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The role of therapeutic jurisprudence to support persons with intellectual and developmental disabilities in the courtroom: Reflections from Ontario, Canada☆

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ABSTRACT

It is generally recognized that persons with intellectual and developmental disabilities (IDD) are at greater risk than the general population when they encounter the criminal justice system due to vulnerabilities such as cognition, memory and language (Jones, 2007). To date, little evidence has been generated regarding best practice to support persons with IDD in the criminal justice system, specifically the courtroom. Various models of problem-solving courts have developed across Canada to divert cases composed of complex human social problems to more appropriate community-based treatment and supports. Past Canadian authors have raised critical questions that require reflection about the broader theory of Therapeutic Jurisprudence (TJ) and its current implementation in problem-solving courts. Given the risk and vulnerabilities of persons with IDD in the criminal justice system, problem-solving courts (specifically mental health courts) hold great promise to address some of the unique needs of these individuals. We reflect on the critical questions raised by previous Canadian authors regarding problem-solving courts and suggest some considerations that need to be addressed to maximize the benefits of these courts for persons with IDD.

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1. Introduction

No one can deny the extraordinary impact that Wexler has had with his work on therapeutic jurisprudence (TJ), the law, and its application. As Wexler (1997) explained "legal rules, legal procedures, and the roles of legal actors are seen as social forces that may produce therapeutic or antitherapeutic consequences" (p. 233). Most recently, Wexler (2018) elaborated on the "birth of therapeutic jurisprudence" and traced the seeds to a "…presentation given in October 1987 in a National Institute of Mental Health (NIMH) workshop on law and mental health coordinated by Saleem Shah and Bruce Sales" (p. 79). These "seeds", he argued, were planted and germinating in the 1970s, and included important work by two other colleagues – Michael Perlin and the late Bruce Winick. In his latest paper, Wexler (2018) traced how the TJ perspective was influenced by "implicit" TJ pieces from his work in mental health law the 1970s and 80s. His 1987 paper, which was not published until 1990 in *Therapeutic Jurisprudence: Law as a Therapeutic Agent*, was critical:

> It was then, preparing my written work during the summer of 1987, that it struck me that my enduring interest was not in law and therapy in general, but rather in law *as* therapy, and that was the TJ lightbulb—therapy *through* law… (p. 12).

Wexler and Winick's book *Essays in Therapeutic Jurisprudence* was, in the words of Wexler (2018), "…the first book to deal completely and *explicitly* with TJ" (p. 14). Over the next few decades, the impact that therapeutic jurisprudence has made is clear: TJ caused a tectonic shift in the legal landscape internationally, including the United States, Canada, Australia, New Zealand, Israel, Spain, Japan and others. It has influenced criminal law, family law, mental health law, workers' compensation law, labor arbitration law, and others (Wexler, 1997). Finally, work about TJ has been published in 14 languages (Wexler, 2018).

From the mid-to-late 1990s in Canada, there was a combined legislative, policy and cultural foundation for adopting therapeutic jurisprudence principles in criminal law (Bakht, 2005). TJ as a perspective and various legal and cultural structures in Canada led to the development of a range of specialized courts, including drug treatment, mental health, domestic violence, and Aboriginal courts. In each court, a particular 'problem' is addressed and 'solved;' or in the case of Aboriginal and mental health courts, populations with specialized needs are paid attention to separately (Bakht, 2005). Apart from operating within a TJ framework and principles, the courts' objective is to use the law to

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divert the accused individual away from the traditional adversarial process while still holding them accountable.

To date, one population that has received less attention in discussions about problem-solving courts in Canada (and internationally) has been persons with intellectual and developmental disabilities. Due to the inclusion of the diagnosis intellectual disability in the *Diagnostic and Statistical Manual* (DSM; American Psychiatric Association, 2013), persons with intellectual and developmental disabilities (IDD) are considered most often under the umbrella as a mental disorder within the context of the law. Subsequently, they are often dealt with in mental health courts in Canada, and due to their unique needs, they may not always fit neatly within a mental health framework (Hamelin, Marinos, Robinson, & Griffiths, 2012).

The response of the criminal justice system in Canada towards those who have an intellectual and developmental disability has been inconsistent. First, there is the issue of how and by whom "diversion" is conceptualized and offered. There are practices of informal diversion away from the criminal courts by police or Crown prosecutors; or more formal diversions to mental health courts using a variety of eligibility criteria, expectations, and practices (i.e., some proceed by way of diversion/withdrawal of charges, guilty pleas, and sentencing hearings) (HSJCC, 2017). Second, identification of a disability is a critical piece before diversion can occur. Persons with IDD are not a homogeneous group, and while some individuals may be more easily identified due to physical characteristics (i.e., Down syndrome) or limited language skills; many individuals may escape early detection due to the lack of identifiable traits (i.e., facial features) or an ability to 'pass' as a being more competent then they are. As Jones (2007) argued, "although police protocols and court-diversion schemes attempt to improve the identification of individuals with intellectual disabilities, many individuals are still overlooked or misidentified" (p. 727). Reasons for why individuals are overlooked or misidentified include better expressive language (i.e., what the individual says) and receptive language skills (i.e., what they understand), seeking to please individuals perceived to have authority, and looking for feedback from the environment and other people in the environment (Perske, 2004).

Mental health courts were created in an ad hoc basis throughout Ontario within existing courthouses to address offenders with mental illness. Across provinces and locales, there are variations such as in referrals, the eligibility of offences, and program components. Within provinces, there is variability as each locale can organize itself. What ties the mental health courts together is that they are offender-focused and needs-based; involve a collaborative team of professionals including the judge, lawyers, mental health professionals and community-based service providers; and is based on therapeutic jurisprudence principles (Reiksts, 2008). Some of the key reported strengths about these mental health courts include: collaboration among court officials, specialized mental health services, and reduced criminalization through alternatives to jail (HJSCC, 2017). However, other involved professionals have identified several gaps including: the general lack of education and training about disabilities, challenges with reliably identifying when someone is diagnosed as having an IDD, and the availability of specialized treatment programs (HJSCC, 2017; Marinos, Robinson, Gosse, Fergus, & Griffiths, 2017).

The focus of the current article is on the operation of mental health courts in Ontario, Canada for persons with intellectual and developmental disabilities (or a dual diagnosis). We consider the role that TJ can play to support persons with IDD accused of offences and identify a number of issues raised within the literature within Canada. We reflect on lessons we can learn from research to date, and ways to move forward in a more inclusive and holistic way to maximize the benefits for persons with IDD within the courts.

2. Deinstitutionalization & the overrepresentation of persons with IDD in the Canadian criminal justice system

Before addressing justice involvement of some individuals with IDD and their participation within mental health courts in Ontario, it is important to understand the historical, social and economic contexts within which persons with IDD interact more generally.

Institutionalization of persons considered "defective" and "feeble-minded" has been one of the most serious and shocking tragedies of the last century in Canada and the United States. Hundreds of thousands of individuals with IDD, some from birth, were viewed as being better cared for in institutions instead of with their families (Griffiths et al., 2016). Beginning with the social hygiene movement in the early 1900s, and supported by legislation and public opinion, persons with intellectual and developmental disabilities were thought to be a contributing factor to the moral decline of society (e.g., vice, crime, declining social conditions) (Griffiths et al., 2016; Wehmeyer, 2013). This notion of segregation was largely based on the recommendations of Henry Goddard, who believed that intelligence testing could be used to identify persons who were a risk to society and proposed that segregation and sterilization be used for the protection and betterment of society (Griffiths et al., 2016; Wehmeyer, 2013).

It has been publicly acknowledged that mass institutionalization was a mistake (Dube, 2016). In addition to the oppressive practice of being excluded from mainstream society, institutionalized individuals with IDD were victims of mistreatment including physical and sexual violence and abuse (Griffiths et al., 2016). For example, Ontario premier Kathleen Wynne apologized in 2013 on behalf of the government to all residents, families and Ontarians for the harm that was caused:

> we take responsibility for the suffering of these people and their families. I offer an apology to the men, women and children of Ontario who were failed by a model of institutional care for people with developmental disabilities.… Today, Mr. Speaker, we no longer see people with developmental disabilities as something "other." They are boys and girls, men and women, with hopes and dreams like all of us (Ontario Office of the Premier, 2013).

Apart from the evidence of mistreatment, isolation, and stigma, one among many reasons for the closure of institutions across Canada and the United States was the shift in orientation from biomedical discourses of the "feeble-minded," "crippled," and "mentally retarded" to a more holistic model that incorporated an understanding that individuals are also shaped by the environment around them. Based on this shift in paradigm, institutions within Ontario were viewed as inappropriate for some individuals, and the process of deinstitutionalization began for persons who were "community ready" or "easy to place" in the 1970s (Griffiths et al., 2016, p. 11; Simmons, 1982). Persons with intellectual and developmental disabilities began to be viewed as capable of living within the community, accessing services within the community, and worthy of participating fully in everyday life.

Deinstitutionalization of persons with IDD continued for more than four decades; however, it was not a smooth and successful transition for all. Problems for individuals living in the community included a lack of adequate resources and supports, ineffective accommodations for complex needs, and inconsistent access to programs. This led to a disproportionate representation of persons with disabilities experiencing poverty, lack of education and employment, homelessness, and involvement in the criminal justice system (Dube, 2016). Some statistics reveal that while 3% of the population has a developmental disability in Canada, it is estimated that upwards to 10% will be justice-involved (SNSC, 2013). Once individuals with IDD are involved with the criminal justice system, they are at risk of not being adequately identified, nor linked to appropriate services, including diversion programs. This can result in being remanded, denied bail, or held in pretrial custody (Cockram, 2000; Holmes, Hancock, Morris, & Hoffman, 2016). Regardless of whether an individual has been identified with an IDD, evidence suggests that they are vulnerable while in custody. For example, Talbot (2008) suggested that risks to individuals with IDD include: depression, anxiety, bullying and exploitation, and suicidal ideation and self-harm.

Bakht (2005) outlines a number of social and historical factors that gave rise to problem-solving courts in Canada, including limitations on the part of government services to meet the needs of persons with mental illness, prison overcrowding, increased pressure by advocates to find alternatives to incarceration, advances in the quality and availability of treatment, and a shift in the perception regarding the underlying problems facing criminal conflicts (i.e., domestic violence). Therapeutic jurisprudence led to the development of problem-solving courts in the United States for drug offenders, mental illness, and the like; similarly, Ontario's legislative foundation was fruitful for the first courts in Ontario in the late 1990's. The *Canadian Criminal Code (1985)* acknowledges the role that "mental disorders" can play in the context of criminal acts (i.e., Sections 2 and 16), and articulates the importance of finding alternatives to incarceration (section 718.2(e)). The *Canadian Criminal Code (1985)* also articulates restorative justice as an important goal in sentencing (R. v. Proulx, 2000), and the Ministry of the Attorney General's Crown Policy Manual makes available diversion at the discretion of the prosecutor (Bloom & Schneider, 2006). Taken together, the legal environment in Ontario was ripe for therapeutic principles and problem-solving courts to develop (Bakht, 2005).

TJ has led to massive changes in the system – including changes to lawyering, judging, the development of problem-solving courts, and changes to the law itself. In Ontario, Canada, we have seen the proliferation of mental health courts for both youth and adults, drug courts, domestic violence courts, and the like. On May 11, 1998 and December 1, 1998 respectively, Ontario saw the first Mental Health Court and Drug Treatment Court in Toronto's Old City Hall, spearheaded by Justices Ted Ormiston and Paul Bentley (Cohl, Lightstone, & Thomson, 2015). This has expanded to 19 mental health courts in Ontario as of April 2017.

3. Therapeutic jurisprudence and persons with IDD: the relationship between bottles and liquid

Wexler has continued to pursue and develop the details and landscape of TJ in last few years. Interestingly, Wexler (2014a,b) provided valuable insight into the TJ framework with the metaphor of bottles and liquid. He stated:

> A useful heuristic is to think of TJ professional practices and techniques as "liquid" or "wine," and to think of the governing legal rules and legal procedures—the pertinent legal landscape— as "bottles" (Wexler, 2014a,b, p. 464).

The metaphor of a bottle and liquid serve to distinguish between elements that make up law and legal rules, from practice and implementation. In another paper, Wexler (2014a,b) expands on the metaphor of bottles and liquid, adding:

> Bottles vary, too, according to whether they are "clear" or "cloudy"—whether they are straightforward and simple to understand or whether they are ambiguous. From a TJ perspective, some of the most interesting bottles are cloudy in the sense that, on initial reading, they may appear to be rather "TJ unfriendly," but, on closer analysis, they may be susceptible to a practical interpretation consistent with desirable TJ practice. What is especially interesting with this type of bottle is the importance of filling the bottle in practice with high-quality TJ liquid (Types of Bottles, para 2).

Wexler's metaphor of the bottle/liquid is instrumental in understanding and reflecting on the role that the law plays in relation to the practices and implementation of TJ, including its strengths and weaknesses. It is critical to examine how the law is structured to give rise to and guide the implementation of therapeutic jurisprudence principles. For without the right bottle, the liquid may not "fit" or be fitting – in being too much, too little, or not the quality that was intended. At the same time, the bottle might not be appropriate for the liquid. The practices, in other words, might be TJ friendly, and are not consistent with the legal structure or bottle, requiring revision to or addition, to guide court actors in a way that is fitting to the desired outcomes. According to Wexler, restorative justice and procedural justice are the "vineyards" of TJ ("The Vineyards, para 2), supporting and co-existing to provide TJ-friendly processes and outcomes to accused, victims, and other stakeholders involved in the initial legal conflict.

Under Section 2 of the *Canadian Criminal Code (1985)*, the legal concept of "mental disorder" is defined as a "disease of the mind" including "…any illness, disorder, excluding however self-induced states caused by alcohol or drugs, as well as transitory states, such as hysteria or concussion" (R. v. Cooper, 1993). The legal definition is intentionally broad to include a number of impairments that could impact intent and decision-making, including intellectual and developmental disability. Typically, intellectual disabilities, mental health issues or dual diagnosis are legally relevant, beginning with the standard of fitness to stand trial if they are relatively severe. In Canada, the test for fitness to stand trial requires persons to be able to communicate to counsel, understand the charges and proceedings, but not necessarily make decisions within his or her best interests (Bloom & Schneider, 2006).[1] Therefore most individuals who have a "mental disorder" under the law are fit to stand trial. Persons with IDD may be fit, but still require substantial assistance and support to meaningfully participate in the criminal process as accused, victim or witness (Bloom & Schneider, 2006).

The implication of the structure of the law in Canada is twofold. First, the law is broad enough to include a variety of conditions that might impair an individual. This is, arguably, a positive response since it is clear that there are multiple ways in which an individual's intent to behave or behaviour itself can be impacted. Second, the breadth and bulk of impairments are psychiatric disorders, rather than cognitive disorders or the like, which can make the "bottle", or the law, less clear about the range of distinctive impairments. In this sense, the law lacks specific guidance to justice actors in thinking about differences among cognitive and developmental strengths and weaknesses other than fitness to stand trial.

There is some evidence about the extent to which the cloudy bottle might be contributing to a perceived homogeneity of mental disorders from the perspective of front-line actors – police, lawyers, and Crown prosecutors. In a small exploratory study in Ontario, criminal justice professionals were asked to define mental illness compared to intellectual disability. The authors found in general, the court actors lacked clarity between the two concepts (Marinos et al., 2017). What this suggests, then, is for a variety of reasons, the legal concept of 'mental disorder' is likely a contributing factor to at least some of the gaps that persons with IDD are experiencing when they become justice-involved.

Understanding the relationship between bottles and liquid in the context of mental health courts in Ontario requires research. Wexler (1997) articulated the need for research on the extent to which TJ is being implemented and its implications:

> …the therapeutic jurisprudence lens generates empirical questions: one may speculate on the therapeutic consequences of various legal arrangements or law reform proposals, but empirical research is often necessary to determine with confidence whether the law actually operates in accordance with the speculative assumption (p. 234).

Overall, relatively less attention has been given to persons with IDD in conflict with the law in Ontario compared to persons with mental illness. In the next section, we consider the use of problem-solving courts for persons with IDD within the literature.

[1] This is known as "limited cognitive capacity" (Taylor (1992), 77C.C.C. (3d) 551, 17C.R. (4th) 371, 11 O.R. (3d) 323 (Ont. C.A.)]. (Taylor (1992), 77C.C.C. (3d) 551, 17C.R. (4th) 371, 11 O.R. (3d) 323 (Ont. C.A.).

4. Current court supports for persons with IDD in Ontario, Canada

At this time, there is not a separate problem-solving court model for persons with IDD in Ontario. As mentioned earlier, in jurisdictions that have mental health courts, matters involving a person with IDD may be diverted from the regular court system (Hamelin et al., 2012). Regardless of the presence of a mental health court, many jurisdictions have a case manager to assist persons with IDD and their caregivers to navigate the criminal justice system. Initiated in 2006, the role of Dual Diagnosis Justice Case Manager (DDJCM) is a court and community-based support for persons with IDD who are in contact with the justice system (SNSC, 2013). At the advent of this program, there were twelve full-time case managers funded for the entire province; however, it has grown to 23 case managers working full-time and part-time across the province. The key responsibilities of the DDJCM is to provide the following services: consultation with justice professionals regarding persons with IDD, available services, and information about intellectual and developmental disabilities; develop a treatment plan that focuses on community-based interventions to address the client's needs to avoid further criminal justice involvement; plan for release from the detention to facilitate successful transition back into the community; coordinate information between all relevant parties and make referrals to necessary services in the community on the client's behalf; and advocate for and monitor diversion from the criminal justice system (SNSC, 2013).

At this time, there is no evidence regarding the effectiveness of the DDJSM program in Ontario (e.g., reduction in recidivism or sentences, increased knowledge of CJS professionals, or improved quality of life). Anecdotal evidence provided by DDJCM's has indicated that challenges included: a missing diagnosis lengthening the process of accessing services, long waitlists for developmental services or lack of appropriate services, lack of community case management for complex cases, and large geographic territories (i.e., the Southwestern Ontario DDJCM is responsible for four counties in the province) (SNSC, 2013).

5. The use of problem-solving courts with persons with IDD

Mental illness and intellectual disabilities have shared a history regarding legislative accommodations (Hamelin et al., 2012). Given the unique needs and barriers of persons with IDD in the criminal justice system, problem-solving courts (specifically mental health courts) hold great promise. Some of the possible benefits for persons with IDD include having dedicated, trained staff able to make the necessary accommodation for cognitive deficits to increase participation of individuals with IDD in the courtroom; and reducing the number of persons with IDD being incarcerated by redirecting them to more appropriate community services. That being said, based on the current research and literature regarding problem-solving courts (particularly mental health courts) in Canada, several considerations must be addressed to maximize the benefits for persons with IDD.

5.1. Marginalization and medicalization of a diagnosis

As stated in a previous section, intellectual and developmental disabilities were previously understood from a biomedical perspective that focuses on an individual's inherent deficits or flaws (Penney, 2002). Increasingly, more organizations (e.g., United Nations, American Association for Intellectual and Developmental Disabilities) are adopting a more holistic definition of what constitutes a disability (Ferrazzi et al., 2013; Kaiser, 2011; Shogren, 2013). They identify that

> disability [is] a form of diversity and the barriers experienced by people with disabilities [are] not [seen] as inherent to the individual, but as a result of the oppression and discrimination from a society that [does] not integrate and accommodate people who learned, moved, and interacted in diverse ways (Shogren, 2013, p. 26).

That is, social, cultural, and systemic factors may intersect with an individual's impairment to create or exacerbate the experience of having a disability. For example, an individual with a moderate intellectual disability who has a history of multiple foster home placements, and more physical impairments that resulted in more absences from school may appear more disabled than an individual with the same intellectual disability from an intact home environment, with fewer physical impairments, and fewer absences from school. It is important for problem-solving courts and its members to accommodate this shift in perspective regarding disability since it may have an impact on the stigma associated with being identified as a member of a special group (i.e., intellectual or developmental disability) within the criminal justice system and have implications for the interpretation of the philosophical underpinnings of mental health courts.

Several authors writing about problem-solving courts in Canada have identified that in order for persons to be considered for diversion, they must identify that they are a member of a particular group in order to be eligible (CAMH, 2013; Ferrazzi, Krupa, & Lysaght, 2013; Kaiser, 2011). For some problem-solving courts (e.g., drug treatment court or domestic violence court), the nature of the offence is enough to indicate a need for a diversion to a specialized court. However, for access to other problem-solving courts (e.g., Aboriginal courts and mental health courts), there is a reliance on the individual or a caregiver to identify the person is a member of a special population in order to participate. These authors have further identified that one of the consequences of having to identify as a member of minority group, particularly in the case of mental illness, is stigma (Ferrazzi et al., 2013; Hannah-Moffat & Maurutto, 2012; Heerema, 2005; Kaiser, 2011). Many problem-solving courts identify which individuals should be diverted using biomedical definitions (e.g., DSM-5 diagnosis) of mental illness and arguably IDD. Kaiser (2011) suggested that by identifying individuals according to diagnosis and diverting them into a separate court strengthens the message that persons with mental illness (and IDD) are a special population, whose behaviour is threatening and/or disruptive enough to warrant special attention. Given this stigma, it is unsurprising many individuals with mental illness or IDD would often prefer not to be identified, and perhaps are more comfortable with being viewed as “bad” rather than “mad.”

Secondly, the perspective of justice professionals may influence the interpretation of the philosophical assumptions of mental health courts. Heerema (2005) identified that in addition to TJ, a mental disorder must be perceived as a treatable condition. This perception of a mental disorder as a treatable condition implies that the law can be used to find solutions that will address the underlying reasons for an offender's criminal behaviour. If justice professionals use diagnostic criteria (i.e., from the DSM-5) to classify and understand mental illness, it invites psychiatry to the team with its host of treatments (e.g., medications, psychosocial treatments) to address the needs of the individual. This proves to be a challenge for cases involving persons with IDD since it is typical that intellectual and developmental disabilities cannot be treated in the same manner as mental illness (i.e., there are not prescribed treatments to address cognitive impairments and the associated behavioural characteristics) (Heerema, 2005). In contrast, if justice professionals and problem-solving courts develop a more holistic perspective of intellectual and developmental disabilities (such as the one found the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)), the focus will shift from ‘fixing’ individual deficits (i.e., cognitive impairments) to addressing the possible influences in the environment that may reduce recidivism. As Dube (2016) indicated, “individuals with developmental disabilities are not necessarily in need of medical treatment to control their behaviour and may be incapable of meeting standard conditions

imposed by the courts as an alternative to incarceration" (p. 86). In fact Ferrazzi et al. (2013) suggested:

> Cases that might be appropriate for MHCs [mental health courts] or diversion could be those in which the behaviour underlying the perceived crime is significantly linked to the unique environmental, social, and biomedical circumstances faced by accused individuals (p. 53).

5.2. The promise of supports and services

The goal of problem-solving courts is to divert persons at risk out of the criminal justice system to more appropriate community-based supports and services in a more collaborative and less adversarial process (Davis, Peterson-Badali, Weagant, & Skilling, 2015). Bakht (2005) suggested that

> the collaborative, integrated, multi-disciplinary approach utilized in problem-solving court processes likely achieve these objectives more effectively than the traditional system, which largely leaves these in the hands of either defence counsel or probation authorities, neither of which have the co-ordinated and directed resources that are available to the problem-solving court (p. 229).

Several Canadian authors have argued that problem-solving courts are an effective way of addressing criminality, without focusing on root causes related to other systems (Heerema, 2005; Kaiser, 2011). These authors question whether the individuals being served by problem-solving courts would be better served by addressing the deficits and gaps in community-based social services before the offences occur (e.g., more addiction treatment programs, opportunities for counselling) (Kaiser, 2011; La Prairie, 1999). Some argue that one of the possible consequences of failing to improve the mental health and psychiatric services in the community is that problem-solving courts will become a "surrogate mental health provider" for persons with mental illness and judges will become "service brokers" (Heerema, 2005, p. 259; Kaiser, 2011, p. 22).

Adequate and appropriate supports for persons with IDD in Ontario are strained. There have been numerous critics of the Ministry of Community and Social Services for not providing persons with IDD with the community-based programs and resources to be successful (Dube, 2016; Spindel, 2013). In a report compiled by the Ontario Ombudsman, it was identified that 14,402 adults with IDD were waiting for funding to pay for community participation; and 12,808 individuals were on the waitlist for residential services (Dube, 2016). Given the long waitlists and lack of community funding and resources for both persons with mental illness and IDD, there is great risk that mental health courts will become an opportunity to "reshuffle the lines for [much needed] social services" (Heerema, 2005, p. 270; Kaiser, 2011). Individuals who are in need of supports and services may be diverted from waiting in the community to the criminal justice system in an effort to jump the queue. Further examination is needed to demonstrate whether there is validity to this claim; however, Davis et al. (2015) suggested that a youth mental health court may have helped to facilitate connection with new services that were previously unavailable. They found that nearly half of the youth in their study were referred to new services as a direct result of being involved in the court; whereas, the remaining referrals were to agencies the youth were already connected to and receiving support from (Davis et al., 2015). It is possible that these results reflect differences in the mandate and resource allocation for youth compared to adult services. In contrast, The Centre for Addictions and Mental Health (CAMH;, 2013) suggested that mental health court workers (working in the adult sector) reported that they find it challenging to link individuals with mental illness to community services due to wait times and lack of appropriate services. Moreover, these workers also reported that there were limits on the number of people they could support, and they had to limit their support to individuals with the greatest need (CAMH, 2013).

One major issue with using the criminal justice system in a specialized way to address increasingly more individuals than what was previously dealt with by the courts is known as "net-widening" (Kaiser, 2011; Bakht, 2005; Hannah-Moffat & Maurutto, 2012; La Prairie, 1999). The claim relates to diversionary programs that refer more individuals to "treatment" that would, in the absence of the program, be released because of the minor nature of the offence (Roesch, Ogloff, & Eaves, 1995). The concept predates the development of problem-solving courts, back to the expansion of outpatient commitment in the 1980s (Perlin, 2000). With respect to problem-solving courts, net widening was used in the United States to describe the phenomenon of including "drug offenders that would otherwise have been diverted out of the criminal justice system and received minimal sanctions" (Bakht, 2005, p. 233). Net-widening may occur when sanctions are imposed for offences that historically would not have been addressed (e.g., nuisance offences) or by imposing sanctions not typically imposed within the typical criminal justice system (Kaiser, 2011; Bakht, 2005). While the increased number of charges may reflect the good intentions of police officers and court officials, the practice also carries the risk of increasing the number of individuals incarcerated due to failing to meet the goals of a treatment plan (e.g., the charges being stayed if the offender fails to complete treatment or chooses not to take a recommended medication) (Bakht, 2005; Kaiser, 2011).

At this time, there has not been any research examining the pathways of persons with IDD into the criminal justice; however, some prevalence data indicated that persons with IDD are over-represented in the criminal justice system and they are being charged as a result of behaviours/crimes that could be classified as a "nuisance," such as public mischief or petty theft (Jones, 2007; SNSC, 2013).

5.3. Congruency of supports and services

Authors have identified that the success of the problem-solving court lays in the ability to match supports and services to promote good mental health and to the offence-related variables (Ferrazzi & Krupa, 2016a, Ferrazzi & Krupa, 2016b; Heerema, 2005). Davis et al. (2015) identified the importance of having access to interventions for both mental illness and criminogenic needs to reduce recidivism. One of the goals of their study was to identify how a youth mental health court in Toronto, Ontario addressed the mental health and criminogenic needs of the individuals being seen. They identified that half of the participants received treatment that was appropriate to address a mental health need (e.g., substance abuse); whereas 26% of referrals were made for generalized treatment. Further examination of the treatment referrals to determine whether criminogenic needs were addressed revealed that only half of participants received treatment to address their criminogenic need. Other authors have also identified the importance of a biopsychosocial approach to reducing recidivism (Bakht, 2005; Marinos & Gregory, 2016; Ferrazzi & Krupa, 2016a; Ferrazzi & Krupa, 2016b). That is, in order to reduce recidivism, it is important to address not only the criminal behaviour, but also the extenuating circumstances that may have contributed (e.g., homelessness, poverty, skill deficits). Bakht (2005) identified that as part of the Toronto drug treatment court, participants are required to demonstrate a genuine commitment to a lifestyle change by addressing issues related to housing, interpersonal skills, and education and training. This suggests that a range of services available to problem-solving courts need to move beyond criminal behaviour to solutions that also address issues related to social and economic challenges and psychosocial functioning (Heerema, 2005; Kaiser, 2011; Slinger & Roesch, 2010).

Lastly, despite the efforts of the ministries involved, services for mental health and addiction, and developmental disabilities remain fragmented (Glasgow & Carter, 2012). Accessing services for persons with IDD, particularly dual diagnosis (intellectual disability comorbid

with a mental health diagnosis) is difficult. Challenges finding appropriate community-based supports and services is compounded by some professionals' sustained beliefs regarding persons with IDD and their ability to participate in certain treatments; poor assessments to address whether the offence was a result of the presence of a disability, a mental illness, or both; and lack of evidence-based best practice guidelines for treating persons with IDD (Glasgow & Carter, 2012). For example, persons with IDD may be excluded from substance abuse treatment programs due to the clinician's beliefs about their ability to access alcohol and drugs, or the inability to modify the program in a way that is meaningful for someone with cognitive impairments. Criminal justice professionals may be further challenged by the lack of congruent supports and services, in addition to the availability of supports and services when developing a treatment plan. Furthermore, it may result in a "dartboard" approach to treatment, in which plans are cobbled together with services that are available in hopes that they will work.

5.4. Proportionality of supports and services

The promise of the sentencing principles in the *Criminal Code of Canada* (section 718.2(d), (1985) is that treatment will be the least intrusive, least onerous, and least restrictive (Bakht, 2005; Kaiser, 2011). When individuals seen in a problem-solving court are successfully able to access the necessary supports and services, consideration also needs to be given to whether the supervision by the court or the length of the treatment program exceeds what would have been received through incarceration or probation for the offence (Kaiser, 2011). Critics of problem-solving courts have cautioned that similar to diversion to forensic programs and community treatment orders (involuntary outpatient commitments), problem-solving courts "risk the expansion of the medical and judicial control of behaviour, the misallocation of treatment resources, and a compromise of procedural fairness and open justice" (Ferrazzi & Krupa, 2016a, p. 160). The fear is that vulnerable individuals may be coerced into participating in supports and services that are more intrusive and restrictive than what would have been experienced in the regular court (Ferrazzi & Krupa, 2016a; Ferrazzi & Krupa, 2016b; Kaiser, 2011). Similarly, concern has been expressed about the privilege given to the medical understanding and treatment of behaviour and culture based on lengthy treatments including medication, mental health services, and hospitalization for housing (Ferrazzi & Krupa, 2016b).

As Perske (2004) identified, "[an individual with IDD] can be the easiest to bear false witness against, the easiest from whom to coerce a confession, the easiest to demonize in the press, [and] the easiest to ignore when it comes to fight for constitutional rights" (p. 485). Given the vulnerabilities identified in this quote and the history of institutionalization of persons with IDD, it is imperative that consideration is given to the proportionality of intervention. Possible solutions may be found in previously mentioned considerations. For example, the use of a holistic definition of disability will create opportunities for collaboration between the court and other professionals outside of psychiatry (e.g., occupational therapists, speech and language pathologists, behaviour analysts). In addition to preserving the principles of proportionality, further consideration should be given to an individual with IDD's memory and attention since this may influence the relevance of the treatment or intervention. Court procedures and interventions that are drawn-out may lose their relevance to the individual with IDD and in turn, may not accomplish what was intended. For example, if a matter is remanded even once, an individual may not make the link between their criminal actions, the court proceedings, and the sentencing due to the passage of time between the behaviour and the consequence. Furthermore, persons with IDD may be at risk of not following through on diversion conditions, attending court dates, and meetings with probation officers for the same reasons, which may jeopardize their ability to remain in a diversion program and/or increase their risk of additional charges.

5.5. Informed consent and genuine inclusion

Finally, consideration needs to be given to whether the accused individual is making an informed decision to participate and whether their inclusion in the proceedings are genuine. Procedurally, if the accused is able to stand trial, they are told about the option to be diverted into the problem-solving court route and asked if they would like to participate (Heerema, 2005; Marinos & Gregory, 2016). However, as Erickson, Campbell, and Lamberti (2006) identified, there is little evidence at this time to suggest that measures are enacted to ensure that persons with IDD are assessed and deemed competent. These authors suggested that it is "imperative for mental health courts to have appropriate safeguards in place to protect incompetent defendants from accepting plea bargains that may lead to mental health treatment but violate fundamental constitutional protections afforded to all criminal defendants" (Erickson et al., 2006, p. 340).

Beyond ensuring that an explicit effort made to secure informed consent, several authors have questioned the validity of the decision to be diverted to a mental health court and have described it as a "false choice" (Heerema, 2005, p. 269). They suggest that the accused individual's cost-benefit analysis of participating in the problem-solving court is shaped by social variables (e.g., poverty, marginalization, stigma) rather than the personal risks associated with accepting treatment (Erickson et al., 2006; Hannah-Moffat & Maurutto, 2012; Heerema, 2005; Kaiser, 2011). For example, Erickson et al. (2006) identified that participation in mental health courts may have an impact on an individual's employment, residential security, and rights as a citizen (e.g., voting). It is therefore imperative that problem-solving court professionals explicitly and completely explain the benefits and risks associated with participation in the diversion to individuals with IDD.

Weller (2016) identified that Article 12 (Equal recognition before the law) and Article 13 (Access to Justice) of the *United Nations Convention on the Rights of Persons with Disabilities* (UNCRPD) are both important in ensuring that individuals with IDD are able to fully participate in matters associated with the law. She identified that "without participation, access to justice is limited and the right to equal recognition before the law is compromised" (Weller, 2016, p. 1). Specifically, the UNCRPD states that persons with disabilities are entitled to "procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages" (United Nations General Assembly, 2007, p. 9). This includes shifting from perceptions based on the assumptions that persons with IDD lack the mental capacity to participate in legal proceedings to supported decision-making that enables active participation consistent with the rights enshrined in the UNCRPD (Ferrazzi et al., 2013; Weller, 2016). Furthermore, Article 13 indicates that measures should be taken to "promote appropriate training for those working in the field of administration of justice, including police and prison staff" (United Nations General Assembly, 2007, p. 11). Several manuals have been developed to provide guidance and recommendations to criminal justice professionals in Ontario regarding interactions with persons with IDD (e.g., Goldberg, 2011; SNSC, 2013). However there has been little research regarding whether these recommendations have been implemented by criminal justice professionals; and if so, whether they are effective for addressing the needs of persons with IDD in both regular criminal justice proceedings and problem-solving courts. To date, little is known about the understanding of persons with IDD regarding the processes of the criminal justice system (e.g., what it means to plead guilty) (Hamelin et al., 2012). Unless there are obvious indications (e.g., severe expressive language deficits) indicating that the person is at risk of not understanding court matters, many criminal justice professionals are at risk of assuming that the individual is comprehending important decision-making processes. This can become more challenging when there are severe discrepancies between an individual's expressive and receptive language skills (i.e., ability to use compared to understand

language), giving the impression that the individual is more competent than they appear – the "cloak of competence" (Hamelin et al., 2012).

It is important to ensure that there is genuine inclusion of the person with IDD in the court process. Due to the reliance on caregivers for support, professionals tend to ignore the individual and focus on the interacting with the caregiver (Ferrazzi et al., 2013; Hamelin et al., 2012). Criminal justice professionals need to ensure that the individual with IDD is included in the discussion within the court proceedings and in the development of the treatment plan. Similar to the youth mental health courts, caregivers can be used to collect collateral information regarding the individual and clarification when needed; however, the youth is encouraged to participate in the court process, including being able to ask the judge questions about court proceedings (Davis et al., 2015; Marinos & Gregory, 2016).

At this time, ways to promote the inclusion of persons with IDD within several social institutions is still developing, and the criminal justice system is no exception. When persons with IDD are seen by the criminal justice system, they are still often not included in the criminal proceedings, even though there is an expectation of fitness and being able to direct their own defence (Hamelin et al., 2012). While the DDJCM provides education regarding disabilities and advocate for appropriate treatment of the accused individual with IDD, there is no indication that they ensure there is genuine inclusion of the person with IDD (e.g., being allowed to participate in court proceedings, making decisions regarding treatment plans) (Southern Network of Specialized Care (SNSC), 2013).

6. Conclusions

Borrowing Wexler's metaphor, one can conclude that the legal landscape in Ontario is relatively TJ-friendly with some cloudiness in the bottles. A number of areas have been identified for improvement, with the potential of producing high-quality liquid (Wexler, 2014a,b). Problem-solving courts appear to produce a reduction in recidivism and satisfaction among those who participate in their programs and it is reasonable to expect that it has potential to support persons with IDD who are involved in the criminal justice system (Heerema, 2005; Marinos & Gregory, 2016). At this time, there appears to be some variance between types of problem-solving courts and jurisdictions regarding implementation (Ferrazzi & Krupa, 2016b; Slinger & Roesch, 2010). While inconsistency may create barriers for research for best practice, problem-solving courts need to be responsive to their community, and therefore, will continue to vary from community to community.

With regards to persons with IDD, there are three possible models that should be examined:

1. Persons with IDD continue to be seen in the regular court stream and TJ is "mainstreamed" (Wexler, 2014a,b). Court professionals receive increased training regarding how to identify and interact with someone who has an IDD. Case managers will help persons with IDD to participate in criminal proceedings, while helping to connect justice professionals with community-based services, including those with developmental expertise, that can address the needs of persons with IDD. Several authors have advocated that rather than separate courts, the principles of TJ be implemented by criminal justice professionals in the regular court stream for all matters (Bakht, 2005; Ferrazzi et al., 2013; Goldberg, 2011). In addition, they advocate for interdisciplinary teams be available for court professionals to support individuals through the process (Bakht, 2005; Ferrazzi & Krupa, 2016a).
2. Persons with IDD are addressed in mental health courts, and the abovementioned considerations are taken into account for training court professionals and improving court process. The training should be multidisciplinary, including expertise in the developmental sector.
3. Persons with IDD have a separate court outside of the regular court, and a mental health court with trained personnel and court actors that address offences committed by persons with IDD exclusively. While there are not any of these courts in Canada at this time, an example court is seen in Western Australia. The Intellectual Disability Diversion Program (IDDP) meets one afternoon per week and operates consistently with what is observed in other mental health courts, with the added benefit of having a judge, coordinator, and support officer responsible for supporting individuals through the court process (Law Reform Commission of Western Australia, 2008). Although the operation of this court is consistent with the principles of a problem-solving court, further consideration needs to be given to whether separate courts, as Ferrazzi et al. (2013) identified, aligned with the universalist principle of the UNCPD, discourages segregation and promotes "transforming structural and social norms so as to include all human diversity rather than the specialized accommodation" (p. 44).

Regardless of the selected model, TJ provides an opportunity to accommodate persons with IDD in the criminal justice system in a way that recognizes who they are as both individuals and their needs as persons with an IDD.

Declaration of interest

None.

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