



Judging for the 21st Century: A Problem-solving Approach

National Judicial Institute

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Table of Contents

Foreword	1
1. Introduction: Viewing the law through a therapeutic lens	3
About this handbook	4
2. Problem-solving courts in Canada	6
3. Taking TJ to scale	8
People before process, outcome before output:	
The psychology of procedural justice	8
A. Enhancing personal skills	9
Empathy	10
Respect	11
Active listening	13
A positive focus	13
Non-coercion	14
Non-paternalism	15
Clarity	16
B. Crafting behavioural contracts and relapse-prevention plans	19
Involve the offender in crafting the plan	20
Identify and incorporate high-risk situations	20
Require offenders to take responsibility for their actions	20
Set specific goals	21
Set specific rewards and sanctions	22
Encourage participation of family and community members	22
Treat the individual with dignity and respect	23
Schedule regular review hearings or judicial supervision	23
C. Developing a non-adversarial, team approach	26
Partnering with community resources	27
D. Sentencing therapeutically	32
Canadian sentencing principles	32
Guidelines for problem-solving sentencing	33
Restorative justice	35
Making informed decisions: Using pre-sentence, police, and other reports	37





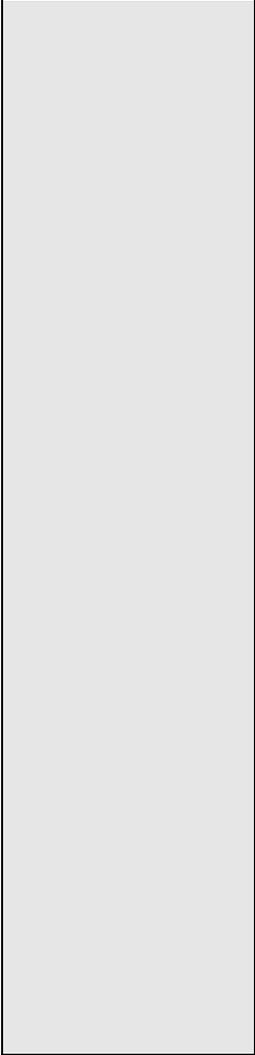
4. Practising TJ in smaller regions:	
Challenges and opportunities	40
Fewer judges vs. increased autonomy	40
Broader jurisdiction vs. increased understanding of the community	41
Fewer treatment resources vs. increased community support and buy-in	41
5. Resources for further research	43
Online resources: Therapeutic jurisprudence	43
Online resources: Restorative justice	45
Canadian community and social service referral services	46
Guidelines for assessing violence and propensity to reoffend	47
Books	47
6. Sources & notes	48

Foreword

The notion that judges should apply a problem-solving approach to the matters that come before them is not new. Mental health practitioners, for example, have long contended that mental illness is a health issue rather than a criminal law matter, and that the criminal justice system is ill equipped to deal with people who are mentally ill. In the 1980s, it was the turn of the addiction community to argue that incarceration alone did little to break the cycle of drug use and crime for substance-addicted offenders. More recently, agencies and practitioners who confront the daily realities of domestic violence have made the case that focusing only on guilt or innocence does little to stop the cycle of abuse or protect survivors of violence from further assault. Members of Aboriginal communities – over-represented in our courts and in our jails – have advocated for a justice system that both considers the complex social, economic, and cultural factors that cause Aboriginal people to be in conflict with the law and that takes a healing approach to sentencing.

All the above initiatives have resulted in the establishment of courts and courtrooms dedicated to addressing some of the root problems – mental health issues, addiction, limited anger- and risk-management skills, poverty, and social marginalization – behind criminal activity. Judges were often in the forefront of pressing for this paradigm shift, arguing that a new approach was long overdue for dealing with the multifaceted social and legal issues they struggled with each day in court. For many judges, the development of a problem-solving approach has permitted them to craft dispositions that reduce the likelihood of parties appearing in court in the future. By considering the issues through a problem-solving lens, judges have been able to devise people-oriented solutions that are acceptable to both litigants and the community.

My own interest in a problem-solving approach started with the Toronto Drug Treatment Court (DTC). Before the court started, I sat as a judge at the Old City Hall courthouse in Toronto, where wave after wave of sad and homeless persons paraded before me, many with severe drug addictions. As part of my sentences, I routinely imposed counselling for substance abuse as a component of a probation order. Invariably, weeks or months later, I would see the same offenders back before me on new charges. When I asked them about the effectiveness of the drug counselling they had received, I would be met with blank stares and comments to the effect that after serving sentence, they had received no counselling. I grew more and more frustrated with the recycling of criminally addicted offenders through our courts and jails and began looking for alternatives. The DTC model was the alternative that seemed to hold the most promise.



During the years I have presided in that court, I have become increasingly aware that the problem-solving approach of DTCs could be adapted to other courtroom situations. While criminal court matters quickly came to mind, I was particularly interested in employing the problem-solving approach in broader contexts: for example, to the trial judge presiding over a docket of civil and/or family matters. How could she apply the skills of problem-solving and therapeutic jurisprudence to her daily experience in the courtroom? How could a judge apply these skills in an appellate court, or at a pre-trial hearing?

This handbook is the culmination of a long process that started by attempting to answer this question. It has involved the collaboration of many people, including judges, the staff at the National Judicial Institute, and writer Susan Goldberg. I hope and anticipate that my colleagues will find this handbook useful and frequently choose to access its pages and consider its suggestions and advice. In addition, I would expect that there will be many readers who are not judges, who will find the concepts and ideas discussed in this handbook useful in their daily interactions with the court system. By understanding why judges are employing a problem-solving lens to arrive at their decisions, I would anticipate that these practitioners will be more likely to work with the judges in creating a more people-oriented system of justice.

Paul Bentley
Justice
Ontario Court of Justice
Toronto

November 2004

1. Introduction: Viewing the law through a therapeutic lens

Over the past few decades, the law's capacity to heal or to harm has been studied extensively as part of the evolving field of **therapeutic jurisprudence (TJ)**. This theoretical framework asks that we seek to minimize the law's anti-therapeutic consequences and maximize its therapeutic value — without sacrificing due process or other judicial and legal values.¹

TJ has been described as the study of the law as a healing agent; a lens that focuses on the law's impact on emotional and psychological wellbeing, through which we can view not only the law but the role and behaviour of legal actors. It proposes that we apply the tools of the behavioural sciences to the law in an effort to create tangible, positive change; to promote the well-being of *all* court actors; and to make the justice system more relevant and effective for the people involved in it and their wider communities.

A therapeutic or problem-solving approach to justice addresses the “complex, often overlapping, and sometimes intractable social and personal issues”² — such as addiction, poverty, impaired emotional or anger-management skills, low literacy, mental illness, or abuse — that underlie human causes of crime and criminal behaviour. By focusing on the causes of criminal behaviour, a TJ approach addresses the “revolving door” system that simply recycles repeat offenders through the criminal justice system. Not surprisingly, then, the most common application of TJ to date has been in the area of criminal law, particularly in courts with a dedicated focus on specific problems such as drug addiction, mental health, and domestic violence.

But a problem-solving approach has — as this handbook will discuss — applications well beyond a few specific courtrooms within the criminal justice system. It aims to make all courts and their decisions relevant to all people who use them and are affected by those decisions, whether in family, appeal, civil, federal, or small claims court settings, at an immigration hearing, or other legal and judicial fora.

Therapeutic jurisprudence does not ask judges to be therapists or social workers. It does not ask judges to cure mental illness or addiction, to counsel court participants, or to single-handedly solve systemic social problems. It does, however, ask judges to be aware that such problems do exist, to be alive to their signs and symptoms and to consider the effects they may have on people in court and on the activities that have brought them to court, and to think about how to address these situations so as to maximize therapeutic outcomes.³

I've obtained a lot of new skills in looking past the legal issues in front of me to the human beings I'm dealing with and understanding the broader human issues. ... I had been feeling that we were warehousing people and not much was changing, ...that it's a system that just rotates human beings through it, and it's extremely difficult for everyone involved, and yet the outcome is not very effective. ...To ensure an approach that can solve the underlying problems is a far more personally satisfying way to do my work and it achieves the objective of reducing recidivism in a more reliable fashion. ...[A problem-solving approach] provides hope for changes and positive outcome. ... I don't know of a better justice system than ours, but this adds something of great value to an already good system.⁴

—Judge Sharon Van de Veen, Provincial Court of Alberta

Therapeutic jurisprudence asks all judges to recognize they can be important agents of change, and to acknowledge that their words, actions, and demeanour will invariably have an impact on the people who come before them in the courtroom. Judges who recognize their potential impact, and who consciously strive to develop the interpersonal skills and understanding that are the foundation of therapeutic judging, are likely to become better, more satisfied judges, with improved outcomes.

About this handbook

This handbook provides Canadian judges with an introduction to TJ principles and practices, and with some practical suggestions and guidelines on how to incorporate those principles and practices into their courtrooms. Its larger aim is to help judges run their courtrooms more effectively, creatively, and successfully.

Section 2 provides a brief background on dedicated drug-treatment, domestic violence, mental health, and Aboriginal courts in Canada, and other TJ initiatives.

Section 3 provides judges in courts of general jurisdiction with a set of guidelines for understanding therapeutic judging and suggestions for incorporating problem-solving principles into their courtrooms. This section is organized according to four broad areas

- enhancing interpersonal skills
- crafting behavioural contracts and relapse-prevention plans
- developing a non-adversarial, team approach, and
- sentencing therapeutically.

Section 4 explores some of the challenges and opportunities judges and courts in smaller, rural, and remote regions face when thinking about incorporating TJ initiatives, and provides suggestions for adapting TJ principles to these regions.

Section 5 provides judges and interested parties with resources and references for information on TJ and support on implementing therapeutic initiatives in the courtroom.

Comparing traditional and therapeutic court procedures & officers⁵

Traditional process	TJ process
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim- or case-oriented	People-oriented
Rights-based	Interest- or needs-based
Emphasis on adjudication	Emphasis on post-adjudication and alternative dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge as arbiter	Judge as coach
Backward-looking	Forward-looking
Precedent-based	Planning-based
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective
Success measured by compliance	Success measured by remediation of underlying problem
Traditional judicial officers	TJ judicial officers
Dispassionate – betray no interest in the litigant as a person, only as a litigant in a legal proceeding	Interested – particularly in the litigant’s welfare
Impersonal – as if the litigant is nothing but a “party” in a “case”	Personal – giving relevance to a litigant’s personal circumstances – making direct enquiries of the litigant
Decisions made in judicial language and form in order to satisfy legal requirements, particularly with a view to review by appellate court	Decisions made in language understood by the parties
Limited communication	Open communication – ensuring stories are heard
Communicate only with counsel	Direct dialogue between judge and parties
Impervious to nuance	Perceptive to nuance; sensitive to special needs (e.g., limited language skills, emotional disturbance, cultural issues)
Formal	Less formal – ensures the comfort of all parties and creates a sense of inclusiveness
Autonomous decision making	Team approach to decision making
Omnipotent	Empowering others
Punitive	Positive/affirming
Never make “deals” with parties	Uses sanctions and rewards
Inert – doesn’t tell counsel how to run case, doesn’t make suggestions	Proactive – gets directly involved in problem solving
Refers only to legal texts, precedents and what counsel puts forward for information	Refers to other disciplines and experts for information

2. Problem-solving courts in Canada

Some of the most visible examples of therapeutic jurisprudence and problem-solving judging in Canada can be found in courts that focus on specific issues, such as drug addiction. In these courtrooms, “therapeutic jurisprudence arguably provides the underlying legal theory.”⁶ Such courts in Canada include

- **drug treatment courts (DTCs)** including those in Toronto, Vancouver, and St. John, which opt for a program of treatment for addiction, judicial supervision, and life-skills training over incarceration
- **mental health courts**, which expedite assessment of mental illness, are sensitive to the potential impact of the court process on the mentally ill, and, where deemed appropriate, opt for treatment of mental health conditions over punitive measures
- **Aboriginal courts**, including Toronto’s Gladue Court, or the Tsuu T’ina Peacemaking Initiative in Alberta, which take into account the circumstances and cultural background of Aboriginal court participants, provide a courtroom environment sensitive to Aboriginal culture, and consider alternatives to incarceration for Aboriginal offenders, and
- **domestic violence (DV)** courts, including the DV court in Calgary, which take into account the complexities of violence between intimates, provide rapid processing of DV cases, support victims throughout the trial process, and monitor offenders closely to ensure compliance with court orders for treatment and terms of contact with survivors of violence.

Problem-solving initiatives can also encompass restorative justice (RJ) programs (see page 36 for information on some Canadian RJ initiatives); re-entry courts for offenders newly released from prison; integrated family courts that deal with all aspects of family law, including DV, divorce, child custody and abuse, and youth cases; and initiatives, like the Intellectual Disability Diversion Programme in Perth, Australia, that aim to divert people with intellectual disabilities from the justice system.

In general, these initiatives share a number of common features

- an underlying premise that courts should do more than simply process cases. Their goal is not simply to clear cases from a docket, but to make a positive, tangible difference in the lives of victims, defendants, and neighbourhoods/communities, including
 - reductions in recidivism
 - increased sobriety for addicts
 - increased safety for survivors of domestic violence and decreased violent behaviour from their partners

- increased compliance with treatment programs and rehabilitation for those with mental health disorders
- increased alternatives to incarceration for all populations, but especially for those, such as Aboriginal people, who are over-represented in prisons⁷
- a non-adversarial, team-based approach
- partnership and collaboration with treatment and social service agencies within communities to address the underlying causes of criminal behaviour
- a focus on a collaborative, rather than an adversarial, approach
- a focus on rehabilitation
- ongoing, hands-on judicial interaction with participants, and
- ongoing judicial monitoring of offenders, generally with appropriate rewards and sanctions for compliance and non-compliance.⁸

TJ on appeal

Therapeutic jurisprudence has applications in any court setting – including appeals court. When appellate courts share their reasoning, they have the opportunity to minimize damage and engender therapeutic consequences by

- providing the appellant with the assurance that his or her story was heard and the salient facts considered by the court
- helping the criminal offender understand the court’s decision that he or she has violated the law, thereby increasing the potential for successful rehabilitation and reintegration into the community
- helping parties in civil disputes get past the bad feelings such disputes inevitably inspire and that lawsuits frequently exacerbate, and
- enabling parties who have experienced the physical or emotional trauma of, for example, accidents, intentional torts, or divorce to begin the healing process.⁹

Nathalie Des Rosiers, dean of civil law of the University of Ottawa and former president of the Law Commission of Canada, has written persuasively about the use of language in written decisions. Her examination of the *Quebec Secession Reference Case*,¹⁰ where the Canadian federal government asked the Supreme Court to rule on the constitutionality of a unilateral Quebec secession, compares and evaluates the way in which language that reflects the parties’ positions better serves the concept of justice.¹¹ The court’s judgment – while it did not resolve the issue – was therapeutic for a variety of reasons which Des Rosiers enumerates as follows.

- The Court emphasized – as problem-solving courts do – the future over the past by valuing the continuity of the relationship between Quebec and the rest of Canada.
- The Court acknowledged the complexity of the issue in its reasoning and the tone of the narration was sympathetic to Quebec’s interests, using the province’s own narrative and history to acknowledge and celebrate its existence.
- The decision framed the discourse in a way that squarely addressed the potential for change.
- The decision allowed “for the debate without shutting up one participant.”¹²

3. Taking TJ to scale

"It is unclear that legal training is the best preparation for judging in specialized contexts."¹³

–David Rottman, associate director of research, National Center for State Courts (U.S.A)

The prevailing litigant might look back upon a recent court experience and say, 'Yes, I won the case, but I don't know if it was worth it. It cost me too much, the judge wouldn't let me speak, I didn't understand what the judge was talking about, I was treated like dirt. I hope I never have to go through that again.' On the other hand, an unsuccessful litigant can leave the courtroom saying, 'I lost my case but I had my day in court, I was treated fairly, I can move on.'¹⁴

–Judge Roger K. Warren

While dedicated problem-solving courts, such as drug-treatment courts, may be the most obvious examples of therapeutic jurisprudence in action, TJ has application well beyond their walls. Indeed, it is important to ensure that TJ is not considered applicable or useful *only* in these settings; as one scholar has noted, somewhat ominously, "one of the defining features of ... specialized courts is the ease with which they can be dismantled."¹⁵ Further, relegating TJ only to certain courtrooms places judges and courts in smaller and/more remote regions, and the communities they serve, at a distinct disadvantage.¹⁶

Judges in all courtrooms have daily opportunities to practise therapeutically. Judges can interact with individuals in ways that will induce hope and motivate them to consider availing themselves of treatment programs. Judges can use techniques that will encourage offenders to confront and solve their problems, to comply with rehabilitative programs, and to develop law-abiding coping skills.

This section provides judges with concrete, practical suggestions and tools for functioning therapeutically in their courtrooms.

People before process, outcome before output: The psychology of procedural justice

Therapeutic outcomes – that is, court decisions that promote healing – rely heavily on court participants' sense of a just and relevant judicial process. The psychology of procedural justice, in fact, suggests that process can be more important than outcome when it comes to people's satisfaction with the proceedings and their willingness to comply with the court's decisions.¹⁷

Research shows that feeling fairly treated and being given a sense of voice play a key role in people's respect for and trust and confidence in the court, and their compliance with its orders.¹⁸ In a study of civil commitment hearings for mental patients, for example, a significant relationship was observed between caregivers' satisfaction with the hearing and their willingness to pledge continuing support to the patient and – to again use the civil commitment process, if necessary. Satisfaction was measured not only by the outcome of the hearing, but by procedural characteristics, such as participation in the process, dignity extended, and trust in the judge's genuine concern.¹⁹

What constitutes “a fair, relevant judicial process”? For court participants, it can mean many things

- being treated with respect and dignity
- having a sense of voice and opportunity to tell their story
- being treated as individuals, rather than numbers on a docket
- being treated fairly and consistently, and
- being able to understand and play an active role in the proceedings.

The following sections outline how problem-solving judges can enhance court participants’ sense of procedural justice – and, therefore, maximize therapeutic outcomes – by

- enhancing interpersonal skills
- crafting behavioural contracts and relapse-prevention plans
- developing a non-adversarial, team approach, and
- sentencing therapeutically.

A. Enhancing interpersonal skills

Direct interaction between a judge and court participants is a foundation of problem-solving judging, and a prerequisite for effective behaviour modification and for change. When judges speak directly to court participants – and, in turn, listen to them – they can inspire trust, motivate change, give participants a sense of voice and dignity, enhance progress and healing, and make court procedures more relevant to participants’ lives by bringing to light their needs and “laying the groundwork for positive solutions.”²¹

Of course, the quality and content of a judge’s interaction with the people who appear before him or her in a court is also important. To be meaningful – and therapeutic – a judge’s interactions with court participants must be characterized by

- empathy
- respect
- active listening
- a positive focus
- non-coercion
- non-paternalism, and
- clarity.

The Criminal Code states that before imposing sentence I'm required to ask the offender if he or she has anything to say. That conversation is now different after my experience in the Toronto Drug Treatment Court. I ask more questions and get more information. If the offender has a gap in his or her record, I ask about that. 'Why were you clean and out of trouble for five years? What do you need to do to get back to that state now?' Or, I look at the offences on the record: if there is a telltale pattern of addiction, I will wonder out loud if there's a problem with drugs or alcohol. Often, the offender will say there is.²⁰

–Justice Peter Hryn,
Ontario Court of
Justice

One of the things I will do is talk directly to [the defendant]. I'll ask him about his psychological assessment: 'How did you feel about it? Did you have a good exchange? Have you read the assessment? Are there any facts you feel it's gotten wrong? Do you think [the psychologist] missed something that should be there?' Talking to him about it gives him ownership of the report: it becomes his.²²

–Judge Heino Lilles, Territorial Court, Whitehorse, Yukon Territory

Empathy

Often, people can resist changes in the criminal justice system when they're thinking in terms of 'other': that's somebody out there that this is going to happen to. It's not me, it's not mine. Taking hold of the fact that you are dealing with human beings who are often very damaged themselves, and thinking in terms of human beings you might care about, really ups the humanity quotient. We start to let go of the rigidity of why it should be punitive rather than rehabilitative.²³

–Judge Jocelyn Palmer, Provincial Court of British Columbia

Empathy is the quality of relating to other people's feelings, perspectives, and world view. By definition, it involves finding some common ground upon which to establish a relationship with another person. Judges can establish empathy by

- asking questions of court participants that indicate an interest in participants' position
- relating events to court participants' lives. For example, in a domestic violence context, instead of talking about a "cycle of violence" or "intergenerational violence," a judge can ask a defendant if he or she has children. "I regularly tell offenders that their children will model their behaviour, and I'm sure they don't want to see that happen," notes one judge in a DV court. "You see fear in their eyes that their sons might grow up to hit their wives and their daughters will let themselves be hit. It's a very personal conversation, and I personalize it whenever I can: 'I see you have a five- or six-year-old. I wonder if you've realized what will happen here.'"²⁴
- acknowledging not only the facts of a case, but people's emotional responses to court events (e.g., "I can see that this situation upsets you/makes you angry/is frustrating.")
- acknowledging their own emotional responses to cases and court events (e.g., "I am confused by what happened here." or "It makes me quite sad to see how things have turned out.")
- conveying a sense of caring, compassion, and respect for all court participants
- acting in a trustworthy, credible manner (e.g., treating all court participants fairly and consistently, respecting due process rights), and
- being aware of their own biases and predetermined ideas.

Respect

A key component of a therapeutic approach is judicial respect for the dignity of all people in a courtroom. Respect is dynamic: a judge's respect for a defendant can in turn generate that defendant's respect for the judge and courtroom. This mutual respect can be the foundation on which to create a judge-defendant relationship that in turn can positively influence a defendant's progress and outcomes.²⁵

To foster mutual respect in their courtrooms, judges can:

- speak slowly, clearly and loud enough to be heard by everyone (not only lawyers)
- refer to defendants as "sir" or "ma'am," or by title and name (e.g., Mr. Smith; Ms. Jones), rather than by first name, the word "defendant," or by case number
- pronounce names correctly; when in doubt, ask court participants for guidance in pronouncing names
- speak in words and tones that convey concern for the defendant as a person, "without pity, disdain, or obvious condescension"²⁶
- refrain from rushing or interrupting court participants
- refrain from sarcasm²⁷
- have high expectations: hold defendants accountable for their words and actions; expect them to be on time; refuse to accept excuses, inconsistent information, or "cognitive distortions" (see page 20)
- treat all participants consistently and fairly, allowing all defendants and observers to see that they are treated "the same as everybody else"
- pay attention to body language: sit up straight; make and maintain eye contact with defendants²⁸ while they speak and while speaking to them (rather than looking down at a stack of papers or only at lawyers)
- encourage dialogue rather than making speeches.²⁹

To do something therapeutic, we should never lose our sense of awe. As Monet said, 'I paint as if I was blind and saw for the first time.' We must act as if we see things for the first time. If we become blasé, how can we help someone? We have to realize that justice is to law what healing is to medicine. If someone is misunderstood or not heard, it manifests itself as injustice, which is, in fact, a form of illness. Both justice and medicine require a return to harmony. I have often said to lawyers and witnesses in a first instance tribunal setting, 'I will give you the chance to begin again and to tell your whole story.' If you enable someone to tell his tale, then you show that you truly care to hear it.³⁰

—Justice Michel Shore,
Federal Court of
Canada

Taking TJ into all courtrooms: Transferable practices and barriers

A recent study conducted by the New York-based Center for Court Innovation surveyed New York and California judges who had sat in drug-treatment, domestic-violence, and other dedicated problem-solving courtrooms *and* in courts of general jurisdiction. The judges identified the following five key “collaborative justice” or “problem-solving” practices as most easily transferable from dedicated problem-solving courtrooms to courts of general jurisdiction.

1. **A proactive, problem-solving orientation of the judge**, which leads judges to seek creative solutions to problems and to treat court participants respectfully and as individuals worthy of respect and attention.
2. **Direct interaction with the defendant/litigant**, which is a prerequisite for effective behaviour modification and enables judges to motivate and influence defendants to make progress in treatment, while identifying parties’ crucial needs and laying the groundwork for positive solutions.
3. **Ongoing judicial supervision**, such as having defendants report back to court for treatment updates and judicial interaction. Ongoing supervision keeps judges informed and offenders accountable, and allows judges to tailor sentencing provisions according to an offender’s progress or relapse.
4. **Integration of social services**, especially for defendants with addiction, mental illness, or vocational/educational needs.
5. **A team-based, non-adversarial approach** with lawyers, social service agencies, and other court actors.

The most common **barriers** to transferring collaborative or therapeutic practices to conventional courtrooms included

- **limited resources**, including time to provide individualized attention to each case, ongoing judicial supervision, and direct interaction with defendants; and lack of additional staff to help connect defendants with appropriate social service programs and provide the court with detailed progress reports
- **institutional pressures** to clear dockets and “move cases along”
- **chronic under-funding** that has rendered probation far less effective than desired
- **a “traditional” judicial philosophy** that views the judge as a decider of cases, not a solver of problems
- **a lack of judicial experience or training in problem-solving justice**, which could discourage judges from attempting to practise therapeutically
- **lawyer unwillingness** toward or lack of education about a collaborative, TJ approach
- **legal and constitutional constraints** on what can or should be done in a conventional court (especially adult criminal courts)
- **public-safety concerns** with regard to violent defendants.³¹

Active listening

Active listening – to all court participants – is a crucial element of therapeutic judging. By actively listening to people in their courtrooms, judges give participants a sense of voice and the opportunity to tell their stories. A judge’s active listening enhances participants’ sense of fair procedure and thus fosters the court’s credibility and relevance, making it more likely that people will respect court decisions and orders.

Judges listen actively when they

- give participants the opportunity to speak; listen attentively; refrain from rushing speakers; and seldom interrupt
- ask clarifying questions and make comments that acknowledge they want to know about and understand a person’s position
- refer to that person’s position in their reasons for judgment³²
- acknowledge and validate the victim’s experience when this is communicated to the court³³
- notice whether the individual uses active or passive language (“The speed limit was exceeded” rather than “I was speeding”; “Someone gave me some heroin” not “I took some heroin” as an indicator of an individual’s acceptance of his/her responsibility for his/her own actions) - (see page 20 for more on the process of “cognitive distortion”)
- read verbal and non-verbal cues, such facial expressions, body language, and/or tone of voice, that could signal a participant’s discomfort, confusion, or emotional state
- maintain body language that indicates they are paying attention: eye contact, up-right posture, focusing on the speaker, and
- ask court participants if they have any questions.

A positive focus: Praise and constructive criticism

Judicial approval carries considerable weight with ex-offenders intent on establishing the authenticity of their reform. Seeing their accomplishment reflected in the words and actions of others, especially authority figures like judges, reinforces their pro-social behaviour.³⁵

It comes down to three words: Listen. Listen. Listen. ... [Author] Eudora Welty used to say, 'Listen, and learn to see.' I would say, 'Listen, learn to see, and only then will you find a voice.' We shouldn't speak before we've listened and learned to see.³⁴

–Justice Michel Shore,
Federal Court of
Canada

My practice is to talk to people very directly when I'm imposing sentence and to acknowledge the things I think they should be proud of. I make it very clear that this work is the basis on which I'm allowing a conditional sentence order. For example, one woman had managed to get herself off heroin and methadone while in custody. She was extremely motivated and I granted a conditional sentence order on that basis.³⁶

–Judge Jocelyn Palmer, Provincial Court of British Columbia

Praise — in the form of words, formal graduation ceremonies, and applause — is a commonplace and effective strategy for drug-treatment and other dedicated problem-solving courts and judges.³⁷ In drug-treatment courts, **graduation ceremonies** are standard practice. Such ceremonies, which acknowledge a former offender's progress may themselves contribute to that progress through the reinforcing nature of praise.³⁸

While formal graduation ceremonies may not be easily incorporated into conventional courtrooms, judges can take advantage of the opportunities for praise afforded by regular **judicial supervision** or **court-ordered review** (see page 23).

As important as praise is, it is equally important to address court participants' negative and anti-social behaviour. Confronting an offender about such behaviours also affords therapeutic possibilities, and judges can maximize these opportunities by employing the following tactics.

- **Refraining from condemnation:** Judges can direct their disapproval at a person's criminal acts, not the person him or herself. Judges can confront anti-social and criminal behaviour without condemning a person.
- **Contrasting an individual's anti-social behaviour with their good qualities and their long-term goals:** "Look carefully at the report and relate the good parts of that report, and then compare that to why they're there. You can show them that they can get to the other side. Underline to them they've done well in certain parts of their life, but not this one."³⁹
- **Expressing continued hope and faith in a person's ability to become a law-abiding citizen.**
- **Focusing on the future:** Instead of dwelling on past wrongs and criminal acts, judges can focus on a defendant's future and the potential it holds for pro-social, law-abiding, and healthy behaviour.

Non-coercion

A person is more likely to succeed when she or he is internally, rather than externally, motivated. Individuals in court who perceive that their choices are non-coerced tend to function more effectively and with greater satisfaction than those who feel coerced, who may respond negatively.⁴⁰

As discussed above, treating individuals with respect and empathy, listening actively, and focusing on the positive, all lend themselves to an environment of non-coercion. Judges can also reduce feelings of perceived coercion by

- **favouring positive pressures**, such as persuasion and inducement, over negative pressures, such as threats and force; balancing negative with positive pressures
- wherever possible, **fostering participants' sense of autonomy and responsibility** by soliciting input into terms for conditional and postponed sentences, parole, behavioural contracts, treatment and risk-management plans (all discussed below), and other terms and obligations imposed by the court
- **fostering self-efficacy and motivation to change** by helping individuals define goals, and understand how to overcome barriers in the way of attaining those goals (see page 21)⁴¹
- **highlighting discrepancies between an individual's current behavior and his or her goals** by asking open-ended questions, listening reflectively, expressing affirmation and support of the goals, and eliciting self-motivational statements (For example, "if the individual wishes to obtain or keep a particular job, the judge can ask questions designed to probe the relationship between her drinking or substance abuse and her poor performance in previous employment that may have resulted in dismissal."⁴²)
- **avoiding arguing** with the individual, which can create defensiveness and be counterproductive; rather than becoming confrontational, judges can listen with empathy and allow an individual "to remain in control, to make her own decisions, and to create solutions to her problems."⁴³

Non-paternalism: Recognizing your limits

In many cases, a judge – especially one attuned to searching for the underlying causes of criminal behaviour or civil disagreement – may suspect or be aware of a problem promoting criminality, such as an addiction or mental illness. A paternalistic attitude, however, is unlikely to facilitate an individual's recognition of such problem, nor will it solve the problem. A paternalistic approach – preaching to an offender, telling him or her what the problem is and what to do about it, or condescension – can be offensive, reinforce denial, foster resentment, and cause a judge's efforts to backfire.

Problem-solving judges must understand that individuals must confront their own problems and assume the primary responsibility for solving them. Heeding the guidelines above on reducing perceived coercion will help judges avoid paternalism. With the support of treatment staff, where available, judges can also help individuals to identify and build upon their "own strengths and use them effectively in the collaborative effort of solving the problem."⁴⁴

After being in mental health court and drug treatment court, you start getting some understanding of the issues, but I think it would be dangerous for a judge to think he or she could make a diagnosis or treat these conditions. It's taken me to a point where I may now better understand an offender's problem and that there are professionals who can help.⁴⁵

-Justice Peter Hryn,
Ontario Court of
Justice

Righting a wrong itself is therapeutic. And if you ensure that individuals can understand how the wrong was made right, it's doubly therapeutic.⁴⁶

- Justice Michel
Shore, Federal Court
of Canada

Clarity: Plain language

When court participants clearly understand what has gone on in a courtroom, their sense of the court's relevance is enhanced. When defendants and offenders clearly understand the terms of conditional or postponed sentences, restraining orders, parole, and other agreements (e.g., enrolling in a treatment program, reporting back to the court on a certain date, etc.), they are more likely to comply with those terms.

Judges can foster greater understanding in the courtroom by being aware of the extent of limited literacy and its impact on the justice system and adopting methods to increase understanding (see "Literacy in the courtroom," below).

Literacy in the courtroom

As a judge, the words 'entering into a recognizance' almost never cross my lips in speaking to an accused. I invariably tell the accused that he or she is required to sign a piece of paper promising the court to do certain things and I outline the consequences if those promises are not kept.⁴⁷

– Judge Susan V. Devine, Provincial Court of Manitoba

The majority of people who appear before judges – accused, offenders, witnesses, jurors, litigants, victims, and defendants – may not read and write well enough to fully understand complex legal documents and language. According to the John Howard Society of Saskatchewan, approximately 65% of the incarcerated population has literacy limitations.⁴⁸

The Canadian justice system, characterized by complex and highly specialized language and legal documents, poses specific challenges for – and is in turn challenged by – those with limited literacy. In its survey of members of legal and literacy communities, the Canadian Bar Association Task Force on Legal Literacy found that “virtually all legal material is written, and it is written in a manner peculiar to the legal system,” creating “formidable obstacles for people with limited literacy who try to use the system. ... Adults with limited literacy are intimidated by the legal system and avoid initiating legal action,” and “do not perceive that lawyers and the legal system are there to help them.” Most people with limited literacy, concluded the task force, “do not see the legal system as a place where they can defend or ensure their rights.”⁴⁹

Only about 20% of Canadians have the literacy skills to fully understand complex legal documents and language, and even fewer Canadians have the literacy skills necessary to navigate the criminal justice system.

When users of the justice system cannot understand and participate fully in its proceedings, and when courts fail to or are unable to recognize and address issues of limited literacy, justice is threatened and the therapeutic potential of the justice system is undermined. Limited literacy can result in miscarriages of justice, reduce court efficiency and effectiveness, be a barrier to reducing crime and recidivism, alienate users from the justice system, and contribute to a culture of systemic discrimination based on ability to read and write.

Judges must learn to recognize and read the signs of low literacy. People may hide to try literacy problems by

- saying they cannot read a document because they forgot to bring reading glasses

- claiming to have lost, discarded, forgotten to bring, or not to have had time to read documents
- asking to take home forms “to read later”
- claiming to have a hurt hand or arm and are therefore unable to write
- glancing quickly at a document and then changing the subject, or becoming traumatized, quiet, or uncommunicative when faced with a document
- hesitating when asked to read a document, and/or reading it excessively slowly, or
- appearing to read a document very quickly, although they are unable to summarize its contents.

Possible markers of low literacy include

- a person who has not completed high school or has difficulty speaking English
- a person who has filled in a form with the wrong information or has made many spelling and grammatical errors
- a person who claims to go to legal aid every day, but states that he or she doesn’t have time to fill in the relevant forms
- a person who seems not to relate to or understand questions about particular times, dates, and places
- a person whose writing and speaking styles don’t match, or
- a pre-sentence report that indicates that an individual left school at a young age, and/or before completing Grade 10; or that chronicles a history of unemployment or refusal of job training, promotion, or reassignment.

People with limited literacy skills may attempt to cope with feelings of fear, embarrassment, or inadequacy by behaving in ways that can appear flippant, dishonest, indifferent, uncooperative, belligerent, defensive, evasive, indecisive, frustrated, or angry. These emotional markers of low literacy may appear on the surface to be markers of a “bad attitude.”

To address low literacy in the courtroom, judges can

- educate themselves about low literacy in Canada and in the courtroom
- be aware of their own biases relating to low literacy
- break the silence by asking about low literacy, and if a court participant has any difficulties reading or writing
- make it easier for people to understand by
 - slowing down
 - doing as much orally as possible
 - speaking clearly and repeating important information
 - supplementing oral information with a written note that person can take away and mull over in private or have someone read later
 - previewing or reading aloud documents in the courtroom
- keep literacy in mind when sentencing: consider literacy training as part of rehabilitation; keep in mind that most rehabilitative programs (job skills training, anger management, substance abuse, spousal abuse, etc.) are literacy based, and
- use plain language instead of “legalese”
 - use short sentences and clear language
 - use words consistently
 - use the active voice
 - avoid strings of synonyms (“all and every”; “authorize and empower”)

For more information, please see the National Judicial Institute’s handbook *Literacy in the Courtroom: A Guide for Judges*.⁵⁰ It is available electronically at the NJI website (<http://www.nji.ca/Public/publication.htm>)

I practise therapeutic jurisprudence by...

Researchers identified an international group of approximately 50 judges who practised therapeutically, and asked them to complete the statement: "One way that I practise TJ in my courtroom is ...". The following statements summarize their responses.⁵¹

- speaking directly to the defendant in language and a tone of voice I think he or she will understand.
- finding something positive to say about the defendant; praising positive steps toward recovery; identifying and building on any indications or demonstrations of willingness to try to effect positive change.
- learning as much as I can about each defendant; trying to understand where a defendant is coming from – educationally, socially, psychologically – so they feel that I know and care about them.
- taking into account the impact of police and court processes to date.
- viewing the case and were as a primarily emotional, not legal, event.
- not allowing therapeutic/anti-therapeutic considerations to trump legal considerations.
- communicating to the parties that I understand their plight and the emotions involved.
- considering any cultural/linguistic factors that have an effect on a defendant's understanding of communication in the courtroom.
- using research-based decision making.
- working in a collaborative fashion with lawyers, health care professionals, probation officers, and community organizations to provide a comprehensive treatment plan.
- looking at each defendant's support system and utilizing that system in the treatment plan.
- listening carefully to each person who comes before me.
- being mindful of the impact of my words and actions on all participants.
- explaining my decisions to all parties.
- trying to schedule all of my contested cases for a case management conference so everyone appears informally and expresses their position. By doing so, often the problem can be resolved.
- using any influence I might have to encourage the client to get services he/she needs to be well.
- always asking an offender, when they say that they will not offend again, what they are going to do to ensure that they do not offend and what supports they have in place.
- getting a defendant to explain what he/she has agreed to do and to explain how he or she is going to do it.
- getting defendants to explain why they think they offended by asking, "What made you do it?"
- insisting on participation by all family members who are present at the disposition stage for an offender.
- being absolutely open about discussing underlying problems.
- constructively incorporating psychological or psychiatric assessments with the parties and their lawyers as a step toward problem-solving.
- treating clients/defendants with respect.
- letting clients ask questions and report positive progress.
- requiring treatment and medication compliance as conditions of release.
- setting status hearings to monitor court orders.
- using incentives (e.g., applause, positive affirmations/reinforcement, encouragement) to reward compliance, and sanctions (e.g., increasing release restrictions) for non-compliance.
- educating myself and parties about mental-health and substance-abuse disorders, treatment, and available community resources.
- believing that people can change.
- recognizing that you can't punish people to make them get better.
- viewing the person as a whole instead of seeing only the parts of them that committed a crime.
- determining what would be in the best interest of the community.

B. Crafting behavioural contracts and relapse-prevention plans

In a medical context, when patients sign **behavioural contracts** — specific agreements with health-care providers in which the patient agrees to follow certain protocols, such as exercising, avoiding certain activities, and/or taking medications appropriately — they are more likely to comply with medical advice than patients counterparts who do not sign such contracts. Further, if family members are aware of the patient’s promise, the patient is again more likely to adhere to the agreed-upon conditions.

In a judicial context, judges can adapt the principles underlying behavioral contracts to increase compliance with court orders.⁵² For example, judges can conceptualize conditional sentences or probation orders as behavioural contracts with the offender, and create formal, signed agreements outlining specific goals and conditions, with appropriate rewards and sanctions.

The terms of a behavioural contract can form the basis of an offender’s **relapse-prevention plan**. Such plans work on the assumption that “offenders can sometimes act rather impulsively,”⁵³ and are “geared to teaching offenders certain problem solving skills: to understand the chain of events that often leads to criminality, to anticipate high-risk situations, and to learn to stop and think so as to avoid such situations or adequately cope with such situations should they arise.”⁵⁴ By creating a relapse-prevention plan, an offender in essence creates his or her own conditional sentence or probation conditions.

When developing behavioural contracts and relapse-prevention plans with offenders, judges should heed the following guidelines to maximize therapeutic outcomes

- Involve the offender
- Identify and incorporate high-risk situations
- Require offenders to take responsibility for their actions
- Set specific goals
- Set specific rewards and sanctions
- Encourage participation of family and community members
- Treat the offender with dignity and respect
- Schedule regular review hearings/judicial supervision.

Giving offenders the respect of involving them in the sentencing process can make a huge difference in their willingness, their success. An offender's public acknowledgment is important: getting his approval to the plan; stating openly in court that he sees the need for it and is willing to make it work. Now he or she has agreed to do it publicly and is part of the plan.⁵⁵

– Judge Sharon Van de Veen, Provincial Court of Alberta

Involve the offender in crafting the plan

By actively involving the offender and according him or her choice, a judge increases an offender's ownership of the plan and creates intrinsic, rather than external, motivation for success. At the outset, then, judges should encourage an individual's active involvement in both the negotiation and design of the behaviour contract or rehabilitative plan, and provide as great a degree of choice (for example, location of treatment facility) as possible in the circumstances.

Identify and incorporate high-risk situations

Judges can help offenders learn how to manage risk by asking them to identify

- high-risk situations
- how to negotiate or avoid such situations in order to avoid relapse – and possible re-arrest, and
- how this plan is different from past efforts to avoid relapse.

For example, "I realize that I am at highest risk for criminal behavior when I party with Joe on Friday nights. I will therefore stay home and rent a video on Friday nights."⁵⁶

By creating a relapse-prevention plan, an offender gains insight into the chain of events that can lead to criminality. In essence, an offender creates his or her own conditional sentence or probation conditions – and thus is more likely to regard them as relevant and fair, and therefore comply with them.

Require offenders to take responsibility for their actions

A key first step in healing and accepting treatment is taking responsibility for one's actions. Yet, people with substance-abuse problems frequently deny the extent of their addictions ("I can stop whenever I want"), while individuals who commit acts of domestic violence or sexual molestation frequently deny responsibility for, minimize, or otherwise distort the seriousness of their acts ("I didn't do it/I did it but it wasn't my idea/She made me hit her/I did it but it wasn't sexual," etc.).⁵⁷

Unchallenged and unaddressed, such "cognitive distortions" can impede healing and lead to recidivism. Judges practising therapeutically, therefore, play a critical role in helping offenders confront their cognitive distortions. Judges can

- **Refuse plea bargains or other compromises that allow offenders to escape responsibility:** Judges should keep in mind the potentially anti-therapeutic effects of such arrangements. “‘No contest’ pleas in the American context⁵⁸ and peace bonds in the Canadian context reinforce distorted thinking by allowing the offender to avoid full responsibility for his [or her] behaviour.”⁵⁹
- **Require offenders to recount what happened, in their own words:** To force people to take ownership of the event and minimize chances of them later denying a problem, judges can request that a defendant admit that he or she committed the offence and explain what happened – in his or her own words and not through counsel. The transcript of this detailed description can also be helpful if, later on, the offender relapses and denies participating in the offence.⁶⁰
- **Be aware of body language that may subtly reinforce a person’s anti-social behaviour or cognitive distortions,** such as nodding, smiling, beckoning, or verbally agreeing (“Uh huh,” “Yes, yes ...”) with a defendant.
- **Take victims’ healing into account as part of the therapeutic process:** As one judge notes, “Where there’s a victim impact statement, I will read paragraphs from that statement to [the defendant] in court. I want to make sure that he really appreciates the degree of emotion and harm done to the victim. That does a number of things: it’s therapeutic to the victim, for the community as a whole, for the gallery, for the media there who report on it, and hopefully notwithstanding the anxiety of being in the courtroom, the offender as well.”⁶¹

Set specific goals

Setting specific goals is a key aspect to the success of a formal or informal behavioural contract. The setting of goals – which “structure and guide performance, provide direction, and focus interest, attention, and personal involvement”⁶² – is itself a significant factor in their achievement.

Goals will be tailored according to an offender’s specific circumstances and may include

- becoming free from alcohol and illicit substance use
- establishing greater contact with children
- finding suitable housing
- getting out of debt
- engaging in further education and training
- stopping criminal and anti-social behaviour
- obtaining employment
- performing agreed-upon acts of restitution to victims, and
- becoming a productive member of the community.

Set specific rewards and sanctions

Rewards and sanctions can be incorporated into behavioural contracts as motivating factors. These factors are, in general, simply the logical consequences of an individual's behaviour and do not need to be elaborate. Judges can consult with offenders to create appropriate and motivating rewards and sanctions.

Public judicial praise, as discussed above, is a very effective reward, as are more formal recognitions of success, such as graduation ceremonies. Judges can reward compliance by eliminating or reducing restrictions, such as curfews or number of court appearances. A judge can also promise a non-custodial sentence if a person successfully completes a treatment/counselling program and does not breach any term of his or her bail.

Sanctions may include

- more mandatory activities, such as increased community work or restorative justice projects
- increased drug and alcohol screening
- increased monitoring, including more frequent attendance before the judge and/or probation officer
- more stringent restrictions, such as earlier curfews and house arrest, and
- revocation of bail.⁶³

Encourage participation of family and community members

Compliance is likely to be enhanced when family and community members can witness the creation of a behavioural contract, rather than when the contract is privately made. Such witnesses can encourage the offender to stick to the terms of the contract and provide another layer of psychological reinforcement: the anticipated disapproval of both a respected authority figure (the judge) *and* "family members, as well as [his or] her own anticipated self-disapproval, can significantly increase the [offender's] motivation to comply."⁶⁴

Community involvement is especially relevant in smaller centres, where criminal acts often affect a large proportion of the population, and where community disapproval can carry proportionally more psychological weight.

Treat the individual with dignity and respect

As with all TJ initiatives, judicial respect is a key factor in the success of behavioural contracts. The medical literature on compliance suggests that

if the physician appears to be distant, distracted, reads case notes, uses professional jargon, asks questions calling for brief 'yes' or 'no' answers, fails to allow the patient the opportunity to tell her story in her own words, describes the treatment plan imprecisely or in technical terms, acts paternalistically, or is abrupt with the patient, compliance with the health care professional's treatment recommendations will be less likely.⁶⁵

Following on the medical context, in a problem-solving context, judges can increase compliance by

- acting concerned rather than distant
- providing the individual with undivided attention during conversations
- avoiding jargon and ensuring the individual clearly understands the terms of the agreement
- allowing the individual an opportunity to voice concerns and ask questions, and
- avoiding paternalism.⁶⁶

Schedule regular review hearings or judicial supervision

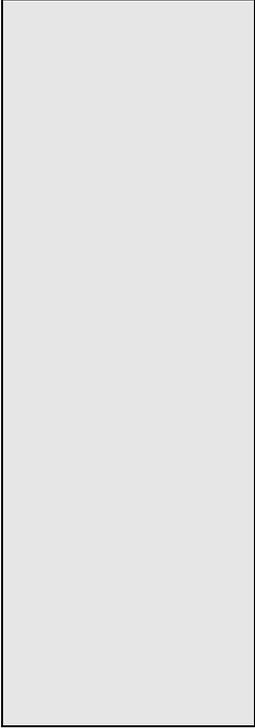
Regular review hearings are a practice easily adopted by courts of general jurisdiction.⁶⁸ Review hearings:

- keep the judge informed of changes in defendants' circumstances
- remind defendants that they are still accountable to the court
- foster a relationship between defendant and judge, and
- provide an opportunity for judges to administer motivating rewards and sanctions.⁶⁹

Judges should consider setting review hearings even when they are not especially worried about an offender's lack of compliance. Review hearings scheduled when all is going well can in fact contribute to the reduction of criminal activity, as a judge positively reinforces an offender's efforts.

I have had people come back for review, once a month or at regular intervals, so that they maintain some sort of connection, so that they know they aren't just going out the door or to an overworked conditional sentence manager. When people know that the judge is keeping an eye on them and is expecting progress and knows that they're capable of progress ... they follow through.⁶⁷

–Judge Jocelyn Palmer, Provincial Court of British Columbia



Scheduling review hearings may also improve fairness. Judges traditionally make decisions – for example, setting conditions of release, establishing bail, issuing restraining orders – based on *predictions* about the offender’s future potential for abuse. These decisions, however, tend to be based on a static, “dangerous or not” model that does not account for the ongoing, dynamic factors in an individual’s life: relationships, housing, employment, addiction, treatment, etc.⁷⁰ Such predictions may also have roots in a judge’s own bias, rather than upon evaluation of the individual in question.⁷¹ Judicial supervision, on the other hand, provides both judge and offender with a dynamic forum in which to make decisions based on ongoing behaviour, progress, and/or relapse. (Resources such as the *Manual for the Spousal Assault Risk Assessment Guide* also provide a more refined set of tools for judges to make predictions about re-offence. See page 45.)

At review hearings, judges can identify and comment favourably on aspects of an offender’s progress, including such factors as impressive meeting-attendance logs, letters or testimony from members of society, employment, education efforts, and a healthy or tidy appearance.

TJ and Domestic Violence

Domestic violence (DV) cases are distinct from other types of cases, such as those involving addiction or mental health issues often considered amenable to a problem-solving approach. Judges practising therapeutically can keep in mind some of the following guidelines⁷² when they encounter DV cases

- While the therapeutic focus for addicted and mentally ill defendants is on rehabilitation, in DV cases, the key therapeutic and judicial priority must be **offender accountability** and the **safety of the abused partner and any children**, with only a secondary focus on offender rehabilitation.
- Further, while relapse is seen as a normal and expected part of the process of recovery from addiction or in controlling a mental health issue, the court cannot tolerate a return to violent behaviour or a breach of court orders by a DV offender.
- That said, alcohol and substance abuse often play a role in DV, and judges should be alive to the possible role of addiction in such cases. They can ask perpetrators and survivors of violence about substance use/abuse, and consult police reports and criminal records for signs of addiction. Treatment for substance abuse can be part of a conditional sentence or probation agreement.
- A problem-solving judge must confront the batterer's **cognitive distortions** – the denial or minimization of violence and responsibility, and/or the blaming of the victim for the abuse. Judges can respectfully insist that offenders take responsibility for their own violence by requiring the offender to explain, in his or her own words, exactly what happened, and querying statements that minimize or deny responsibility, or blame the victim.
- Judges can also query passive language that removes the offender from the violent situation (“When you say, ‘She got hurt,’ what do you mean? How did she get hurt? Who hurt her?”).
- Offenders are most open to accepting responsibility immediately after a violent incident. As time passes, cognitive distortions can set in. Therefore, a therapeutic approach involves **acting as soon as possible** after an offence or breach, and judges **should discourage delays in processing**.
- Judicial demeanour toward defendants and survivors of violence can increase compliance with court orders and have therapeutic effects. Judges can make survivors “feel welcome, express empathy, and mobilize resources for them. With offenders, judges can be respectful while insisting that offenders take responsibility for their violence and acknowledge the court’s authority over their behaviour.”⁷³
- **Sentencing should not involve excessive fines**, as payment may be unrealistic and can jeopardize the wellbeing of the offender, the survivor of violence, and any children involved.
- To ensure the offender understands that the court takes its orders seriously, judges can **schedule regular, post-sentencing reviews**, without cause, to monitor compliance. Judges can reinforce compliance by modifying restrictions on an offender, and impose graduated sanctions – including incarceration – in the case of non-compliance. Court appearances can include DV treatment providers, victim advocates, and probation officers.
- Judges can “flag children at risk and initiate appropriate referrals to child advocacy and child welfare agencies.”⁷⁴ To minimize conflict and repetition, judges can also seek to coordinate DV cases with other cases occurring at the same time that may involve the perpetrator, victim, or their family members.

C. Developing a non-adversarial, team approach

Judges interested in practising therapeutically can benefit from the cooperation and input of a skilled *team* that could include Crown and defence lawyers; parole and police officers; social workers; social services agencies; addictions, domestic violence, and mental health professionals; addiction treatment centres; court staff; and – not least of all – offenders themselves.

Drug-treatment, domestic-violence, mental-health, and other dedicated problem-solving courts have as cornerstones a team-based approach: a coordinated strategy among judge, prosecution, defence, and treatment providers to govern offender compliance and promote rehabilitation and healing. Each representative provides input from his or her unique institutional perspective and expertise, and, at the same time, can gain skills and insight into the therapeutic potential of the judicial process. Judges are no longer “dispassionate, disinterested magistrates” but instead become “emphatic counsellors”⁷⁵ who play an active role in the treatment process, monitoring compliance, rewarding progress and sanctioning infractions.

A non-adversarial, team-based approach is easily transferable to courts of general jurisdiction. As the following examples suggest.

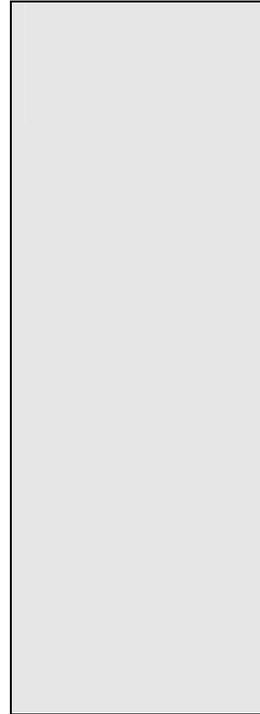
- Judges can encourage **lawyers** to be both team players *and* vigilant to their clients’ best interests. In a therapeutic context, “the prosecution and defence are not sparring champions, they are members of a team with a common goal.”⁷⁶ As one judge in Criminal court remarks, “When somebody’s coming forward with a really viable plan, often the Crown will say, ‘I understand that my friend [the defence lawyer] has a submission to make about background information and a plan.’ My job is to be in the middle and hear both sides fresh; I don’t have anything vested except a will to do the best thing.”⁷⁷
- Judges, however, can and must respect the lawyers who appear before them. In the same way that an overbearing, paternal, or top-down attitude will alienate defendants, a judge who unilaterally imposes his or her stance on a lawyer, and disregards a lawyer’s desire to represent his or her client, will alienate that lawyer and foster an adversarial environment.
- **Court staff** can also play a key role in creating a therapeutic environment in the court through their treatment of defendants and the tone they set in the courtroom. Judges can encourage court staff to treat defendants with respect and to facilitate court participants’ understanding of the process.

Partnering with community resources

I suppose a starting point for any judge [who wants to practise therapeutically] would be to become more familiar with what's available in the community by way of resources, and to know what exactly can be accomplished in and outside a custodial setting, what exactly probation can accomplish. ... They may need to find a way to figure out how to access that knowledge, perhaps making a request of the Crown to do some inquiries, or asking defence counsel. The Crown, for example, can do a background check into which recovery houses are doing a good job. The judge can then refuse bail for certain houses.⁷⁸

– Judge Jocelyn Palmer, Provincial Court of British Columbia

Legal problems don't simply have legal origins. Rather, they stem from multiple social, educational, health-related, and psychological sources, and from issues of justice. Given the multidisciplinary origins of legal problems, it makes sense to take a multidisciplinary approach to address such problems. And a key factor in taking such an approach is to utilize diverse community partners. Judges practising therapeutically can learn about community resources in their communities and refer defendants and other court participants to them.



Partnering with social services: One judge's solution

In the face of new child-protection legislation, Justice Lucy Glenn of the Ontario Court of Justice in Chatham, Ontario, spearheaded a simple but effective problem-solving initiative designed to link the court and its clients with community services — and, in the process, keep families together. In Judge Glenn summarizes the experience as follows.

Volume for child protection cases has gone up dramatically in recent years. At the same time, new rules stipulated that cases had to go through in 120 days. Then, in 1999, the *Child and Family Services Act* mandated that children under the age of six should not be held in care for more than 12 months — two years for kids over age six — at the end of which time, basically, they were to go back to their parents or be made Crown wards.

Well, we were swamped with cases, often involving children under age six. They'd be taken into care, and six months would pass, and when I asked on status review about the parent's progress, often everyone would shrug their shoulders and say, "I don't know," or "Nothing."

I've always thought that child protection law and proceedings should be remedial: you've got a family with a problem and you're trying to help them fix it. And sometimes you can't fix it. But I don't think it's good enough for a court to look at a parent and say, "You've got a problem, we're taking your kids; come see me in six months and we'll see if it's any better."

The child-protection legislation talks about putting forward a plan. How can you be an effective lawyer for this kind of client if you don't know where to draw on help? Parents, lawyers, and courts need plans for solving problems. They need social services. And we didn't know what was out there. I realized that this was my community: I practised here for 17 years before I became a judge, and I didn't know what social services were available. If I didn't know, how could parents? How could lawyers? If we knew, maybe we could do more to help parents get their children back.

Social services fair

I called the head of the Children's Aid Society, the head of Family Service Bureau, and the Crown and CAS lawyers. And I said, "What do you think about us having an exposition where we find out what's out there?"

So we rented a hotel meeting room for a morning and put on a social-services "fair," funded by CAS. We invited all the agencies that served the areas. A lot of them had all sorts of supports that we didn't know about. The child-protection workers didn't know what the other branches of their agency offered. We found a service that would provide school lunches for children, another that would provide kids with bicycles. We discovered services to help with transportation, clothing. One public housing agency offered a support system that ranged from simply providing a cup of tea to emergency child care. These were crucial: when you're trying to make a decision about whether to return a child to a single mom with a lot of issues, one of the questions you ask is "does she have a support system?"

Filling in the "grid"

Once we knew what was available, we needed to find a way to ensure that we could create realistic plans and put them into action. Everyone in the system was so stressed that I finally

developed the belief that if we didn't have it organized before people walked out the courtroom door, it wasn't going to get organized. So we developed what's come to be known as "the grid" (see page 30).

It's a simple document: a set of questions about what services parents need and what they need to do to work toward getting their children out of protective custody. If they need anger-management counselling, where will they get it? Who's going to facilitate it? Is there a cost, and if so, who pays? How are they going to get there — what if there's no bus? When is it going to start, and when will it end? What if a parent needs child care during counselling? And we go through these questions for every element of a parent's plan, often three or four elements. Any number of people are filling in the blanks: the CAS lawyers, the client's lawyers, the client him- or herself.

At first the resistance was unbelievable, but lawyers swung around quickly because they saw the benefit. Everybody walks out of the court with clear expectations: they all know what needs to be done. It forces everyone to look at the logistics of a plan. You can run your eye down it and realize if the expectations are realistic: it's not realistic, for example, for a single mom on welfare with no car and two kids at home to travel at night down a country road with no public transportation. It makes sure that we aren't just holding these kids in suspension for 12 months.

Sometimes we'll come back very early on in the review — say, 30 days in. We've only got 12 or 24 months to fix the problem, so my attitude is, let's not waste time. I'll start with the grid: is the plan still working? Sometimes it is. And sometimes things have fallen apart for good reason, so you adjust the plan if you need to — I'll even take a break in the middle of the conference and send someone out to phone the agency to see what's available. You try to pull the thing out of the ashes right from the very beginning. We still have cases where parents simply don't carry through, and that speaks volumes. But it's pretty rare that things fail to happen because they fail to get organized. And that happened all too often before.

A lot of judges would say, "That's a social worker thing. I'm not going to get into that." But the reality is that six or eight months from now, you may be asked to take the kid away permanently. And I personally am more prepared to come to grips with those kinds of decisions if I've even done the basic work in trying to set up a plan to remedy the fault that I found in the first stages of the proceedings. It's fine for me to say the kid is in need of protection because parents lack the ability to manage their resources, or their anger, or because of domestic abuse. It's not acceptable to make those findings and come back later to find that nothing's happened. It's not that difficult to figure out what's out there and create a plan. And with a plan, there's a much better chance that change can occur.

It's not rocket science. It's a question of taking a much more active role in fixing the problem.

“The Grid”: Service plan agreement

Type of service. For whom?	Name and location of service provider	Who will make the arrangements?	How will the client get there?	Is there a cost for this service?	Who will pay for the cost?	When will it start?

CAS: _____
 PARTY: _____
 PARTY: _____
 PARTY: _____

WITNESS: _____

Avoiding misunderstanding

Judges can enhance the effectiveness of their interactions with court participants by paying close attention to the effects and all possible interpretations of their words. As one judge has learned, it's very important to think carefully about word choice and how to craft orders so that both judge and offender understand clearly their intent. Judges can discuss the terms with offenders and ask for their input to help ensure clarity. As well, judges can ask offenders to explain the terms of the order in their own words.

Instead of ordering an offender to “Attend as **recommended** by the probation officer for counselling on substance abuse issues,” it may be more effective for a judge to order an offender to “Attend as **directed** by the probation officer for counselling on substance abuse issues.” This wording reduces the potential for an offender to challenge the probation officer’s authority to order him or her into counselling on the grounds that he or she can accept or reject the “recommendation.” The offender cannot argue that the court intended only for probation to “recommend” – not require – counselling.

Judges may write that an offender is “not allowed to reside where alcohol is kept or stored”: some offenders have interpreted that directive as “being allowed to store alcohol in a shed in the back yard.” So I try to word the order to read that the offender “not reside at a property where alcohol is kept or stored.”

With repeat drinking drivers, I do not always order them to abstain from consuming alcohol while on probation. In some cases, they may be alcoholics with little prospect of being able to give up alcohol. If I order them to abstain, there is a real prospect that they would breach a probation order very quickly. Probation officers, however, have told me that some offenders interpret this failure to order them to stop drinking as implicit approval of their consumption of alcohol. Some have reported to their probation officers that the judge said it was okay for them to continue drinking alcohol.

As a result, I try as a matter of practice to tell offenders that I do not approve of them continuing to drink alcohol. I give them examples of why drinking appears to be very unwise: the risk to their health, their continuing contact with the criminal justice system, their loss of employment, etc. I try to tell them, “I am not telling you that you should continue to drink alcohol. I do not want your probation officer to report back to me that you told her that the judge said it was okay for you to drink alcohol. I am not saying that at all.” I often order a transcript of this discussion with the offender and direct that a copy of it be forwarded to the probation officer. I tell the offender I am doing this so that there will be no confusion on this issue.

Until it was pointed out by the probation office, I did not appreciate that my failure to prohibit some offenders from drinking alcohol was being interpreted as ‘permission’ to continue the practice.⁷⁹

-Justice Julia Morneau, Ontario Court of Justice, Owen Sound

One of the biggest concerns in [therapeutic] sentencing has to be rehabilitation. You can't accomplish deterrence without rehabilitation. In practical terms, that comes into play in looking at the viability of conditional sentence orders.... We are keeping an eye out for the protection of the public but allowing for some sort of rehab that will hopefully be more effective than what would be offered in a custodial setting.⁸⁰

– Judge Jocelyn Palmer, Provincial Court of British Columbia

D. Sentencing therapeutically

The criminal sentencing process is a therapeutic opportunity. The terms of a sentence can provide an offender with the means to confront wrongdoing and to begin (or continue) a process of change and healing. As discussed elsewhere in this handbook, the way a judge interacts with court participants can have a significant impact on the effectiveness of the court's decisions and offenders' willingness to comply. As well, behavioural contracts and relapse-prevention plans are a key therapeutic tool to guide postponed and conditional sentences, discussed below.

This section provides more information and ideas for judges on therapeutic sentencing, including

- Canadian sentencing principles
- guidelines for postponed and conditional sentencing
- restorative justice, and
- making informed decisions.

Canadian sentencing principles⁸¹

In September 1996, the Canadian Parliament passed Bill 41, which enacted comprehensive changes to the sentencing provisions of the *Criminal Code*.⁸² These revisions, as interpreted by the Supreme Court of Canada, have incorporated some therapeutic aspects into the criminal justice system and have helped judges adopt a problem-solving approach to sentencing.⁸³ Specifically, the legislation embraces the concept that prison ought to be a last resort in sentencing.

- **Section 742.1** contains a **conditional sentence** option. A conditional sentence is a sentence of less than two years that is served in the community subject to the conditions prescribed in the order. It may be ordered where the court is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing in ss. 718 to 718.2 of the *Criminal Code*. A conditional sentence is not available in instances, such as murder, where the offence provides for a mandatory minimum term of imprisonment.

Three other provisions of the new sentencing legislation embrace the concept of therapeutic or community-based sentencing.

- **Section 718.2(d)** incorporates the notion that no person ought to be deprived of his or her liberty if less restrictive sanctions may be appropriate.
- **Section 718.2(e)** specifically states that all alternatives to incarceration ought to be considered by the court in every case, but especially in the case of Aboriginal offenders.
- As well, **Section 720** states that “A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.” *If both the Crown and the defendant agree, however, a judge may postpone sentencing, allowing the defendant the opportunity to put in place or complete a treatment plan or fulfill other conditions before sentencing. A judge may then grant a conditional or non-custodial sentence.*

In *R. v. Proulx*,⁸⁴ the Supreme Court considered the new sentencing legislation generally and the conditional sentence provision in particular. It held that a conditional sentence is available in principle for all offences in which the statutory prerequisites are satisfied. As well, they noted, failure to consider this option may well constitute reversible error.⁸⁵ The court went further to say that whenever both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration.

Other sections of the *Criminal Code* sentencing provisions empower judges who wish to monitor an offender’s progress and compliance, and to impose certain conditions (for example, that the offender attend treatment or counselling, or that the offender appear before the court whenever the court requires it) upon sentencing.

- **Section 732.1(3)(h)** allows the court to impose “such other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender’s successful reintegration into the community.”
- **Section 742.3(2)(f)**, regarding conditional sentence orders, states similarly that the court may impose reasonable conditions “for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.”

Guidelines for problem-solving sentencing

If an offender appears to present a reasonably low risk, and the offence permits it, judges should consider the therapeutic benefits of a conditional discharge, a conditional sentence, postponing sentencing, or alternate measures allowing for a period of attempted rehabilitation.

- Delaying the imposition of a sentence, with the consent of the judge, the Crown, and the defendant, might be useful in cases where a judge isn't certain about the propriety or advisability of non-custodial disposition (such as probation or imposing a conditional sentence). During this period, the court can obtain the information it needs to make a more informed decision or set conditions that allow the offender to demonstrate improved behaviour.⁸⁶ For example, a judge might say to a defendant, "The Crown has recommended that you go to jail. If you agree, however, I'd like to delay sentencing you. I'd like you to come back before me in two weeks with a treatment plan. If I find the plan to be reasonable and realistic, I will allow you to engage in the treatment program. While you are in treatment, I will require you to appear before me once a month to report on your treatment progress. If you successfully complete the program, and do not breach any other terms of your bail, then I will impose a non-custodial sentence, which will probably be a suspended sentence and probation. If, however, you breach any terms of your bail, your bail may be revoked and I may agree to the Crown's request that you be sentenced to jail."
- Some treatment facilities will not take clients who are in custody. Delaying sentence, therefore, may facilitate getting an offender into treatment. Alternatively, a judge may grant bail for a day or a few hours while an offender is interviewed for treatment, thus allowing the offender to meet the treatment facility's requirements. (Again, a judge's familiarity with treatment options and social services in his or her community can inform decisions about sentencing.)
- Behavioural contracts and relapse-prevention plans, discussed above, are key factors that can enhance the effectiveness of delaying sentence or imposing a conditional sentence. Judges should follow the guidelines for crafting such contracts and plans when making them a part of the sentencing order. Therapeutic terms of such sentences can be incorporated into behavioural contracts and relapse-prevention plans, and could include
 - entering into treatment for substance use or addiction, anger management, parenting skills, depression, etc.
 - avoiding certain triggers or high-risk situations, such as associating with specific people or going to certain bars or restaurants
 - developing strategies for dealing with such triggers and high-risk situations
 - finding stable and appropriate housing
 - acquiring education and vocational skills (e.g., GED, high school diploma)

- maintaining employment
- having a sponsor in the community⁸⁷
- being current in all financial obligations, including drug court fees and child support payments⁸⁸, and
- restorative components – discussed below in greater detail – such as apologizing to victims and making restitution, where possible and appropriate, for criminal and/or abusive acts.

Restorative justice

Like therapeutic jurisprudence, restorative justice (RJ), is a philosophical framework for addressing issues of crime and conflict. RJ initiatives aim to hold offenders accountable in a meaningful way while addressing the needs of victims and the larger community. While RJ initiatives vary, they share similar principles, which can best be illustrated by contrasting them with “traditional” adversarial court systems.

Adversarial versus restorative justice systems⁸⁹

Adversarial System	Restorative Justice
<ul style="list-style-type: none"> • crime is defined as a violation of rules, and a harm to the state 	<ul style="list-style-type: none"> • crime is seen as a harm done to victims and communities
<ul style="list-style-type: none"> • victim is inhibited from speaking about his/her real losses and needs 	<ul style="list-style-type: none"> • victim is central to the process of defining the harm and how it might be repaired
<ul style="list-style-type: none"> • offender, victim and community remain passive and have little responsibility for a resolution 	<ul style="list-style-type: none"> • offender, victim and community are active and participate in the resolution resulting from the restorative forum
<ul style="list-style-type: none"> • community’s role is limited 	<ul style="list-style-type: none"> • community is actively involved in holding offenders accountable, supporting victims, and ensuring opportunities for offenders to make amends
<ul style="list-style-type: none"> • restitution is rare 	<ul style="list-style-type: none"> • restitution is normal
<ul style="list-style-type: none"> • controlled and operated by the state and professionals who seem remote 	<ul style="list-style-type: none"> • overseen by the state, but usually driven by communities
<ul style="list-style-type: none"> • offender is blamed, stigmatized and punished 	<ul style="list-style-type: none"> • the long-term protection of the public mandates a focus on the methods of problem solving that include the reintegration of the offender into the community, and the preservation of his/her dignity
<ul style="list-style-type: none"> • repentance and forgiveness are rarely considered 	<ul style="list-style-type: none"> • repentance and forgiveness are encouraged
<ul style="list-style-type: none"> • assumes win-loss outcome 	<ul style="list-style-type: none"> • makes possible win-win outcome

The terms of a conditional sentence could also take into account aspects of restorative justice, such as

- having an offender apologize to the victim
- having an offender write a statement indicating that s/he understands the nature of the offence and how/why it hurt the victim (this could also be a letter to the victim or the victim's family)
- having an offender perform community work
- having an offender offer some kind of reparation (e.g., money, labour, etc.) to the victim, or
- within a specific community or cultural context, having an offender meet with and/or receive counselling from a respected community member or elder.

Canadian RJ initiatives

Circle Sentencing and Elder Panels in the Yukon, and the Tsuu T'ina Peacemaking Initiative and Court outside Calgary, are examples of restorative justice initiatives that serve Aboriginal communities and function alongside or independently of traditional court systems. The Nova Scotia Department of Justice offers a Restorative Justice Program to all eligible youth across the province.

All the above initiatives attempt to divert defendants from jail into community-based programming. They can be lengthy processes that require significant participation from the accused, victims, their friends and families, and members of the larger communities. In each, the aim is to resolve conflict, facilitate healing for victims and rehabilitation for offenders, and to strengthen communities and work toward preventing future dysfunction. All RJ initiatives are based on similar premises that highlight the importance of community

1. A criminal offence represents a breach of the relationship between the offender and victim as well as offender and community.
2. The stability of the community depends on healing such breaches.
3. The community is best positioned to address causes of crime, which are often rooted in its social or economic fabric.⁹⁰

The specific methods of each initiative vary. Participants generally sit on the same level, in a circle, to symbolize their equality within the setting; in Sentencing Circles, for this reason, the judge removes his or her robes. In Aboriginal settings, culturally specific ceremonies, prayers, and/or dress link participants to their heritage.

Generally, all the RJ initiatives provide multiple opportunities for participants to speak about the impact of the offence and to offer suggestions for its resolution, as well as about larger issues, such as the impact of crime and dysfunctional behaviour on the community. Offenders and victims are offered support before and throughout the process. Offenders are generally required to accept responsibility for the offence and to agree to perform agreed-upon acts of restitution and healing.

The offender's progress is monitored by support groups, community justice committees, probation, and by the court. The circle or court will meet, often in a celebratory manner, once an offender has completed his or her tasks. The case can then be referred back to a judge within a provincial or Aboriginal band court, who can decide to discharge the case or to impose sentence while taking into account the restorative process. With elder panels, clan leaders sit with the judge on the bench and the judge defers to them on sentence.

Making informed decisions: Using pre-sentence, police, and other reports

Judges can often feel under pressure to deal with cases of repeat criminal behaviour quickly (and harshly). Further, judges can often “shoot from the hip” in making decisions,” setting conditions of release, establishing bail, issuing restraining orders, and taking other actions based on *predictions* about the offender’s future potential for rehabilitation or recidivism.⁹¹ Such predictions can be based on stereotyping and the judge’s own bias, rather than upon evaluation of the individual in question.⁹² Further, pressures to act quickly may prevent judges from collecting and considering the relevant background information necessary to make informed decisions – and making decisions that can enhance therapeutic outcomes.

To make informed decisions, judges need information about the defendant’s

- criminal record
- family (Is there a support system in place? Are there vulnerable children in the home? A spouse/partner? In the case of domestic assault, is the victim pregnant?)
- employment situation
- health problems (including addiction problems and mental health concerns)
- education (including skills, literacy status)
- motivation (Has the defendant accepted of responsibility for his or her actions? Is there a relapse-prevention plan? Has the defendant taken any actions taken toward rehabilitation or restitution?)
- progress in treatment, and
- compliance with other court orders (as well as the existence of any new court cases).⁹³

Judges can also benefit from a knowledge of available treatment facilities (and their terms).

Pre-sentence reports (PSRs), psychological assessments, victim impact statements, police and parole reports, and criminal records provide crucial background information that may help illuminate some of the causes behind criminal behaviour – such as addiction, substance abuse, mental-health issues, or psychological trauma – that may well respond to or benefit from treatment. Where possible, judges should avail themselves of these resources and use them to make informed choices when sentencing.

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 (consideration of which is now mandatory pursuant to s. 722 of the Code). This list is not exhaustive.

–Supreme Court of Canada, *R. v. Proulx*⁹⁴

People's records are very telling. If someone appears before me whose record shows an addiction or alcohol problem, assaults and drive impaireds, I will generally send them for an assessment. I tell them that I can't tell them whether they have a problem or not but the circumstances suggest that this might be the case and certainly it would be to both our advantages to know.⁹⁵

– Judge Susan V. Devine, Provincial Court of Manitoba

Where formal PSRs are not available, judges can scan an offender's record for mentions or signs of problems that may respond to a more therapeutic approach. If an addiction problem is not specified, signs of substance abuse can include

- multiple theft charges
- multiple charges of impaired driving
- a criminal record that begins in mid-to-late adulthood: "When I look at a person's record, the [sign] that's most telling for me is when the accused is 44, and there are no problems until 10 years ago. What happened? Often, that's when the addiction started: they got involved in crack cocaine at age 34," notes Justice Peter Hryn of the Ontario Court of Justice.

Judges can also look for signs that a defendant has coped successfully with substance abuse in the past, and therefore may be able to again. "I look at a gap in a criminal record and ask why it's there," says Justice Hryn. "Often I'm told there's an addiction but that during the gap the offender received treatment, stopped using, became involved in a good relationship and got a job. When he lost the relationship and the stability that provided, he relapsed – and then the job also went and the record started over again."⁹⁶

When in doubt about addiction or other possible causes of criminal behaviour, judges can simply *ask* defendants about the reasons behind the events. "Just ask, 'Why did you do this?' [An offender will] usually have said to me, 'I'm sorry, I apologize.' But if you ask *why*, you often get something about addiction or other stresses in his life – for example, he'll say, 'That was a time when my mother passed away, and I got drunk and got in a fight.'"

Judges in several jurisdictions around the world have adopted resolutions endorsing and adopting the principles of therapeutic jurisprudence. For example, at their 56th Annual Meeting, on July 29, 2004, the Conference of Chief Justices of the United States and the Conference of State Court Administrators of the United States adopted a resolution in 2004 endorsing problem-solving court principles and methods. The resolution below was passed by the Western Australian country magistrates at their annual conference in 2004

Country Magistrates' Resolution Adopting Therapeutic Jurisprudence

The Western Australian country magistrates resolve as follows:

1. The Western Australian country magistrates endorse and adopt the principles of therapeutic jurisprudence.
2. In adopting therapeutic jurisprudence, the magistrates seek a more comprehensive resolution of legal problems coming before the court for the greater benefit of litigants and the communities served by the court. A more comprehensive resolution of legal problems may require addressing health, educational, relationship, financial, cultural or other underlying issues.
3. In using therapeutic jurisprudence, the magistrates seek to use the authority and standing of the court to minimise any negative effect of court processes and, as far as possible, to promote the wellbeing of those affected by court processes be they victim of crime, defendant, other party to court proceedings, witness, counsel or court staff. This can be done consistent with traditional judicial principles such as independence, impartiality, fairness and integrity.
4. The magistrates seek to apply therapeutic jurisprudence within the context of statute and the common law.
5. A more comprehensive resolution of legal problems requires country magistrates to consult with local stakeholders and to meaningfully include professionals from other disciplines in the therapeutic jurisprudence related projects that they operate.
6. The magistrates believe it is important to consult with each other in relation to therapeutic jurisprudence related projects so that best practice may be promoted throughout the state.
7. Country magistrates, court stakeholders and relevant local agencies should be included in the design and implementation of therapeutic jurisprudence related projects in their courts.
8. For these purposes, the country magistrates have formed a reference group to monitor the implementation of therapeutic jurisprudence related court projects in country magistrates' courts.

4. Practising TJ in smaller regions: Challenges and opportunities

Therapeutic jurisprudence need not be relegated only to large, urban courtrooms with access to sophisticated resources. Although smaller, more remote communities may have fewer resources – judges, dedicated courtrooms, social services, treatment facilities – than their urban counterparts, their judges and courts have many opportunities to practise therapeutically, and in fact may have several advantages over their “city cousins.” The very nature of smaller, remote, and/or isolated communities can make them ideally suited to TJ practices that may be less effective in larger, urban centres.

This section explores some of the specific challenges and opportunities that practising TJ in smaller region can present, including

- fewer judges vs. increased autonomy
- broader jurisdiction vs. increased understanding of the community, and
- fewer treatment resources vs. increased community support and buy-in.

Fewer judges vs. increased autonomy

Being the sole judge, or one of only a handful of judges, in a region speaks to smaller populations and a lack of resources. The situation, however, may also allow judges more autonomy and flexibility in terms of initiating therapeutic practices. As one of a handful of judges in the Yukon, for example, Chief Judge Heino Lilles has the freedom to practise therapeutically, without the need to establish consensus in a large courthouse. Chief Judge Lilles has initiated the Whitehorse Court’s Domestic Violence Treatment Option (DVTO) and has worked with Aboriginal communities to establish a Sentencing Circle and elder panels (see page 36).

Increased autonomy levels, however, mean that TJ initiatives depend on judicial preferences and attitude. If a problem-solving judge leaves or retires, his or her initiatives and practices may cease. Similarly, if a judge is sceptical about or unaccepting of a problem-solving orientation, there may be little application of such principles in that district.⁹⁷ For this reason, consideration should be given to institutionalizing TJ initiatives where possible, in order that these will survive beyond a specific judge’s tenure.⁹⁸

Teslin, a remote community two hours north of Whitehorse, thinks extremely highly of the Whitehorse Court’s Domestic Violence Treatment Option (DVTO) program and uses it frequently. The treatment program and the community contributed money to hire a mini-bus to bring Teslin residents into Whitehorse for the DVTO.

“Now, the group that comes in from Teslin has some of the best results. They spend two hours on the bus to Whitehorse, discussing the program, and another two hours debriefing on the way back. It’s so useful that we’ve joked about driving local participants around town in a bus for a few hours before and after court appearances. Then the bus driver comes and volunteers for the program, after listening to these men for so long.”⁹⁹

– Judge Heino Lilles, Territorial Court, Whitehorse, Yukon Territory

Broader jurisdiction vs. increased understanding of the community

Judges in rural and remote areas tend to be generalists rather than specialists, exercising a broader jurisdiction than metropolitan judicial officers. A typical session in a circuit court, for example, may encompass adult criminal cases, child and/or youth matters, family law, and other civil cases – all of which may involve several members of the same extended family.¹⁰⁰ This broader jurisdiction means that judges get a better sense of the overall picture of how judging affects families, communities, and community health.

This kind of familiarity with a community, notes Judge Lilles, may influence a judge's approach. After 17 years of circuit court in the same community, Judge Lilles says he sees the impact of his decisions and thus gets direct feedback on their effectiveness and on his performance. As he notes

I think that a significant portion of [judges] think they're making a difference and that their intervention was positive, when in fact it's not. Once a reasonable, dedicated professional realizes that what they're doing isn't really helping – and sometimes it's actually hurting – then they're open to changing the way they practise. Otherwise, they're going to continue as they have all along, and it won't lead to change.¹⁰¹

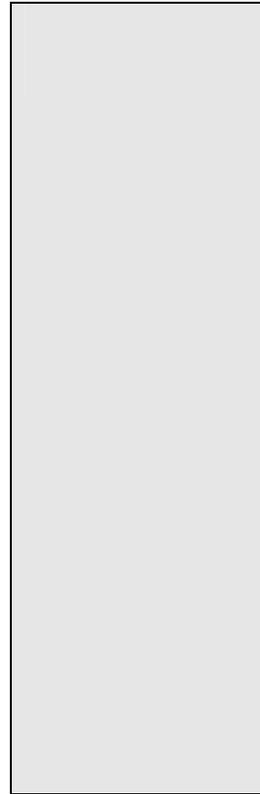
Judging on circuit and/or in smaller communities may also allow judges to more easily use therapeutic strategies such as judicial supervision. Whereas a circuit judge with a dedicated schedule and in-depth knowledge of a community can arrange to review an offender's progress at regular intervals, the same option may not be open to judges in urban centres, who may not have autonomy over their schedules or whose schedules may not be predictable.¹⁰²

Fewer treatment resources vs. increased community support and buy-in

Judges in smaller communities can often face difficulties in finding treatment for addicted offenders, those with mental-health issues, and offenders (and victims) struggling with issues such as domestic violence.

When sentencing, judges serving these communities must often weigh the therapeutic and anti-therapeutic aspects of ordering a shorter sentence in a local jail facility — often without treatment facilities — or a longer sentence, further away, at a federal institution with treatment facilities. The former may offer the offender increased family and community support, while the latter may offer much-needed treatment, and/or may remove the individual from potentially toxic family or community conditions. To make an informed decision, the judge benefits from knowing as much as possible about an offender. As discussed above, pre-sentence reports, victim impact statements, and a well-developed understanding of the community in which they practise can aid judges in making such decisions.

While smaller communities often have fewer material resources than urban centres, they may be at an advantage in terms of community buy-in and support. The close-knit nature of smaller communities may give them more influence over offenders' behaviour. As Judge Susan Devine notes, "In situations in which you have a community court, the impact of the shame of wrongdoing can be significant. In Winnipeg, by contrast, there is no common group observing and passing judgment ... there are very few community-specific deterrents in a large urban courtroom."¹⁰³



5. Resources for further research

Online resources: Therapeutic jurisprudence

International Network on Therapeutic Jurisprudence (INTJ)

www.therapeuticjurisprudence.org

The International Network on Therapeutic Jurisprudence, housed at the University of Puerto Rico Law School and directed by Professor David Wexler, serves as a clearinghouse and resource center on the topic. "It keeps abreast of individuals working in the area and co-sponsors meetings and conferences. In addition, the University's law journal, *Revista Juridica*, includes a regular section called 'Therapeutic Jurisprudence Forum' that also is a resource for current thinking in therapeutic jurisprudence."¹⁰⁴ The Web site provides a comprehensive TJ bibliography, regularly gives news of upcoming activities and meetings, and sponsors a TJ Listserv (see below).

Therapeutic Jurisprudence Listserv

The INTJ (above) also coordinates a TJ Listserv with many judicial (and other) members internationally. The Listserv allows members to discuss and keep up to date on TJ and related problem-solving-court developments. To subscribe, send a BLANK email to tjsp-subscribe@topica.com

Canadian Association of Drug Treatment Courts Listserv

This interactive email Listserv for Canadian DTC court professionals and interested parties can be accessed by writing to cadtc@lists.camh.net.

Toronto Drug Treatment Court

<http://www.torontodrugtreatmentcourt.ca>

The Drug Treatment Court (DTC) program provides court-supervised treatment for people charged with drug offences. While in treatment, the court keeps track of an offender's progress, through such means as drug testing and special court sessions held just for DTC clients.

Center for Court Innovation, New York

www.courtinnovation.org

"The Center for Court Innovation is a unique public-private partnership that is dedicated to enhancing the performance of courts and those whose work intersects with the courts. In performing this work, the Center's goals are to reduce crime, aid victims, strengthen communities and promote public trust in justice."¹⁰⁵ The site includes a broad range of publications on TJ and problem-solving courts, available for downloading.

Center for Court Solutions

<http://solutions.ncsconline.org/default.htm>

A resource for courts interested in developing and implementing

solutions in the areas of diversity, emergency management and security, family and juvenile justice, *pro se/pro bono* services, and sentencing alternatives.

Wexler, David. "Therapeutic Jurisprudence: It's Not Just for Problem-Solving Courts and Calendars Anymore"
http://www.ncsconline.org/WC/publications/kis_spepro_trends04.pdf
(current as of December 15, 2004)

National Association of Drug Court Professionals
www.nadcp.org/

International Association of Drug Court Professionals Listserv
www.nadcp.org/iadtc
This Listserv is open to professionals who are involved in drug treatment courts on all continents. Participants can post and address questions and comments to an international membership, fostering cooperation and information exchange amongst drug treatment courts.

National Center for Preventive Law
www.preventivelawyer.org

National Center for State Courts' *Problem-Solving Reporter*
www.ncsconline.org/Newsletters/NCSC_newsletters.htm
The National Center for State Courts (U.S.A.) publishes the *Problem-Solving Reporter*, a quarterly electronic newsletter designed to show how courts are serving their communities by engaging in problem-solving and therapeutic justice. To subscribe, go to the link above, complete the information requested, and then select the "Reporter" from the list of electronic newsletters at the bottom of that page.

The author and editorial committee have endeavoured to ensure these website references are correct and up-to-date as of December 2004.

Online resources: Restorative justice

Restorative Justice: A Program for Nova Scotia

<http://www.gov.ns.ca/just/rj/rj-contents.htm>

A comprehensive look at Nova Scotia's RJ program, with useful background information on RJ.

Restorative Justice Online

www.restorativejustice.org

"The purpose of Restorative Justice Online is to be a credible, non-partisan source of information on restorative justice."

Centre for Restorative Justice, Simon Fraser University

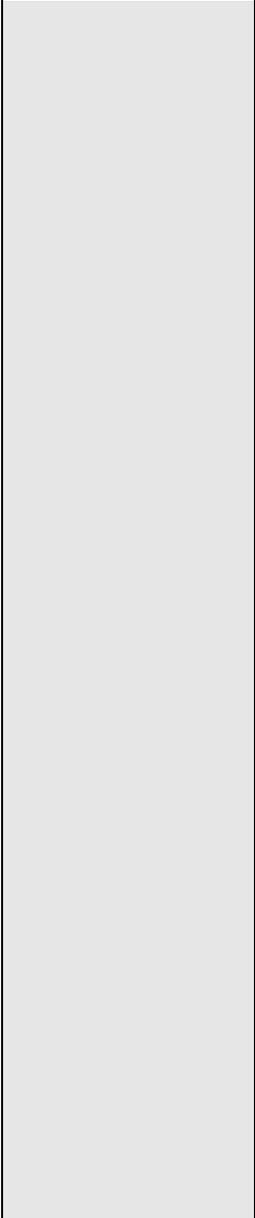
www.sfu.ca/restorative_justice

"The Centre for Restorative Justice, in partnership with individuals, the community, justice agencies and the University, exists to support and promote the principles and practices of restorative justice by providing education, training, evaluation and research."

International Institute for Restorative Practices

www.iirp.org

"The International Institute for Restorative Practices (IIRP) is a non-profit organization that provides education, consulting and research in support of the development of restorative practices around the world." The institute focuses on restorative practices in the areas of criminal justice, schools, child and family welfare, and workplaces.



Canadian community and social service referral services

Provincial drug and alcohol treatment referrals and resources

- St. John's, NFLD: Drug Dependency Services: (709) 738-4919
- Charlottetown, PEI: Health and Community Services: (902) 368-4120
- Fredericton, NB: Dept. of Health and Wellness: (506) 452-5558
- Moncton, NB: Addiction Services: 506-856-2333
- Halifax, NS: Dept. of Health, Drug Dependency Service: (902) 424-5920
- Montreal, QC: Drug Help and Referral Line: (800) 265-2626
- Ottawa, ON: Canadian Centre on Substance Abuse: (613) 235-4048
- Ontario: The Drug and Alcohol Registry of Treatment (DART): 1-800-565-8603; www.dart.on.ca
- Winnipeg, MB: Addiction Foundation of Manitoba: (204) 944-6200
- Regina, SK: Program Branch: (306) 787-4686
- Edmonton, AB: Alberta Alcohol and Drug Abuse Commission: (780) 427-2837
- Vancouver, BC: Alcohol and Drug Information and Referral Service: (800) 663-1441
- Whitehorse, YK: Yukon Dept. of Health and Social Services: (800) 661-0408
- Yellowknife, NWT: Territorial Government Department of Health and Social Services: (867) 920-8946
- www.211.ca – 211 has been designated the information number in Canada for all social service listings. At publication, Ontario is the only province active, but 211 services are expected to roll out across the country.
- *Directory of Addiction Services in British Columbia 1999*; Kaiser Youth Foundation; Province of British Columbia, Ministry for Children and Families (ISBN: KYF: 604-681-1888)

Guidelines for assessing violence and propensity to re-offend

“Actuarial” approaches to assessing and predicting the likelihood of recidivism have provided judges with a more refined set of tools – rather than relying on intuition - to make predictions about re-offence. Scholars at Simon Fraser University (SFU) have developed a range of books and manuals that set out professional guidelines for assessing violence risk, including

- *SARA: Manual for the Spousal Assault Risk Assessment Guide* (2nd Edition), which measures risk for spousal violence
- *SVR-20: Manual for the Sexual Violence Risk-20: professional guidelines for assessing risk of sexual violence*
- *Risk for Sexual Violence Protocol (RSVP): structured professional guidelines for assessing risk of sexual violence*
- *HCR-20: Assessing Risk for Violence (Version 2)*, which assesses risk for violence committed by people with serious mental illnesses or personality disorders
- *Stalking assessment and management guide (SAM)*, and
- child abuse (CARE).

No formal training is required to use these manuals and all are available to the public at a nominal cost through SFU. Some are also available through affiliated organizations such as the BC Institute Against Family Violence (www.bcifv.org) and Psychological Assessment Resources Inc. (www.parinc.com).

Books

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