Judicial Perceptions of the Criminal Justice System in Response to Drug-Addicted
Offenders: The Mainstream Court and the Drug Treatment Court

By Mary-Ann Mattioli

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Abstract

Dissatisfaction with recycling drug-addicted offenders through the criminal justice system has brought on innovative changes. With the implementation of Drug Treatment Courts (DTC), the roles, goals, and procedures of the court change in order to “close the revolving door on crime” by treating the addiction. This thesis explores the changes brought on by the DTC, focussing on judicial perspectives from 10 judges. Research reveals that all the interviewed judges embrace a rehabilitative approach for non-violent drug-addicted offenders, rather than a punitive approach of incarceration. The judges in the mainstream criminal courts are trying to deal with drug-addicted offenders more effectively but raise concerns, such as lack of treatment programs and probation officers. Instead, DTCs are equipped with the resources and provide intensive judicial supervision to resolve the flaws in the mainstream criminal justice system. While there are concerns noted about the DTC, the majority of the judges embrace the DTC and the new role of the DTC judge. Although DTCs may resolve some of the problems experienced in the mainstream criminal courts, broader barriers of both the mainstream criminal courts and the DTCs are discussed, including: drug laws, the division of governmental powers, political notions of justice, funding, and the media. While the judges and courts are changing to deal with the realities of drug-addicted offenders, other factors play a role in the judge’s efforts to rehabilitate these offenders.

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Chapter One

Introduction

The narrow application of the law and the mere processing of cases are not working effectively for the criminal courts, the drug-addicted offender, and the community. Some judges, legal actors, community groups, and treatment services recognize that the traditional approach of the criminal justice system in dealing with drug-addicted offenders is a failure. According to these individuals, the traditional principles, roles, and procedures for dealing with drug offences and drug-related offences require a re-evaluation and an innovative alternative.¹ Currently, Canada's criminal courts are beginning to face this challenge.

Dissatisfaction with the recycling of offenders through the criminal justice system, better known as "the revolving door," has brought on this re-examination of the traditional methods of doing justice. The revolving door effect is described as "...a cycle of jail term, release, re-offence, jail awaiting, sentence, and jail term again..."² Judges are often faced with drug addicts who return to court repeatedly because of the same underlying problem - their drug habit.³ Some drug-addicted offenders return to court so often that the judges know them on a first name basis.⁴ The threat of incarceration, probation, or fines alone does nothing to deter the addict from committing another crime.

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¹ The Honourable Mr. Justice Paul Bentley, "Canada's First Drug Treatment Court," *Criminal Reports* 31 (5th) (2000): 260.

² Jake Rupert, "Breaking the cycle of drugs and crime," *The Ottawa Citizen*, 11 April 2003, F3.

³ There are other socio-demographic variables that drug-addicted offenders have in common, such as poverty, unemployment, and low social values. See Carol LaPrairie, et al., "Drug Treatment Courts – A Viable Option for Canada? Sentencing Issues and Preliminary Findings From the Toronto Court," *Substance Use and Misuse* 37 (2002): 1531.

⁴ Rupert, *supra* note 2.

The need to satisfy the drug addiction is more powerful than the potential legal ramifications.⁵

As a result of the offender's addictive need to satisfy his/her drug habit, the traditional values and processes in the criminal justice system are considered ineffective and unequipped to deal with the drug problem. Incarceration, the scarcity of treatment programs, and overloaded probation officers do not deal effectively with the offender's drug addiction.⁶ It is in regard to these problems that some judges have decided to insist on changes in the criminal justice system. Through an innovative judge-led court, the Drug Treatment Court (DTC), reforms in the judicial role, legal procedure, and goals of the criminal justice system are slowly taking place.

The goal of the DTC is to reduce criminal behaviour by rehabilitating drug-addicted offenders through intense judicial supervision and treatment.⁷ To meet the rehabilitative goal of the DTC, traditional court roles and procedures are altered. Judges are now adopting a role where interaction and involvement in the offender's rehabilitation is fundamental. In addition, the court procedures are now therapeutic in nature, thus acknowledging the importance of immediacy,⁸ frequent court hearings,⁹ the use of sanctions and rewards,¹⁰ and the collaboration with primary court actors, treatment personnel, and social services.¹¹ The new DTC roles and court procedures are designed

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⁵ The Honourable Peggy Fulton Hora, The Honourable William G. Schma and John T.A. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," *Notre Dame Law Review* 74 (1999): 467.

⁶ Bentley, *supra* note 1 at 258.

⁷ LaPrairie, *supra* note 3 at 1536.

⁸ Hora, *supra* note 5 at 524.

⁹ *Ibid.*, 509.

¹⁰ Bentley, *supra* note 1 at 266.

¹¹ Hora, *supra* note 5 at 468.

in order to facilitate treatment. Non-traditional roles and procedures that enhance the physical and mental well-being of the offender are being embraced as a new alternative.¹²

In light of these changes, DTCs are receiving widespread attention in Canada - both negative and positive. This new way of delivering justice has been criticized as undermining the traditional role of the common law judge and being too soft on criminal offenders.¹³ On the other hand, there is openness to viewing DTCs as a possible solution to the drug use problem and drug-related crime in Canada.¹⁴ Despite the conflicting views on DTCs, the Minister of Justice and the Minister of Health announced on May 29, 2003 that the Government of Canada planned to give \$23 million dollars over a five year period to DTCs.¹⁵ This funding has come from Canada's Drug Strategy, a governmental initiative to reduce the supply and demand for drugs through many different approaches.¹⁶

Currently, two DTCs are operating in Toronto and Vancouver; additional funding is slated for these DTCs. The remaining federal funds are allocated for three new DTCs that are to be developed in Canada in 2004.¹⁷ By the end of 2004, there should be five DTCs operating in Canada. However, as of July 2004 no plans have been finalised to set up these other three DTCs.

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¹² *Ibid.*, 472.

¹³ Bentley, *supra* note 1 at 266-268.

¹⁴ Dan Gardner, "Holistic justice," *The Ottawa Citizen*, 11 May 2003, C4.

¹⁵ Department of Justice Canada, "Government of Canada Commits to Expand Drug Treatment Court Program," 29 May 2003, http://canada.justice.gc.ca/en/news/nr/2003/doc_30914.html (accessed on August, 2003).

¹⁶ Health Canada, *Canada's Drug Strategy*, Report. 1998, 4. <http://www.hc-sc.gc.ca/hppb/alcohol-otherdrugs> (accessed on October 15, 2003).

¹⁷ Department of Justice Canada, *supra* note 15.

Research Focus

This paper examines the DTC as part of sweeping changes that are occurring in the criminal justice system. The aim is to assess these changes through the perspectives of the Canadian judiciary. As such, this research paper explores the perceptions of Canadian judges involved in the DTC, as well as judges who preside in mainstream criminal courts, with respect to responses to drug-addicted offenders. The role of the judge, the changing role of the DTC judge, the perceived effectiveness of the criminal justice system, and the perceived effectiveness of the DTC are examined in detail. Focusing on judicial perceptions allows us to explore whether judges are supportive of the changes that are occurring in the criminal justice as a result of the implementation of the DTC.

This research paper also examines the experiences of judges in regards to dealing with drug-addicted offenders. The experiences of the judges in both the mainstream criminal court and the DTC identify the flaws and barriers in which the judiciary faces in relation to delivering justice to drug-addicted offenders in the criminal justice system.

Three major themes are explored: the changing role of the judge, the perceived effectiveness of DTCs and mainstream criminal courts, and the challenges in which the judges face in delivering justice to this sector of the criminal justice clientele.

Key Concepts and Terms

The term “drug” is used repeatedly. For the purposes of this thesis, “drug” includes all the illegal drugs specified under the *Controlled Drugs and Substances Act* (CDSA).¹⁸

During the interviews, many of the judges pointed out that alcohol was a drug of concern.¹⁹ Even though alcohol is not an illicit drug, over-use of it has negative effects, including addiction. However, unless stated otherwise, throughout this paper the term “drug” will only include illicit drugs enlisted in the *CDSA*. DTCs in Canada accept only non-violent, drug-addicted offenders charged with an offence under the *CDSA* of either trafficking or possessing cocaine, heroin or opiates.²⁰ Therefore, the drug-addicted offenders that are eligible for the DTC are those specifically addicted to only cocaine, heroin, or opiates.

The term “jail” is raised quite often by the judges and also used in direct quotes from the literature. “Jail” is a simplified term referring to imprisonment. Canada’s correctional system is split between the federal and provincial jurisdictions. This split is determined by the “two year-rule.” That is, sentences of two years less a day fall within provincial jurisdiction, whereas sentences of two years or more fall under federal jurisdiction.²¹ Specifically, prisons under the federal government are referred to as a “penitentiaries.” Under the provincial government, carceral institutions are referred to as

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¹⁸ *Controlled Drugs and Substances Act*, RSC 1996, c. C-19

¹⁹ Alcohol is considered a drug under Canada’s Drug Strategy.

²⁰ Bentley, *supra* note 1 at 260; Department of Justice Canada, “Drug Treatment Court of Vancouver Program,” Dec. 2001, http://www.justice.gc.ca/en/news/nr/2001/doc_27970.html (accessed on September 7, 2003). Opiates are a narcotic derived from the opium poppy plant, *papaver somniferum*. Heroin is a semi-synthetic opiate referred to as an opioid. See Schaffer Library of Drug Policy, “Frequently Asked Questions About The Opioids,” 10 January 1994, <http://www.druglibrary.org/schaffer/heroin/opifaq.htm> (accessed on April 18, 2004).

correctional centres.²² Because of this jurisdictional split, when judges state the term “jail” among the drug-addicted offenders, they are mainly referring to the provincial correctional centre where most of them may serve their term of imprisonment.

Throughout the thesis, shifts between the US and Canadian literature are made. US literature is relevant because the majority of DTC research comes from the US. As there are only two new DTCs in Canada, only a small amount of Canadian literature exists. In contrast, there are over 800 DTCs in the US making the US literature quite extensive.²³ Most of the US DTC research is compatible with the Canadian DTCs as the Canadian DTCs are partially modeled from the US.

Methodology

Sample

Judicial perceptions were evaluated through interviews with 10 judges. Judges interviewed came from the provinces of Ontario and British Columbia (B.C.). A sample of judges was chosen from these two provinces in which DTCs are currently operating. By choosing judges within the same province of a DTC, it is assumed that the judges are more than likely to have some knowledge on DTCs. The judges who were selected work in criminal courts. All interviewed judges had some experience in dealing with drug-using offenders.

The judges who were interviewed are divided into 3 groups: judges that currently preside over a DTC in Canada (DTC judges), judges who have actively proposed a DTC

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²¹ John W. Ekstedt and Curt T. Griffiths, *Corrections in Canada: Policy and Practice*, 2nd ed. (Toronto: Harcourt Brace & Company, 1988), 46.

²² *Ibid.*, 47.

or judges who are interested in DTCs (Interested-DTC judges), and lastly judges who preside in the mainstream criminal justice system (Non-DTC judges). Judicial perceptions on Canadian DTCs were evaluated through semi-structured interviews tailored for these 3 selected groups of judges.

The sample size of DTC judges was determined by the number of DTC judges in Canada and by their willingness to participate in the research study. Out of the 6 DTC judges in Canada, 4 were contacted, 2 volunteered, and 2 were interviewed. The pioneer of Canada's DTC, Justice Paul Bentley, is one of the DTC judges interviewed. The other DTC-judge is given anonymity.

For the sample of "Non-DTC judges," a non-random sample of 15 judges was selected. First, a list of names of judges in both the Ontario and B.C. Court of Justice was collected from a website search. This list of over 300 judges included both male and female judges in rural and urban areas from Ontario and B.C. From this list, Professor Brettel Dawson who works for the National Judicial Institute selected 45 judges who would likely be in a position to participate in this thesis.²⁴ From this selection of 45 judges, I randomly selected 25 judges. Due to difficulty in accessing judges, Professor Dawson sent out an e-mail to 25 of these randomly selected judges. The e-mail briefly explained my thesis project and asked them whether they would like to participate in an interview on "Judicial Perceptions on DTCs". I was notified through Professor Dawson of the judges who responded back to her e-mail agreeing to participate in the interview.

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²³ Adele Harrell, "Judging Drug Courts: Balancing the Evidence," in *Criminology & Public Policy*, ed. Todd R. Clear, et al., (New York: American Society of Criminology, 2003), 207.

²⁴ Professor Dawson, along with a senior advisor at the National Judicial Institute, selected 45 judges based on their knowledge of "open-minded" judges. The selection of 45 judges was also determined on a basis of geographic and gender distribution. There is a potential of bias on the selection process for the Non-DTC judges; however, if there was any bias, it would likely have been on a selection of judges who are more

A detailed letter explaining the parameters of the interview was then e-mailed to the Non-DTC judges. 6 Non-DTC were interested in participating in an interview and all 6 judges were forwarded an Information Letter explaining my thesis. 6 replied back, and 5 interviews were conducted. Out of the 5 Non-DTC judges that agreed to participate, 2 were from Ontario and 3 were from B.C. Due to a large population size of B.C. and Ontario criminal court judges, anonymity and confidentiality were guaranteed for this group.

The final interviewed group is judges who are interested in presiding over a DTC, “Interested-DTC judges”. Two of the interested-DTC judges were selected based on their proposal to the federal government for an Ottawa DTC. Both justices are interested in presiding over a DTC if their proposal for an Ottawa DTC is accepted; their interest in the Ottawa DTC has been profiled in the local newspaper.²⁵ These 2 judges confirmed their interest once contacted; both agreed to be interviewed. For the Interested-DTC judges from B.C., Professor Dawson gave me the names of two judges whom she thought were interested in DTCs based on her work in the area drug policy and judicial innovation. The two judges were contacted through e-mail, only one responded back and agreed to participate. This Interested-DTC judge from B.C. was guaranteed anonymity.

Therefore, the 3 groups of judges interviewed were composed of 2 DTC judges, 5 Non-DTC judges, and 3 Interested-DTC judges. Appendix A will demonstrate how the judges will be referenced in the footnotes.

Description of the Interviews

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open-minded and progressive. Yet, since judicial perceptions on DTCs from the 45 Non-DTC judges was not known from either Professor Dawson or the senior advisor, the data was not biased in this way.

²⁵ Rupert, *supra* note 2.

Before the interviews began, all judges were e-mailed a detailed letter of information and a consent form (See Appendix B). The letter of information and the consent form outlined the essence of the interview, the duration of the interview, and the risks involved. Once I had the judges consent to voluntarily participate in this study, I conducted the interviews. The interviews with the Ontario Court judges took place in Toronto, Ottawa, and over the telephone. The interviews with all B.C. judges took place over the telephone.

Semi-structured interviews were conducted with all judges. Interview questions for Non-DTC judges revolved around their experiences and their roles in the regular criminal courts, the challenges they face in the courts, their perceptions of DTCs, and their perceptions on the most viable and effective approach in dealing with drug-addicted offenders (Appendix C). Additional questions were asked to the Interested-DTC judges regarding their interest and knowledge of DTCs (See Appendix D). Even more questions were asked to the DTC judges. These questions surrounded their experiences in the DTC, their reasons for presiding over a DTC, and their concerns or foreseeable challenges of this new court (See Appendix E).

Method of data collection

Only upon consent the interview was tape-recorded. Once the tape cassettes of the interview were transcribed, the tapes were erased. If the interviewee did not agree to be taped, detailed notes were taken.

Interviews lasted approximately 45 minutes to 1 hour. On average, interviews with DTC judges lasted longer because more questions were asked.

Analysis

Questions were open-ended, allowing for more variation and room to explore certain issues. Some questions constricted the judges to single-response answers however these responses were probed for more detail. Once all the interviews were transcribed, key themes were identified and coded.²⁶ The main themes that were identified will be discussed in Chapter 3, 4, and 5.

Significance of Research

Criminal court judges hear case after case, many of which involve drug-addicted offenders. Considering the prevalence of drug-addicted offenders, and the amount of time hearing such cases, inevitably a judge's experience broadens as he/she is faced with the real issues and complex problems associated with drug-addicted offenders.²⁷

With regards to the effectiveness of the criminal justice system in dealing with drug-addicted offenders, it is evident that judges are in a special position to provide insight in this area. It is important to assess the judges' views on drug addiction, their roles as judges, and their perceptions of the effectiveness of the mainstream criminal justice system and DTCs. In effect, their perceptions are extremely valuable because it is their perceptions that will ultimately influence their decision-making and what programs they support.

DTCs are relatively new in Canada, therefore not an extensive amount of literature has been written on them. This is the first research project to ask Canadian

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²⁶ Herbert J. Rubin & Irene S. Rubin, *Qualitative Interviewing: The Art of Hearing Data* (London: Sage Publications, 1995), 241.

²⁷ Edward Beiser, "Perspectives on the Judiciary," *American University Law Review* 39 (1990): 509.

criminal court judges to describe in detail their perceptions on DTCs and the impact of the new judicial roles in the criminal justice system.

Although judicial views vary among different judges, this paper will attempt to express some of the thoughts, opinions, and concerns of the judiciary. This research paper will examine some of the major issues that emerge from the interviews.

Overview of Chapters

Chapter 2 explores the context in which DTCs were first developed and why they exist in Canada today. In addition, Canada's drug situation and response to drugs is examined in order to provide an accurate picture of Canada's current views on drugs.

Chapter 3, 4 and 5 are premised on the interviews and the issues in which the judges discussed and raised. In essence, the topics in these chapters attempt to portray the thoughts, views, and opinions of the judges.

Chapter 3 provides an account of the judicial role in both the mainstream criminal courts and the DTCs. Due to the unconventional nature of the DTC judge, the changing role of the judge is examined. Chapter 4 explores the processes of the DTC in comparison to the mainstream criminal justice system. The processes, goals, and concerns of each system are discussed. The fifth chapter discusses the challenges in which judges in both the DTCs and non-DTCs are experiencing. Lastly, the final chapter discusses the findings along with some suggestions for further research.

Chapter 2

The Development of the DTC

DTCs have been introduced in the criminal justice system as a response to deal with drug addiction and the revolving door of the criminal courts. This chapter explores the development, organization, and operation of such courts in attempting to respond to the drug problem. The following discussion also explores Canada's drug situation and a range of recent innovations established in response.

Changes in the Criminal Code of Canada

The Criminal Code of Canada was revised in 1996 with respect to sentencing, in order to deal more effectively with offenders. Then Minister of Justice and Attorney General of Canada, Allan Rock, introduced Bill C-41 which proposed that incarceration should only be used for offenders who posed a risk to public safety. Alternatives other than incarceration were to be pursued for less serious offenders. A key section in the new approach is s.742.1 and s.718.

Section 742.1 introduced the conditional sentence; this sentence may be given "where a court imposes a sentence of imprisonment of less than two years and where the court is satisfied that serving the sentence in the community would not endanger the safety of society as a whole, the court may order that the offender serve the sentence in the community rather than in an institution."²⁸ With this added provision to the Criminal

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²⁸ Criminal Code, R.S.C 1985, c. C-46. <http://laws.justice.gc.ca/en/C-46/>

Code, most drug offences would be eligible for a conditional sentence instead of incarceration.²⁹

Aside from the conditional sentence, a statement of purpose and sentencing principles were added to guide judges in sentencing; the sentencing purpose and principles are listed in section 718 to 718.2 of the C.C.C.³⁰ Like the conditional sentence, sections 718.2(d) and 718.2(e) of the C.C.C. also support alternatives to incarceration.

These new sentencing provisions have been addressed by the Supreme Court of Canada (S.C.C.) in both the cases of *R. v. Proulx*³¹ and *R. v. Gladue*.³² In *R. v. Proulx*,³³ Chief Justice Lamer commented:

Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation, the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement...

Clearly, these provisions in sentencing allow judges an opportunity to deliver restorative justice instead of punitive justice.³⁴ The punitive approach of incarceration is not

²⁹ LaPrairie et al., *supra* note 3 at 1534.

³⁰ Julian V. Roberts and Andrew Von Hirsh, "Legislating the Purpose and Principles of Sentencing" in *Making Sense of Sentencing*, ed. Julian V. Roberts and David P. Cole (Toronto: University of Toronto Press, 1999), 48.

³¹ *R v Proulx*, [2000] 1 S.C.R. 61 (2000) SCC 5

³² *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.)

³³ *R.v Proulx*, [2000] 1 S.C.R. 61 (2000) SCC 5, para 113.

³⁴ There is not one clear definition for Restorative Justice (RJ). RJ can be referred to as "an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm." RJ will be explored further in chapter 3. See Public Safety and Emergency Preparedness Canada, "Restorative Justice: Directions and Principles - Developments in Canada," paper for the Technical Assistance Workshop of the Programme Network of Institutes, by Robert B. Cormier, 2002, http://www.psepc-sppcc.gc.ca/publications/corrections/200202_e.asp (accessed March 2, 2004).

necessarily the best or only solution. Instead, restorative justice offers alternatives to improve the legal system and to improve the response to certain crimes. Consequently, when applicable, judges are dedicated to consider rehabilitation of the offender, the option of community service, the interests of the victim, and the availability of treatment services. Incarceration is to be applied only as a last resort.³⁵

While these sentencing provisions encourage judges in the criminal justice system to take a restorative approach, the reality is that the task of finding the available resources is usually the responsibility of defence counsel or the probation officer.³⁶ In effect, this renders the judge unaware of and uninvolved in the progress or the outcome of the offender.³⁷ However, these sections have created “a favourable legal environment”³⁸ for an innovative court that has developed in a few cities across Canada: Problem-Solving Court (PSC).

Problem-Solving Court (PSC)

Specialized courts, also known as PSCs, are a new approach by judges to delivering justice. Recognizing that the traditional court process has been unsuccessful in dealing with many social, human, and legal problems, PSCs try to respond to the problems that have brought the offender to court. PSC judges use their authority to develop new solutions to deal with the complex problems that flood the courts.³⁹

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³⁵ The Honourable Judge Sherry L. Van de Veen, “Some Canadian Problem Solving Court Processes” Draft (prepared for CAPCJ Pre-Institute Conference, St. John’s, Newfoundland, July 2003), 15.

³⁶ *Ibid.*

³⁷ Richard C. Boldt, “Rehabilitative Punishment and The Drug Court Movement,” *Washington University Law Quarterly* 76 (1998): 1261.

³⁸ Van de Veen, *supra* note 35 at 6.

³⁹ Greg Berman and John Feinblatt, “Problem-Solving Courts: A Brief Primer,” *Law and Policy* 23 (2001): 3.

Mental health, domestic violence, drug addiction, and juvenile delinquency are some of the many problems addressed by specific PSCs. Mental Health Courts acknowledge that the offender has a mental illness and seek to divert the mentally ill from the criminal process into treatment programs.⁴⁰ Domestic Violence Courts address the crime but also the needs of the battering victim and her family by providing special support and services, including counseling and information on the court trial.⁴¹ Domestic Violence Courts also connect the offender to counseling programs and relevant resources.⁴²

Although each court is tailored to deal with a specific problem, PSCs share common elements. All PSCs are premised on achieving positive outcomes for victims, offenders, and public. To achieve these positive outcomes, a judge has a central role in the court. Judges are active and involved, using their authority as a means to change behaviour and produce certain outcomes. All PSCs are based on a collaborative approach with the judge, lawyers, government agencies, and community groups. By having this team approach, multiple efforts to help the offenders and/or victims are employed. The collaborative effort among the legal actors, government agencies, and community services allows the PSC to deal effectively with complex problems. Unlike the traditional courts, PSCs have newly defined roles among the legal actors and new dynamics in the courtroom. These non-traditional roles and procedures are employed in

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⁴⁰ Richard A. Marini, "Mental Health Courts Focus on Treatment; Criminals Often Overlooked in Traditional System are Sentenced to Hospital Care" in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 59.

⁴¹ Ministry of the Attorney General, "Domestic Violence Court Program," 2003, <http://www.attorneygeneral.jus.gov.on.ca/english/about/vw/par.asp> (accessed on May 31, 2004).

⁴² Bruce Winick and David Wexler, eds. *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts* (Durham: Carolina Academic Press, 2003), 55.

order to achieve the best possible outcomes for the victims, offenders, courts, and community.⁴³

This paradigm shift in delivering justice was initiated in order to target and respond to the many problems that cause criminal behaviours. Specifically, a PSC that addresses the drug addiction problem among many criminal offenders is the Drug Treatment Court (DTC). The DTC recognizes that the underlying problem among many drug crimes, and drug-related crime, is drug addiction.⁴⁴

Origins of DTCs

Although this research revolves around the Canadian drug problem, and specifically perceptions of some members of the Canadian judiciary, it is useful to trace the origin of our DTCs in initiatives commenced in the US in 1989. With over 800 DTCs in operation and an additional 450 DTCs on the way, the American DTC movement has depth and broad support. It has influenced the implementation of DTCs in Canada.⁴⁵

The current American drug policy, better known as the “War Against Drugs”, began in the 1980s as the attempt to control the American drug problem. New drug laws were implemented that increased penalties for drug offenses. As a result, “Drug arrests nationally increased by 134% between 1980 and 1989, while during the same period the total number of arrests increased by only 37%.”⁴⁶ As a consequence of the explosion of

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⁴³ John Feinblatt, Greg Berman and Derek Denckla, “Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts,” *The Court Manager* 15:3 (2000): 30.

⁴⁴ LaPrairie, et al., *supra* note 3 at 1530.

⁴⁵ Harrell, *supra* note 23 at 207.

⁴⁶ Hora, *supra* note 5 at 459.

police drug arrests, the number of offenders sent to prison increased dramatically by 317%.⁴⁷

In reaction to these changes in the legislation and police enforcement, courts became overwhelmed and overburdened by the influx of drug crimes; at least half of these offender's recidivated and returned back to the court system and back in jail.⁴⁸ In order to deal with flooded courts, jail overcrowding, and recidivism rates, Expedited Drug Case Management (EDCM) courts were developed which essentially worked to achieve the "quick disposition"⁴⁹ and management of cases.

Yet EDCM only fixed the immediate problem. An innovative court strategy to tackle the underlying problem of addiction was proposed. In 1989, Miami was the first to develop a DTC with the goal of treating the underlying addiction. Judge Klein, then Associate Chief Judge of the Miami DTC, made a recommendation;⁵⁰ he said, "We could try to help them."⁵¹ With emphasis on treatment and an opportunity to assist the drug-addicted offender, the concept developed that this would reduce recidivism rates, promote healthier lifestyles, generate cost-savings, and lead to safer communities. This therapeutic perspective, the acceptance of treatment and the crisis in the courts and jails are all considered to have influenced the establishment of DTCs all across America.⁵² The therapeutic perspective in dealing with drug-addicted offenders has influenced the

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⁴⁷ *Ibid.*, 460.

⁴⁸ *Ibid.*, 461.

⁴⁹ *Ibid.*, 463.

⁵⁰ *Ibid.*, 455.

⁵¹ John S. Goldkamp, "The Impact of Drug Courts" in *Criminology & Public Policy*, ed. Todd R. Clear, et al., (New York: American Society of Criminology, 2003), 197.

⁵² Steven Belenko, "The Challenges of Conducting research In Drug Treatment Court settings," *Substance Use & Misuse* 37 (2002): 1638.

late development of DTCs in Australia, England, Ireland and Scotland.⁵³ This new way of delivering justice to drug-addicted offenders has also recently been introduced in Canada.

What is a DTC?

A DTC is defined as “a court with the responsibility of handling cases involving...[non-violent] drug-using offenders through an intensive supervision and treatment program.”⁵⁴ DTCs are specialized courts within the legal system which seek to address the drug addiction problem and focus on treating the drug-addicted rather than incarcerating them.⁵⁵ This approach to treatment is premised on the notion that drug and drug-related crimes are not only legal concerns but public health and social ones as well. DTCs combine therapeutic treatment with criminal justice system response.⁵⁶ The DTC effect a paradigm shift in justice – from a predominantly punitive system to a treatment-oriented one – in order to break the cycle of drug addiction and crime.⁵⁷

While there is no fixed “cookie-cutter” approach, there are many common elements in DTCs.⁵⁸ Some of these essential elements include a non-adversarial adjudication process, immediate intervention to treat the drug-user, a hands-on judiciary, frequent drug testing, and a collaborative effort between the judge, lawyers, treatment

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⁵³ Gardner, *supra* note 14; Justine Walker, *International Experience of Drug Courts: Executive Summary*, Scottish Executive, 2001, www.scotland.gov.uk/cru/kd01/green/courts03.htm (accessed on January 24, 2004).

⁵⁴ Hora, *supra* note 5 at 452.

⁵⁵ Public Safety and Emergency Preparedness Canada, “Drug Treatment Court: Program Information,” 28 January 2004, www.prevention.gc.ca/en/library/features/dtc/brochure.html (accessed on August 7, 2003).

⁵⁶ Hora, *supra* note 5 at 453.

⁵⁷ John Goldkamp, “The Drug Court Response: Issues and Implications for Justice Change,” *Alberta Law Review* 63 (2000): 924.

⁵⁸ *Ibid.*, 929.

providers, and social service agencies.⁵⁹ Clearly, DTCs mark a departure from the common law tradition of conviction and processing.

Who is part of the DTC team?

DTCs function through a “DTC team” composed of the judge, duty counsel, crown prosecutor, and the probation officer; all these individuals engage in non-traditional roles. However, the legal actors in the DTC alone are not equipped to solve the complex problems that come to court. Other influential players who enhance the effectiveness in the DTC are the treatment providers and community/court liaison. To meet the goals of the DTC, the DTC team is comprised of both legal and treatment personnel.

Legal Team

The DTC judge is the central and most involved figure in the DTC. The redefined role of the judge is most important to the successful functioning of the DTC because it is the judge who must exercise his/her authority to motivate the drug-addicted offender to stay in the treatment program.⁶⁰ Therefore, judges are actively engaged and interested in the rehabilitation of the drug-using offenders before them.⁶¹ Instead of a lawyer-driven court, DTCs have shifted the roles to emphasize a judge-driven court.⁶²

Nolan explains that the judicial role in the DTC is comprised of activism, compassion, expediency, and enthusiasm. That is, judges must be proactive in their

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⁵⁹ *Ibid.*, 936.

⁶⁰ Hora, *supra* note 5 at 476.

⁶¹ Deborah J. Chase and Peggy Fulton Hora, “The Implications of Therapeutic Jurisprudence,” *Court Review* 37:1 (2000):12.

leadership and coordinating role, interested and understanding to the drug-using offenders before them, willing to change and take risks, and finally eager to take on this new role.⁶³

The DTC judge must also be aware of the complexities of drug addiction in order to understand the reality of drug abuse – “physiological, psychological, and behavioural.”⁶⁴ By having specialized knowledge in the “disease model of addiction and drug abuse behaviour patterns,”⁶⁵ the DTC judge can effectively assess the appropriate response of sanctions or rewards in order for the drug-offender to complete treatment.

In addition to the non-traditional judge, the DTC Crown and the duty defense counsel depart from their traditional roles. Traditionally, the defense counsel is concerned with protecting his/her client’s rights while the prosecutor is concerned with public safety. While both their traditional roles are still enforced, they “must take a step back”⁶⁶ and instead focus more on the defendant’s recovery. “In deference, then, to the larger goal of the client’s recovery, lawyers must fundamentally depart from moral practices, acting as cooperative partners rather than legal adversaries.”⁶⁷

The judge, duty counsel, and prosecutor all embrace new roles that depart from traditional criminal court roles in order to assist the offender in recovering from their addiction. Therefore, “the judge is not just worried about process and precedents. The prosecutor is not just concerned with locking up “bad guys.” And the defender is not just

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⁶² Anthony C. Thompson, “Access to Justice: The Social Responsibility of Lawyers,” *Washington University Journal of Law & Policy* 10 (2002):77.

⁶³ James L. Nolan, *Reinventing Justice: The American Drug Court Movement* (New Jersey: Princeton University Press, 2001), 94-110.

⁶⁴ Judge Jeffrey S. Tauber, ed. “Drug Courts: A Judicial Manual,” Special Issue, *California Center for Judicial Education and Research Summer* (1994): 2.

⁶⁵ Hora, *supra* note 5 at 476.

⁶⁶ Boldt, *supra* note 37 at 1264.

⁶⁷ Nolan, *supra* note 63 at 76.

looking to get her client off.”⁶⁸ Legal facts and legal procedures are no longer a priority, but a new perspective that focuses on treatment for the client is adopted.

The probation officer is also a member of the legal team. Traditionally, the responsibility of the probation officer is to supervise the drug-addicted offender and to ensure that he/she is obeying court orders upon release into the community. This responsibility still exists. However DTC probation officers are also aware of the drug treatment process and complexities of drug addiction. Therefore, if a urinalysis tests positive for drugs, the probation officer does not jump to advocate for a custodial remand.⁶⁹ Instead, by understanding the treatment process, relapse of drug use is an expected part of recovering from an addiction.⁷⁰

Treatment Team

The treatment team is the other key component of the DTC process and is comprised of treatment staff and court/community liaison. These new and important figures have been added to the scene.

It is the responsibility of the Case Manager of the treatment team to ensure that the drug-using offenders have established treatment goals. It is also their responsibility to connect the drug-using offenders to community resources if needed (ie. housing, employment, education, health care, etc.). The community/court liaison communicates the progress/status of the drug-using offender between the courts and the treatment providers. That is, community/court liaison staff notifies the court on the drug-using

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⁶⁸ Greg Berman and John Feinblatt, “Judges and Problem-Solving Courts,” Think piece (Center for Court Innovation, 2002), 4. http://www.courtinnovation.org/center_1publications.html (accessed on August 29, 2003).

⁶⁹ Nolan, *supra* note 63 at 84.

offender's progress in the treatment centre and in turn notifies treatment providers of the drug-using offender's status in court. This communication link is essential for both the treatment and legal system to work together.

The importance of the treatment team is clearly recognized in the DTC. Not only are the treatment team members a vital influence in the decision-making process, but they are also visibly present in the courtroom because they sit with the legal team. The mere presence of the treatment providers in the courtroom reinforces their integral part in the functioning of the court and in the decision-making process. Clearly, the presence of the treatment team in the courtroom is a new element that departs from the traditional court settings.⁷¹

All these members of the DTC team, both legal and treatment, have a cooperative and collaborative relationship in which the DTC can achieve its goals. Thus, DTCs are like a "marriage between communities that have been traditionally at odds and foreign to each other – treatment communities, court communities, prosecutors, defense attorneys."⁷²

How DTCs work?

DTCs work within the framework of the existing criminal justice system. However DTCs adopt a therapeutic perspective in dealing with the people who come before them.⁷³ As discussed above, the DTCs' goals and roles are fundamentally

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⁷⁰ Van de Veen, *supra* note 35 at 33.

⁷¹ Hora, *supra* note 5 at 480.

⁷² *Ibid.*, 469.

⁷³ *Ibid.*, 470.

different than those of the traditional criminal justice system, thus affecting the operation of the court as well.

While DTCs attempt to rehabilitate the offender, each DTC varies in its operation depending on the needs of that community. Therefore there is not a universal approach in operating a DTC. Variations can appear in the type of treatment programs, eligibility criteria, and even court rules. For example, the American DTC treatment programs differ significantly from the Canadian treatment programs. In Canada, treatment for heroin addicts includes methadone maintenance, whereas in America, treatment excludes this because they adopt an “abstinence from all drugs”⁷⁴ model. The difference in the American and Canadian ideology of drugs is hence reflected in the type of treatment offered.⁷⁵

Overall, many aspects remain constant in order to increase the therapeutic outcomes for the offender. First, drug-using offenders in the program are supervised in one court with primarily the same judge. Drug-using offenders are not bounced around from different judges or within different courts. With this organization, a unified court creates a setting for the judge and the participant to build a relationship.⁷⁶ This “unified court” creates a consistent, continuing and accountable environment for the legal actors, treatment staff, and the drug-using offenders. Therefore, “the drug court judge and

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⁷⁴ Bentley, supra note 1 at 271.

⁷⁵ The American and Canadian response to drugs is different. Canada takes a more “harm reduction” approach while the U.S. takes a more “prohibitionist” approach to all drugs. The goals of the 2003 U.S. National Drug Control Policy are to reduce drug use through prevention strategies, increase treatment for drug addicts, and to stop high level drug trade. Canada’s Drug Strategy also aims to prevent drug use and treat drug addicts. However, Canada’s Drug Strategy is also concerned with reducing the harm associated with drug abuse through the use of harm reduction strategies. Therefore, while methadone is an illegal drug that can be used to treat a heroin addict, the US will not consider its treatment because it is not complete abstinence. Canada views methadone maintenance as a harm reduction strategy to heroin use. See Bentley, supra note 1 at 270-271; Health Canada, supra note 16; Office of National Drug Control

personnel are assigned for at least a one-year term (optimally, for two years)” making each member responsible for the effectiveness of the DTC.⁷⁷

To participate in the DTC program, a drug-using offender must be eligible. The Crown determines the eligibility of the drug-using offender for the DTC. The eligibility criteria for the DTC includes: offenders with a drug addiction to cocaine, heroin or opiates and no criminal history with violent offences.⁷⁸ Clearly, this criteria reflects a priority to treat those offenders with an addiction problem, while at the same time protecting the public.⁷⁹ Following the eligibility criteria, an assessment from a health professional confirms whether a drug addiction is present. On establishment of the presence of a drug addiction, the drug-using offender must volunteer to participate in the DTC. The judge must accept the drug-addicted offender into the program and then treatment and court supervision begins immediately. An offender charged with simple possession does not need to plead guilty before the court (Track 1-Pre Plea). A drug-addicted offender with a more serious record and charged with simple possession, possession for the purpose of trafficking, or trafficking must plead guilty (Track 2 – Post Plea).⁸⁰

Marijuana use is a recurring issue in the DTCs as most drug-addicted offenders of heroin and cocaine additionally use marijuana. The DTC is thus faced with dealing with marijuana indirectly. A drug-addicted offender will not graduate from the DTC program if he/she continuously uses marijuana; they must be clean from marijuana for one month,

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Policy, *National Drug Control Strategy*, 2004, <http://www.whitehousedrugpolicy.gov/> (accessed on May 1, 2004)

⁷⁶ Hora, *supra* note 5 at 471.

⁷⁷ Tauber, *supra* note 64 at 3.

⁷⁸ For more on the eligibility criteria, see Bentley, *supra* note 1 at 260-3.

⁷⁹ Hora, *supra* note 5 at 482.

and clean from heroin or cocaine for four months, in order to graduate.⁸¹ Marijuana use, according to the DTC judge and other court actors, can lead to other serious use of drugs; therefore continual use of marijuana is not acceptable in DTCs.⁸²

Upon acceptance into the program, the offender is released on bail with conditions. Weekly or bi-weekly court appearances, frequent urine screens, counseling, and intensive outpatient drug treatment are all conditions that may be mandated by the DTC. The status of the drug-using offenders are discussed in pre-court meetings where the judge, prosecution, defense counsel, probation officers, and treatment personnel discuss the appropriate incentives or sanctions for the drug-using offenders who will appear in court that day.⁸³

The duration of the DTC program is expected to last eight to eighteen months.⁸⁴ Once the drug-addicted offender successfully completes the drug treatment program, the charge for the offender under Track-1 is withdrawn or stayed. Upon successful completion for the offender under Track-2, the offender will be given a non-custodial sentence for the offence(s) to which he/she has pled guilty. Those who do not complete the program are sent back to the regular court system.⁸⁵

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⁸⁰ Bentley, *supra* note 1 at 260-261. The issues involved with a guilty plea (Track 2-Post Plea) will be discussed in Chapter 4.

⁸¹ Louis Gliksman Ph.D., et al. "Toronto Drug Treatment Court Evaluation Project: 2003 Interim Evaluation Report" (Centre for Addiction and Mental Health, December 2003), 14.

⁸² Dawn Moore, "To Cure the Offender: Drugs, User and the Canadian Criminal Justice System" (PhD diss., University of Toronto, n.d.), Chapter 3, 39-40.

⁸³ LaPrairie, *supra* note 3 at 1537-1538.

⁸⁴ Department of Justice Canada, "The Toronto Drug Treatment Court: The Key Components," by Kofi Barnes, 1999, 6 www.torontodrugtreatmentcourt.ca/Kofi%27s%20articles/KEYDTC22.DOC (accessed on September 13, 2003).

⁸⁵ Bentley, *supra* note 1 at 261.

The new roles, structure, and process of the DTC are implemented in order to enhance the chances of rehabilitation for the drug-addicted offender. The roles, structure, and processes are guided by the theoretical framework of therapeutic jurisprudence (TJ).

Legal Theory of Therapeutic Jurisprudence – Theoretical Framework for DTCs

DTC's embrace the theoretical principles of therapeutic jurisprudence (TJ). Although the first American DTC developed as an experiment and without a theoretical framework, therapeutic jurisprudence (TJ) is now used as a theoretical foundation that guides the courts.⁸⁶ TJ brings coherence to the judge-led DTCs and also provides direction for further improvement and development of such courts.

Legal scholars Winick and Wexler were the first to define TJ. They outline it as “a mental health approach to law that uses tools of the behavioural sciences to assess law's therapeutic impact, and when consistent with other important legal values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected.”⁸⁷ TJ acknowledges that the law can produce therapeutic or anti-therapeutic consequences for the individuals that are affected by the law; however, it is the latter that must be increased. By using a multidisciplinary approach to study the consequences and effects of the law, TJ can help inform and shape

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⁸⁶ David. B. Rottman, “Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?” *Court Review* 37:1 (2000): 26.

⁸⁷ Bruce Winick and David Wexler, “Drug Treatment Court: Therapeutic Jurisprudence Applied,” *Touro Law Review* 18 (2002): 479.

the law by supporting the practices that enhance therapeutic outcomes.⁸⁸ It is through the use of empirical and multidisciplinary studies that knowledge is acquired.⁸⁹

The insights of TJ can be extremely beneficial in improving the mental health of an offender. A significant insight of TJ consists of studying how judges and other important actors in the DTC setting can impact the individuals' psychological well-being. As a result, TJ provides insight to the main legal actors of the DTC in how to view their roles as therapeutic agents, thus increasing therapeutic consequences for the offender.⁹⁰ TJ has applied psychology and social science principles for the operation of DTCs. For instance, psychology of choice, psychology of procedural justice, psychology of behavioral contracting and psychology on denial mechanisms are able to provide judges and lawyers with new techniques in carrying out their role.⁹¹

TJ is a perspective through which legal rules, legal roles, and legal procedures are viewed through a therapeutic lens in order to influence legal changes. It is this theory that challenges the common law tradition in dealing with drug addiction. For instance, "TJ has been instrumental in questioning the centrality of the adversarial model and supporting alternatives to dispute resolution mechanisms..."⁹² However, TJ is viewed as a tool to inform and guide the operation of DTCs, yet it does not claim to override fundamental legal values.⁹³ Instead, TJ identifies how legal procedures and roles can be

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⁸⁸ *Ibid.*, 479.

⁸⁹ Nathalie Des Rosiers, "Rights Are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers," *Touro Law Review* 18 (2002): 453.

⁹⁰ Winick and Wexler, *supra* note 87 at 481.

⁹¹ *Ibid.*, 482.

⁹² Des Rosiers, *supra* note 89 at 455.

⁹³ Hora, *supra* note 5 at 445.

improved without dominating societal and legal values, such as due process and freedom of the press.⁹⁴

It is this theory, therapeutic in essence, which is guiding the implementation of DTCs in many countries. It is this theory that can be useful for Canadian DTCs.

Why DTCs in Canada - Is there a drug problem?

Drug addiction and drug crime is a problem in Canada.⁹⁵ Not only is drug addiction a legal problem, but it is also a social and health concern. For the ninth consecutive year, drug offences in Canada are on the rise. From 1992 to 2002 there has been a shocking 42% increase in drug offences.⁹⁶ In 2002, there was an increase in almost all illegal drug offences. The drug offence that far leads them all is possession of cannabis, accounting for almost three-quarters of all drug offences.⁹⁷ Nonetheless, there were approximately 12,500 cocaine and 800 heroin related incidents reported under the *Controlled Drugs and Substances Act* in 2002 (CDSA).⁹⁸

In 1997, for offenders charged with drug possession the most common sentence for such offences involved a fine while only 13% were imprisoned. However, in the cases of drug trafficking, 64% were sentenced to imprisonment.⁹⁹

Ironically, drug-using offenders sentenced to incarceration seem to face the same temptation of drug use in prison, where drugs are still accessible. Drug use in prison is

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⁹⁴ William Schma, "Judging For the New Millennium," *Court Review* 37:1 (2000): 4.

⁹⁵ All the interviewed judges believe that there is a drug problem in Canada, although some state that there is not a drug problem in their community.

⁹⁶ Marnie Wallace, "Crime Statistics in Canada," *Juristat: Canadian Centre for Justice Statistics* 23:5 (2002): 1.

⁹⁷ *Ibid.*, 12.

⁹⁸ *Ibid.*, 12.

⁹⁹ Sylvain Tremblay, "Illicit Drugs and Crime in Canada," *Juristat: Canadian Centre for Justice Statistics* 19:1 (1997): 7.

common: “38% of inmates incarcerated in federal institutions said they had used illegal drugs at least once since their admission.”¹⁰⁰ Clearly, prisons are not helping abstinence since the drug-using offenders still have drugs available to them. In addition, what good is prison if the problem prisoners came in with is the same problem they leave with? While there are treatment programs in jails, the reality is, most of these treatment programs are limited.¹⁰¹

Not only are drug crimes on the rise, but so too are drug-related crimes - offences other than drug offences that are committed in order to satisfy the drug habit. A study in Miami found that 573 drug addicts had committed approximately 6,000 robberies and assaults, 25, 000 acts of shoplifting, and 900 car thefts.¹⁰² The reality is, “if you’re an addict and you need the drug, you’re going to get the money somehow. If you can do it legally, you do. But unfortunately most of these people spiral down through the social strata.”¹⁰³ Although there may not be a direct link between drug addiction and other offences, one cannot ignore the correlation with drug addiction and crime. It is also worth noting that the increases in drug crime and drug-related crimes may not be attributed to increases in drug use per se, but rather a consequence of more “aggressive law enforcement activities.”¹⁰⁴

Drug-users also pose a health concern for Canadians, and in particular, a health concern for the drug-users themselves. The National Aids Society argues that Canada is

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¹⁰⁰ *Ibid.*

¹⁰¹ Canadian Centre on Substance Abuse, “Drug Treatment Courts: Substance Abuse Intervention Within the Justice System,” November 2000, <http://www.ccsa.ca/pdf/ccsa-008697-2000.pdf> (accessed on October 28, 2003).

¹⁰² Hora, *supra* note 5 at 462.

¹⁰³ Gardner, *supra* note 14.

¹⁰⁴ Eric Jensen and Jurg Gerber, “State Efforts to Construct a Social Problem: The 1986 War of Drugs in Canada” *Canadian Journal of Sociology* 18 (1993): 457; Janice Tibbetts, “Marijuana charges reach 20-year high” *The Ottawa Citizen* 24 February 2003, A3.

very close to experiencing “a public health crisis concerning HIV and AIDS, and injection drug use, as the infection continues to spread in vulnerable populations...”¹⁰⁵

While it is difficult to estimate just how many HIV infections in Canadians were caused through needle-sharing, research indicates that it is increasing dramatically.¹⁰⁶

Additionally, Hepatitis C is also a concern among injection drug users because of the sharing of needles. While 0.8% of the Canadian population have been diagnosed with Hepatitis C, this percentage increases dramatically for injection drug users.¹⁰⁷

How is Canada responding to the drug problem?

In response to Canada’s drug problem, multiple partnerships have been formed with the federal/provincial/territorial governments, law enforcement, community groups, and addiction agencies. In 1987, the federal government introduced a drug strategy to reduce the supply and demand of drugs - Canada’s Drug Strategy.¹⁰⁸

The goal of Canada’s Drug Strategy is to reduce the harm associated with drugs and alcohol. Clearly, Canadians are affected directly or indirectly by the consequences of alcohol and drug addiction. It is the goal of the drug strategy to prevent and reduce the harm for the addicts, families, and communities. The strategy attempts to do this by focussing efforts on research development, public awareness, prevention, treatment and rehabilitation, legislation and enforcement, and national and international cooperation.¹⁰⁹

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¹⁰⁵ Canadian Foundation for Drug Policy, “HIV/AIDS and Injection Drug Use: A National Action Plan,” 1997, www.cfdp.ca/hivaids.html (accessed on October 6, 2003)

¹⁰⁶ *Ibid.*

¹⁰⁷ Health Canada, “Hepatitis C in Canada,” report by Shimian Zou, Martin Tepper, and Antonio Giulivi, September 2001, http://www.hc-sc.gc.ca/pphb-dgspsp/publicat/ccdr-rmtc/01vol27/27s3/27s3f_e.html.

¹⁰⁸ Health Canada, *supra* note 16.

¹⁰⁹ *Ibid.*, 6.

With \$245 million dollars over the next five years, Canada's Drug Strategy has recently been renewed to reflect Canada's present drug situation. While the majority of public attitudes are more liberal in regards to marijuana, the law in turn should reflect this.¹¹⁰ The drug strategy advocates legislative reforms including alternative penalties, rather than criminal sanctions for small amounts of marijuana and more severe penalties for marijuana growers. The severity of the crime will fit the penalty. Following *R. v. Proulx*¹¹¹ and *R. v. Gladue*,¹¹² the criminal justice system should focus on more serious crimes and offenders; possession of 15 grams or less of marijuana should not count as one of them. Decriminalization of small amounts of marijuana and tougher penalties for large amounts of marijuana is being proposed by Canada's Drug Strategy as a more effective way for the criminal justice system and law enforcement to deal with marijuana.¹¹³

A current recommendation for the drug strategy is the implementation of safe-injection sites (SIS). SISs are health facilities that provide medical supervision for users to inject their drugs. SISs also include counselling services and referrals to other social services. The aim of SISs is to reduce drug overdoses and the spread of diseases, increase public safety, and reduce health and legal costs for drug injected users who are

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¹¹⁰ Jensen and Gerber, *supra* note 104 at 460.

¹¹¹ *R v Proulx*, [2000] 1 S.C.R. 61 (2000) SCC 5. The decision of the SCC held that the conditional sentence, a two year less a day sentence which served in the community, is appropriate under certain conditions. If there is no harm presented to the community and there is the potential for rehabilitation of the offender and reparation to the community, a conditional sentence would be in accordance with the sentencing principles set out in section 718. The SCC decided that judges have discretion in sentencing offenders and that judges should consider conditional sentences since incarceration is not the only viable sentence.

¹¹² *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.) The decision of the SCC held that in accordance to the sentencing principles, sentences other than incarceration for aboriginal offenders must be taken into consideration. Conditional sentences should be considered in that it reduces incarceration among aboriginal offenders and that it increases rehabilitation and reparation.

unable or reluctant to stop using drugs.¹¹⁴ Canada's first SIS opened in Vancouver on September 15, 2003 as a response to the growing numbers of injection drug users in Downtown Eastside Vancouver.¹¹⁵ This SIS is funded as a pilot project by Health Canada; however SISs would like to be part of the federal drug strategy. Currently, only needle-exchange programs are part of Canada's Drug Strategy.¹¹⁶

The recommendation for the decriminalization of small amounts of marijuana and the development of SISs are innovative alternatives fashioned for Canada's environment. While these same reforms are not supported by our American neighbours, it is a response to Canadian issues and societal views on reducing harm. The mere implementation of SISs and the recommendation for the decriminalization of marijuana demonstrate Canada's approach to harm reduction, rather than adopting a complete prohibitionist approach, as is evident in America's National Drug Control Strategy.¹¹⁷ Certain approaches in responding to drugs are unique to that of the American and Canadian drug policies; nonetheless, both these countries highly support DTCs.

Through Canada's Drug Strategy, innovative approaches to treating and rehabilitating the drug-addicted offender are encouraged. An innovative response that has been supported and funded by the federal government's drug strategy is the implementation of DTCs.

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¹¹³ Health Canada, "Renewal of Canada's Drug Strategy to Help Reduce the Supply and Demand for Drugs," News Release, 27 May 2003, http://www.hc-sc.gc.ca/english/media/releases/2003/2003_34.htm (accessed on December 12, 2003).

¹¹⁴ Thomas Kerr, "Safe Injection Facilities: Proposal for a Vancouver Pilot Project," *Canadian Foundation for Drug Policy*, Prepared for the Harm Reduction Action Society, November 2000, www.cfdp.ca/safei.pdf (accessed on February 13, 2004).

¹¹⁵ Leslie Boldt, "North America's First Supervised Injection Site Opens in Vancouver," *Four Pillars Coalition* 1, no.1 (2003), www.city.vancouver.bc.ca/fourpillars/newsletter/October03/ (accessed on January 15, 2004).

¹¹⁶ Kerr, *supra* note 114 at 19.

¹¹⁷ Office of National Drug Control Policy, *supra* note 75.

Canadian DTCs

Toronto and Vancouver

Canada's first DTC did not develop until almost a decade after the first American DTC. December 1998 marks the date of Canada's first DTC in Toronto. Three years later, in December 2001, Canada's second DTC opened in Vancouver. The goals of these DTCs are to increase public safety through providing treatment that in turn will reduce drug abuse, drug crimes, and the costs of the criminal justice system.¹¹⁸

Both the Vancouver and the Toronto DTC accept non-violent offenders charged with federal drug offences under the *CDSA* for trafficking or possession of cocaine, heroin, or opiates.¹¹⁹

Ottawa

Two judges in Ottawa have spearheaded an initiative to open a DTC in Ottawa. Ottawa would like to include youth (15-19 years)¹²⁰ and to include crimes of "theft, non-residential break and enter, and prostitution as well individuals with a history of low-level non-violent crime where there is an underlying substance use disorder."¹²¹

If the proposal for an Ottawa DTC is accepted, both the interviewed Ottawa judges would preside over the DTC. Rideauwood Addiction and Family Services will provide the treatment services. Links have already been made with community services,

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¹¹⁸ Department of Justice Canada, *supra* note 20.

¹¹⁹ Public Safety and Emergency Preparedness Canada, *supra* note 55.

¹²⁰ Toronto had first proposed a youth and adult DTC however it was not successful in managing both adults and youth under the same system. According to Justice Bentley, "youth need a separate court and not an adult court. For a youth court, we would need more funding. Youth have different needs."

¹²¹ "Proposal to Operate a Drug Treatment Court in Ottawa," 2002, 1; Rupert, *supra* note 2.

such as the John Howard and Elizabeth Fry Society. However, funding has not yet been approved for an Ottawa DTC.¹²²

Conclusion

Clearly, while DTCs have been growing exponentially in the U.S., they are quite a new experience for the Canadian justice system. This experience has brought about significant changes in the criminal justice system. The most notable changes have involved changes to the criminal court judge and to the procedures in the criminal court.

The following chapters will examine the views of the judges towards these changes. Before we examine judicial perceptions of the DTCs, first it is important to examine some of the prevalent themes that arose in the interviews. These themes will be discussed in the next chapter.

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¹²² Rupert, supra note 2.

Chapter 3

The Criminal Judge: Influences, Attitudes, and Roles

Based on interviews with judges, this chapter explores the roles of the judges in both the mainstream criminal courts and the DTCs. Some common themes emerged in the interviews with respect to judicial attitudes and role changes within the criminal justice system. These factors include: judicial perceptions on drugs and drug abuse; theoretical influences; mediation in the civil justice system and family law courts; the *Youth Criminal Justice Act* (YCJA); and current amendments to criminal law. This chapter shows how these factors result in the interviewed judges openly embracing a rehabilitative approach towards sentencing drug-addicted offenders, rather than a punitive one. Rehabilitation, rather than punishment, is taking the forefront.

While all the interviewed judges share the same rehabilitative philosophy, the judicial roles in the DTC and the mainstream criminal court do deviate from one another. Therefore, it is essential that we also discuss the differences in the roles of the mainstream criminal court judges and the DTC judges.

Views on Drugs: A Generational Change

Judicial views on drugs have changed dramatically just in the last decade. For instance, both the Ontario and B.C. Non-DTC judges comment on the severity and over-use of incarceration for drug offences over a decade ago.¹²³ One of these judges

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¹²³ As discussed in chapter 1, 10 judges were interviewed. These included: 2 judges who preside over a DTC (DTC judges); 3 judges from British Columbia (B.C.) and 2 judges from Ontario who preside over a mainstream criminal court (Non-DTC judge); 1 judge from B.C. and 2 judges from Ontario whom are interested in supervising a DTC (Interested-DTC judge).

compares the possession of marijuana to almost a “hanging offence.”¹²⁴ He states, “Do we say as we did before, we need to lock up these bastards.” However, according to both the judges, severe views on drugs have dissipated.¹²⁵ For instance, in Canada, in 1994, 2027 convicted offenders for drug possession were sent to prison. In the year 2002, this number dropped to 1390.¹²⁶ This statistic demonstrates that over the last decade more offenders were given other sentences rather than incarceration: these include probation, conditional sentences, and absolute or conditional discharge. For example, in 1998, only 47 offenders of drug possession were given a conditional sentence as compared to 124 in 2002.¹²⁷ In 1994, 2651 offenders for drug possession were given probation; the number rose to 2992 in the year 2002.¹²⁸ In addition, the increase in the number of offenders who were charged with possession of drugs and were given absolute or conditional discharges is most dramatic; 823 offenders in 1994 compared to 2447 offenders in the year 2002.¹²⁹ Evidently, judicial views on the possession of drugs have changed over the last 10 years indicating an acceptance of alternatives to jail in sentencing decisions.

However, drug trafficking cases are viewed differently. There was a dramatic increase in convicted drug trafficking cases over the same period. In 1992 there were 4679 convicted drug trafficking cases, while in 2002 there were 7497 cases.¹³⁰ Drug trafficking cases are also treated more severely than drug possession cases.¹³¹

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¹²⁴ Non-DTC #4, interview by the author, Ottawa, ON, December 12, 2003.

¹²⁵ *Ibid.*; Non-DTC#2, interview by the author, Ottawa, ON, January 8, 2004.

¹²⁶ Statistics Canada, “Adult Criminal Court Survey, Number of Convicted Cases by Type of Sentence” Table 2520017, CANSIM 2 Series, V20149219.

¹²⁷ *Ibid.*, V20149220.

¹²⁸ *Ibid.*, V20149221.

¹²⁹ *Ibid.*, V20149224.

¹³⁰ *Ibid.*, V20149226; The rise in trafficking offences is a result of cannabis. Cocaine and heroin trafficking offences have declined. See Norm Desjardins and Tina Hutton, “Trends in Drug Offences and the Role of Alcohol and Drugs in Crime,” *Juristat: Canadian Centre for Justice Statistics* 24:1 (2003): 3

¹³¹ Desjardins and Hutton, *ibid.*, 7.

In adult criminal court, a prison term was the most common sentence imposed on drug trafficking cases (42%) compared with 12% of possession cases. Similarly probation was imposed slightly more commonly in trafficking cases than for possession (30% vs. 28%). Conversely, a fine was the more prevalent sentence in possession cases (57%). Fines were only imposed in 20% of trafficking cases.¹³²

Further, the mean length of custody for a prison sentence imposed for trafficking was 220 days and a prison sentence for possession was 22 days.¹³³ These statistics reflect severe judicial views toward drug trafficking. These attitudes were apparent during the interviews with the judges; they all agreed that incarceration was an appropriate sentence for drug traffickers. According to a DTC judge, “drug pushers should belong in jail.”¹³⁴ However, it is worth noting that while prison sentences were most common for drug trafficking cases, conditional sentences, fines, probation, and absolute or conditional sentences have been used as well.¹³⁵ But, while alternatives to prison sentences are imposed for trafficking cases, prison sentences far outnumber them. Sentences for drug trafficking continue to be severe.¹³⁶

Judicial attitudes and sentencing patterns are comparative to the objectives of Canada’s Drug Strategy. The most recent renewal of Canada’s Drug Strategy, May 23, 2003, proposes to decrease the penalties with possession of cannabis, while increasing the penalties for cannabis grow operations.¹³⁷ Canada’s Drug Strategy promotes more tolerance for possession of cannabis users, while remaining tough with grow operations.

Many judges indicate that an addiction to drugs is no longer seen more harshly than an addiction to alcohol; seeing as both drug and alcohol addictions are thought to

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¹³² *Ibid.*, 7.

¹³³ *Ibid.*, 8.

¹³⁴ DTC #1, interview by the author, Ottawa, ON, January 29, 2004

¹³⁵ Statistics Canada, *supra* note 126 at V20149228 - 32.

¹³⁶ Tremblay, *supra* note 99 at 1.

¹³⁷ Health Canada, *supra* note 113.

drive deviant behaviour. Although in the past, drug addiction was considered “taboo,”¹³⁸ according to the interviewed judges, there is not the same taboo to drug addiction as it once was. As Giffen describes, historically Canada has paradoxically labeled the drug addict as both a victim of a disease and as a criminal. Although drug addicts were seen as sick individuals, many factors historically neutralized this view. These factors included influential political groups, hostility towards the Chinese, addicts as traffickers, and addicts being harmful to themselves and others.¹³⁹ These factors suppressed the view of the “addict-as-victim” and instead endorsed the “addict-as-criminal”.¹⁴⁰ Today, however, drug addiction is beginning to be recognized more as a medical problem; that is, addict-as-victim. All judges agree that drug addiction is a disease.¹⁴¹ It is with this medical perspective to drug addiction, among all the judges, that rehabilitation and treatment rather than punishment, is preferred; incarceration for non-violent offenders is clearly recognized as counterproductive, especially when an addiction is involved.¹⁴² Therefore, the decrease in the rate of incarceration and the increase in the use of alternative sentences are a reflection of these judicial views. Fundamentally, a change among the judiciary’s views on drugs and drug addiction has occurred.

According to a few judges, a generational change in delivering justice to drug offenders and drug-addicted offenders has occurred. According to one judge, no longer

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¹³⁸ Non-DTC #1, interview by the author, Ottawa, ON, January 28, 2004

¹³⁹ P.J. Giffen, Shirley Endicott and Sylvia Lambert, *Panic and Indifference: The Politics of Canada’s Drug Laws* (Ottawa: Canadian Centre on Substance Abuse, 1991), 155-157.

¹⁴⁰ *Ibid.*, 158.

¹⁴¹ Although all judges agree that drug addiction is an illness, a Non-DTC judge (Non-DTC #5, interview by the author, Ottawa, ON, January 8, 2004) was more hesitant to answer this question. He felt that drug addiction was an illness but he also believed there were instances when it wasn’t. He states that it depends on the circumstances. For instance when people use it as an excuse for their conduct, this is not an illness.

¹⁴² Incarceration for large-scale grow ops or trafficking would warrant incarceration.

is applying the “majesty of the law”¹⁴³ the only and final solution for such offenders. As this judge explains, his predecessor strictly applied the law and interpreted its plain meaning. However, the idea that the law is majestic and “pure”¹⁴⁴ should be challenged and critically analyzed in order to accommodate changing views and diverse societies.¹⁴⁵ This interviewed judge states that he is open to suggestions of something that is going to work better. Further, this judge says, “we [judges] are now looking more at how do we make it work rather than just being the final and only say.”¹⁴⁶ Consequently, knowledge from other disciplines, such as psychology, sociology, and biology are having an impact on the judiciary’s decision-making for drug-addicted offenders.

Clearly, judicial views on drugs and drug-addicted offenders are changing. Further, over the last decade, views towards the “purity” of the law are changing as well.

Theoretical Movements and Approaches to Justice

In addition to contemporary judicial views on drug addiction, new perspectives of justice that are presently underway in the legal system also affect the judiciary. A few of these new perspectives, Therapeutic Jurisprudence (TJ) and Restorative Justice (RJ), offer new ways to meet the challenges and failures of the traditional legal system. Although the terms “TJ” and “RJ” were not incorporated in any of my questions for the judges, it was interesting that these theoretical perspectives were independently brought up by the judges. While these perspectives were mentioned more by the DTC and

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¹⁴³ Non-DTC #2, interview by the author, Ottawa, ON, January 8, 2004.

¹⁴⁴ Moore (Introduction) *supra* note 82 at 14.

¹⁴⁵ *Ibid.*, 16.

¹⁴⁶ Non-DTC #2, interview by the author, Ottawa, ON, January 8, 2004

Interested- DTC judges, some Non-DTC judges discussed them as well. Apparently, an understanding of these theoretical principles and approaches is evident among the judges.

TJ and RJ are distinct, yet very similar concepts. TJ is the study of legal rules, procedures and roles, in order to increase therapeutic consequences and to minimize anti-therapeutic consequences. The social sciences are employed to study these consequences.¹⁴⁷ TJ is thus a lens in which to identify therapeutic improvements. RJ lacks the model of TJ; instead RJ is a philosophical framework.¹⁴⁸ RJ can be defined as a “process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”¹⁴⁹ RJ is an approach to justice while TJ is a theoretical tool for examining justice. Although RJ and TJ are somewhat different, they both have great potential to solve conflict, enhance outcomes, and minimize inequalities.¹⁵⁰ These perspectives were recommended by the judges as beneficial perspectives for the criminal justice system to adopt.

In an interview with an Interested-DTC judge, a particular book was mentioned, *Judging in a Therapeutic Key*. This book focuses on the multiple approaches in which to guide judges in applying therapeutic principles. For DTC judges, understanding the cycle of addiction,¹⁵¹ using behavioural contracting to help individuals comply with

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¹⁴⁷ Schma, *supra* note 94 at 4.

¹⁴⁸ Thomas J. Scheff, “Working With Shame and Anger in Community Conferencing,” in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 232.

¹⁴⁹ John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford; New York: Oxford University Press, 2002), 11.

¹⁵⁰ Scheff, *supra* note 148 at 232.

¹⁵¹ Shannon Lafferty, “Terry Emphasizes Counselling in San Hose,” in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 25.

treatment,¹⁵² using praise when good is done,¹⁵³ and giving voice to the individuals¹⁵⁴ are just a few of the principles discussed in his book. However, this book should not only be useful for DTC judges but also for judges in the mainstream courts. According to the interviewed judge, “I hope this is where we [judges] are going.”¹⁵⁵

Further, both DTC judges discussed the principles of TJ and agreed that other judges should also use these principles. Even though Justice Bentley employs rules of TJ in the Toronto DTC, he asserts that TJ is appropriate in the mainstream courts as well. Specifically, Justice Bentley mentions that all judges should apply an “ethic of care.” That is, “judges applying an ethic of care need to be sensitive to the emotional aspects of their interaction with the parties appearing in court, such as when to display sympathy or empathy, they should be careful not to abandon principal adjudicative values such as impartiality and independence.”¹⁵⁶ Justice Bentley clearly states that TJ does not need to occur only in PSCs; these principles should be a part of the mainstream courts.

A few Non-DTC judges also mention the holistic approach that RJ entails. Other institutions need to be involved in order to solve or address the multiple problems that come before the court. According to these judges, this theoretical approach is useful in the criminal context in order to produce more enduring outcomes. It is the recognition that many drug crimes are multifaceted and thus it would be common sense if they were

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¹⁵² David Wexler, “Health Care Compliance Principles and the Judiciary,” in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 218.

¹⁵³ David Wexler, “Robes and Rehabilitation,” in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 250.

¹⁵⁴ Bruce Winick, “The Judge’s Role in Encouraging Motivation for Change,” in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 185.

¹⁵⁵ Interested #3, interview by the author, Ottawa, ON, January 9, 2004

¹⁵⁶ Winick and Wexler, *supra* note 42 at 130.

approached in a “holistic” manner rather than an “intellectual” way.¹⁵⁷ Judges should take an approach in which the social, economic, and health issues are considered, rather than solely applying the law. “An alternate vision for coping with crime which goes well beyond the sentencing process”¹⁵⁸ is supported by the judges.

RJ includes the involvement of the victim, offender, community, and professionals in solving the problem.¹⁵⁹ Instead of viewing the crime as a violation against the state, RJ views crime as an act against a relationship. In order to repair the relationship, restoration rather than restitution is adopted.¹⁶⁰ Holistically, the stakeholders discuss the crime and the solution essential for the restoration of the relationship.¹⁶¹

Both perspectives of justice have created a paradigm shift in delivering justice in both the civil system and in the criminal system. An overview of some of these “monumental changes,” as it was termed by the judges, will be examined.

Changes in the Legal System

Mediation in Civil Law: What about Criminal Law?

According to the interviewed judges, mediation, family apprehension, and pre-trial conferences are widely accepted as more effective than trials in the civil justice system; effective in resolving disputes, reducing costs and delay, and in reserving trial for

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¹⁵⁷ Non-DTC #4, interview by the author, Ottawa, ON, December 12, 2003.

¹⁵⁸ B.P. Archibald, “A Comprehensive Canadian Approach to Restorative Justice: The prospects for sentencing fair Alternative Measures in Response to crime,” in ed. Don Stuart et al., *Towards a Clear and just Criminal Law* (Carswell: Toronto, 1999), 520.

¹⁵⁹ Patricia Hughes and Mary Jane Mossman, “Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses,” *Windsor Review of Legal and Social Issues* 13 (2002): 17.

¹⁶⁰ *Ibid.*, 72.

those who really need it.¹⁶² For this reason, in January 1999, Ontario Mandatory Mediation Program (OMMP) came into effect. The OMMP refers all civil law cases and some family law cases to a 3 hour mandatory mediation session; dispute resolution is being more widely accepted as a potential venue to settle disputes rather than going to trial. In addition, other provinces have developed similar mandatory mediation programs for certain civil legal cases.¹⁶³ Whether it is the judge who is directly involved in the mediation, or a certified mediator, alternatives to the formal court process are becoming a significant aspect of dispute resolution.

In many instances, judges are now encouraged, some are even mandated, to adopt these alternative approaches to the law; thus altering their judicial roles. The processes in which judges mediate, negotiate, or try to settle a case before it gets to trial is Judicial Dispute Resolution.¹⁶⁴ According to a Non-DTC judge from B.C., in certain cases the judge comes down from the bench, takes off his/her robe, and meets with the parties to try to reach a negotiation.¹⁶⁵ Another Non-DTC judge from B.C. states “that in mediation for family and civil matters, 60-70% of the cases get resolved.”¹⁶⁶ Further, a Non-DTC judge from B.C. states that judges “are there [in court] for that purpose - to try

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¹⁶¹ *Ibid.*, 76.

¹⁶² Patricia Hughes, “Mandatory Mediation: Opportunity or Subversion?” *Windsor Yearbook of Access to Justice* 19 (2001): 176.

¹⁶³ *Ibid.*, 172; See Minister of Attorney General, “British Columbia Bulletin: Dispute Resolution Office Updates,” June 2000, <http://www.ag.gov.bc.ca/dro/publications/bulletins/when-to-mediate.htm> (accessed on February 10, 2004). A program developed in the province of B.C. where mediation becomes mandatory in civil matters once one party initiates a “Notice to Mediate.”

¹⁶⁴ Government of Alberta, “Judicial Dispute Resolution Program a Success,” News Release, Edmonton Provincial Court – Family Division, 22 May 2002, www.gov.ab.ca/acn/200205/12396.html (accessed on March 2, 2004).

¹⁶⁵ Non-DTC #4, interview by the author, Ottawa, ON, December 12, 2003. This brought up judicial mediation to settle mainly matrimonial matters.

¹⁶⁶ Non-DTC #3, interview by the author, Ottawa, ON, January 16, 2004

and help people with their differences before it gets to trial.”¹⁶⁷ All of the interviewed B.C. judges point out the changing role of the judge in civil cases.

One Non-DTC judge from B.C. states that judges are moving away from the traditional role of the judge and embracing this new movement. However, according to this judge, the changing role did not come without hesitation. He explains that at first judges thought mediation was inappropriate because this new role of the judge was considered “too fuzzy.”¹⁶⁸ According to this judge, attitudes began to change with time and experience. This judicial role has been accepted by more judges now that it is more evolved.¹⁶⁹ “The image of the judge as mediator, in various iterations, is becoming much more common in Canada.”¹⁷⁰

These supportive attitudes from the B.C. judges are somewhat to be expected. The B.C. provincial court now mandates settlement conferences for most civil cases in which the judge is the mediator.¹⁷¹ In addition, all the interviewed judges from B.C. not only preside over criminal courts, but they also preside over youth court and civil matters. All these judges, then, have experience in some sort of mediation. Nonetheless, without question, Judicial Dispute Resolution is beginning to be more accepted and hence used in Canada’s civil and family courts.

Although not all judges are equipped with the skills for mediation or would want to be involved in it, education in mediation for judges is paramount. An Interested-DTC judge from B.C. mentions the need to fine tune one’s judicial skills by being more

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¹⁶⁷ Non-DTC #5, interview by the author, Ottawa, ON, January 8, 2004

¹⁶⁸ Berman and Feinblatt, *supra* note 68 at 10. “Fuzzy” can be referred to ambiguous and uncertain, as opposed to the judge who applies the precision and clarity of the law.

¹⁶⁹ Non-DTC #5, interview by the author, Ottawa, ON, January 8, 2004

¹⁷⁰ The Honourable Hugh F. Landerkin and Andrew J. Pirie, “Judges as Mediators: What’s the Problem With Judicial Dispute Resolution in Canada?” *Canadian Bar Review* 82 (2003): 251.

¹⁷¹ *Ibid.*, 266.

people-oriented and more respectful; education and training is thus provided for most judges.¹⁷² That is, instead of being a disinterested and dispassionate judicial referee, it is beneficial, in many instances, for judges to adopt the role of an interactive mediator.

The Judicial Dispute Resolution that is apparent in civil and family law cases is not as evident in the criminal justice system. An Interested-DTC judge states that the judge in the criminal justice system is traditionally less involved. Nevertheless, this Interested-DTC judges claims that it does not mean that this is how it should remain.¹⁷³

The Youth Criminal Justice Act

The *Youth Criminal Justice Act* (YCJA) was used as an example of Judicial Dispute Resolution in the criminal justice system. Through the interviews with the judges, at least one Non-DTC judge, Interested-DTC judge, and DTC judge mentioned the YCJA. These judges referred to the enactment of the YCJA as a stepping-stone to such judicially involved innovations with drug-addicted offenders within the criminal justice system.

The YCJA came into effect on April 1, 2003 replacing the Young Offenders Act (YOA). A key element was a move away from an over use of formal court processes and the sentencing of too many non-violent youth to custody. At the same time, the most violent youth were being dealt with too leniently.¹⁷⁴ The YCJA was enacted to deal with these concerns.

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¹⁷² *Ibid.*, 266; Interested #3, interview by the author, Ottawa, ON, January 9, 2004.

¹⁷³ Interested #1, interview by the author, Ottawa, ON, November 6, 2003.

¹⁷⁴ Nicholas Bala, *Youth Criminal Justice Law* (Irwin Law: Toronto, 2003), 19.

The purpose of the YCJA is clearly stated in the detailed Preamble and Declaration of Principle.¹⁷⁵ Here, the support for initiatives that prevent crime, seek to address the underlying factors that cause crime, promote rehabilitation and reintegration, ensure that sentences are proportional to the crime, and attempt to avoid custodial sentences for non-violent offenders are emphasized.¹⁷⁶ The YCJA incorporates more declarations of principle, including extrajudicial measures and sanctions.

Extrajudicial measures support diversion from the formal court process because it is believed that the conventional model is a failure and many non-violent offenders can be dealt with informally. This may include warnings by a police officer or the use of extrajudicial sanctions which include family group conferences and circle sentencing.¹⁷⁷ Sentences that encourage the rehabilitation of the offender and the restoration of the community and victim are encouraged. Extrajudicial measures and sentences maintain the government's objective in "reserving the most serious interventions for the most serious crimes and reducing over- reliance on incarceration for non-violent young persons."¹⁷⁸

In many situations, the judge in youth court has adopted a new demeanor. Depending on the verdict or the crime, the youth court judge will engage the youth and his/her parents in a discussion or he may even convene conferences.¹⁷⁹ In addition, the judge might sentence the youth with an "Intensive Support and Supervision Order."¹⁸⁰ This in effect places the youth on probation, with more supervision than usual, but it also

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¹⁷⁵ *Ibid.*, 76.

¹⁷⁶ *Ibid.*, 77.

¹⁷⁷ *Ibid.*, 423.

¹⁷⁸ *Ibid.*, 94.

¹⁷⁹ *Ibid.*, 431.

¹⁸⁰ *Ibid.*, 437; Interested #3, interview by the author, Ottawa, ON., January 9, 2004.

allows the judge to place certain conditions for the youth to appear back in court. The judge has more of an active role.¹⁸¹

According an Interested-DTC judge in Ontario, the new methods of dealing with youth and family law cases have, in essence, established precedent for the DTC. Comparable to judges in family and youth court, an involved DTC judge “is not something shockingly new.”¹⁸² DTC judges can and should be more involved with drug-addicted offenders.

Two Interested-DTC judges expect that the innovations seen within the YCJA will be brought into the criminal field, especially with drug-addicted offenders.¹⁸³ They are even more hopeful that this will happen since the criminal law and the higher courts clearly support extra-judicial sentences, and similar changes.

Loyalty to the law and higher court decisions

Fundamental to the role of the judge is to apply the law of the land.¹⁸⁴ Loyalty and respect for the law and higher court decisions is essential among judges. A Non-DTC judge from B.C. acknowledges that the sentencing “parameters are set by laws and legislators and secondly by the courts of appeal of the country.”¹⁸⁵

However, in the past, merely applying the law or “lavishly following the decisions of the higher courts of what should be imposed”¹⁸⁶ was not always in the favour of drug-addicted offenders. This Non-DTC judge from B.C. spoke of a time when young

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¹⁸¹ *Ibid.*, 437.

¹⁸² Interested DTC #1, interview by the author, Ottawa, ON, November 6, 2003.

¹⁸³ *Ibid.*; Interested #3, interview by the author, Ottawa, ON., January 9, 2004

¹⁸⁴ Gerald L. Gall, *The Canadian Legal System*, 3rd ed. (Carswell: Toronto, 1990), 217.

¹⁸⁵ Non-DTC # 4, interview by the author, Ottawa, ON, December 12, 2003.

¹⁸⁶ *Ibid.*

children were sent to correctional centres and people lost their jobs for the mere possession of marijuana. Although provincial court judges could see that incarceration was not working, this was the law at the time. There were many drug convictions and harsh sentences that followed. According to this judge, it took the Courts of Appeal a while to come along to the thinking of the provincial court judges that incarceration was not effective.

In 1996, along with the development of the conditional sentence, section 718-718.2 of the Criminal Code was developed setting out the sentencing purposes and principles.¹⁸⁷ Most important are sentencing principles 718.2 (d) and 718.2 (e). Section 718.2(d) states that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and e) “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” Further, section 718 sets out the purposes of sentencing. Section 718 (d) states “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 acknowledgement of the harm done to victims and to the community.” These additional sections encourage the judiciary to use their discretion in imposing jail sentences and to employ RJ principles in sentencing.¹⁸⁸ Although there is still a conviction, judges now have a diverse set of purposes for reaching a specific sentence.

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¹⁸⁷ Roberts and Von Hirsh, *supra* note 30 at 48.

¹⁸⁸ R v Proulx, [2000] 1 S.C.R. 61 (2000) SCC 5, para 19.

Today, the Supreme Court of Canada¹⁸⁹ and the Criminal Code (section 718 and 742) have armed judges with the tools to take a rehabilitative approach in sentencing. These changes are helping judges move away from a punishment based system. For instance, this Non-DTC judge from B.C. states that the conditional sentence, detailed in s. 742 of the Criminal Code, has changed the attitudes of many judges. In their view, serving time in the community is a lot more effective than sending people to correctional centres.¹⁹⁰ This is evident in the first year of the enactment of the conditional sentence; over 13,000 conditional sentences were imposed throughout Canada.¹⁹¹ Clearly, judges are beginning to look at the whole picture; hence, they are using the sentencing options set out in s.742. Rehabilitation, probation, and conditional sentences are the preferred approaches among all the interviewed judges.

The Role of the Mainstream Criminal Court Judge

In light of these influences - current views on drugs and drug addiction, emergence of theoretical perspectives, mediation in the civil system and family courts, the *YCJA* in the criminal law system - all appear to have impacted on judges in the criminal courts. Specifically for the judges in the mainstream criminal courts, these factors seem to have had an impact in shifting their philosophy and their parameters in sentencing drug-addicted offenders. A rehabilitative ideal is endorsed among all the judges interviewed; in cases where applicable, rehabilitation over incarceration is

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¹⁸⁹ R v Proulx, [2000] 1 S.C.R. 61 (2000) SCC 5; R. v. Gladue, [1999] 1 S.C.R. 688 (S.C.C.)

¹⁹⁰ There is this awareness among judges that drugs and dirty needles and drugs are present in jail. There is this awareness that an offender could end up worse leaving jail than when they came in. Jail should be used for public protection.

¹⁹¹ Julian Roberts, "Conditional Sentencing: Issues and Problems," in *Making Sense of Sentencing*, ed. Julian V. Roberts and David P. Cole (Toronto: University of Toronto Press, 1999), 78.

preferred. How does the new philosophy square with or shift judicial roles, what judges do, and how they do it? What is the role of today's judge and are judges remaining traditional?

When asked what the role of a judge is, a few judges had stated that the judicial role cannot be explained in one interview, let alone one definition. In response to this question by the interviewed judges, some common themes did arise. These themes around the role of a judge included: truth-seeking, applying the law and precedent cases, interpreting the law, adjudicating, and sentencing. While this is an oversimplified portrayal of the role of a judge, it does however reflect a traditional vision of the judiciary.

In regards to the role of a judge in dealing with drug-addicted offenders, a Non-DTC judge states that the most important aspect is effective sentencing.¹⁹² With the acknowledgment of an addiction problem, judges often use drug addiction as a mitigating factor in sentencing. In addition, with the provisions set out in s.718 and s.742, judges can now determine an appropriate sentence for a drug-addicted offender; one that includes treatment and counselling and one that can be served in the community rather than in a correctional centre.

However, the judges state that their role is limited when dealing with drug-addicted offenders because it usually stops once the sentence is given. Judges apply the law, look for alternatives to imprisonment, order treatment and rehabilitation when an addiction is present, but then pass the case off to a probation or correctional agency. There is little or no involvement of the judge in the treatment process; the responsibility

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¹⁹² Non-DTC # 2, interview by the author, Ottawa, ON, January 8, 2004.

in monitoring treatment lies with the probation officer and the treatment providers. This is known as the “refer-out model.”¹⁹³

All judges agree that it is a real challenge for judges in the criminal justice system to be faced with drug addiction since it is a multifaceted area. Issues of poverty, abuse, prostitution, housing, mental health, and education are other problems associated with drug addiction. Hence, the judge can only do so much and go so far with each case. An Interested-DTC judge states that the criminal justice system is a blunt instrument to deal with this type of criminal activity.¹⁹⁴ This is not only a legal issue, but it is a societal and health problem that has to be dealt with by various services and organizations. A judge from B.C. holds that too many people expect the criminal justice system to cure drug addiction; he is adamant that this is not possible.¹⁹⁵ In his view, the criminal justice system is simply not equipped to deal with the many problems associated with drug-addicted offenders. The interviewed judges therefore realize that their role is limited in preventing and curing drug addiction. It is for this reason that the role of the judge remains highly traditional; the traditional role of a judge as enforcer of the law and as an adjudicator continues to be practiced.¹⁹⁶ Judges will settle issues of law, but not solve issues of substance abuse. The organization and the values of the court do not permit them to go beyond that traditional role.

One judge states that as a result of caseloads, the complexity of each case, and the availability of resources, a drastic role change in the mainstream criminal courts would

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¹⁹³ Goldkamp, *supra* note 57 at 932.

¹⁹⁴ Interested #2, interview by the author, Ottawa, ON, January 14, 2004.

¹⁹⁵ Non-DTC #4, interview by the author, Ottawa, ON, December 12, 2003

¹⁹⁶ Joshua Matt, “Jurisprudence and Judicial Roles in Massachusetts Drug Courts,” *New England Journal on Criminal and Civil Confinement* 30 (2004): 155.

not be possible.¹⁹⁷ Due to these factors, the therapeutic experience of the drug-addicted offender is often jeopardized. As a result of the court in which they preside, the judge is constrained to get involved with the treatment process.

The role of the judge in the criminal justice system may be limited in dealing with drug-addicted offenders, but the rehabilitative perspective in which all judges embrace is a step forward. Instead of “just focusing on what’s the minimum sentence and the maximum sentence,”¹⁹⁸ judges are now given more choices to deliver a sentence that makes sense and that could make a difference. For example, in the instances in which drug-addicted offenders come to the court, one judge said that he recommends support groups to parents and informs them about resources.¹⁹⁹ Another judge said that he asks drug addicted offenders whether they are ready for a drug program and if so he offers to make them be at the top of the line for rehabilitation.²⁰⁰ Although the judge is not involved in the treatment process, this is an example of judge’s taking on an active role in directing the offender towards treatment. This seems to me to be quite a different portrayal than a disinterested and passive judge that is only concerned with the written law while ignoring social realities. Clearly, the interviews indicate that judges are choosing to be more proactive in sentencing.²⁰¹

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¹⁹⁷ Non-DTC #5, interview by the author, Ottawa, ON, January 8, 2004.

¹⁹⁸ Center for Court Innovation, “Reflections of Problem-Court Justices,” *Judicial Roundtable*, 2000, 11 http://www.courtinnovation.org/pdf/reflections_psc_justices.pdf (accessed on January 15, 2004).

¹⁹⁹ Interested # 3, interview by the author, Ottawa, ON, January 9, 2004

²⁰⁰ Non-DTC # 1, interview by the author, Ottawa, ON, January 28, 2004

²⁰¹ Berman and Feinblatt, *supra* note 68 at 22; Center for Court Innovation, “Survey of Judicial Attitudes Towards Problem-Solving: Executive Summary,” (forthcoming), <http://www.problem-solvingcourts.org/questions.html> (accessed on May 31, 2004). In 2001, a study was conducted in the US assessing judicial perceptions on problem-solving. With more than 500 criminal court judges surveyed, the results indicate great support among the judges for treatment of non-violent drug-addicted offenders, rather than incarceration. Most importantly, 80% agreed that judges should be involved in helping drug-addicted offenders. 90% of the US judges wanted to ensure that drug-addicted offenders attended orders to go to treatment, as well as batterer’s to attend counselling and intervention programs.

Even though the mainstream criminal court judges do not depart drastically in their roles, they fully embrace the new roles of other judges. Among the judges, there is an acknowledgement that there is a changing role of the judge; the whole movement with Judicial Dispute Resolution is an indication of this. Clearly, judges are dealing with multiple cases and complex problems that the single-sentencing approach is not always efficient. Thus, the roles of some judges have evolved by adopting new perspectives and seeking new solutions to meet the needs of contemporary society and to deal with the inadequacies of the justice system.²⁰² These modern perspectives and roles are evident in DTCs as judges seek to deal with the drug-addicted offenders that come before them over and over again.

In regards to the role of the DTC judge, 9 out of the 10 interviewed judges were profoundly supportive of this new role. One judge, however, was more critical of this non-traditional role. This new role of the judge will be discussed – both the advantages and the concerns.

The Role of the DTC judge

There is a clear departure in the role of the judges in the DTCs and in the mainstream criminal courts. Throughout the literature, the DTC judge is described as having multiple functions and roles. For instance, the DTC judge is referred to as a “counselor”,²⁰³ “mentor”,²⁰⁴ and even a “broker”²⁰⁵. On the other hand, critics of this

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²⁰² Gall, *supra* note 184 at 214.

²⁰³ Rottman, *supra* note 86 at 25.

²⁰⁴ Hora, *supra* note 5 at 477.

²⁰⁵ Berman and Feinblatt, *supra* note 68 at 5.

new judicial role have described the DTC judge as an “untrained psychiatrist”,²⁰⁶ a “social worker”,²⁰⁷ and a “morally invested force of correction rather than an enforcer of justice.”²⁰⁸ Clearly, the views on the new role of the judge are mixed.

Justice Bentley describes his role as a DTC judge as being a “problem-solving agent”; that is, assuming a role to address social issues and to help solve them. As a problem-solver, the DTC judge works collaboratively with the legal and treatment team comprised of duty lawyers, Crown, probation officers, treatment staff, community/court liaison and case managers. It is with a collaborative ideology that all the team players work together for the success of the offender’s treatment.

The judge becomes the central figure in the DTC team where he monitors offenders in treatment; engages in discussion with the offender; manages the cases; meets regularly with the same offenders; sits in pre-court meetings with the DTC team; adopts a proactive and hands-on approach; acquires specialized knowledge on drug addiction; and employs therapeutic principles.²⁰⁹ It is assumed that all these judicial dimensions will facilitate a therapeutic and supportive environment for the drug-addicted offenders to get through the treatment program. Clearly this role is inconsistent with the traditional notion of judging – disconnected from the treatment services, disinterested with the offender’s problems, and removed from the offender’s rehabilitation and progress. So, does this new role clash with the non-traditional role? Is one judicial role better than the other?

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²⁰⁶ Morris B. Hoffman, “Therapeutic Jurisprudence, Neo-rehabilitation, and the New Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous,” *Fordham Urban Law Journal* (2002): 3.

²⁰⁷ Berman and Feinblatt, *supra* note 68 at 10.

²⁰⁸ Benedikt Fischer, “Doing good with a vengeance: A critical assessment of the practices, effects and implications of drug treatment courts in North America” *Criminal Justice* 3 (2003): 239.

²⁰⁹ Goldkamp, *supra* note 57 at 936; Hora, *supra* note 5 at 476.

Since DTCs are new to Canada's criminal justice system, concerns about this new role are inevitable. The concerns that will be addressed and examined are those that were raised by mainly one Non-DTC judge and those that were found in the literature. It is also worth noting that some of the supportive judges of this new judicial role agree that these concerns are legitimate; however, upon careful conduct of the judge, it is suggested that these concerns can be dealt with.²¹⁰

The Role of the DTC Judge: What are the concerns?

Tensions with the new role of the DTC judge are present because it is asserted that the judge jeopardizes judicial core values of independence, neutrality, and impartiality; adopts a social work role; and risks being paternal.²¹¹ It is important that these concerns for the role of the DTC judge are addressed. Justice Bentley and the other interviewed judges challenge these concerns.

As mentioned above, it is a concern of some that the traditional principles that are fundamental to the judicial role, independence, neutrality, and impartiality are being challenged. First, critics argue that when a judge becomes specialized in drug addiction, he/she loses impartiality because he/she becomes biased on this issue. If the judge is aware of an issue, it is assumed the judge must already have preconceived biases.

Further, with this specialized knowledge in drug addiction, concerns are raised that the judge may be crossing over into the social work or medical domain. I asked Justice Bentley and the other DTC judge whether they received any "special" training in drug addiction. Neither DTC judges received any. Justice Bentley mentioned that he has

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²¹⁰ The new role of the DTC judge has been accepted by the majority of judges interviewed. It was suggested that not all judges belong in this role nor should all judging become like this.

attended an American conference on DTC, given a conference, attended some peer reviews, and has also done some of his own reading on drug addiction. Clearly, he has acquired some knowledge from these functions which make him more informed and educated; however, this acquired knowledge is not for the judge to become a social worker or to assume a medical role. This knowledge is to familiarize judges with the issues of, and around, drug addiction. Unlike a social worker, the judge does not work independently with the drug-addicted offender through counselling or assessing problems.²¹² Unlike the treatment staff, the judge does not make medical decisions. The DTC judge claims that he can not become what he is not.²¹³ The DTC judge is not trying to assume the roles of other professionals. The treatment providers, counsellors, psychologists, and social workers work directly with the drug-addicted offenders to overcome the drug addiction, the judge does not cross over into their realm.

DTC judges remain knowledgeable but they keep their judicial distance by not trying to be the experts in drug addicted treatment or social work; they are simply not trained in these areas.²¹⁴ Therefore, the DTC judges rely on the expertise of those administering the treatment. One Non-DTC judge from Ontario states, "But you are not a social worker you are really a monitor and there is still a line between being a judge and being the actual person in the field. You have to rise above that and rely on the people who have expertise that are actually administering the program." Further, Justice Bentley states, "Therapists make recommendations and the judge takes this." As a result, the DTC judge takes into consideration the advice from the treatment team, the lawyers, and

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²¹¹ Berman and Feinblatt, *supra* note 68 at 10.

²¹² National Association of Social Workers, "Social Work Profession," May 2, 2004, <http://www.naswdc.org/>

²¹³ DTC #2, interview by the author, Ottawa, ON, February 3, 2004.

the probation officers – based on all the information provided, the judge can then reach a “final decision.”²¹⁵ In this respect, the judge still remains neutral to all the information provided before him. According to Justice Bentley, DTC judges still hold on to the core values of independence, neutrality, and impartiality.

In response to the question, “do DTC judges threaten the core values of the impartial, neutral, and independent judge?” there was wide support among most judges that these values were not threatened. The core values of judicial conduct, impartiality, neutrality and independence, are deemed essential for the role of judge.²¹⁶ The *Charter of Rights and Freedoms*, section 11(d), confirms these judicial values by stating that “any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”²¹⁷ That is, the role of the common law judge is to decide a case, free from bias and without the interference from others. While the DTC judge claims that he could reconcile with this concern, he still does not feel that it threatens the institution of judging.²¹⁸ There are innovative ways to accomplish a suitable resolution – this is one of them. According to this judge, core values can be upheld.²¹⁹ That is, the traditional judicial role is not abandoned; instead, it is adapted to take a more problem-solving role.

Also, a Non-DTC judge from Ontario states that there is a real spectrum in the way judges run their courts. Depending on the case, court, and judge, the role may

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²¹⁴ *Ibid* at 16.

²¹⁵ Berman and Feinblatt, *supra* note 68 at 16.

²¹⁶ The Honourable Mr. Justice T. David Marshall, *Judicial Conduct and Accountability* (Scarborough: Carswell Thomson Professional Publishing, 1995), 69.

²¹⁷ Department of justice Canada, *Charter of Rights and Freedoms*, Schedule B, Constitution Act, 1982(79) <http://laws.justice.gc.ca/en/charter/>

²¹⁸ DTC #2, interview by the author, Ottawa, ON, February 3, 2004.

²¹⁹ Non-DTC # 5, interview by the author, Ottawa, ON, January 8, 2004

vary.²²⁰ For example, DTC judges could become more involved and engaged with the offenders because the majority of the offenders have already pled guilty before going to DTC. Essentially, judges are in a different role when evidence is going in and when they are determining a verdict. Because DTC judges recognize that most of the offenders are already guilty of an offence, it allows them to focus on the treatment of the addiction and engage what is appropriate.²²¹ In reality, there are many factors that could possibly affect judicial conduct.

A last concern involves the DTC judge being paternal. That is, there is too much power for the DTC judge to place his/her own views on the offender, thus governing the offender according to what he/she deems as being right or wrong.²²² According to the one Non-DTC judge, “judges should remain like a black box.”²²³ This way, the judge remains detached from the Crown, Duty Counsel, and drug-addicted offender; legal rules will apply; and everyone will get “a fair hearing no matter what.”²²⁴ Since DTC judges often deal with the offender’s familial, health and social issues, the power the judges exert over these matters could be dangerous.

I’m not sitting back and watching the parties and ruling. I’m making comments. I’m encouraging. I’m making judgement calls. I’m getting very involved with families. I’m making clinical decisions to some extent, with the advice of experts. So I have much greater opportunities, I think, to harm someone than I would if I just sat there, listened, and said guilty or not guilty.²²⁵

The potential risk in harming offenders is apparent. DTC judges may impose decisions with the best intentions, yet it may be detrimental to the offender. However, the

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²²⁰ Non-DTC #2, interview by the author, Ottawa, ON., January 8, 2004

²²¹ *Ibid.*; Interested #1, interview by the author, Ottawa, ON., November 6, 2003; Interested #2, interview by the author, Ottawa, ON., January 14, 2004.

²²² Van de Veen, *supra* note 35 at 76.

²²³ Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004

²²⁴ *Ibid.*

²²⁵ Greg Berman, “What is a Traditional Judge Anyway?” *Judicature* 84:2 (2000): 82.

decisions of the judge are also in consultation with the treatment and legal team, thus minimizing the occurrence of abusive judicial power. Judicial paternalism is a concern in all courts since all judges have a remarkable power over the people that come before them.

In effect, addressing all of the above concerns is useful in understanding the challenges and the risks that DTC judges may face. Nevertheless, the interviews did reveal that the majority of judges support, rather than criticize, this new role of the DTC judge.

Conclusion

A rehabilitative philosophy in dealing with drug-addicted offenders is clearly evident among the judges who were interviewed. Judicial attitudes for the rehabilitation of offenders, instead of punishment, have prevailed. Many factors have influenced and supported such an attitude change. Clearly, there is a strong consensus among all the judges interviewed that rehabilitation is the way to go.

While both the DTC judges and the mainstream criminal court judges have embraced a rehabilitative ideology towards drug-addicted offenders, it is the DTC judge who confronts these issues to attack the problem. In doing this, the role of the DTC judge has departed from that of the traditional judge. Although the DTC judge adopts a new role outside of the traditional, the majority of the interviewed judges were supportive of this new role. According to these judges, the role of the DTC judge is not a contradiction to the judicial system.

In theory, traditional conceptions of the judicial role are often idealized because it emphasizes values of fairness, formality, and predictability. However, in practice, the traditional role may not always produce the most favourable outcomes or be the most logical way to proceed. More is going on in the world today than what tradition could have assumed. Consequently, new roles are evolving to respond to current social problems, changing norms, and challenges inside and outside the system. Should the ideal judge of the 17th century be upheld in every courtroom in the 21st century? It is in this case that an interviewed judge stated that the traditional characteristics of a judge should be re-examined critically.²²⁶ Further, an American judge had said, “I truly believe in separation of powers and the independence of the judiciary, but that doesn’t mean that the judiciary has to do the same thing for over three hundred years.”²²⁷

As a result, the role of the DTC and the mainstream criminal court judges does differ significantly. The DTC judge is able to carry out his new role through the dynamics, structure, collaborations, and processes of the DTC. The following chapter will explore how both the mainstream criminal courts and the DTCs deal with drug-addicted offenders.

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²²⁶ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

²²⁷ Nolan, *supra* note 63 at 107.

Chapter 4

The Criminal Justice System vs. Cadillac Courts

The previous chapter demonstrates how various influences have an impact on the attitudes of the criminal court judges in endorsing a rehabilitative ideal. However, the roles of both the mainstream criminal court and DTC judges differ significantly. The role of the DTC judge departs from that of the mainstream criminal courts as a result of the new structural system in place.

For instance, DTC stakeholders have deemed the mainstream criminal courts ineffective in responding to drug-addicted offenders.²²⁸ Incarceration is viewed by the DTC stakeholders, and all the interviewed judges, as an ineffective sentence for drug-addicted offenders. However, according to the interviews, the use of alternative sentences is also posing some challenges. According to the interviews, judges are now imposing alternatives to jail sentences for drug-addicted offenders, as well as ordering treatment or counseling. Yet the reality is that probation officers are overloaded with cases,²²⁹ resources for the offenders are scarce,²³⁰ and the offenders' multiple needs are barely addressed.²³¹ The current mainstream criminal court structure is posing some challenges for the judges. DTCs have been structured partly to face these challenges head on. The structure of the DTC creates an environment in which the main players in

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²²⁸ DTC stakeholders are individuals or groups actively involved in the DTC, such as: particular judges, addiction groups, correction officers, and defence counsel and Crown representatives. See Bentley, *supra* note 1 at 260.

²²⁹ Probation Officers Association of Ontario, "Conditional Sentences: Survey of Probation and Parole Officers in Ontario," 2000, http://www.pao.org/HTMLobj-365/Conditional_Sentence_Paper.pdf (accessed on January 15, 2004).

²³⁰ Jennifer Madigan, "Making Better Citizens, not better criminals" *Capital News Online*, 29 November 2002, <http://www.carleton.ca/jmc/cnews/29112002/n2.shtml> (February 1, 2004); Bentley, *supra* note 1 at 258.

the DTC can effectively deal with the underlying problem of their criminal behaviour and drug addiction. DTCs have thus been referred to as the “Cadillac Courts” because more resources, people, and management are employed in order to provide effective drug treatment; this support is not evident in the mainstream courts.²³² The term “Cadillac Courts” is used in a positive context. “Cadillac Courts” can also be used as a derogatory reference for DTCs in that they cost too much money, are too specialized, and are not viable models for Canada’s criminal justice system. However, according to one of the interviewed judges, and for the purposes of this thesis, “Cadillac Courts” is used in a positive sense.

This chapter explores the two different justice systems, the mainstream criminal courts and DTCs, in their approach in dealing with drug-addicted offenders. More importantly, the judge’s views’ on the effectiveness of the criminal justice system in comparison to the DTCs is examined.

Mainstream Criminal Courts: How do they proceed?

The Canadian criminal courts are traditionally and primarily adjudicative in nature.²³³ They are founded on the common law adversarial model. The offender and the victim usually remain passive throughout the court process in which their advocates zealously provide the arguments for each of their cases. These arguments are presented before an independent, impartial, and neutral adjudicator, the judge. It is the judge who

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²³¹ Van de Veen, *supra* note 35 at 7.

²³² Interested #1, interview by the author, Ottawa, ON., November 6, 2003.

²³³ Adjudication can be defined as “resolving disputes in which some general principle or rule of law is applied to the facts that gave rise to the dispute and in which the parties involved are able to participate by presenting proofs and reasoned arguments.” See Neil Brooks, “The Judge and the Adversary System,” in *The Canadian Judiciary*, ed. Allen Linden, (Toronto: Osgoode Hall Law School, 1976), 89.

will hear each side and who will then settle the dispute by rendering a verdict of guilty or not guilty.²³⁴

The adversarial system is meant to guarantee a fair, consistent, and just trial. That is, in the criminal process, both parties are given the opportunity to put forth their arguments. It is the responsibility of the Crown to prove its case beyond a reasonable doubt. Based on the evidence and the applicable law, a neutral and objective judge or jury will determine the outcome of the case.²³⁵ According to one judge interviewed, the adversarial process offers procedural fairness.²³⁶ It is the judge who makes sure that everyone is following procedural rules.²³⁷

According to some judges, the mainstream criminal justice system is very much backward-looking. That is, it is concerned with past events and punishing an individual for the past wrongs, rather than being concerned with the offender's future. However, according to the interviewed judges, changes in the Criminal Code are helping judges move away from a "backward-looking" approach. An Interested-DTC judge explains that a trend is slowly developing that demonstrates that judges are moving away from punishment-based sentences and instead looking at alternatives.²³⁸ This trend is emerging because legislation (section 718 and 742), SCC decisions,²³⁹ and the judge-led initiative of DTCs²⁴⁰ support it. However, with this rehabilitative and non-punitive approach, "the correctional system and its related services would probably become the

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²³⁴ Colin Goff, *Criminal Justice in Canada* 2nd ed. (Australia: Nelson Thomson Learning, 2001), 14.

²³⁵ Gall, *supra* note 184 at 213.

²³⁶ Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004.

²³⁷ Goff, *supra* note 234 at 32.

²³⁸ Interested #3, interview by the author, Ottawa, ON., January 9, 2004.

²³⁹ *R v Proulx*, [2000] 1 S.C.R. 61 (2000) SCC 5; *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.)

²⁴⁰ Natasha Bakht, "Problem-Solving Courts as Agents of Change" (National Judicial Institute, 2004), 6.

most important agencies of the criminal justice system.”²⁴¹ The question then is: are the correctional systems equipped to deal with the judges “rehabilitative” ideal?

The truth about probation

In the U.S., the increase in drug cases had an extremely negative impact on the probation services. With many drug offenders on probation, probation officers were overloaded with probationers and thus unable to monitor them accurately. As Goldkamp suggests,

Overwhelmed by numbers and unsupported by resources, probation was relegated to a more passive role over time in large jurisdictions which focused more often on enforcement, fee collection, and violation of non-compliant probationers than on remedial or restorative functions – such as actively providing drug treatment, employment or education services.²⁴²

Probation was declared ineffective and meaningless in meeting the needs of the drug-addicted offenders. As a result, DTCs were formed to replace this failed system.²⁴³

In Canada, the situation is quite similar. While sentences of probation have remained fairly stable²⁴⁴ over the last few years, the numbers of offenders given conditional sentences has risen to striking numbers.²⁴⁵ Many more individuals are serving their time in the community; the probation officers are most affected by this.

A vital duty of a probation officer is to supervise the probationers and to make sure that they are following court orders. However, since conditional sentences are prison-like sentences being served in the community, there are more conditions than a

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²⁴¹ Goff, *supra* note 234 at 96.

²⁴² Goldkamp, *supra* note 57 at 933.

²⁴³ *Ibid.*, 934.

²⁴⁴ Madigan, *supra* note 230.

²⁴⁵ Statistics on the rates of conditional sentences are provided in Chapter 3.

regular probation sentence.²⁴⁶ For instance, strict curfews and reporting to a probation officer are highly probable conditions that are not present in a regular probation order. Further, under a conditional sentence, a judge can order the offender to undergo treatment, whereas in a probation order, consent from the offender is needed.²⁴⁷ In turn, probation officers are busier supervising these additional conditions.

In a “Survey of Probation and Parole Officers in Ontario,”²⁴⁸ important concerns in regards to Conditional Sentence Orders are noted. A few of these concerns include: bigger workloads since the Conditional Sentence Orders were implemented; inadequate consequences in the court taking “no action” for breaches in conditional sentences; lack of training for probation officers, police, and judges, thus resulting in ineffective enforcement of probation orders; and more paperwork.²⁴⁹ According to the survey, the amount of supervision and management is far too much for the probation officers to realistically and adequately handle. New approaches, more officers, and more support services need to be in place. Although probation is a function of the provinces,²⁵⁰ the provinces do not have the money to allocate for more services or probation officers. The federal government is not helping either since probation is not within its jurisdiction.²⁵¹

As discussed in the previous chapter, judges are replacing incarcerated sentences with more alternatives. Consequently, increased time in the community results in more responsibility for the probation departments and community agencies. Aside from the concerns raised by the probation and parole officers in the “Survey of Probation and

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²⁴⁶ R v Proulx, [2000] 1 S.C.R. 61 (2000) SCC 5, para 24.

²⁴⁷ *Ibid.*, para 36.

²⁴⁸ Probation Officers Association of Ontario, *supra* note 229.

²⁴⁹ *Ibid.*

²⁵⁰ Ekstedt and Griffith, *supra* note 21 at 88.

²⁵¹ Madigan, *supra* note 230.

Parole Officers in Ontario,” the interviews with the judges note additional limitations with the probation department.

A criticism among some judges is that probation is not always effective in managing the rehabilitation of offenders. The reason for this is that the offender may never get into a treatment facility. Even if treatment or counseling programs are ordered by the judge, it is the duty of the probation officer to find a space in treatment or counseling facilities; this may take weeks or even months.²⁵² A Non-DTC judge from B.C. mentions that it may take over six months to get a spot in a treatment program, but, by this time the probation order may be over and the offender no longer obligated to go.²⁵³ When sentencing most drug-addicted offenders, the main objective for most of the interviewed judges is to try to rehabilitate; however this goal is dependent on the resources. This B.C. judge said, “my personal philosophy, is to try every effort to rehabilitate if it’s a minor offence. Then it is the question of what actual resources are available to deal with rehabilitation.”²⁵⁴ The reality is, the availability of resources is often scarce, thus leaving probation officers unsuccessful in managing the judge’s intentions to rehabilitate offenders with drug addiction problems.

According to an Interested-DTC judge in Ontario, the lack of treatment facilities and programs are not the fault of the courts or the probation departments. In her view, the defendants who do not receive treatment cannot be blamed either; in essence, this is a systemic problem.²⁵⁵ This is unfortunate but true. Judges may order conditions for treatment, but there is no guarantee that this will be carried out. As indicated by another

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²⁵² Bentley, *supra* note 1 at 267.

²⁵³ Non-DTC #5, interview by the author, Ottawa, ON, January 8, 2004

²⁵⁴ *Ibid.*

²⁵⁵ Interested #1, interview by the author, Ottawa, ON, November 6, 2003.

Interested-DTC judge in Ontario, if probation services had more officers and more resources, better rehabilitation for drug-addicted offenders could be achieved.²⁵⁶

Treatment openings are not only a problem for offenders serving time in the community, but it is also a concern for drug-addicted offenders in correctional centres and penitentiaries. For sentences involving incarceration, judges can only recommend treatment in custody. Judges cannot order treatment as they would in a probation or conditional sentence. Unfortunately, the same concern lies with drug-addicted offenders in penal institutions – will the drug-addicted offender actually receive treatment?

In addition to the lack of resources, an Ontario Interested-DTC judge mentions further obstacles encountered in the probation system. This judge paints a picture of the social realities of some drug-addicted offenders. Many drug-addicted offenders live on the street, lack a support system, and lack permanent housing. Some do not even have a watch, let alone a calendar or an alarm clock. One might question how this affects probation, but it does. Without a calendar, how can a drug-addicted offender remember probation appointments? Without a support system, who will encourage the drug-addicted offender to go for treatment? According to this judge, these realities lower the possibility for success of the drug-addicted offender's rehabilitation and increase the possibility of a breach of probation.²⁵⁷

A Non-DTC judge from B.C. mentions that judges must be careful when imposing conditions of treatment on offenders so that they are not setting people up for a breach. This judge understands that relapse is very common and if drug use is a term of

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²⁵⁶ Interested #2, interview by the author, Ottawa, ON, January 14, 2004.

²⁵⁷ Ibid.

probation, judges can end up criminalizing the minor drug-addicted offender.²⁵⁸ In the literature, one judge had said, “When I was in criminal court, I used to give defendants one chance at drug treatment, and if they messed up, I would give them a harder sentence or disposition.”²⁵⁹ The interviewed B.C. judge states that placing unreasonable treatment conditions would be counterproductive because it would most likely result in a jail sentence. Aside from placing unrealistic treatment conditions on the drug-addicted offenders, judges must also be careful when there is a breach of other bail conditions.²⁶⁰ For instance, a breach of curfew should not result in an automatic remand to custody.²⁶¹ This would defeat the purpose of conditional sentencing, creating instead “system-generated offences. “System-generated offences” are offences that result from the breach of conditions placed on bail, probation, or conditional sentences that are imposed by the criminal justice system.”²⁶² Unfortunately, research is limited in this area and judges are not informed as to what conditions usually lead to breaches of conditions or what conditions avoid breaches. However, Statistics Canada figures show that breaches of conditions in conditional sentence orders have risen from 9% in 1997-1998 to 22% in 2000/2001.²⁶³

It is clear among some of the judges that the probation system can be ineffective in meeting the rehabilitative needs of many drug-addicted offenders. With many more individuals serving time in the community, resources are scarce and probation officers

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²⁵⁸ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003.

²⁵⁹ Center for Court Innovation, *supra* note 198 at 9.

²⁶⁰ Non-DTC#4, interview by the author, Ottawa, ON., December 12, 2003.

²⁶¹ Tim Quigley, “Has the Role of Judges in Sentencing changed...or should it?” *Canadian Criminal Law Review* 5 (2000): 327.

²⁶² *Ibid.*, 334.

²⁶³ Julian V. Roberts, “The Evolution of Conditional Sentencing: An Empirical Analysis,” *Criminal Reports* 3 (6th) (2004), <http://westlaw.com>.

are even more overloaded.²⁶⁴ The stark reality is that while drug addiction is prevalent, there are not enough treatment facilities or programs to deal with it.²⁶⁵ However, it is worth noting that although the judges expressed their concerns for probation they did note that probation does help many people as well. For example, the Ontario Interested-DTC judge claims that some individuals are extremely motivated and eager to follow probation orders. He also claims that it depends on the degree of addiction. If some individuals have been addicted to drugs for a short time, it may require less support to break the cycle of addiction.²⁶⁶

In addition, although some Non-DTC judges had some concerns for the lack of resources in the community, they were nevertheless optimistic about using the probation system over custodial sentences. One Non-DTC judge from Ontario said, “I think it is more effective than dumping someone in jail for 30 days.”²⁶⁷ Probation may not have all the solutions, but it is definitely better than “the black dungeon.”²⁶⁸

Should the court bear any responsibility in alleviating the offenders drug-addiction?

In response to the limitations of the probation services, what can the courts do? Is it the court’s responsibility to deal with the drug addiction problem among non-violent offenders? According to Non-DTC judges, currently cases are being dealt with the only way they can be; that is, to pass the cases off to the probation services in hope that they will receive treatment. One Non-DTC judge from B.C. states, “I could adopt a DTC philosophy to be on top of them always, but based on the caseload, this is not

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²⁶⁴ Probation Officers Association of Ontario, *supra* note 229.

²⁶⁵ Madigan, *supra* note 230.

²⁶⁶ Interested #2, interview by the author, Ottawa, ON., January 14, 2004

²⁶⁷ Non-DTC#2, interview by the author, Ottawa, ON., January 8, 2004

possible.”²⁶⁹ Based on the duties and workload of the judge, the “refer-out”²⁷⁰ model is the only practical approach. As a result, the hands-off nature of the judge renders them incapable of observing whether offenders are getting into treatment or counseling programs; the judge has no follow up to see if treatment was received or even if treatment was successful.²⁷¹

A Non-DTC judge from B.C. states, “We are limited in what we can do.”²⁷² He says that all judges can do is point offenders in a direction and hope they can deal with it. It is useful to steer some offenders in the areas that may be able to help them, but that is as far as they can go. He states that it is the judge’s responsibility to deal with the offences and the sentences that should be imposed for these offences. Most important, he states that it is not their role to take a holistic approach.

Another Non-DTC judge from B.C. states that there are multiple social problems that come before the courts. These include housing, poverty, mental health, prostitution and unemployment. These problems “have dimensions that extend well beyond the legal points at issue”²⁷³ and as a result the criminal justice system is unable to cope. Judges can try to deal with the addiction problem through ordering treatment, however, the judge states that there are many other problems and realities which drug-addicted offenders

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²⁶⁸ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

²⁶⁹ Non-DTC #5, interview by the author, Ottawa, ON., January 8, 2004

²⁷⁰ As discussed in the previous chapter, the “refer-out” model indicates that the judge has nothing to do with the treatment process of the offender. In other words, he “refers” the drug-addicted offender “out” of the court, and to treatment. See Goldkamp, *supra* note 57 at 932.

²⁷¹ *Ibid.*

²⁷² Non-DTC#4, interview by the author, Ottawa, ON., December 12, 2003.

²⁷³ P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Limited, 1987): 7.

endure. The court cannot deal with all of them. In terms of addiction, judges can play a role, however this role is minor.²⁷⁴

Justice Bentley agrees that the criminal justice system is not well equipped to deal with social problems. In his view, “All of society’s ills are dumped on the criminal justice system.”²⁷⁵ In an ideal world, the facilities would be sufficient and “the blunt instrument of the law” would not need to be used. “But”, he says, “We are dealing with reality.”²⁷⁶ The other interviewed DTC judge states that the criminal justice system is not intended to treat addiction because it is simply not equipped. On the other hand, DTCs are equipped; DTCs have collaborations with the treatment sphere.²⁷⁷

One Non-DTC judge from B.C. points out that society has expectations that the criminal justice system is supposed to remedy the drug addiction problem. According to this judge, “responsibility tends to be placed on the judiciary to fix something that society couldn’t fix up in the first place.”²⁷⁸ He further commented on the lack of resources to deal with the problem at an earlier stage before it gets out of hand and ends up appearing in the justice system. Attention should be spent on primary prevention and “slowing down crime.”²⁷⁹

Clearly, all Non-DTC judges feel limited in their ability to effectively deal with the drug addiction problem. Non-DTC judges believe that the criminal courts are not set up to deal with drug addiction, nor do they feel able to take on the responsibility. Ultimately, the court is not designed or equipped to take on that task. On the other hand,

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²⁷⁴ Non-DTC #3, interview by the author, Ottawa, ON., January 16, 2004

²⁷⁵ DTC #1, interview by the author, Ottawa, ON., January 29, 2004

²⁷⁶ Non-DTC #3, interview by the author, Ottawa, ON., January 16, 2004

²⁷⁶ DTC #1, interview by the author, Ottawa, ON., January 29, 2004

²⁷⁷ DTC #2, interview by the author, Ottawa, ON, February 3, 2004.

²⁷⁸ Non-DTC #5, interview by the author, Ottawa, ON., January 8, 2004

²⁷⁹ Ibid.

Interested-DTC judges had more of an optimistic answer in response to the question, “Should the courts bear any responsibility in alleviating the drug addiction? One Interested-DTC said, “I think we could play a part; we can refer people to support groups and inform them on resources.”²⁸⁰ This judge mentions that he wishes he could have more of a say in where the government should spend money in terms of social programs. Another Interested-judge believes that drug addiction can be viewed as a societal issue; however, the courts should take interest in it as well because in many instances it is the drug addiction that brings people in contact with the law. He states that judges have to react to these cases that are brought before the courts.²⁸¹ Although the Interested-DTC judges are just as limited in what they can do as the Non-DTC judges, the Interested-DTC judges seem to assume more of a sense of responsibility in dealing with the offender’s drug addiction. Thus, the views of the Interested-judges reflect their interest in presiding over a DTC and assuming more of an involved judicial role.

In summary, the courts are often expected to address many complex issues, drug addiction being one of them.²⁸² While the mainstream courts may recognize this issue, it is difficult to deal with. According to all the interviewed judges, the criminal justice system alone is ill-equipped to do this. The criminal courts are referred to as blunt tools which have little impact on treatment. The criminal justice system is not designed to treat offenders with addictions or to solve social problems. In essence, the criminal justice system is designed to adjudicate issues of law and sentence offenders.

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²⁸⁰ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

²⁸¹ Interested #2, interview by the author, Ottawa, ON., January 14, 2004

²⁸² Van de Veen, , *supra* note 35 at 6.

In contrast, PSCs developed to attend to such problems with the necessary resources, with the proper staff, and well-organized management.²⁸³ The objective is to equip DTCs to proactively intervene to address the offender's underlying drug-addiction problem by addressing some of the challenges faced by the judges, probation officers, and drug-addicted offenders.

The DTC – Also referred to as the “Cadillac Court”

One Interested-DTC judge in Ontario made the analogy that DTCs are “Cadillac Courts.” This judge commented, “DTCs offer a Cadillac service”²⁸⁴ to the drug-addicted offenders. Since treatment through the mainstream criminal courts is difficult to come by, drug-addicted offenders are receiving a benefit going into a treatment program that they otherwise would have had to wait to receive.

Treatment programs and social services are available through the DTC because of funding from the federal government distributed to treatment facilities for additional counseling, more meeting rooms, urine analysis, bus passes for the offenders and salaries for treatment staff.²⁸⁵ Federal funding has enabled the court to expand on current resources. With this “Cadillac service,” there is no waiting in line for the services, there are plenty of resources to address the multiple needs, and there is support from the legal and the treatment team. This Cadillac court is thus able to adopt a holistic approach where drug addiction, the family, education, housing, and employment are all addressed.²⁸⁶

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²⁸³ *Ibid.*, 6-9.

²⁸⁴ Interested #1, interview by the author, Ottawa, ON., November 6, 2003

²⁸⁵ *Ibid.*

²⁸⁶ Goldkamp, *supra* note 57 at 938.

The DTC attempts to tackle many of the challenges faced by the mainstream criminal courts. According to the judges, DTCs contain redefined traditional goals, court procedures, and roles in order to respond more effectively to the realities of drug addiction and to correct the weaknesses of the traditional model. As discussed in chapter two, the lack of probation supervision is resolved through the intensive judicial supervision.²⁸⁷ The scarcity of resources in the mainstream criminal justice system is replaced with more resources and partnerships in the DTCs.²⁸⁸

DTCs adopt a therapeutic philosophy in which a forward-looking approach is valued. Justice Bentley and an Interested-DTC judge from B.C. note that DTCs are forward-looking rather than backward-looking.²⁸⁹ That is, DTCs focus on solving problems instead of focusing on past wrongs; the future well-being of the offender is considered. By looking to the future, the DTC team concerns itself with “protecting society and preventing the offender from future criminal behaviour.”²⁹⁰ Punishment is deemed counterproductive to the drug-addicted and useless for society. However, while the interviewed mainstream criminal court judges maintain a rehabilitative perspective, rather than a punishment-based perspective, they are limited in resolving the drug addiction problem. DTCs, on the other hand, are structured and equipped to more actively deal with the underlying problem of addiction.

In the fall of 2004, the evaluation of the first five years of the Toronto DTC will be released. The upcoming report will provide information on treatment and court

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²⁸⁷ Bentley, *supra* note 1 at 258.

²⁸⁸ Public Safety and Emergency Preparedness Canada, “Interim Project Evaluation Findings: Toronto Drug Treatment Court,” 28 January 2004, www.prevention.gc.ca/en/library/features/dtc/factsheet.html (accessed on February 1, 2004)

²⁸⁹ DTC #1, interview by the author, Ottawa, ON., January 29, 2004; Interested #3, interview by the author, Ottawa, ON., January 9, 2004

²⁹⁰ Nolan, *supra* note 63 at 156.

processes, as well as criminal activity among the drug-addicted offenders in the DTC program. Although success of the DTC will be difficult to define and measure, an examination of the DTC will be presented in this upcoming report.²⁹¹

How are DTCs equipped?

First, in order to treat an offender's addiction there need to be resources in place. For drug-addicted offenders who enter the DTC program, access to treatment is not a problem. The \$23 million over five years in funding from the federal government has enabled DTCs to pump up resources.²⁹² Yet, it is worth mentioning, that some of this federal money was intended to open three new DTCs – this has yet to happen.

DTCs offer non-violent offenders, who meet the eligibility criteria, intense treatment and multiple services. According to an Interested-DTC judge, PSCs in general offer special programs and services that may be more difficult to access on their own.²⁹³ The services made available include “housing, education/training, medical care, detox services, residential treatment, mental health, AA/NA/CA, financial assistance, and family/marriage services.”²⁹⁴ Moreover, an Interested-DTC judge from Ontario and a Non-DTC judge from B.C. state that with a DTC, a holistic approach is possible.²⁹⁵ Therefore, it is not just about drug treatment, but also about family counseling, job skills, employment, housing, support of their needs, etc. Thus, a special support system is in place.

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²⁹¹ Gliksman, et al., *supra* note 81 at 10.

²⁹² Department of Justice Canada, *supra* note 15.

²⁹³ Interested #1, interview by the author, Ottawa, ON., November 6, 2003.

²⁹⁴ Gliksman, et al., *supra* note 81 at 27; Specifically, in Vancouver, some of the actual services provided include “Family Services of Greater Vancouver;” “Maple Ridge Treatment Centre,” “L.I.F.E Recovery House,” “Vancouver Detox,” etc.

An Interested-DTC judge from Ontario discusses the importance of providing treatment and multiple services for drug-addicted offenders by referring to its intervention as a “ripple effect.” She notes the direct successes of DTCs, but she also emphasizes the “broader social impact.” That is, not only will the offender become drug free, but ideally he/she will also find employment, pay taxes, and support his/her family. In addition, fewer children will be in child protection and more communities will feel safer.

Clearly, the resources from the DTC enable drug-addicted offenders to confront their problems and to meet their multiple needs. With these extra resources, DTCs avoid some of the obstacles experienced by the mainstream criminal courts and the probation services. It should be noted, however, that even with all the extra resources, both DTC judges stated that housing is a problem. According to Justice Bentley, housing and residential treatment is lacking.²⁹⁶ Another DTC judge states that there were incidences of drugs in some shelters and that this was causing problems. Now, he said, the Toronto DTC has safer shelters and houses.²⁹⁷ Clearly, judicial supervision of the DTC program is a vital component for the success of the court and the offender. Judges need to be aware of what goes on in and out of the courtroom.²⁹⁸ Ultimately, DTCs are not just about the extra resources, but also about efficient management and organization.

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²⁹⁵ Interested #1, interview by the author, Ottawa, ON., November 6, 2003; Non-DTC#4, interview by the author, Ottawa, ON., December 12, 2003.

²⁹⁶ DTC #1, interview by the author, Ottawa, ON., January 29, 2004

²⁹⁷ DTC #2, interview by the author, Ottawa, ON, February 3, 2004.

The Management of Cases

To deal with the drug-addicted offenders efficiently, offenders are placed in a treatment program immediately; being put on a waiting list is not an issue. Immediacy is valued because once the drug-addicted offender is placed before the DTC judge it “creates an immediate crisis [for the substance abuser] and can force substance abusing behaviour into the open, making denial difficult.”²⁹⁹ Upon acceptance into the program, instead of passing the cases off to the probation department or to other institutions, it is the judge who manages and supervises the cases from beginning to end.³⁰⁰ “Drug Courts were “invented” to reinvent a justice role similar to the one formerly played by probation services, but this time entrusted to the power, authority, symbolism, and centrality of the judge intervening at an earlier stage.”³⁰¹ Essentially, what was once the main responsibility of the probation department is now the responsibility of an involved judge. The judge monitors the treatment progress of the offenders, discusses treatment options with the treatment staff, discusses sanctions and rewards with the DTC team, and organizes resources for the offenders.³⁰² The “hands-on” approach of the judge renders him/her aware of the drug-addicted offender’s progress in the DTC. Along with the judge, the probation officer, defense counsel, the Crown Attorney, the treatment team, and the court liaison, all have a collaborative, continual, and cooperative role in the supervision of the drug-addicted offenders; the team’s input and expertise is vital to accomplish this supervision.³⁰³

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²⁹⁸ Hora, *supra* note 5 at 524.

²⁹⁹ *Ibid.*, 473.

³⁰⁰ Tauber, *supra* note 64 at 3.

³⁰¹ Goldkamp, *supra* note 57 at 934.

³⁰² Bakht, *supra* note 240 at 10.

³⁰³ Tauber, *supra* note 64 at 5.

According to an Interested-DTC judge, for treatment to be effective, it needs to be intensive and closely supervised. Rarely is a drug-addicted offender in the right frame of mind to admit he/she has a problem and to undergo treatment. The non-DTC system lacks the intensity that is needed for many people to successfully complete the treatment program. Therefore:

The challenge is to keep them in the program until sobriety and attitudinal change can occur...A court-ordered program must build a chain-link fence around the drug-using offender, made up of frequent supervision contacts and drug testing, direct access to full information on the drug offender's progress, immediate responses to program failures, and frequent program report hearings before a single Drug Court judge and permanent staff.³⁰⁴

Clearly, DTCs are structured in order to promote ongoing support and motivation to complete the treatment program. The intensity in supervision creates an environment in which compliance to staying drug-free is enhanced.

The drug-addicted offender must return to the DTC weekly or bi-weekly in order to report to the judge. For the judge to comprehensively monitor and understand the progress of the drug-addicted offender, a pre-court meeting before every court hearing is mandated.³⁰⁵ At the pre-court meeting, each participant's case is discussed: treatment progress, breaches, urine tests, and future conditions are all considered. Failures and successes in treatment are brought to the attention of the judge. This is addressed in court where the judge imposes sanctions or rewards contingent on the offender's behaviour.³⁰⁶

In contrast to the traditional system, the management of cases in the DTC is much more intense and structured. In addition, the resources are plentiful. With more management and with more tools to work with, DTCs are able to meet the needs of the

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³⁰⁴ *Ibid.*, 6.

³⁰⁵ Bentley, *supra* note 1 at 265.

drug-addicted offenders. Rather than being limited to what judges are able to accomplish in the traditional criminal justice system, DTC judges have the tools to make a difference.

Concerns with the DTC

While DTCs offer an attractive program in which to deal with the needs of the drug-addicted offenders, concerns with this court are present. The concerns for the DTCs included: abandoning the adversarial process; coercing offenders into drug treatment; disregarding due process safeguards; being too “soft” on crime; and using limited resources on criminals. An analysis of these concerns is discussed here as they were raised, and challenged, by the judges. These concerns were mainly raised by one judge, in addition to being raised in the literature.

As mentioned above, adjudication and the adversarial process are significant parts of our justice system. However, in a DTC, the formal adversarial rules are lacking according to some critics, thus affecting the dynamics of the court and the roles of the defence counsel, Crown, and judge.³⁰⁷ It is true that there are significant changes, however, as argued by one Non-DTC judge, the adjudication and adversarial process is not completely missing.³⁰⁸ For instance, adjudication is most evident up until the offender enters the DTC program or pleads guilty. Although the adversarial process is not the defining process of the DTC, it is there when needed. According to the Non-DTC judge and Justice Bentley, the adversarial approach still has a place because the offender always has the right to counsel. A lawyer in the US states,

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³⁰⁶ Tauber, *supra* note 64 at 16.

³⁰⁷ Berman and Feinblatt, *supra* note 68 at 15.

³⁰⁸ Non-DTC #3, interview by the author, Ottawa, ON., January 16, 2004

I sit there quietly most of the time. I learned to cut the lawyer yap because the traditional public defender shtick isn't what these clients need. But once in a while, I think I might hear something coming, and I have to jump up...I have to ask my client what they're about to say, just to make sure they're not about to admit to some murder 20 years ago.³⁰⁹

Defence counsel will still give legal advice to his/her client. The Crown will also voice questions or concerns as they arise. The adversarial process has a minimal place in the DTC, but it does exist. In accordance with the principles of TJ, it is therapeutic for the judge and the offender to build a relationship.³¹⁰ It must be remembered that this court is not based on a party driven court to determine guilt or innocence,³¹¹ but it is instead focused on dealing with an addiction problem. There is already a guilty plea and so adjudication is not an issue. Thus, the adversarial process is not a defining characteristic in this court.

According to the Non-DTC judge in Ontario, DTCs also fuel concern for “extorting guilty pleas.”³¹² This judge questions why the DTC program is only offered to individuals who plead guilty. However, DTCs are offered to some drug-addicted offenders required to plead guilty (Track 2- Post Plea) and some who need not to (Track 1- Pre Plea); this depends on the seriousness of the crime or the presence of more serious records. For instance, offenders charged with trafficking drugs or offenders with a more serious criminal record will need to plead guilty before they enter the DTC. On the other hand, simple possession and a minor criminal record would not warrant a guilty plea.³¹³ Yet, in reality, the results from the 2003 Interim Evaluation Report of the Toronto DTC

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³⁰⁹ Berman and Feinblatt, *supra* note 68 at 16.

³¹⁰ Carrie J. Petrucci, “The Judge-Defendant Interaction: Toward a Shared Respect Process,” in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 150.

³¹¹ Landerkin, *supra* note 170 at 269.

illustrate that the majority of the offenders plead guilty before entering the court. Only 3.2% have been eligible under the Track 1-Pre Plea while 96.8% were eligible for Track 2-Post Plea.³¹⁴

For those who plead guilty, the literature explains that this is beneficial for the treatment process. That is, admitting to guilt allows the offender to admit to a drug addiction problem, thus minimizing denial mechanisms of having an addiction.³¹⁵ However, it is not just the admission of guilt to an addiction problem; there is an admission of guilt to a criminal offence. The non-DTC judge in Ontario questions why an addict needs to plead guilty to get help.³¹⁶ The literature states, however, that a guilty plea may provide an incentive to continue with treatment, rather than to risk the reinstatement of the sentence and a possible jail sentence.³¹⁷ Another Non-DTC judge from Ontario states, the “carrot-stick intervention is all positive stuff. It is far more helpful than tossing someone in jail.”³¹⁸ A DTC judge states that “motivation is needed from the addict and DTCs give them this incentive, especially to get out of prison.”³¹⁹ Motivation, according to many other judges, is critical for the success of the drug-addicted offender.

According to the Non-DTC judge from Ontario, the concern arises when an innocent drug addict enters a guilty plea in order to participate in the DTC program. However, Justice Bentley indicates that a guilty plea in the DTC is no different than a

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³¹² Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004

³¹³ Bentley, *supra* note 1 at 260-262.

³¹⁴ Gliksman, et al., *supra* note 81 at 11.

³¹⁵ Stephanos Bibas, “Using Plea Procedures to Combat Denial and Minimization,” in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and The Courts*, ed. Bruce Winick and David Wexler (Durham: Carolina Academic Press, 2003), 171.

³¹⁶ Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004

³¹⁷ Hora, *supra* note 5 at 515.

³¹⁸ Non-DTC #2, interview by the author, Ottawa, ON., January 8, 2004

guilty plea in a traditional court. Plea bargaining in the traditional courts is defined as “the practice whereby the accused uses his right to plead not guilty and demand a full trial to bargain for a benefit that is usually related to the charge or the sentence.”³²⁰ Plea bargaining raises doubt when an individual pleads guilty in order for a lighter sentence - is this truly a voluntary choice? This notion of voluntariness is similar to that in the DTCs; a plea of guilt offers an offender an opportunity to receive treatment along with numerous services, rather than go to trial and face the possibility of jail. Yet some critics of plea bargaining state that “there is an incentive to plead guilty which in many cases may raise serious doubt about the voluntariness to plea and give rise to the possibility of defendants, who have a defence (or a possible defence), pleading guilty because of the penalty repercussions.”³²¹ The Non-DTC judge from Ontario states that DTCs “offer an attractive bargain,” yet this is unfair if the offender has a defence.³²² This judge claims that it is not much of a choice when the drug-addicted offender is asked whether they want “warm fuzzy treatment or jail.”³²³ The concern of voluntariness, as is evident for plea bargaining, is also present for the DTC.

Nonetheless, it is mandated by the DTC that drug-addicted offenders need to give their voluntary consent to enter the DTC program.³²⁴ Yet, although consent is essential, it is still a concern as to whether the drug-addicted offender truly understands the extensive process of the DTC. It is vital for defence counsel to inform his/her clients on all the possibilities and risks. Most importantly, drug-addicted offenders need to be

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³¹⁹ DTC #2, interview by the author, Ottawa, ON, February 3, 2004.

³²⁰ D.F. Cousineau, Ph.D., et al. ed. “Setting Standards for Canadian Criminal Courts: The Case of the Plea Bargaining,” (Simon Fraser University, Department of Criminology, 1977) at 1.

³²¹ Ooanagh E. Fitzgerald, *The Guilty Plea and Summary Justice*, (Carswell: Toronto, 1990), 139.

³²² Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004

³²³ *Ibid.*

³²⁴ Van de Veen, , *supra* note 35 at 27.

aware if they enter the DTC, they must surrender many individual rights. The drug-addicted offender must sign a Rule and Waiver Form agreeing to give away most legal rights including the right to a trial³²⁵ and the presumption of innocence.³²⁶ It is in these situations where the defence counsel is responsible for informing and directing his/her client. The drug-addicted offender will need to be aware that there is a 30 day window period to withdraw from the program in order to have his/her guilty plea struck. After this window period, if he/she is expelled or withdrawn from the DTC program, he/she will return to court where he/she will be sentenced to the guilty charges. As one Interested-DTC judge in Ontario said, there must be “reasonable consent.”³²⁷ Therefore, drug-addicted offenders must be notified of the possibility of incarceration if they fail the program.

Disregarding due process rights can be counterproductive because the drug-addicted offender may feel “sold out.”³²⁸ Having the client informed, well aware of the risks, understanding the status of his case, and not feeling coerced, do indeed have a therapeutic effect.³²⁹ In essence, if due process is upheld before an offender decides to plead guilty or enter the DTC, no matter what the outcome of the DTC may be, the offender will not experience “feelings of betrayal or dehumanization.”³³⁰

DTCs are also associated with the terms “warm and fuzzy”, hence criticized for being too soft on offenders.³³¹ But if DTCs are so “warm and fuzzy”, why did I observe a drug-addicted offender decline the opportunity to get treatment at the Toronto DTC?

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³²⁵ Martin Reisig “The Difficult Role of the Defense Lawyer,” *Criminal Law Bulletin* 38 (2002): 221.

³²⁶ Hora, *supra* note 5 at 514.

³²⁷ Interested #2, interview by the author, Ottawa, ON., January 14, 2004.

³²⁸ Winick and Wexler, *supra* note 87 at 109.

³²⁹ Reisig, *supra* note 325 at 223.

³³⁰ *Ibid.*, 221.

³³¹ Bentley, *supra* note 1 at 266; Berman and Feinblatt, *supra* note 68 at 10.

Why do the figures of the 2003 interim report demonstrates that approximately 20% actually graduate while 80% have been expelled or withdrawn from the DTC program?³³² Overcoming an addiction problem may be more intense than what some may perceive. Is a one year treatment program where relapse is expected, sanctions could be imposed, drugs will become a temptation, problems will need to be confronted, and the possibility of failing the program and returning to the mainstream criminal justice system is present, deemed “softer” than spending 30 days in jail? Clearly, when a drug addict is overcoming an addiction, it may be more difficult because it involves changing a lifestyle.³³³ Kofi Barnes, a former Crown prosecutor for the Toronto DTC states that serving time does not involve any “self-analysis” or confrontation of “demons”. He claims that for many, doing time is more appealing.³³⁴

The last concern involves the use of scarce resources, specifically using resources on criminals. This argument assumes that people who commit crimes will receive treatment, but what about those who do not commit crimes? Those who break the law will get help while those who are law-abiding citizens will still have to wait on the waiting-lists. According to Justice Bentley, there is no proof that if the federal funding for DTCs was withdrawn, treatment services would be redirected to the non-offending public.³³⁵ During the interview, Justice Bentley stated, “this is a criticism of policy and not of the DTC.” These issues are for the government to rethink; the DTC per se should not be criticized for this.

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³³² Gliksman, et al., *supra* note 81 at 13.

³³³ Hora, *supra* note 5 at 518.

³³⁴ Gardner, *supra* note 14.

³³⁵ Bentley, *supra* note 1 at 269.

While there are apparent concerns for the DTC, it must be noted that these concerns are mainly raised by one judge.³³⁶ On the other hand, the concerns raised by the 4 remaining Non-DTC judges include: “burnout of judges in hearing the same story over and over again”³³⁷; “if too many requirements, some drug-addicted offenders may rather go to jail”³³⁸; “no concerns - the only people who have concerns are those that value the American system of 3 strikes and you are out”³³⁹; and “negative bad press on the courts surrounding the weakening of judges in not dealing with things harshly.”³⁴⁰ However, it is worth noting that these concerns did not erase the benefits that were noted by the judges. The few concerns that were vocalized by the majority of the Non-DTC judges did not seem fundamental to the operation of DTCs. One Non-DTC judge states, “I really can’t see a downside on DTCs on any realistic or practical basis.” A lack of criticism and concern for the DTC is apparent among the majority of judges.

Are DTCs More Effective than the Mainstream Criminal Justice System?

While the majority of the interviewed judges had very few pressing concerns and far more commendations for the implementation of DTCs, it is important to assess whether the judiciary perceives DTCs to be effective in reducing the recidivism rates and in rehabilitating the client. In addition, it will be useful to examine whether DTCs are deemed more effective than the mainstream criminal courts by examining the judiciary’s perceptions.

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³³⁶ Additionally, these concerns are expressed in the DTC literature. See Bentley, *supra* note 1 at 266-269.

³³⁷ Non-DTC #5, interview by the author, Ottawa, ON., January 8, 2004

³³⁸ Non-DTC #3, interview by the author, Ottawa, ON., January 16, 2004

³³⁹ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

³⁴⁰ Non-DTC #2, interview by the author, Ottawa, ON., January 8, 2004

All judges seem very optimistic that DTCs are able to rehabilitate the drug-addicted offender and reduce recidivism rates. Non-DTC judges state that from what they heard and from what they read, DTCs seem to be effective. One Non-DTC judge from B.C. states that most of his reliable information on DTCs comes from such newspapers as “The Vancouver Sun” and “The Province”.³⁴¹ One Non-DTC judge states that he has read articles by Justice Bentley and heard him speak on the DTCs.³⁴² However, the Non-DTC judges also state that while it seems that “this is the most humane to deal with this problem” and that you “need to take a holistic approach to these issues,”³⁴³ they also explain that it was too early to assess effectiveness of long-term outcomes of DTCs. All Non-DTC judges were clearly cautious to give a definite answer as to whether DTCs were effective. While the judges were supportive and optimistic about DTCs, they did note that DTCs need additional studying and more statistical research. With only two DTCs in operation, Canadian research on DTCs is lacking. Further, since both DTCs are relatively new to the Canadian justice system, only preliminary research has been done.³⁴⁴ Currently, the Centre for Addiction and Mental Health (CAMH), the centre in which the treatment of the drug-addicted offender is being delivered, is conducting the research on the Toronto DTC.³⁴⁵ Although the CAMH has a huge stake in the DTC (seeing that they provide the treatment), they are recently in progress of releasing an evaluation report for the first five years of results of the Toronto DTC. These results will be released in the fall.

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³⁴¹ Non-DTC # 5, interview by the author, Ottawa, ON., January 8, 2004

³⁴² Non-DTC #2, interview by the author, Ottawa, ON., January 8, 2004

³⁴³ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

³⁴⁴ There are more than just preliminary results from the Toronto DTC. The 2003 Interim Report evaluates the first 4 years of the DTC; however, it is unlikely that this has been made easily accessible to the public. The final report will be published this fall and will most likely receive more attention.

³⁴⁵ Moore, (Introduction,) supra note 82 at 13.

In contrast, the Interested-DTC judges are quite certain that DTCs are effective. This certainty is based on the amount of knowledge they had acquired through attending conferences and through reading the US literature. All the Interested-judges claim that they have read the research studies that have been conducted in the US. One Interested-DTC judge from Ontario explains that although DTCs are very new to Canada, they have been operating in the US for over a decade. He gave credit to the amount of research that has come from the US.³⁴⁶ In addition, the other Interested-DTC judge from Ontario said, "I have read research on it and I am satisfied. It is not 100% successful but no drug program is."³⁴⁷ Some state that the results from the Toronto DTC are promising, but Canada needs more DTCs because you can not draw enough findings from one court.³⁴⁸ Clearly, all Interested-DTC judges are well-informed from the literature and confident that DTCs are effective. As would be expected, the DTC judges share these same views that DTCs are effective. One DTC judge states, "The results say so."³⁴⁹ For the Interested-judges and DTC-judges, research is backing up their views. Both the Interested-DTC and the DTC judges are confident that DTCs are effective since the literature they have read supports the rehabilitation of drug-addicted offenders and the reduction in recidivism rates. On the other hand, the non-DTC judges are supportive of

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³⁴⁶ Interested-DTC #2, interview by the author, Ottawa, ON, January 14, 2004. The research in the United States by Steven Belenko is the most comprehensive study yet conducted. Belenko reviewed 37 evaluations of 36 US DTCs. The results indicated that in general DTCs provide intensive treatment programs, retention rates are higher for court-mandated treatment over voluntary treatment, lower recidivism rates while in DTC program, and cost savings. On the other hand, more research needs to be done on the "long-term post program impacts of drug courts on recidivism and other outcomes." See Steven Belenko, "Research on Drug Courts: A Critical Review 2001 Update," (The National Center on Addiction and Substance Abuse, Columbia University, 2001), 1. Although the drug situation in Canada is unique to that of America, the promising data of American DTCs in dealing with drug addicted offenders is nonetheless influential.

³⁴⁷ Interested #1, interview by the author, Ottawa, ON, November 6, 2003

³⁴⁸ Vancouver DTC opened in 2001. The research from this court is too preliminary.

³⁴⁹ DTC #2, interview by the author, Ottawa, ON, February 3, 2004.

the DTC yet they are not overly confident, but rather reluctant, to proclaim whether DTCs are effective.

Apparent support and optimism is apparent in all judges, but one. All three Interested-DTC judges and two Non-DTC judges explicitly state that they heard Justice Bentley speak at a conference, watched a video on DTCs, or had read literature produced by Justice Bentley. The interviewed judges' optimistic perceptions of the DTCs may be influenced by the promotional nature in which DTCs have been presented in Canada. Most of the literature has been positive; positive enough to get funding from the federal government, and support from the police and community. A video on the DTC has also presented the benefits of such a court for the drug-addicted offender, the courts, and society.³⁵⁰

However, while there may be optimism for the DTC, all the interviewed judges demonstrate a lot more uncertainty to give a definite answer as whether DTCs are more effective than the mainstream criminal courts. First and foremost, according to Justice Bentley, this is a difficult comparison to make because certain traditional ways are just not working. In other words, how do you compare DTCs to the mainstream criminal justice system which is "an idealized vision of justice that does not exist in real life"?³⁵¹ According to Justice Bentley, the traditional criminal justice system should not be completely abandoned, but instead it needs to be improved. DTCs are not a solution for everything but it may work for some people, whereas the traditional system may work for others. For these reasons, DTCs are only one option. Justice Bentley specifically states

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³⁵⁰ Moore, (Chapter 3) *supra* note 82 at 22.

³⁵¹ Berman and Feinblatt, *supra* note 39 at 12.

that he doesn't want to "scrap incarceration or probation. Incarceration should still be used for violent offenders and traffickers. Probation can work in some instances as well."

The majority of the other judges share this view – "DTCs are not going to work for everyone."³⁵² One Non-DTC judge from B.C. states that it depends on the drug-addicted offender and the type of crime. There are a number of different factors that need to be considered; some people need to be incarcerated while some may be "salvageable".³⁵³ Based on this judge's use of the word "salvageable," there are some individuals who are deemed deserving of the DTC and those that are not. This dichotomy can thus be determined by those who meet the eligibility criteria of the DTC.

For the drug-addicted offenders who meet the eligibility criteria to enter the DTC program, a Non-DTC judge from B.C. states that DTCs would probably be more effective for this targeted group. He said,

Those who have an addiction problem also have baggage of other problems. This is not solved in a single sentencing sentence. The combination of different resources is beneficial to DTC. The combination of residential programs, intense supervision, counseling, and intense treatment is a good thing to have.³⁵⁴

A holistic approach is a good approach to take, especially over a mere sentence of incarceration. One thing is certain among all of the interviewed judges; "throwing people [drug-addicted offenders] in jail"³⁵⁵ is counterproductive. A Non-DTC judge from Ontario was convinced that DTCs are "better than the traditional in-sentence and out."³⁵⁶ The traditional "in-sentence and out" has only demonstrated a revolving door for the

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³⁵² Non-DTC #3, interview by the author, Ottawa, ON, January 16, 2004

³⁵³ Non-DTC #4, interview by the author, Ottawa, ON, December 12, 2003

³⁵⁴ Non-DTC #5, interview by the author, Ottawa, ON, January 8, 2004

³⁵⁵ Non-DTC #2, interview by the author, Ottawa, ON, January 8, 2004 and Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

criminal justice system. Once the drug-addicted offenders leave jail, they are soon to be back in with another drug or drug-related offence.

Motivation is another important factor that must be visible among those that enter the DTC. The DTC judge states that the offender needs to be motivated in order for treatment to work. One Non-DTC judge from B.C. asserts that at the end of the day, whether the offender is on probation or in the DTC, it is the “offender’s motivation to get back on right track”³⁵⁷ that is critical to his/her own success.

While DTCs are deemed effective in some circumstances, DTCs may not be appropriate in other instances. Among the interviewed judges, neither system is outright more effective than the other. Both systems offer justice, therefore a complete rejection of one system is not required. The justice system, both the mainstream and the DTC, is dependant on the individual person and crime committed. Individuals who are deemed a threat to society need to be incarcerated through the mainstream criminal justice system. Individuals who meet the eligibility criteria and demonstrate motivation to enter the DTC will thus be considered for the DTC program.

Ironically, the Non-DTC judge who was most critical about DTCs states that DTCs would most likely be more effective than the mainstream criminal courts. Although he thought it would be more effective, he confirmed that his concern lay with whether it is the court’s place to deal with this problem. He said, “they [drug-addicted offenders] should be getting help, but not with the court.”³⁵⁸ According to this judge, the

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³⁵⁶ Non-DTC #2, interview by the author, Ottawa, ON., January 8, 2004 The “traditional in-sentence and out” refers to the traditional way of dealing with drug-addicted offenders – a jail sentence. Once released, the revolving court door is more than likely to occur.

³⁵⁷ Non-DTC #5, interview by the author, Ottawa, ON., January 8, 2004

³⁵⁸ Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004

court is to solve legal disputes, not to solve problems. The court's role is to direct offenders to get treatment, but not to get involved in the treatment itself.

Evidently, the DTCs rehabilitative and holistic approach is supported among the majority of the judges. The majority of the judges are optimistic about the effectiveness of DTCs. Yet, judges believe that neither system is absolutely more effective than the other.

Conclusion

The most prominent attitude among all the judges is that DTCs are “not a magic bullet.”³⁵⁹ Justice Bentley states that DTCs are not a panacea for everything. DTCs are not going to solve Canada's drug problem, but nor are they claiming to. There is a distinction to be made between Canada's drug problem and Canada's crime problem. DTCs may have an effect on those that come before the law, thus impacting the drug crime problem. However, as a Non-DTC judge states, there are people who have addiction problems who never come in contact with the law. He said, “To solve Canada's drug problem is too big of an expectation.”³⁶⁰ DTCs are therefore not claiming to solve all drug problems but instead are designed to solely deal with certain non-violent drug addicts that come in contact with the law. All judges, even DTC judges are realistic of its impact. It is apparent that fixing the criminal justice system is not going to fix all social problems.

Although all the judges view DTCs as having a limited impact, they are a viable alternative to the traditional criminal justice system. As one Non-DTC judge said, “We

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³⁵⁹ Bentley, *supra* note 1 at 274.

³⁶⁰ Non-DTC#4, interview by the author, Ottawa, ON., December 12, 2003

need to look at new ways and new alternatives.”³⁶¹ DTCs resolve many of the problems that they are currently experiencing in the criminal justice system and that the probation officers are experiencing in the correctional agencies. Still, it is clear among all the judges that DTCs should not replace the existing system, nor should all judges be required to preside over a PSC. Some judges do not want to be involved and some offenders do not want to be involved either. The majority of judges indicated that both systems have much to offer. Chief Justice Kaye from New York supports this view. She said, “The truth is, we’re trying to improve the system, and maybe disaggregating a little bit is a good way to do it. The system is so massive, we can’t declare it a failure and walk away from it. Nobody’s doing that.”³⁶²

DTCs are not looking to completely replace the mainstream criminal justice system. However, some of the interviewed judges would like them to be set up in jurisdictions where the numbers warrant them. Through the interviews, it became clear that DTCs are dependant on the needs of the community. As one Vancouver judge put it, “geography is important.”³⁶³ According this judge, “Vancouver’s court experience is skid row.” On the other hand, a Non-DTC judge from Ontario (outside Toronto) states that “life in Toronto is not the same down here.”³⁶⁴ Instead, this judge was concerned with the alcohol addiction problems that seemed to dwell in his community, rather than the drug addiction problems in Toronto and Vancouver.

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³⁶¹ Non-DTC #3, interview by the author, Ottawa, ON., January 16, 2004

³⁶² Berman, *supra* note 225 at 85.

³⁶³ Non-DTC #5, interview by the author, Ottawa, ON., January 8, 2004

³⁶⁴ Non-DTC #2, interview by the author, Ottawa, ON., January 8, 2004 - Based on the assured confidentiality and anonymity of this interviewed judge, the community in Ontario in which this judge presides cannot be identified.

Although judges serve in different parts of the country, in different courts, and serve different problems, many are experiencing similar barriers and concerns in delivering justice. The next chapter explores such barriers.

Chapter 5

Concerns and Barriers to Justice

Both the mainstream criminal justice system and the DTC have different goals, roles, and procedures. Even though there are many differences, both courts are experiencing many of the same impediments in the delivery of justice. Throughout the interviews, the judges raise certain barriers and concerns in delivering justice to drug-addicted offenders. Although these issues were not discussed in great detail, the consistency in which they were raised among most of the judges renders them significant. These include: drug laws, media influences, slow-changing law, human fallibility, the division of powers, and alcoholism. Not all of the interviewed judges experience the same impediments.

Drug Policy and Drug Laws

The first barrier, mentioned by a few judges, involves drug policy and drug laws. Justice Bentley states, “I have to deal with what the reality is today in Canada and that’s every drug that we’re talking about, whether it’s marijuana, heroin, cocaine, is a criminal offence. You have possession of it, you are breaking the law.”³⁶⁵ This quote is interesting in that it situates judges in a context in where they administer the law, not create it. Criminal court judges must enforce drug laws, made by the government. However, judges become frustrated when they are enforcing laws that they view as unrealistic.

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³⁶⁵ Gardner, *supra* note 14 at C5.

One Interested-DTC judge from B.C. explains that he sometimes sees a lack of connection between reality and certain drug laws.³⁶⁶ He suggests that drug policy may view severe sentences and incarceration as a resolution to the drug problem. The “War Against drugs” in the US increased penalties for drug offences and also incorporated mandatory minimum sentences as a solution to the drug problem.³⁶⁷ Canada’s response to drugs involved increased enforcement strategies.³⁶⁸ Clearly, these “solutions” proved to be a failure in reducing the supply and demand for drugs.

Ultimately, the power to make or amend drug laws lies in the hands of the government. Judges are aware of their role in administering the law, yet at the same time, they express some frustration when they see that law is not working. Since drugs have been criminalized for almost 100 years, any changes in the law or changes in the traditional approaches in dealing with drug-related issues is controversial. Four recent and influential cases around the marijuana laws have occupied our courts and our government: *R. v. Parker*,³⁶⁹ *R. v. Clay*,³⁷⁰ *R. v. Caine*,³⁷¹ and *R. v. Malmo-Levine*.³⁷²

The first was *R. v. Parker*.³⁷³ Terrence Parker, an epileptic, experienced serious seizures for almost all his life. He underwent surgeries to control his seizures yet all were unsuccessful. However, through smoking marijuana, Parker was able to control his epileptic seizures; he grew marijuana for himself. Police searched Parker’s home and he was charged with cultivating and possessing marijuana under the *CDSA*. Parker argued

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³⁶⁶ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

³⁶⁷ Bentley, *supra* note 1 at 271.

³⁶⁸ Jensen and Gerber, *supra* note 104 at 459.

³⁶⁹ *R. v. Parker*, (2000) 146 C.C.C. (3d) 193

³⁷⁰ *R. v. Clay*, [2003] 3 S.C.R. 735

³⁷¹ *R. v. Caine*, [2003] S.C.R. 571

³⁷² *R. v. Malmo-Levine*, [2003] S.C.R. 571

³⁷³ *R. v. Parker*, (2000) 146 C.C.C. (3d) 193

that these charges infringed on his section 7 right under the Charter which states, “everybody has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Since marijuana is illegal, Parker could be imprisoned despite the fact that marijuana was the only thing that improved his medical condition. Justice Rosenberg from the Ontario Court of Appeal agreed with the Ontario Court trial judge, Sheppard J., in that the prohibition for the possession of marijuana for health reasons infringed on his section 7 Charter rights. Prohibiting marijuana for Parker would negatively affect his health. However, Justice Rosenberg disagreed with the decision of Sheppard J. to incorporate a “medical use exemption in the legislation.”³⁷⁴ Justice Rosenberg decided that medical use of marijuana needed to be dealt with by Parliament. He said, “To avoid an undue intrusion into the legislative sphere, any exemption crafted by a court should be the minimum necessary to cure the constitutional defect.”³⁷⁵ Rosenberg explained that there were issues around medical use of marijuana that only Parliament could deal with. Parliament was given one year to deal with medical use of marijuana. In 2001, the Marihuana Medical Access law came into effect whereby the government of Canada grows and governs marijuana for medical purposes.³⁷⁶ Those with certain medical conditions can apply for an exemption from the marijuana laws.

One of the current issues surrounding drug laws involves the decriminalization of possession of small amounts of marijuana for personal use. This has been an ongoing debate for politicians for many years. In 2003, the SCC explored this issue in three

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³⁷⁴ *Ibid.*, para 11.

³⁷⁵ *Ibid.*, para 205.

similar cases: *R.v. Malmo-Levine*,³⁷⁷ *R.v. Caine*,³⁷⁸ and *R. v. Clay*.³⁷⁹ David Malmo-Levine, Victor Eugene Caine, and Christopher James Clay were all charged with possession of marijuana. The defence argued in these three separate cases that the prohibition of marijuana infringed on section 7 Charter Rights. That is, the appellants faced the possibility of imprisonment for simple possession of marijuana. The revocation of their liberties was disproportionate to the harms of marijuana. The court was to decide whether prohibition of marijuana for personal use was constitutional.

The majority of the SCC held that marijuana is a harmful psychoactive drug. Parliament considered the effects of such a drug on society and especially on vulnerable groups. The protection of certain vulnerable groups such as pregnant women, children and schizophrenics, is a policy choice of government. Ultimately, the SCC decided to leave any amendment of the marijuana laws for the Parliament to decide. Justices Gonthier and Binnie reasoned:

Advancing the protection of these and other vulnerable individuals through criminalization of the possession of marihuana is a policy choice that falls within the broad legislative scope conferred on Parliament. Equally, it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy. The questions before the Court are issues of law, not policy, namely whether the prohibition, including the availability of imprisonment for simple possession, is not valid legislation, either because it does not properly fall within Parliament's legislative competence, or because the prohibition, and in particular the availability of imprisonment, violate the guarantees of the *Canadian Charter of Rights and Freedoms*.³⁸⁰

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³⁷⁶ Health Canada, "Drug Strategy and Controlled Substances Programme" 8 January 2004, <http://www.hc-sc.gc.ca/hecs-sesc/hecs/dscs.htm> (accessed on April 29, 2003).

³⁷⁷ *R. v. Malmo-Levine*, [2003] S.C.R. 571

³⁷⁸ *R.v. Caine*, [2003] S.C.R. 571

³⁷⁹ *R. v. Clay*, [2003] 3 S.C.R. 735

³⁸⁰ *R. v. Malmo-Levine*, [2003] S.C.R. 571; Justices McLachlin, Iacobucci, Major, Bastarache in agreement with Justices Gonthier and Binnie.

The SCC held that laws that prohibit the possession of marijuana are within the government's power and not within the scope of the courts to amend. According to the SCC, the demonstrated harm of marijuana is not "insignificant or trivial."³⁸¹ It is up to government to re-examine this if they chose. The majority of the SCC also stated that the possibility of incarceration for the possession of marijuana was constitutional since there is no minimum sentence. The majority stated that a marijuana charge rarely results in incarceration since most offenders are given discharges or conditional sentences. However, if imprisonment is sentenced when it is not warranted, it could be appealed.

In dissent, Justice Arbour stated that "The threat of imprisonment clearly engages the s. 7 liberty interest of the appellants."³⁸² Further, Justice Arbour argued that there is no public health evil in the possession of marijuana, that the harm that is associated with marijuana use is individual and not societal, therefore, imprisonment is not justifiable and infringes on section 7 of the Charter. Lastly, she stated that the harm caused by the prohibition of small amounts of marijuana outweigh the harm caused by its use.³⁸³

In regards to all the cases above, the SCC made it clear that it is their role to ensure that legislation is in conformity with the Charter.³⁸⁴ In *R. v. Parker*, Justice Rosenberg concluded that "Parliament is not bound to legislate to the constitutional minimum. It can adopt the optimal and most progressive legislative scheme that it considers just."³⁸⁵ Therefore, it is Parliament's power and jurisdiction to deal with the

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³⁸¹ *Ibid.*, para 133.

³⁸² *Ibid.*, para 222.

³⁸³ Justices LeBel and Deschamps in dissent with Justice Arbour. *Ibid.*, para 301.

³⁸⁴ *R. v. Clay*, [2003] 3 S.C.R. 735, para 38.

³⁸⁵ *R. v. Parker*, (2000) 146 C.C.C. (3d) 193, para 205.

law on marijuana and the broader issues that surround it. Parliament however has been reluctant to make any drastic changes.

The decriminalization of marijuana, as well as the preservation of marijuana laws, is an on-going issue. Although there was pressure from the court to re-examine the laws in *R. v. Parker*,³⁸⁶ for medical use of marijuana, there is no pressure from the courts to re-examine the laws on the possession of the marijuana. In addition, there is no pressure from the US to re-examine the marijuana law, but instead to uphold it.³⁸⁷ US drug czar John Walters commented on Canada's marijuana law, "I have been encouraged because of the statements he [Prime Minister Paul Martin] has made about marijuana being a serious drug. He has made an effort to show a recognition that he does not side with those that say this is a soft drug, or that this is something you don't have to pay attention to."³⁸⁸ Clearly, political pressure from the US government officials cannot be ignored. US views on controlling drugs has an undeniably large affect on Canada's marijuana laws. A major concern from the US involves exporting cannabis into the US from Canada. John Walters from the National Drug Control Policy states that with more lax laws, the US will see an increase in smuggled marijuana over the border.³⁸⁹ If Canada is viewed as a threat to the importing of marijuana and other drugs into the US, the tightening up of border controls could likely be a consequence.³⁹⁰

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³⁸⁶ *Ibid.*

³⁸⁷ Sheldon Alberts and Janice Tibbets "U.S. drug czar praises "positive" PM" *The Ottawa Citizen*, 24 December 2003: A2.

³⁸⁸ *Ibid.*

³⁸⁹ Canadian Foundation for Drug Policy, "Cannabis Exports from Canada to the United States," 5 June 2003, <http://www.cfdp.ca/export.htm> (accessed on March 1, 2004).

³⁹⁰ *CBC News*, "US warns Canada against easing pot laws," 2 May 2003, http://www.cbc.ca/stories/2003/05/02/us_pot_rxn030502 (accessed on April 2, 2004).

Further, Canada must also meet international obligations for the control of drugs.³⁹¹ With the decriminalization of marijuana, Canada may be violating International treaties. The 1961 Single Convention on Narcotic Drugs, 1971 Convention on Psychotropic Substances, and 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances include cannabis as a controlled drug. These international treaties state that cannabis can only be used for limited medical or scientific purposes, but it is restricted for “the cultivation, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery...”³⁹² International obligations and pressures from the US undeniably have an effect on the preservation of Canada’s current drug laws.

Although there are pressures to uphold drug laws from the US and from the United Nations, they can not directly influence issues of national sovereignty. For instance, the role of the International Narcotic Control Board (INCB) is to monitor Governmental compliance of the International Conventions, to work with governments in ensuring control and access to medical drugs, and to detect weaknesses in drug control.³⁹³ However, when there is a violation of a treaty, the INCB gets involved by examining the violation and seeking explanations. With the implementation of a Safe-Injection Site (SIS) in Vancouver, the INCB states in their 2003 report that SISs are of “concern.”³⁹⁴ In regards to decriminalizing marijuana in Canada, the INCB is “concerned that the revisions could contribute to the mistaken perception that cannabis is a harmless

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³⁹¹ R. v. Parker, (2000) 146 C.C.C. (3d) 193, para 124.

³⁹² International Narcotics Control Board, *Report of the International Narcotic Control Board*, 2001, 34 www.incb.org/e/index.htm (accessed on May 1, 2004).

³⁹³ International Narcotics Control Board, “The Role of the International Narcotics Control Board,” News Release, 2003, www.incb.org/e/index.htm (accessed on May 1, 2004).

³⁹⁴ International Narcotics Control Board, *Report of the International Narcotic Control Board*, 2003, 49 www.incb.org/e/index.htm (accessed on May 1, 2004).

substance.”³⁹⁵ In regards to SISs and the decriminalization of small amounts of marijuana, the report verbalizes the INCB’s “concern.” Yet, the ultimate power to uphold or amend laws is in the hands of the Canadian government.

The pressures from the United Nations and the US have not stopped some individuals from initiating harm reduction strategies and from making drastic changes in responding to Canada’s drug problems. One interviewed judge from B.C. comments on the introduction of a SIS to deal with the city of Vancouver’s drug problem. Specifically, this judge mentions both the work done by Larry Campbell and Phil Owen.

First, the former mayor of Vancouver, Phil Owen, “pushed for a four pillar approach and harm reduction through safe-injection-sites.”³⁹⁶ With the goals of reducing drug crime, making safer communities, and increasing public health and awareness, Owen proposed that the four pillars of prevention, treatment, enforcement and harm reduction was a practical approach.³⁹⁷ This includes educating and promoting health, increasing drug treatment and housing for drug users, promoting DTCs, needle exchange programs, and developing pilot projects.³⁹⁸ In order for this to be successful, both the provincial and federal governments need to be on board.³⁹⁹

This harm reduction approach was adopted by Larry Campbell, Vancouver’s current mayor. It was with this outlook, particularly harm reduction, that Campbell proposed and implemented Canada’s first SIS where intravenous drug users can inject their own drugs in a supervised and clean environment.⁴⁰⁰ Health care professionals,

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³⁹⁵ *Ibid.*

³⁹⁶ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

³⁹⁷ Donald MacPherson, “A Framework for Action: A Four-Pillar Approach to Drug Problems in Vancouver,” (Drug Policy Coordinator, City of Vancouver, April 24, 2001), 1.

³⁹⁸ *Ibid.*, 11.

³⁹⁹ *Ibid.*, 2.

⁴⁰⁰ Stevie Cameron, “The Big Fix,” *Elm Street*, April 2003: 38.

sterile equipment, links to treatment resources and counseling are present.⁴⁰¹ SISs and needle exchange programs demonstrate Canada's use of harm reduction strategies.

On the other hand, there are times when services for drug addicts are cut. Depending on the governmental budgets, societal programs for drug-addicts and responses to certain issues will vary. The judge from B.C. states that programs and services for the drug addicted were cut in the Ontario government in the 1990s. He also states that a major tax cut in B.C. hurt many drug addicted individuals.⁴⁰² The allocation of money for resources for drug addicts is clearly in the hands of the government. When these programs are cut or severely under-funded, judges are aware that their efforts to rehabilitate a drug-addicted offender will more than likely be unsuccessful.

Unquestionably, the government decides the drug laws of Canada, the implementation of innovative programs, and the allocation of funding of resources. Judges may be faced with a barrier to attend to the needs of the drug-addicted offenders when the decisions arrived at by Parliament are disconnected from their views and from their reality.

Debates around drugs and drug-addicted offenders live-on. These debates often take lots of time and deliberation to affect any change. The law has changed, so too has new ways of delivering justice, yet it has changed very slowly.

Law changes slowly

As previously stated in this research paper, there have been dramatic changes within the courts and the Canadian judiciary. These changes are very promising in that

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⁴⁰¹ Kerr, *supra* note 114 at 4.

⁴⁰² Interested #3, interview by the author, Ottawa, ON., January 9, 2004

traditional approaches are being critically examined to respond more therapeutically and effectively to the people who come before the courts. According to a few judges, the changes that are occurring are definitely “hopeful.”⁴⁰³

While changes within the criminal justice system are occurring, the changes come about very slowly. As an Interested-DTC judge from B.C. stated, “The Canadian way is to take small steps.”⁴⁰⁴ This judge offered three examples of just how slow legal change occurs in Canada: the LeDain Commission, the marijuana laws, and prescription heroin.

First, to demonstrate just how slow change takes place in the law, the Interested-DTC judge from B.C. mentions the 1971 LeDain Commission. Over 30 years ago, an inquiry into the non-medical use of drugs was conducted by a committee, including a psychiatrist, a criminology professor, a social worker, the then dean of Osgoode Hall Law School, and lastly the chairman of the commission, Professor Gerald LeDain. For four years, the effects, usage, consequences, and recommendations for certain drugs were studied.⁴⁰⁵ It was assumed by the RCMP and government officials that with the diverse range of researchers, the harmfulness of marijuana use would be demonstrated.⁴⁰⁶

Instead, in the 1970 Interim Report, the LeDain Commission reported that marijuana, a drug of great controversy at the time, should be covered under the *Food and Drugs Act* instead of the Narcotic Control Act “since cannabis is clearly not a narcotic.”⁴⁰⁷ Additionally, another recommendation included the removal of imprisonment for the mere possession of a psychotropic drug.⁴⁰⁸ Further, first offenders

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⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Giffen, *supra* note 139 at 518. The drugs studied by the Commission included “non-medical use of sedative, stimulant, tranquillizing and psychotropic drugs...”

⁴⁰⁶ *Ibid.*, 517.

⁴⁰⁷ *Ibid.*, 518.

⁴⁰⁸ *Ibid.*

guilty of simple possession should be given an absolute discharge according to the commissions findings.⁴⁰⁹

In 1972, when the final report on cannabis was produced, the commission was unable to reach an agreed upon policy recommendation because there was some evidence for potential harm in the use of marijuana.⁴¹⁰ The Commission did, however, agree that marijuana is not a “gateway drug” and does not produce criminal behaviour as was declared by the RCMP.⁴¹¹ In their analysis, the commissioners believed that the punishments of marijuana “under the *Narcotic Control Act* were much too severe for the seriousness of the crime.”⁴¹² Specifically for the possession of marijuana, the majority of the Commissioners recommended the abolishment of this prohibition.⁴¹³ Ironically, although this was discussed almost 30 years ago, we are still dealing with this same issue today. Needless to say, the law moves slowly. Reform on drug laws does not come without hesitation or opposition.

Currently, under the *Controlled Drugs and Substances Act*, offences for trafficking or possession for trafficking greater than 3 kg of cannabis could receive a life imprisonment sentence. For cultivation of cannabis, a maximum jail sentence of 7 years may be given. For possession of cannabis, an individual with less than 30 g may receive a fine of \$1000.00, six month sentence, or both, while possession of greater than 30g of cannabis may depend on whether the Crown chooses to proceed as a summary or

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⁴⁰⁹ *Ibid.*, 519.

⁴¹⁰ *Ibid.*, 519.

⁴¹¹ *Ibid.*, 520. Gateway drug – that marijuana leads to heroin.

⁴¹² *Ibid.*

⁴¹³ *Ibid.* However, for offences of trafficking and possession of trafficking, the Commissioners proposed that the offender should be able to proceed by an indictable or summary offence. Trafficking and Possession for trafficking should still be a criminal offence.

indictable offence.⁴¹⁴ However, the reform for Canada's cannabis law is being debated - again.

The reform for cannabis laws, Bill C-10, recommends that cannabis will remain illegal; only the punishments will be reconsidered. For certain offences, the Bill recommends more severe penalties while for others it recommends less severe penalties. For example, growing large amounts of cannabis may now receive a maximum penalty of 14 years. However, for possession of small amounts of marijuana, the maximum penalty will instead involve a fine rather than the possibility of a jail sentence.⁴¹⁵ Bill C-10 proposes more lenient sentences for possession charges while tougher sentences for large grow operations. However, Bill C-10, has died on the paper because Parliament was dissolved before it came before the House.

Additionally, the Interested-DTC judge from B.C. applauds Vancouver's project to implement prescription heroin – the first in North America.⁴¹⁶ Prescription heroin involves providing doses of heroin to heroin-addicts who are unsuccessful with methadone maintenance.⁴¹⁷ Again, the LeDain Commission recommended heroin maintenance, along with methadone maintenance, for the treatment of drug addicts. The LeDain Commission proposed heroin maintenance in order “to attract addicts who could not be lured by methadone maintenance.”⁴¹⁸ Finally, 30 years later, Canada has now accepted this approach for a few cities. Vancouver, Montreal, and Toronto will now provide prescription heroin. Prescription heroin will be a pilot project that will allow

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⁴¹⁴ *Controlled Drugs and Substances Act*, *supra* note 18.

⁴¹⁵ Bill C-10, An Act to amend the Contraventions Act and the Controlled Drugs and Substances Act, 3rd sess., 37th Parliament, 2004.

⁴¹⁶ Jonathan Cohen, “Collateral damage of a drug war,” *The Globe and Mail*, 8 May 2003, www.globeandmail.com (accessed on March 6, 2004).

⁴¹⁷ *Aids Vancouver Island*, “Prescription Heroin Project,” December, 3 2003, www.avi.org/node/view/155 (accessed on January 29, 2004).

certain doctors to prescribe heroin to a small group of addicts who have failed methadone treatment. By providing prescription heroin, the spread of HIV through contaminated needles and the incidents of criminal offences will be reduced.⁴¹⁹ According to this Interested-DTC judge, “I think that it [prescription heroin] is a logical step to take. Take prescription heroin to stop committing crimes. I think that is revolutionary. Why wouldn’t you try it? The war on drugs has been a total failure.”⁴²⁰

The issues discussed in the LeDain Commission explicitly demonstrate the slow nature in which the law accepts change. This can often be frustrating for judges who recognize that changes need to be implemented before others realize this. The Non-DTC judge from B.C. states that it took the courts of appeal a while to come along to the way of thinking at the provincial court level. He said that the lower courts recognized that certain things were a failure way before the higher courts did.⁴²¹ Additionally, in the literature, a judge stated that he opposed the “medieval methods of dealing with addiction” and expressed “hope that these methods would soon be a thing of the past.”⁴²² This judge was frustrated with sending drug-addicted offenders to prison and preferred a medical approach to dealing with the problem rather than a criminal approach. Ironically, this quote was taken from a judge over 50 years ago. These issues are finally being addressed in Canada today.

As mentioned above, a major factor for slow drug law reform has also stemmed from political restraint. For example, in 1975, soon after the LeDain Commissions *Final*

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⁴¹⁸ Giffen, *supra* note 139 at 404.

⁴¹⁹ Ingo Ilja Michels, “Heroin-Based Treatment,” *Journal of Drug Issues* 32 (2002): 524.

⁴²⁰ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

⁴²¹ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

⁴²² “Judge raps drug laws,” *Vancouver News Herald*, 9 October 1946, quoted in Giffen, *supra* note 139 at 364.

Report (1973), the least drastic recommendation, that marijuana should belong under the *Food and Drugs Act*, was accepted under the Bill S-19. Shortly after, the Bill died. As noted by Giffen, for the next 10 years government officials were reluctant to make any change in the law. It was said that the Bill would not be re-introduced because it was not considered “high-priority legislation.”⁴²³ In 1978, decriminalization for possession of marijuana was re-introduced; however, it would have to wait another three to four years because it was also not considered high-priority. In addition to political avoidance, law reform for marijuana was slow to change in the 1980’s because of various influential groups protesting against the decriminalization of small amounts of marijuana. These groups included parent and teacher associations, police associations, and addiction centres.⁴²⁴ Drug law reform initiatives were easily hindered. The situation looks very much the same today.

Evidently, legal change occurs very slowly. This remains a barrier among judges who see flaws yet do not always have the power to change them.

Media

The media’s portrayal of the drug problem is another barrier the judges face. The media’s portrayal of drugs, according to some of the judges, induces a sense of fear in the public. In the past, the media portrayed drugs by using “alarmist stories.”⁴²⁵ These stories claimed that people who were addicted to drugs were contagious, immoral, and violent criminals.⁴²⁶ A decade ago, the infamous commercial of two eggs sizzling on a

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⁴²³ Giffen, *supra* note 139 at 571.

⁴²⁴ *Ibid.*, 572.

⁴²⁵ *Ibid.*, 203.

⁴²⁶ *Ibid.*, 150.

frying pan was used to depict a brain on drugs. The media was thus influential in “staging” and “legitimizing” the war on drugs.⁴²⁷ Today, many fears about drugs exist.

According to an Interested-DTC judge from B.C., “there is this fear out there about drugs. Fear about drugs seems to sell.”⁴²⁸ The media coverage on drugs seems to be directed toward “bad news,” while the good coverage is not “newsworthy.”⁴²⁹ “In the business of producing and selling news, large media organizations are generally in the business of reporting back to the public what it needs to know and is willing to pay for.”⁴³⁰ Clearly, if bad news sells, this is what the media will continue to focus on. In effect, it is this negative coverage on drugs and drug addicts that has thus instilled a sense of fear within society.

Consequently, it is this sense of fear that initializes a negative public reaction to drug addicts. According to two Interested-DTC judges, the negative press on drugs and drug addicts prompts pressure from the “law-abiding public to lock them [drug addicts] up in jail.”⁴³¹ One Non-DTC states that although the public is persuaded by the media, the judge must not let the public influence decision-making. Instead, a judge takes into account the person and the crime before him/her, without public pressure. This judge claims that there is this “false perception from the media and society.”⁴³² This false perception implies that the more people in jail, the less crime there will be. Society often

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⁴²⁷ Jimmie L. Reeves & Richard Campbell, *Cracked Coverage* (Durham and London: Duke University Press, 1994), 15.

⁴²⁸ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

⁴²⁹ *Ibid.*, 19.

⁴³⁰ *Ibid.*, 22.

⁴³¹ Interested #1, interview by the author, Ottawa, ON., November 6, 2003; Interested #3, interview by the author, Ottawa, ON., January 9, 2004

⁴³² Non-DTC #3, interview by the author, Ottawa, ON., January 16, 2004

assumes that the tougher the sentence, the better things are. Yet, this judge also points to the American system where there are more people in jail, yet still high rates of crime.⁴³³

In addition, when the government decides to allocate money to resources for drug addicts, society may oppose this. A Non-DTC judge from B.C. explains that when the needs of the community involve helping the marginalized, society is not always supportive. He said, "There are a whole lot of people who are recovering addicts but it is not easy to set things up when everyone says "not in my backyard." There is a lot of pressure when you try to do anything with people that are marginalized in society."⁴³⁴ Societal attitudes toward helping drug-addicts, especially drug-addicted offenders, are usually lacking enthusiasm. An Interested-DTC judge from Ontario states that society often questions "the reasons for spending all this money on them [drug addicts]."⁴³⁵ The marginalized are often disregarded as deserving special resources. This judge claims that society just does not seem to realize the benefits that special resources and treatment would have on the drug addicted offender, as well as on society.

Apparently, the media has an impact on society's perceptions of drugs and drug addicts. The fear that society often assumes can largely be attributed to the drug scare that was created by the media.⁴³⁶ A Non-DTC from B.C. states that it is almost impossible to avoid the media. Society, thus listens to the media; the media is "an important factor that shapes the attitudes of people."⁴³⁷ It is not surprising that as a

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⁴³³ Dan Gardner, "Free junk for junkies," *Ottawa Citizen*, 18 January 2004, C6.

⁴³⁴ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

⁴³⁵ Interested #1, interview by the author, Ottawa, ON., November 6, 2003

⁴³⁶ Giffen, *supra* note 139 at 203.

⁴³⁷ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

consequence of the bad press on drugs and drug addicts, society prefers harsher penalties.⁴³⁸

Yet while more judges decide to take a rehabilitative approach in sentencing drug-addicted offenders, one Non-DTC judge from Ontario notes that there may be “bad press on courts on the weakening of judges and not dealing with things sufficiently or harshly.”⁴³⁹ The Honourable Claire L’Heureux-Dube stated that judges are sometimes personally attacked on their decisions. She stated that the ““messenger” rather than the “message””⁴⁴⁰ may receive scrutiny from the media and public. Furthermore, one of the interviewed judges stated that there is this pressure from the media to the courts “to try to deal with everything.”⁴⁴¹ However, the criminal justice system can only play a limited role. This judge states that it is easy to point fingers and to criticize the judiciary.

Evidently, the media plays a role in influencing societal views on drugs, drug addicts, and the judges. This fear or criticism that is often instilled in the public by the media can be a barrier to innovative approaches.

Human Fallibility

As was discussed above, there is bad press on judges in the delivery of justice. Some of this bad press concerns the wide disparities in sentences. In many instances, for the same crime, some judges may sentence too leniently while others may sentence too harshly. A Non-DTC judge from Ontario stated that “every judge deals with things

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⁴³⁸ James Giffen, “The Criminal Courts and the Control of Addiction” in *Courts and Trials: A Multidisciplinary Approach*, ed. Martin L. Friedland, (Toronto: University of Toronto Press, 1975), 118.

⁴³⁹ Non-DTC #2, interview by the author, Ottawa, ON., January 8, 2004

⁴⁴⁰ The Honourable Claire L’Heureux-Dube, “Judicial Independence and Judicial Activism,” (paper for Council Awards Luncheon, Canadian Bar Association, 21 August 1999) 8.

⁴⁴¹ Non-DTC #4, interview by the author, Ottawa, ON., December 12, 2003

differently.”⁴⁴² The law allows the judges enough discretion when it comes to sentencing.

According to a judge, the mere nature of humans trying to do justice already involves flaws in the justice system.⁴⁴³ Justice will always be imperfect because it involves human beings. While judges must strive for impartiality and neutrality, one must accept the fact that all judges come to the bench with a set of beliefs, experiences, and values that will ultimately influence their decisions.⁴⁴⁴

Whether a judge presides over a PSC or the mainstream criminal courts, the judge’s personality will be influential in decision-making.

Ultimately, the impact of problem-solving courts on judicial independence may come down to the personality of individual judges, just as it does in conventional courts. As anyone who has practiced in criminal court knows, some judges rely heavily on the advice of experts, others do not. Some judges are known as soft touchers, others are notorious for being hanging judges. Although we have long strived for a court system devoid of bias and inconsistency, the reality is that any system designed and implemented by humans will always be idiosyncratic.⁴⁴⁵

Evidently, since every judge is unique, the justice system will not be flawless. Although some judges may endorse a rehabilitative ideal, other judges may still feel inclined to sentence more harshly.

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⁴⁴² Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004

⁴⁴³ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

⁴⁴⁴ Bertha Wilson, “Will Women Judges Really Make a Difference?” Wilson, Bertha. “Will Women Judges Really Make a Difference?” *The Fourth Annual Barbara Betcherman Memorial Lecture*, Osgoode Hall Law School, 8 February 1990.

⁴⁴⁵ Berman and Feinblatt, *supra* note 68 at 18.

Federal and Provincial Government

Another barrier discussed among the judges involves the division of powers between the federal and provincial government. First, section 91 of the *British North American Act* (1867) allocates the federal government power over criminal law and federal penitentiaries. Section 92 gives each province power to devise its own laws for matters falling within its jurisdiction as well as to assume responsibility over the administration of justice.⁴⁴⁶ This split in jurisdictional powers most notably affects the administration of corrections because the correctional system is also split between federal and provincial governments.⁴⁴⁷ The “two-year rule” determines whether offenders will be under the provincial or federal penal institutions.⁴⁴⁸

According to many of the interviewed judges, most drug-related crime falls within the provincial correctional system. For instance, one Interested-DTC judge from Ontario claims that the majority of offences committed by drug-addicted offenders are minor property offences to fuel the drug habit. It is these types of offences that keep bringing the drug-addicted offenders back to court. A Non-DTC judge from B.C. agrees that break and enter and vehicle theft are the most common offences committed by drug-addicted offenders.⁴⁴⁹ One Non-DTC from Ontario states that almost all drug crimes are minor street crimes by crack addicts. Most of the crack addicts are prostitutes.⁴⁵⁰ While most drug-related crimes would fall under the provincial corrections, DTCs only accept offenders who have been charged with a federal offence prescribed under the *Controlled*

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⁴⁴⁶ Ekstedt and Griffiths, *supra* note 21 at 4.

⁴⁴⁷ *Ibid.*, 48.

⁴⁴⁸ As discussed in Chapter 1, a sentence of 2 years less a day is under the provincial correctional system and 2 years and more is under the federal.

⁴⁴⁹ Non-DTC #3, interview by the author, Ottawa, ON., January 16, 2004

⁴⁵⁰ Non-DTC #1, interview by the author, Ottawa, ON., January 28, 2004

*Drugs and Substance Act (CDSA).*⁴⁵¹ The Interested-DTC judge from B.C. believes that DTCs need to be extended to include provincial matters as well.⁴⁵² The question then becomes: why are drug-addicted offenders who only commit federal drug offences under the CDSA eligible for the DTC program? If the majority of crimes committed by drug-addicted offenders are property crimes which fall under the provincial jurisdiction, why is this large group excluded from the DTC?

According to Justice Bentley, this will most likely be changed by the provincial government, but once again this is a policy issue for the government and not for the courts to decide. As mentioned earlier, drug laws and drug policies are within the power of the government, not the judiciary. Further, Justice Bentley states that the federal government is responsible for federal drug offences therefore the federal funds are limited to their jurisdiction. The provincial governments, on the other hand, are unwilling to provide such funding for other crimes. Clearly, the political struggles between the provincial and federal governments impede the rehabilitation process of drug-addicted offenders.

An Interested-DTC judge from B.C. states his frustration on the division of powers between the federal and provincial government. He said, "It seems the federal/provincial jurisdiction seem to hold up all things."⁴⁵³ Judges are impeded by the fact that the law encourages judges to reconsider sentences, yet, the judges are also aware that the proper resources are not in place to support it.

Clearly, clashes arise when provincial and federal governments have different visions in dealing with offenders. One example of this provincial/federal clash is evident

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⁴⁵¹ LaPrairie, *supra* note 3 at 1537.

⁴⁵² Interested #3, interview by the author, Ottawa, ON., January 9, 2004

in the correctional system in Ontario. In 1995, the province of Ontario, under the Progressive Conservatives, introduced a new vision of justice: a “get tough” approach.⁴⁵⁴ With this “get tough” approach, the Ontario government proposed “super-jails”,⁴⁵⁵ the privatization of one “super-jail”,⁴⁵⁶ and cutbacks of community-based programs.⁴⁵⁷ The “get-tough” approach promises a more penal and cost-effective system.⁴⁵⁸ Thus, drug-addicted offenders are most affected by this because the majority of drug-addicted offenders fall under the provincial jurisdiction. With a cut-back of resources, rehabilitation and counseling in correctional centres and in the community is severely lacking. On the other hand, the federal corrections system believes in “actively encouraging and assisting offenders to become law-abiding citizens”⁴⁵⁹ through its emphasis in rehabilitation and reintegration for offenders into society.⁴⁶⁰ Clearly, a contradiction between both governments is evident. The federal government is adopting a rehabilitative perspective while the Ontario government is adopting a punitive perspective.

However, the Interested-DTC judge from B.C. does seem optimistic that the governments can work cooperatively towards the same goal. This judge mentions that this cooperation is evident under the enactment of the YCJA. The federal government

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⁴⁵³ Ibid.

⁴⁵⁴ Dawn Moore, Kellie Leclerc Burton and Kelly Hannah-Moffat, ““Get Tough” Efficiency: Human Rights, Correctional Restructuring and Prison Privatization in Ontario, Canada,” in ed. Andrew Coyle et al., *Capitalist Punishment* (Atlanta: Clarity Press Inc., 2003), 156.

⁴⁵⁵ Instead of smaller prisons geared towards gender and cultural differences, the development of larger “super-jails” were developed. Two super-jails in Ontario are Maplehurst and Central North Correctional Centre. Super-jails warehouse up to 1200 people. See ibid.

⁴⁵⁶ The Central North Correctional Centre in Penetanguishene is the first privatized jail in Canada.

⁴⁵⁷ John Howard Society of Ontario, “Fact Sheet #15 - The Changing Face of Ontario Corrections: An Assessment,” August 2000, 1, <http://www.johnhoward.on.ca/Library/Fctsheets/fctsh-15.pdf>.

⁴⁵⁸ Moore, supra note 454 at 154.

⁴⁵⁹ Correctional Service Canada, “Our Mission,” 25 February 2004, http://www.csc-scc.gc.ca/text/organi/organe01_e.shtml (accessed on March 7, 2004).

⁴⁶⁰ Moore, supra note 454 at 152

has provided more money to the provinces to enforce drug treatment and residential counseling for young offenders.⁴⁶¹ One example of this is the Intensive Support Supervision Orders whereby young offenders are highly monitored and supported by probation officers. The judge can even have the offenders come back to court in order to monitor their progress.⁴⁶² The judge said, “This [Intensive Support Supervision Orders] is an example of cooperation with the fed’s and the provinces. I can say good things about governments working together.”⁴⁶³

Judges are thus impeded when different ideals in administering justice are present, both federally and provincially. Drug-addicted offenders too are impacted by the two different jurisdictions and by their different visions of justice.

Alcohol

While all judges agree that Canada has a drug problem, a stronger concern among the majority of the judges lies with alcohol addiction. In many jurisdictions, drug abuse is prevalent; however, alcohol abuse always raises far more concern. Two judge’s state that approximately 35% of the cases heard before them were drug related, while 70% were alcohol related.⁴⁶⁴ A Non-DTC judge from Ontario said, “Drugs don’t exacerbate criminal conduct as much as alcohol.”⁴⁶⁵ For this judge, alcohol addiction is more of a problem in his community. He believes that to meet the needs of his community, more emphasis should be placed on alcohol programs rather than on DTCs.

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⁴⁶¹ Bala, *supra* note 174 at 275.

⁴⁶² *Ibid.*, 437.

⁴⁶³ Interested #3, interview by the author, Ottawa, ON., January 9, 2004

⁴⁶⁴ Interested #1, interview by the author, Ottawa, ON., November 6, 2003; DTC #1, interview by the author, Ottawa, ON., January 29, 2004.

⁴⁶⁵ Non-DTC#2, interview by the author, Ottawa, ON., January 8, 2004

Literature suggests that alcohol causes more problems than drugs.⁴⁶⁶ Not only are health and social problems associated with alcohol, but according to the judges, alcohol use is a large factor that is associated with criminal activity. The findings of a study conducted by the Canadian Centre on Substance Abuse demonstrate that alcohol is associated with more than 39% of assaults, 34 % of murders, and 30% of attempted murders. These percentages jump more than 20% when drug and alcohol are used together.⁴⁶⁷ Domestic violence assaults are higher for men who have alcohol addiction problems than those who do not.⁴⁶⁸ Further, the costs of alcohol (health care, law enforcement, productivity loss, research) in Canada amount to 7.5 billion dollars, whereas the costs for illicit drugs are 1.37 billion.⁴⁶⁹ The numbers associated with alcohol and alcohol dependency is serious and substantial. The million-dollar question: why are drugs deemed more problematic than alcohol? If alcohol is a bigger problem, why not alcohol treatment courts instead of DTCs?

There is not one response that can answer both questions. However, as for the former question, the perceived harmfulness associated to drugs far outweighs that of alcohol. The societal perception attached to a cocaine addict versus an alcohol addict is quite different. The perception of an occasional heroin user to an occasional wine drinker is quite different. The image attached to drugs is highly negative – one could say, drugs are more “evil.”

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⁴⁶⁶ Judith C. Blackwell and Patricia Erikson, *Illicit Drugs in Canada*, (Ontario: Nelson Canada, 1988) at 29.

⁴⁶⁷ Public Safety and Emergency Preparedness Canada, Report, “Release of Report on Impact of Crime and Substance Abuse in Canadian Society,” 30 April 2002, http://www.psepc-sppcc.gc.ca/publications/news/20020430_e.asp (accessed on April 17, 2004).

⁴⁶⁸ Desjardins and Hotton, *supra* note 130 at 10.

⁴⁶⁹ Eric Single, et al., “The Costs of Substance Abuse in Canada,” Report, *Canadian Centre on Substance Abuse*, 1996, www.ccsa.ca/pdf/ccsa-006277-1996.pdf (accessed on December 3, 2003).

Drugs are deemed problematic, hence their criminalization. Yet, upon examination of the emergence of Canadian drug laws, a new factor as to why drugs may have been criminalized, and not alcohol, emerges. If we go back almost a century to Canada's first drug legislation, the Opium Act (1908), issues of race will submerge. Anti-Chinese sentiments were prevalent in the early 20th century as the Chinese were considered an economic threat. In effect, the opium habit of the Chinese, associated with Chinese hostility, fostered negativity towards the drug opium. In turn, Opium was perceived to be a problem and the Opium Act soon followed.⁴⁷⁰ Therefore, it was not the harmfulness of the drug per se but a problem with the Chinese. Racism is linked to the establishment of Canada's first drug law.⁴⁷¹ As a result of this law, for two decades that followed, the majority of narcotic convictions involved the Chinese.⁴⁷²

Simply put, drugs were criminalized, and not alcohol, because government deemed drugs a problem. In essence, drugs remain criminalized because government still deems them to be a problem. However, harm lies beyond criminalized substances. Should more emphasis, such as treatment, media attention, education, and health services, be placed on the harm rather than on the criminalization?

As for the latter question, both DTC judges had different answers as to why there are not alcohol treatment courts. Justice Bentley states that alcohol treatment courts would be something for the governments to decide. Again, this is a policy issue in which judges do not get involved. He thinks that it would be advantageous to have one, especially in response to domestic violence cases. In addition, the other interviewed DTC judge states that an alcohol treatment court would not be the same as a DTC, nor

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⁴⁷⁰ Giffen, *supra* note 139 at 33.

⁴⁷¹ *Ibid.* 38.

does he foresee an alcohol treatment court developing. He says that there would need to be support from the police; this he does not see happening. Also, there needs to be a threat of sanction.⁴⁷³ Since alcohol itself is not a criminalized substance, it would not have the same effect or support that drugs do. From both these responses from the DTC judges, alcohol treatment courts are not something they are concerned with.

According to the judges, alcohol abuse is a matter that keeps bringing people back to court; this concern should be taken seriously. While drug-related matters have attracted lots of governmental, media, and societal attention, alcohol abuse is a serious matter that deserves more consideration.

Conclusion

The barriers the mainstream criminal courts and the DTCs encounter ultimately affect the delivery of justice. Clearly, drug policy and drug laws, the slow changing law, the media, human fallibility, the division of powers, and other substance abuse problems most definitely impede and affect the justice system.

Also, through analysis of these barriers and concerns, drugs are not only a legal issue, but are connected with political, societal, international, health, and historical aspects. All these issues have contributed in shaping drug policy.

Lastly, although some of these concerns were mentioned briefly by the interviewed judges, it was the Interested-DTC judge from B.C. who was the most open about these issues. These barriers were greatly elaborated on and critiqued by this one judge. This judge was the most vocal about the broader issues affecting the courts and

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⁴⁷² *Ibid.* 97.

⁴⁷³ DTC #2, interview by the author, Ottawa, ON, February 3, 2004.

drug-addicted offenders. His comments are a reflection of his experiences in the justice system, while at the same time a demonstration of his passion to address the barriers in which the drug-addicted offenders may face. The other Interested-DTC judges did not go into so much detail as the B.C. Interested-DTC judge; this is most likely a result of not being able to guarantee anonymity. The same can be said for the DTC judges. Nevertheless, the issues that were raised by the Interested-DTC judges are an indication of his interest in DTCs where rehabilitation of the drug-addicted offender is enhanced.

Conclusion

Summary and Observations

In communities where drugs are prevalent, some judges are getting frustrated with the criminal justice system because it is not working effectively for drug-addicted offenders; the revolving door initiated this concern. With the impetus of few judges, DTCs have developed in two cities in Canada to respond more effectively to the realities of drug-addicted offenders. As a result of the implementation of DTCs, apparent changes have been made to deal with the problems that are encountered in the mainstream criminal justice system. Through the interviews with the Canadian criminal court judges, it is clear that the changes that have occurred to the traditional framework of the criminal justice system are favoured. The non-traditional roles, procedures, and goals of the DTC are deemed effective among the majority of judges in dealing with drug-addicted offenders.

The research revealed that every interviewed judge supports a rehabilitative ideal in responding to drug-addicted offenders. Among all the judges, incarceration is deemed to be an ineffective sentence among non-violent drug-addicted offenders; instead, all judges openly embrace rehabilitation as an effective reason for sentencing. The factors that have influenced a rehabilitative ideal for drug-addicted offenders include: more tolerant views on drug addiction, new theoretical influences, judicial dispute resolution in family courts, and recent amendments in the law. These influences have undeniably encouraged a rehabilitative outlook among all the judges. Therefore, all the interviewed mainstream criminal court judges and DTC judges support this philosophy.

However, while all judges embrace this philosophy, they embrace it with realistic expectations. The reality is, while the mainstream criminal court judges have every belief that rehabilitation is the most effective sentence for drug-addicted offenders, the judge is not responsible for implementing the treatment or for following-up with the treatment process. The rehabilitation process becomes the responsibility of other important players – the probation officers and the treatment providers. According to the judges, the criminal justice system is simply not equipped to deal with these social issues. The judge is concerned with the trial process and proper sentencing while the other players are responsible for the enactment of the sentence.

At the same time, with the emergence of offenders serving time in the community, partly as a consequence of the conditional sentence, probation officers are not able to provide intensive supervision. Further, with a lack of provincial resources, the drug-addicted offender may not even receive treatment. Clearly, these factors detract from the intentions of the judges – to rehabilitate the drug-addicted offender in order to break the cycle of drugs and crime. Even though the judges may embrace a rehabilitative ideal, the chances of drug-addicted offenders actually being rehabilitated are minimized. Ultimately, there is a large gap between the ideal of the mainstream criminal court judges and reality. While judges may be eager to endorse a rehabilitative philosophy, other structures need to be prepared to support this new outlook. The mainstream criminal court judges are aware of this limitation.

On the other hand, DTC judges are able to adopt a new role as a result of the DTC. The DTC collaborates with the treatment services, social services, and the legal team in an attempt to provide intensive, coordinated, and effective rehabilitation for the

drug-addicted offender. The structures are in place to allow the DTC judge effective management of the cases in order to ensure that recovery of the drug-addicted offender is optimized. Although this role is more involved, there is clear support from the majority of the judges for this new role of the judge. According to the majority of the judges, the role of a judge is not one-dimensional; other unconventional roles are acceptable as long as the judge stays within his/her judicial sphere.

However, the DTC, along with the new role of the DTC judge, is not going to cure all drug-addicted offenders, clean up all drug crime, nor eliminate Canada's drug problem; DTCs are not, nor are they claiming to be a panacea. Judges are aware that their roles are limited; they are also aware that the role of a DTC is limited as well. DTCs deal with only a small portion of drug offenders. Therefore, DTCs do not propose to take over the mainstream system. The DTC is a system intended to help non-violent drug-addicted offenders that are motivated to get treatment, those who need the support of the DTC, and those who will put in the effort to get help. The mainstream criminal justice system is better in other cases involving drug offenders.

While the majority of the interviewed judges embrace the changes that have occurred in the criminal justice system, mainstream criminal court judges and DTC judges all suggest that there are barriers that impede significant development in responding to drug crime. Drug policy, the media, judicial fallibility, and the division of powers were all raised. These barriers illustrate that judges and the courts do not live in a vacuum – there are other factors that impact judicial decision-making and impact progressive change.

Limitations and Future Research

Due to time constraints and difficult access to judges, the sample size of judges was fairly small. It would have been beneficial to interview more criminal court judges in order to be able to generalize to the larger population of Canadian criminal court judges.

Also, this research originally set out to examine the roles of the judges and the perceived effectiveness of the courts, however, the interviews revealed other important themes. Although the roles and the perceived effectiveness were initially and deeply explored in the interviews, it would have been interesting to explore in more detail the barriers judges identified. These issues have significant policy implications and should therefore be evaluated extensively. Future research should seek to make recommendations that will resolve these flaws and systemic barriers in order to close the gaps.

There is also a need to focus on other vital problems that are evident in the court system. According to the judges, alcohol is a serious and recurrent concern. Even though alcohol is not criminalized, it is nonetheless problematic and a significant factor in criminal offences. This problem is apparent from the costs on society, crime and addiction. There is a need to focus more attention on this substance abuse.

Conclusion

Due the complexity involved with drugs, no one program is the solution. DTCs are an alternative for non-violent drug-addicted offenders; an alternative that is supported by the majority of the judiciary.

Judges play an important part in the criminal justice system, especially in sentencing offenders. However, other social factors play a role in dealing with the drug problem. Overall, judges are a small, but an important factor in responding to Canada's drug problem. The criminal courts are only one structure in the broader picture. As mentioned above, they may pursue new ideals, yet other structures need to be in place to carry the ideal out. On a closer and broader level, other factors such as the availability of treatment programs and the division of government powers are affecting the way in which the judiciary is responding to drug-addicted offenders. These issues must be addressed in order for the many different players to work together for a beneficial cause.

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Appendix A:**To Reference the Interviews with the Judges**

The two DTC judges will be referenced as:

DTC #1 (The Honourable Mr. Justice Paul Bentley)

DTC #2

The three Interested-DTC judges will be referenced as:

Interested #1

Interested #2

Interested #3

The five Non-DTC Judges will be referenced as:

Non-DTC #1

Non-DTC #2

Non-DTC #3

Non-DTC #4

Non-DTC #5

The dates in which the interviews took place will also be provided in the footnotes.

Appendix B:**Consent Form for DTC judges**

I _____ have been asked by Mary Ann Mattioli, an M.A. student in Legal Studies at Carleton University, to participate in a research study on judicial perceptions of Drug Treatment Courts. I understand that Ms. Mattioli is under the academic supervision of Professor Brettel Dawson and Professor Dawn Moore.

I understand that I will be participating in a semi-structured interview that will take approximately 45 minutes. The interview will focus on my role as a judge, my experiences with drug-using offenders in both the traditional criminal justice system and the DTC, the differences between the traditional court versus the DTC, the perceived effectiveness of the criminal justice system and the DTC, and the challenges and concerns of the criminal justice system and the DTC.

I understand that the topic of this research project is controversial and my opinions might not be shared by others. As a result there could be some risk to me. I acknowledge that the researcher is NOT offering me anonymity. I am aware that my name and ideas will be revealed in the research thesis – which is a public document.

I understand that my participation is voluntary. I have the right to refuse to answer any questions or to end the interview at any time. If I chose to end the interview I will decide at that time if the researcher may use the information I have provided to that point.

_____ I agree to be tape-recorded. I understand that the tapes will be destroyed after being transcribed by the researcher.

_____ I do not wish to be tape-recorded. The researcher will only take hand written notes.

_____ I agree to have quotations and ideas attributed to me in the researcher's thesis.

I understand that only the researcher will be the only person to have access to the notes and transcripts. All transcripts and notes will be destroyed upon completion of the research thesis (July 2004).

I am aware that the results of my interview will be revealed in the thesis.

I have also had the opportunity to have any questions that I may have answered by the researcher. My signature indicates that I agree to participate in the interview and to allow the researcher access to the data arising from my participation. I understand that the Carleton University Research Ethics Committee has approved this project.

If I have any questions about the project I may contact the researcher or her supervisors:

Researcher:

Mary-Ann Mattioli

maremattioli@hotmail.com

(613) 829-9224).

Supervisors:

Prof. Brettel Dawson & Prof. Dawn Moore

Department of Law

Carleton University

1125 Colonel By Drive

Ottawa, ON K1S 5B6

Any concerns I may have about the project and the conduct of the researcher are to be reported to the ethics committee.

Research Ethics Committee

511A Tory Building

Carleton University

1125 Colonel By Drive

Ottawa, ON K1S 5B6

Tel: 613-520-2517

E-mail: Leslie_MacDonald-Hicks@carleton.ca

PARTICIPANT'S SIGNATURE: _____

DATE: _____

Researcher's Signature: _____

Date: _____

Consent Form for Non-DTC Judges and the Interested-DTC in B.C.

I _____ have been asked by Mary Ann Mattioli, an M.A. student in Legal Studies at Carleton University, to participate in a research study on judicial perceptions of Drug Treatment Courts. I understand that Ms. Mattioli is under the academic supervision of Professor Brettel Dawson and Professor Dawn Moore.

I understand that I will be participating in a semi-structured interview that will take approximately 45 minutes. The interview will focus on my role as a judge, my experiences with drug-using offenders in the traditional criminal justice system, the differences between the traditional court versus the DTC, the perceived effectiveness of the criminal justice system and the DTC, and the concerns of the criminal justice system and the DTC.

I understand that the topic of this research project is controversial and my opinions might not be shared by others. As a result there could be some risk to me. However, I acknowledge that the researcher is offering me anonymity.

I understand that my participation is voluntary. I have the right to refuse to answer any questions or to end the interview at any time. If I chose to end the interview I will decide at that time if the researcher may use the information I have provided to that point.

_____ I agree to be tape-recorded. I understand that the tapes will be destroyed after being transcribed by the researcher.

_____ I do not wish to be tape-recorded. The researcher will only take hand written notes.

_____ I agree to have quotations and ideas attributed to me in the researcher's thesis.

I understand that only the researcher will be the only person to have access to the notes and transcripts. All transcripts and notes will be destroyed upon completion of the research thesis (July 2004).

I am aware that the results of my interview will be revealed in the thesis.

I have also had the opportunity to have any questions that I may have answered by the researcher. My signature indicates that I agree to participate in the interview and to allow the researcher access to the data arising from my participation. I understand that the Carleton University Research Ethics Committee has approved this project.

If I have any questions about the project I may contact the researcher or her supervisors:

Researcher:

Mary-Ann Mattioli

maremattioli@hotmail.com

(613) 829-9224).

Supervisors:

Prof. Brettel Dawson & Prof. Dawn Moore

Department of Law

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1125 Colonel By Drive

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Any concerns I may have about the project and the conduct of the researcher are to be reported to the ethics committee.

Research Ethics Committee

511A Tory Building

Carleton University

1125 Colonel By Drive

Ottawa, ON K1S 5B6

Tel: 613-520-2517

E-mail: Leslie_MacDonald-Hicks@carleton.ca

PARTICIPANT'S SIGNATURE: _____

DATE: _____

Researcher's Signature: _____

Date: _____

Consent Form for Interested-DTC judges in Ontario

I _____ have been asked by Mary Ann Mattioli, an M.A. student in Legal Studies at Carleton University, to participate in a research study on judicial perceptions of Drug Treatment Courts. I understand that Ms. Mattioli is under the academic supervision of Professor Brettel Dawson and Professor Dawn Moore.

I understand that I will be participating in a semi-structured interview that will take approximately 45 minutes. The interview will focus on my role as a judge, my experiences with drug-using offenders in the traditional criminal justice system, my interest in DTCs, the differences between the traditional court versus the DTC, the perceived effectiveness of the criminal justice system and the DTC, and the challenges and concerns of the criminal justice system and the DTC.

I understand that the topic of this research project is controversial and my opinions might not be shared by others. As a result there could be some risk to me. I acknowledge that the researcher is NOT offering me anonymity. I am aware that my name and ideas will be revealed in the research thesis – which is a public document.

I understand that my participation is voluntary. I have the right to refuse to answer any questions or to end the interview at any time. If I chose to end the interview I will decide at that time if the researcher may use the information I have provided to that point.

_____ I agree to be tape-recorded. I understand that the tapes will be destroyed after being transcribed by the researcher.

_____ I do not wish to be tape-recorded. The researcher will only take hand written notes.

_____ I agree to have quotations and ideas attributed to me in the researcher's thesis.

I understand that only the researcher will be the only person to have access to the notes and transcripts. All transcripts and notes will be destroyed upon completion of the research thesis (July 2004).

I am aware that the results of my interview will be revealed in the thesis.

I have also had the opportunity to have any questions that I may have answered by the researcher. My signature indicates that I agree to participate in the interview and to allow the researcher access to the data arising from my participation. I understand that the Carleton University Research Ethics Committee has approved this project.

If I have any questions about the project I may contact the researcher or her supervisors:

Researcher:

Mary-Ann Mattioli

maremattioli@hotmail.com
(613) 829-9224).

Supervisors:

Prof. Brettel Dawson & Prof. Dawn Moore

Department of Law
Carleton University
1125 Colonel By Drive
Ottawa, ON K1S 5B6

Any concerns I may have about the project and the conduct of the researcher are to be reported to the ethics committee.

Research Ethics Committee

511A Tory Building

Carleton University

1125 Colonel By Drive

Ottawa, ON K1S 5B6

Tel: 613-520-2517

E-mail: Leslie_MacDonald-Hicks@carleton.ca

PARTICIPANT'S SIGNATURE: _____

DATE: _____

Researcher's Signature: _____

Date: _____

Letter of Information for DTC judges

Dear Justice _____,

My name is Mary-Ann Mattioli and I am a M.A candidate in Legal Studies at Carleton University, conducting research on judicial perceptions in response to dealing with drug-using defenders. This study is related to my thesis project. The research project is under the supervision of Professor Brettel Dawson and Professor Dawn Moore, Law Department, Carleton University.

With the emergence of specialized courts, specifically Drug Treatment Courts (DTC), I would like to evaluate your perceptions for this new way of delivering justice. I am proposing to conduct a semi-structured interview that will take approximately 1 hour at a location and time convenient to you.

The interview will focus on your role as a judge, the reasons for why you serve on a Drug Treatment Court, the differences between the traditional court versus the therapeutic, the effectiveness of the DTC, the challenges and concerns that you encounter in both courts, and your opinion of the most viable option for dealing with Canada's drug-using offenders.

Because there are a limited number of DTC judges in Canada, I cannot offer you anonymity. There may be some risk to you and some opinions you express may be controversial. Your identity and ideas will be revealed in my thesis – which is a public document.

Your participation is voluntary. You have the right to refuse to answer any questions and you may end the interview at any time. Should you end the interview you may decide at that time if I can use the information you have provided to that point or not. With your permission, I would like to tape record the interview. If this is not to your liking, I will take written notes only during the interview.

The information from the interview will be kept in a secure locked location off campus to which only I have access. Tapes will be destroyed once all the data is transcribed. The transcribed data and consent forms will be destroyed upon completion of the research project. Only I, the principal investigator, will have access to this information.

You can contact me anytime, Mary-Ann Mattioli (Principal Investigator, at maremattioli@hotmail.com or at (613) 829-9224). You can also contact Professor Brettel Dawson and Professor Dawn Moore (Thesis Supervisors, at 520-2600 ext. 3823). Should you have any ethical or other concerns about this study please contact the Carleton University Research Ethics Committee (613-520-2517, or e-mail the committee coordinator at Leslie_MacDonald-Hicks@carleton.ca).

Results of this study will be made public in my Masters thesis. If you are interested in the obtaining the results, please contact me for a summary of the findings.

Your time and interest in the study are greatly appreciated. If you have any other questions or concerns, please do not hesitate to contact me.

Thank you,

Mary-Ann Mattioli

Letter of Information for Non-DTC judges and the Interested-DTC in B.C.

Dear Justice _____,

My name is Mary-Ann Mattioli and I am a M.A candidate in Legal Studies at Carleton University, conducting research on judicial perceptions in response to dealing with drug-using offenders. This study is related to my thesis project. The research project is under the supervision of Professor Brettel Dawson and Professor Dawn Moore, Law Department, Carleton University.

With the emergence of specialized courts, specifically Drug Treatment Courts (DTC), I would like to evaluate your perceptions for this new way of delivering justice. I am proposing to conduct a semi-structured interview that will take approximately 45 minutes at a location and time convenient to you.

The interview will focus on your role as a judge, your experiences with drug-using offenders, your perceptions regarding the differences between the regular criminal courts versus the DTC, the effectiveness of the DTC, the challenges and concerns that you foresee, and your opinion of the most viable option for dealing with Canada's drug-using offenders.

Because of the nature of the topic and the small number of DTC operating in Canada, there may be some risk to you. Some opinions you express may be controversial therefore I am offering you anonymity. I will not identify you or your court in the thesis. You will not be directly quoted and the information you and others provide will only be discussed in an aggregated form.

Your participation is voluntary. You have the right to refuse to answer any questions and you may end the interview at any time. Should you end the interview you may decide at that time if I can use the information you have provided to that point or not. With your permission, I would like to tape record the interview. If this is not to your liking, I will take written notes only during the interview.

The information from the interview will be kept in a secure locked location off campus to which only I have access. Tapes will be destroyed once all the data is transcribed. The transcribed data and consent forms will be destroyed upon completion of the research project. Only I, the principal investigator, will have access to this information.

You can contact me anytime, Mary-Ann Mattioli (Principal Investigator, at maremattioli@hotmail.com or at (613) 829-9224). You can also contact Professor Brettel Dawson and Professor Dawn Moore (Thesis Supervisors, at 520-2600 ext. 3823). Should you have any ethical or other concerns about this study please contact the Carleton University Research Ethics Committee (613-520-2517, or e-mail the committee coordinator at Leslie_MacDonald-Hicks@carleton.ca).

Results of this study will be made public in my Masters thesis. If you are interested in obtaining the results, please contact me for a summary of the findings.

Your time and interest in this study are greatly appreciated. If you have any other questions or concerns, please do not hesitate to contact me.

Thank you,

Mary-Ann Mattioli

Letter of Information for Interested-DTC judges in Ontario

Dear Justice _____,

My name is Mary-Ann Mattioli and I am a M.A candidate in Legal Studies at Carleton University, conducting research on judicial perceptions in response to dealing with drug-using defenders. This study is related to my thesis project. The research project is under the supervision of Professor Brettel Dawson and Professor Dawn Moore, Law Department, Carleton University.

With the emergence of specialized courts, specifically Drug Treatment Courts (DTC), I would like to evaluate your perceptions for this new way of delivering justice. I am proposing to conduct a semi-structured interview that will take approximately 45 minutes at a location and time convenient to you.

The interview will focus on your role as a judge, the reasons for why you are interested in serving on a Drug Treatment Court, the differences between the traditional court versus the DTC, the perceived effectiveness of the DTC, the challenges and concerns that you encounter in the mainstream criminal courts, and your opinion of the most viable option for dealing with Canada's drug-using offenders.

Because your interest in an Ottawa DTC has been profiled in the local newspaper, I cannot offer you anonymity. There may be some risk to you and some opinions you express may be controversial. Your identity and ideas will be revealed in my thesis – which is a public document.

Your participation is voluntary. You have the right to refuse to answer any questions and you may end the interview at any time. Should you end the interview you may decide at that time if I can use the information you have provided to that point or not. With your permission, I would like to tape record the interview. If this is not to your liking, I will take written notes only during the interview.

The information from the interview will be kept in a secure locked location off campus to which only I have access. Tapes will be destroyed once all the data is transcribed. The transcribed data and consent forms will be destroyed upon completion of the research project. Only I, the principal investigator, will have access to this information.

You can contact me anytime, Mary-Ann Mattioli (Principal Investigator, at maremattioli@hotmail.com or at (613) 829-9224). You can also contact Professor Brettel Dawson and Professor Dawn Moore (Thesis Supervisors, at 520-2600 ext. 3823). Should you have any ethical or other concerns about this study please contact the Carleton University Research Ethics Committee (613-520-2517, or e-mail the committee coordinator at Leslie_MacDonald-Hicks@carleton.ca).

Results of this study will be made public in my Masters thesis. If you are interested in the obtaining the results, please contact me for a summary of the findings.

Your time and interest in the study are greatly appreciated. If you have any other questions or concerns, please do not hesitate to contact me.

Thank you,

Mary-Ann Mattioli

Appendix C:

Questions for Non-DTC Judges

Questions on the criminal justice system:

What is the role of a judge in the criminal justice system?

What is the goal or goals of the criminal justice system?

Do you think that drug use is a serious problem in Canada?

What percentage of your caseload involves drug-addicted offenders?

How do you deal, in the mainstream criminal justice system, with drug offenders and drug-related crime? Typically, what are the decisions/sentences that the criminal courts decide for these cases?

Is this current approach in dealing with drug-addicted offenders effective in meeting the goals of the criminal justice system?

Does the current approach in the criminal justice system have any impact on the drug addiction problem in our society?

Does the criminal justice system bare any responsibility in alleviating the drug addiction problem? Do you think the courts should deal with this issue?

Have your expectations about the nature of drug abuse, since you first started serving on a court, changed? Has your perception of drug abuse changed over time?

Do you view drug addiction as a crime or a disease or both?

Questions on DTCs:

What do you know about DTCs?

What are the conditions that have created DTCs in Canada?

Do you think that DTCs are an effective court in rehabilitating the drug-using offender and reducing recidivism rates?

Do you think it is more effective than the current criminal Justice System?

Do you have any concerns on the DTC?

Do you think there is a need for DTCs in Canada?

How would you describe the role of a judge in a DTC?

Would you be interested in being involved in the DTC?

So, would you say that there is a difference in the role of a judge in the DTC over that in a “regular” criminal court?

What do you think about these differences and the departure from the traditional criminal court role? Do these differences threaten/challenge the traditional philosophy of the impartial, neutral and independent judge?

Do you think that the criminal justice system should embrace the non-traditional roles, the collaborative nature and non-adversarial process of DTC?

What challenges do you face as a judge with drug-using offenders? Can the DTC deal with these problems?

Do you think that DTCs are a viable alternative in responding to Canada’s drug problem?

What are your views on other problem solving courts (Domestic Violence Courts, Mental Health Courts, etc.)? Do you see them as being effective?

Appendix D:

Questions for Interested-DTC Judges

Questions on the criminal justice system:

What is the role of a judge in the criminal justice system?

What is the goal or goals of the criminal justice system?

Do you think that drug use is a serious problem in Canada?

What percentage of your caseload involves drug-addicted offenders?

How do you deal, in the regular criminal justice system, with drug offenders and drug-related crime? Typically, what are the decisions/sentences that the criminal courts decide for these cases?

Is this current approach in dealing with drug-addicted offenders effective in meeting the goals of the criminal justice system?

Does the current approach in the criminal justice system have any impact on the drug addiction problem in our society?

Does the criminal justice system bare any responsibility in alleviating the drug addiction problem? Do you think the courts should deal with this issue?

Have your expectations about the nature of drug abuse, since you first started serving on a court, changed? Has your perception of drug abuse changed over time?

Do you view drug addiction as a crime or a disease or both?

Questions on DTCs:

What are the conditions that have created DTCs in Canada?

Why do you think that DTCs are an effective court in rehabilitating the drug-using offender and reducing recidivism rates?

How and why are you involved/interested in DTCs?

Do you think DTCs are more effective than the current criminal Justice System?

Do you think there is a need for DTCs in Canada?

How does a DTC define/measure success?

Can you explain the role of a DTC judge? What character traits must a DTC judge have and WHY? Is there some sort of ideal judge?

What differences exist in being a judge of a traditional court and a judge of a DTC?

Do these differences threaten/challenge the role of the common law judge - impartial, neutral and independent judge? Does it compromise deep-seated legal values?

Why are you interested in becoming a DTC judge?

How do you respond to the criticisms (ie. lack of the formal adversarial roles, due process and individual rights jeopardized, lack of research, etc.) of the DTC?

Why do you think that the criminal justice system should embrace the non-traditional roles, the collaborative nature and non-adversarial process of DTCs?

Do you have any concerns for the DTCs?

What challenges do YOU face as a judge with drug-using offenders? Can the DTCs deal with these problems?

What challenges do DTCs face?

Do you think that DTCs are a viable alternative in responding to Canada's drug problem?

Appendix E:

Questions for DTC Judges

Questions on the criminal justice system:

What is the role of a judge in the criminal justice system?

What is the goal or goals of the criminal justice system?

Do you think that drug use is a serious problem in Canada?

Before presiding over a DTC, what percentage of your caseload involved drug-addicted offenders?

How did you deal, in the regular criminal justice system, with drug offenders and drug-related crime? Typically, what were the decisions/sentences that the criminal courts decide for these cases?

Was this current approach in dealing with drug-addicted offenders effective in meeting the goals of the criminal justice system?

Do you think the approach in the criminal justice system has any impact on the drug addiction problem in our society?

Are you satisfied with the way the criminal justice system deals with drug-using offenders?

Does the criminal justice system bare any responsibility in alleviating the drug addiction problem? Do you think the courts should deal with this issue?

Have your expectations about the nature of drug abuse, since you first started serving on a court, changed? Has your perception of drug abuse changed over time?

Do you view drug addiction as a crime or a disease or both?

Questions on DTCs:

How did the Toronto/Vancouver DTC begin?

Why did you want to become a DTC judge and how did you get involved?

What model does the Toronto/Vancouver DTC use?

What are the goals of the DTC?

Who is eligible for the DTC?

What are the conditions that have created DTCs in Canada?

Do you think that DTCs are an effective court in rehabilitating the drug-using offender and reducing recidivism rates?

Do you think it is more effective than the current criminal justice system?

When will you ultimately decide when DTCs are working or not? How do you know that DTCs are working?

Can you explain the role of a DTC judge?

What differences exist in being a judge of a traditional court and a judge of a DTC? Do these differences threaten/challenge the role of the common law judge - impartial, neutral and independent judge? Does it compromise deep-seated legal values?

Do you receive any type of training?

What sort of criticisms/concerns/challenges do DTCs receive and how do you respond to these criticisms?

Are you more satisfied with your role as a DTC judge?

What challenges do you face as a DTC judge?

Will your DTC take back re-offending graduates?

Has your perception of drug abuse changed over time?

Do you think that DTCs are a viable alternative in responding to Canada's drug problem?

What are your views on other problem solving courts (Domestic Violence Courts, Mental Health Courts, etc.)?