Survey of Lawyers’ Attitudes and Perceptions Regarding Impaired Driving in Canada

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Background
The Criminal Code of Canada (C.C.C.) is a federal statute that applies across the country. Driving with a blood alcohol concentration (BAC) over 80mgs, or refusing to provide a breath sample, became offences under the C.C.C. in 1969, joining the pre-existing offence of impaired driving. There was a marked decline in driving while impaired as measured by the percentage of fatally injured drivers with BACs over the legal limit that began in the early 1980s. This decline was attributed largely to enforcement initiatives such as roadside screening breath tests and evidentiary blood tests; amendments in many provincial Highway Traffic Acts to introduce administrative sanctions such as short term licence suspensions for drivers with BACs in the 40 to 80mg% range, and long term suspensions for drivers convicted of impaired driving as well as public education programs, undertaken to portray impaired driving as socially unacceptable behaviour. However, despite a 30% reduction in the number of fatally injured drivers with BACs over 80mg% from 1980 to 1990, the early 1990’s saw a modest increase in the percentage of fatally injured drivers who were impaired. This was in contrast to continuing reductions in general traffic fatalities during the same period.

As a first step in better understanding the administration of C.C.C. provisions dealing with driving while impaired, Transport Canada, in collaboration with the Canadian Association of Chiefs of Police, conducted a national survey of front-line police officers’ perceptions and attitudes regarding detection of impaired driving, processing of driving while impaired (DWI) charges, criminal court proceedings and DWI sanctions in 1997¹. The research pointed to a number of perceived problems with the legal process that, in the opinion of the police officers, contributed to the difficulty with enforcing the law, among them: pre-trial negotiations regarding the possibility of a guilty plea or sentencing recommendations; lack of preparation by the Crown Prosecutors; time demands on police of court appearances; and acquittals related to evidentiary issues.

It should be pointed out that the police officers’ perceptions regarding convictions or acquittals are necessarily based on their experience with that subgroup of drivers who enter a “not guilty” plea to the drinking and driving charge(s) and opt to go to trial rather than enter a plea to another charge or a guilty plea. The side of the legal process that the police officers do not see involves the accused pleading guilty to the impaired charge(s), or some other charge. In addition, the police officers may not be present throughout the entire trial and may base their perceptions on only that part of the trial in which they participated, i.e. their testimony for the prosecution.
There has been an increase in the penalties for an impaired driving conviction under the C.C.C. Amendments to the C.C.C. in 1985 created new penalties resulting in long maximum periods of incarceration for drivers convicted of impaired driving that causes death or bodily harm. Subsequent changes in 1999 increased the financial penalties on conviction where there is no injury or death, increased the mandatory minimum period of driving prohibition on conviction and introduced the possibility of the use of alcohol ignition interlock devices to decrease the federal order of prohibition on driving anywhere in Canada. In addition, provincial/territorial legislation includes other administrative consequences related to these convictions. As more requirements or preconditions for reinstatement are imposed on convicted drivers such as medical assessment and treatment, use of ignition interlocks and increased fees it becomes more onerous and expensive for drivers to remain in compliance with the sanctions placed upon them by both levels of legislation. Many believe that these increased consequences of conviction motivate the accused persons to exercise their right to a trial, based on the presumption of innocence, requiring the prosecution to prove the charge beyond a reasonable doubt. For a number of reasons in the criminal justice system, the prosecution is unable to meet this standard of proof in all cases. Accused persons retain their driver licence while awaiting trial and take a chance that there will be some element of the case that the prosecutor cannot prove. Drivers want to retain their driving privileges and often view the cost of a defence as a small price to pay. In contrast to the total cost of being in compliance with the medical, technical and administrative requirements in order to return to fully licensed status following a conviction legal fees may seem relatively minor. In addition, the increased burden may increase the incentive for some police officers to use other non-C.C.C. sanctions, such as short-term suspensions, rather than pursue the more serious and onerous C.C.C. charge(s).2

Objectives
The study is a national survey of Canadian criminal lawyers (defence and prosecution), conducted in both official languages. The goal is to produce statistically valid results using regional breakdowns that are similar to those in the 1997 police survey.1

The research objectives are as follows:

- examine the legal process, as it applies to impaired driving, from the point of view of Crown Prosecutors and Defence Counsel;
- identify evidentiary or procedural factors that may impact on the legal process, the rights of the accused and interactions of all parts in the legal process; and
- complement and interpret further the findings that emerged from the survey of front-line police officers.

Methodology
The target population for this survey was currently practicing Canadian criminal lawyers with experience in the area of impaired driving prosecutions within the past 24 months. One of the major challenges involved was the source(s) for a sample frame to ensure a representative sample and, hence, valid results.

Two possible approaches to the sampling design were examined.

The first was to draw the sample from lists of lawyers in each region. An effort would be made to include only those lawyers with some recent experience with impaired driving
cases, wherever possible. Possible sources for compiling the population list of lawyers included:

1. **The Canadian Bar Association (Criminal Law Section)**, and its ten provincial counterparts, (e.g., the Ontario Bar Association). The national organization consists of some 37,000 members; the National Criminal Law Section consists of 1,170 members. Membership in the CBA is voluntary in many provinces and not limited to lawyers in current practice; it is also open to non-practicing lawyers, law professors, law students, notaries and judges. Secondly, while two-thirds of all lawyers in Canada are members of the CBA, it is difficult to say what inherent self-selection bias may exist.

2. **The Criminal Lawyers Association** and/or **The Canadian Council of Criminal Defence Lawyers**. These organizations may or may not have counterparts in other jurisdictions. Although associations such as the Ontario Criminal Lawyers Association and the CBA are potential sources of lawyers, names, the fact that membership is voluntary means that a certain (undefined) subset of lawyers won’t belong, while others may belong to several, eventuating the possibility of sampling the same lawyer several times as well as missing a sector of the population altogether.

3. **The Canadian Lawyer Index’s 2002 Directory of Canadian Lawyers** contains a database of over 45,000 Canadian lawyers on CD-ROM. However, it is not searchable by type of practice (criminal, corporate, environmental, etc.), and therefore does not permit identification of the target population (practicing criminal lawyers).

4. **Provincial and Territorial Law Societies** are the regulating body for the legal profession in Canada. Since there is a requirement for every practicing lawyer in Canada to be a member, it represents a true population. However, their database does not permit the identification of type of law practice, making it an extremely inefficient way of contacting those lawyers at whom the survey is targeted.

5. **Crown Prosecutors Associations**. There isn’t necessarily one in each jurisdiction and some are in their infancy.

6. **Legal Aid**. Where available, was thought to represent a good source of defence counsel practicing in this area (defending those charged with drinking and driving related offences); however, not all jurisdictions provide legal aid for persons charged with these offences and the database may not be offence-driven.

The second possible sampling design involved identifying lawyers who had prosecuted or defended impaired driving cases within the specified time frame. This option for identifying the sample would have involved searching legal case databases to find references to lawyers who had been involved in a prosecution involving a C.C.C. charge related to impaired driving. The search was anticipated to be slow and cumbersome and involve problems of identifying mailing addresses or finding sufficient lawyers for statistically valid results on a regional basis.
Survey Instrument
Given the specialized nature of the target population, a draft set of questions was
developed in consultation with various knowledgeable contacts at the Department of
Justice, the Ontario Ministry of the Attorney General, Canadian Bar Association, Transport
Canada and the Canadian Council of Motor Transport Administrators.

While it was anticipated that only one survey instrument would be created for both groups
(defence counsel and Crown prosecutors), it was expected that the questions would
branch at certain points to accommodate the specifics of prosecution and defence work.

The survey instrument was pre-tested using two focus groups, one for prosecutors and
one for defence counsel. Participants were offered $150 Cdn to participate in the 2 hour
focus group. At the session, the participants were asked to complete the questionnaire as
a subject, and then a facilitator went through the questionnaire question by question in an
time to elicit comments and suggestions on the issues, the wording and process of the
survey.

Results
The original project plan called for a 3-phase project. The first phase involved finalizing
the first draft of the questionnaire and call letter and preliminary focus testing of the survey
instrument. The second phase was to involve focus group testing in each of the five
regions of Canada used in the front-line officer survey. This phase would have finalized
the instrument and assured that any regional differences would be addressed. The final
phase of the project was to conduct the actual survey, either by mail or electronically, an
issue to be addressed in the focus group testing in phase 2.

Initially the design of the survey instrument was an issue. The amount of information that
was requested by the various partners was clearly much more than a single survey was
likely to be able to reasonably collect. It was very apparent from the preliminary focus
groups that the number of questions would have to be limited and that there were some
topics that evoked negative responses and influenced the respondent’s attitude towards
the survey. Wording and legal phrases used in the survey were also an issue, with some
people taking exception to colloquial or “TV lawyers” phrases rather than the correct
Canadian legal terms.

Enticing participants to participate was also a problem, despite the financial remuneration.
The task was made more difficult by the fact the participants had to have dealt with C.C.C.
charges for impaired driving within the past 24 months. There was also some reluctance
from defence lawyers who may not want to be seen to be involved in a process potentially
perceived by some as an attempt to make the laws concerning impaired drivers more
stringent. Some concern was expressed regarding prosecutors criticizing the existing
process, criminal law and the criminal justice system. Of course, the matter of busy
schedules was an issue for all.

A number of conclusions resulted from the original focus group testing. The 3-phase
system proposed in the original proposal was not going to be an efficient and effective way
of undertaking the survey. It was felt that the resources needed to run 5 regional focus
groups would not be worth the expected results and would likely fail in certain regions. In
addition, the sampling plans that had been examined were not likely to be successful. In
the focus testing, prosecutors indicated that they would not likely complete a survey which
arrived by mail or electronically, nor would they be likely to participate based on a letter
from their deputy minister or minister. Prosecutors did indicate that their provincial
jurisdictions hold annual conferences, which are very well attended. They felt the best way to obtain the involvement of prosecutors would be to have the respective crown association endorse the survey and ask interested prosecutors with the requisite experience to attend a session at the conference to complete the survey. A number of sessions would be made available throughout the conference to try and attract as many respondents as possible. It is recognized that this process does not follow the random assignment used in the police survey, but may provide the best source of the largest number of respondents, especially in the larger jurisdictions.

There were different problems associated with Defence Counsel. No such central conference exists at which one could try to reach this group in large numbers. In response, the project group has been in touch with the Defence Counsel Association and is attempting to work with this group to distribute and collect the survey. It was felt that if the Association took responsibility for the distribution and collection of the completed surveys they could protect their members’ privacy and encourage them to ensure that defence concerns are included in any further suggested changes to the C.C.C. with respect to impaired driving.

Rather than the regional focus groups originally proposed in the project plan, the prosecutors and defence associations were asked to review the questions with respect to the issues and wording and to highlight possible contentious issues or issues which would be important to their constituents which were not covered in the survey.

Discussion
A survey of legal professionals working in the area of impaired driving is much more difficult than the survey of police officers that was conducted as the first part of this series. Police services are easier to find and, with the support of senior officers, there was a reasonably good response rate. On the other hand, prosecutors and defence counsel are two very distinct groups and in essence this involves two surveys operating at the same time. There does not seem to be an efficient and effective way to determine which lawyers routinely deal with C.C.C. impaired driving cases, and for those that do, there is a fair amount of concern and/or suspicion about participation in this type of consultation conducted by the government or government-related agencies.

These two groups represent a quite significant component within the legal system that processes impaired drivers. These groups have important but diverse perspectives regarding the process, the law and the people involved. Their opinions, along with those of other significant participants in the legal system, including police and judges, must be considered when evaluating the existing process.

Conclusion
This project has undergone significant modifications since its inception based on a lack of experience with the legal process and various aspects of the work of legal professionals during the planning stage. However, the results should be invaluable in completing a process wide evaluation of impaired driving laws in Canada and suggesting possible changes which would be both fair to the accused and other involved persons and efficient in terms of achieving the Road Safety Vision 2010’s goal of a 40% reduction in the number of persons killed and seriously injured on Canadian roads by 2010. Recent monitoring suggests that decreases in fatalities have “plateaued” and in fact there may be a slight increase³. If Canada is to achieve the target, new and creative process wide solutions must be sought by considering the views of all significant participants.
Possible Next Steps
This body of work began with a survey of front-line police officers and has now progressed to a survey of prosecutors and defence lawyers. The next logical step is to survey the attitudes and perceptions of the judiciary. In contrast to the present group, the judiciary has been surveyed previously on other topics such as victim’s rights and it is not believed that this group will be as difficult to survey. However, there may be perceived restraints on surveying these professionals while maintaining judicial impartiality. When all three critical components of the Canadian criminal justice system are combined, it is hoped that a more complete picture of the process from multiple points of view will allow for the creation of the new and creative solutions mentioned above.

References