Impaired Judgment:

Assessing the Appropriateness of Drug Treatment Courts as a Response to Drug Use in Canada

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

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About the Canadian HIV/AIDS Legal Network
The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

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Introduction

Over the last twenty years, drug treatment courts (DTCs) in Canada have become a popular alternative to imprisonment. DTCs are specialized courts that aim to reduce drug-related crime and increase public safety by providing intensive, supervised treatment outside the prison system to drug-dependent people. These specialized courts are often heralded as a more effective and humane approach by which the judicial system can aid people whose drug use is a factor in their interaction with the criminal justice system, while reducing the burden on the courts and harms to the community at large.

Yet an assessment of the effectiveness of DTCs leads to a more equivocal conclusion. The purpose of this report is to critically examine DTCs in Canada using the available evidence, which includes process and outcome evaluations of existing DTCs, grey literature and academic research. Our assessment is also informed by interviews with a number of key informants who interact with DTCs in various ways. Beyond the question of effectiveness, this report also raises a number of larger policy concerns. The development of DTCs as an alternative to incarceration — where there is often limited access to the advisable range of drug treatment options — constitutes an important step towards emphasizing the importance of treatment in responding to drug-related crime. This evolution in thinking, and desire to address proactively problematic drug use as an underlying health issue in many cases, rather than simply imposing harsh criminal punishment, is laudable. Nonetheless, it is important to examine whether the punitive measures employed in DTCs unnecessarily undermine human rights and a firmly public health approach. We must also consider whether certain drug-related activities could be dealt with strictly in the public health realm rather than in the judicial system, whether a broader range of drug treatment services could and should be made available, and whether there are opportunities to improve the current DTC system.

The premise of DTCs is that by eliminating or reducing the use of illicit drugs, they will also lead to a reduction in drug-related crime and hence an increase in public order and safety. However, the coercive characteristics of the DTC system result in encroachment on the drug treatment sphere and can contort the judicial protections of defendants to the point of undermining health needs and infringing human rights. Based on the available evidence, this report evaluates the effectiveness of DTCs in terms of cost, reduced drug use and recidivism. This report finds that the evidence that DTCs are effective is inconclusive at best. Furthermore, the needs of the vulnerable populations DTCs have targeted for intensive, supervised treatment have not been adequately assessed or addressed; consequently, these populations may be disproportionately exposed to the punitive impact of DTCs. Despite good intentions, given the numerous shortcomings of the DTC system, and its potential for undermining physical and mental well-being and infringing human rights, it is essential to consider other alternatives that may more adequately respect, protect and fulfill the human rights of people with drug dependence while achieving the desired goals of reducing drug-related crime and thereby improving public safety.

Drug Treatment Courts in the Canadian Context

Public health context: drug use, HIV and hepatitis C

Problematic drug use is fundamentally a public health concern — one heightened by the extent to which risky drug use contributes to the spread of blood-borne diseases such as human immunodeficiency virus (HIV) and hepatitis C virus (HCV). People who use drugs have been among those particularly affected by these epidemics. Yet, treating drugs as predominantly a matter for criminal prohibition has only exacerbated the linked epidemics of risky drug use and infectious disease. High rates of involvement with the criminal justice system among people who use drugs, particularly those with drug dependence, also mean high rates of such involvement for a disproportionate number of people living with HIV or HCV. High rates of incarceration among people who use drugs also contributes to disproportionately high prevalence of HIV and HCV in prisons, as well as further increased risks for transmission given the conditions of detention. Therefore, the criminal justice system's response to drug use and drug-related crime — including the advent of DTCs — is also a matter of public health concern and relevant to the response to HIV and HCV.

In the early1990s, Canadian researchers warned that an explosive HIV epidemic among people who inject drugs was looming.[1] Yet little attention was being paid to the emerging public health crisis. As a result, injection-related HIV and HCV transmission and overdose deaths reached epidemic proportions in many municipalities during this period. By 1996, injection drug use was thought to account for approximately 50 percent of all new HIV diagnoses in Canada that year.[2] The figure has been halved over the subsequent decade: in 2008, an estimated 17 percent of new infections were attributed to the use of non-sterile drug injection equipment.[3] Notwithstanding this positive development, unsafe injection drug use continues to play a significant role in the spread of HIV — and certain populations continue to be affected disproportionately. Injection drug use plays a particularly pronounced role in the HIV epidemic among Aboriginal people in Canada: "Between 1998 and the end of 2006, injection drug use was the exposure category for 53.7% of HIV-positive test reports among Aboriginal men and 64.4% of HIV-positive test reports among Aboriginal women."[4]

The overall prevalence of HIV remains unacceptably high among people who inject drugs.[5] The Public Health Agency of Canada (PHAC) reported that, between 2005 and 2008, the prevalence of HIV among a total of 3287 injection drug users (IDUs) who participated in the study ranged from 3 to 21 percent.[6] The prevalence of HCV is even higher. A national study conducted by PHAC reported that, between 2003 and 2005, almost two thirds (65.7 percent) of the study participants who reported injecting drugs were HCV-positive.[7] There is also a high prevalence of co-infection associated with injection drug use: based on a 2008 PHAC *Epi Update***,** of those who injected drugs and who were HCV-positive, 21 percent were also HIV-positive, whereas of those who were HIV-positive, 91 percent were also HCV-positive.[8]

While sharing equipment to inject drugs represents a major public health concern, other means of consuming

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1 R.S. Remis and D.W. Sutherland, "The epidemic of HIV and AIDS in Canada: current perspectives and future needs," *Canadian Journal of Public Health* 84 (1993): pp. 34–38.

2 Health Canada, *Injection Drug Use and HIV/AIDS: Health Canada's Response to the Report of the Canadian HIV/AIDS Legal Network*, 2001.

3 Public Health Agency of Canada, *HIV/AIDS Epi Updates — July 2010, Chapter 10, 2010*. Available via http://www.phac-aspc.gc.ca/aids-sida/publication/epi/2010/10-eng.php

4 Public Health Agency of Canada, *Population-Specific HIV/AIDS Status Report: Aboriginal Peoples*, 2010, p.24.

5 Public Health Agency of Canada, *HIV/AIDS Epi Updates — July 2010, Chapter 10, 2010*. Available via http://www.phac-aspc.gc.ca/aids-sida/publication/epi/2010/10-eng.php.

6 Ibid.

7 Public Health Agency of Canada, *Epi Update: Hepatitis C Virus Infection among Injecting Drug Users (IDU) in Canada: Results from I-Track (2003-2005)*, June 2008 (available via http://www.phac-aspc.gc.ca/sti-its-surv-epi/epi/itrack-eng.php). The study included seven sites: Victoria, Edmonton, Regina, Winnipeg, Sudbury, Toronto, and the SurvUDI sites (Abitibi-Témiscamingue, Estrie, Maurice/Centre du Québec, Montérégie, Montréal, Ottawa, Outaouis, Québec, Sanguenay/Lac St-Jean).

8 Ibid.

drugs can also carry serious health risks. Smoking crack has been identified as a possible risk factor for transmitting both HIV and HCV.[9] Research has found that HCV infection is much more prevalent among people who smoke heroin, crack or cocaine — but who report that they have never injected — than in the population as a whole.[10] Without ready access to safer equipment properly suited to the task, pipes are often made from materials with sharp edges such as pop cans and small glass vials, increasing the risk of cuts to mouth and lips, as well as burns from hot equipment. Sharing of equipment then carries a greater risk among users of exposure to blood containing HIV or HCV. In response to emerging evidence, a number of programs in Canada have expanded harm reduction services to include not just distribution of sterile injecting equipment but also sterile smoking equipment, although this has provoked controversy in some settings despite being analogous to and consistent with approved, longstanding needle and syringe programs.[11]

Treating drugs as predominantly a matter for criminal prohibition has only exacerbated the linked epidemics of risky drug use and infectious disease.

The transmission of HIV and HCV is particularly problematic in prisons. Most studies estimate the HIV prevalence rate in Canadian prison to be at least 10 times that in the population as a whole.[12] The prevalence of HCV in the Canadian prison population is estimated to be between 19.2 and 39.8 percent,[13] or at least 20 times the estimated HCV prevalence in Canada as a whole.[14] Two key factors explain this: the high rate of incarceration among people who use drugs and the greater risk of transmission in prison settings. The Correctional Service of Canada Review Panel estimates that 80 percent of offenders arrive in prison with a serious substance abuse problem.[15] Although people who inject drugs may inject less frequently in prison, the scarcity of sterile syringes means that a significant number of incarcerated people resort to using non-sterile injecting equipment.[16] In a study of seven Quebec provincial prisons, 63 percent of men and 50 percent of women who reported injecting in prison also reported having shared equipment.[17] Thus, it is not surprising that the HIV and HCV prevalence rates among people in prisons far exceed those in the population as a whole.

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[9] A. Weber, et al., "Risk factors associated with HIV infection among young gay and bisexual men in Canada," *Journal of Acquired Immune Deficiency Syndromes* 28 (2001): pp. 81–88; S. Tortu, et al., "Sharing of Noninjection Drug-use Implements as a Risk Factor for Hepatitis C," *Substance Use and Misuse* 39(2) (2004): pp. 211–224.

[10] Tortu, et al.

[11] Canadian HIV/AIDS Legal Network, *Questions & Answers: Distributing safer crack use kits in Canada*, September 2008.

[12] Centre for Infectious Disease Prevention and Control, Health Canada, and Correctional Service of Canada (CSC), *Infectious Disease Prevention and Control in Canadian Federal Penitentiaries 2000–01*, Ottawa: CSC, 2003; C. Poulin, et al., "Prevalence of HIV and Hepatitis C Virus Infections Among Inmates of Quebec Provincial Prisons," *Canadian Medical Association Journal* 177(3) (2007): pp. 252–256.

[13] S. Skoretz, et al., "Hepatitis C virus transmission in the prison/inmate population," *Canada Communicable Disease Report* 30(16) (2004): pp. 141–148; Poulin, et al.

[14] R. Remis, et al., *Estimating the number of blood transfusion recipients infected by hepatitis C virus in Canada, 1960–1985 and 1990–92*, Report to Health Canada, June 1998.

[15] Correctional Service of Canada Review Panel, *A Roadmap to Strengthening Public Safety*, 2007, p. v.

[16] E. Wood, et al., "Recent incarceration independently associated with syringe sharing by injection drug users," *Public Health Reports* 120(2) (2005): pp. 150–156; W. Small, et al., "Incarceration, Addiction and Harm Reduction: Inmates Experience Injecting Drugs in Prison," *Substance Use and Misuse* 40(6) (2005): pp. 831–843; S. Chu and R. Elliott, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada* (Toronto: Canadian HIV/AIDS Legal Network, 2009); S. Chu and K. Peddle, *Under the Skin: A People's Case for Prison Needle and Syringe Programs* (Toronto: Canadian HIV/AIDS Legal Network, 2010).

[17] Poulin, et al., *supra* 12.

Beyond the question of preventing further transmission, concerns also persist about access to adequate care and treatment for people with HIV, HCV and/or drug dependence in Canadian prisons. Therefore, sound public health policy should encourage adoption of measures within the criminal justice system that can reduce the incarceration of people with drug dependence and encourage treatment of that dependence — something that DTCs should in theory help achieve.

Evolution of drug policy

The *Opium Act* of 1908 and the *Opium and Drug Act* of 1911 laid the foundation for Canada's current criminal laws on psychoactive substances, criminalizing people who use drugs and restricting the type of medication physicians can prescribe.[18] Class biases and racism, particularly towards Chinese immigrants, have been well documented as the basis of the *Opium Acts*, along with concern that white people, particularly women, were increasingly using opium.[19] The *Acts* also resulted in substantial changes in the government's role in dealing with drugs. The Department of Health was established in 1920, including its Narcotic Division with responsibility for overseeing the *Opium and Drug Act*. The division collaborated with the Royal Canadian Mounted Police (RCMP), also formed in 1920 (as the successor to the Royal North West Mounted Police), influencing changes to federal drug policy.[20] Some researchers have argued that enforcement of drug legislation and policy was the primary justification for establishing the RCMP and that "[b]y the early 1930s, federal police and drug officials emerged as Canada's only drug experts."[21] These *Acts* initiated an approach towards drug use based entirely on enforcing criminal prohibitions, an approach largely uncontested until the treatment movement in the 1950s.[22]

Canada's current drug policies have emerged from a prohibitionist and punitive framework, targeting (certain) drugs and those who use them. In the last two decades, spurred particularly by the emergence of the HIV epidemic, there has been some modest accommodation for services that aim to reduce harms sometimes associated with drug use (such as HIV), while pragmatically recognizing that drug use continues despite those harms and despite criminal prohibition. These have included needle and syringe programs in the community (but not in prisons) and, in Vancouver, one officially sanctioned supervised injection facility. Until 2007, Canada's Drug Strategy explicitly incorporated harm reduction as a key feature: the stated "long-term goal of Canada's drug strategy is to reduce the harm associated with alcohol and other drugs to individuals, families and communities."[23]

However, in 2007, the federal government further entrenched an ostensibly "tough-on-crime" approach in drug policy by removing harm reduction as a pillar of its national drug strategy (leaving prevention, treatment and law enforcement — the last of which claims by far the greatest portion of resources)[24] and introducing numerous crime bills, including proposals for mandatory minimum sentences for certain drug offences. It is worth noting that such proposals have often been accompanied by claims that greater enforcement of harsher penalties will only target "dealers," while offering "compassion" for those with addictions — including

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[18] C. Carstairs, *Jailed for Possession: Illegal Drug Use, Regulation, and Power in Canada, 1920–1961* (Toronto: University of Toronto Press, 2006); R. Solomon and M. Green, "The First Century: The History of Non-Medical Opiate Use and Control Policies in Canada, 1870–1970," in C. McCormick and L. Green (Eds.) *Crime and Deviance in Canada: Historical Perspectives* (Toronto: Canadian Scholars' Press, 2005), pp. 353–365; G. Dias, "Canada's Drug Laws: Prohibition is not the Answer," in *Perspectives on Canadian Drug Policy* (Kingston: The John Howard Society of Canada, 2003), Volume 1: pp. 10–24.

[19] V. Berridge and G. Edwards, *Opium and the People: Opiate Use in Nineteenth Century England* (London: Allan Lane, 1981); Carstairs, *supra* 18; E. Comack, *Women in Trouble: Connecting women's law violations to their histories of abuse* (Halifax: Fernwood Publishing, 1996); Solomon and Green, *supra* 18; Dias, *supra* 18.

[20] Solomon and Green, *supra* 18.

[21] Ibid.

[22] Dias, *supra* 18.

[23] Government of Canada, *Canada's Drug Strategy* (Ottawa: Minister of Public Works and Government Services Canada, 1998). The Four Pillars Drug Strategy introduced in the late 1990s, included prevention, enforcement, treatment and harm reduction. C. Collin, *Substance Abuse Issues and Public Policy in Canada: I. Canada's Federal Drug Strategy*. Library of Parliament, April 13, 2006.

[24] Government of Canada, National Anti-Drug Strategy (2007), on-line: www.nationalantidrugstrategy.gc.ca.

through the expansion of drug treatment courts. As has been pointed out, such a distinction is often artificial, and the claimed effect unlikely, with the burden of harsher enforcement likely to fall most heavily on those with addictions, particularly those who may engage in small-scale dealing to support their own drug use.[25] To the extent that DTCs are presented as tempering the impact of harsher law enforcement, it becomes all the more important to consider carefully their claimed benefits and their significant limitations.

"Our Government introduced Bill S-10 which will set mandatory jail time for serious drug crimes, specifically targeting drug-traffickers connected to organized crime who use violence or weapons, dealers who sell to youth or frequent places where youth gather, and drug producers who pose a hazard to the health and safety or security of residential neighbourhoods."[26]

— Pamela Stephens, spokesperson for Justice Minister Rob Nicholson, February 2011

This approach of harsher enforcement has also intensified calls for drug policy reform in Canada. New organizations have been formed to challenge harmful drug policies, encourage dialogue about drug issues in communities and propose alternative drug policies and approaches that move away from a punitive approach and towards a public health approach. One recent example of the call to rethink the approach of prohibition and punishment is the Vienna Declaration — the official declaration of the 2010 International AIDS Conference, endorsed by thousands of experts and service-providers, as well as some Canadian municipalities — that highlights the necessity of an evidence-based, public health model to address drug use and misuse.[27] In early 2011, the Global Commission on Drug Policy, including several former heads of state, issued their report calling for a paradigm shift in policies dealing with drugs, to focus on preventing and reducing harms rather than a costly, damaging and ineffectual "war on drugs."[28]

Drug use and drug treatment approaches

Data from the Canadian Addiction Survey released in 2005 indicated that 44.5 percent of Canadians report using cannabis and 17 percent of Canadians report using an illicit drug other than cannabis at least once in their lifetime. Only 23.8 percent of people who have used drugs in their lifetime and 17.5 percent of people who have used drugs in the previous 12 months have reported some harm related to their drug use.[29] Of the small percentage of people who do develop drug dependence, the majority decrease or stop harmful substance use without engaging in formal treatment.[30]

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[25] Canadian HIV/AIDS Legal Network, "Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses", Briefing Paper, April 2006; L. Lapidus, et al., *Caught in the Net: The Impact of Drug Policies on Women and Families* (American Civil Liberties Union, Break the Chains: Communities of Color and the War on Drugs, The Brennan Center at NYU School of Law, 2004); L. Maher and D. Dixon, "Policing and public health: Law enforcement and harm minimization in a street-level drug market," *British Journal of Criminology* 39(4) (1999): pp. 488–512.

[26] G. Galloway, "Health researchers slam Tory mandatory-minimum-sentence proposal for drug crimes," *The Globe and Mail*, February 7, 2011.

[27] "The declaration was drafted by a team of international experts and initiated by several of the world's leading HIV and drug policy scientific bodies: the International AIDS Society, the BC Centre for Excellence in HIV/AIDS, and the International Centre for Science in Drug Policy (ICSDP)." Available via www.viennadeclaration.com.

[28] Global Commission on Drug Policy, *~~War~~ on Drugs: Report of the Global Commission on Drug Policy* (June 2011), on-line: www.globalcommissionondrugs.org.

[29] E. Adlaf, et al. (eds.), *Canadian Addiction Survey: A national survey of Canadians' use of alcohol and other drugs: Prevalence of use and related harms: Detailed report*, Canadian Centre on Substance Abuse, March 2005.

[30] C. Winick, "Maturing Out of Narcotic Addiction," Bulletin on Narcotics 14 (1962): pp. 1–7; R. Granfield and W. Cloud, "Social Context and 'Natural Recovery': The Role of Social Capital in the Resolution of Drug-Associated Problems," Substance Use & Misuse 36 (11) (2001), pp. 1543–1570; R. Mariezcurrena, "Recovery from addictions without treatment: Literature

Formal treatment programs vary in philosophy and include a range of different practices. However, all efforts to provide and pursue drug dependence treatment in Canada are situated within an overall policy approach to drug use that is predominantly punitive in orientation — unsurprisingly, many of those in treatment are therefore also involved in the criminal justice system.[31] This phenomenon is not new. Prior to World War II, little attention was paid to addiction, other than in the case of alcohol, and available drug dependence treatment was often closely tied to compulsory systems. For example, some treatment services were available in certain private asylums[32] and some drug-dependent people were institutionalized in psychiatric facilities.[33]

All efforts to provide and pursue drug dependence treatment in Canada are situated within an overall policy approach to drug use that is predominantly punitive in orientation.

With the treatment movement of the 1950s, advocates began to challenge the law-and-order approach to addiction with the view that "criminals" and "addicts" "should be rehabilitated through treatment rather than alienated through punishment."[34] This understanding of the ability of treatment to rehabilitate people was championed by "the 'helping professions' — particularly psychiatrists, social workers, and clinical psychologists."[35] New treatment methods were developed in the late 1950s and 1960s, with addiction treatment programs increasingly established in the 1970s.[36] Treatment services became more specialized in the mid-1980s, particularly for women, Aboriginal people and youth, in response to research showing that different types of treatment may be more beneficial for different groups.[37]

Today, drug dependence is understood as "a multi-factorial health disorder that often follows the course of a relapsing and remitting chronic disease."[38] Among specialists in addiction treatment, there is also a much stronger recognition of the link between problematic drug use and experiences of violence or abuse, including resulting post-traumatic stress disorder (PTSD).[39] These analyses challenge traditional simplistic assumptions of individual pathology or moral failing, calling instead for more sophisticated, multi-dimensional approaches

review," Scandinavian Journal of Behaviour Therapy 23(3–4) (1994): pp. 131–154; H. Klingemann, et al., "Continuities and changes in self-change research," Addiction 105(9) (2010): pp. 1510–1518.

31 A. Ogborne, et al., "The treatment of drug-related problems in Canada: Controlling, caring and curing," in G. Hunt and H. Klingermann (eds.), *Demons, Drugs and Democracy* (Thousand Oaks, CA: Sage, 1997), pp. 20–32.

32 B. Rush and A. Ogborne, "Alcoholism treatment in Canada: History, Current Status and Emerging Issues," in H. Klingermann and G. Hunt (eds.), *Cure, Care and Control: Alcoholism Treatment in Sixteen Countries* (Albany, NY: State University Press, 1992), p. 3.

33 Carstairs, *supra* 18.

34 P.J. Giffen, et al., *Panic and Indifference: The Politics of Canada's Drug Laws: A Study on the Sociology of Law* (Ottawa: Canadian Centre on Substance Abuse, 1991): p. 353; Solomon and Green, *supra* 18.

35 Giffen, et al.

36 Ogborne, et al., *supra* 31, p. 26.

37 Roberts and Ogborne, *supra* 32.

38 United Nations Office on Drugs and Crime and World Health Organization, *Principles of Drug Dependence Treatment*, Discussion Paper, 2009, p. 1.

39 K. Merikangas and D. Stevens, "Substance Abuse Among Women: Familial Factors and Comorbidity," in C. Wetherington and A. Roman (eds.), *Drug Addiction Research and the Health of Women* (Rockville, Maryland: U.S. Department of Health and Human Services, National Institutes of Health, National Institute on Drug Abuse, 1998) pp. 245–270; D. Kilpatrick, et al., "Victimization, Posttraumatic Stress Disorder, and Substance Use and Abuse Among Women," in Wetherington and Roman (eds.), pp. 285–308; S. Wilsnack, et al., "Childhood Sexual Abuse and Women's Substance Abuse: National Survey Findings," *Journal of Studies on Alcohol* 58(3) (May 1997): pp. 264–271.

to treatment. They challenge as well the notion that people who use drugs should be understood primarily as a threat to public safety and therefore simply contained inside correctional or psychiatric institutions. Instead, there is a large body of research which suggests that many drug-dependent people, especially women, Aboriginal people and people of colour, take drugs to self-medicate in order to address the symptoms of PTSD, and the emotional and psychological consequences that stem from violence, poverty and racism they have experienced.[40] This understanding signals a profound shift from positing people with drug dependence as potentially or actually violent criminals or as morally flawed "junkies." Drug-dependent people are instead viewed as survivors who require assistance in addressing self-harming behaviours, including problematic drug use, as well as support in addressing issues of poverty and dealing with the violence they have experienced. This reflects a broader understanding that good or poor health is affected by a host of social determinants. Tackling social and economic deprivations or inequities therefore become central issues in confronting drug addiction, both on the level of an individual's treatment and on the level of broader public policy, rather than focusing on controlling drug-dependent people or reforming them through explicitly or implicitly punitive measures.

Notwithstanding this broader analysis and more nuanced understanding of addiction, access to effective, humane treatment lags behind. For example, data from the Ontario Health Survey reveals that only 36 percent of people diagnosed with alcohol abuse or dependence had access to treatment services.[41] A Vancouver study of people who inject drugs revealed "that the most unstable and highest-risk IDUs were the most likely to seek addiction treatment but were unable to access these services due to lack of availability."[42] A fragmented treatment system that is inadequately funded contributes to a lack of access to addiction treatment programs.[43] In its 2008 national assessment of services and supports offered to Canadians with substance use problems, the National Treatment Strategy Working Group (NTSWG) found that "the services and supports devoted to addressing these problems are inadequately funded and not optimally distributed."[44] Furthermore, the assessment indicates that, "historically, there has been little integration or effective communication within and between the systems and jurisdictions that provide services and supports to people with substance use problems,"[45] undermining people's ability to access the treatment services they need. One factor contributing to inadequate funding in the drug treatment sector stems from "the unfavourable competitive position of the addiction treatment sector compared to other health care priorities that are politically better positioned to obtain enhanced and sustained health care funding."[46] The NTSWG recommends the development of a more coordinated national system of services and supports to address problematic substance use.

Without such a national coordinated effort, access to voluntary treatment may continue to be difficult, especially for people in more marginal communities, with the consequence that involvement with the criminal

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40 B. Richie, *Compelled to Crime: The gender entrapment of battered Black women* (New York: Routledge, 1996); M. Buchanan, et al., "Understanding Women's Perspectives on Substance Use: Catalysts, Reasons for Use, Consequences, and Desire for Change," *Journal of Offender Rehabilitation* 50(2) (2011): pp. 81–100; B. Dansky, et al., "Prevalence of Victimization and Posttraumatic Stress Disorder Among Women with Substance Use Disorders: Comparison of Telephone and In-Person Assessment Samples," *The International Journal of Addictions* 30(9) (1995): pp. 1079–1099; P. Fazzone, et al., *Substance Abuse Treatment and Domestic Violence, Treatment Improvement Protocol (TIP) Series 25*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services, 1997; National Household Survey on Drug Abuse, *NHSDA Report: Substance Use Among American Indians or Alaska Natives*, May 16, 2003; Office of the Director, National Institutes of Health, *Women of Color Health Data Book*, 74 (2nd ed.), 2002.

41 J. Cunningham and F. Bresli, "Only one in three people with alcohol abuse or dependence ever seek treatment," *Addictive Behaviors* 29(1) (2004): pp. 221–223.

42 E. Wood, et al., "Inability to Access Addiction Treatment and Risk of HIV Infection Among Injection Drug Users," *Epidemiology and Social Science* 36(2) (2004): p. 752.

43 National Treatment Strategy Working Group, *A Systems Approach to Substance Use in Canada: Recommendations for a National Treatment Strategy*, October 2008; W. Skinner, "The need for policy alternatives to address alcohol and other drug problems: Developing a behavioural risk insurance model," *Contemporary Drug Problems*, 34(4) (2007): pp. 715–727; G. Thomas, *Addiction Treatment Indicators in Canada: An Environmental Scan*, Canadian Centre on Substance Abuse, 2005; Wood, et al., *supra* 42.

44 National Treatment Strategy Working Group, p. 35.

45 Ibid, p. 9.

46 Skinner, *supra* 43, p. 719.

justice system becomes the route by which people belatedly gain access to treatment. According to one expert on drug treatment courts:

> What is still missing is adequate funding of the treatment system to meet the demand for voluntary treatment. There is a definite downside if the criminal justice system were to become the preferred gateway to the treatment system. Recent efforts to expand access to the voluntary treatment system could be sabotaged through the over-use of the criminal justice system as a mandated point of entry.[47]

With this more sophisticated understanding of addiction, and the systemic lack of adequate access to voluntary treatment services as the context, it is important to examine the assumptions upon which DTCs are founded, and how these assumptions might affect people in the DTC system.

Canadian Drug Treatment Courts: Overview and Objectives

Brief history and current status of drug treatment courts

Drug treatment courts have been operating longer and much more extensively in the U.S. than in Canada.[48] The first drug court in the U.S.[49] was established in Florida in 1989 and there are currently over 2100 such courts across the country.[50] The first DTC in Canada was established in Toronto in 1998, and there are now six federally funded DTCs operating across the country in Toronto, Vancouver, Edmonton, Winnipeg, Ottawa and Regina.

Drug courts in the U.S. were established in response to the soaring number of arrests and incarcerations as a result of the continued and vigorous prosecution of the "war on drugs."[51] In contrast, DTCs in Canada were established at a time when the overall crime rate was declining and incarceration rates were relatively stable.[52] Nevertheless, the stated goal of such courts in both Canada and the U.S. is the same: to break the cycle of drug use and criminal recidivism, as well as to reduce overreliance on the costly prison system.[53]

In the early 2000s, Canada's federal government established the Drug Treatment Court Funding Program (DTCFP), a partnership between Justice Canada and Health Canada. The program's stated objectives are to:

- "promote and strengthen the use of alternatives to incarceration (with a particular focus on youth - operationalized as 18 to 24 year olds, Aboriginal men and women, and street prostitutes)
- build knowledge and awareness among criminal justice, health and social service practitioners and the general public about DTCs

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[47] J. Anderson, "What to do about 'much ado' about drug courts?" *International Journal of Drug Policy* 12 (2001): 469–475 at 473.

[48] For some details of the use of quasi-compulsory treatment in connection with the criminal justice system in some European countries, see A. Stevens, et al., "Quasi-Compulsory Treatment of Drug-Dependent Offenders: An International Literature Review," *Substance Use & Misuse* 2005; 40(3): 269–283.

[49] "Drug treatment courts" is the term used in Canada, whereas "drug courts" is the standard term in the U.S.

[50] A. Bhati, et al., *To Treat or Not to Treat: Evidence on the Prospects of Expanding Treatment to Drug-Involved Offenders*, Justice Policy Center, The Urban Institute, April 2008.

[51] J. Rosenthal, "Therapeutic Jurisprudence and Drug Treatment Courts: Integrating Law and Science," in J. Nolan (ed.), *Drug Courts in Theory and Practice* (New York: Aldine de Gruyter, 2002), pp. 145–171.

[52] B. Fischer, "Doing good with a vengeance: a critical assessment of the practices, effects and implications of drug treatment courts in North America," *Criminal Justice* 3(3) (2003): 227–248 at 239.

[53] Comparing the Canadian drug treatment court system to the U.S. drug court system or that of other jurisdictions is beyond the scope of this report, which seeks to examine the appropriateness of using drug treatment courts to respond to problematic drug use and related drug crimes in Canada. For more information on U.S. drug courts, see N. Walsh, *Addicted to Courts: How a growing dependence on drug courts impacts people and communities*, Justice Policy Institute, March 2011; and Drug Policy Alliance, *Drug Courts are not the answer: toward a health-centered approach to drug use*, March 2011.

- collect information and data on the effectiveness of DTCs in order to promote best practices and the continuing refinement of approaches"[54]

Following a call for proposals in December 2004, four DTCs were granted funding in addition to the Toronto DTC (1998) and the Vancouver DTC (2001) already in operation. There has not been another call for proposals since. Currently, the DTCFP funds six DTCs and in 2010, each court had its funding renewed for two more years, until March 31, 2012. The courts are still described as "pilot courts" as they do not have long-term funding.[55] These DTCs receive approximately $3.5 million per approved year, from the Treatment Action Plan of the National Anti-Drug Strategy introduced in 2007.[56]

The stated goal of drug treatment courts in both Canada and the U.S. is the same: to break the cycle of drug use and criminal recidivism, as well as to reduce overreliance on the costly prison system.

There are four other DTCs that do not receive DTCFP support: Durham, Ontario;[57] London, Ontario; Moose Jaw, Saskatchewan; and Calgary, Alberta.[58] The Calgary DTC secured funding from the City of Calgary and later provincial funding through the Safer Communities Fund for 2010.[59] The Canadian Association of Drug Treatment Court Professionals (CADTCP) includes the four non-federally funded courts in the list of Canadian DTCs[60] and some of the non-federally funded DTCs participated in the CADTCP conference in 2010. Unfortunately, there is much less information available about the four non-federally funded courts. For example, in April 2011, the London DTC produced a PowerPoint presentation entitled *London Drug Treatment Court: First Year Update and Plans for Year Two*.[61] The first-year evaluation of the program is expected September 30, 2011. There is also an evaluation of the Durham DTC, but the evaluators caution that their findings cannot be generalized because of the very small sample size (28 participants) and that no comparison groups were used: "Because of the very small size of the sample, these results should be taken with extreme caution, noting that even small changes can severely affect these numbers. The reader is discouraged from generalizing these results."[62] Therefore, given the very limited information on non-federally funded DTCs that is readily available, this report limits its analysis to the six federally funded DTCs, which provide more accessible and reliable information about the function of Canadian DTCs.

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54 Department of Justice Canada, *Drug Treatment Court Funding Program: Summative Evaluation: Final Report*, March 2009, p. 3.

55 Ibid.

56 Department of Justice Canada, "Drug Treatment Court Funding Program." Available at http://www.justice.gc.ca/eng/pi/pb-dgp/prog/dtc-ttt/index.html.

57 The Durham DTC has been denied federal funding because it is in close proximity to Toronto.

58 Allard e-mail communication with Margaret Trottier, Senior Policy Analyst, Policy Implementation Directorate, Programs Directorate, Policy Sector, Justice Canada, March 3, 2011.

59 C. Cooper, et al., "Establishing Drug Treatment Courts: Strategies, Experiences and Preliminary Outcomes," Volume One: Overview and Survey Results," Justice Programs Office, School of Public Affairs, American University, paper prepared for the Drug Summit: European, Latin American and Caribbean Mayors and Cities, April 2010.

60 The Department of Justice also funds the Canadian Association of Drug Treatment Courts (CADTC) meetings and conferences.

61 *London Drug Treatment Court: First Year Update and Plans for Year Two — A community Collaboration*, PowerPoint presentation, April 2011, available at http://www.adstv.on.ca/london_drug_treatment_court.htm.

62 Angela Heagle and Hannah Scott, *Durham Drug Treatment Court (DDTC) Evaluation: A Literature Review and Analysis of Drug Treatment Courts*, Faculty of Criminology, Justice and Policy Studies, University of Ontario Institute of Technology, October 2010, p. 6.

Key common features of drug treatment courts

A more detailed discussion of the operation of DTCs follows later (see "Drug treatment courts in action," p. 15), but some key features common to all federally funded DTCs in Canada are worth noting here in order to understand the basic approach.[63] To be admitted to a DTC program, applicants are required to plead guilty to charges before the DTC and agree to comply with a variety of bail conditions and a rigorous treatment program. Most DTCs follow quite similar legal processes and treatment programs, yet differences do arise given their latitude in developing particularized treatment programming and court proceedings. Some of the key similarities include requiring participants to:

- attend court at least once or twice each week;
- undergo random urine testing at least weekly (and sometimes more frequently); and
- participate in group and individual counselling.[64]

Additionally, numerous bail conditions — some of them particularly challenging — are imposed by some DTCs, including requirements to:

- observe curfews;
- maintain or find safe and secure housing; and
- stay out of designated areas ("red zones").[65]

Courts have different criteria for "graduation" from the program but they generally require at least:

- a minimum length of time in the program;
- a period of documented abstinence from drug use; and
- some evidence of stability (i.e., stable housing; attending school or work).[66]

DTCs represent an effort to introduce a hybrid of treatment and punishment to better meet the social and psychological needs of drug-dependent people, while maintaining the weight of the judicial system.

However, some DTCs will allow, on a case-by-case basis, an alternative type of "graduation" referred to as substantial compliance.[67] For instance, a person may be deemed substantially compliant with program requirements if she or he succeeds in abstaining from certain substances of problematic use that were the target of treatment, even if there is use of another substance and that use is not deemed problematic — e.g., someone

[63] Given the limited amount of information about non-federally funded DTCs available at the time of writing, this report's examination and assessment will be limited to the six federally funded DTCs.

[64] Department of Justice Canada, *supra* 54.

[65] Ibid.

[66] Ibid; K. Gorkoff and M. Weinrath, *Winnipeg Drug Treatment Court: Outcome Evaluation: Final Report*, January 2009.

[67] Substantial compliance may be treated differently depending on the DTC. For instance, substantial graduation in Toronto means that a person will receive the same benefits as graduates, except that he or she will not participate in the graduation ceremony.

who enters a DTC program to tackle cocaine dependence could meet the criteria for substantial compliance notwithstanding marijuana use.

Objectives and philosophy of drug treatment courts

The conceptual foundation of the DTC system is that of *therapeutic jurisprudence*. Within Canada's history of drug policy and treatment, which has been predominantly punitive in orientation, DTCs represent an effort to introduce a hybrid of treatment and punishment to better meet the social and psychological needs of drug-dependent people,[68] while maintaining the weight of the judicial system — considered necessary to address the drug dependence of people deemed to be high-risk (i.e., more likely to not follow rules and to continue using and engaging in criminal activity). According to the late Justice Paul Bentley,[69]

> These courts can provide necessary drug treatment to a portion of society that is the most in need of treatment and yet the least likely to receive it. The combination of judicial supervision and immediate and intensive drug treatment offers the best hope for many drug addicts to achieve a sustained reduction and an eventual elimination of their drug habit.[70]

As stated by Justice Canada: "The fundamental intent of the DTC program is to divert serious drug-addicted offenders out of the correctional system and into treatment in order to halt the cycle of addiction and criminal behaviour. Also at the core of the program is that offenders admitted to the program should not pose a public safety threat."[71] While DTCs vary in their policies and treatment practices, it is clearly established that the goal of DTCs is to stop drug-dependent individuals from using drugs, thereby reducing recidivism and increasing public safety. Consequently, as a general principle of DTCs, participants are to establish or re-establish their lives by

1. becoming and remaining abstinent from specified substances;[72] and
2. becoming or re-establishing themselves as "productive," non-crime-committing members of the community.

These objectives are reflected in the DTC approach to defining successful outcomes. In general, with a few exceptions as noted elsewhere, including the possibility of exiting some DTC programs with "substantial compliance," the only acceptable treatment outcome for Canadian DTCs is complete abstinence from drug use.[73] A period of abstinence, ranging from two to four months, from all or some substances, is also required to graduate from DTC.[74] Some of the literature reveals that few people maintain long-term abstinence following addiction treatment;[75] yet, despite the low rate of success, abstinence remains a central principle in the Canadian DTC system. While DTC policy is not to impose penalties for relapses to drug use, abstinence is nonetheless required to graduate from DTC. In some courts, participants who repeatedly relapse may be eventually punished with time in custody or expulsion; in the case of the latter, having already pled guilty to enter the DTC, they face the traditional criminal sentencing process.

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[68] C. Kirkby, "Drug treatment courts in Canada: who benefits?" *Perspectives on Canadian Drug Policy* 2 (2004): pp. 59–76; Fischer, 2003, *supra* 52.

[69] The first DTC in Canada was established by Justice Paul Bentley in 1998.

[70] P. Bentley, "Canada's First Drug Treatment Court," *Commonwealth Law Bulletin* 25(2) (1999): 634–647 at 643.

[71] Department of Justice Canada, *supra* 54, p. 28.

[72] In some DTCs, mood-altering substances include alcohol, especially when it results in problematic use.

[73] Cooper, et al., *supra* 59; Fischer, 2003, *supra* 52; J. Nolan, *Reinventing Justice: The American drug court movement* (New Jersey: Princeton University Press, 2001).

[74] Department of Justice Canada, *supra* 54.

[75] D. Sellman, "The 10 most important things known about addiction," *Addiction* 105 (2009): pp. 6–13; C. O'Brien and A. McLellan, "Myths about the treatment of addiction," *The Lancet* 347(8996) (1996): pp. 237–240.

Use of medically recognized controlled substances in drug treatment courts

It should be noted that the use of certain controlled substances for medically recognized purposes is accepted in some DTCs, but not all. For instance, in the Edmonton Drug Treatment and Community Restoration Court (EDTCRC), participants who have approval to use marijuana for medical purposes under the federal Marihuana Medical Access Regulations (MMAR) can successfully graduate from DTC while using marijuana.[76] However, as of March 2011, the Toronto Drug Treatment Court had yet to allow the successful graduation of a person who is using under an authorization issued under the MMAR and the issue remains under discussion.[77]

The approach also varies among DTCs when it comes to methadone maintenance treatment (MMT).[78] Some DTCs allow people to continue MMT if they were already on it before entering DTCs, but do not allow DTC participants to initiate MMT while participating in the DTC; other courts, such as the Toronto DTC, allow participants not previously on MMT to initiate within the program.[79]

Proponents of the Toronto DTC who support the distinction allowing methadone use by participants but (so far) disallowing medical marijuana use argue that marijuana is not an approved drug assigned a drug identification number (DIN) by Health Canada that can be prescribed by physicians. Under the MMAR, a person can obtain an authorization to possess a certain quantity of marijuana for medical use. However, the physician is not prescribing marijuana; rather, the patient's application for an authorization is accompanied by a physician's medical declaration stating that marijuana is medically beneficial for the applicant.[80] Given that both substances are legally possessed for recognized medical purposes, this technical distinction is arbitrary and untenable. Denying DTC participants the use of marijuana as medicine, if therapeutically beneficial, is unethical interference in medical treatment, with potentially adverse consequences for people's overall health and well-being.

[76] Allard e-mail communication with Doug Brady, Director, Edmonton Drug Treatment and Community Restoration Court, March 4, 2011.

[77] The other courts have not encountered this issue yet, and as such no decision has been made on whether medically approved marijuana use would be accepted within the program.

[78] Methadone itself is a long-acting synthetic opioid agonist, prescribed as a treatment for opioid dependence. In Canada and many parts of the world, methadone maintenance treatment is an appropriate form of treatment for opioid dependence.

[79] P. Bentley, "Problem solving courts as agents of change," *Journal of the Commonwealth Magistrates' and Judges' Association* 15(3) (2004): pp. 7–15; Allard e-mail communication with Shellie Addley, Supervisor of Duty Counsel (Criminal) at the Ontario Court of Justice at Old City Hall courthouse, March 16, 2011; Allard e-mail communication with Birns at Regina Drug Treatment Court, March 16, 2011; Allard e-mail communication with Brady at Edmonton Drug Treatment and Community Restoration Court, March 4, 2011.

[80] Allard e-mail communication with Shellie Addley, Supervisor of Duty Counsel (Criminal) at the Ontario Court of Justice at Old City Hall courthouse, March 3, 2011.

Operating on a complete abstinence model leaves little room for reduced or moderated drug use as an acceptable measurement of progress. While DTCs have sought to integrate forms of harm reduction within their programs, their definitions and practices may not conform to the long-established harm reduction approaches based on a health-first model. For example, the Winnipeg DTC "uses a 'harm reduction' approach that recognizes that participants may relapse at various times in their struggle against addiction," yet focuses on abstinence in order to successfully graduate.[81] DTCs' "therapeutic jurisprudence" goal is to reduce criminal activity by helping people stop their drug use. Unlike a more health-focused treatment model where improving people's health is the goal, the reduction or moderation of drug use is generally not seen as meeting the DTC goal. On the other hand, under a health-focused model the reduction of harmful drug consumption would meet the goal of improving one's health, and continued use would not lead to penalties.

It is important to note that some DTCs are recognizing the necessity of helping DTC participants address some social determinants (e.g., employment and housing) in an effort to reach the goal of abstinence and reduced recidivism. Yet emphasizing complete abstinence as the end goal, whether via the traditional punitive approach to drug use or via the hybrid punishment/treatment model of DTC "therapeutic jurisprudence," has the potential to draw attention away from prioritizing and implementing gender-specific, culturally appropriate or youth-friendly initiatives to address the social determinants of health that affect the lives of people who use drugs. For example, for women who self-medicate with illicit substances because they have been sexually abused, who live in poverty and who must deal with medical issues because of their lived trauma, sobriety is just one step in a long series of efforts.

The most powerful tool DTCs have to coerce people into ending substance use and completing treatment is the threat of incarceration. The underlying implication is that drug-dependent individuals are only fully capable of surmounting their addiction provided they face really negative consequences for failure (i.e., drug use, violation of bail conditions). This approach dismisses the underlying premise that for many people drug dependence often stems from the unaddressed social determinants of health resulting in chronic relapses. In a punitive model, people who cannot achieve permanent abstinence are deemed failures deserving of punishment. This failure is attributed to the individual and is not perceived as a consequence of environmental circumstances (e.g., lack of housing or unaddressed trauma) with which people must contend, or of inappropriate or ineffective treatment. While some Canadian DTCs may, on a case-by-case basis, initially address relapse with additional treatment intervention, continued use will eventually be met with penalties, including expulsion. This is despite the fact that "[i]ncarceration, when used to punish continued drug use or relapse, is fundamentally at odds with a health approach to drug use. In a treatment setting, relapse is met with more intensive services. In drug court, relapse is often met with temporary or permanent removal of treatment services."[82]

Drug treatment courts as quasi-compulsory treatment

The DTC system is premised on the belief that participants voluntarily enter DTCs. Yet this is a rather elastic notion of "voluntariness," given the criminal justice system, complete with penalties, in which DTCs are embedded.

Treatment can be said to be *voluntary* when a person decides, free of pressure or constraints, to undergo that treatment.[83] (At an ethical minimum, treatment decisions should also be fully informed.) Treatment can also be less than *voluntary* to varying degrees. At the most extreme end, treatment may be *compulsory* in the sense that a person has no option but to undergo prescribed treatment. Physical restraint, or more often the explicit or implicit threat of physical restraint, compels the treatment, which is fully involuntary. This compulsion may arise by law, whether criminal or civil.

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81 K. Gorkoff, et al., "Winnipeg Drug Treatment Court Interim Evaluation," August 2007.

82 Drug Policy Alliance, *supra* 53.

83 R. Mugford and J. Weekes, *Mandatory and Coerced Treatment*, Canadian Centre on Substance Abuse, 2006.

Note that some commentators use the term *mandatory* interchangeably with *compulsory*, although these are not necessarily entirely synonymous. Treatment is truly *compulsory* when a person has no choice. In contrast, treatment may be *mandatory* as a condition of obtaining or retaining some benefit or status (e.g., employment), but the person retains, at least notionally some degree of choice — he or she may avoid treatment by foregoing that benefit or status. In this sense, DTC programs could be said to consist of mandatory, rather than compulsory, treatment, since an accused person is not compelled to participate in a DTC, and indeed must "choose" to apply to participate.

Of course, a person's "choice" to undergo treatment may be coerced by external pressures to varying degrees. The economic threat of job-loss may effectively limit choice. Parents may be faced with the choice of going into treatment or losing custody of or access to their children (a factor that often disproportionately affects women with drug dependence).[84]

In the case of DTCs, its defining feature is treatment that could be best characterized as *quasi-compulsory*. In most cases, people are incarcerated when encouraged to apply to the DTC program; if they are accepted into the program, they are released from jail and gain access more quickly than other people to a limited pool of treatment spots. Once accepted into a DTC, participants are compelled to submit to a highly rigorous treatment regime under intrusive judicial supervision — and failing to comply with the treatment program may ultimately (if not necessarily immediately) result in some deprivation of liberty. Some may argue that participation is voluntary because participants technically must consent to the DTC. However, the "choice" people have, often made while in pre-trial custody, is between either likely incarceration or participating in a drug treatment program over which they have little or no control, and in which they are under close scrutiny. Given that ongoing or imminent deprivation of liberty is the known or likely alternative, in this sense, the "choice" to enter drug treatment in the context of DTCs is marked by a considerable degree of coercion by the state.

People from marginalized communities may have access to treatment only once they've come into contact with the criminal justice system and successfully applied to enter the DTC system. This reflects a systematic "upstream" gap in access to needed health services.

The quasi-compulsory nature of treatment within the DTC program sits on a continuum of voluntariness of drug dependence treatment within the Canadian criminal justice system. For instance, under a *conditional sentence* — a custodial sentence that is served in the community instead of in prison and is available as the preferred sentencing alternative in some circumstances — a person who has been found guilty of an offence can be compelled by the court as a condition of the sentence to enter a drug treatment program.[85] At the other end of the spectrum, a *probation order* can include a condition that a person "participate actively" in a drug treatment program, but only if the person agrees.[86] (A probation order is commonly imposed after a person has served the rest of his or her sentence. However, it is also commonly used, for less serious offences, as the only penalty in cases where a person, having pled guilty or been found guilty of an offence, is nonetheless given a *conditional discharge* — the person is deemed by law not to have been convicted of the offence and

[84] A. Vaillancourt and B. Keith, "Substance Use among Women in 'The Sticks,'" in N. Poole and L. Greaves (eds.), *Highs & Lows: Canadian Perspectives on Women and Substance Use* (Toronto: Centre for Addiction and Mental Health, 2007), pp. 37–50; S. Boyd, *Mothers and Illicit Drugs: Transcending the Myths* (Toronto: University of Toronto Press, 1999).

[85] *Criminal Code*, s. 742.3(2)(e).

[86] *Criminal Code*, s. 732.1(3)(g).

is discharged, thereby acquiring no criminal record for the offence, but on conditions set out in a probation order.[87])

By providing access to drug treatment, DTCs are offering an extremely important service to which many low-income, marginalized people often face additional barriers. It is quite common for marginalized people dealing with drug dependence to not have access to a drug treatment program until they come in contact with the judicial system. For instance, according to Shellie Addley, duty counsel (at the time, in 2003), Ontario Court of Justice at Old City Hall courthouse,

> We have people in the program right now who, on their own, had tried to connect with treatment and just were not able to do so … I deal with people all the time who tell me, I had a condition on my probation that I had to take this treatment or this counselling but my probation officer couldn't find any place for me to do it.[88]

It is profoundly troubling that people from marginalized communities may have access to treatment only once they've come into contact with the criminal justice system and successfully applied to enter the DTC system. This reflects a systematic "upstream" gap in access to needed health services — which services might have prevented criminal charges from arising in the first place.

The preferential treatment that DTC participants receive also raises ethical concerns, including the basic issue of fairness. People accepted into the DTC have been known to 'jump the line' to access treatment[89] and other social services, including housing.[90] People who have voluntarily signed up for residential treatment, for example, are bumped down the waiting list for people in DTCs. Participation in the DTC system may not only ensure more rapid access to treatment, it may also offer drug-dependent participants more comprehensive social services to accompany the treatment program. One informant explained that, for him, the DTC "had its benefit because if there was a problem you were given that bed initially over anybody else. You were given things. They worked quickly. They had some sort of power to get you into a halfway house or a dry-out, a two- or three-day one or a longer-term one. There was no waiting period."[91]

Therefore, DTCs may be setting up a system whereby some people (and particularly those who are socio-economically marginal in various ways) have to be criminally charged and face the risk of penal consequences in order to gain access to drug dependence treatment and other social services. Additionally, participation in DTCs can determine who has access to scarce treatment resources. Both of these dynamics throw into stark relief the lack of adequate, equitable access to affordable drug treatment on a voluntary basis, with the consequence that the criminal justice system becomes a problematic fallback means of coercing people into treatment, in the absence of evidence to suggest this is as effective.

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87 *Criminal Code*, s. 730(1).

88 D. Gardner, "Holistic Justice," *The Ottawa Citizen*, May 13, 2003, p. C3.

89 Kirkby, *supra* 68.

90 Allard interview with Tucker Gordon, Systemic Advocate in Addictions, Empowerment Council, February 24, 2011: as Mr. Gordon indicated, "Self-referrals to CAMHA will not benefit from housing subsidies as will DTC participants."

91 Tara Lyons, Ph.D. candidate, Carleton University, interview with Ottawa DTC participant during research field work, June 2009.

Drug Treatment Courts in Action

Drug treatment in the traditional criminal justice process

Before considering the close integration of drug treatment and (potential) punishment in the therapeutic jurisprudence experiment embodied in drug treatment courts, it is worth noting the existence of other means within the criminal justice system that can be used to provide drug treatment in non-custodial settings. Some cases may result in a post-adjudication diversion program, essentially diverting people from prison following a finding of guilt (e.g., post-plea DTC option and conditional sentencing). Other cases could be dealt with pre-adjudication (e.g., pre-trial diversion or former pre-plea DTC option). Conditional sentencing or pre-trial diversion programs demonstrate that there are options available within the traditional judicial system to address more serious offences and those offences that may not require such punitive measures as those found in the DTCs.

Conditional sentencing

In 1996, as part of sentencing reform, conditional sentencing — allowing a custodial term to be served in the community rather than in prison — was introduced "to reduce the use of incarceration as a sanction and to provide judges with a more powerful alternative disposition than probation."[92] Courts, including the Supreme Court of Canada, have recognized the utility of the conditional sentence in providing a viable non-custodial sentencing option for certain offenders, including those convicted of drug offences.[93]

To be considered for a conditional sentence, a person guilty of an offence must meet certain criteria, including not posing a public safety risk. Anyone convicted of an offence that carries a sentence length of up to two years less a day is eligible for a conditional sentence of imprisonment.[94]

Persons receiving a conditional sentence are required to abide by the following mandatory conditions that always form part of any conditional sentence:

1. keeping the peace;
2. appearing before the court when requested;
3. reporting to a court-appointed supervisor;
4. remaining within the jurisdiction of the court; and
5. notifying the court of any name or address change.[95]

Much like the bail conditions imposed in DTCs, judges can impose a wide range of conditions at a conditional sentencing hearing — including ordering a person into drug treatment. Indeed, a national survey examining the use of conditional sentencing by judges, "found that fully 88% of judges stated that they "often" imposed treatment as a condition of a conditional sentence of imprisonment."[96] In addition, conditional sentencing provisions found in the *Criminal Code* could also enable a judge to require a conditional sentence supervisor to assist an offender in finding employment, housing and/or an educational program in the community.[97] Failure to abide by conditions can result in the person serving the remainder of his or her sentence in prison. Very

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92 B. Fischer, et al., "Compulsory Drug Treatment in Canada: Historical Origins and Recent Developments," *European Addiction Research* 8(2) (2002): pp. 61–68 at 63.

93 *R. v. Proulx*, [2000] 1 S.C.R. 61; *R. v. Cunningham* (1996), 27 O.R. (3d) 786) [Court considered whether an offender who was a courier of drugs was an appropriate candidate for conditional sentence]; *R. v. Wellington* (1999) 43 O.R. (3d) 534 (C.A.) [Court determined that conditional sentence can be appropriate in drug trafficking cases].

94 *Criminal Code*, s. 742.1.

95 *Criminal Code*, s. 742.3(1).

96 Fischer, et al., *supra* 92, p. 64.

97 *Criminal Code*, s. 742.3(2)(f).

much like the DTC framework, the possibility of facing time in prison creates an incentive to comply with a treatment program's requirements.

When ordering drug treatment under the conditional sentencing provisions of the *Criminal Code*, judges do not generally get directly involved in the drug treatment program developed for those sentenced. They rely on pre-sentence reports and post-sentencing progress reports prepared by supervisors and treatment providers to determine whether breaches of the conditions of sentence have occurred. The administrative requirements to amend conditions under a conditional sentence may prove more onerous than amending bail conditions in the DTCs. However, a breach of conditions will not automatically lead to a custodial sentence. Rather, the judge has the option to take no action in the face of a breach.[98] A judge has the opportunity to take the reality of relapse into consideration and offer the possibility of continuing treatment.

Conditional sentences and DTCs appear to serve a similar purpose as they relate to people who face drug-related charges. Both provide the opportunity to divert people from prison while accessing treatment and a variety of related services. As previously mentioned, while some have argued that people voluntarily access treatment through the DTC system but that under a conditional sentence people are required to attend treatment, it is clear that the voluntariness of DTC remains questionable.

Extending pre-trial diversion to a broader range of offences, provided the people being diverted do not pose a public safety concern, could increase people's access to drug treatment without the lifelong consequence of having a criminal record.

Pre-trial diversion

Pre-trial diversion typically allows the defence and the Crown to suspend trial proceedings for an agreed period, during which an accused person can undertake some type of rehabilitative effort such as drug treatment. Where the accused completes a rehabilitation program, the Crown can request to have the charges withdrawn. The pre-trial diversion enables a person to avoid the consequences of a criminal conviction.

However, the eligibility criteria established by most pre-trial diversion programs limit the pool of possible participants. The majority of people selected for pre-trial diversion have been accused of minor offences such as theft and drug possession and are likely to be first-time offenders. Many of the minor offences for which a person may be selected for diversion are likely to lead to minimal or no jail time. As a result, many of those eligible have opted not to enter a diversion program, which is likely to be more intrusive in nature or demand a significantly lengthier time commitment than the alternative of serving a possible sentence.[99] That said, there appears to be a willingness to expand the accessibility of some diversion programs to more "serious" drug offences. For instance, the Toronto Old City Hall post-charge criminal court diversion project,[100] while limited to first-time offenders, allows people charged with possession of controlled substances or possession for the purposes of trafficking to enter the program.[101]

The pre-adjudication diversion option previously offered in some DTCs could be revisited to address the

[98] *Criminal Code*, s. 742.6(9).

[99] J. Nuffield, *Diversion Programs for Adults*, Ministry of the Solicitor General of Canada, May 1997.

[100] In a post-charge criminal court diversion program people charged with minor criminal offences who meet strict criteria are diverted from the judicial process, provided they perform a community service.

[101] T. Landau, "How to Put the Community on Community-based Justice: Some Views of Participants in Criminal Court Diversion," *The Howard Journal* Vol. 43 (2), May 2004.

current limitations of the traditional judicial system, broadening the spectrum of drug-related offences that are taken into consideration for pre-adjudication diversion. In the past, some DTCs offered a pre-plea option. Such was the case with the Toronto DTC. In its early days, the court included both a *pre-plea* track and a *post-plea* track. The pre-plea track was discontinued in the early 2000s, in large part because overly stringent eligibility criteria meant it went largely unused. Enrolment in the DTC without having to enter a guilty plea was only an option for people who (i) faced charges of simple possession of cocaine or an opioid, (ii) had no criminal record, and (iii) would not likely face a custodial sentence even if convicted of the offence in a regular court. As a result, the Toronto DTC had very few clients under the pre-plea track. With the abolition of the pre-plea option, a person with no criminal record and a simple possession charge can enter the DTC program only if he or she pleads guilty. In such cases, upon successful completion of the DTC program, the Crown and defence can request that the court strike the person's plea, after which the Crown can request that the charges be withdrawn.[102] It would appear that the opportunity for the pre-plea option continues to exist, and could become more viable by relaxing the eligibility criteria.

Evidently judges within the traditional criminal justice system already have at their disposal some judicial disposition tools that can be used to address drug-related charges. Conditional sentencing could be used in cases where the Crown deems it necessary to pursue a conviction because of the severity of the offence, yet agrees with the defence that community safety would not be endangered, and that the interest of the person convicted of the offence would be best served by a rehabilitative sentence of drug treatment served in the community. Provided that the traditional judicial system is as adequately resourced as the DTC system to provide treatment services — including staff to oversee people's treatment progress and that some of the onerous administrative requirements are eased — conditional sentencing could serve to meet the needs of people who are either convicted of or who plead guilty to drug-related offences and who could potentially benefit from treatment services. On the other end of the spectrum, pre-trial diversion provides the opportunity to avoid the consequence of a criminal conviction while offering access to drug treatment. Extending pre-trial diversion to a broader range of offences, provided the people being diverted do not pose a public safety concern, could increase people's access to drug treatment without the lifelong consequence of having a criminal record. Perhaps DTCs could be used to expand the pre-adjudication diversion option for people facing drug-related charges.

Drug treatment courts: combining punishment and treatment

Penalties and rewards: therapeutic jurisprudence in action

As noted above, a fundamental characteristic of DTCs is the greater integration of treatment within the criminal justice system and courtroom, often referred to as therapeutic jurisprudence.[103] In DTCs, the courtroom functions as a conduit for treatment where a treatment team and a court team work closely together. Given that one of the assumptions upon which DTCs are premised is that drug-dependent people are driven to commit crimes because of their drug dependence, treatment and enforcement are necessarily closely aligned in the DTC. As such, treatment in the court context has a broader reach than simply 12-step meetings and group counselling. Treatment is partially outlined in a long list of bail conditions that participants in DTC must comply with, including living at a DTC-approved residence, submitting to random urinalysis on demand (usually at least once per week and sometimes more frequently), participating in individual and group counselling, and attending court once or twice per week, depending on the court. Thus, treatment parameters are unique in the DTC and the boundaries between therapeutic and enforcement interventions are easily and continually blurred.

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[102] Allard e-mail communication with Shellie Addley, Supervisor of Duty Counsel (Criminal) at the Ontario Court of Justice at Old City Hall courthouse, March 3, 2011.

[103] P. Hora, et al., "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," *Notre Dame Law Review* 74(2) (1999): pp. 439–537; L. Nored and P. Carlan, "Success of Drug Court Programs: Examination of the Perceptions of Drug Court Personnel," *Criminal Justice Review* 33(3) (2008): pp. 329–342; B. Wexler and B. Winick, "Therapeutic Jurisprudence as a New Approach to Mental Health: Law, Policy, Analysis, and Research," *University of Miami Law Review* 45 (1991): pp. 979–1004.

The DTC system works on a basis of penalties for non-compliance and rewards for progress, which are supposed to function as incentives and motivations.[104] Penalties can include verbal reprimands, community service orders, writing a letter to the court, bail revocation (i.e., incarceration) or expulsion from the DTC (which results in the person being subject to traditional sentencing, having already pled guilty as a condition of entry into the DTC). Rewards could include verbal praise, gift cards, tokens and privileges such as reduced court appearances. Rewards are given when clients do not use drugs or alcohol, when their counsellors confirm that they are participating in treatment, and when they do not violate any of their bail conditions and are not charged with new criminal offences.[105]

Judges and treatment providers impose penalties as a way to "motivate" people to work towards their treatment goals.[106] While the DTC team may advise as to whether a penalty is necessary and what type of penalty is required, "[t]he final decision power over these questions is unilaterally held by the judge, and in most cases conceived of and exercised in favour of such principles of justice as deterrence or punishment. Therefore, in the competition between the approaches of punishment and rehabilitation, the 'rehabilitative ideal is ordinarily outmatched in the struggle.'"[107]

Example of a drug treatment court appearance

Every participant appears before the judge at each court session. The judge always asks whether the participant has used drugs or alcohol and whether they have had any high risk situations. Here is an example of a typical exchange where someone does not report drug use or specific high-risk situations:

> **Judge:** Do you have any drug or alcohol use to report?
>
> **Sam:** No.
>
> **Judge:** Any high-risk situations?
>
> **Sam:** They're all over the place.
>
> **Judge:** Nothing out of the ordinary?
>
> **Sam:** No.

The Judge asks for the treatment report.

> **Treatment Liaison:** Sam's had a lot of contact with treatment. [We're] very pleased to hear he's alcohol- and drug-free. There was a missed urine test but he was in detox at the time so we don't consider it missed… He's meeting with his case manager after court about some housing issues.

Applause by participants and DTC team members sitting in the courtroom.

In DTC programs, great emphasis is placed on a participant's honesty. As such, during their weekly court appearances, participants are encouraged to discuss candidly in open court any recent drug use, "high-risk"

[104] G. Bourgon and S. Price, *Evaluation of the Drug Treatment Court of Ottawa: Year One: February 2006 to February 2007*, 2007; Department of Justice Canada, 2009.
[105] Ibid; Rideauwood Addiction and Family Services, *Outcome evaluation of the Ottawa drug treatment court pilot project*, January 2009.
[106] S. Burns and M. Peyrot, "Tough love: Nurturing and coercing responsibility and recovery in California drug courts," *Social Problems* 50(3) (2003): pp. 416–438; Department of Justice Canada, *supra* 54.
[107] Fischer, *supra* 52, p. 241.

situations,[108] and daily activities in which they have engaged. Any dishonesty with the treatment or court team results in admonition and a penalty.

In the spirit of encouraging this honesty, a critical therapeutic factor recognized by DTCs is to refrain from automatically punishing people for admitting drug use. Generally, efforts are made to help a person who frequently relapses. Nonetheless, given that the goal of DTCs is complete abstinence — a necessary requirement to graduate — participants who continue to use drugs or frequently relapse are likely to face penalties eventually. As the Director of the Edmonton DTC indicates, the court recognizes that "relapse can be an important part of recovery. If a participant relapses continuously, we look at providing additional treatment to begin with. Eventually, we have to make a determination as to whether the person is serious about getting clean and putting effort into recovery or does not want to change his/her lifestyle."[109] Nonetheless, penalties will be readily imposed if a participant is not complying with treatment suggestions, misses counselling or medical appointments, misses a urine test or breaks curfew.

Key actors in drug treatment courts

In addition to significantly altering the therapeutic nature of drug treatment, DTCs also alter the adversarial nature of the traditional judicial system, chipping away at many of its procedural safeguards. The Canadian judicial system is based on an adversarial model in which judicial actors represent the interests of various stakeholders. The Crown represents the state's interest, defence counsel (either duty counsel or a lawyer from the private bar) advances and protects the interests of the defendant, and the judge is intended to be a neutral arbiter between the two parties.

Within the DTC system, the adversarial process is generally suspended, and "[o]ne of the key procedural aspects where this becomes relevant is the role of the defence counsel."[110] In the DTC system, defence counsel's legal representation of the defendant's "best interest" may be altered. Defence counsel's traditional role is to advance his or her client's interest by minimizing the impact of punitive measures, ideally acquittal of criminal charges. Under the DTC process, in which defendants are subjected to rigorous drug treatment and legal requirements that can often result in penalties, duty counsel tends to represent defendants throughout the DTC process, while a private lawyer, if any is hired by the defendant, generally only represents defendants at bail hearings and at sentencing. Duty counsel's role is no different from the role of a private criminal lawyer — both are placed in the judicial system to safeguard the defendant's legal rights and interests within the norms of due process (appearing to be quite necessary in the informal and discretionary procedural structure of DTCs). However, within the DTC framework, duty counsel is considered a member of the "DTC team,"[111] and as a member of the DTC team, his or her perspective of the best interest of the participant may be altered.[112] In this new role, unlike a defence lawyer's traditional role of limiting liability and punishment, many duty counsel lawyers may prioritize the drug- and crime-free objective of DTC, thereby accepting certain penalties and bail conditions as necessary in the treatment process and potentially failing to protect DTC participants from punitive penalties.[113] In this way, participants are stripped of their rights to have a legal defence advancing their interest to be free of punishment, which violates their rights to due process.

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[108] High risk situations could include spending time with individuals who use drugs or engage in criminal activities, or frequenting places where drug use or criminal activity occurs.

[109] Allard e-mail communication with Doug Brady, Director of the Edmonton Drug Treatment and Community Restoration Court, March 4, 2011.

[110] Fischer, *supra* 52, p. 239.

[111] Ibid.

[112] R. Boldt, "Rehabilitative Punishment and the Drug Treatment Court Movement," *Washington University Law Quarterly* 76 (Winter) (1998): pp. 1205–1306; Kirkby, *supra* 68.

[113] D. Moore, "Translating Justice and Therapy: The Drug Treatment Court Networks," *British Journal of Criminology* 47 (2007): pp. 42–60.

As the Director of the Edmonton Drug Treatment and Community Restoration Court observes about the role of DTC team members, "One of the key components of all DTCs is collaboration with all people involved in the participant's process. That includes treatment, crown, and defence. We have had defence lawyers (much to our surprise sometimes) requesting a short period of custody for their client as a sanction and wake up call."[114]

The therapeutic model of DTCs requires an interdisciplinary approach, combining both legal and treatment professionals. Each DTC has a team of actors that make up the court and treatment teams and these actors generally remain the same at each court appearance. The court teams in each DTC include judge(s), provincial and federal Crown prosecutors[115] and duty counsel. The treatment teams consist of treatment counsellors (also called case managers) and, in three of the courts (Toronto, Vancouver and Regina), psychologists and nurses who specialize in addiction.[116] In the Vancouver and Regina DTCs, probation officers are considered members of the treatment teams, while in the other DTCs they are members of the court teams.[117] The legal and treatment teams work closely together but "the scope of practice and in areas of overlap, such as defining progress for participants, determining penalties/rewards, and deciding whether to retain participants"[118] can lead to tensions.

The team members in the DTC have roles and duties that are unique to the DTC, falling outside of their traditional roles. Judges are usually the arbiters within the traditional adversarial system and do not necessarily interact directly with defendants.[119] While judges' central courtroom role is maintained in a DTC, they are expected to work closely with the treatment and legal teams, a therapeutic practice that blurs the roles of treatment provider and judge. Judges "actively preside over and direct the goal-oriented enterprise of the DTC working towards the reformation of the offender."[120] They give therapeutic orders and attempt to engage participants in therapy, despite not having therapeutic qualifications or training. Participants in the DTC are referred to as "clients" and judges provide therapeutic orders, such as instructing participants to attend 12-step meetings. It has been noted that the relationship between judges and participants in the DTC is "similar to a therapeutic alliance"[121] and is more successful if there is a good rapport. This is consistent with the treatment literature that finds trust and positive interactions between clients and treatment providers are fundamental to success in treatment.[122] DTC judges regularly refer to participants on a first-name basis.

At the same time, treatment counsellors in the DTC are given powers of enforcement and judgment. Treatment counsellors recommend that participants be sanctioned if they do not follow the treatment suggestions they are given.[123] Some DTC actors who have identified the blurring of roles and responsibilities point out that "the relationship between court and treatment teams [is] 'not well-defined,' 'lacking effective collaboration,' and 'not consultative.'"[124] Treatment teams have indicated that they believe that "their professional judgment is not properly considered,"[125] while court teams remain entrenched in the reality that the treatment program is part of a judicial process under the criminal law of the country.

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[114] Allard e-mail communication with Doug Brady, Director of the Edmonton Drug Treatment and Community Restoration Court, March 4, 2011.

[115] The exceptions are the Vancouver and Winnipeg DTCs, which do not have a provincial Crown prosecutor, and the Regina DTC, which does not have a federal Crown prosecutor.

[116] Department of Justice Canada, *supra* 54.

[117] Ibid.

[118] Ibid, p. 35.

[119] Nolan, *supra* 73.

[120] Fischer, *supra* 52*,* p. 239.

[121] Bourgon and Price, *supra* 104, p. 35.

[122] S. Ackerman and J. Hilsenrot, "A review of therapist characteristics and techniques positively impacting the therapeutic alliance," *Clinical Psychology Review* 23 (2003): pp. 1–33; Sellman, *supra* 75.

[123] Tara Lyons, Ph.D. candidate, Carleton University, observation from fieldwork conducted in the Ottawa drug treatment court from February 2006 to January 2008.

[124] Department of Justice Canada, *supra* 54, p.35.

[125] Ibid.

Participants are required to sign release of confidentiality forms upon entry into the DTC. As a result, each participant's individual and group treatments are discussed in both pre-court meetings with the entire DTC team and in open court, to which the public has complete access, raising concerns about the right to confidentiality between participants and therapists.[126] For instance, the "Ottawa Drug Treatment Court Consent and Waiver" form instructs those signing that they are agreeing that "any statements made during the counselling sessions may be reported to the Court, which monitors my progress in the Program."[127] The Drug Treatment Court Funding Program's summative evaluation of the six federally funded DTCs found that "[s]ome treatment team members perceive the court team as wanting more information than they would share at case management meetings."[128] Efforts have been made to make DTCs less formal than the traditional judicial process and to create a more supportive environment. These efforts have led to a blurring of professional lines and consequently, without a strong treatment management team, a participant's privacy is potentially compromised.

To require the disclosure of personal information in return for their continued freedom from incarceration not only constitutes an affront to DTC participants' dignity, it also undermines their right to privacy.

Confidentiality between therapists and their patients is the foundation upon which a trusting therapeutic relationship rests. As a consequence of facilitating the rapport between judges and participants, the confidential nature that typically underlies the therapeutic relationship between treatment counsellors and clients can be compromised by the DTC process, inhibiting participants from disclosing information to their treatment providers and/or having personal information potentially shared with the large DTC team, in open court and/or with other clients and staff. To require that participants disclose their most personal information to the state and the public is also highly disruptive to the therapeutic relationship that is characterized by trust and non-judgmental values. To require the disclosure of personal information in return for their continued freedom from incarceration not only constitutes an affront to DTC participants' dignity, it also undermines their right to privacy.

Pre-court meetings

The pre-court meeting process is another example of how the therapeutic component of the DTC system can potentially undermine some of the safeguards of the traditional judicial system. Pre-court meetings are closed meetings that are held before every court session. Judges, treatment liaisons, duty counsel, and Crown prosecutors attend each meeting, as well as, on occasion, treatment counsellors and defence lawyers. The pre-court meetings have two functions: (1) to review treatment files and reports on participants' progress in treatment and the DTC program in general; and (2) to discuss potential new participants. Treatment counsellors provide written progress reports on each participant to be reviewed at the pre-court meetings. According to the second evaluation of Ottawa's DTC, "[t]hese reports track participants' overall progress in treatment and overall compliance in the time intervening between the last court session and the current, and form the basis of discussion and decision making regarding how each participant will be dealt with in court."[129]

[126] Very personal matters deemed necessary to share with the DTC team so the members of the team have a better understanding of the challenges a participant may be facing will be discussed in a pre-court meeting but not in open court. It is important to note again that a participant will not be present during such discussions.

[127] *The Ottawa Drug Treatment Court Consent and Waiver form*, p. 6.

[128] Department of Justice Canada, *supra* 54, p. 36.

[129] Rideauwood Addiction and Family Services, *supra* 105.

In other words, treatment progress reports are used to evaluate a person's progress in the treatment program and determine whether they warrant penalties for failing to progress appropriately, or rewards for progressing in acceptable ways (e.g., abstaining from drug use).

In the DTC system, participants waive the right to be present for all court-related proceedings to which they are entitled in the traditional system — where they can hear the allegations of wrongdoing made against them and advise their legal counsel as to why the allegations should be challenged, so counsel can zealously protect the interest of the participant. For instance, the Toronto DTC waiver form indicates, "I understand that while I am participating in the Program, members of the Drug Court Treatment team … will discuss my case in my absence prior to each attendance in Drug Treatment Court. I am satisfied that duty counsel or my lawyer will represent my interests. I agree to this in order to obtain maximum help from the Drug Treatment Court."[130] The pre-court meeting is a clear example where the therapeutic nature of DTCs is advanced as a reason for forgoing due process rights. While defence counsel continues to have a responsibility to inform the participant of information shared during the pre-court meetings, a participant must, nonetheless, rely on his or her legal counsel to fervently protect his or her interest with, in some cases, insufficient background information during those meetings. As mentioned earlier, in some cases, defence counsel's role may be significantly altered from his or her traditional judicial role as to compromise his or her client's interest during pre-court meetings — recommending penalties for his or her client, and as such shifting defence counsel's role to the point of being indistinguishable from the Crown's role.

Admission into drug treatment court

Eligibility

Would-be participants in DTC submit their applications, usually while in custody. Applications are vetted by Crown prosecutors, who have wide discretion in deciding whether applicants are appropriate DTC candidates based on their current or past charges.

In order to be eligible to enter DTCs in Canada, participants have to be charged, generally with a non-violent criminal offence, and demonstrate they have an addiction that leads to criminal activity. However, DTCs in Toronto and Vancouver have begun relaxing the eligibility criteria regarding violent offences, recognizing that a history of violence may not necessary classify participants as a public safety threat and that it is unhelpful to unnecessarily exclude people from the DTC's target population.[131] Yet, in most cases, violent offences and major trafficking charges disqualify people from entering DTCs, which means most people in DTCs have been charged with drug possession or minor thefts. For example, while charges involving violence will not automatically result in ineligibility, the most common types of charges at entry in the Toronto DTC are trafficking (58 percent); administration of justice offences, e.g., breach of probation, failure to appear (50 percent); property offences (38 percent); and drug possession (27 percent). In the Winnipeg DTC, 57 percent of the charges are for trafficking, while in the Edmonton DTC "74% had at least one *Controlled Drugs and Substances Act* offence."[132] In addition, the charge must not involve children under the age of 18 or have occurred near places frequented by children or in their presence.[133] The applicant's probation record is also checked for evidence of past compliance or non-compliance with court orders.

The practice of excluding people charged with an offence that occurs in the presence of children or in the vicinity of places frequented by children[134] is likely to disproportionately affect women because they are the primary caregivers to children under the age of 18. It is also likely to disproportionately affect low-income women, women of colour and Aboriginal women who are less likely to be sufficiently financially stable to pay for safe childcare, thereby having children generally in their vicinity at all times. Accordingly, the equality

[130] Toronto Drug Treatment Court, "Program Waiver," available via http://www.tdtc.ca/courtprocess/forms.

[131] P. Gendreau and D. Andrews, *Report for the Ottawa drug treatment court: Correctional program assessment inventory — 2000 (CPAI — 2000)*, March 2007; Department of Justice Canada, *supra* 54.

[132] Department of Justice Canada, *supra* 54, p. 29.

[133] Ibid., pp. 75–76.

[134] Ibid.

rights of women participants may be at issue, since such a requirement would have a systemic discriminatory impact on participants based on sex. While the state has a valid interest in protecting children from harm, the blanket rule may fail to recognize the particular circumstances where children would not necessarily be exposed to harm, with women disproportionately bearing the consequence of being denied access to DTCs.

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) obliges Canada to take positive steps to realize progressively "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[135] The ICESCR sets out a number of elements that states should address in an effort to ensure the full realization of the right to health, including (1) "the prevention, treatment and control of epidemic, occupational and other diseases;" and (2) the "creation of conditions which would assure to all medical service and medical attention in the event of sickness."[136] As such, the practice of excluding people charged with an offence if it has occurred in the presence of children or in the vicinity of places frequented by children interferes with Canada's obligation to take steps to ensure the full realization of the health of people who use drugs. This practice particularly affects parents, especially mothers.

In addition, the arbitrary distinctions embedded in DTC eligibility criteria could potentially constitute an infringement of a participant's equality rights under section 15 of the *Canadian Charter of Rights and Freedom* (*Charter*),[137] and the ICESCR. Article 2 of the ICESCR requires that the right to health be enjoyed without discrimination, and Article 3 further expressly requires Canada "to undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights," including the right to health protected under Article 12. Section 15 of the *Charter* is intended "to remedy the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotypes."[138] As interpreted by the courts, including the Supreme Court of Canada, when a treatment or service is offered by the government, s. 15 of the *Charter* requires that it be done in a way that is non-discriminatory, which may involve an obligation on the part of the government to take positive steps to ensure that disadvantaged groups benefit equally from or refrain from interfering with disadvantaged groups' access to the services offered to the general public.[139] The exclusionary DTC practice is likely to impose unfair limitations on women's ability to access treatment services, consequently infringing equality rights.

Guilty Plea

Once approved by a judge for admission into the DTC, applicants appear before the court and are required to plead guilty to the offences with which they are currently charged. In addition, applicants must also agree to a series of bail conditions and to submit to an intensive treatment program, before the judge formally admits them into the DTC. After entering a guilty plea, certain DTCs allow a participant 30 days to reconsider their application. During this time, a participant can decide to withdraw from the program without prejudice; the earlier guilty plea will be struck from the record, restoring the presumed plea of not guilty. Similarly, during this 30-day period, the DTC team can also decide the person is not a suitable fit for the program and may remove the participant from the DTC, again striking the guilty plea.[140] (While duty counsel or other defence counsel can make a case before the DTC judge for not removing a participant after the 30-day trial period, there is no formal appeal process to challenge the judge's decision.) Even though, in both these scenarios, the participant's guilty plea is struck from the record, during this time he or she will have been exposed to particular penalties that may not have been possible had a plea of not guilty been maintained. If, at any time

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135 *International Covenant on Economic, Social and Cultural Rights*, 999 U.N.T.S. 3 (1966), Articles 2 and 12.

136 Ibid., Article 12.

137 The right to equality between women and men under section 28 of the *Charter* could also be infringed.

138 *Law v. Canada*, [1999] 1 S.C.R. 497 (Supreme Court of Canada) at para. 42. In *R. v. Kapp*, the Supreme Court of Canada stated, "There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity." *R. v. Kapp*, [2008] 2 S.C.R. 483 (Supreme Court of Canada) at para. 21.

139 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

140 Toronto Drug Treatment Court, "Eligibility Criteria and Application Procedure," available via http://www.tdtc.ca/courtprocess/eligibilitycriteria.

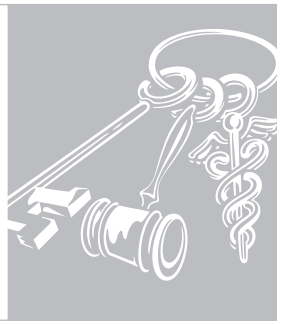
after the 30-day trial period, a participant quits or is expelled from the DTC program, the guilty plea remains on record and the person is sentenced in the traditional criminal justice system as guilty — all of which occurs without any requirement of proper and complete disclosure by the Crown of the evidence against the participant.

The requirement to plead guilty in order to gain access to drug treatment potentially undermines participants' human rights. In addition, the requirement to plead guilty to a crime to gain access to health services and medical treatment may potentially violate people's right to security of the person under section 7 of the *Charter* and Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), as well as the right to health under Article 12 of the ICESCR.

The right to security of the person is infringed where state action is likely to seriously impair a person's health.[141] Courts have found that forcing a person to choose between imprisonment and health violated *Charter* section 7 rights. The B.C. Supreme Court in *PHS Community Services Society v. Attorney General of Canada* endorsed and summarized the principle emerging from the Ontario Court of Appeal's decision in *R. v. Parker* as follows:

> Deprivation by means of a criminal sanction of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of security of the person, as does preventing access to a treatment by threat of criminal sanction.[142]

"Addiction is an illness. One aspect of the illness is the continuing need or craving to consume the substance to which the addiction relates."[143]



Research has demonstrated that drug treatment can aid in overcoming drug dependence,[144] which can, in turn, reduce or eliminate the chance of engaging in risky drug use likely to expose people to a variety of serious health consequences — in some cases potentially life-threatening ones — including soft tissue injuries, blood-borne viruses and overdose. Depriving people of access to treatment in a timely manner because they do not admit to criminal guilt exposes the drug-dependent accused to serious health consequences.[145] By erecting this unnecessary barrier to access to treatment via DTC programs, the state essentially contributes to drug-dependent people continuing to face an increased likelihood of continued, potentially unsafe, drug use, which could lead to serious health consequences. As such, the right to security of the person may be relevant when considering the DTC's restrictive requirements for gaining access to drug treatment. These human rights

[141] The Supreme Court of Canada has established that physical and psychological integrity is also protected by the right to security of the person: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

[142] *PHS Community Services Society v. Attorney General of Canada*, 302 DLR (4th) 740 (BCSC), at para. 134, citing with approval, *R. v. Parker* (2000), 49 O.R. (3d) 481 (Ontario Court of Appeal), at para. 97.

[143] *PHS Community Services Society v. Attorney General of Canada*, 2008, BCSC 661 (British Columbia Supreme Court), at para. 87. Decision of the Court of Appeal for British Columbia, January 15, 2010. At time of writing, on appeal before the Supreme Court of Canada, S.C.C. Case No. 33556.

[144] M. Haden, *Program Evaluation Report: The Central Clinic*, Alcohol and Drug Services, Ministry for Children and Families, Province of British Columbia, 1997; R. Hubbard, et al., "Overview of 5-year followup outcomes in the drug abuse treatment outcome studies (DATOS)," *Journal of Substance Abuse Treatment* 25(3) (2003).

[145] Long waiting periods for drug treatment that drug-dependent people are likely to encounter by not forgoing their innocence could arguably even infringe the right to life by increasing the risk of death. See *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, in which the Supreme Court of Canada found that extremely long waiting periods for treatment in public health facilities in Quebec increased the risk of death, thereby infringing on the right to life.

concerns highlight the importance of restoring the *pre-plea* access to DTCs with less stringent conditions for eligibility, enabling a greater number of potential candidates to gain access to potentially beneficial treatment without having to forgo their legal rights.

Furthermore, the most expeditious way to obtain drug treatment currently available within the judicial system — especially when the accused has limited resources — is through the DTC system. Accused people who opt to assert their innocence may either face long waiting periods in the traditional judicial system before accessing treatment or may be sentenced to prison where their immediate access to treatment is even more limited — in some cases non-existent. Drug treatment in a prison context is fraught with access barriers. For instance, the limited funding provided for inmate services can result in inadequate funding for substance use treatment.[146] Another common barrier experienced by women is that their unique treatment needs have yet to be translated into targeted treatment approaches.[147]

Once a DTC agent determines that the accused is drug-dependent and may benefit from a medically recognized treatment, the state has an ethical and legal obligation to not interfere with the person's access to treatment. DTCs clearly interfere with the "creation of conditions which would assure to all medical service and medical attention in the event of sickness," an obligation under international law.[148] The current DTC eligibility criteria of granting access to drug treatment conditional upon a guilty plea — potentially exposing drug-dependent individuals to serious health consequences by forcing them into the traditional judicial system, where there are insufficient resources for treatment either in the community or in prison — may also result in Canada not meeting its international human rights obligation of ensuring to all the enjoyment of the highest attainable standard of health.

Drug Treatment Court Program "Waiver"

…

If I choose to participate in and complete the Program, I understand that I am giving up my right to plead "not guilty" to the charge against me.

In making this decision I have:

[CHOOSE ONLY ONE OF THE FOLLOWING BY CROSSING OUT OTHER OPTION]

had an opportunity to consult with a lawyer about the Crown's evidence against me, and

OR

only been able to consult with a lawyer based on a summary of the Crown's evidence against me, but nevertheless

I am prepared to give up my rights to plead "not guilty" and to have a trial.

I am willing to give up these rights in order to try and benefit from Drug Treatment Program.

[146] H. Kitchin, "Needing Treatment: A Snapshot of Provincially Incarcerated Adult Offenders in Nova Scotia with a View towards Substance Abuse and Population," *Canadian Journal of Criminology and Criminal Justice* 47(3) (2005): pp. 501–525.
[147] A. Van Den Broek. "The forgotten offender: Women in prison have unique substance use treatment needs," *CrossCurrents,* Spring 2006.
[148] ICESCR, Article 12.

Crown disclosure to defence

For the sake of expedience, the people charged with "serious" drug or drug-related charges may be compelled to plead guilty and forgo disclosure by the Crown to gain access to drug treatment. While in jail a person can decide to apply for bail through the traditional judicial system and wait for disclosure from the Crown before deciding to apply for DTC. If bail is denied, the person will need to wait in jail until the case goes to trial without access to drug treatment. Consequently, forgoing adequate disclosure, pleading guilty and submitting an application to participate in the DTC may be the most practical solution to leave jail and obtain access to treatment more quickly. Unfortunately, pleading guilty to leave jail and obtain medically necessary drug treatment may result in defence counsel receiving inadequate disclosure from the Crown to provide a client with thoroughly considered advice as to whether to proceed to trial or take a plea. Generally, proper and complete disclosure can take several weeks. In most cases, the accused is likely to receive a synopsis of the case that provides limited information. In the Toronto DTC, the waiver form that the accused must sign allows the person to agree to plead guilty based on a synopsis of the Crown's evidence.[149]

To ensure that a person has universally available access to treatment, such health-care treatment should never be pitted against that person's innocence, requiring her to choose between admitting criminal liability on the one hand and her right to necessary health services to manage a debilitating, chronic and relapsing illness on the other.

Without proper disclosure, defence counsel is unable to advise the client on whether to take a plea or proceed to trial. Once the accused enters a guilty plea, the Crown's disclosure obligations cease.[150] As such, the accused's right to make a full answer and defence under section 7 of the *Charter* and Article 14 of the ICCPR is likely to be infringed.[151] In addition to forgoing the right to make a full answer and defence, a guilty plea under these circumstances also results in the waiver of several other procedural rights, including the right to be free from unreasonable searches and seizures (e.g., the requirement to submit to regular urine tests).

As mentioned earlier, most DTC proponents argue that a person voluntarily enters DTC, and so she voluntarily consents to forgo both her due process rights and the protections available under traditional therapeutic modalities. However, given the difficulty of obtaining drug treatment and social services without going through the DTC system, it is questionable whether a person is voluntarily entering DTC. To ensure that a person has universally available access to treatment, such health-care treatment should never be pitted against that person's innocence, requiring her to choose between admitting criminal liability on the one hand and her right to necessary health services to manage a debilitating, chronic and relapsing illness on the other. Consequently, a person forgoes fundamental due process rights, has a prison term hanging over her head and contends with a criminal record for the rest of her life.

DTC limitations interfering with participants' overall well-being

DTCs impose numerous limitations on participants' daily living. In some cases, these may be completely incompatible with their treatment needs and undermine the likelihood of successful treatment.

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149 Toronto Drug Treatment Court, "Program Waiver," available via http://www.tdtc.ca/courtprocess/forms.

150 Toronto Drug Treatment Court, "Eligibility Criteria and Application Procedure," available via http://www.tdtc.ca/courtprocess/forms.

151 *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966); K. Roach, *Criminal Law: Third Edition* (Toronto: Irwin Law, 2004), p. 39.

Penalties have, at times, interfered with participants' drug treatment programming. For instance, some observers have raised the concern that participants may be given so many community orders to fulfill in a short period of time that they may be unable to comply with both their treatment program and the community orders.[152] However, the Vancouver DTC has sought to address some of the bail conditions that have interfered with participants' treatment efforts. The Vancouver DTC recently eased its bail conditions because participants were having their bail revoked for breaching bail conditions (e.g., missing curfews) and consequently they were unable to engage in treatment because of their incarceration. The Vancouver DTC reports that reducing bail conditions to "reporting to the treatment centre and abiding by its conditions" has helped treatment outcomes.[153] Similarly, unlike the other DTCs, the Vancouver DTC only uses penalties "to reengage the participant in treatment." As a result, if participants are understood to be participating in treatment they are not sanctioned for violations, including missed urinalysis or appointments, which other DTCs automatically sanction.[154]

Some of the courts prohibit participants from working or attending school during their first few months of DTC to ensure the priority and focus is recovery and treatment.

On the other hand, some DTC requirements may undermine participants' social and economic well-being. Some of the courts prohibit participants from working or attending school during their first few months of DTC to ensure the priority and focus is recovery and treatment. People who have such commitments are required to quit to prevent any conflicts with the time and energy demands of the DTC. However, a significant number of DTC participants are employed at the time of admittance to a DTC program. For example, 45 percent of participants in Regina and 31 percent of participants in Toronto have employment at entry.[155]

Ironically, employment or attendance in school, as a marker of stability, is one of the requirements for graduation in the Toronto, Vancouver, Winnipeg and Ottawa DTCs.[156] Therefore, some DTC participants may be compelled to quit their jobs or end their schooling in order to access DTC programs, while some DTC applicants may decide to forgo applying to DTC because they cannot afford quitting their jobs. Yet, DTC participants will eventually be required to find employment or enrol in school in order to successfully graduate. The summative evaluation by the Department of Justice Canada found "some DTC team members acknowledged that the requirements of the treatment program can make it difficult for participants to achieve other outcomes during the program, such as education and training or employment."[157] Prohibiting people from either working or attending school full-time as a condition of accessing drug treatment, and then imposing a requirement to either be employed or attending school in order to successfully graduate from DTC seems counterintuitive and counterproductive.

[152] Allard interview with Tucker Gordon, Systemic Advocate in Addictions, Empowerment Council, February 24, 2011.
[153] Department of Justice Canada, *supra* 54, p. 32.
[154] Ibid.
[155] Ibid., Table 7.
[156] Ibid.
[157] Ibid, p. 33.

Assessing the Effectiveness of Drug Treatment Courts

The documented link between drug use and crime is often cited in the literature as the justification for drug treatment courts. Proponents argue for DTCs and their expansion based on the following key premises:

- DTCs are effective at reducing rates of drug use and drug-related crime; and
- DTCs are effective at reducing criminal justice costs (e.g., by reducing incarceration).[158]

The following section addresses the claims that DTCs are successful at reducing drug use and drug-related crime and that DTCs are cost-effective. Graduation rates reported in the DTC evaluations are reviewed, including with attention to the data related to women and Aboriginal people who have participated in DTCs. The quality of DTC research varies and the majority of the studies have methodological limitations which further call into question claims about the benefits of DTCs and hence reinforce the need to consider whether they are the most appropriate investment of resources. The "opportunity cost" of dedicating resources to quasi-compulsory drug treatment via a criminal justice system, rather than simply scaling up access to good quality voluntary treatment, must also be kept in mind.

Methodological issues with drug treatment court evaluations

The quality of science in DTC research varies. The majority of the studies have serious methodological flaws and as a result do not offer reliable data. In the case of Canadian DTCs, the evaluations are conducted by invested parties, raising a concern about possible bias being inadvertently introduced into the evaluations. For example, the Toronto and Ottawa DTC evaluations are conducted by treatment providers who run the treatment team and programs and have vested interests in DTCs reporting positive outcomes. The methodology of the majority of evaluations was also problematic because

- appropriate comparison groups were often not used;
- the studies do not account for people who drop out of DTCs; and
- data assessing the long-term impact of DTCs is extremely limited and inconclusive.[159]

Comparison/control groups

DTC evaluations often use a quasi-experimental research design which does not randomly assign participants to control groups.[160] In the Toronto DTC evaluation, the comparison group was composed of people who had applied to the DTC and were deemed eligible but did not end up enrolled in the DTC.[161] The control group has been documented as inappropriate because it was mismatched with the treatment group:

> Some of the preliminary Toronto findings reveal that the Experimental and Comparison groups are poorly matched along a number of demographic, drug use, and criminal history variables, and the

[158] N. Darbro, "Overview of issues related to coercion in substance abuse treatment: Part I," *Journal of Addictions Nursing* 20(1) (2009): pp. 16–23; Gendreau and Andrews, *supra* 131; D. Werb, et al., "Drug treatment courts in Canada: An evidence-based review," *HIV/AIDS Policy and Law Review* 12(2/3) (2007) pp. 12–17; J. Weekes, et al., *Drug Treatment Courts FAQs*, Canadian Centre on Substance Abuse, March 2007.

[159] Stevens, et al., *supra* 48; Fischer, *supra* 52; L. Gutierrez and G. Bourgon, *Drug Treatment Courts: A Quantitative Review of Study and Treatment Quality*, Public Safety Canada, December 2009; Orbis Partners Incorporated, *Drug Treatment Court of Vancouver Program Evaluation Second Outcome Report: December 2001 – December 2004*, April 2005; S. Belenko, *Research on Drug Courts: A Critical Review 2001 Update*, National Center on Addiction and Substance Abuse, Columbia University, June 2001.

[160] Weekes, et al., *supra* 158; Anderson, *supra* 47; Gutierrez and Bourgon, *supra* 159; S. Belenko, "The challenges of conducting research in drug treatment court settings," *Substance Use and Misuse 37*(12) (2002): pp. 1635–1664; Fischer, *supra* 52.

[161] Anderson, *supra* 47; C. La Prairie, et al., "Drug Treatment Courts: A Viable Option for Canada? Sentencing Issues and Preliminary Findings from the Toronto Court," *Substance Use and Misuse* 37(12/13) (2002): pp. 1529–1566.

> comparison group members are at greater risk for re-offending. The program attracts more males than females, and many more Black than Aboriginal clients, although Caucasians comprise the largest single group.[162]

The comparison group used in the Vancouver DTC evaluation was also mismatched, with more men, Caucasian people and older people than in the experimental group comprised of DTC participants.[163] The proper matching of treatment and control groups is a vital aspect of an appropriate research design of DTC evaluations because mismatching, as evidenced in the Toronto and Vancouver DTC evaluations, results in selection bias and inaccurate data.[164] Researchers have indicated that "[t]he process of random assignment is essential in creating a control group that can be fairly compared with a treatment group. Without the use of random assignment, there is a chance that the results are reflective of individual differences and not of the effectiveness of the program."[165] Furthermore, it is argued that the self-selection of participants to DTCs result in a selection bias in that participants in the DTC group may be more motivated to engage with DTC programming than those in the comparison groups.[166] This may have resulted in biased findings that overestimate the effectiveness of DTCs compared to control programs, as DTC participants may be more likely to engage with drug treatment compared with participants in the control program — who self-select out of DTC. Such a scenario would therefore falsely attribute participant-specific outcomes (i.e., improved retention in treatment) to enrolment in a DTC program. While the bias resulting from the lack of appropriate comparison groups can be addressed by a research design that uses random sampling techniques, the Canadian DTC evaluations have not employed these sampling designs.[167]

When comparisons are made, they are often made between DTC participants and other populations in the criminal system. For example, the Winnipeg DTC evaluation compares DTC participants to people who are on conditional sentence and those on provincial probation in Manitoba.[168] It has been argued that a more appropriate comparison would be to compare DTC program cohorts with cohorts in voluntary treatment programs to examine whether DTCs are as effective as voluntary treatment,[169] and whether the element of coercion embedded in the DTC system makes it more effective.

Such an approach was taken by the Toronto DTC evaluators, who included a treatment comparison group. The treatment comparison group consisted of individuals in the Centre of Addiction and Mental Health cocaine program who did not participate in the DTC program. The goal was to have 200 individuals take part in the comparison group; however, in the end, only 26 individuals (23 men and 3 women) constituted the group. The treatment comparison group was deemed inappropriate for comparison to the group of individuals participating in the DTC because of this low number and because of significant differences in age, housing, employment and history of criminal involvement.[170]

DTC proponents argue that the coercive nature of their treatment programs is effective, but there is insufficient evidence to support this claim. Some DTC evaluations have documented that, according to treatment participants, the regular court visits ensured they completed the program.[171] Unfortunately, these evaluations do not offer comparison to other forms of treatment programs and approaches. To determine which treatment protocol is most likely to reap benefits for the individual or the community at large, more qualitative and quantitative research is required. Research studies that examine retention rates, successful completion, motivation for entering and remaining in a treatment program, and reduction of drug use and/or recidivism, to name a few questions, would be needed to assess whether voluntary or less voluntary treatment programs are

[162] La Prairie, et al., p. 1589.
[163] Werb, et al., *supra* 158.
[164] Fischer, *supra* 52.
[165] Gorkoff, et al., *supra* 81, p. xv.
[166] Werb, et al., *supra* 158; Gutierrez and Bourgon, *supra* 159; Belenko, *supra* 160; Fischer, supra 52.
[167] Fischer, *supra* 52.
[168] Gorkoff and Weinrath, *supra* 66.
[169] Anderson, *supra* 47.
[170] L. Gliksman, et al., *Toronto Drug Treatment Court Evaluation Project Final Report*, November 30, 2004, p. 93.
[171] Department of Justice Canada, *supra* 54.

most effective in tackling drug dependence.

Thus far, there are few research studies that engage in comparative analysis. Of those that have, it is clear that voluntary treatment leads to similar outcomes as mandatory or quasi-compulsory treatment. For instance, a European study comparing outcomes of voluntary and quasi-compulsory treatment found that after controlling for various factors, quasi-compulsory treatment and voluntary treatment programs were equally effective in reducing substance use and crime.[172] In another study that examined participants' motivation for change in legally coerced and voluntary residential treatment programs, the study found that there was no difference between the participants in the two groups at program entry and throughout the early stages of the program. However, the study found that "coerced clients in this study did leave treatment at a much higher rate than voluntary clients after the first 5–6 weeks of treatment."[173]

More research is definitely needed before drawing clear conclusions. However, the limited research available indicates that voluntary treatment is as beneficial for individuals and community safety as legally coerced or quasi-compulsory treatment. This suggests the preference should be given to supporting such approaches that do not raise the ethical and human rights concerns that have been identified with DTCs.

High rates of attrition

Low rates of retention and high rates of attrition affect the validity of the DTC evaluations.[174] For example, in 2006 only 6 (19 percent) of the 31 participants made it to the six-month mark in the Ottawa DTC.[175] Of the 365 people admitted to the Toronto DTC until 2004, 308 people (84 percent) were expelled, with close to half (46.8 percent) of people expelled within the first two months.[176] With such low rates of retention, it is difficult not only to claim that DTCs are effective, but even to claim that the evaluations are valid and reliable. Further, while in some cases indicators of recidivism and drug use during program participation demonstrate effectiveness among individuals who subsequently graduate from DTC, the small number of DTC graduates (which remains consistently low across the DTC evaluations) strongly suggests that these programs are limited in their level of effectiveness across drug-dependent sub-populations.

Lack of long-term impact assessment

Claims abound that DTCs are effective and appropriate.[177] Yet these claims are undermined by the failure to examine long-term impacts of DTCs. While many DTC evaluations have been undertaken, there is a serious dearth of data regarding follow-up outcomes. Indeed, while many DTC evaluations assess outcomes for drug use, recidivism, and other drug-related outcomes during DTC participation, few DTC evaluations in Canada include post-program data on these indicators of effectiveness. It is noted in the Toronto DTC evaluation that "[w]hile in the short-term there may appear to be positive outcomes, the true test of drug court programs may be whether clients are able to sustain the changes made while in the program for an extended period of time."[178] Assessing the long-term effectiveness of DTC programs in this context is absolutely necessary.

The Toronto DTC evaluation did include post-program data on recidivism, which demonstrated a similar drop in levels of recidivism among both DTC clients and participants in the judicial comparison group.[179] However, indicators of post-program drug use were not assessed, which seriously hampers an assessment of the effectiveness of this program in addressing one of its primary aims.

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[172] M. Schaub, et al., "Comparing Outcomes of 'Voluntary' and 'Quasi-Compulsory' Treatment of Substance Dependence in Europe," *European Addiction Research* 16(1) (2010): pp. 53–60.

[173] J. Nolan and A.P. Thompson, "Psychological Change in Voluntary and Legally Coerced Clients of Residential Drug and Alcohol Treatment Programme," *Psychiatry, Psychology and Law* 16(3) (2009): pp. 458–472 at 469.

[174] Weekes, et al., *supra* 158; Belenko, supra 160; Gutierrez and Bourgon, *supra* 159.

[175] Rideauwood Addiction and Family Services, *supra* 105.

[176] Gliksman, et al., *supra* 170, p. 84.

[177] Anderson, *supra* 47; Werb, et al., *supra* 158

[178] Gliksman, et al., *supra* 170, p. 32.

[179] In this study, the participants in a judicial comparison group were individuals who were deemed eligible for the Toronto DTC but did not participate in the program after the initial assessment.

Methodological issues: conclusion

The summative evaluation by the Department of Justice Canada of the Canadian DTCs is based upon: the flawed evaluations of the courts, provided by the DTCs themselves; key informant interviews; a survey of stakeholders; and case studies of people participating in DTCs.[180] The report does not explain how key informants, stakeholders or case studies were sampled. Nor does it address the methodological flaws and selection biases within the DTC process and outcome evaluations. In assessing the quality of DTC evaluations some researchers have concluded:

> In summary, the present study found that study quality and treatment quality greatly influenced the results of the drug court evaluations. Issues surrounding quasi-experimental study designs, comparison groups, management of high attrition rates, as well as inadequate searches and controls for group differences are methodological problems that often biased evaluations in favour of treatment.[181]

Therefore, given that current evaluations of the Canadian drug treatment programs emerge from unreliable data, it is impossible to conclude at this stage that DTCs result in decreases in drug use and/or recidivism.[182]

Rates of graduation

In general, DTCs in Canada have low graduation rates. The latest summative evaluation found that DTC graduation rates at various points have ranged from 6 percent (Toronto) to 36 percent (Winnipeg). Ottawa and Regina DTCs have a graduation rate of 11 percent.[183]

- In the Vancouver DTC from 2001–2005, 322 people were admitted and only 34 people graduated (10.6 percent).[184] Of those who did not graduate, 13.7 percent withdrew of their own accord and were sentenced, while 43.8 percent were removed from the program at the request of the Crown and/or the treatment team and transferred to sentencing.[185]
- Between 1999 and 2003, 15.6 percent of people admitted to the Toronto DTC graduated.[186] Only 3 people (6 percent of participants) graduated from the Toronto DTC program between April 2007 and September 2008.[187]
- From October 2006 to September 2008, only 8 people (11 percent of participants) graduated from the Regina DTC.[188]
- In the Ottawa DTC, there were no graduates from February 2006 to February 2007.[189] In an evaluation dated January 2009, the Ottawa DTC cites 8 graduates since the program began in 2006.[190]

While the federal DTC Funding Program has mandated DTCs to target individuals from high-needs groups, including "Aboriginal men and women, and sex trade workers, as well as women in general,"[191] DTCs

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180 Department of Justice Canada, *supra* 54.
181 Gutierrez and Bourgon, *supra* 159, p. 12.
182 Stevens, et al., *supra* 48; Drug Policy Alliance, *supra* 53; Gutierrez and Bourgon, *supra* 159.
183 Department of Justice Canada, *supra* 54.
184 Orbis Partners Incorporated, *supra* 159.
185 Ibid.
186 Gliksman, et al., *supra* 170.
187 Department of Justice Canada, *supra* 54.
188 Ibid.
189 Gendreau and Andrews, *supra* 131.
190 Rideauwood Addiction and Family Services, *supra* 105.
191 Department of Justice Canada, *supra* 54, p. iii.

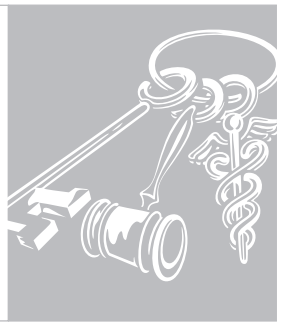
have tended to be more successful in attracting and retaining men and older adults.[192] DTCs appear to have difficulty not only attracting sex workers and women, including Aboriginal women, but also retaining Aboriginal men. Furthermore, the graduation rate of these groups is remarkably low.

Women participants

Women are less likely to apply to DTCs, and if they do apply and are accepted, they are much less likely to graduate at comparable levels to men in the DTCs.[193] The Department of Justice evaluation confirms that the Canadian DTC programs have "most success attracting men and older adults."[194]

- In the Toronto DTC, women are less likely than men to attend their first court appearance after their clinical assessment.[195]
- Women are less likely to be accepted into the Toronto DTC than men.[196]
- In Vancouver, women were less likely to complete the initial assessment and completed fewer hours of treatment.[197]
- Women were more likely to graduate in the Edmonton DTC than in the other DTCs, but were also more likely to withdraw within 28 days of entry.[198]

Women are less likely to apply to DTCs, and if they do apply and are accepted, they are much less likely to graduate at comparable levels to men in the DTCs.



These outcomes may be reflective of the shortcomings regarding gender-specific programming in the Canadian DTCs. Some DTCs have sought to provide more culturally appropriate and gender-specific services. For instance, the Toronto DTC has sought to address its difficulties in attracting and retaining women by forming a Women and Children's Sub-Committee of its Community Advisory Committee. One issue noted by the Toronto DTC service providers was that "[m]any of the women in the program know a lot of the men in the program from being on the streets. In a mixed group setting, this can present triggers for the women and make it difficult for them to succeed."[199] This concern has led to the Toronto DTC offering separate programming for women. Yet, many of the DTCs "struggle with being able to provide this type of support due to limited staff."[200]

The methods of the drug treatment programs offered via DTCs may be inappropriate for a significant number of women. For instance, for women whose drug use is linked to a history of physical, emotional and/or sexual abuse, drug treatment programs based on a male-centred model may be ill-suited. As a result, many women

[192] Ibid.
[193] Ibid.; Gliksman, et al., *supra* 170; Gutierrez and Bourgon, *supra* 159.
[194] Department of Justice Canada, *supra* 54, p. 25.
[195] Gliksman, et al., *supra* 170.
[196] Department of Justice Canada, *supra* 54.
[197] Orbis Partners Incorporated, *supra* 159.
[198] Department of Justice Canada, *supra* 54.
[199] Centre for Addiction and Mental Health "Drug Treatment Court Program adapting for women," press release, November 15, 2010, on-line at http://rffada.org/2010/12/new-drug-treatment-court-program-adapting-for-women/#more-212.
[200] Department of Justice Canada, *supra* 54, p. iii.

may challenge the treatment methods of the DTC program, being viewed as non-compliant or resistant to treatment,[201] and being expelled from or quitting the program.

In addition to specialized programming, greater flexibility of the DTC regimen may be required as many women are the sole caretakers of children and, increasingly, of elders. The requirement that women move to a court-determined residence or leave full-time employment or school represents an unfair and unreasonable burden particularly where women's dependents rely on their emotional and financial support.

The lack of gender-specific and culturally appropriate programs in DTCs raises concerns as to the effectiveness of the treatment services in adequately supporting people's physical and mental health.

Aboriginal participants

For the most part, Aboriginal participants are less likely to graduate from DTCs in Canada than other participants.

- Aboriginal participants are less likely to succeed in the Toronto and Regina DTCs, despite Aboriginal people constituting 67 percent of participants in the Regina court.
- In Winnipeg, Aboriginal people were less likely to graduate and "being Caucasian was strongly associated with graduation."[202]

Aboriginal women and men, people living in poverty, and street-involved people who use drugs are already overrepresented in Canadian jails and prisons. Aboriginal people represent almost 4 percent of the Canadian population and 20 percent of the federal prison population.[203] The situation is even more pronounced for women: Aboriginal women represent 33 percent of federal prisoners, a 90 percent increase in the last ten years.[204] Therefore, DTCs as they are currently set up may exacerbate the inequalities already inherent in the criminal justice system, given high rates of Aboriginal people and women not participating in or not completing DTC programs. While some DTCs have sought to provide more culturally appropriate services "by either directly offering or referring Aboriginal participants to Aboriginal-specific programming," there may be a need to further develop Aboriginal-specific treatment services in consultation with Aboriginal communities.

These low enrolment and graduation rates need to be assessed and addressed in DTCs overall. For instance, a study examining the Winnipeg DTC found that graduation standards are biased against participants who are marginalized. They state:

> The phase completion standards are better suited to those who are less marginalized and have more privileged backgrounds and family support. There is a concern that the court's standards for achievement and graduation may be biased toward better advantaged clients who are of the majority

[201] Lapidus, et al., *supra* 25.
[202] The Ottawa and Toronto DTCs do not collect data pertaining to Aboriginal ancestry. In the Toronto DTC, the two categories are "Caucasian" or "Other" (Department of Justice Canada, *supra* 54).
[203] H. Sapers, Correctional Investigator of Canada, *Annual Report of the Correctional Investigator 2009–2010*, Office of the Correctional Investigator, June 30, 2010.
[204] Ibid.

(i.e. white, socio-economically advantaged, male).[205]

Thus far, no evaluations of the very few gender-specific or culturally appropriate programs have been conducted to determine their effectiveness in addressing drug dependence. The significant low enrolment and graduation rates among Aboriginal participants demonstrate that further work is required if they are to address the needs of these participants. This represents an important shortcoming of DTCs that are intended to address the needs of a main social group with disproportionate levels of addiction and of being incarcerated.

There is an underlying assumption that DTC programs are effective in aiding participants to overcome their addiction and, as such, are appropriate for participants and provide effective treatment. Perhaps the enrolment, retention and graduation rates of women and Aboriginal people highlight that the current DTC programs may not necessarily meet the treatment needs of two key DTC target populations.

As documented by the Department of Justice Canada's summative evaluation, treatment services addressing gender, racial and cultural difference in programming is necessary. Particularly vulnerable populations are subject to the same bail conditions and penalties as all other participants yet they may be placed at a disadvantage by not receiving gender-specific and culturally appropriate treatment programming. The failure to provide them with such tailored treatment services increases their vulnerability to DTC penalties and possible expulsion. There is a need to accommodate rather than punish drug-dependent people, based on their capabilities. The lack of gender-specific and culturally appropriate programs in DTCs raises concerns as to the effectiveness of the treatment services in adequately supporting people's physical and mental health. It also raises equality concerns with respect to treatment provided, particularly given the state's role in coercing people into treatment via DTCs.

Reduction in recidivism

Despite the claims, evaluations to date in Canada do not demonstrate that DTCs decrease rates of recidivism over the long term.[206] The primary goal of DTCs is to reduce recidivism, and DTC proponents often argue that DTCs are successful in this regard. For example, the Department of Justice summative report claims, "Most key informants, survey respondents, and case study participants *believe* the program is reducing recidivism,"[207] despite only a minority of DTC evaluations providing data on participants' rates of recidivism while in the DTC. The Winnipeg evaluation includes data on recidivism with a short follow-up. They note that "detail in documenting recidivism [was] lacking"[208] and that data on recidivism was "highly preliminary."[209]

The Toronto DTC outcome evaluation included two follow-up assessments of DTC participants at 6 months and 18 months after individuals were admitted to the program. The evaluation team noted the difficulty in successfully following up with participants, which was identified as a limitation of the evaluation findings.[210] Substance use was found to decrease over time from admission to time of follow-up at 6 months, and to decrease further over the subsequent 12 months, among both DTC graduates and the comparison groups that were used. However, the evaluation notes: "While it is tempting to assume that these results suggest that merely participating in the TDTC, even for a short time, helped clients reduce the number of days that they used drugs, this inference cannot be made in the absence of a comparison group that did not participate in the TDTC at all."[211] The evaluation also included data on criminal convictions at one, two and three years after participants left or graduated from the Toronto DTC, and found that initially DTC graduates were less likely to have criminal convictions compared to individuals in the comparison groups. Individuals who spent the least amount of time in the DTC were more likely to have criminal convictions in the future. However, the

[205] Gorkoff, et al., *supra* 81, pp. 50–51.
[206] Department of Justice Canada, *supra* 54; Fischer, *supra* 52; Anderson, *supra* 47.
[207] Department of Justice Canada, *supra* 54, p. v. [emphasis added]
[208] Gorkoff, et al., *supra* 81, p. 6.
[209] Ibid, p. 8.
[210] Gliksman, et al., *supra* 170.
[211] Ibid., p. 124.

evaluators also found "[b]y the time clients had been out of the program for three years, the results indicate that the experimental group are similar to those of the judicial comparison group."[212] Thus, there is limited data from the outcome evaluations that offers evidence that DTCs reduce recidivism.

Cost savings

The comparison markers used to assess the comparative cost-effectiveness of DTC programs are inappropriate on at least two fronts. First, most evaluations compare the costs of one year in the DTC and one year of incarceration. However, most people who are eligible and accepted into DTCs for drug-related convictions would likely have served a much shorter prison term than one year.[213] Secondly, low program completion significantly elevates the overall cost to treat a single individual. For example, it cost $4,058,819 to operate the Vancouver Drug Treatment Court for approximately five years. During this time, only 42 people graduated. Thus the cost per graduate was $96,639.[214] The Department of Justice Canada summative evaluation concludes:

> Assuming a DTC participant graduates from the program and does not reoffend, the costs of the DTC are 70% lower compared to two years of incarceration. However, if an offender is sentenced to one year of probation, the cost of DTC is 365% higher than the traditional system.[215]

Furthermore, the parameters used to calculate the annual costs of incarcerating one individual do not necessarily match those employed in cost analyses of treating an individual in a DTC program. For example, the estimates of the costs of DTCs included in most Canadian evaluations do not account for such expenses as salaries of the treatment and legal teams, housing and operating costs.[216]

Given the vast majority of people do not graduate from DTCs, and there is limited data on the rates of recidivism for graduates and individuals who do not graduate, it is difficult to conclude that DTCs are cost-effective compared to other criminal justice approaches. Looking at the measures of graduation and cost-effectiveness, it cannot be concluded that DTCs are effective as a criminal justice system intervention, particularly for marginalized communities and women.

Conclusion

There is little sound data on which to base a proper assessment of DTCs, including assessment of proponents' claims. The available data is drawn from methodologically weak and limited studies. Even on the basis of this data, which is likely biased in favour of DTCs, it cannot be concluded that DTCs are particularly effective in reducing drug use and/or recidivism,[217] and certainly it is not clear that they are more effective than voluntary treatment. There is some evidence that current DTCs are particularly failing marginalized communities and women. A lack of rigorous data means it is not possible to conclude that DTCs are comparatively cost-effective.

[212] Ibid., p. 128.
[213] Fischer, *supra* 52; Department of Justice Canada, *supra* 54, p. 25.
[214] Werb, et al., *supra* 158
[215] Department of Justice Canada, *supra* 54, p. vi.
[216] Fischer, *supra* 52.
[217] Stevens, et al., *supra* 48; Drug Policy Alliance, *supra* 53; Gutierrez and Bourgon, *supra* 159.

Conclusion and Recommendations

The basic vision that underlies the drug treatment court framework is laudable — providing access to drug treatment as an alternative to incarceration. Yet the current approach raises significant concerns. The therapeutic jurisprudence model embedded in the DTC system significantly alters the therapeutic, health-centred nature of drug treatment, emphasizing abstinence as the primary — and in some cases, only — measure of success. Without appropriate harm reduction measures within DTC programs, or viable alternative avenues outside the judicial system to access drug treatment, the threat of people who use drugs being exposed to HIV and/or HCV persists. Simultaneously, the traditional judicial process is also dramatically altered where defence counsel, the Crown, the judge and treatment providers all work as a team; this model can undermine due process protections established in the traditional judicial process. There are clear opportunities to improve the functioning of DTCs that could (1) better ensure the protection of DTC participants' human rights; (2) expand the services needed alongside treatment; (3) address needs for gender-specific and culturally appropriate treatment services; and (4) better evaluate the real impact of DTCs, including in comparison with other approaches to ensuring greater access to drug-dependence treatment while responding to public order concerns.

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By diverting people from prison, giving people a second chance to reclaim their lives, drug treatment courts represent an important step in the development of drug treatment policy. However, policymakers have an obligation to assess not only the effectiveness of DTCs, including their impact on different marginalized communities, but also to consider and assess the viability of other approaches inside and outside the criminal justice system. Punitive drug treatment measures that are deemed instrumental to the effective functioning of the DTC system may not only be unnecessary for some people but may also undermine the chance to tackle their drug dependence. Given the DTC system's potential to undermine a person's physical and mental well-being and infringe human rights, it is vital to consider other alternatives that may more adequately respect, protect and fulfill the human rights of people with drug dependence, while achieving the desired goals of reducing drug-related crime and thereby improving public safety.

Health-centred policies to prevent and reduce individual and social harms associated with drug use

Increase viability of voluntary treatment

Current research shows that coerced or quasi-compulsory treatment produces no better results than voluntary treatment. Voluntary treatment has been shown to be as effective as the other two types of treatment approaches in reducing drug use and related crime. Yet inadequate funding has resulted in a highly fragmented and stressed treatment system leading to poor access to voluntary treatment. Providing adequate funding and advancing policy priorities that can increase voluntary treatment options are required before prioritizing other treatment approaches, such as DTCs, that are more likely to infringe the human rights of people who use drugs. In addition, assessments should be conducted to determine the reasons why people from certain marginalized communities are less likely to voluntarily access community-based treatment programs, and to identify ways to increase access to and use of voluntary drug treatment in those communities. "The funding of mandatory

treatment interventions should be delayed until the voluntary treatment system is able to provide timely access to anyone seeking assistance who is eligible for and might benefit from treatment and empirical evidence demonstrates that mandatory treatment is superior to voluntary options."[218]

Ensure access to more harm reduction programs

In an effort to increase the number of people who get treatment *before* they come into contact with the criminal justice system, facilitating access to more harm reduction programs should be a priority. Health programs providing access to sterile drug use equipment (e.g., clean needles, safer crack use kits and related materials) and services (e.g., supervised injection facilities) have not only been effective in reducing harms associated with risky drug use (e.g., HIV and HCV transmission, fatal and non-fatal overdoses), but also create opportunities to connect people with drug treatment if such services exist with sufficient capacity.[219] In addition, by increasing access to methadone maintenance treatment and other opiate substitution treatments, more people may be able to manage their drug dependence so as to avoid or reduce problematic drug-related activity such as drug-related offences. The federal government should restore harm reduction as the fourth pillar of Canada's drug strategy, and it should equally form a key part of all provincial/territorial and municipal strategies. Furthermore, supervised injection facilities should be encouraged and through a nationwide consultative process, a national framework for these facilities should be developed. The federal, provincial, territorial and municipal governments should ensure that diverse harm reduction programs meeting the needs of various communities are easily accessible in all jurisdictions in Canada — particular attention being placed on making harm reduction programs more accessible in remote, rural communities. Adequate funding for harm reduction programs should be provided by the federal, provincial and territorial governments.

Decriminalize certain drug offences

The federal government should eliminate certain drug offences currently in place. It is incumbent on the government to conduct evidence-based assessments of which drug offences are the least likely to represent a threat to public safety and the removal of which is most likely to reduce drug arrest rates and encourage access to voluntary drug treatment services. The decriminalization experience of countries such as Portugal, with positive outcomes on both health and public order fronts, represents an important blueprint for any efforts to decriminalize drug offences. In 2001, the Portuguese government passed a national law decriminalizing personal possession and consumption of any drug, including cocaine and heroin. Drug possession for personal use and "drug usage [are] still prohibited under the law of Portugal," but these prohibitions are "treated strictly as an administrative, not a criminal, offense."[220] Recent assessments of the new law found that while drug use in Portugal has remained the same or has slightly decreased in comparison to other EU countries, the law has had a significant impact on public health, dramatically reducing incidences of HIV and HCV transmission and drug-related deaths.[221]

Appropriate diversion opportunities

Institute pre-criminal adjudication diversion program

The pre-plea option that was previously offered in some DTCs and most pre-trial diversion programs currently offered tend to focus on groups of offenders who are the least likely to require or accept diversion. Efforts should be made to expand the eligibility criteria, so more people could benefit from pre-adjudication diversion opportunities. "Too many diversion programs end up diverting offenders who would not have penetrated the

[218] Anderson, *supra* 47, p. 474.

[219] A. Klein, *Sticking Points: Barriers to Access to Needle and Syringe Programs in Canada*, Canadian HIV/AIDS Legal Network, Toronto, 2007; R. Elliott, et al., *Establishing Safe Injection Facilities in Canada: Legal and Ethical Issues*, Canadian HIV/AIDS Legal Network, Toronto, 2002; Canadian HIV/AIDS Legal Network, *Question & Answers: Distributing safer crack use kits in Canada*, Toronto, September 2008.

[220] G. Greenwald, *Drug decriminalization in Portugal: Lessons for creating fair and successful drug policies*, Cato Institute, Washington, D.C., 2009, p. 3.

[221] Ibid.

justice system very far. The challenge is to construct and maintain admission criteria which take probable dismissal rates into account and test the limits of what can, and should, be done with those who will not be dismissed. Little needs to be done to improve the performance of low risk offenders and the resources of the system can be better used elsewhere."[222] Evaluations to determine which type of offences could be reasonably considered for pre-criminal adjudication diversion should be conducted. Appropriate pilot diversion projects could be developed to assess whether the selected offences are suitable.

Opportunities to improve the functioning of drug treatment courts

Institute a harm reduction practice

Most DTCs operate on a complete abstinence model, leaving little room for reduced or moderated drug use as an acceptable measurement of progress. While some DTCs have sought to integrate forms of harm reduction within their programs, their definitions and practices may not conform to the long-established harm reduction approaches based on a health-first model. The therapeutic jurisprudence goal of DTCs is to reduce criminal activity by helping people stop their drug use. Unlike a more health-focused treatment model, where improving people's health is the goal, the reduction or moderation of drug use is generally not seen as meeting a DTC's goal. While some harm reduction practices have been embraced by certain DTCs, a more uniform and integrated harm reduction practice should be implemented within the operations of all DTCs. DTC programs should all implement a substantial compliance option for people who continue to use. People who use marihuana for medical purposes, and people who are on or need methadone maintenance treatment or other forms of opiate substitution treatment, should be accommodated in all DTCs.

Strengthen defence lawyer–client relationship

Pre-court meetings are closed meetings that are held before every court session. In order to gain admission to a DTC program, a participant is required to waive the right to attend the pre-court meetings. It is during those meetings that a DTC team discusses a participant's progress and determines whether sanctions or rewards will be ordered. DTC participants should be entitled to have the opportunity to be present alongside their defence counsel during pre-trial court meetings. Even if a participant's involvement is limited to simply observing during those meetings, he or she should at least be entitled to listen to discussions about his or her case in order to be able to advise counsel better, and thereby minimize the potential for rights to be infringed.

Remove discriminatory admission criteria and barriers to compliance with program requirements

Excluding people charged with an offence that occurs in the presence of children or in the vicinity of places frequented by children is likely to disproportionately affect women because they are the primary caregivers to children under the age of 18. It is also likely to disproportionately affect low-income women, women of colour and Aboriginal women who are less likely to be sufficiently financially stable to pay for safe childcare, thereby having children generally in their vicinity at all times. Accordingly, this criterion for DTC admission should be removed to address the discriminatory impact on women participants. In addition, childcare services should be offered to enable mothers to meet their bail conditions (e.g., court appearances and counselling appointments).

Ease the restrictiveness of DTC requirements

DTCs should assess the effectiveness of their participation requirements. As shown by the Vancouver DTC, by easing its bail conditions, the court has improved participants' engagement in treatment. DTC programs could develop some flexibility to enable participants who are employed or attending school before entering the treatment program to continue those endeavours while in DTC — e.g., some of the DTC services and court appearances could be scheduled in evenings for those working during the day.

[222] Nuffield, *supra* 99, p. 22.

Ensure appropriate treatment services are available

One of the objectives of the federal DTC Funding Program is to "promote and strengthen the use of alternatives to incarceration (with a particular focus on youth - operationalized as 18 to 24 year olds, Aboriginal men and women, and street prostitutes)."[223] Yet DTCs suffer from a general lack of available culturally appropriate and gender-specific treatment services. Given the low graduation rates that women and Aboriginal people experience within the DTC system, it is imperative that treatment services take into account and incorporate programming that is amenable to the needs of the diverse target populations. Women, youth, Aboriginal people and people of colour should be involved in the development of programming, so that not only can suitable supportive services be identified but also an appropriate framework in which people are active participants in their healing. Adequate funding should be earmarked so DTCs can address the needs of target populations.

Conduct appropriate, reliable, valid evaluations of DTCs in operation

Available evaluations of Canadian DTCs do not allow the conclusion that they are more effective than other forms of interventions with respect to drug use or recidivism rates. Furthermore, the Canadian evaluations do not address questions of how DTCs fit into larger policy questions (i.e., would offering health services outside of the criminal justice system be more effective?), and whether they are more effective than other current options, including probation, conditional sentencing, or an increase in the provision of voluntary treatment. It is vital that DTCs be evaluated by independent researchers and that methodologically sound evaluations be conducted with rigour, examining broader ranging research questions. One of the DTC Funding Program's objectives is to "collect information and data on the effectiveness of DTCs in order to promote best practices and the continuing refinement of approaches."[224] Yet, the information and data collected continues to be methodologically flawed. It is particularly important to have unbiased, evidence-based assessments of DTC operations, and of their effectiveness and cost-effectiveness.

[223] Department of Justice Canada, *supra* 54.
[224] Ibid.