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Results from a national survey of Crown prosecutors and defense counsel on impaired driving in Canada: A "System Improvements" perspective

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ABSTRACT

Introduction: This article summarizes the main findings from a study designed to examine the legal process in Canada as it applies to alcohol-impaired driving from the point of view of Crown prosecutors and defense counsel, and to identify evidentiary or procedural factors that may impact the legal process, the rights of the accused, and interactions of all parts in the legal process. *Method:* The data in this study were collected by means of a survey that was mailed out to the population of Crown prosecutors and defense counsel in Canada. In total, 765 prosecutors and 270 defense lawyers or an estimated 33% of all Canadian prosecutors and 15% of defense lawyers completed and returned the questionnaire. The "systems improvement" paradigm was used to interpret the findings and draw conclusions. Such an approach acknowledges the importance of the context in which countermeasures are implemented and delivered and the structures or entities used to deliver countermeasures to a designated target group. *Results:* Results on type of charges and breath alcohol concentration, caseload, case outcomes, case preparation time, conviction rate at trial and overall conviction rate, reasons for acquittals and time to resolve cases are described. *Discussion:* The findings from this national survey suggest that there are important challenges within the criminal justice system that impede the effective and efficient processing of impaired driving cases. Some of these challenges occur as a function of practices and policies, while others occur as a function of legislation. *Impact on industry:* This study illustrates that a "system improvements" approach that acknowledges the importance of all elements of the criminal justice system and the interaction between those elements, can be beneficial in overcoming the alcohol-impaired driving problem.

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1. Introduction

1.1. Background

From the mid-1980s through to the late 1990s Canada achieved significant declines in alcohol-impaired driving fatalities and injuries. This progress was paralleled by a dramatic shift in public attitudes from complacency and apathy to a situation where drinking and driving was considered by many to be socially unacceptable and reprehensible. However, the progress observed in the 1980s and 1990s stalled by the end of the latter decade and little progress has been made since then. The problem remains a significant one – for example, in 2005, 851 people were killed in alcohol-related motor-vehicle crashes on public highways in Canada and approximately one-third of all fatal road crashes were alcohol-related (Mayhew, Brown, & Simpson, 2008). Not surprisingly, impaired driving remains a priority concern among Canadians – more than 80% believe it is a serious problem and one of greater importance than all other road safety issues (Vanlaar, Emery, & Simpson, 2007; Vanlaar, Simpson, & Robertson, 2008).

The lack of recent progress has been considered somewhat paradoxical since it was during this time that many new laws and regulations were introduced that enabled the use of countermeasures such as: (a) alcohol ignition interlocks (i.e., breath testing devices that are installed in a vehicle and that require the driver to provide a breath sample below a pre-set limit before the driver can actually start the car; for an overview of research, technology and judicial concerns regarding interlocks see Robertson, Vanlaar, & Simpson, 2006); and (b) administrative license suspension and vehicle impoundment, which independent evaluations have demonstrated to be effective in dealing with impaired drivers (e.g., Beck, Rauch, Baker, & Williams, 1999; Beirness, 2001; Beirness, Mayhew, & Simpson, 1997; Voas & Tippetts, 1994; Voas, Marques, Tippetts, & Beirness, 1999; Voas, Tippetts, & Taylor, 1996). In the presence of such measures, it was expected that continued declines in alcohol-related

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crashes would be evident. As described above, however, this was not the case. Since the year 2000, increases in the number of alcohol-related crashes have been recorded in both Canada and the United States and progress has halted.

This somewhat perplexing situation has led a number of investigators to speculate that a primary problem is not with the countermeasures, laws, and regulations, per se, but rather with how they are applied, or more generally, with the system in which they operate. To some extent, this is not surprising, given that the volume of new laws and regulations pertaining to impaired driving have served to increase the complexity of the system considerably. This complexity has opened the door for inconsistencies, weaknesses, and loopholes in the system. Technical evidentiary issues are becoming more common, trial delays are increasing, and "evidence to the contrary" defenses may allow offenders to avoid conviction. This suggests that there may be impediments in the Canadian criminal justice system that can result in impaired drivers avoiding arrest, prosecution, conviction, and sanctioning, and also suggests that these problems need to be overcome if further gains are to be made in dealing with the problem of alcohol-impaired driving. Such a possibility is certainly consistent with findings from recent studies in the United States, which revealed that the legal system for dealing with impaired driving is replete with inconsistencies and "loopholes" that compromise its efficiency and effectiveness (e.g., Goldsmith, 1992; Hedlund & McCartt, 2001; Jones, Lacy, & Wiliszowski, 1998; Krause, Howells, Bair, Bendick, & Glover, 1998; Meyer & Gray, 1997; Rehm, Nelson, MacKenzie, & Ross, 1993).

The scope and the nature of system problems in the U.S. criminal justice system has also been extensively documented in a comprehensive series of studies (Robertson & Simpson, 2002a,b, 2003a; Simpson & Robertson, 2001) conducted by the Traffic Injury Research Foundation (TIRF), based on the experiences and perceptions of criminal justice professionals across the United States – 2,763 police officers, 390 prosecutors, 900 judges, and 890 probation and parole officers – gathered by means of focus groups and national mail surveys. Of interest, the problems and solutions identified in the U.S. research were highly comparable across states, despite the rather substantial differences in their justice systems and laws. Accordingly, it would not be surprising if similar problems were identified in Canada despite the recognized differences between the Canadian and U.S. justice systems and laws.

In Canada, concern about the effectiveness of the legal system for dealing with alcohol-impaired driving cases has also been an issue of historical concern, and research to determine the validity of this concern and identify where problems exist has been undertaken several times since the 1980s. Prior research includes: a 1987 survey of Ontario prosecutors designed to understand the strengths and limitations of the adjudication process for dealing with drinking-drivers to identify feasible improvements (Vingilis et al., 1988); a 1992 evaluation of the 1985 amendments to alcohol-impaired driving legislation based on interviews with front-line police officers and lawyers from several different jurisdictions (Moyer, 1992); and also a 1997 nationally representative survey of front-line police officers in Canada (Jonah et al., 1997) to determine their attitudes and perceptions regarding the detection of impaired drivers, the handling of charges, court proceedings, and sanctions.

This article, based on a report by Robertson, Vanlaar, and Simpson (2008), highlights the main findings from a study designed to further examine the legal process in Canada as it applies to alcohol-impaired driving from the point of view of Crown prosecutors and defense counsel, and to identify evidentiary or procedural factors that may impact the legal process, the rights of the accused, and interactions of all parts in the legal process. The study was conducted by TIRF under funding from Transport Canada and the Canadian Council of Motor Transport Administrators (CCMTA) and was based on an earlier survey of law enforcement in Canada conducted by Jonah et al. in (1997).

Generally speaking, the justice system in Canada is very comparable to that in the United States. However, there are a few important distinctions. Although systems in both countries give consideration to both the rights of the community (the "greater good") and individual rights, the former is given greater emphasis in Canada, whereas as the latter receives greater emphasis in the United States. Another distinction is that prosecutors (known as Crown prosecutors because they represent the "Crown" or government) are appointed and not elected. However, the role of the prosecutor in Canada is highly comparable to that of a district attorney, county attorney, or prosecuting attorney. Similarly, judges are also appointed in Canada.

In Canada, there are two primary impaired driving charges that are laid (called "filed" in the United States) by either the police or the Crown depending on the jurisdiction. The first is an impairment based offense and the other is a per se offense (the legal limit according to this per se offense is 0.08%, with lower administrative limits in most provinces and territories). Most states in the United States also have these two types of impaired driving charges. Finally, in Canada charges can proceed by summary conviction through Provincial Court (comparable to a misdemeanor in the United States) or by indictment (comparable to a felony in the United States) through Superior Court. The distinction between summary conviction and indictable offenses is a function of the severity of the offense and the level of penalties that may be applied. Similar to the United States, the vast majority of impaired driving cases are summary conviction offenses and are processed through the lower courts. A unique feature in Canada is the "hybrid" offense. These offenses can be charged as either a summary conviction or an indictable offense depending on the circumstances. Generally, the Crown prosecutor is able to decide by which method the case will proceed.

1.2. Objectives

The purpose of this study was to survey Crown prosecutors and defense counsel to obtain contemporary information pertaining to the prosecution of impaired driving cases; more specifically, to identify problems that impede effective and efficient prosecution and to determine how these problems can be overcome. Accordingly, the survey was designed to gauge the attitudes, experiences, and perceptions of lawyers with regard to the legal system vis-a-vis alcohol-impaired driving in Canada. To achieve these objectives, the issues at stake were studied using a "systems improvement" paradigm.

1.3. A "systems improvement" paradigm

Since 2000, TIRF has worked closely with criminal justice practitioners as part of a comprehensive U.S.-based research effort designed to improve the effectiveness and efficiency of the impaired driving system for dealing with hard core or persistent drinking drivers (see Simpson, Beirness, Robertson, & Hedlund, 2004 and Williams, McCartt, & Ferguson, 2007 for more information about hard core drinking drivers). The goal of this work was to examine priority problems that professionals face at each phase of the justice system and identify practical ways to address these problems. One of the key findings was that similar problems exist at all phases of the justice system and that fixing just one can have positive reverberations throughout. A priority recommendation emanating from this research emphasized the importance of an intimate understanding of the entire *system* in which measures are implemented as a pre-requisite for successfully applying them to any target population (see Simpson & Robertson, 2001; Robertson & Simpson, 2002a,b, 2003a,b). In this respect, "system" refers to the context in which strategies and countermeasures are implemented and delivered (e.g., goals of scheme, how processing of offenders occurs, levels of communication, information-sharing protocols) and structures or entities used to deliver these countermeasures to a designated target group (e.g.,

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