SOME CANADIAN PROBLEM SOLVING COURT PROCESSES

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Over the past several years a series of specialized or problem solving courts or court processes have evolved within the criminal justice system in Canada. These courts are based upon the principles of Therapeutic Jurisprudence which regards the law (including its procedures and rules) itself as a social force which often produces both therapeutic and anti-therapeutic consequences to the participants to the legal proceedings and society at large.

Problem solving courts have arisen in criminal court cases involving drug offences, Domestic Violence, mental health related offences and Aboriginal justice. This paper will describe several problem solving courts and court processes in Canada along with their various characteristics. The objectives of these courts is to reduce recidivism by dealing with the underlying issues which cause the criminal behaviour, thereby assisting both offenders and victims alike.

Therapeutic Jurisprudence and problem solving courts have been embraced as a matter of policy by the United States Conference of Chief Justices and the United States Conference of State Court Administrators in August 2000. In addition, the United States Trial Court Performance Standards of 1997 direct trial courts in the United States to be concerned with the social outcome of court cases and with whether the social problems are truly addressed by the outcome of judicial proceedings.

In Canada, the 1996 sentencing provisions added to the Criminal Code of Canada, along with subsequent interpretations of that legislation by the Supreme Court of Canada, have added significant emphasis to restorative justice objectives in sentencing, and thus community based dispositions. Problem solving courts have evolved in response to this fundamental shift in emphasis within the criminal justice system.

Au cours des dernières années, des tribunaux spécialisés ou de règlement des conflits ainsi que des procédures judiciaires ont évolué au sein du système de justice pénale du Canada. Ces tribunaux sont fondés sur les principes de la jurisprudence thérapeutique en vertu desquels le droit (y

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compris ses règles et procédures) est considéré comme une force sociale ayant souvent des conséquences à la fois thérapeutiques et antithérapeutiques sur les participants aux instances et sur la société dans son ensemble.

Les tribunaux de règlement des conflits sont issus d'affaires criminelles comportant des infractions en matière de drogue, de violence conjugale et de santé mentale ou touchant les Autochtones. Le présent document porte sur plusieurs tribunaux de règlement des conflits et processus judiciaires au Canada et présente leurs caractéristiques. L'objectif des tribunaux est de réduire les taux de récidive en abordant les problèmes sous-jacents aux comportements criminels et d'aider ainsi à la fois les contrevenants et les victimes.

En août 2000, la jurisprudence thérapeutique et les tribunaux de règlement des conflits ont été considérés par la Conference of Chief Justices (CCJ, Conférence des juges en chef) et la Conference of State Court Administrators (COSCA, Conférence des administrateurs judiciaires d'État) des États-Unis comme touchant des questions de politique. En outre, les Trial Court Performance Standards (Standards de qualité des procès) de 1997 des États-Unis ordonnent aux tribunaux de première instance des États-Unis de tenir compte des conséquences sociales des affaires traitées et de s'assurer que les décisions rendues dans le cadre des instances règlent vraiment les problèmes sociaux.

Au Canada, les dispositions de 1996 sur la détermination des peines insérées dans le Code criminel du Canada et leur interprétation ultérieure par la Cour suprême du Canada ont considérablement accru l'accent mis sur la justice réparatrice dans la détermination des peines, et donc sur les mesures axées sur la collectivité. Les tribunaux changes de résoudre des conflits ont évolué en réponse à ce changement fondamental du système de justice pénale.

I. *Introduction*

Over the past several years, a new direction of thought has been developing concerning the manner in which the criminal justice system delivers some of its services to the community.[1] There is a growing recognition that the traditional adversarial justice system, on its own, cannot effectively deal with causes of recidivism. In certain complex issues coming before the courts the adversarial system, on its own, does not address the underlying causes of the criminal conduct and can even make things worse for victims and the community at large. In several jurisdictions in Canada, initiatives have emerged which are designed to enable courts to respond more effectively to cases where complex, often overlapping, and sometimes intractable social and personal issues are

[1] In fact the new direction of thought is impacting not only the criminal justice system but other parts of the justice system. However, this paper is primarily concerned with problem solving court processes within the criminal justice system.

involved. Poverty, illiteracy, cultural dislocation and the cycle of abuse are often implicated and, in some instances, courts are faced with situations involving profound and systemic disadvantage.[2]

In response to these complexities, certain court processes have recently emerged which attempt to deal more effectively with the underlying factors causing the criminal behaviour and the significantly damaging effect of these problems on victims and the community itself. Specifically, problem solving court processes have arisen in Canada in cases involving such issues as drug addiction, mental health, Aboriginal justice and domestic violence. These courts attempt to deal holistically with cases involving these issues in order to prevent recidivism and to provide follow-up treatment and support for victims and offenders alike, when appropriate.

The traditional adversarial system is designed to deal with intentional behaviour and in cases involving mentally ill people whose behaviour is beyond their control, the traditional system is both ineffective and unfair. In the case of drug dependent individuals, it is clear these individuals will continue to reoffend as long as the underlying cause of their crimes, namely, their addiction, is not dealt with. In the case of Aboriginal people, the Aboriginal culture is not based upon punishment or separation of offenders from society. It is based upon the concept of restoring relationships between the offender and the victim. The Aboriginal culture involves a community based system of sanctions, and therefore the traditional adversarial system is often not understood by Aboriginal people. In the area of domestic violence, while the adversarial system is vital with respect to this issue, on its own, it fails to recognize the complexity of family issues the criminal conduct impacts. Most notably, by the time the matter comes to trial, a significant percentage of victims of domestic violence do not wish to see the offender punished. They want the violence to stop, and the legal outcomes from the traditional adversarial system often fails to produce this result. In all of the foregoing areas, there is a growing recognition that the traditional adversarial system, on its own, is often inadequate to bring about justice to offenders, victims, and the community itself.

New problem solving court developments have arisen partly as a result of judicial initiative and partly as a result of increased community expectations upon the court system. The developments are founded upon principles which have come to be known as “Therapeutic Jurisprudence”,

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[2] This description is taken from the National Judicial Institute invitation relating to the Pre-Conference Institute session entitled “How Judges Are Applying The Problem Solving Lens to Confront Complex Social Problems In Their Courts”, September 17, 2003, St. John’s Newfoundland. The invitation was prepared by The Honourable Justice Paul Bentley & Professor Brettel Dawson.

a study of the law, its rules and procedures, as inherently either therapeutic or anti-therapeutic from the point of view of the participants in the court process including accused individuals, victims of crime and the community itself. In addition, the 1996 Sentencing Revisions to the *Criminal Code of Canada*, along with the Supreme Court of Canada interpretations of this new legislation, have incorporated certain aspects of Restorative Justice into the criminal justice system in recent years.

The scope of this paper will include a general discussion of the salient features of problem solving courts and court processes in Canada and the therapeutic basis upon which these court processes are founded. The existence of strong policy directions embracing problem solving courts and Therapeutic Jurisprudence as the future direction of trial courts in the United States will be considered. The 1996 sentencing provisions added to the *Criminal Code of Canada* and the Supreme Court of Canada decisions *R. v. Proulx*[3], and *R. v. Gladue*[4] will be discussed. The new Canadian legislation and the Supreme Court of Canada's consideration of these provisions does not equate to the same administrative policy direction for Canadian trial courts as that which exists in the United States. However, these factors create a favourable legal environment within which problem solving courts and the therapeutic principles upon which they are based are evolving in Canada. The development and functioning of specific problem solving courts in the areas of mental health, drug treatment, Aboriginal justice and domestic violence are described in some detail. The tensions or questions surrounding Canadian problem solving court processes will be mentioned along with some conclusions and suggestions as to the future of this preventative approach of the criminal justice system in Canada.

II. *Characteristics of Problem Solving Courts*

The characteristics of problem solving courts differ among these courts depending upon the nature of the problem the court has been established to deal with, whether this be mental illness, drug addiction, domestic violence or cultural diversity. However, there are certain salient features these courts share, although their application will vary from one problem solving court to another.

1. Problem solving courts are characterized by enhanced co-ordination and collaboration, not only between the various criminal justice agencies themselves but also between the community service and treatment agencies which deal with the particular problem the court is established to manage. In the traditional court process, the

[3] *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.).
[4] *R. v. Gladue*, [1999] 1 S.C.R. 688.

criminal justice system agencies like Police, Crown prosecutors, probation authorities and Defence Counsel all operate within their own specific areas of concern as do the community service providers and treatment agencies. The problem solving court process compels a collaborative effort on the part of all stakeholders, both within the justice system and the community itself. The objective is to find the best solution to the underlying problem which has caused the individuals to come into contact with the criminal justice system and to find the best possible solution for both offenders and victims of the crime before the court. This solution will involve treatment of the mentally ill individuals and addicted drug offenders. In the domestic violence court context the solution will involve not only treatment (often specialized domestic violence counselling as well as substance abuse counselling) of the offender, but safety and treatment plans for victims and their children, both throughout the criminal justice proceedings themselves and after the proceedings have been concluded. In the Aboriginal context, the traditional sentencing circle dispute resolution technique is utilized as part of the collaborative and co-ordinated process.

2. Problem solving courts are characterized by a multi-disciplinary approach to complex social problems. In the case of mental illness, drug addiction and domestic violence, the justice system is not equipped to solve the underlying problems which give rise to often repeated criminal behaviour. Hence, the community treatment and service providers with the appropriate training and expertise to assist with the fundamental issues of behaviour participate as part of the court process to address the problem.

3. Problem solving court processes rely upon specialized or dedicated units within the criminal justice system and the community itself. Thus, in the case of the domestic violence court process, specialized domestic violence units exist within the Police, Probation and Crown Prosecutor's office. There is also a dedicated duty counsel to provide legal advice to the accused. Community treatment agencies similarly have dedicated staff dealing with referrals from the court. This system of designated staff within each agency allows for a higher degree of continuity and effective management of individual cases. In the domestic violence context, this specialization allows for early intervention and treatment of both victims and offenders in an effort to break the inter-generational cycle of violence so commonly seen in Criminal Courts. In other problem solving court processes the dedicated staff in each agency also ensure prompt and effective application of sentencing plans along with early negotiations and assessments carried out to effect early resolution of the case.

4. Judicial monitoring or supervision of offenders is commonly a part of problem solving court processes. In the drug treatment court judicial monitoring is intensive, as much as two court appearances per week initially. In the mental health courts mental health offenders are also monitored in order to establish a structure within which the accused can progress on the treatment plan. In the domestic violence court, it is useful to have judicial review take place at various intervals as well.

5. One feature of the problem solving court which is fundamental to its success is the presence of the Case Worker, individuals (social workers or psychologists) assigned to the specific case who ensure participants in the courts are personally dealt with. In the domestic violence situation, Case Workers ensure the complainant's family needs and safety concerns are conveyed to the court and all other participants in the court process, including Crown Counsel and Defence Counsel or the duty counsel assigned to the court. These Case Workers also direct complainants to appropriate resources within the community and ensure complainants are supported throughout the criminal proceedings and afterward.

In the mental health courts, the Case Worker represents the interests of the offender and often deals with his or her family to collect and convey necessary information to the court and other participants in the justice system and integrated community agencies available for the case. The Case Worker in the mental health court also ensures the offender is directed to and assisted with attending treatment sessions and other community based resources applicable to the individual case not only throughout the proceedings, but often after their conclusion as follow-up assistance to prevent recidivism .

In the Aboriginal context, The Peacemaking Initiative at Tsuu T'ina Nation is co- ordinated by a Peacemaker, whose role is similar to a Case Worker. In both the Gladue Court and the Drug Treatment Court, a Case Worker exists to assist the accused.

III. *Therapeutic Jurisprudence - The Policy Direction for Trial Courts in the United States*

Both instinctively (in the case of some domestic violence courts) and by design (in the case of drug treatment courts) problem solving court processes developing in Canada have embraced the principles of a body of law known as Therapeutic Jurisprudence. The International Network on Therapeutic Jurisprudence describes Therapeutic Jurisprudence as a perspective that regards the law (including the rules of law, legal procedures and roles of legal actors) itself as a social force that often

produces therapeutic or anti-therapeutic consequences[5]. Therapeutic Jurisprudence concentrates on the law's impact on the emotional life and psychological well-being of the participants to the legal process. According to Professor David Wexler, the Director of the International Network on Therapeutic Jurisprudence, there is a symbiotic relationship between the problem solving court processes emerging in North America and elsewhere and the development of Therapeutic Jurisprudence. While it is clear the problem solving approach to justice is founded upon the principles of Therapeutic Jurisprudence, those principles also appear to be evolving along with the expansion of the problem solving approach to justice. This approach to justice issues is not limited to the criminal justice system problem solving court context but indeed was founded in the mental health area of law and has application to all areas of law.[6]

In August of 2000 the United States Conference of Chief Justices and the United States Conference of State Court Administrators, endorsed the concept of problem solving courts and calendars that utilize the principles of Therapeutic Jurisprudence as the future policy direction for trial courts in the United States. A joint task force had earlier been established to consider the policy and administrative implications of the courts and special calendars that utilize the principles of Therapeutic Jurisprudence and the joint resolution of the Chief Justices and State Court Administrators accepted its recommendations. One of the findings of the task force was that the public and other branches of government look to the courts to address certain complex social issues and problems and that the principles and methods founded in Therapeutic Jurisprudence enhance the quality of justice services within communities. The principles of Therapeutic Jurisprudence include integration of treatment services with judicial case processing, and involve ongoing judicial intervention and the close monitoring of and immediate response to behaviour. A multi-disciplinary approach to individuals appearing before the courts and a system which is characterized by a collaborative approach between the community and governmental based organizations involved in the court process is a feature of the new court processes endorsed by the Conference of Chief Justices and the Conference of State Court Administrators.[7] These same features are present in the Canadian problem solving court processes dealt with in this paper.

In addition, the United States Bureau of Justice Assistance published *The Trial Court Performance Standards* in 1997, encouraging courts to

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[5] International Network on Therapeutic Jurisprudence, online: <http//www.therapeuticjurispudence.org>.

[6] David B. Wexler & Bruce J. Winick, *Law In A Therapeutic Key: Developments in Therapeutic Justice* (Durham: Carolina Academic Press, 1996); see Table of Contents.

[7] United States Conference of Chief Justices and the United States Conference of State Court Administrators, "Resolution #22" (August, 2000).

look more than at the legal outcome in cases coming before them. These standards direct trial courts to be concerned with the social outcome of court cases and whether social problems are truly addressed by the outcomes of judicial proceedings. Hence, in the United States there is considerable administrative policy justification for the problem solving approach to justice.

IV. *Criminal Code Changes and Supreme Court of Canada Remarks*

A. *The Introduction of Changes to the Criminal Code of Canada*

In September, 1996 the Parliament of Canada enacted comprehensive changes to the *Criminal Code* in the area of sentencing of criminal offenders. When The Honourable Allan Rock, then Minister of Justice and Attorney General of Canada, introduced Bill 41 for second reading in the House of Commons he stated the Bill represented over 14 years of work to achieve comprehensive reform in the sentencing process as part of the criminal justice system in Canada and that the need for such reform in the sentencing process was long recognized by judges, parliamentarians, lawyers and the Canadian people.[8]

Minister Rock stated a general principle running throughout the Bill is that jails should be reserved for those who should be there and alternatives should be put in place for those offenders who do not need or merit incarceration. One of the key changes enunciated by the Minister was the creation of the conditional sentence option in sentencing and the authority to divert cases from the justice system where appropriate in the opinion of the investigating officers and other authorities. Both of these changes invite a closer relationship between the justice system and its correctional agencies and other community agencies dealing with the rehabilitation of offenders. The provisions of the conditional sentence are found in s. 742 of the *Criminal Code* which reads as follows:

> 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
> (a) imposes a sentence of imprisonment of less than two years, and
> (b) 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 set out in sections 718 to 718.2,
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> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[8] *House of Commons Debates*, (20 September 1994) at 5870-73 (Hon. Allan Rock).

In discussing this change in the law the Minister stated as follows:

> Where a court imposes a sentence of imprisonment of less than two years and where the court is satisfied that serving the sentence in the community would not endanger the safety of society as a whole, the court may order that the offender serve the sentence in the community rather than in an institution. Offenders who do not comply with such conditions as may be imposed at that time can be summoned back to court to explain their behaviour, to demonstrate why they should not be incarcerated. If the court is not satisfied with that explanation, it can order the offender to serve the balance of the sentence in custody. This sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls.

He went on to say this approach promotes the protection of the public by seeking to separate the most serious offenders from the community while providing that less serious offenders can remain among society while adhering to appropriate conditions. He mentions throughout his introductory remarks the "scarce resources" available for the purposes of incarceration and the need to use those resources wisely in those cases involving "more serious offenders". He also mentions the rate of incarceration in Canada is extremely high when compared with other industrialized countries.

In addition to the conditional sentence option contained in the sentencing legislation, Sections 718 and 718.2 have been held by the Supreme Court of Canada to embrace the concept of Restorative Justice or community based sentencing. The notion that no person ought to be deprived of his liberty if less restrictive sanctions may be appropriate, is found in Section 718.2(d). Furthermore there is a requirement for the court to consider all alternatives to incarceration for all offenders, but especially with respect to Aboriginal offenders which is found in Section 718.2(e). The concept that prison ought to be a last resort in sentencing is embraced by the new legislation. While Section 718 also contains clear references to traditional goals of sentencing such as denunciation, deterrence, and the need to separate offenders from society, the Supreme Court has held restorative justice goals are now included alongside the traditional sentencing objectives.

B. *Supreme Court of Canada Remarks in R. v. Proulx*[9] *and R.v. Gladue*[10]

The Supreme Court of Canada has interpreted the 1996 sentencing provisions of the *Criminal Code* in great detail in the cases of *R. v. Proulx*

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[9] *R. v. Proulx, supra* note 3.

[10] *R. v. Gladue, supra* note 4.

and *R. v. Gladue*. In both cases the Court emphasized the need for judges to consider the availability of community service and treatment programs, a task often left to Probation authorities in the past. In the past judges would often identify the type of counselling required, such as substance or alcohol abuse counselling. They would then leave the matter of determining which programs, if any, were available in the community up to the Probation authorities. It appears from the recent Supreme Court decisions that the duty to consider availability of community treatment programs has been broadened to include more direct involvement on the part of the judge, both by the legislation itself and the manner in which it has been interpreted by the Supreme Court of Canada.

In addition, the Supreme Court of Canada has held the legislation creates a series of new sentencing goals to be considered alongside the traditional sentencing goals. These new goals are restorative in nature and focus upon the offender making reparations for the harm he or she has done and becoming re- integrated into the community. These goals are not generally consistent with incarceration.

Notably in both *R. v. Proulx* and *R. v. Gladue* the sentence of incarceration handed down by the sentencing judge was upheld. Both cases involved the death of a victim, one from dangerous driving and the other from manslaughter. The Supreme Court of Canada has not held that the new restorative sentencing goals are necessarily the primary sentencing goals in all cases, but rather that the new restorative sentencing objectives must be considered alongside the traditional sentencing goals which existed prior to the new legislation.

In the case of *R. v. Proulx* the Supreme Court of Canada dealt with the case of an accused who entered guilty pleas to dangerous driving causing death and dangerous driving causing bodily harm. The facts involved an 18 year old accused who consumed alcohol prior to driving a mechanically unsound vehicle. He collided head-on with an oncoming car as he attempted to pass another vehicle. The driver of the other car was seriously injured and the passenger in the accused's vehicle was killed. At trial the judge concluded that a conditional sentence would not be consistent with the objectives of denunciation and general deterrence and sentenced the accused to 18 months incarceration, and a driving prohibition of five years. The Court of Appeal of Manitoba allowed the accused's appeal and substituted a Conditional Sentence Order for the jail term. The Supreme Court of Canada restored the trial judge's decision on the basis that it was not demonstrably unfit and held the Court of Appeal had no grounds to intervene in the lower court's discretionary conclusion. The Supreme Court further held the Court of Appeal erred in holding that the sentencing judge had given undue weight to the objective of denunciation.

In the *Proulx* case, however, the Supreme Court addressed the new sentencing legislation with respect to conditional sentences in general and made several important points.[11] They held a conditional sentence is available in principle for all offences in which the statutory prerequisites are satisfied and that failure to consider this option when the prerequisites exist may well constitute reversible error. [12] 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. At paragraph 113 of the *Proulx* decision the Supreme Court stated the following:

> In sum, in determining whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing, sentencing judges should consider which sentencing objectives figure most prominently in the factual circumstances of the particular case before them. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the *Code*). This list is not exhaustive.

Thus, the sentencing judge must consider four things in order to ascertain whether restorative goals can be satisfied in a particular case, namely:

1. The offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation,

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[11] The conditional sentence provisions of the Criminal Code are found in Section 742 which reads as follows:

> 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
> (a) imposes a sentence of imprisonment of less than two years, and
> (b) 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 set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[12] *R. v. Proulx*, *supra* note 3 at para. 90.

2. The availability of appropriate community service and treatment programs,

3. Whether the offender has acknowledged his or her wrongdoing and expresses remorse, and

4. The victim's wishes as revealed by the Victim Impact Statement.

The question arises as to how a judge can most effectively consider the offender's prospects of rehabilitation and the availability of appropriate community service or treatment programs. The Supreme Court suggests, in the case of Aboriginals, that case-specific information will come from counsel and from a pre sentence report which may come from the representative of the relevant Aboriginal community.[13] The collaborative, integrated, multi-disciplinary approach utilized in problem solving court processes achieves these objectives more effectively than the traditional system which largely leaves these in the hands of either Defence Counsel or the Probation authorities, neither of which have the co-ordinated and directed resources available to the problem solving court processes. In some cases the resources do not exist unless a problem solving court process has been established in the community. Such was the case with respect to the Calgary Domestic Violence Court Project. Domestic violence counselling programs were created and co-ordinated with the specialized Domestic Violence Court.

In addition, defence counsel are often unaware themselves of what community service or treatment programs are available to their clients and sometimes these services and programs are scattered in such a manner that it is difficult for them to access for the benefit of their client. The Supreme Court suggests that judges may have to request witnesses be called to give evidence with respect to availability of community treatment agencies. While this suggestion was made in the context of Aboriginal offenders, the rationale with respect to other offenders is equally applicable.[14]

With respect to the concept of deterrence, the Supreme Court recognized once again that jail may ordinarily provide more deterrence than a conditional sentence, but cautioned judges they ought to be "wary of placing too much weight on deterrence given the uncertain deterrent effect of incarceration".[15] In the context of problem solving courts these remarks arguably are an encouragement for judges to craft effective community alternatives in sentencing whenever appropriate, and in order to do this, the multi-disciplinary integrated and

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[13] *R. v. Gladue*, *supra* note 4 at para. 93, point 7, page 738.

[14] *Ibid.* at para. 84 at 732.

[15] *R. v. Proulx*, *supra* note 3 at 452.

collaborative approach to various categories of cases which characterizes the problem solving court processes is of great value.

In the case of *R. v. Gladue*[16] the Supreme Court of Canada dealt with an Aboriginal woman who entered a guilty plea to manslaughter after killing her common-law husband. She was sentenced to three years incarceration for the offence which took place in circumstances involving the accused stabbing her common-law husband once after seeing the victim and the accused's sister together and becoming jealous. After stabbing the victim it did not appear she realized she had killed him. Alcohol was also a factor in the circumstances of this case.

The accused appealed her sentence to both the Court of Appeal and the Supreme Court of Canada, without success. Although the three year sentence of imprisonment was upheld by both courts, the Supreme Court carefully considered the provisions of S. 718 and S. 718.2(e) of the Criminal Code. The Court has this to say at para 43:

> Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (a) through (d). What are new, though, are paras. (e) and (f), which along with para. (d) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (d), (e), and (f) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: ... Restorative sentencing goals do not usually correlate with the use of prison as a sanction. *In our view, Parliament's choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(e) will necessarily be informed by this re-orientation.[*emphasis mine]

Section 718 and 718.2(d) and (e) read as follows:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives;
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> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;

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[16] *R. v. Gladue*, *supra* note 4.

(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.2 A court that imposes a sentence shall also take into consideration the following principles: ...

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Therefore, the Supreme Court of Canada has held the traditional sentencing goals are incorporated into Section 718, paragraphs (a) through to (d). These include denunciation, general and specific deterrence, separation of offenders from society where necessary and rehabilitation of offenders. The Court held these to be a restatement of existing law. The Court then went on to say, however, that additional sentencing goals have been added which focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole as well as promoting a sense of responsibility and acknowledgment of the harm caused on the part of the offender. The Court further stated that the sentencing goal of rehabilitating the offender can also be regarded as healing the offender. In summary, the Court held that the concept of Restorative Justice underpins paragraphs (d), (e) and (f) of Section 718.

It appears there are two parts to Restorative Justice. One involves the treatment component of the sentence, or the rehabilitation of the offender. The other focuses upon the offender themselves taking responsibility for their actions and repairing the harm they have done. The Supreme Court held this concept to be central to the sentencing process. Therefore, simply crafting a treatment oriented sentence as an alternative to incarceration does not address the second part of Restorative Justice objectives, that being focussed upon the requirement for offenders to repair the harms suffered by individual victims in the community as a whole as a result of their criminal conduct. Ordering an offender to pay restitution is only one way for an offender to repair the harm done to victims.

The Supreme Court referred to Section 718.2(e) which mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of Aboriginal offenders. The Court held there is a judicial duty to give the

provision's remedial purpose real force.[17] In addition, the Court stated Parliament has placed a new emphasis upon decreasing the use of incarceration.

As with the remarks in the *Proulx*[18] decision concerning conditional sentences, the remarks from the Supreme Court in the *Gladue*[19] decision concerning s. 718.2(e) underline the importance for judges to consider and be aware of the alternatives to incarceration, an approach which invites integration between the criminal justice system and the community it serves. The need for the court to become aware of other sentencing alternatives in the case of Aboriginals caused the Toronto Judges to establish a special court called The Gladue Court, which is dealt with later in this paper. Information and availability of alternative sentences with a restorative approach had to be created and co-ordinated in a fashion which could be accessed by the court itself. Judicial initiative was involved in meeting with the Aboriginal community in Toronto to create this specially structured court which now deals with Aboriginal offenders and provides judges with the information they require to carry out the directives from the Supreme Court of Canada.

The Supreme Court adopts the summary of the Saskatchewan Court of Appeal in *R. v. McDonald* (1997), 113 C.C.C. (3d) 418 who stated that at least one commission or inquiry into the use of imprisonment has been held in each decade since 1914, and went on to say:

> An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation.[20]

Thus the Supreme Court interprets the new legislation to include the principle of restraint with respect to incarceration. Judges are required to "expand the parameters of the sentencing analysis for all offenders" and this principle of restraint is to be "informed by this re-orientation". Problem solving courts accomplish these objectives, since these courts typically have integrated the criminal justice system agencies with the rehabilitative resources within the community. Thus, community based sentencing plans appropriate to the individual complexities of the case can more effectively be formulated.

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[17] *R. v. Gladue*, *supra* note 4 at para.93, subpara. 3.

[18] *R. v. Proulx*, *supra* note 3.

[19] *R. v. Gladue*, *supra* note 4.

[20] *R. v. Gladue*, *supra* note 4 at para. 54.

V. *Specific Examples of Problem Solving Court Processes*

A. *Mental Disorder Courtroom Toronto Old City Hall*

In May, 1998 Courtroom 102 in the Old City Hall Court House in Toronto opened a specialized court designed to deal with the mentally disordered accused. With the reduction in the number of Public Mental Hospitals coupled with the absence of alternative housing for the mentally ill, there was a significant increase in the number of homeless mentally ill people who were arrested and brought before the criminal courts at the Old City Hall Court House, located as it was in downtown Toronto. The behaviour of these mentally ill people was in reality a health issue, but because of their inability to manage their lives (often characterized by homelessness and poverty), their behaviour brought them squarely into the criminal justice system, a system established to protect society from persons whose intentional behaviour violates the criminal law.

The impetus for the court came from the observations of those who dealt with the mentally ill population who noted the following:

> a) mentally disordered accused were entering the criminal justice system at a rate which exceeded the growth of prosecutions in general;
>
> b) mentally disordered accused were not treated in a manner which appropriately took into account their disorder (they were treated much the same as other prisoners);
>
> c) the mentally disordered accused were processed at a very slow rate and required many remands in order to adjudicate simple and preliminary issues, and
>
> d) many of the mentally disordered accused entering the criminal justice system were cases which did not belong in the criminal system.[21]

A loose coalition of interested parties who saw this phenomenon daily began to meet, a coalition which included social workers, court staff, psychiatrists, Crown attorneys, defence lawyers, security staff, and judges. A plan involving the co-operation of the Ministries of Health, Attorney General, Solicitor General, Community and Social Services, Corrections, Metropolitan Toronto Police Services and the Centre for Addiction and Mental Health emerged. At present, additional stakeholders have been integrated into the functioning of the Court. Interestingly, Mr. Justice Ormston relates that no new funds were required when the Court was first

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[21] The Honourable Mr. Justice Richard D. Schneider "Mental Disorder in the Courts" Criminal Lawyers Association Newsletter 19 (4 December 1998) online: <http://www.criminallawyers.ca/newslett/19-4/schneider.htm.>

established, although with its expansion funding has been required.[22]

The Mental Health Court was established to deal firstly with mentally ill accused who were in custody and whose fitness to stand trial was to be determined prior to the criminal charge proceeding. A main advantage of the Court was its physical proximity to adjoining holding cells and office space which would allow psychiatrists, social workers, lawyers and families access to the prisoner, who could be isolated from the mainstream of offenders to whom mental health was not an issue. A health oriented atmosphere was thus created instead of the atmosphere of a large remand institution with a substantial population of prisoners charged with varying degrees of criminal activity.

The characteristics of the Mental Health Court in Toronto Old City Hall are the following:

1. The Court creates a non-adversarial atmosphere. Rules of evidence, procedure and court room etiquette are relaxed. People who are both competent and interested in dealing with mentally disordered people are utilized in all aspects of the Court and its support staff. The dialogue concerning each case includes family members as well as the accused. Often family members are the only ones with the information required by the Court to deal with the accused and are also the only ones able to convey such information in a meaningful way.

2. Forensic psychiatrists are available in the Court five days a week. When there are reasonable grounds to believe that an accused may be unfit to stand trial the person is remanded into court 102 where a psychiatrist can examine him the same day. Even accused persons from the College Park Courts in Toronto can be transported for an afternoon appearance in Court 102 at the Old City Hall Court House. The accused is not required to remain in custody in order to be examined by a psychiatrist at a future date, and the typical eight day remands are thus eliminated. Often, under the traditional system, a shortage of hospital beds resulted in accused persons needlessly being held in custody rather than being assessed immediately.

3. The Court is a docket court and if the psychiatrist finds the accused is fit to stand trial, other procedures such as bail applications or diversion of the case from the criminal process can be dealt with. In addition, guilty pleas can be taken by the court. The accused can be

[22] The Honourable Mr. Justice Edward F. Ormston, Mental Health Court In Ontario.

dealt with in these cases in Court 102 or can be remanded back to the Court from which the case was referred. A significant percentage of cases result in a psychiatric finding that the accused is fit to stand trial and therefore this early determination results in early disposition of many cases which do not warrant further criminal proceedings.

4. In cases where an accused is found unfit to stand trial or if fitness is uncertain the Court may remand the accused to a psychiatric facility for a more comprehensive assessment or hold a fitness hearing. In cases where an accused is not found to be fit to stand trial the Court may commence a disposition hearing, consider a Crown application for a treatment order, remand the accused to a hospital pending a disposition hearing by the Ontario Review Board, or do nothing in which case the accused is reviewed by the Ontario Review Board within 45 days. The functioning of the Ontario Review Board established pursuant to the *Criminal Code* to determine criminal responsibility and deal with persons found not to be criminally responsible has been integrated with the Mental Health Court in Toronto.[23]

5. The Court has the advantage of physical proximity between the offices of support staff, cells for the prisoners, and the Court itself. These are all connected to one another. Thus, the prisoners are immediately available to psychiatrists without having to be segregated out of the main prisoner population. They are also immediately available to Mental Health Court Workers or Defence Counsel.

6. One of the most important components of the Court is the on-site presence of Mental Health Court Workers whose role is to provide extensive assistance to the accused. These are social workers who have special knowledge of the mental health and social services available in the community and their role is to ensure the accused person is appropriately directed to these services. They assist the accused in contacting referral agencies and even assist the accused in getting to scheduled appointments. Their involvement increases the level of compliance with treatment and with court orders and can be credited with reducing recidivism.

7. The Court has on-site duty counsel to provide legal advice to the accused and thus the normal delay in obtaining counsel (during which time the accused may remain in custody) is avoided. With

[23] Mental Disorder In The Courts, *supra* note 18.

immediate legal advice and representation, the matter can be more expeditiously handled as well. For example, whether or not the accused is found fit to stand trial, legal representation is necessary before any further proceedings ought to occur and the disposition of many cases the same day as the accused appears and is examined by the psychiatrist is made possible by the presence and availability of immediate legal advice.

8. Judges are selected for this court on the basis of their expertise and interest in dealing with mentally disturbed individuals. Some judges are more familiar with the *Criminal Code* provisions dealing with mentally disordered individuals than others.

Ideally, a mentally disordered person who is arrested will be identified and sent (either by police or by Crown or Defence Counsel) to the Mental Health Court. There he will be seen by Legal Aid, social workers and psychiatrists. A fitness hearing immediately followed by a bail hearing occurs. If he is unfit, he is sent to hospital for further assessment or treatment. Once fitness is achieved an accused is usually released on bail with some terms dealing with risk management, counselling and re-integration. If fit, he is usually released on bail with the same types of conditions.

Once released on bail an accused is ordered to re-attend court on a regular basis to monitor and encourage compliance. Thus, judicial supervision and intervention is present in the Court process throughout. After a 4 to 6 month time frame, if an accused has stabilized, re-integrated and has not been charged with any other offences, the court workers prepare documentation to support a Crown Stay of the charge and the Crown Attorney is approached by the court worker on this basis. Sometimes a Crown Stay is the outcome, but other times a non-custodial sentence is seen by the Crown to be appropriate, particularly in cases where the case does not warrant diversion.

Justice Ormston, who was instrumental in the establishment of the Mental Health Court in Toronto Old City Hall succinctly summarizes the philosophy behind the Court as follows:

> This form of 'Therapeutic Jurisprudence' has at its core a philosophy that most of these offenders are not evil, but ill. It believes that one of the purposes of the Justice system is to heal as well as protect. It believes that the accused must be heard and participate in the planning. It believes that positive encouragement, rather than threat, creates a better atmosphere for healing.[24]

[24] Mental Health Court In Ontario, *supra* note 19.

The goals of the Court are:

a) to expedite case processing

b) create effective interactions between the mental health and criminal justice system

c) increase access to mental health services

d) reduce recidivism

e) improve public safety, and

f) reduce the length of confinement in jails for mentally disturbed offenders.

Some important challenges remain in the operation of the Mental Health Court in Toronto, including the issue of whether the Court ought to be expanded to receive prisoners from other courts in Toronto and whether an on site clinic ought to be made available as an adjunct of the court. The question of whether the Court ought to advocate for a facility where police can bring mentally disordered people rather than incarcerating them in the first place has also been identified.[25]

B. *Toronto Drug Treatment Court*

During the past decade or so Drug Treatment Courts have proliferated within the United States in order to deal more effectively with the issue of recidivism among drug addicted accused. In 1998 Columbia University's National Center on Addiction and Substance Abuse (CASA) released a study which examined some 24 drug courts across the United States, specifically comparing the offenders who participated in the process offered by drug treatment courts with those who participated in other forms of community supervision.[26]

The study found that:

1. Drug courts are successful in engaging and retaining offenders in treatment services.

2. Drug courts provide more comprehensive and closer supervision of the drug- using offender than other forms of community supervision.

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[25] *Ibid.*

[26] Steven Belenko, "Research on Drug Courts: A Critical Review" [1998] 1:1 National Drug Court Institute Review 35.

3. Criminal behaviour and the use of drugs are substantially reduced during the time frame within which offenders participate in drug treatment court proceedings.

4. Even after the drug court program is complete, criminal behaviour is reduced, especially for graduates of the program.

5. Drug courts generate cost savings

6. Drug courts successfully bridge the gap between the court and the treatment agencies and public health systems.

The same study found that 70% of the drug court participants remain in treatment for a full year and 50% actually graduate from the program. These impressive statistics contrast with the study results of participants enrolled in other community programs where 50% of participants stay less than three months.[27]

The main difference between non court related community programs and those tied to the drug court is the coercive element which is involved when community treatment agencies are integrated with the criminal justice system. The authority of the court and the close judicial monitoring of offenders combines with the treatment agencies to provide both structure and motivation to offenders. The aggressive follow-up on court-ordered treatment, both by the court itself as well as the various agencies within the justice system and the community create a more intensive treatment environment for individual offenders as well as providing the structure and goal oriented plan which is often very needed by offenders. It is clear to those working with drug dependent or addicted people that they will repeatedly offend the criminal law in order to "feed" their habit and that the answer to recidivism (and more importantly, preventing recruitment of otherwise non drug dependent youth and others), is to treat the addiction and thus allow offenders realistic alternatives to their criminal behaviour.

The first drug treatment court in Canada began operating on December 1, 1998 in the Old City Hall Court House in Toronto, Ontario. It began as a pilot project funded by the National Crime Prevention Centre, and was intended to target prostitutes, youth and visible minorities. Other offenders with drug related offences were also eligible to enter the program. The funding has recently been extended for a further two years and in the most recent Speech from the Throne the Federal Government has committed to expand the number of Drug Treatment Courts in Canada. The Special Commons Committee on the Non-medicinal Use of Drugs has recommended the permanent funding

[27] *Ibid.*

of existing pilot projects.[28]

1. *General Functioning of the Court*[29]

Generally speaking, participation in the Court is voluntary. An offender is given the option of participating in the program of treatment or proceeding through the traditional criminal court process. The advantage of the drug treatment court is that closely monitored treatment for the drug addiction is offered and if the accused succeeds in completing the program, the charges are withdrawn or stayed.

Non-violent offenders charged with possession or trafficking in small quantities of crack/cocaine or heroin may be eligible to participate in the Drug Treatment Court. Generally, offenders whose charges would normally result in a sentence of nine months incarceration or less are considered eligible for the option of participating in the Drug Treatment Court. This general target of seriousness of the offence is consistent with the purpose of the Court being to reach the addicted offenders whose primary reason for possessing or trafficking in drugs is to satisfy their own addiction, rather than to profit from the transaction. Clearly the court is not designed to assist the drug dealer whose objective is financial profit.

(a) *Track One - Prior to Plea Entry*[30]

Offenders with little or no criminal record charged with simple possession of crack/cocaine or heroin may be eligible to enter Track One of the Drug Treatment Court Program. Candidates are screened and assessed by treatment providers to determine whether a drug addiction exists. They are then screened by the Crown and ultimately their entry must be approved by the judge. The following factors are considered in determining eligibility, although they may be varied in individual cases at the discretion of the Crown.

- The nature and extent of any prior criminal convictions, discharges or diversions. Sometimes prior criminal history precludes entry into Track One.

- Whether there are any pending charges and whether the offender poses a risk the community.

- The nature and seriousness of the current offence with which the offender is charged.

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[28] Toronto Drug Treatment Court Fact Sheet. The writer acknowledges the help and assistance of Justice Paul Bentley who has provided extensive material to the writer relating to the Toronto Drug Treatment Court and other Toronto City Hall Initiatives.

[29] The Honourable Mr. Justice Paul Bentley, Canada's First Drug Treatment Court (2000), 31 C. R. (5th) 257.

[30] *Ibid*.

If the offence would normally bring a sentence in excess of three months, the offender may be precluded from entering Track One.

- The circumstances of the current offence with which the offender is charged. Entry to Track One is generally not available if other young persons under 18 years were involved or drawn in by the offender. If the offence location was in or near a school, playground, or other place frequented by persons under 18 years, or if it involved consumption or the open display of a drug in a motor vehicle, entry to Track One will generally be precluded.

- Acceptance of the candidate by the treatment provider. Typically, the candidate is required to enter into and abide by a treatment contract.

(b) *Track Two - Post Plea Entry*[31]

Offenders with assessed drug addiction charged with criminal offences including simple possession, possession for the purpose of trafficking, or trafficking will be eligible for Track Two of the Drug Treatment Court program. As with Track One, candidates are initially screened and assessed by the treatment provider to determine whether a drug addiction exists and Crown approval for entry is required. The following criteria are relevant in determining whether an offender is suitable for entry:

- The nature and extent of prior criminal convictions, discharges, or diversions and the extent to which an offender has in the past demonstrated co- operation with probation supervision. Lack of co-operation with probation supervision in the past may preclude entry to Level Two as will a criminal record which requires prison as the only appropriate sanction.

- Whether the offender has completed a Drug Treatment Court Program in the past. If an offender has been unsuccessful in such a program in the past his entry into Track Two will generally be precluded.

- Whether the offender is facing other criminal charges. Notably, if an offender faces other minor non-drug charges, he will be required to plead guilty to those in order to enter the Drug Treatment Court.

- Whether the offender poses a risk to the community.

- Nature and seriousness of the current offence with which the candidate is charged. As earlier mentioned, Track Two will generally be available only to those offenders whose normal sentence would not exceed nine months imprisonment.

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[31] *Ibid*.

- Motivation of the offender in committing the current offence. Motives involving commercial gain preclude entry into the Drug Treatment Court Program.

- Circumstances of the offence and the same restrictions which apply in Track One concerning young people under 18, places they frequent, and motor vehicles will generally preclude entry into Track Two.

- Acceptance of the candidate by the treatment provider and the willingness of the offender to agree to and abide by the terms of a treatment contract.

2. *The Treatment Component of the Drug Treatment Court*[32]

A cognitive behavioural approach to reducing drug use is utilized by the Centre for Addiction and Mental Health in Toronto, which is the primary counselling agency integrated with the Drug Treatment Court. However, the Centre links offenders with other clinical supports within its own mandate as well as to agencies and resources within the community. The scope of services available to an offender include health care, social stability, employment, housing, education and addressing relationship issues. These are, of course, in addition to the counselling and treatment services having to do directly with the addiction to drugs.

Each participant is assigned a Case Manager, much like the Court Worker social worker found in the Mental Health Court. The role of these Case Workers is fundamental to the success of the problem solving courts, and in the case of the Drug Treatment Court, the Case Manager meets with the offender on a regular basis to plan, discuss and implement mutually agreed upon treatment goals. Thus, the structure and goal setting needed in the life of the individual and which contributes to the success of the program, is intensively and personally addressed by the Case Manager, who maintains frequent and personal contact with the offender as he/she progresses through the program. Issues such as housing, employment, education and other personal issues are discussed with the Case Manager on an ongoing basis throughout the program.

The scope of this paper does not permit an in-depth discussion of the treatment offered to drug addicted participants, but the depth and intensity of such treatment can be understood by reference to the five phase treatment program at the Centre for Addiction and Mental Health (CAMH) for significant addiction to cocaine. Phase One is the Assessment Phase during which a comprehensive assessment is done, consisting of personal interviews, objective testing and motivational interviewing. Phase Two is the Stabilization Phase and is comprised of psycho-educational group counselling including subjects like motivation, preparation for change,

[32] *Ibid.*

coping with cravings, stabilization of substance use, and development of social support networks. Phase Three is the Intensive Treatment phase which explores the functions of the substance use, addresses triggers, consequences, goal setting and developing alternative coping strategies. Phase Four is the Maintenance Phase which directs offenders with respect to positive lifestyle changes and relapse prevention and Phase Five is the Continuing Care Phase which provides ongoing support to maintain positive lifestyle changes and prevention of relapse strategies.[33]

For offenders addicted to heroin the Methadone Maintenance Program is offered by the Centre in accordance with provincial guidelines. It is not uncommon for offenders to be addicted to both cocaine and heroin in which case the pharmaceutical aspect of the Methadone Maintenance Program is integrated with the five phase Cocaine Addiction Treatment Program discussed earlier.[34]

3. Specific Procedure

Each drug charge is initially reviewed by the Drug Treatment Court prosecutors who inform the accused or his counsel (or duty counsel) that he/she may be eligible for the Drug Treatment Court. Much like the Alternative Measures Program, there is a one page form the accused must complete and if he/she is eligible (Crown decides after receiving the one page application), the accused must appear in the Drug Treatment Court within a week. On the morning of the first appearance, the offender is interviewed by a court liaison staff member who is attached to both the Drug Treatment Court and CAMH. This initial screening focuses on whether the accused has a drug dependency, and if so, the accused is brought to the Drug Treatment Court and released on bail conditions which require the accused to attend for an intensive assessment at CAMH the following day. The accused is ordered to return to Court the next court day after the assessment to advise whether he/she wishes to enter the program.

The offenders eligible for Track Two must be prepared to plead guilty and sign a consent to postpone sentencing agreement. S. 720 of the *Criminal Code* requires the Court to conduct proceedings to determine the appropriate sentence as soon as practicable after a guilty plea has been entered and the consent to postpone sentencing agreement addresses this statutory requirement. A further condition of entry to the Court is a consent to dispense with Crown disclosure and consent to the exchange of information concerning matters necessary for treatment, between the Court and treatments teams. These agreements are signed in the presence of legal counsel and after the accused has received legal advice.

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[33] *Ibid.*

Treatment begins immediately after the accused is accepted into the Court program and accused are initially required to return to court twice each week, in order to ensure compliance. Regular and random urinalysis are performed at CAMH at least once a week and results are placed before the Court at each court appearance.

Each bail order is tailored to meet the specific situation of the individual accused. It is the breach of the bail order which permits the Court to impose sanctions for non- compliance. A Drug Treatment Court team meeting takes place prior to every sitting of the Court, including the Judge, Prosecutor, Defence Lawyer/Duty Counsel, Probation Officer and Court liaison members. The file of every offender on the Court docket is reviewed and the decision as to future treatment and judicial involvement is made. Consistency in the team members and the Judge are important. Accused develop a personal relationship that is an important component of the dynamic of a Drug Treatment Court. It is especially important for the Judge to be the same Judge, since it is the Judge who positively commends the accused for their progress and discusses their progress on a weekly basis.[35] This personal reinforcement is an important aspect of the treatment. The Judge, representing as he/she does, the society from which the accused has been excluded by his drug addiction and its consequences, provides the positive link and encouragement to the accused concerning his future prospects as a productive individual. The traditional condemnation and punishment approach of the justice system cannot produce the belief in an accused that he/she can overcome the addiction and be restored as a functioning member of society. Typically, accused persons with such addictions commonly receive condemnations for their actions, but the commendations from the Judge in the Drug Treatment Court provide motivation which have reportedly had a powerful effect upon the accused's ongoing efforts to remain drug free.[36]

Relapse is an expected part of recovery and therefore is tolerated as long as there is honesty and accountability from each offender.[37] The team assesses each case individually, and it is the commitment toward abstinence which is constantly evaluated by the treatment team. If an accused fails to attend court or treatment sessions, or fails to provide a urine screen, sanction may be imposed at the next Court appearance. Such sanctions include a reprimand from the Judge, more frequent court attendances being ordered, counselling, community service hours, or revocation of bail. In the event bail is revoked, the accused will be remanded in custody for a period not exceeding five days. (It should be

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[34] *Ibid.*

[35] Canada's First Drug Treatment Court, *supra* note 26.

[36] *Ibid.*

[37] *Ibid.*

noted that participants sign an acknowledgment that their bail may be revoked and sets forth the conditions upon which this may occur.). Thus, there is an immediate consequence for contravention of the bail release conditions.

In cases where an offender refuses to admit to ongoing drug use despite evidence to the contrary from the urinalysis testing, or if there is any tampering with the testing procedures, it is likely the offender will be returned to the mainstream court (if a pre-plea Track One offender) or expelled from the program and sentenced (if a Track Two post- plea offender).

4. *Preliminary Results*

Evaluation of the Court will not be complete until June 30, 2004, but the preliminary research results for the first three years of the Court's operation include the following:

(a) Offenders who are accepted into the program have an average of 18.15 convictions over the course of their lifetime and 8.4 convictions in the past five years. They have used cocaine on an average of 39 days out of the past 90 days.

(b) Some 65 people graduated from the Court and only three of those have been convicted of *Criminal Code* offences since graduation.

(c) Offenders expelled from the Drug Treatment Court for non-compliance are nevertheless significantly less likely to re-offend than non Drug Treatment Court offenders.

(d) Drug use decreases over the period of involvement with the Drug Treatment Court for both graduates and those who fail to graduate. Graduates must be drug free from cocaine and heroin for four months and from marijuana, for one month.

(e) Graduates of the Drug Treatment Court show improved levels of psychological well-being, anxiety, depression, and self control as well as physical health itself.

(f) Strong links with the community are formed through the Drug Treatment Court, providing follow-up and other ongoing supports to accused persons.

(g) Four pregnant women graduates had babies born drug free.[38]

The experience with American Drug Treatment Courts has demonstrated significant cost savings as compared to the traditional system of

[38] *Ibid.*

incarceration and other punitive sanctions. The same scenario exists in Australia.[39] There are now more than 1,000 Drug Treatment Court programs in existence in the United States of America, and as mentioned earlier the Conference of Chief Justices and the Conference of State Court Administrators have resolved to pursue the problem solving court approach justice in future, as has the Federal Government of Canada through its recent announcement to expand these courts in Canada.

C. *The Tsuu T'ina Court and the Peacemaking Initiative*[40]

The Tsuu T'ina Nation is located adjacent to Calgary, Alberta and is comprised of a population of 1,800 Dene people. The Reserve land covers approximately 108 square miles in size. In 1996 the Tsuu T'ina proposed to the Federal Government the concept of an Aboriginal court and peacemaking initiative to be created on the Reserve itself.

In October, 2000 a Provincial Court was established upon the Reserve with sittings of the court held in the Council Chambers. The Court has jurisdiction over criminal and youth matters. The deep respect for the Elders of the community was incorporated into the functioning of the court through a peacemaking process of rehabilitation of offenders, restoration of relationships, and healing; all of which are an integral part of the Court program and the cultural heritage of the Aboriginal people.

The history of the Court is that a charge against a Tsuu T'ina Band member for the offence of operating an uninsured motor vehicle on a road located within the Tsuu T'ina Reserve itself was dismissed. The Alberta Court of Appeal held that the Reserve road in question was, on the facts, not a public road and therefore the Motor Vehicle Administration Act prohibiting the operation of uninsured motor vehicles on public roads had no application. A Traffic By-Law under the Federal Indian Act was enacted but not enforced. The conduct of drivers on the Reserve caused concern among the Elders who requested the Chief and Council rectify the problem. The Council decided to revise the Traffic By-Law to deal with the problem, but in the course of dealing with the traffic issue, the Tsuu T'ina decided to address all criminal justice issues on the Reserve. It was decided that a proposal for an Aboriginal Court to be held on the Reserve would be formulated.

The Tsuu T'ina decided that a justice system created by the community incorporating Aboriginal traditions and a peacemaking

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[39] *Ibid.*

[40] The Honourable Judge L S. Tony Mandamin, "Peacemaking and The Tsuu T'ina Court" (2003) 8:1 Justice as Healing Newsletter 1; Throughout this portion of my paper I have drawn heavily upon this recently published article by Judge Tony Mandamin, kindly provided to the writer by him prior to its publication.

initiative should be established. Their recommendation was that any offence could be considered for the peacemaking initiative except homicide or sexual assaults and that the peacemaking initiative would only be carried out when the victim of the offence was agreeable to participate.

With respect to the Court itself, the Judge, Prosecutor, Court Clerks, Court Workers and Probation Officers are all Aboriginal people. Some Defence Counsel are also Aboriginal. The protocols of the Court reflect Tsuu T'ina traditions in that the Court opens with a smudge ceremony, being the burning of sage or sweet grass signifying a prayer for help from what the Aboriginal people understand to be the Great Spirit. The Judge wears a beaded medallion representing the Tsuu T'ina Nation and Court Clerks wear tabs embroidered with eagle feathers which is a sacred symbol for Aboriginal People. These outward appearances are important so that the people of the community will recognize the Court as their own system of justice designed to bring about peace and order in their community.[41]

Peacemaking is a fundamental part of the Court process. During court proceedings the Peacemaker Co-ordinator sits across from the Crown Prosecutor in the Courtroom, which is the Band Council Chamber. All counsel as well as the judge are seated in a circular arrangement, rather than counsel tables and a separate judge's dias. At the first appearance on criminal charges the case is adjourned to assess whether the case will be accepted into the Peacemaking Program, a determination made by the peacemaking co-ordinator and dependant upon the accused's willingness to participate in the peacemaking. If the case is accepted into peacemaking, the Peacemaker Co-ordinator assigns the matter to a Community Peacemaker, being someone who will be seen as fair to both sides and that Peacemaker then determines the course of the peacemaking process. Peacemakers were identified by the community itself prior to the establishment of the Court. Being a small community, it was possible to ask every household on the Reserve who they trusted to be fair in peacemaking.

Once the Peacemaker takes charge he or she gathers together a number of interested persons in the case including the accused and the victim. Family members for both the offender and the victim may also be involved, and there is always an Elder present to oversee the process and ensure it is conducted properly. In addition, resource people such as addiction workers or other resource agency personnel are present. A peacemaking circle may have anywhere from 5 to 25 people participating.[42]

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[41] *Ibid.*

[42] *Ibid.*

A peacemaking circle is conducted in accordance with Aboriginal tradition. The objective is to resolve the conflict and create a healing of relationships within the community, and in particular between the victim and the offender. A formal ceremony or opening such as the use of sage or sweet grass, a prayer or just a simple statement that the circle is about to deal with an important matter begins the process. Each person is given an opportunity to speak uninterrupted while all other participants listen. Each person is given this opportunity more than once. The first time each person speaks, they address the events that happened. The second time around the circle, each person speaks about how they were personally affected by what occurred. The third time around the circle, each person speaks about what should be done. The process may be time-consuming but it continues until it is clear what should be done. The fourth time each person speaks they speak about what is agreed. The entire circle procedure may take from two hours to two days, but the majority are concluded within an afternoon. Typically the judge is not present during these peacemaking proceedings.

Upon the conclusion of the circle, the offender signs an agreement to carry out whatever has been decided by the peacemaking circle. Such solutions as apologies and restitution are common outcomes of the circle as are alcohol abuse counselling, psychological counselling, or even one on one sessions with an Elder in the community. Other solutions include community service either for the Elders or the community itself and there is no specific characterization of the tasks which the offender may be required to perform. Each case has the flexibility to determine what is an appropriate outcome for the circumstances and individuals involved.

An important part of the process is the final peacemaking circle which is held after the offender has completed the tasks he or she has agreed to perform. At this circle there is a ceremony which celebrates the completion of the tasks and here there can be the recognition by the offender and the community that the matter can be put behind everyone and things have been set right. This brings to mind the graduation ceremonies which are held in the Drug Treatment Court, which also celebrate the success of the offender in a different context, but also has a restorative aspect from a community and offender perspective.

After the final peacemaking circle has been held the matter is returned to court, where the Peacemaker Co-ordinator reports on what has been completed by the offender. The Crown Prosecutor then assesses whether the charge can be withdrawn, depending upon the seriousness of the charge and whether the peacemaking circle outcome is an appropriate consequence. If the charge is not withdrawn, the prosecutor agrees to have the peacemaking report as part of the information the Court ought to consider in the sentencing process. Hence the peacemaking process has a

great deal of relevance to the final resolution of the case.[43]

There are inherent checks and balances in the Peacemaker process. The offender and his counsel can assess whether to choose peacemaking and the Peacemaker Co-ordinator also can assess whether the matter is appropriate for peacemaking. The Crown also assesses the matter both before and after the peacemaking process occurs and the Judge has the ultimate authority to adjourn the case to permit peacemaking to take place. The Judge also has the adjudicative role when the matter comes back from peacemaking in terms of sentencing, or withdrawal of the charges.

The entire peacemaking procedure is voluntary from an accused's and victim's point of view. If an accused does not wish to pursue peacemaking, or if the case is not accepted into peacemaking, or if the accused does not carry out his or her obligations as a participant in the peacemaking process, the matter is returned to the Court to be dealt with without prejudice to the accused.

The obvious strengths of the Tsuu T'ina Court are that it is clearly a court established by the community to meet the specific culture of that community. The Court takes place within the physical boundaries of the community and employs Aboriginal people to whom the community can relate and trust. The Court and the Peacemaking Program are designed to restore peace and order within the community through the restoration of relationships between members of the community affected by the criminal activity and the offender themselves.

The Court exemplifies the underlying principles of Therapeutic Jurisprudence and Restorative Healing in that it is intent upon dealing with the root causes of the criminal activity, offering treatment and counselling where needed in the case of both victims and accused persons. The peacemaking circles themselves are therapeutic to all parties coming before the court.

D. *The Toronto Gladue (Aboriginal Persons) Court*[44]

As earlier mentioned, in the decision *R. v. Gladue* [45]the Supreme Court of Canada considered the comprehensive *Criminal Code* sentencing provisions enacted in 1996. Section 718.2 of the *Criminal Code* set forth various factors which the Court must consider in the determination of

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[43] *Ibid.*

[44] The author has relied upon internal Ontario Court of Justice documents for this section of the paper, including *Gladue* (Aboriginal Persons) Court - Ontario Court of Justice -Old City Hall Fact Sheet dated October 3, 2001 and a Background Document relating to this Problem Solving Court.

[45] *R. v. Gladue*, *supra* note 4.

sentence, and the *Gladue* case specifically dealt with S. 718.2(e) which reads as follows:

> all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The Court held the section was remedial in nature, and specifically intended to deal with the problem of over-incarceration in Canada. The Court further held that the number of Aboriginal people incarcerated or in the criminal justice system was disproportionate to the percentage of the Canadian population they represented. The following remarks of the Court demonstrate the degree of concern expressed in the decision.

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic over-representation of Aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out Aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.[46]

These strong words from the Supreme Court presented some difficulty for sitting judges who were not always aware whether an offender was Aboriginal, or whether there were any resources available to assist in the Restorative Justice approach to sentencing, especially in a large urban context. In addition there was an absence of directed resources toward the special circumstances of Aboriginal people appearing in court. It seemed apparent the Supreme Court of Canada concerns relating to Aboriginals included not only Aboriginal people living on Reserves, but those living in urban areas as well. The Court cited the Report of the Royal Commission on Aboriginal People which states the following:

> Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal people's existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.[47]

Therefore, Aboriginal people in urban areas were specifically dealt with by

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[46] *R. v. Gladue*, *supra* note 4, para.722.

[47] Cited in *R. v. Gladue*, *supra* note 4, para. 91.

the Supreme Court of Canada, and arguably their need to retain their identity would be even more in jeopardy since they are separated from their roots as a result of residing in the city away from the Reserve.

In Toronto a group of judges, academics and community agencies began meeting on a regular basis to discuss a meaningful response to the *Gladue* decision and the result has been the establishment of the Gladue Court at the Old City Hall Court House in Toronto. The objective of the Court is to provide the trial court response to *Gladue* and to s. 718.2(e) of the *Criminal Code* and to facilitate the trial Court's ability to consider the unique circumstances of Aboriginal accused and Aboriginal offenders. The Court is available to all Aboriginal people, including status and non status Indians, Metis and Inuit.

In order to assist the Court with identifying Aboriginal people the Aboriginal Legal Services of Toronto has designated Court Workers in Court to deal with the initial problem of identifying Aboriginal people, should they wish to be identified. The participation in the Court is voluntary on the part of accused persons, but once they have chosen to be tried in the Gladue Court, the case remains in that Court until its conclusion.

The Committee in Toronto dealing with the *Gladue* decision found it necessary to address the subject of pre-trial detention, specifically as it relates to or has an impact upon sentencing. They accepted the following statement from the *Report of the Commission on Systemic Racism in Ontario Criminal Justice System*[48] with respect to the matter of pre-trial detention:

> Beyond their immediate suffering, untried prisoners are considerably disadvantaged throughout the criminal justice process. Imprisonment before trial intensifies pressures on them to plead guilty, hampers their preparations for trial and may affect how they are perceived in court. Several studies in different jurisdictions have shown that imprisoned accused who plead not guilty are less likely to be acquitted at trial than those who are not detained before trial; and that whatever the plea they are much more likely to receive a prison sentence if convicted. These studies. . . suggest that part of the difference at trial and sentencing is due to the earlier detention decision[49]

During the joint conference of the Ontario Conference of Judges and the Canadian Association of Provincial Court Judges in Ottawa, held in September 2000, Mr. Justice Patrick Sheppard of Toronto, Kent Roach,

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[48] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995).

[49] Cited in Ontario Court of Justice Background Document re Gladue (Aboriginal Persons) Court.

Professor of Law, University of Toronto, and Jonathan Rudin, Program Director Aboriginal Legal Services of Toronto, began discussions for the purpose of redistributing existing resources and identifying and developing additional needed resources to permit the Courts in Toronto (and the Aboriginal Community itself) to deal with Aboriginal offenders in Toronto. Other members of this project were added being Justices Joseph Bovard, Brent Knazan, and Rebecca Shamai as well as the Aboriginal Court Worker at Old City Hall Court, Sara Jane Souliere.

The Gladue Court hears all matters including bail hearings, bail variations (with Crown consent), remands, trials, and sentencing. The distinguishing features of the Court are that all persons working in the Court, including Prosecutors, Duty Counsel, Case Workers, Defence Counsel, Probation and Judges have the expertise and a particular understanding of the range of programs and services available to Aboriginal people in Toronto, and these services are linked to the Court through the presence of the Aboriginal Legal Services Case Workers. Initially, four Judges rotated through the Court, although that number is expected to increase as other Judges expressed an interest.

The Court has dedicated Crown Counsel, Duty Counsel, Probation and Parole Officers and Court Clerks. Training and education about relevant Aboriginal issues for all participants in the Court is provided by the Aboriginal Legal Services of Toronto, and this training is made available to Defence Counsel who wish to take advantage of its availability. This aspect of the Court's functioning is important since the most important concern expressed by Judges in light of the *Gladue* decision was the question of accessing the necessary information and resources applicable to Aboriginal peoples in order to ensure their identity was preserved throughout the judicial process.

The Aboriginal Court Worker is employed by the Aboriginal Legal Services of Toronto and is available to Defence Counsel to assist with the preparation of the sentencing reports or other information with respect to bail hearings needed by the Court. The Court is designed to take the necessary time to deal with Aboriginal cases and the pace of the Court recognizes that special effort to understand the needs and circumstances of particular Aboriginal offenders may require a more detailed and time consuming examination of the underlying causes of the criminal behaviour in order to satisfy the Court's mandate. The Gladue Court is a response to Parliament's direction to judges in s. 718.2(e) of the *Criminal Code* requiring an inquiry into alternatives to imprisonment, especially in cases of Aboriginal offenders.

AN AVERAGE DAY IN THE GLADUE COURT

In the morning commencing at 8 a.m. the process of identifying Aboriginal persons in custody or appearing in other courts takes place. This involves the Aboriginal Court Worker, Police, Defence and Duty Counsel, Crown Counsel and Accused persons along with their family and friends. An interview of accused persons by the Aboriginal Court Worker and meetings with the designated Duty Counsel also occurs. In the afternoon meetings are held involving Crown Counsel, the Aboriginal Court Worker, Designated Duty Counsel and Defence Counsel. The Court opens at 2:00 p.m. for purposes of bail hearings, setting dates, diversion, guilty pleas or sentencing. Sometimes the review of detention orders or bail orders also occurs in order to take full advantage of the available resources for Aboriginal accused. There is a follow through for these resources in situations where an accused enters a not guilty plea and trials are also conducted in the Gladue Court.

The Court originally was designed to sit Tuesday and Friday afternoons, with provision to expand this where needed.[50]

The Gladue Court contrasts with the Tsuu T'ina Court in that the former is a large urban answer to the directives of the Supreme Court of Canada in the decision of *R. v. Gladue*. The Tsuu T'ina Peacemaking Initiative and Court, on the other hand, are physically held on the Reserve property and inherently incorporate Aboriginal culture and resources within a specific, relatively small Aboriginal community.

E. *Calgary Diversion Project - Mentally Ill Accused*

The Calgary Mentally Ill Project diverts mentally ill people from the criminal justice system and differs from the Mental Health Court in Toronto in that the mental illness cases arise in all docket courts in Calgary and are diverted accordingly. There is no special court room assigned to these cases, but the mentally ill accused are nevertheless diverted into treatment programs as soon as possible after they are identified.

The primary goal of the Calgary Diversion Program is to reduce contact with the justice system for individuals who are mentally ill and commit minor, low risk offences.[51] The program seeks to meet the needs of mentally ill accused persons who might end up in jail either pre-trial or

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[50] The Honourable Mr. Justice P.A. Sheppard, "Memorandum to Judges and Justices of the Peace in Old City Hall Court House" 4 October 2001.

[51] Holley, H. and Arboleda-Flórez, J., 1988 as quoted in the "The New Hope Project: A Community Rehabilitation Program For Mentally Disordered Offenders", May 1996., p.3.

post-trial as a result of their commission of minor criminal offences. The objective of deterrence fundamental to the rationale of the criminal justice sanctions not only has no application to the mentally ill but can result in further deterioration of their condition. Through timely treatment-oriented intervention and follow-up by linking the mentally ill people with community based mental health treatment and support services, the Calgary Diversion Program provides an alternative to the status quo. A continuum of care to prevent the mental illness from causing the individual to come into conflict with the criminal law is a main component of the program. A final goal of the program is to serve the community appropriately and safely.

In order to appreciate the significance of the problem, some background information is useful. During the late 1960's and 1970's, the Community Mental Health Movement generated a major change in the philosophy of institutionalization of the mentally ill. As a result, 34,000 patients were discharged from psychiatric facilities between 1961 and 1976.[52] The care of these patients was shifted from the psychiatric hospital to the general hospital psychiatric unit in Calgary. The problem for these hospitals to absorb and treat the mentally ill is illustrated by what was soon to be known as the "revolving door" syndrome. A cycle of admissions characterized by short lengths of stay, rapid relapse, and subsequent re-admission of mentally ill patients developed, and by 1976 over half of the admissions to hospital were re-admissions, many of whom were the mentally ill who could not manage their lives. As a result, they refused medications, were discharged against medical advice and failed to attend treatment programs which could assist them.[53]

After the de-institutionalization of the mentally ill, many chronically mentally ill people came into confrontation with the law shortly after their discharge from hospital. Virtually none of these patients received outpatient psychiatric care at the time of their arrest and most committed crimes as a direct result of acute psychotic processes, poor judgment, or impulsive behaviour[54] In 1995 some 1,199 persons admitted to the Calgary Remand Centre were examined by psychiatrists to determine the prevalence of mental illness in pre- trial custody. The study revealed that 9% of pretrial detainees suffered from a serious mental illness such as schizophrenia, major affective disorder or other psychotic disorders. An additional 47% met the criteria for substance abuse disorder and only approximately one half of those detained did not meet the criteria for

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[52] *Ibid*.

[53] Pablo, Kadlec, and Arboleda-Flórez, 1986, as quoted in "The New Hope Project", *supra* note 51.

[54] Arboleda-Flórez, J. and Holley, H., 1988 as quoted in "The New Hope Project", *supra* note 51.

mental illness or substance abuse. Just under half of those who did have a mental illness or substance abuse problem eventually were sentenced to probation or fine at the conclusion of the court process.[55]

Thus it became apparent that not only were psychiatric departments of hospitals seeing the revolving door syndrome, but the criminal justice system was also cycling mentally ill persons, many of whom did not cycle back to the psychiatric hospital programs but remained untreated in the community until they again came into conflict with the criminal law as a result of their mental illness. Once arrested these people were often unable to secure bail because of a lack of funds or lack of fixed address and remained in pre-trial custody longer than necessary. Therefore, several health care workers and community agencies as a result of the judicial initiative of The Honourable Judge William Pepler began meeting with other stakeholders in Calgary to determine how to develop a specialized forensic rehabilitation program to reduce the revolving door phenomenon among mentally ill offenders and to integrate the treatment and community support services with the criminal justice system.

The Functioning of the Mental Health Diversion Project

Cases where an accused is charged with a minor criminal offence and is suspected of having a mental illness are adjourned for a period of two weeks at the suggestion of Crown Counsel, and during this timeframe an initial assessment of the accused is performed. If the person is found to be suffering from a mental illness and is accepted into the Mental Health Diversion Program, the case is adjourned for an additional timeframe of approximately three months to permit the accused to receive treatment. The Crown then assesses the case and if the accused has completed the treatment, usually the case is withdrawn.

The criteria for entry into the Mental Health Diversion Program are the following:

1. The accused must be an adult, 18 years of age or older;

2. The accused must be suffering from a mental disorder which includes a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life.

3. The charge before the court must be a minor, low risk offence including the following:

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[55] Arboleda-Flórez, Love, Fick, et al., 1995 as quoted in “The New Hope Project”, *supra* note 51.

· assault (simple assault in non-domestic context)
· theft
· possession of stolen property
· fraud
· false pretence
· mischief- property related
· causing a disturbance
· transportation, lodging and meal fraud
· obstruction of a peace officer
· other minor charges on a case by case basis.

4 Crown Counsel must be satisfied that the charge has a reasonable likelihood of conviction.

5. Diversion must not be contrary to the public interest with the safety of the public being a paramount consideration.

6. A prior criminal record or diversion under the program or other programs does not preclude diversion under the Mental Health Diversion Project Program, although both factors are relevant considerations in the exercise of the Crown's discretion to divert.

7. The accused must accept mental health diversion

8. Substance abuse in addition to suffering from a mental disorder does not preclude eligibility for participation in the Calgary Mental Health Diversion Program.

9. It is not necessary for the accused to admit guilt to participate.

The program attempts to ensure outcomes which include reduced recidivism, reduced hospital admissions and emergency room visits, improved psychiatric status for individuals coming into conflict with the law, along with general improved quality of life. In addition, follow-up services are designed to include stable housing and employment or other meaningful activity, and to ensure effective links to community agencies which can assist mentally ill people to manage their lives and prevent further conflict with the law.

In the majority of cases involving minor offenders who are mentally ill, pre-trial custody is avoided as is a repetitive criminal record. This is a much more equitable outcome since the case would not normally attract a custodial sentence and the accused's conduct bringing him or her into conflict with the criminal law is often not the product of a normal operating mind.

The Calgary Diversion Project is a partnership between various Provincial Justice Ministries and community organizations. The Provincial

Departments of Justice, Solicitor General and Alberta Health and Wellness are the primary government departments involved in the partnership. The Salvation Army Centre of Hope is the physical facility in which the Project is located. Other agencies such as the Calgary Police Service, AADAC, Human Resources and Employment and the Calgary Health Region are represented in the community partnership which comprises the Calgary Mental Health Diversion Project.

The Calgary Diversion Project is a three year pilot project which commenced in April, 2001 when funding in the amount of 1.4 Million Dollars was provided from the Alberta Health and Wellness Health Innovation Fund. In order to sustain the Project, additional funding will be needed to continue beyond March, 2004. The limited evaluations currently available are most promising and as a sitting judge in the Calgary Criminal Division this author is relieved to see the problem of low risk mentally ill offenders being addressed in a more humane and just fashion.

F. *The Domestic Violence Court Project in Calgary*

Just as the need to re-examine the traditional criminal justice system as it deals with drug dependency, mental illness and Aboriginal justice issues is obvious to many stakeholders within the justice system, so too is the need to improve upon the handling of domestic violence cases. In various locations within Canada more effective models for dealing with domestic violence cases are being explored.

One such model is the Domestic Violence Court in Calgary. The Court is the result of extensive community consultation and discussion. The subject of domestic violence as a community focus began with an open forum on 6 February 1998 with a presentation by Dr. Stephen Toope, Dean of Law at McGill University on the subject of violence. The tragic murder of his parents was an event which became the catalyst for change. The unreasonable, senseless murder made a deep impact upon those attending the forum, and the already co-operative community environment among community agencies and services dealing with domestic violence deepened into a resolve to collaborate and integrate with the justice system to deal more effectively with the issue of domestic violence within the Calgary community.

Those in attendance at the first forum were invited to a one-day workshop with representation from law enforcement, Probation, Crown, members of the Judiciary, Family and Criminal Bar, and community agencies involved with domestic violence services. The conference opened a dialogue among systems and service providers and provided a common framework of understanding regarding the issue of domestic violence.

Based upon the energy generated by this initiative, community support and funding were garnered for a two-day working conference in April, 1998. In excess of 80 delegates attended this event, representing the key constituencies from the first conference. Co-ordinated justice system models from Toronto, Winnipeg and San Diego were studied and a framework for a Calgary project was created on the second day of the conference. Subsequently a small cross-sector work group came together to further refine the concepts generated at the April conference and further extensive research into other models was done.

Soon after a non-profit society called The HomeFront Society For The Prevention of Domestic Violence (referred to hereafter as "HomeFront"), which, in collaboration with the Action Committee Against Violence (a municipally funded committee established by then Mayor Al Duerr) formulated a proposal for a domestic violence project. The framework for the project was developed and presented to the Minister of Justice of Alberta, The Minister of Justice of Canada, and The Assistant Chief Judge of The Provincial Court of Alberta, The Honourable Judge Brian Stevenson. All to whom the project was presented provided advice, support and encouragement. Judge Stevenson appointed two members of the judiciary to participate in the planning and initial establishment of the Domestic Violence Court envisioned by the project. Several planning committees were established to deal with the various aspects of the project and Judge William Pepler and the author were members of the Justice Committee which dealt with the integration of the various criminal justice agencies and the establishment of the Court itself. The goals and objectives of the project[56] reflect a holistic view of domestic violence which requires that strategies be developed at the individual, family, community and institutional levels. The overall goal is to reduce domestic violence in Calgary and provide a structurally linked system that is cohesive, specialized and integrated with community services. The objectives associated with achieving that goal are:

a. To protect the community through the provision of services for the abused; including advocacy, information and treatment services that promote the safety of the victim and facilitate their active involvement in the criminal justice system;

b. To increase public confidence in the justice system by providing a more immediate and appropriate response to domestic violence;

c. To hold the offender accountable for his/her behaviour through the imposition of legal

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[56] Justice Working Project Business Plan (1999-2003) and Justice Working Project - A Co-ordinated Criminal Justice System Response To Domestic Violence in Calgary - Technical Working Paper [on file with the author].

sanctions and the provision of opportunities for treatment and rehabilitation;

d. To increase accessibility of diverse cultural groups and populations to the justice system;

e. To reduce gaps and avoid duplication of service through co-ordination and collaboration within the system, and between the justice system and the broader community.

To accomplish these goals on an ongoing basis, HomeFront has established a Board of Directors which meets regularly and is comprised of senior officials from all stakeholders. The Chief Crown Prosecutor, Chief Probation Officer, Director of Legal Aid and the senior officer in charge of the Domestic Violence and Sexual Assault Section of the City of Calgary Police Service sit on this board. A senior member of the Defence Bar is also a member of this Board and senior officials from key community agencies also sit on the HomeFront Board of Directors. The duties and authorities of each stakeholder is not diminished by this collaborative approach to the subject of domestic violence, but as these stakeholders meet and discuss common problems, better solutions are achieved to produce the most effective, collaborative and integrated response to the issue of domestic violence in Calgary. The success of the Domestic Violence Court Project in Calgary is, to a great extent, attributable to this ongoing dialogue between all stakeholders involved in the issue of domestic violence. Members of the Judiciary are not represented on the HomeFront Board but the author is the assigned member of the Court who maintains communication with the Board covering the Domestic Violence Court Project on an "as needed" administrative basis.

Funding for the project came from a number of community resources, including NOVA Corporation, First Energy Capital Corporation, Canadian Pacific, Alberta Law Foundation, United Way of Calgary and Area, Cathedral Church of the Redeemer, Canadian Hunter, and Bennett Jones. In addition all three levels of government committed to fund a four year pilot phase of the project. A total of six million dollars in new or reallocated funds was raised from both community and governmental sources. The involvement of the Faith community and the funding support provided by the corporate community for the development of this initiative reflects the uniqueness of Calgary's model.

1. *Functioning of the Court*

The Court deals not only with spousal (or intimate relationship) violence but also assaults by parents against children and adult children against parents, including elder abuse. In addition, sexual assaults in intimate relationships or formerly intimate relationships as well as sexual

assaults against children are handled by the Domestic Violence Court. Mischief offences involving separating couples or formerly intimate couples are also dealt with in this Court. It is intended all degrees of domestic violence are channelled through the Domestic Violence Court.

The Domestic Violence Court currently functions as a docket court which deals with first appearances and preliminary matters such as Judicial Interim Release and the appropriate conditions of such release. Guilty pleas and sentencing procedures also occur in this Court. Matters in which the accused enters a not guilty plea take their place in other trial courts, although it is expected that within the next year trial matters will be better integrated into the project as a whole. Initially two judges were assigned to the Court(and two backup judges) which sits every morning in the Criminal Division of the Provincial Court of Alberta. At present several judges rotate through the Court. At its outset a small court room was assigned, but it was quickly realized one of the largest court rooms would be required to accommodate the volume of cases and the Court was moved to court room 412 in the Provincial Court Building in Calgary. The Court sits with a Domestic Violence Team present consisting, in addition to Crown counsel, of duty Defence Counsel, Probation, Police and Case Workers. Information from each of these agencies is thus available to the court in a timely fashion as will be discussed later with regard to each specific agency.

A unique feature of the Domestic Violence Court is the pre-court conference which brings together all parties having a role to play in each individual case. These include the Crown Prosecutor, Defence Counsel, Probation, Case Workers and Police. These meetings begin at 8:30 a.m. before the Court opens at 9:00 a.m. and are held on adjournments throughout the morning if required, in order to accommodate an early resolution of a case. Crown Counsel chair these meetings and all pertinent information can be exchanged at this time, permitting early resolution of the case or agreement with respect to terms of Judicial Interim Release discussed in many instances. A specific sentencing plan or agreement as to Judicial Interim Release can be agreed upon between Crown and Defence as a result of the multi-disciplinary discussion which includes direct input from the complainant and from Probation. Case Workers convey victim input to Crown and Defence Counsel after personally contacting complainants. Commonly, joint submissions are then placed before the Court, taking into account the unique features of each case whether they be safety of the victim and their family or specialized treatment of the offender, both, or other concerns unique to the case before the court.

2. *Characteristics of the Court*

The main features of the Calgary Domestic Violence Court include the

integration of the criminal justice system with the community treatment agencies dealing with domestic violence and the co-ordination of the community treatment and resource agencies themselves. The criminal justice system agencies themselves are effectively linked and operate in a collaborative environment, with specialized or dedicated units within each agency, including Police, Crown Counsel, Probationary Services, Correction Services, and Legal Aid. Similarly, the treatment agencies within the community are effectively linked and integrated with each other and with the criminal justice agencies.

Another significant feature of the court project is the presence in court of the Case Worker, whose duty it is to obtain information from the victim, convey victim information to the Court Team, and support the victim throughout the criminal justice proceedings. The Case Worker also directs victims to community resources available to deal with the variety of issues affecting the family as a whole. Case Workers offer support to the victim whether or not they wish to participate in the advancement of the Criminal charge. Case Workers are employed by HomeFront and report to its Director, rather than being government employees. This independence is thought to be important in order to avoid the possibility of the perception of conflict of interest allegations, since Crown Counsel and duty Defence Counsel are both employed by agencies within the Justice Department of the Government of Alberta. Case Workers also liaise with Child Welfare Authorities and provide the court with relevant information from that source when needed.

Another feature of the court is the potential for further investigation to be done by Police, if necessary, to accommodate early applications for Judicial Interim Release. Often Crown Counsel do not possess corroborative evidence relating to the allegations at the time the show cause hearing is held. Nor are they made aware of whether such corroborative evidence exists. The presence of police in court as part of the multi-disciplinary team, permits collection of needed evidence such as medical reports in cases where the offence is denied by the accused. The case can be adjourned for an hour or to the afternoon if necessary for this evidence to be brought to court by police if it exists. The judge therefore has the advantage of receiving needed information concerning whether corroborative evidence exists, or even receiving the evidence itself, in a very short timeframe to accommodate the need for an early show cause hearing.

3. *Early intervention and some common dispositions*

A primary focus for the project at its outset was the development of a new attitude in dealing with the first reported incidence of domestic violence in a home or community setting. Treatment agencies note the

importance of early intervention in domestic violence on three levels.

1. Early intervention in terms of the lapse of time from the event. It is known that at the time of the event often offenders are remorseful, but with the passage of time, excuses and the psychological state of denial set in. Offenders, after the passage of time sometimes blame others, even the victim for the violence, and no longer consciously accept the facts surrounding their behaviour. The project has co-ordinated the police who investigate the offence with the Crown Counsel so that the matter is before the courts within a few days, rather than weeks as in the prior system. Legal Aid will respond to a request by an accused for Defence Counsel within two days, and treatment agencies will respond within 48 hours of a referral for treatment, rather than the length of a few weeks, and often offenders are referred to treatment agencies as a condition of their release.

2. Early intervention in terms of the degree of violence. It is generally clear that the lower the level of violence, the better chance for successful and timely treatment and the resultant ending to the violence. Conversely, the higher the degree and extent of violence, the more difficult it is to prevent future violent behaviour.

3. Early intervention in terms of the lives of the children. Even when children are not the victims of the violence directly, they are often traumatized by the violence and its effect is negative upon their development. More importantly, the inter-generational cycle of violence commonly seen in the courts can best be broken if the violence in the home is stopped as early as possible in the lives of the children in the home.

Thus, there is considerable emphasis in the project to achieve the objective of early intervention in the violence in appropriate cases, and one of the greatest successes so far is in the lower-end domestic violence cases[57] where seventy percent of cases are resolved within one month from the date of the first appearance in court.[58]

These lower-end cases typically result in joint submissions by Crown and Defence Counsel for either peace bond dispositions[59] with treatment/counselling oriented conditions or suspended sentences, also incorporating treatment/counselling oriented conditions. Often in these cases the victim and the offender wish to reconcile and these resolutions are intended to permit the family to safely reconcile and go forward on a stronger foundation. As part of the process victims and their families (also

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[57] There is no such thing as low-end domestic violence, but the term used here is to acknowledge the lower-end of the spectrum of domestic violence seen in the courts.

[58] HomeFront Evaluation Output Update, 9 April 2003.

[59] The police officer, who is a member of the court team, swears a Section 810 Information if Crown and Defence agree on a Peace Bond as the appropriate disposition. If the Peace Bond is granted by the court, the Crown applies to withdraw the Criminal charge.

including children) are also directed to appropriate ongoing support resources.

Prior to the establishment of the Domestic Violence Court in Calgary, significant time elapsed between the offence date and various steps in the criminal justice process. By the time complainants were called upon to testify or participate in the criminal process, it appeared they often would refuse to testify because they wished to reconcile with the accused. Alternatively, they would change their evidence to prevent any criminal sanctions against their loved ones. These phenomena came to be known as the "recanting witness" phenomenon and accounted for a large percentage of domestic violence cases. With the advent of the Domestic Violence Court this phenomenon has been significantly reduced, primarily because of the emphasis upon dealing with the underlying issues rather than punishment of offenders.

In some cases counsel consent to postpone plea or sentencing in order for an accused to take domestic violence counselling or other appropriate treatment so that the results of this treatment can be made available prior to the entry of plea or the passing of sentence.[60] This is not uncommon in cases where Defence Counsel understand and have confidence in the potential advantages of the Domestic Violence Court Project, not only with respect to the legal result to their client, but also with respect to the broader quality of life outcome for the accused and their family.

Similarly, the terms of Judicial Interim Release often incorporate appropriate counselling provisions (among others) and when applications to remove a condition prohibiting contact between the complainant and accused are forthcoming (as is common in domestic violence cases), information from Probation can be made available to Crown Counsel and the Court concerning the accused's progress in counselling along with other information in order to permit the Court to assess more accurately any safety considerations respecting the removal of the prohibiting condition.

4. *Judicial Supervision of Peace Bonds, Suspended Sentences and Conditional Sentence Orders*

It is not uncommon for Peace Bonds, Suspended Sentences and Conditional Sentence Orders coming from the Domestic Violence Court to include mandatory court ordered reviews of the offender's progress at

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[60] In these situations Crown Counsel agrees to re-open bail conditions and both counsel then agree to incorporate terms requiring treatment/counselling and other desirable conditions such as abstinence from alcohol, into a revised Judicial Interim Release order.

future dates. This is a form of judicial supervision not unlike that used in other problem solving courts. Research indicates that compliance with court orders significantly increases in circumstances where court ordered reviews are included in the terms of the initial order.[61]

Often the court ordered review is consented to by counsel. There is also some general authority in the *Criminal Code* which may permit the use of court ordered reviews, even in the absence of consent, especially as part of a problem solving court processes. With respect to Probation Orders, such authority is found in Section 732.1(2) which provides, as one of the compulsory conditions of a Probation Order, that the offender appear before the court when required to do so by the court. In addition, Section 732.1(3)(h) permits the court to impose "such other reasonable conditions as the court considers desirable", with respect to Probation Orders.

With respect to Conditional Sentence Orders, Section 742.3(1)(b) directs the court to prescribe, as a condition to the Conditional Sentence Order, that the offender appear before the court when required to do so by the court. In addition, Section 742.3(2)(f) permits the court to order (as an optional condition of a Conditional Sentence Order), that the offender comply with "such other reasonable conditions as the court considers desirable". Section 810, dealing with Peace Bonds, contains similar provision permitting the court to order "such other reasonable conditions ... as the court considers desirable for securing the good conduct of the defendant (Section 810(3)(a)).

When court ordered reviews are included in a sentence or Peace Bond from the Domestic Violence Court, a date for the review is set approximately three months away, or at such other time as the case requires. A written progress report is ordered from the Probation Authorities for purposes of the court ordered review and is usually provided to the judge a day or two prior to the review taking place. The progress report is usually in letter form directed to the court and provided to counsel. Court ordered reviews may occur once, or repeatedly throughout the term of the Court Order, depending upon the circumstances of the individual case.

While the court does not have jurisdiction to change any of the terms of the court order, unless requested to do so by the Prosecutor, offender or Probation Officer (Section 732.2(3)), the desirability of changes, if any, to the conditions of the order becomes apparent to these constituencies as a result of the attention paid to the matter in preparation for the court ordered review. Section 732.2(3) authorizes the court to make such changes if it is

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[61] Edward W. Gondolf, *The Impact of Mandatory Court Review on Batterer Program Compliance*, Final Report submitted to the Pennsylvania Commission On Crime and Delinquency (Harrisburg, P.A., 15 May 1998).

of the opinion such changes are rendered desirable by a change in circumstances since the conditions were initially prescribed. As a result of the progress of an accused it would not be unusual for terms of the original order to be altered as a result of the positive progress of an accused since the date of the initial Court Order. Often, however, court ordered reviews do not result in changes to the original order. A main benefit appears to be the incentive to the accused to accomplish a favourable review. The encouragement of the court for compliance with the order is also an important aspect of long-term change in behaviour. Another benefit of the court ordered review is that it assists supervisors and probation authorities to encourage consistent and timely compliance with the original order, because the review sets a timeframe within which certain matters are expected to occur. The rapport between the sentencing judge and the accused is also important and can be a powerful motivator in the context of court ordered reviews which are conducted by the judge who passed the original sentence.

5. *Cases in Which the Offence is Denied*

Although accused persons wishing to plead not guilty are entitled to do so and their cases set for trial in other courtrooms, it is not uncommon for Case Workers to follow complainants throughout the court process, providing support with respect to navigating the criminal justice process as well as other community resources needed by the family, including Child Welfare Services where appropriate. In addition, more timely and efficient investigations of domestic violence cases permit more timely and complete disclosure to Defence Counsel. Crown Counsel are also able to evaluate the strength of their case at an earlier time. Hence, early resolution of even those cases in which the accused has entered not guilty pleas have a greater likelihood of earlier resolution as a result of the co-ordinated Domestic Violence Court Project.

6. *Roles of Various Agencies within the Project*

With the exception of the addition of the Case Worker, the project does not create new representatives in the court process. However, the existing constituencies within the justice system have been expanded and their roles more intensively co-ordinated with one another. The parameters of this paper permit the author to generally set forth the roles of each of the constituencies participating in the project. The functioning of each agency set forth below is taken from the Technical Working Paper and Business Plan of HomeFront.[62]

[62] Justice Working Project Business Plan & Technical Working Paper, *supra* note 53.

Police - The Calgary Police Service established a Domestic Conflict Unit in 1997 through which partnerships had already been created with Calgary Counselling Centre, Calgary Legal Guidance, Calgary Communities Against Sexual Abuse, Shelters, Bethany Lifeline and the Crown Prosecutor's office along with Probation and Parole Officers. This Unit has been expanded as a result of the Domestic Violence Court Project and a more direct involvement with the Calgary Prosecutor's Office has been created in order to ensure timely and accurate exchange of information in each case. Earlier and more complete investigation of domestic violence cases are possible as a result of the enhanced Domestic Conflict Unit. The police, as part of the project, play an important on- site role with respect to notifying alleged victims about resources and service providers for their needs and, when necessary, advocate for services on behalf of such victims. The Police Service also maintains current listings of service providers printed on the back of Calgary Police witness statements. They also produce domestic violence information pamphlets in a variety of languages in order to increase accessibility to service providers within differing cultural communities.

In addition the Domestic Conflict Unit officers are trained in risk assessment of future behaviour. They notify the alleged victim of the accused's possible release or detention immediately upon the arrest of the accused and also notify the alleged victim of the conditions of any Recognizance, Undertaking or other Court Order along with the possible implications and procedure to follow if a condition is breached upon the accused's release following a Bail Hearing. The Domestic Conflict Unit Police act immediately upon allegations of violations of any Court Order, Recognizance or Undertaking prohibiting contact. They also co-ordinate services with the Calgary Police Victim Assistance Unit to ensure victim impact statements and restitution/compensation forms are forwarded to the Crown Prosecutor as early as possible.

Police attempt to collect evidence in addition to the alleged's victim's statement for use at the Show Cause Hearing in domestic violence cases to enhance the quality of the information available to the court at the time of the Judicial Interim Release Hearing. The non existence of corroborating evidence is also important information police provide to Crown Counsel at the show cause stage. Typically there is a dearth of information beyond the victim's statement at the time of the bail hearing, and the enhanced Domestic Conflict Unit attempts to provide more complete investigations in a timely fashion so that the court will have better information at the time accused persons apply for their release in cases where an accused has not been released on an Appearance Notice.

There is a police presence in the Domestic Violence Court (as a member of the Domestic Violence Team) at all times for purposes of

follow-up with respect to cases before the Court and to provide up-to-date information to Crown Counsel about each case. This officer participates in the pre-court conferences dealt with later in this paper. He or she also is available to swear Peace Bonds pursuant to s. 810 of the *Criminal Code of Canada* when the pre- court conference results in a Peace Bond solution to the case.

Crown Prosecutor's Office - A Domestic Violence Unit has been created within the Crown Prosecutor's Office and two dedicated Crown Counsel have been assigned to appear in the Domestic Violence Court for all first appearances and any other appearances in this court including bail and sentencing hearings. Cases set for trial are transferred to a trial unit within the Prosecutor's Office at this point in time, but arrangements are currently underway to expand the Domestic Court Project to include all trial matters as well.

The Domestic Violence Unit within the Crown Office is responsible for the initial review and screening of all domestic violence cases, which include not only spousal assaults and intimate relationship violence, but also elder abuse, child abuse and sexual assaults within domestic relationships, including sexual assaults against children. All domestic violence cases are placed into the Domestic Violence Court Room. As mentioned, the Domestic Violence Unit within the Crown Office has enhanced its liaisons with the Calgary Police Service to ensure it is in possession of relevant information regarding risk assessment and release conditions prior to speaking to release of an accused person.

The Crown Unit also liaises with the Case Workers to ensure the Crown is in possession of any additional relevant information received from alleged victims. The Prosecutor in the Domestic Violence Court refers all complainants to Case Workers present in the court and in the event there are children, the Prosecutor provides advice with respect to the availability of programs for the children as well. The Prosecutor and Case Workers advise the complainant of the results of bail hearings and provide the complainants with copies of release documents, sometimes important in other court proceedings. This is especially important in cases where custody or access must be determined in another forum. The Prosecutor has the discretion concerning the ultimate sentencing solution or the conditions of release to be suggested to the court and the pre-court conferences are conducted by Crown Counsel to ascertain whether the case can be resolved at an early stage of the proceedings or if it can be resolved at all without conducting a trial.

The decision of whether to proceed with domestic violence charges is made by Crown Counsel, as in all other criminal charges.

Case Workers **-** The Domestic Violence Court Case Worker is a critical component of the Domestic Violence Court Project. This is an innovative mechanism to ensure victims of domestic violence and their family members receive consistent support and resource information throughout the judicial process. These are individuals with a social work background who are sensitive to the needs of a diverse population including, but not limited to, children, Aboriginals, individuals with immigration and resettlement issues, persons with disabilities, as well as those experiencing spousal or elder abuse.

The Case Worker is employed by HomeFront (as opposed to the government) and initiates contact with the complainant during the period immediately following the arrest of the accused. The Case Worker also offers a continuum of services throughout the criminal proceedings. These services include:

a. maintaining contact with the complainant during the court process and notifying the complainant about all changes in the accused's circumstances, including his release status and any conditions of his release;

b. facilitating the complainant's active involvement in the justice process by offering to accompany the complainant to court and ensuring the complainant's perspective is communicated to the court, usually through Crown Counsel. Even when the case is set for trial the Case Workers are present with the complainant during the trial in some cases;

c. educating the complainant about ongoing risk management and safety planning for themselves and their family members and ensuring feasible safety plans are in place, and

d. facilitating access to additional community supports and resources.

e. providing information to the Court regarding Child Welfare involvement in the case.

A further component of the Case Worker's function is the participation in the pre-court conference with the Domestic Violence Court Team, including the Crown, Probation, Police and Defence Counsel. This conference is where the Case Worker shares critical information pertaining to the complainant's circumstances and concerns. The Case Worker provides this information to the Crown and Defence both orally and in a written synopsis.

Care is taken by the Case Worker not to gather evidence about the circumstances of the offence before the Court and not to attempt to bias the Court to the complainant's perspective. The objective of the Case Worker

is to enhance the information sharing process by providing pertinent information regarding the complainant, the accused, and other family members. Care is also taken so that the Case Worker does not duplicate services provided by other agencies in the community.

Probation services - As a result of the Domestic Violence Court Project a specialized Domestic Violence Probation Unit has been established to whom most domestic violence cases are referred.[63] The Domestic Violence Probation Unit allows for closer monitoring of offenders, as well as encouraging more consistent and timely handling of domestic violence cases. The objective is to ensure there are more timely referrals for treatment and counselling than previous to the establishment of the Domestic Violence Court. There is also the recognition that there is a need to expand the companion program, being a partner support program, to provide supportive services to the victim as well as to the offender.

Accused persons and offenders will continue to report to a Probation Officer with certain court ordered conditions, often including the following:

1. A requirement to attend for assessment and take such counselling or treatment as directed, including domestic violence counselling,[64] addiction counselling and psychological counselling;

2. A prohibition against contact with the complainant or any of his/her family (often including the accused's children) either directly or indirectly subject to any subsequent court order from another forum with respect to the question of access;

3. Prohibitions from attending within a two block radius of the complainant's residence and place of employment. Often there is an exception allowing the accused to attend at the residence in the company of a police officer for the purpose of taking possession of his or her belongings;

4. A requirement the accused provide probation with proof of attendance at any counselling or treatment ordered;

5. A requirement the accused sign any release or waiver of information needed by probation to properly supervise the accused;

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[63] Due to heavy case loads, it may not be possible to refer all cases to this Unit, but most cases are expected to be dealt with by this Unit.

[64] Prior to the Domestic Violence Court, often anger management was a type of counselling ordered. Treatment agencies advise that while domestic violence counselling includes anger management, domestic violence is not only an anger management issue.

6. A requirement the accused abstain completely from the use, purchase, consumption or possession of alcoholic beverages and a prohibition concerning the accused attending any business establishment whose primary purpose is the sale of alcoholic beverages. Depending upon the seriousness of the offense, there may also be provision for random urinalysis testing for alcohol or drugs.

The Domestic Violence Probation Unit deals in a more specialized way with Judicial Interim Release supervision. There is a recognition within this Unit that one of the most dangerous times for victims of domestic violence is the timeframe immediately before trial and therefore through the specialization of pre-trial supervision, the accused's compliance with the conditions of release can be more efficiently monitored, and violations quickly acted upon in order to improve the safety of the victim and their families.

Probation Officers review police reports concerning the incidents before the Court to determine the nature and frequency of the abusive behaviour as well as reviewing the report provided by the Case Worker in this regard. Case Workers provide the name and phone number of the supervising Probation Officer to victims and review conditions of the Probation Order as they pertain to the victim. Probation authorities ensure the victim is notified immediately if, as a result of the supervision of the offender, it is believed the victim's safety has become or remains a concern.

Two Probation Officers have been assigned to the Domestic Violence Court itself. Prior to court opening, these officers review the court docket for the morning and provide information concerning individual cases if accused individually have dealt with the probation authorities either in the past or as an ongoing file. This background information is provided to both Crown and Defence Counsel with respect to first appearances of persons who are already reporting to Community Corrections. Once court opens the Probation Officer is available to provide the court with information about resources available in the community which may assist in the supervision of an offender or accused person. This probation information does not take the place of a full pre- sentence report, which remains a duty of the probation authorities, but the immediacy of certain background information to both Crown and Defence aids in establishing a sentencing solution in cases which can be resolved, thus avoiding lengthy delays created by the absence of such information.

The probation authorities are committed to ensure persons referred to them for assessment and counselling in domestic violence cases are directed to contact a counselling service within 72 hours of the referral, whether the ordered counselling is by way of Judicial Interim Release or through sentencing.

The Domestic Violence Probation Unit permits closer supervision of accused persons and offenders referred for counselling and supervision services and a more rapid response to breaches is evident as a result of the Domestic Violence Court Project. Prior to this project, the offenders were typically given the length of the Probation Order within which to complete any counselling considered appropriate to the offender. Since the advent of the Domestic Violence Court, offenders are now expected to enroll in treatment or counselling within thirty days and to have completed the same within six to eight months. Thus, the timeframe within which treatment and counselling programs are completed by offenders is substantially reduced. In addition, the Domestic Violence Probation Unit provides progress reports to the court for purposes of court ordered reviews.

Defence Counsel - The Legal Aid Society of Alberta has provided specialized duty counsel to the Domestic Violence Court to assist offenders at their first court appearance and thereafter if they have not yet secured their own counsel. A staff lawyer provides legal advice to the victim in the areas of divorce, custody/access and matrimonial property matters. Thus, the Legal Aid Society now provides legal services to both the accused and the complainant, which is a significant departure from the previous system. There is enhanced and more timely treatment of domestic violence cases and counsel is generally made available within 48 hours of the occurrence to victims and within 48 hours of the request made by an accused. This avoids delays caused by the lack of legal representation on the part of the accused person and enhances the opportunity for early resolution and intervention in domestic violence cases.

Duty Counsel assigned to the Domestic Violence Court participates in pre-court conferences if requested by the accused and provides legal advice to unrepresented accused. It is not uncommon for Duty Counsel to resolve cases upon the instructions of the accused either at the first appearance or shortly thereafter. However, often accused individuals request adjournments in order to secure their own counsel. Adjournments in the Domestic Violence Courtroom tend to be shorter than in other docket courts, often for a matter of days or a week rather than the traditional two or three weeks at a time. The purpose of short adjournments is to ensure early intervention in appropriate cases.

Duty Counsel also assist unrepresented accused in applications for Judicial Interim Release if requested to do so or request adjournments on behalf of unrepresented accused who require time to secure their own counsel.

Defence Counsel, once retained, play as important a role in the Domestic Violence Court as in the traditional system. They provide advice to assist with the early resolution of the case where appropriate and participate in pre-court conferences. They also represent the interests of the

accused in applications for Judicial Interim Release and continue to represent the accused throughout the criminal proceedings in cases which proceed to trial.

Victim Support Services - According to the Technical Working Paper for the Domestic Violence Court Project, there are three emergency shelters for victims[65] and children fleeing domestic violence in Calgary, with a collective capacity of 84 beds and a 21 day limit on shelter stay. Approximately 2,500 complainants and children receive services through these three shelters. According to the Technical Working Paper referred to earlier, for every person admitted three are turned away because all three shelters are at capacity. Alberta Family and Social Services assists victims by finding hotel accommodation. There are also services provided to families who prefer the benefit of ongoing support within their own homes and communities, as well as four crisis lines available 24 hours a day, each with a crisis counsellor who is able to assess and counsel victims as to their needs and the services available. There are also two second-stage or longer-term shelters which permit a stay up to six months for victims needing continued security and additional support following a shelter emergency stay. One of the three shelters focuses specifically on services for Aboriginal women and children. All three participate as members of the Calgary Coalition on Family Violence to address the needs of abused immigrant victims and their children as well as victims and their children from diverse cultures.

These community resources are integrated with the Project and accessed immediately if necessary. There are programs available to children who have witnessed the violence as well as parental resources. Safety planning for victims is an aspect of the information provided and from the shelter, victims are able to access legal advice and information.

Treatment Interventions[66] - The scope of this paper does not permit a detailed examination of the treatment component of the Project which is central to its success. Therefore, a very general overview of this subject has been included. The mandate of the counselling treatment agencies in the community is to provide counselling and treatment services to offenders of domestic violence and those accused who are awaiting trial and referred by probation. Existing programs have been enhanced to accommodate both victims and offenders or accused persons dealt with in the Domestic Violence Court. The general timeframe to ensure early intervention is 48 hours from the date of the Court Order. Programs have been developed for abusive individuals who use physical or psychological violence and

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[65] Services are available for both men and women, although not at the same facility.

[66] The information on this subject comes from The Calgary Counselling Centre, one of the major service providers integrated in the Domestic Violence Court.

control tactics in relationships. Most programs in Canada and the U.S. have a primary goal focussing on assisting abusive individuals to become violence-free. In addition, most domestic violence treatment programs in North America insist that abusive individuals examine the dominance and control aspects of domestic violence - especially issues of entitlement and privilege. The major objectives of treatment programs for abusive individuals include: (a) decreasing all forms of abusive behaviour, (b) accepting responsibility for one's behaviour, (c) increasing self-esteem, (d) increasing assertive behaviour, (e) improving family relationships, (f) self-management, (g) communication, (h) problem solving, (I) decreasing stress, (j) increasing empathy towards those who have been impacted by abusive behaviour, and (k) assisting parents to cease physically abusing their children.

The two programs in Calgary which are integrated with the court support the above mentioned programs goals and objectives. The program at Calgary Counselling Centre combines both individual and group counselling with family and couple work once the group program is complete. Individuals must be assessed by a counselor prior to beginning group counselling and must have taken responsibility for the abusive behaviour prior to entering the group program. The program at the YWCA Family Violence Centre and Sheriff King Home is a phased group program, where individuals begin with a group program and move to a longer more intensive program upon completion of the first group. All programs involve a specific program dealing with domestic violence. In cases involving intensive psychiatric evaluation and treatment, the existing Forensic Assessment Services are utilized, these services having also been integrated into the Domestic Violence Court Project.

7. *Preliminary Evaluations*

Because the court began in May of the year 2000, extensive evaluations are not as yet available. However, independent evaluations have been ongoing since the outset of the project. The latest evaluations indicate the following results:[67]

Demographic Characteristics:

- The majority of accused individuals were male (85%) and the majority of the victims were female.

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[67] Synergy Research Group and the Mental Health Department of the Government of Alberta have both done independent evaluations of the Domestic Violence Court Project. The evaluation results set forth are from the June, 2003 evaluations provided to HomeFront by Synergy Research Group.

- 13% of spousal assaults occurred in same sex relationships including 12% being gay relationships and 1% being lesbian couples.

- Majority of both accused and victims in spousal assaults were employed full and part-time or casually (64% each) while 27% of the accused and 26% of the victims were unemployed or on disability insurance.

- 69% of the accused and 67% of the victims were of white/European origins, about 11% of both the victims and the accused were Aboriginal and the remaining 20-22% were of other visible minority origins.

Situational Factors:

- Although the Domestic Violence Court dealt with not only spousal abuse cases, but also parent-child, neighbour, or sexual abuse against children cases, the large majority of cases appearing in the Domestic Violence Court were spousal abuse cases (79%).

- Alcohol or other substances were a factor in 82% of the cases, and of these, 76% of the time the alcohol or other substances were consumed by the accused rather than the victim.

- A weapon was threatened or used in 21% of the incidents.

- More than half of the accused were in co-habiting relationships. Of these 24% were married and 30% were common-law. 18% were ex-partners, having been legally separated, divorced, or ex common-law girlfriend/boyfriend.

- The most frequently laid charges included common assault (78%), uttering threats (20%), breach of recognizance (14%) and assault with a weapon (11%).

Case Processing Variables:

- Seventy percent of all cases heard in the Domestic Violence Court were resolved within a month from the first appearance date. On average trials were scheduled about four months hence. On average most cases were resolved within two brief adjournments and 88% were resolved within four such adjournments.

Resolutions, Dispositions and Conditions:

- 35% of cases were resolved with Peace Bonds, 33% entered not guilty pleas and proceeded to trial and 27% entered guilty pleas in the Domestic Violence Court or as a result of a change of plea over time.

- The most commonly occurring dispositions included offender treatment conditions (79%), alcohol/substance abuse assessment and treatment (52%), conditions requiring the offender to abstain completely from the use of alcohol (38%), and conditions prohibiting contact with the complainant (30%).

Recidivism Explored:

- The only evaluation concerning recidivism currently available involves a seven month follow-up conducted from May 1, 2001 to March 1, 2002, which produced a 10% re-offence rate for offenders coming from the Domestic Violence Court. Offences perpetuated by adults against children were associated with the highest rate of reoffence (14% of reoffenders fit into this category).

- In addition, the use of alcohol or substances during prior incidents was associated with higher reoffence rate and individuals with previous offence histories were more likely to reoffend (12% of reoffences) compared to those without prior histories (7% of those who reoffended).

- 64% of those referred to treatment successfully completed their programs.

Trial Dispositions:

- One hundred and twenty-two cases were tracked to trial during the timeframe between May 1st , 2001 and December 1st, 2002. Of these, 32% resulted in Peace Bonds, 25% were found guilty or entered guilty pleas, and 34% were dismissed for want of prosecution. In addition, offender treatment conditions were placed in 64% of trial dispositions and prohibitions relating to communication with the complainant were placed in 60% of the cases. Alcohol/substance abuse assessment and treatment conditions resulted in 22% of the cases and in 14% of the cases a condition relating to abstinence from alcohol resulted.

VI. *Tensions and Questions Regarding Problem Solving Courts*

The scope of this paper does not permit a full debate on the tensions and questions regarding problem solving courts. However, it is worthwhile to briefly mention the more salient tensions and questions which have arisen in connection with the evolution of problem solving court processes.

1. *The Lack of Freely Given Consent to Enter a Guilty Plea*

The view has been expressed that accused persons may not freely consent to participating in a problem solving disposition in the sense they are required to admit guilt in order to receive treatment, even though there may be a defence to the criminal charge before the court. The rationale for this criticism is that there is an element of manipulation or inducement involved in such a procedure, which may bring into question the validity of the guilty plea itself.

Proponents of problem solving courts note the current practice of plea bargaining utilized to resolve a large proportion of criminal cases is based upon a similar footing. In a plea bargaining process, an accused is assured the Crown will seek a lesser disposition, often for a less serious offence, in exchange for a guilty plea to the charge being entered. Similar "coercion", "inducement" or "manipulation" exists in the plea bargaining process, but with less effective treatment oriented sentencing dispositions being offered.

Proponents of problem solving courts also note that all accused persons participating in the problem solving court processes have the benefit of legal counsel and advice throughout the proceeding. Thus, the traditional safeguards are maintained in the sense that an accused is always entitled to plead not guilty to the offence, thus avoiding any arrangements requiring him or her to participate in the process. Defence Counsel will advise accused persons of their legal rights and exposure in the case and assist with the decision of whether to enter into the problem solving process. Defence Counsel will also advise the client about the consequences of non-compliance with the court mandated treatment, in advance of any agreement to enter the guilty plea to the charge.

With respect to the guilty plea itself, the Tsuu T'ina Peacemaking Initiative is structured so that the case can be returned to the normal court process at the option of the accused, so that nothing is lost by the accused utilizing the peacemaking process.

2. *The Role of Counsel Changes In The Problem Solving Court*

Concern has been expressed that lawyers in these courts are forced to change their manner of handling cases and providing legal advice. The argument is that the traditional role of the lawyer is to protect the client's legal position, and problem solving courts place Defence Counsel into a collaborative role equally concerned about the quality of life outcome to the client.

Proponents of problem solving courts say that the role of Defence Counsel is vital to assist accused persons with decisions about whether to participate in treatment oriented sentencing processes. Problem solving courts can be viewed as adding an additional sentencing option of treatment in appropriate cases, rather ran punitive sentencing measures. Defence Counsel are also involved with providing advice concerning legal sanctions for non- compliance with court orders or agreements concerning treatment. Proponents of problem solving courts concede that the role of Defence Counsel broadens somewhat in the problem solving court context.

3. *The Lack Of Traditional Structural Safeguards*

There are concerns that problem solving courts may give greater licence to judges to make rulings based upon their own personal opinions rather than the law because the well defined legal boundaries and procedures in traditional courts do not exist with the same uniformity in problem solving courts. The question asked is whether the traditional guarantee of equality before the law and the uniformity of process which ensures such equality is compromised in the problem solving court process.

However, in drug treatment courts, for example, there is in fact more uniformity of treatment of accused than the traditional system offers because of the wide range of sentences for various offences which occurs in the traditional system. Problem solving courts have a pre-determined sentencing scheme, or treatment plan, along with a system of sanctions and rewards applicable to all cases. Thus, the predictability of a problem solving court may in fact be much higher than the traditional court system, especially in the cases involving mental illness, drug addiction, or Aboriginal courts, but also to a significant degree in the domestic violence problem solving court system.

4. *Judges In Problem Solving Courts May Lack Impartiality*

This concern is that as judges become involved in sentencing alternatives they begin to rely upon *ex parte* communications from other

disciplines in out of court meetings. For example, in drug treatment courts, judges meet out of court with treatment professionals and counsel to discuss cases prior to court. This does not occur in either the Calgary Domestic Violence Court, where pre-court conferences do not involve the Judge or in the Tsuu T'ina Peacemaking Initiative. The concern however is broad enough to include "specialized" knowledge in domestic violence which could influence the judge's thinking.

Perhaps more knowledge about any specialty enhances the work of a judge who can consequently gain insights, the ability to ask questions, and consider potential issues and solutions in a more meaningful way.

5. *Paternalism*

Some view problem solving courts as a widening of governmental control in the lives of individuals, on the assumption this is a "good" thing to do for the accused. Proponents of these courts believe that judges in these courts attempt to deal more constructively and humanely with the underlying problems which bring people into conflict with the law. In addition, whenever people contravene the criminal law, there is a legal justification to address rehabilitation of the accused, not only in his or her interests, but in the broader interests of safety of the community.

It is also worth noting that often it is the family members of the accused and sometimes the victim who see the necessity for treatment of the accused and in these cases the future welling being of the accused and his family are the paramount concern.

6. *Judges Ought Not To Engage In Policy Making*

Concern has been expressed that Judges in problem solving courts inappropriately step beyond the third branch of government, being the judiciary and its role. The criticism is that problem solving court processes involve judges in policy decisions which ought to be left to the legislative and executive branches of government. Judges ought to interpret, not make, the law, and the argument is that if the government want us to deal more effectively with these issues, they ought to pass legislation and direct this be done. Furthermore, judges are not social workers.

The new sentencing legislation in the *Criminal Code* discussed earlier, while it may not directly require the establishment of problem solving courts, may certainly invite the closer look for alternatives to incarceration which are incorporated into the problem solving court processes, especially in light of the Supreme Court Of Canada interpretations discussed earlier.

Judges are well aware that sometimes traditional sentences involving punitive measures have little impact upon the future of the individual and in particular upon his risk to re-offend. Therefore, the discretionary powers of the judge in the sentencing process are properly spent in crafting sentences which actually address the underlying problems which cause recidivism, and the need to integrate the criminal justice process with the community agencies is a part of this objective.

7. *Insufficient Administrative Resources*

There is some concern that these new court processes are being funded at a time when the justice system and other government services are the subject of cut backs. There is no doubt that the advent of conditional sentences has placed an added burden upon Probation authorities. Specialized courts add to this in the context of court ordered reviews as well as the need for dedicated or specialized prosecutors and staff. In addition, court rooms must be allocated for the purposes of the problem solving court, and community agencies must be structured and integrated with the justice system throughout the legal proceedings.

The question of resource issues is never an easy one to deal with, but the success of the problem solving courts in other jurisdictions, specifically in the United States, has persuaded governments to allocate resources into this new preventative direction which promises more effective outcomes, and presumably economic savings in future. HomeFront has estimated the cost of domestic violence to the community and government to be extremely high.[68] Not only the Justice Department but the Departments of Education, Social Services and others incur millions of dollars in costs arising directly and indirectly from domestic violence in the home. According to HomeFront's research the personal costs to the participants in terms of consequent inability to carry on productive lives and relationships are over and above the financial impact of domestic violence and cannot directly be measured in financial terms.

VII. *Some Conclusions and Possibilities for the Future*

A. *The Supreme Court Direction in Gladue Applies to all Offenders*

When the Supreme Court dealt with s.718.2(d) and (e), being part of the new sentencing amendments to the *Criminal Code* in 1996, their direction to judges was to consider alternatives to incarceration for all offenders, but especially Aboriginal offenders. The Supreme Court interpretation of the sentencing legislation was acted upon in a meaningful way by creation of The Gladue Court in Toronto with respect to

[68] HomeFront Technical Working Paper, *supra* note 53.

Aboriginals. Contemporaneously, The Tsuu T'ina Council initiated the creation of the Tsuu T'ina Peacemaking Initiative in Calgary. There are undoubtedly many other examples of Aboriginal initiatives across Canada related to the need to design a justice system more acceptable to and appropriate for Aboriginal peoples, all of which no doubt address the uniqueness of Aboriginal culture in the consideration of sentencing alternatives.

However, the question arises as to whether sufficient efforts have been made with respect to all other offenders, who are also entitled to receive the benefit of s. 718 (d) and (e) of the *Criminal Code*. The problem solving courts and other initiatives mentioned in this paper are a partial response to the requirement that judges consider all other alternatives to incarceration when determining the appropriate sentence in given cases, but these have been only with respect to certain identifiable categories of cases.

Arguably, the same integrative and collaborative approach seen in the problem solving courts ought to be available, when appropriate, in other criminal cases. The intensity of the search for alternative sentencing plans and the same ability of the court to access directed resources as that demonstrated by The Gladue Court with respect to Aboriginal offenders, is mandated by both the legislation and the Supreme Court direction to judges with respect to all offenders. Indeed the Supreme Court of Canada referred to a reorientation of thought with respect to the parameters of sentencing analysis, away from incarceration and toward community based sentencing in appropriate cases. This concept appears to be consistent with the Gladue Court approach to sentencing. Therefore, it is reasonable to pursue the benefits of the problem solving approach and in particular the co-ordinated directed resources with respect to other accused individuals and victims, whether or not the case falls into the specific categories of cases which have currently been targeted in this new approach.

B. *The Use of Court Ordered Reviews*

In 1999 The National Center for State Courts in the United States published a survey entitled "How The Public Views The State Courts".[69] One interesting finding in this study was that the vast majority of the public believed that judges could solve problems by bringing the offender back to report back to the judge on his or her progress. This judicial monitoring or supervision is a fundamental

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[69] This study, in part, was presented: National Judicial College (Reno, NV) "How the Public Views The State Courts." Paper presented to the "Judges as Change Agents" seminar, June 2003.

feature of the problem solving approach to sentencing.

This opinion is supported by a study conducted by Professor Edward W. Gondolf,[70] of The Indiana University of Pennsylvania which revealed that compliance with Probation Orders in domestic violence cases significantly increased in cases where judicial monitoring by way of court ordered review took place. While this study deals with the area of domestic violence, the rationale may well be applicable to other probationary sentences as well. Certainly the success of the drug treatment courts is partly attributable to the ongoing judicial monitoring of offenders.

There are a number of reasons why a higher level of compliance appears to exist when court ordered reviews are conducted. Firstly, the offenders themselves are placed into a structure whereby their progress is reported to the court in a public proceeding. This in itself sometimes is a motivating force. Secondly, the Probation authorities, who are often burdened with high caseloads, must report to the Court concerning the progress of the individual and this places Probation authorities themselves in a position where certain referrals and results must take place within the timeframe set by the Court and a written progress report must be prepared for the Court. This requirement to report progress to the Court can be of assistance to Probation Officers who in turn require offenders to participate in treatment plans in a timely fashion in order to permit the progress report to be placed before the court within the timeframe designated by the court ordered review. Probationary monitoring of offenders in cases where court reviews are ordered are sometimes more extensive, and sanctions such as charges being laid for breaches of probationary terms are forthcoming more quickly as a result of increased probationary monitoring for purposes of the court ordered review. Research tells us that immediate consequences for non-compliance is important to the long-term success of court mandated treatment.[71]

As earlier mentioned, this judicial monitoring is a characteristic of problem solving courts, but whether or not a problem solving court process is in existence in any given jurisdiction, the use of judicial monitoring through court ordered reviews is worthy of consideration and may be an effective tool to reduce recidivism.

Another aspect of court ordered reviews involves the personal interest and commendations of the same sentencing judge. Drug treatment court research tells us that the encouragement of the same judge who monitors the offender as he or she proceeds through treatment is a powerful motivator. It seems reasonable that this same motivation would exist in

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[70] Edward W. Gondolf, *The Impact of Mandatory Court Review on Batterer Program Compliance*, *supra* note 61.

[71] Canada's First Drug Treatment Court, *supra* note 26.

other contexts, whenever the same judge repeatedly reviews an offender's progress and provides encouragement as the offender successfully completes each phase of his or her program.

It may even be worth considering some sort of public recognition upon completion of the treatment program, something similar to the graduation ceremonies of the drug treatment courts or the final sentencing circle in the Tsuu T'ina Peacemaking Initiative. At the very least, congratulations from the sentencing judge would seem a very important motivator to offenders who successfully complete probationary conditions.

C. *Therapeutic Direction in General*

It is not only problem solving courts which are applicable to the therapeutic direction of justice services. As mentioned in this paper, diversion projects such as the Mental Health Diversion Project in Calgary have been initiated by judges, specifically Judge William Pepler, who saw a problem with mentally ill people coming into conflict with the law. Through the collaborative efforts of the Criminal Division of the Provincial Court of Alberta, the Crown's Office, the Mental Health Professionals in the community and other community service agencies, a solution was found for this problem which did not involve the creation of a problem solving court itself, but rather a diversionary process in which mentally ill offenders are diverted from the criminal process to be treated and provided with follow-up services upon completion of the court case in order to prevent recurrence of the offence. In Lethbridge, Alberta, a similar diversion project has evolved with respect to cases involving accused who suffer from Fetal Alcohol Syndrome, a condition involving brain damage caused prior to birth to unborn children as a result of alcohol consumption by the mother. A person suffering from this condition is often unable to appreciate the consequences of their actions and therefore concepts like specific deterrence and the adversarial process itself has no meaningful application to them.

In addition, the therapeutic approach to justice issues has a wide and diverse application, not only with respect to criminal law, but court processes in general. David Wexler and Bruce Winick developed Therapeutic Jurisprudence in relation to Mental Health Law in the late 1980's and since then its principles have been expanded. The scope of this paper does not permit a discussion of these other developing uses of Therapeutic Jurisprudence. However, Therapeutic Jurisprudence puts forward the view that the application of the law, specifically including court processes, can promote or inhibit psychological and physical well being.[72] To improve the quality of life of participants in

[72] *Law In A Therapeutic Key*, *supra* note 6.

the court process is a well intended objective of problem solving court processes, and a perspective worth careful consideration throughout day-to-day judicial duties.

D. *Geraldton Alternative Sentencing Regime*[73]

An interesting application of Therapeutic Jurisprudence exists in regional Western Australia, an area in which a sentencing option is available to the court which involves court mandated treatment in all cases where substance abuse or other health issues are the underlying problem. Accused persons in criminal proceedings may choose to participate in a holistic program which attempts to address all the factors which may contribute to the offending behaviour. The court process, including judicial management of offenders is utilized to promote the psychological and physical well being of participants.

The Geraldton Alternative Sentencing Regime permits adjournment of the case for up to six months, in order for the accused to participate in a treatment regime. The legislation in that jurisdiction empowers the court to adjourn sentencing for a period of not more than six months following conviction and the Bail Act[74] allows a court to impose a requirement as to participation in treatment programs as a condition of bail if it considers it desirable to do. The program is not only available to those accused who have entered guilty pleas but also to those who have not, the rationale being that often accused persons are at risk of re-offending if left without treatment.

The concept of assessing accused for treatment of underlying problems which contribute to recidivism, without categorizing the case, may be worth considering in both large and small jurisdictions. It is clear for instance, that often there are overlapping problems between problem solving courts. For instance, domestic violence often has drug or alcohol abuse issues as root contributing causes to the violence, or other mental health issues which contribute to re-offending behaviour. Hence, it may be that the concept of Therapeutic Jurisprudence will expand in the years to come as a more effective use of court processes than in the past. Clearly, there is no suggestion that directed resources toward therapeutic sentencing replaces the traditional sentencing options, but this may well provide an increasingly effective additional option in appropriate cases.

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[73] Michael S. King, "Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush" (2002), 26 C.L.J. 260.

[74] Section 16 of the *Sentencing Act* of Australia

E. *Conclusion*

Parliament has amended the *Criminal Code* to expand the objectives of sentencing beyond the traditional objectives of denunciation, deterrence, retribution and the relative latecomer of rehabilitation of offenders. New objectives of a restorative nature have been added to the *Criminal Code* and the Supreme Court of Canada has held that these new restorative objectives must be considered along side the traditional sentencing objectives. Restorative sentencing objectives are consistent with therapeutic jurisprudence which emphasizes the practical impact of legal proceedings upon individuals affected by both the process and outcome of the proceedings.

The problem solving court processes described in this paper represent an addition to the current adversarial system with its emphasis on process and procedure. Without diminishing the importance of process, problem solving court processes provide an additional option to the criminal justice system, an option which emphasizes the practical outcome of the case upon the quality of life of the community and individual participants.

The co-ordination and integration accomplished between the criminal justice system and the community agencies dealing with specific social problems appears to represent an improvement in terms of the way in which the criminal justice system serves the community. Aspects of this approach may benefit all cases before the courts, not just those where the characterization of the problem has been high profile enough to warrant specialized court processes. The problem solving court process approach and therapeutic jurisprudence in general warrants further study and discussion.

Of note is the fact that the Toronto *Gladue* Court initially began its sittings without any additional funding. Perhaps existing resources can be better co-ordinated and integrated than they are at present, where each agency operates within its own "watertight" container, doing its narrow role well, but unable to have sufficient regard to the overall outcome of the entire criminal justice proceedings upon the individuals affected by the events and the proceedings themselves. For example, prior to the establishment of the Domestic Violence Court in Calgary, the Judges, Crown Prosecutors, Defence Counsel and Probation authorities all did a splendid job in their specific area of responsibility, but the outcome in many domestic violence cases was that often little change in the situation of the accused or his or her family occurred after the wrenching experience of traversing the criminal justice system. The results were not the best despite each "player" in the system performing well in their specific role.

One matter which must be mentioned in this discussion is that the

planning and implementation of any problem solving court process is impossible without the support and willingness of the Chief Administrative Judges and their Regional Assistants. Their foresight to explore new avenues of thought concerning the criminal justice system is essential. In particular, the problem solving court processes described in this paper could not have come about in the absence of the willingness and support of the Chief Justice of Ontario, The Honourable Mr. Justice Brian W. Lennox, and the Chief Judge of Alberta, the Honourable E.J.M. Walter along with their Assistant Chief Judges, the Honourable Justice Ted Ormston and the Honourable Judge Brian Stevenson, respectively. In addition, the willingness of Federal, Provincial and Municipal Governments to pursue a prevention oriented direction for the utilization of scarce resources is also paramount. Finally the co-operation of both the Defence and Crown Counsel is a vital part of the success of any problem solving court process.