

**THERAPEUTIC JURISPRUDENCE -
SENTENCING PRINCIPLES IN A CANADIAN
CONTEXT**

**The Honourable Judge S. L. Van de Veen
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INTRODUCTION

Therapeutic jurisprudence (TJ), the study of the law as a potential therapeutic agent, is an interdisciplinary approach that, among other things, seeks to import promising developments from the social sciences into the legal system so as to improve the therapeutic and rehabilitative functioning of the law and of the judiciary¹. In the present article, we hope to convey how psychological and criminological developments might be brought into play in the Canadian sentencing context.

The social science insights discussed here relate to compliance, relapse prevention and reinforcing desistance from crime. TJ suggestions have been derived from such works as Donald Meichenbaum (from the University of Waterloo, Ontario) and Dennis Turk, *Facilitating Treatment Adherence* (compliance)²; an edited collection by UK psychologist James McGuire, entitled *What Works: Reducing Reoffending* (relapse prevention)³ and Shadd Maruna's Liverpool study of reformed

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¹ David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"*, 38 COURT REVIEW 18 (Spring 2001). See generally: Bruce J. Winick & David B. Wexler, eds., *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003).

² Donald Meichenbaum & Dennis C. Turk, *Facilitating Treatment Adherence: A Practitioners's Handbook* (1987).

³ James McGuire ed., *What Works: Reducing Reoffending* (1995).

offenders, *Making Good: How Ex-Inmates Reform and Rebuild Their Lives* (reinforcing desistance)⁴.

This article grows out of a series of joint presentations we have given to the Canadian judiciary regarding the application of emerging therapeutic jurisprudence principles to the area of sentencing. We have learned much from each other, but our division of labour, both for the presentations and for the present article, is such that Professor Wexler has set forth the suggested TJ principles and Judge Van de Veen has explicated the Canadian law and its practical application. Let us, then, turn to the task at hand.

Therapeutic jurisprudence suggests a handful of principles for use in sentencing. These principles represent a process for thinking about certain sentencing decisions, especially (but not only) those that might result in probation or conditional liberty. The judicial use of therapeutic jurisprudence suggests competencies that fall into a tripartite framework, namely:

- (a) knowledge of the relevant legal landscape (mostly legal),
- (b) knowledge of the relevant treatments and services (mostly social work, but judges need to know how to talk to the other professions), and
- (c) knowledge of theory-inspired practices (“TIPS,” which are fully inter-disciplinary and comprise the “how to” principles derived from the relevant research.⁵

In the context of sentencing, the TJ framework may be applied in specific ways.

⁴ Shadd Maruna, *Making Good: How Ex-Inmates Reform and Rebuild Their Lives*. (American Psychological Association Books, 2001).

⁵ David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice*, FLORIDA COASTAL LAW REVIEW (in press).

DEFERRING SENTENCE IN APPROPRIATE CASES

One important technique is deferring sentence, if the legal landscape permits, in order to allow for a period of attempted rehabilitation prior to sentencing. If an offender appears to be reasonably low risk this might be resorted to in a case where the court is inclined toward a probationary sentence but uncertain in this regard. The therapeutic jurisprudence literature urges defence counsel to seek sentence deferral so that a treatment plan might be put into place and its likely effectiveness might be demonstrated.⁶ Such a demonstration, after all, would be much more meaningful than the hope, promise, and good intentions that may be in evidence when a deferral is first sought.

Jurisdictions vary widely regarding the availability of sentence deferral. In a recent U.S. case, sentence was deferred for nearly 2 years.⁷ In Western Australia, there is a six month limit.⁸

In Canada, Section 720 of the *Criminal Code* provides as follows:

720. A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.

In addition, Sections 721 and 722 permit sentencing to be deferred for purposes of obtaining pre sentence reports and victim impact statements. However there is no specific provision which allows sentence to be deferred for purposes of permitting an offender to carry out a treatment program. Thus, currently the legislation on its own does not appear to permit sentence deferral, and prior to 1996 case authority prohibited this procedure.

For example, in the 1991 decision of *R. v. A.B.C.*(1991), 120 A.R. 106, [1991], A.J. No. 1118 (Alta. C.A.), the Alberta Court of Appeal clearly enunciated this

⁶ *Ibid.*

⁷ *Ibid.* (discussing *U.S. v. Riggs*, 370 F.3d 382 (4th Cir. 2004)).

⁸ *Ibid.* (discussing Section 16 of Western Australia's Sentencing Act of 1995).

prohibition. This was a case of a major sexual assault by a father upon his sixteen year old daughter. The Court held cases of child abuse by a person in a position of trust required a stern denunciatory sentence and that postponing sentence, even with the consent of the Crown and defence, with the objective of treatment for the offender, and in cases where the family can be restored, is not permitted by the *Criminal Code*. The Court reversed the trial judge who had suspended the passing of sentence after deferring sentence to permit treatment. The offender was sentenced to gaol for a year followed by a period of probation for a year.

In the *A.B.C.* decision, *supra*, the Court stated at para. 33:

[33] ... [I]n an attempt to ... present ... the picture of a rehabilitated offender and a reunited family, the victim would be subjected to inappropriate pressure and a truly reunited family unit would be illusory.

The Court at para. 32 stated:

[32] ... The object of sentencing, ... is not to reward or punish an offender for the success or otherwise of his rehabilitation program. If this were the intent of Parliament, it could ... have been expressed, as was done in s. 735 of the *Code*.

(735 of the *Criminal Code* in 1991 specifically permitted sentencing to be adjourned or postponed for certain purposes such as obtaining a pre sentence report or victim impact statement). The Court also was critical of the sentencing judge for having implied the promise of leniency to the offender with the full cooperation of the Crown.

In the past several years a number of problem solving court processes have arisen in Canada to deal with cases involving domestic violence, drug addiction, aboriginal justice, and mental illness. In all of these specialized court processes, specific programs are linked to the court system in a manner which make it logical, in appropriate cases, to defer sentence. It is currently commonly done only with the consent of both the Crown Counsel and Defence counsel, both of whom are, in certain cases, in a better position to suggest the most appropriate sentence once the underlying problem causing the criminal behaviour is addressed.

These court processes have arisen as a result of the emphasis upon restorative justice sentencing objectives added to the *Criminal Code* in 1996, specifically the Conditional Sentence Order regime found in Section 742.1 and the provisions of Section 718.2(d) and (e) which require judges to consider all reasonable alternatives to gaol that are available in all cases (but especially in the case of aboriginals). The Conditional Sentence Order regime permits judges to allow a sentence of incarceration to be served in the community (unless the offence is punishable by a minimum term of imprisonment), if the sentence of imprisonment is less than two years, if the court is satisfied that serving the sentence in the community would not endanger the safety of the community, and if the sentence would be consistent with fundamental purpose and principles of sentencing set out in the *Criminal Code*.

The Supreme Court of Canada, in interpreting this legislation, held these provisions must be given real effect and that the restorative justice objectives they embody must be considered alongside the traditional sentencing objectives of deterrence and denunciation [see *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.) and *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.)]. The Supreme Court of Canada held these provisions are intended to reduce actual incarceration in Canada because the value of incarceration as a means of successfully changing behaviour is questionable.

As a result of the reformatory sentencing legislation enacted in 1996 and the Supreme Court of Canada interpretations of this legislation, it seems reasonable that the Court of Appeal decisions prohibiting sentence deferral ought to be revisited. The rationale for deferring sentence in order to permit a productive treatment regime to take place may now be justified so long as both Crown and Defence consent, especially in cases where such sentence deferral occurs as part of a court system which incorporates a multi-disciplinary approach integrating community treatment agencies with the court process itself. Such is the case with the various problem solving court processes which have arisen throughout Canada in recent years.

It is expected legislation will be forthcoming from the Parliament of Canada in the near future to specifically permit judges to defer sentence in order to allow treatment of an offender to take place prior to the determination of sentence, if the consent of both Crown and defence are forthcoming. However this legislation has not as yet been put in place.

Procedurally, in the event a sentence is to be deferred, it is suggested that the bail conditions be changed with the consent of the Crown and Defence in order to direct the offender into the specific treatment plan anticipated. It would not be unusual in today's legal environment, in appropriate cases, for a judge to ask the Crown whether they are prepared to reopen bail to change conditions of Judicial Interim Release to accommodate the specific treatment program proposed prior to sentencing. Because the Crown itself is often in a better position once treatment has occurred to determine appropriate sentence, commonly this consent is forthcoming not only from Crown but also from Defence. This is especially true in cases where completion of treatment may well result in more favourable reports being provided to the court concerning the prognosis for any recidivism in future.

In the Tsuu T'ina Peacemaking Initiative, deferring sentence is a fundamental aspect of this aboriginal court model. If accepted into the Peacemaking Program, the case is adjourned until the entire Peacemaking Program for that individual case has been completed. It is only on completion that the matter is brought before the court again.

CONCEPTUALIZING PROBATION AS A BEHAVIOURAL CONTRACT

Therapeutic jurisprudence writing suggests that, ideally, a probationary disposition ought to be thought of as a two-way street, rather than probation and its accompanying conditions being imposed by unilateral judicial fiat. In essence, probation might be conceptualized as a type of bilateral behavioural contract: "I will consider you for probation if you will in turn agree to abide by some conditions that will give me and the public greater comfort about you living responsibly in the community."⁹

Judges are now required to ask offenders, if they are present, whether they have anything to say before determining the sentence to be imposed (Section 726 of the *Criminal Code*). Therefore, rather than communication between lawyers and judges throughout the sentencing process, there is now a legal obligation upon the judge to speak directly to the offender, which is a perfect opening to engage in the

⁹ Wexler, *Robes and Rehabilitation*, *supra* note 1.

kind of dialogue suggested above. Of course, for the allocution provision to be used with reasonable efficiency, the preparation of a proposed probationary plan should involve the earlier efforts of Defence counsel, the offender, the probation office, and the like. In that way, the offender at allocution will be prepared at least to initiate a discussion about a hoped-for probationary sanction.

The question arises whether judges feel they have time to enter into a discussion with each offender in order to arrive at a behavioural contract. If the great bulk of the work occurs earlier, however, through the out-of-court efforts noted above, the judicial time spent should not be excessive. Further, not every case will lend itself to the kind of dialogue in order to establish a behavioural contract; in some cases, the appropriateness of an incarcerative penalty will be evident. However, in appropriate cases, it must be borne in mind that the time spent during the initial sentencing process in this regard would pale in comparison to the time and resources spent as a result of recidivism of the accused. Therefore, if the recidivism can be reduced or eliminated, there is a strong argument that the extra time is well worth the effort.

OFFENDERS ROLE IN PREPARING A PROBATIONARY PLAN

The therapeutic jurisprudence literature suggests that if a probationary sentence seems in the ballpark of reasonable possibilities, the bilateral approach can be launched by a judge saying the court is willing to consider probation but needs to be convinced that it will work. The offender, with professional assistance, can be asked to think through his/her criminal activity, high-risk situations, and come up with a probationary plan to avoid or deal with those high-risk situations which lead to criminal behaviour, (triggers to drug or alcohol abuse, or risk of fighting, etc.). This engages the offender in a very rudimentary form of relapse prevention planning.¹⁰

At the present time, normally pre sentence reports are ordered from the Probation authorities and provided to the judge shortly before sentencing. Perhaps the probation office's role ought to be expanded to include a second kind of assistance to the court. With judicial initiative, systems could be created whereby

¹⁰ *Ibid.*

upon receipt of a pre sentence report in cases where community-based sentence is anticipated, the court could refer the matter back to probation for the preparation of a probationary plan to avoid and deal with high-risk situations involving triggers to behaviour which contributes to re-offending. Another option would be for Probation authorities to assist with the preparation of a probationary plan at the same time the pre sentence report is prepared. Sometimes this probationary plan can be prepared with the assistance of defence counsel or other persons known to the accused. If defence counsel is involved in the manner suggested in the preceding section, the preferred option might be for counsel to play a major role in the effort, ideally before the allocution stage.

Consideration might also be given to the presence of caseworkers in criminal courtrooms, being persons who are trained to assist offenders with this aspect of their sentencing hearing. Caseworkers are common in problem solving courts and are of great assistance to offenders and their families (in the case of some domestic violence courtrooms, caseworkers are present for the assistance of the victim and family of an offender). Perhaps the presence of caseworkers in ordinary criminal courtrooms can be justified if the suggested approach to sentencing results in diminished recidivism. Professional assistance being available to offenders in early case resolution courtrooms, where only guilty pleas and sentencings take place, would seem to be very valuable.

RELAPSE PREVENTION PROGRAMS

As noted above, an offender's involvement with defence counsel and the probation office to create a proposed probationary plan can be regarded as a very rudimentary effort in relapse prevention planning. A true relapse prevention plan should be the product of a more sustained and ambitious effort. In that connection, if probation is awarded, a full blown relapse prevention program could be included as one condition of the probationary sentence. In other words, a full course of relapse prevention planning, such as the Canadian developed "Reasoning and Rehabilitation" approach that originated in Ottawa and is now in wide use internationally¹¹, could be imposed as an additional condition of probation.

¹¹ The programs are well-presented in *What Works*, *supra* note 3.

From a judge's perspective, this is easily accomplished as a condition of any probationary order. Currently, it is common to order that an offender attend for assessment and complete such counselling as directed. It would not be difficult to add an additional term requiring the offender to attend for relapse counselling as well as to attend a full course of relapse prevention planning. Once again, however, Probation authorities will be involved and it would be important to establish systems where the Probation authorities understand the therapeutic approach being taken by the judge, and why. In particular they may also have to establish linkages with the necessary community resources in order to refer offenders for relapse counselling and relapse prevention planning. The availability of such resources is an obvious issue.

In addition, it may be that training Probation authorities to understand the "Reasoning and Rehabilitation" would be helpful. In some jurisdictions, in fact, trained probation officers actually run such programs.¹²

SOME SPECIFIC TECHNIQUES FOR IMPROVING OFFENDER COMPLIANCE

Drawing on the psychology of health care compliance¹³, the therapeutic jurisprudence literature suggests using some of the following techniques to improve offender compliance with release conditions:

- A) use of offender's probationary plan as a springboard for discussion to formulate an individually tailored probation "contract";
- B) make sure to speak in simple understandable language;
- C) use the hearing as a forum where an offender can in essence make a public commitment to comply, probably with agreed upon family members or friends being present in court at the time, etc.;
- D) help ground the offender in a perspective that this time is different from prior unsuccessful times by specifically asking the

¹² *Judging in a Therapeutic Key*, *supra* note 1, at 191.

¹³ Meichenbaum & Turk, *Facilitating Treatment Adherence*, *supra* note 2; *Judging in a Therapeutic Key*, *supra* note 1, at 213-226.

offender why he/she thinks compliance will occur this time when past behaviour has not been in conformity with the law.

Each of these techniques is available in Canada at this time. It is a relatively new idea to suggest an offender bring family members or friends to court (except in problem solving court systems) although it is common that persons supporting the offender are present in any event. It may be a suggestion to be made to Defence counsel at the time the sentencing date is established. Moreover, as Defence attorneys become more acquainted with therapeutic jurisprudence, they themselves may take the initiative in this regard.¹⁴

Once again, the matter of time will be the obvious question. In appropriate cases, however, and in the long run if sentencing techniques will result in diminished recidivism, they may be well worth the time spent.

SCHEDULE PERIODIC REVIEW HEARINGS

Therapeutic jurisprudence considerations suggest the value of scheduling periodic review hearings.¹⁵ Research indicates that compliance with court orders significantly increases in circumstances where court ordered reviews are included in the terms of the initial order.¹⁶ In cases involving peace bonds, suspended sentences, and conditional sentence orders the concept of judicial supervision through court ordered reviews is evolving in Canada.

Often the court ordered review is consented to by counsel. There is also some general authority in the *Criminal Code* which may permit the use of court ordered reviews, even in the absence of consent, especially as part of a problem solving court process. With respect to probation orders, such authority is found in Section 732.1(2)

¹⁴ David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, St. Thomas Univ. L. Rev. (in press).

¹⁵ See generally Wexler, *Robes and Rehabilitation*, *supra* note 1.

¹⁶ Edward W. Gondolf, *The Impact of Mandatory Court Review on Batterer Program Compliance*, funded by Pennsylvania Commission On Crime and Delinquency, Harrisburg, PA., Final Report May 15, 1998.

which provides, as one of the compulsory conditions of a probation order, that the offender appear before the court when required to do so by the court. In addition, Section 732.1(3)(h) permits the court to impose “such other reasonable conditions as the court considers desirable,” with respect to probation orders.

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

When court ordered reviews are included in a sentence, depending upon the time frame appropriate to any given case, a date for review is set and the offender is ordered to appear in court at that time. A written progress report is ordered from the Probation authorities for purposes of the court ordered review and is usually provided to the judge a day or two prior to the review taking place. The progress report is usually in letter form directed to the court and provided to counsel. Court ordered reviews may occur once, or repeatedly throughout the term of the Court Order, depending upon the circumstances of the individual case. In some cases, the personal attendance of the probation officer or supervisor may be beneficial.

While the court does not have jurisdiction to change any of the terms of the court order at the time of the court ordered review, unless requested to do so by the prosecutor, offender or probation officer (Section 732.2(3)), the desirability for changes, if any, to the conditions of the order becomes apparent to these constituencies as a result of the attention paid to the matter in preparation for the court ordered review. Section 732.2(3) authorizes the court to make such changes (requested by the prosecutor, offender or probation officer) if it is of the opinion such changes are rendered desirable by a change in circumstances since the conditions were initially prescribed.

There are a number of reasons why a higher level of compliance appears to exist when court ordered reviews are conducted. Firstly, the offenders themselves are placed into a structure whereby their progress is reported to the court in a public proceeding. This structure in itself sometimes is helpful to the offender and in that sense a motivating force. Secondly, offenders often take the court ordered review seriously and in this sense the review acts as an incentive to the offender to accomplish a positive review. Thirdly, the Probation authorities, who are often burdened with high caseloads, must report to the court concerning the progress of the individual and this places Probation authorities themselves in a position where certain referrals and results must take place within the time frame set by the court because a written progress report must be prepared for the court.

Indeed, review hearings are scheduled not only for the purpose of monitoring the offender's compliance, but also to monitor whether treatment and other services are holding up to their end of the bargain.

Therefore, the requirement to report progress to the court can be of assistance to probation officers who in turn can require offenders and treatment agencies to carry out the treatment plans in a timely fashion in order to permit the progress report to be placed before the court within the time frame designated by the court ordered review. Probationary monitoring of offenders in cases where court reviews are ordered are sometimes more extensive and sanctions such as charges being laid for breaches of probationary terms are forthcoming more quickly as a result of increased probationary monitoring for purposes of the court ordered review. Research tells us that immediate consequences for non-compliance is important to the long-term success of court mandated treatment.¹⁷

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

¹⁷ *Canada's First Drug Treatment Court*, The Honourable Mr. Justice Paul Bentley, Ontario Court of Justice, Toronto, 31 C.R. (5th) 257

Furthermore, review hearings can be structured to reward and reinforce positive offender reform efforts. This may be accomplished pursuant to Section 732.2(3) upon application of the prosecutor, offender or probation officer, with the result that changes to the original order can be made as a result of the positive progress of an accused since the date of the initial court order. For example, if an offender is doing well, probation may apply to have his curfew changed.

Another aspect of court ordered reviews involves the personal interest and commendations of the same sentencing judge. Drug Treatment Court research tells us that the encouragement of the same judge who monitors the offender as he or she proceeds through treatment is in itself a powerful motivator. It seems reasonable this same motivation would exist in other contexts, whenever the same judge repeatedly reviews an offender's progress and provides encouragement as the offender successfully completes each phase of his or her program. The rapport between the judge and the offender can be a significant motivator in the context of court ordered reviews which are conducted by the judge who passed the original sentence. Thus, these hearings should be taken seriously not only if the offender's compliance is in doubt, but also in cases where all is going well. Indeed, the positive reinforcement is important in the context of a court ordered review.

OFFICIALLY RECOGNIZE THE SUCCESSFUL COMPLETION OF PROBATION

If probation is successfully completed, it can be recognized with a type of positive court ceremony.¹⁸ Examples of this are found in Drug Treatment Courts. Another example is in the Tsuu T'ina Peacemaking Initiative, where a formal ceremony is held upon completion of a certain program established by the Peacemaking Initiative itself. The ceremony is designed to restore the offender to his community and to recognize that he has done what is necessary to correct the wrong he committed against the community itself.

There is nothing in Canadian Law which prohibits this suggestion and indeed this suggestion is very important to the Drug Treatment Courts in operation in Canada.

¹⁸ Wexler, *Robes and Rehabilitation*, *supra* note 1.

In an ordinary case, however, as part of the judicial monitoring or supervision of probationary orders, a system could be established to accomplish this purpose.

It may be that at the time of sentencing or at some other judicial review time frame a final reporting process could occur in which the judge invites the offender to have his family and friends attend for a final review of his probationary order and to officially recognize the successful completion of his probation. It would be an opportunity for the judge to congratulate the offender and in some way recognize he has “corrected the wrong,” in the sense of doing what is necessary to restore himself to the community.

There are some practical difficulties in the ordinary context and in the absence of a problem solving court context. Often people regard having to attend court as a punishment and it would have to be made very clear that the court appearance recognizing the official completion of probation, if done by the courts, is not intended as a punishment.

It is also possible that once again some sort of recognition be built into the probation process in the absence of court involvement. However, such a process would likely not be as meaningful or as effective as having the original sentencing judge acknowledge a successful completion of a probationary sentence. It is open to us to find a way to do this and there are no legal barriers to this process. At the very least, congratulations from the sentencing judge would seem a very important motivator to offenders as part of the last court ordered review considered necessary by the court.

CONSIDERATION OF EARLY TERMINATION OF SUCCESSFUL PROBATIONARY SENTENCES

In order to accomplish this, an application to the court would have to be made by the offender, the probation officer or the prosecutor. Section 732.2(3) of the *Criminal Code* reads as follows:

732.2(3) Changes to probation order -

A court that makes a probation order may at any time, on application by the offender, the probation officer or the prosecutor, require the offender to appear before it and, after hearing the offender and one or both of the probation officer and the prosecutor,

- (a) make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,
- (b) relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition, or
- (c) decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the order so endorsed.

Therefore, there is legislative authority permitting the termination of successful probationary sentences, but only upon an application being made to the court. It may be that Probation authorities, prosecutors, and offenders would carry out this function more readily if the application of therapeutic jurisprudence principles became common in the criminal courts. Currently it is not common for such applications to be made.

Of note is that with respect to Peace Bonds, Section 810(4.1) of the *Criminal Code* permits the court, on application of the Informant or the defendant, to vary the conditions fixed in the recognizance. There is nothing prohibiting the court from early termination of the Peace Bond as a variation to the recognizance.

With respect to conditional sentence orders, Sections 742.4(1) and 742.4(5) permit supervisors, offenders and prosecutors to give written notice of proposed changes to the optional conditions of a conditional sentence order. When such notification is given by the offender or prosecutor, a court hearing must be held within 30 days of the court's receipt of the notice to determine whether the changes sought ought to be granted. When the notification is given by the supervisor, however, a court hearing need not be held unless requested by the offender,

prosecutor or the court of its own initiative. If no such request for a hearing is made, the change to optional conditions proposed by the supervisor becomes effective.

Upon the hearing of any application for changes to the optional conditions of a conditional sentence order, the court must either approve or refuse the proposed changes and may make any other changes to the optional conditions that the court deems appropriate. (Section 742.4(3)) Therefore, in the case of conditional sentence orders, if defence, prosecutors and supervisors became more knowledgeable about the relevance of the principles of therapeutic jurisprudence, applications for changes to the optional conditions could be done more frequently and the method of having the supervisor submit the notice to all parties and the court could be utilized to simplify the process.

Judges are generally permitted to act in chambers (out of court), with respect to applications for changes to probationary orders, whether it be a probation order itself, or a conditional sentence order. There is no specific provision permitting the judge to act in chambers with respect to variation of a Peace Bond. Of note, however, is that a judge acting in chambers could not accomplish the objective of public or official recognition of a successful and early completion of the order. While an in-chambers determination would be more expeditious, the therapeutic objective of recognition would be lost.

JUDGES CAN PLAY A REHABILITATIVE ROLE EVEN WHEN INCARCERATIVE SENTENCES ARE CALLED FOR

While the criminal act can surely be condemned, judges ought to be careful not to condemn the person. For instance, remarks such as “You are no good as a mother” or “You are a menace to society” and the like are gratuitously disparaging and can interfere with a longer range rehabilitative goal. Relatedly, judges ought to comment positively on any favourable features, good qualities, et cetera especially if the factor is used to mitigate somewhat the sentence being imposed.¹⁹

¹⁹ *Ibid.*

A good example of this can be found in the *R. v. A.B.C.* case, *supra*, where the Court commented, as a mitigating factor, that the respondent pleaded guilty at an early stage in the proceedings in order to save his daughter the trauma of being involved in court proceedings of a highly embarrassing nature. The Court further commented that the offender immediately sought professional help for both himself and his victim following the offence.

Indeed, even in circumstances where a favourable feature cannot influence disposition, mentioning it can nonetheless plant a helpful seed.²⁰ He uses as an example the following quotation: “I don’t really know what went wrong here, for you are obviously a very intelligent person who is a good father and a good worker. Somehow, you seem to have gotten on a bad path; I hope you’ll think about changing that direction, for you obviously have a lot of talent and it would be wonderful to see you, your family and society profit from it.”

There is absolutely nothing in the Canadian legal landscape prohibiting this approach. Judges are required to mention, in their reasons for sentencing, both aggravating and mitigating factors. These mitigating factors can be personalized and aggravating factors can be mentioned in a manner that is an objective statement of fact. Generally pre sentence reports and psychological reports provide ample personal information, both favourable and unfavourable to the accused to permit judges to act in this regard, in appropriate cases.

It was once thought that what judges say doesn’t really matter, but research shows that judicial behaviour can influence accountability on the part of the offender. Because judges represent the society as a whole, or the state, their words of condemnation or rejection of an offender can easily cause that person to believe they are on the outside of the society to which they will ultimately return once their sentence has been served. The objective of restoring that individual to that very society is made more difficult by such condemnation. As earlier mentioned, condemning the act without condemning the person is a valuable skill for judges.

Our sentencing discussion represents a part of a philosophical shift in Canada from incarceration to community-based sentencing dispositions involving treatment of

²⁰ *Ibid.*

the underlying reasons for the criminal behaviour. Therapeutic jurisprudence work is evolving rapidly in that area and in others. Judges ought to keep abreast of these developments. The NJI library is adding “therapeutic jurisprudence” to its list of search terms for its electronic library, and is endeavoring to increase its online resources in that area. The NJI manual, *Judging for the 21st Century: A Problem-Solving Approach* (2005), is an extraordinarily valuable resource, as are other Canadian publications.²¹ And up-to-date developments are noted on the website of the International Network on Therapeutic Jurisprudence (INTJ), at www.therapeuticjurisprudence.org. We encourage interested judges to join the INTJ mailing list or the INTJ Listserv, a project with many members-and judicial members-from many nations.

²¹ Hon. Sherry L. Van de Veen, *Some Canadian Problem Solving Court Processes*, 83 CANADIAN BAR REVIEW 91 (2004); Justice Paul Bentley with Natasha Bakht, *Problem Solving Courts as Agents of Change*, COMMONWEALTH JUDICIAL JOURNAL 16(3):7 (2004). The Bentley-Bakht piece is also scheduled to appear in the CRIMINAL LAW QUARTERLY, December 2005.