the wider structural forces that are at work in society. Drug treatment courts represent just one of many innovations in the area of substance abuse taking place in the Canadian criminal justice system.<sup>70</sup> Mapping the political environment from which drug treatment programs have emerged, along with the shifting public policy approaches that have shaped these initiatives, would contribute greatly to our understanding of state and public responses to problems associated with substance abuse. These broad political and ideological currents exert a powerful influence on the directions of drug policy, and on the activities of those authorities responsible for establishing the goals and principles of the criminal justice system. As Dunn (1994) writes, “... the way a [policy] problem is defined governs our ability to search out and identify appropriate solutions” (69).

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<sup>70</sup> For instance, in February 2000, the Correctional Service of Canada (CSC) implemented *Intensive Support Units* for federal institutions. Intensive Support Units provide a positive living environment for offenders who wish to remain drug-free, and they support and reinforce offender efforts to change substance using behaviour (see Varis, 2001). CSC has also engaged in research on upgrading the *Computerized Lifestyle Assessment Instrument (CLAI)*, a database developed to assess the severity and nature of substance abuse problems. The CLAI is designed to focus on substance abuse recognition/treatment issues, and includes an audio component that allows offenders to have questions read to them. (see CSC, 2002). Newly developed substance abuse programs continue to be established in federal institutions, such as Methadone Maintenance Treatment (MMT), High Intensity Substance Abuse Treatment (HISAP), Offender Substance Abuse Pre-Release (OSAP) treatment, and urinalysis testing. Finally, the Canadian criminal justice system supports the implementation of needle exchange schemes, safe injection sites, and methadone maintenance in communities to reduce the harms caused by drug use and related criminal activity.

Bearing these various points in mind, I am confident that my thesis findings will provide some guidance to other programs where therapeutic jurisprudence principles are present. Further, this study has made a substantial contribution to drug treatment court research and the conceptual development of therapeutic jurisprudence theory. The results of my investigation should offer a useful starting point for other studies related to the operations, effects and perceptions of drug treatment courts, especially in the Canadian context, and against the background of significant recent trends in social, legal and medical responses to the drug offender.



**APPENDIX “A”  
INFORMED CONSENT BY PARTICIPANTS  
IN A RESEARCH STUDY**

**The University and those conducting this research study subscribe to the ethical conduct of research and to the protection at all times of the interests, comfort, and safety of participants. This research is being conducted under permission of the Simon Fraser Research Ethics Board. The chief concern of the Board is for the health, safety and psychological well-being of research participants.**

**Should you wish to obtain information about your rights as a participant in research, or about the responsibilities of researchers, or if you have any questions, concerns or complaints about the manner in which you were treated in this study, please contact the Director, Office of Research Ethics by email at [hweinber@sfu.ca](mailto:hweinber@sfu.ca) or phone at 604-268-6593.**

**Your signature on this form will signify that you have received a document which describes the procedures, possible risks, and benefits of this research study, that you have received an adequate opportunity to consider the information in the documents describing the study, and that you voluntarily agree to participate in the study.**

**Any information that is obtained during this study will be kept confidential to the full extent permitted by professional ethics. Knowledge of your identity is not required. You will not be required to write your name or any other identifying information on research materials. Materials will be maintained in a secure location. Any specific Professional Ethics that are used are described in the study information document.**

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**Title:** Therapeutic Jurisprudence Revisited: The Experience of Criminal Justice and Treatment in Toronto's Drug Treatment Court  
**Investigator Name:** Mark Edwards  
**Investigator Department:** Criminology

---

**Having been asked to participate in the research study named above, I certify that I have read the procedures specified in the Study Information Document describing the study. I understand the procedures to be used in this study and the personal risks to me in taking part in the study as described below:**

**Risks to the participant, third parties or society:**

There are no foreseen risks to research participants, third parties and society in this study.

**Benefits of study to the development of new knowledge:**

The proposed thesis research will generate findings of considerable relevance for policy and procedure. For example, this study has the potential to identify specific aspects related to therapeutic jurisprudence present in the TDTC as a treatment-oriented initiative which could, in turn, have implications for the policy framework within which the program is constituted. In addition, knowledge generated from this study may offer insights into the quality of education and training afforded to individuals working within criminal justice and treatment circles. The project may also stimulate further studies on perceptions of drug treatment courts, their implementation in other locations, and their overall function of reducing substance related crimes, especially in the Canadian context, and against the background of significant recent trends in social, legal and medical responses to the drug offender.

I am confident that this thesis research will generate many important insights into the philosophy of therapeutic jurisprudence, along with the operations and impact of the TDTC, and will offer useful guidance to administrators and practitioners in addressing the research issues mentioned above. By addressing therapeutic jurisprudence in the context of a specialized court, this thesis will help to illuminate the TDTC from the diverse perspectives of its employees.

**Procedures:**

The participants are five case managers/therapists, one probation officer, 2 court liaison officers, three judges, two Defence counsel, two Crown counsel, one manager, and one community coordinator.

The participants will be required to answer interview questions based on their individual experiences and perceptions of working in the Drug Treatment Court program. Each interview will range between one to two hours, and will primarily consist of answering open-ended questions.

In addition, all participants (including clients) will be observed during the court process for a period of one to two months.

**I understand that I may withdraw my participation at any time. I also understand that I may register any complaint with the Director of the Office of Research Ethics or the researcher named above or with the Chair, Director or Dean of the Department, School or Faculty as shown below.**

**Department, School or Faculty: Chair, Director or Dean:**  
Criminology Simon Verdun-Jones

8888 University Way,  
Simon Fraser University,  
Burnaby, British Columbia, V5A 1S6, Canada

**I may obtain copies of the results of this study, upon its completion by contacting:**

Mark Edwards  
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Joan Brockman  
School of Criminology  
Simon Fraser University  
(604) 291-4036  
brockman@sfu.ca

**I have been informed that the research will be confidential.**

**I understand that my supervisor or employer may require me to obtain his or her permission prior to my participation in a study of this kind.**

**I understand the risks and contributions of my participation in this study and agree to participate:**

**Participant Last Name:**

**Participant First Name:**

**Participant Contact Information:**

**Participant Signature:**

**Witness (if required):**

**Date:**

## APPENDIX “B”

### INTERVIEW QUESTIONS – TDTC STAFF

#### GENERAL BACKGROUND OF TDTC STAFF

1. What year were you appointed to the Bench? (*Judges*)  
What year were you called to the Bar? (*Lawyers*)  
How long have you been working in substance abuse treatment? (*Therapists*)  
How long have you worked in probation? (*Probation Officer*)  
What did you do prior to becoming [participant’s position]? How long did you work in this role? (*Court Liaison Workers, Program Manager, Community Coordinator*)
2. How long have you been working in the Toronto Drug Treatment Court (TDTC)? (*All interviewees*)
3. Why did you decide to work in the TDTC? (*All interviewees*)
4. What type of training did you receive to work in the TDTC? (*All interviewees*)

#### ROLES OF TDTC STAFF

1. Could you please describe your role in the TDTC. (*All interviewees*)
2. Do you believe you are contributing to treatment? [If yes] In what ways? (*Judges, Lawyers, Probation Officer, Court Liaison Workers*)
3. Do you consider your role in the TDTC as one of treatment, one of criminal justice, or both? (*Judges, Lawyers, Probation Officer, Court Liaison Workers, Therapists*)
4. Would you describe yourself as a therapeutic agent? Why or why not? (*Judges, Lawyers, Probation Officer, Court Liaison Workers, Program Manager, Community Coordinator*)
5. How comfortable are you working in the TDTC? (*All interviewees*)
6. Do you feel that working in the TDTC has changed how you approach your work? [If yes] please describe how. (*All interviewees*)

#### TDTC: TREATMENT AND COURT

1. In your opinion, do you think the TDTC is effective? Why or why not? (*All interviewees*)
2. [After showing section 718 of the *Criminal Code* of Canada (see Appendix D)]  
Do you think it is possible to satisfy the fundamental objectives of sentencing under section 718 of the *Criminal Code* while addressing the treatment needs of non-violent, drug dependent offenders? (*All interviewees*)
3. In your opinion, what responsibilities of the criminal justice system are easiest and most difficult to fulfil in the TDTC? (*Judges, Lawyers, Probation Officer*)

In your opinion what responsibilities of drug treatment are easiest and most difficult to fulfil in the TDTC? (*Therapists*)

In your opinion what responsibilities of the criminal justice system and drug treatment are easiest and most difficult to fulfil in the TDTC? (*Court Liaison Workers, Program Manager, Community Coordinator*)

4. Describe the relationship between court and treatment. What level of importance does each component have in the TDTC? (*All interviewees*)
5. How has the criminal justice system changed to accommodate treatment in the TDTC? (*Judges, Lawyers, Probation Officer*)  
How has drug treatment changed to accommodate the legal system in the TDTC? (*Therapists*)  
How has the criminal justice system and drug treatment changed to accommodate each other in the TDTC? (*Court Liaison Workers, Program Manager, Community Coordinator*)
6. How is success and effectiveness defined in the TDTC? (*All interviewees*)
7. How do you determine an individual's progress? What aspects do you look at in particular? (*Judges*)

#### THERAPEUTIC RELATIONSHIPS IN THE TDTC

1. How do you think participants view the combination of court and treatment? (*All interviewees*)
2. What positive effects does the interaction with the Judge have on participants? Negative impacts? (*All interviewees*)
3. TDTC participants have more frequent contact with treatment providers than with the Judge. Does this put either party at a disadvantage? Why or why not? (*All interviewees*)

#### THERAPEUTIC JURISPRUDENCE AND THE TDTC

1. Do you think the TDTC court proceedings are therapeutic? Why or why not? (*All interviewees*)
2. How much of a difference does reporting to the Judge make? (versus another authority figure) (*All interviewees*)
3. Do you think having the Judge give out rewards and/or sanctions in Court is a good idea? Why or why not? (*All interviewees*)
4. I) Given this list of possible rewards participants could receive in court, which do you feel are the most effective in the TDTC? Why? (*All interviewees*)  
II) How do you use each of these rewards? (*Judges*)  
III) What outcomes are you hoping to achieve from each of these? (*Judges*)
  - a. Being placed on the 'Early Leave List'
  - b. Encouragement
  - c. Praise
  - d. Applause
  - e. Removing curfew

- f. Reducing the number of days at the treatment clinic
- g. Reducing the number of court appearances
- h. Other

5. I) Given this list of possible sanctions participants could receive in court, which do you feel are most effective in the TDTC? *Why? (All interviewees)*

II) How do you use each of these sanctions? *(Judges)*

III) What outcomes are you hoping to achieve from each of these? *(Judges)*

- a. Having to sit 'up front' while in court
- b. Warnings
- c. Admonishment
- d. Writing an essay to the court
- e. Having to stay in court until all participants have talked to the Judge
- f. Increasing the number of days at the treatment clinic
- g. Increasing the number of court appearances
- h. Community service
- i. Giving and/or adding curfew and boundary conditions
- j. Being sent to jail for a short time (bail revocation)
- k. Other

6. What aspects of the court-reporting component do you find the most and least effective? *Why? (All interviewees)*

7. What other ways of influencing participant behaviour do you use besides defined rewards and sanctions? *(Judges)*

8. Are you familiar with the term 'therapeutic jurisprudence'? If so, what does the term mean to you? *(All interviewees)*

**[After introducing the term 'therapeutic jurisprudence', and providing some information on its meaning (see Appendix G)]**

9. To your knowledge, what role, if any, does therapeutic jurisprudence play in the Toronto Drug Treatment Court? *(All interviewees)*

10. To what extent should therapeutic jurisprudence be incorporated into drug policy and practice in Toronto and elsewhere? *(All interviewees)*

**APPENDIX “C”**  
**EXAMPLE OF A TDTC TREATMENT CONTRACT**

I, \_\_\_\_\_, agree to the following course of treatment:

- 1) To continue methadone maintenance at CAMH (Centre for Addiction and Health) and to continue seeing Dr. \_\_\_\_\_ for all prescriptions for benzodiazepines and prescription opioids.
- 2) Not to see Dr. \_\_\_\_\_ for all prescriptions and to utilize the CAMH primary care clinic for the balance of my time in the DTC.
- 3) I understand that my behaviour both in court and treatment has been problematic in the past and that as of today, I may be sanctioned by the court for disruptive and/or disrespectful behaviour. I also understand that these incidents will all be documented and may result in my expulsion from the program if they do not subside.
- 4) I understand that group participation is an essential part of the DTC program and that I have been exempted from Drug Court groups and outside treatment programs because my attitude and behaviour are disruptive. As a result of this and because of my continued drug use, treatment expectations will be greater in other areas.
- 5) I agree to see my therapist as required, once or twice weekly. Missing these sessions or cancelling inappropriately will result in 4 hours CSO (community service) per session.
- 6) I agree that if I have another cocaine use, I will check into a detox. Failure to do so will result in a sanction from the court which may include CSOs or incarceration.
- 7) I agree to be placed on the sanction for use list for any further use of benzodiazepines. (Due to the way in which benzos are measured, this will require input from Dr. \_\_\_\_\_ to determine if increased levels are a result of additional uses).

I understand that failure to comply with the above will result in sanctions by the court. These sanctions may include community service hours, incarceration or dismissal from the program should there be a pattern of non-compliance.

This treatment plan will be reviewed and possibly altered on May 10, 2004.

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(signed) Participant's Name

(witness) Therapist's Name

**APPENDIX “D”**  
**CRIMINAL CODE:**  
**PURPOSE AND PRINCIPLES OF SENTENCING**

From: *Criminal Code*, R.S.C. 1985, c. C-46, online: Department of Justice Canada  
<http://laws.justice.gc.ca/en/C-46>.

**718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.



**Appendix “E”**  
**TORONTO DRUG TREATMENT COURT CONDITIONS**

Name of Accused: \_\_\_\_\_

Info # \_\_\_\_\_

- a) Obey all court orders;
- b) Be honest with the court; Be honest with Treatment Centre Staff;
- c) Keep the peace and be of good behaviour;
- d) Attend the Drug Treatment Court as and when required and on time;
- e) Not to possess/use any non-medically prescribed drugs/narcotics prohibited by the *Controlled Drug and Substances Act*;
- f) Abstain from the consumption of alcohol;
- g) Report prior to court any usage of any non-medically prescribed drugs, or any exposure to high risk situations where non-medically prescribed drugs are or have recently been used;
- h) Report of usage of alcohol;
- i) Attend at the Centre for Addiction and Mental Health as and when required, be on time and actively participate;
- j) Attend at the Centre for Addiction and Mental Health for urinalysis as and when required and be on time;
- k) Reside at \_\_\_\_\_ or, where directed by the Drug Treatment Court or the Centre for Addiction and Mental Health;
- l) No to change your address without first getting approval from the Drug Treatment Court;
- m) Abide by all rules/treatment recommendations as directed by the Drug Treatment Court;
- n) Advise the Drug Treatment Court and the Centre for Addiction and Mental Health of all medication you are taking;

- o) Advise the Drug Treatment Court of all outstanding/new charges regardless of the date of offence;
- p) Sign such releases as necessary to allow the Drug Treatment Court or the Centre for Addiction and Mental Health to obtain or disclose any information it deems necessary;
- q) Curfew, be in your place of residence between the hours of \_\_\_\_\_ to \_\_\_\_\_ seven (7) days a week, except \_\_\_\_\_.
- r) Not to be in the area bounded by \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- s) No contact directly or indirectly with \_\_\_\_\_  
 \_\_\_\_\_

\_\_\_\_\_  
 Signature of Bondsman

\_\_\_\_\_  
 Signature of Accused

NOT TO POSSESS, until dealt with according to law, any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance.

**APPENDIX “F”**  
**TDTC STAFF PERCEPTIONS**  
**OF THERAPEUTIC JURISPRUDENCE**

“My understanding of it is that it means interpreting people’s involvement in the legal system in a different way and making changes in the legal system that will kind of funnel people towards getting therapy if their involvement with the legal system is because of an addiction or a mental health issue” (Court Liaison Worker).

“But therapeutic jurisprudence, to me I mean, what I think it means ... easy definition ... how we look at treatment in ethics of the law, you know ... how issues relating to treatment are dealt with in the criminal justice system” (Court Liaison Worker).

“I think it strikes me that it relates, not just to the kind of thing we’re doing in drug treatment court, but to other sorts of what have been called problem-solving courts, like the Mental Health Court where there’s a significant emphasis on people getting the treatment for their mental health issues. Like the Gladue (Aboriginal) court where the emphasis is really on finding some way to structure a way for Aboriginal accuseds to overcome whatever problems have led to their criminal activity primarily by getting reengaged with their cultural communities ... Where it’s still a court process, but the emphasis is less on you know, conviction and sentence and retribution and denunciation and deterrence and more on kind of ferreting out what the root causes are and addressing those to the same end, to try and reduce the criminal activity, but by helping people to overcome the stuff that gets them there in the first place” (Crown Counsel).

“I think from my perspective, therapeutic jurisprudence I see as tying into the idea of, or the philosophy of problem-solving courts again. Which is the idea that the way that the criminal justice system works now is not right for everyone. And that sometimes there are issues that, or underlying issues I guess you would say, that are specific to certain individuals involved in the criminal justice system that have to be addressed. And sometimes these are things like mental health issues, sometimes these are things like statuses and being Aboriginal, and sometimes these are things like being addicted to substances. And that the idea of therapeutic jurisprudence is that you are trying to address those issues on those ideas, and in a just manner in a court setting, in order to hopefully assist those people with getting help that they need so that they are not continually coming before the criminal justice system” (Duty Counsel).

“... my understanding was therapeutic jurisprudence is kind of a term coined from drug courts that deals with the therapeutic aspect of the court” (Duty Counsel).

“One of the important objectives of the court process is to facilitate treatment for an individual. The central component is the process of the court and the way it has substantial impacts. It is part of the court system generally, but where we have specialized courts, this is more focused and is the predominant role of the court process. It’s one of the principles of sentencing, rehabilitation. Both judges (one in a specialized

court, one in a regular court) applying the same principles, but the former is following up more, stressing and following” (Judge).

“... it really is a paradigm shift, a way of looking at things, a way of looking at the court. A way of trying to get individuals, judges and the courts to treat people in a different manner” (Judge).

“I think it’s using the court to address the underlying problems, whether or not it’s necessary or goes beyond the response required for the particular offence in judicial sentencing. That’s how I understand it” (Judge).

“Basically I see it as therapy through justice. That’s what it means to me” (Probation Officer).

“Well to me it means using the courts for therapeutic purposes. And defining some kinds of legal, some kinds of clinical behaviours in terms that go beyond the legal. I think of the notion of problem-solving courts when I think of therapeutic jurisprudence” (Program Manager).

“What it means to me is kind of a way of redefining the role of the justice system into an instrument for behavioural change. And for initiating a process of change on an individual basis with hopefully a positive outcome” (Community Coordinator).

**APPENDIX “G”**  
**DEFINITION OF THERAPEUTIC JURISPRUDENCE**  
**AS SHOWN TO INTERVIEWEES**

**THERAPEUTIC JURISPRUDENCE**

“*Therapeutic Jurisprudence* concentrates on the law’s impact on emotional life and psychological well-being. It is a perspective that regards the law (including rule of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It suggests that the law’s role as a potential therapeutic agent should be recognized and systematically studied” (Wexler, 2003a: 1).

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## **Statutory Laws**

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