

**STATEMENT OF PAUL J. LARKIN, JR., JOHN, BARBARA, AND VICTORIA RUMPEL
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IES, INSTITUTE FOR CONSTITUTIONAL GOVERNMENT, THE HERITAGE FOUNDA-
TION, TO THE SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTER-
NATIONAL TRADE OF THE PARLIAMENT OF CANADA REGARDING BILL C-45, AN
ACT RESPECTING CANNABIS AND TO AMENDMENT THE CONTROLLED DRUGS
AND SUBSTANCES ACT, THE CRIMINAL CODE, AND OTHER ACTS
APRIL 16, 2018**

INTRODUCTION AND SUMMARY

Before the Parliament of Canada and the Senate Standing Committee on Foreign Affairs and International Trade is Bill C-45, An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code, and other Acts. If passed into law, the bill would generally legalize the recreational use of marijuana by adults. The committee has the responsibility to analyze how, if at all, Bill C-45 will affect “Canada’s international obligations” and, in particular, “how Bill C-45 may impact Canada-US relations.”¹ To make that determination, the committee invited various parties to offer their opinions on the task before it.

My name is Paul J. Larkin, Jr. I am the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow at the Meese Center of The Heritage Foundation Institute for Constitutional Government.² One of the areas of my research and scholarship is the field of drug policy. Thank you for the opportunity to submit this statement to you regarding Bill C-45. For the convenience of the committee, I will summarize my views in this statement. I have submitted to the committee one published and two forthcoming articles of mine that discuss those issues at greater length.³

As I explain below, the passage of Bill C-45 could have adverse ramifications for Canada’s relationship with the international community and the United States in three respects. *First*, it could weaken the judgment of the world community regarding the reliability of Canada as a party to international agreements. *Second*, it could contribute to a public health problem in the United States by making it easier to smuggle marijuana edibles across the border. *Third*, it could create a public safety problem if Canadians drive under the influence of marijuana on American roadways.

¹ Email from Marie-Eve Belzile, Committee Clerk, Senate of Canada, to Mr. Paul Larkin, Senior Legal Research Fellow, Meese Center for Legal and Judicial Studies, Institute for Constitutional Government, The Heritage Foundation (Apr. 9, 2018).

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³ Paul J. Larkin, Jr., *States’ Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a “States’ Rights” Issue*, 16 GEO. J.L. & PUB. POL’Y (forthcoming 2018) [hereafter Larkin, *States’ Rights*]; Paul J. Larkin, Jr., *Marijuana Edibles and “Gummy Bears,”* 66 BUFF. L. REV. 313 (forthcoming 2018) [hereafter Larkin, *Marijuana Edibles*]; and Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015) [hereafter Larkin, *Drugged Driving*].

I. THE PROBLEM OF WEAKENING THE INTERNATIONAL COMMUNITY'S PERCEPTION OF THE RELIABILITY OF CANADA AS A PARTY TO INTERNATIONAL AGREEMENTS

Bill C-45 could have ramifications for Canada in the international community by affecting the judgment of the world community regarding the reliability of Canada as a party to international agreements. Canada and the United States are signatories to several international agreements that require participating nations to outlaw the distribution of controlled substances,⁴ such as marijuana.⁵ For the last twenty-plus years the United States government has allowed states to enact legislation permitting cannabis to be used for medical and recreational purposes. The United States, therefore, is already at risk in this regard. By enacting Bill C-45, Canada would put itself at the same risk.

In the United States, the development of state medical and recreational marijuana initiatives has been defended on the ground that the issue whether to allow cannabis to be used for those purposes should be left to the states to decide.⁶ That argument, however, is not persuasive. The Constitution of the United States grants the federal government a prerogative over foreign policy by expressly granting that authority to the federal government⁷ and by expressly forbidding the states from interfering in that field.⁸ In fact, the Constitution bars Congress from delegating foreign policy-making authority to the states.⁹ The states, therefore, cannot disrupt federal policy by adopting their own domestic laws. Moreover, the Supreme Court of the United States concluded in *Gonzales v. Raich*¹⁰ that the Congress of the United States had the authority under the Commerce Clause of the United States Constitution to prohibit the interstate transportation of intrastate cultivation of marijuana. The federal laws that prohibit marijuana trafficking are a legitimate exercise

⁴ Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, *amended by* 1972 Protocol, Mar. 25, 1972, 26 U.S.T. 1439; Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 164; *see* WILLIAM B. McALLISTER, *DRUG DIPLOMACY IN THE TWENTIETH CENTURY: AN INTERNATIONAL HISTORY* (2000); William B. McAllister, *Conflicts of Interest in the International Drug Control System*, in *DRUG CONTROL POLICY: ESSAYS IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 143, 152-62 (William O. Walker III ed., 1992).

⁵ *See* INT'L NARCOTICS CONTROL BD., UNITED NATIONS, LIST OF PSYCHOTROPIC SUBSTANCES UNDER INTERNATIONAL CONTROL 5 (28th ed. 2017); INT'L NARCOTICS CONTROL BD., UNITED NATIONS, UNITED NATIONS INFORMATION SERVICE (Mar. 14, 2013) ("Allowing for the recreational use of cannabis 'would be a violation of international law, namely the United Nations Convention on Narcotic Drugs of 1961 This was stressed by the President of the International Narcotics Control Board (INCB), Raymond Yans, here, today in a statement to the fifty-sixth session of the Commission on Narcotic Drugs as he made reference to the outcome of the November 2012 voting in the US states of Colorado and Washington in favour of initiatives which – if implemented – would allow for the recreational use of cannabis in these states. "); Denial of Petition To Initiate Proceedings To Reschedule Marijuana, by the Drug Enforcement Administration (DEA), Dep't of Justice. 81 Fed. Reg. 53767-01, 2016 WL 4240243 (Aug. 12, 2016).

⁶ *See* Larkin, *States' Rights*, *supra* note 3 (Manuscript at 1 n.1) (collecting authorities).

⁷ *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties").

⁸ *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation"); *Arizona v. United States*, 567 U.S. 387 (2012) (ruling that the states cannot interfere with the immigration laws and policies adopted by the federal government).

⁹ *Compare* U.S. CONST. art. I, § 10, cl. 1 (quoted *supra* note 6) *with id.* cl. 2 ("No State shall, *without the Consent of the Congress*, lay any Imposts or Duties on Imports or Exports") (emphasis added).

¹⁰ 545 U.S. 1 (2005).

of Congress's regulatory authority. Accordingly, state laws permitting private parties to grow or distribute marijuana are invalid as a matter of law in the United States.¹¹

The states' rights argument is flawed for an even deeper reason. For 80 years the United States have entrusted the decision whether a particular drug is safe and effective, and therefore can be sold throughout the nation, to experts at the Food and Drug Administration (FDA). Congress first decided to leave that decision to experts in 1938, when Congress enacted the Federal Food, Drug, and Cosmetic Act.¹² Congress has reaffirmed that judgment on numerous occasions since then: in 1962, when it passed the Food, Drug, and Cosmetic Act Amendments;¹³ in 1997, when it passed the Food and Drug Modernization Act of 1997;¹⁴ in 2007, when it enacted the Food and Drug Administration Amendments Act of 2007;¹⁵ in 2012, when it passed the Food and Drug Administration Safety and Innovation Act;¹⁶ and in other years as well.¹⁷ In fact, Congress implicitly but clearly reiterated its initial judgment every time that it passed an appropriations law underwriting the work of the Commissioner of Food and Drugs and his colleagues at the FDA.¹⁸ Congress has made the same judgment every annual appropriations cycle for decades. In sum, federal law does not decide by plebiscite which antibacterial, antiviral, antifungal, or drugs should be sold, and there is no good reason to create an exception for cannabis.

At one time, "a promise [was] really something people kept, not just something they would say and then forget."¹⁹ The United States is at risk of giving the international community the impression that it no longer is interested in upholding its commitments to treat cannabis as contraband. Passage of Bill C-45 could pose the same risk for Canada.

II. THE PUBLIC HEALTH PROBLEMS CAUSED BY THE DISTRIBUTION IN THE UNITED STATES OF MARIJUANA EDIBLES MANUFACTURED IN CANADA

How Canada regulates the use of marijuana by its own citizens in their own nation is generally not a concern of the United States. But the legalization and commercialization of the manufacture and distribution of marijuana will inevitably have an effect on your neighbor to the south. Although United States' law prohibits the importation of marijuana into my country from Canada (and everywhere else), experience teaches that marijuana, like other controlled substances, will find a way across our common border. Given current federal law and current private demand for marijuana in America, parties in Canada, aided and abetted by parties in the United States, will

¹¹ See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

¹² The Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938).

¹³ The Drug Efficacy Amendment (Kefauver Harris Amendment), Pub. L. No. 87-781, 76 Stat. 780 (1962).

¹⁴ The Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (1997).

¹⁵ The Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823 (2007).

¹⁶ The Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, 126 Stat. 993 (2012).

¹⁷ See Larkin, *States' Rights*, *supra* note 3 (Manuscript at 4).

¹⁸ See *TVA v. Hill*, 437 U.S. 153, 189–91 (1978) (noting that, when passing appropriations bill, Congress ordinarily assumes that the underlying substantive law will remain unchanged).

¹⁹ The Judds, *Grandpa (Tell Me 'Bout the Good Ol' Days)* (1986).

have a powerful economic incentive to grow marijuana and manufacture marijuana products for their ultimate sale in the United States. Just as marijuana grown or processed in American states that have legalized recreational marijuana use has wound up in other states that continue to outlaw that activity, so, too, will the agricultural and processed forms of Canadian marijuana will inevitably make their way across the border into the United States. If a profit can be made by smuggling Canadian marijuana into the United States, that activity will occur. And we know that will happen because we have already seen it occur in connection with a comparable product: alcohol. Enterprising parties smuggled Canadian whiskey into the United States from 1920 to 1933, the period known in my nation as the Prohibition Era.

But put aside the debate over the wisdom of the federal and state laws in America governing the distribution of cannabis to adults.²⁰ Recreational marijuana use raises a particular concern in the case of minors. There is a consensus in the United States that marijuana should not be peddled to children.²¹ Even states that allow marijuana to be sold to adults for recreational purposes deny minors that privilege.²² The reason is that “[g]rowing evidence suggests that marijuana use during adolescence affects normal physiological maturation processes in the frontal cortex.”²³ Respected government and private organizations—the American Medical Association, the American Psychiatric Association, the American Academy of Pediatrics, the American Cancer Society, the American Academy of Ophthalmology, the National Institute for Drug Abuse, and others—agree that minors should not use marijuana for recreational purposes.²⁴

Bill C-45 would endorse the same policy. The version of that bill passed by the House of Commons contains several provisions making clear that, if the bill were to become law, the distribution of marijuana to minors would remain prohibited.²⁵

²⁰ For a summary of that debate, see Larkin, *Marijuana Edibles*, *supra* note 3, at 322-31.

²¹ See, e.g., THOMAS BABOR ET AL., DRUG POLICY AND THE PUBLIC GOOD 105 (2010) (“Preventing people from becoming illicit drug users is a broadly shared goal among policymakers. When focused on young people, prevention programmes enjoy broad popular support as well.”); Robert J. MacCoun & Michelle M. Mello, *Half-Baked—The Retail Promotion of Marijuana Edibles*, 372 N. ENG. J. MED. 989, 989–90 (2015).

²² Magdalena Cerdá et al., *Association of State Recreational Marijuana Laws with Adolescent Marijuana Use*, 171 JAMA PEDIATRICS 142, 143 (2017).

²³ GEORGE F. KOOB ET AL., DRUGS, ADDICTION, AND THE BRAIN 287 (2014); see also, e.g., Larkin, *Marijuana Edibles*, *supra* note 2, at 329-30 (“Since the 1960s, scientists have discovered that the human brain maturation process extends into a person’s mid-twenties as the brain creates neurons while pruning and reorganizing neural pathways for efficient use by adults. The process of ongoing development is particularly important in connection with the prefrontal cortex, the region responsible for higher mental functions such as reasoning, judgment, and decision-making. Given the labile state of the adolescent brain, and depending on the dose and frequency of use, a minor’s use of a psychoactive substance like THC is likely to have adverse physical and mental effects that would not occur in an adult or, even if they did, would not be present to the same degree. The result hampers development of higher-order mental states necessary for mature reasoning and planning.”) (footnotes omitted).

²⁴ See, e.g., U.S. FOOD & DRUG ADMIN., FDA AND MARIJUANA (Feb. 28, 2017) (“The FDA has not approved marijuana as a safe and effective drug for any indication.”); NAT’L INST. ON DRUG ABUSE, MARIJUANA 17 (Aug. 2017); Larkin, *Marijuana Edibles*, *supra* note 3, at 326-28 & n.31 (collecting citations). An additional problem is the presence of hazardous contaminants in edible products. Larkin, *Marijuana Edibles*, *supra* note 3, at 346-48 & n.81.

²⁵ See, e.g., Sections 2 (defining a “young person” as being under 18 years old), 7(a) & (b) (stating that the purpose of the act is to prevent young persons from consuming and having access to marijuana), 8(1)(c) & 8(2)(a)(ii) (unless otherwise authorized by the act, making it a crime, and authorizing a penalty, for a young person to possess more than 5 grams of marijuana), 9(1)-(5) & 10(1)-(5) (prohibiting the distribution of marijuana to or by a “young person”).

The problem, however, is how to police that judgment when marijuana is sold, not in its harvested or processed forms (that is, as leaves or as cigarettes), but in different commercial food products, colloquially known as “edibles.” Designed to be eaten, edibles often resemble food products that anyone, including minors, would consume.²⁶ Edibles allow individuals to obtain the psychoactive benefits of using marijuana without inhaling carcinogens.²⁷ Edibles have two other attractive features as well: they can contain a heavy dose of sugar, making them enticing for people with a sweet tooth, and they avoid the tell-tale aroma of smoked marijuana, making them attractive for minors trying to avoid detection by their parents. For those reasons and perhaps others, states in American that have legalized recreational marijuana use, such as Colorado, have found that edible versions of that drug are a popular item.²⁸

My point is not that Bill C-45 will itself generate the smuggling of marijuana products from Canada into the United States. Marijuana smuggling will occur even if Bill C-45 were never to become law as long as it is profitable, regardless of the state of Canadian law on the manufacture, distribution, and use of cannabis and its products. But the combination of two factors will make that practice a greater problem than it now is if Bill C-45 were to become law.

One is the risk that legalization of recreational marijuana use by adults in Canada will result in the commercial distribution of cannabis products in edible form. The other factor is the ease of disguising edibles as normal food items. Edible marijuana can be purchased in the United States in various forms, such as brownies, cookies, candies, cakes, popcorn products, lozenges, chocolates, butter, popsicles, and liquids.²⁹ As one observer has written, “[e]ssentially, a cannabis culinary professional can infuse just about anything you want to eat with THC”³⁰ Canadians have the culinary skills to manufacture the same items. Because marijuana-infused edible products can be created in forms that render them indistinguishable from ordinary food and drink products, distinguishing between the two at the border will become an increasingly complicated task for Canadian and American law enforcement authorities.

²⁶ The Appendix to this written statement offers some examples.

²⁷ See, e.g., ROBERT L. DUPONT, *THE SELFISH BRAIN: LEARNING FROM ADDICTION* 156 (1997) (“Marijuana smoke contains more tar and cancer-causing chemicals than even cigarette smoke. One marijuana cigarette has as much cancer-causing tar as 17 tobacco cigarettes. Marijuana smoke, like tobacco smoke, causes bronchitis, inflammation of the airways in the lungs, and chronic respiratory illnesses.”).

²⁸ See Larkin, *Marijuana Edibles*, *supra* note 3, at 319-20.

²⁹ See, e.g., 1 COLO. CODE REGS. § 212-2.103 (2017) (“‘Edible Retail Marijuana Product’ means any Retail Marijuana Product for which the intended use is oral consumption, including but not limited to, any type of food, drink, or pill.”); JOHN HUDAK, *MARIJUANA: A SHORT HISTORY* 17–18 (2016) (noting that edibles come in “countless forms including cookies, brownies, candies, granola, salad dressing, and even pasta sauce.”); Katherine M. Kosa et al., *Consumer Use and Understanding of Labeling of Information on Edible Marijuana Products Sold for Recreational Use in the States of Colorado and Washington*, 43 INT’L J. DRUG POL’Y 57, 57 (2017); MacCoun & Mello, *supra* note 8, at 989–90; George Sam Wang et al., *Unintentional Pediatric Exposures to Marijuana in Colorado, 2009–2015*, 170 JAMA PEDIATRICS 1, 2 (2016); Jennifer Maloney & David-George-Cosh, *Big Brewer Makes a Play for Marijuana Beverages*, WALL ST. J. (Oct. 27, 2017), <https://www.wsj.com/articles/big-brewer-makes-a-play-for-marijuana-beverages-1509300002?mod=mktw&mg=prod/accounts-wsj>.

³⁰ HUDAK, *supra* note 29, at 20; *id.* at 18 (“The variety now available is a real testament to American entrepreneurship and innovation.”).

III. THE PUBLIC SAFETY PROBLEMS CAUSED BY CANADIANS DRIVING UNDER THE INFLUENCE OF MARIJUANA IN THE UNITED STATES

American states have made it a crime to drive under the influence of alcohol or other impairing substances.³¹ Canada also prohibits driving while impaired by alcohol or other drugs.³² Marijuana is one of those substances. The active ingredient, Δ^9 -tetrahydrocannabinol or THC, hampers the ability of drivers to quickly and effectively process changing information and respond to unexpected or rapidly changing driving scenarios.³³ That problem, often labeled “drugged driving” or Driving Under the Influence of Drugs (DUID), is not a trivial matter. The U.S. National Highway Traffic Safety Administration conducted a roadside survey in 2013 and 2014, and it made the disturbing discovery that 20 percent of drivers surveyed tested positive for potentially impairing drugs.³⁴

There is considerable evidence that the American state legalization measures have contributed to an increase in highway morbidity and mortality.³⁵ To be sure, the evidence is not dispositive that recent drug use inevitably and invariably *causes* motor vehicle collisions; there is disagreement on that score.³⁶ But there are two other factors to consider. The first one is that the

³¹ See, e.g., Larkin, *Drugged Driving*, *supra* note 2, at 456.

³² See Canadian Criminal Code, R.S.C., 1985, c. C-46, § 253 (Dec. 12, 2017); ONTARIO MINISTRY OF TRANSP., IMPAIRED DRIVING (Jan. 10, 2017).

³³ See, e.g., Letter from Director Nora D. Volkow, *in* NAT’L INST. ON DRUG ABUSE, MARIJUANA 3 (Apr. 2017) (“Because marijuana impairs short-term memory and judgment and distorts perception it can . . . make it dangerous to drive.”); *id.* at 12-13 (“THC also disrupts functioning of the cerebellum and basal ganglia, brain areas that regulate balance, posture, coordination, and reaction time. This is the reason people who have used marijuana may not be able to drive safely.”); U.S. DEP’T OF HEALTH & HUMAN SERVS., NAT’L INST. ON DRUG ABUSE, DRUGFACTS: DRUGGED DRIVING 2 (2013), http://www.drugabuse.gov/sites/default/files/drugfacts_druggeddriving_2014.pdf (“Considerable evidence from both real and simulated driving studies indicates that marijuana can negatively affect a driver’s attentiveness, perception of time and speed, and ability to draw on information obtained from past experiences.”); WORLD HEALTH ORG., CANNABIS: A HEALTH PERSPECTIVE AND RESEARCH AGENDA 15 (1997).

³⁴ See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN, DEP’T OF TRANSP., DOT HS 811 415, DRUG INVOLVEMENT OF FATALLY INJURED DRIVERS 1 (2010) (“Nationwide in 2009, 63 percent of fatally injured drivers were tested for the presence of drugs. Overall, 3,952 fatally injured drivers tested positive for drug involvement in 2009. This number represents 18 percent of all fatally injured drivers (Table 1) and 33 percent of those with known drug test results (Table 2) in 2009.”).

³⁵ See, e.g., ROBERT L. DUPONT, INST. FOR BEHAV. & HEALTH, IMPLEMENT EFFECTIVE MARIJUANA DUID LAWS TO IMPROVE HIGHWAY SAFETY (Oct. 12, 2016); SMART APPROACHES TO MARIJUANA, LESSONS LEARNED FROM MARIJUANA LEGALIZATION IN FOUR U.S. STATES AND DC 7 (Mar. 2018); Tamara Johnson, Am. Auto. Ass’n NewsRoom, *Fatal Road Crashes Involving Marijuana Double after State Legalizes Drug* (May 10, 2016), <http://newsroom.aaa.com/2016/05/fatal-road-crashes-involving-marijuana-double-state-legalizes-drug>; Johannes E. Ramaekers, *Driving Under the Influence of Cannabis: An Increasing Public Health Concern*, J. AM. MED. ASS’N (Mar. 26, 2018) (online).

³⁶ See, e.g., D. Mark Anderson et al., *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & ECON. 333, 335, 345, 359-60 (2013); Scott V. Masten & Gloriam Vanine Guenzburger, *Changes in Driver Cannabinoid Prevalence in 12 U.S. States After Implementing Medical Marijuana Laws*, 50 J. SAFETY RES. 35, 45 (2014) (“Increased prevalence of cannabinoids among drivers involved in fatal crashes was only detected in a minority of the states that implemented medical marijuana laws. The observed increases were one-time changes in the prevalence levels, rather than upward trends, suggesting that these laws result in stable increases in driver marijuana prevalence. The reasons that changes in prevalence were detected in some states but not in others are unknown, but one factor may be differences between states in drug testing practices and regularity.”).

evidence might vary from region to region. American states are free to disagree over the persuasive value of academic studies. Under American law, they can adopt different responses to the risk of DUID based on their own analyses of the evidence, perception of the risks, and willingness to force entirely innocent parties to bear of the burden of their mistaken judgment regarding marijuana-induced unsafe driving.³⁷ Nations, like American states, are free to disagree over the persuasive value of academic studies on the effect that sanctions may have on individual conduct. The second factor is that there is unanimity regarding the crucial background moral judgment that no one should drive a vehicle under the influence of any substance that could impair a motorist's ability to safely operate it. Numerous government authorities,³⁸ as well as highly respected private organizations and individual experts³⁹ have recommended against anyone driving while under the influence of any impairing drug, illicit or legal. Even parties who advocate for the liberalization of current federal and state marijuana laws recognize that no one should drive while impaired by marijuana.⁴⁰

Moreover, the evidence also shows that people who use drugs, illicit or legal, often do not limit their intake to one particular drug.⁴¹ Polydrug use is common, perhaps particularly in the

³⁷ See *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (lead opinion) (“The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”) (citation omitted).

³⁸ See, e.g., Heidi King, Deputy Dir., Nat'l Highway Safety Admin., *DUID: A Vision for the Future* (Feb. 27, 2018), <https://www.nhtsa.gov/speeches-presentations/duid-vision-future>; *Planes, Trains, and Automobiles: Operating While Stoned: Hearing Before the Subcomm. on Operations of the H. Comm. on Oversight and Government Reform*, 113th Cong. (2014). Each of the expert witnesses who testified at the hearing acknowledged that drugged driving is an important public policy issue and poses a danger to road and highway safety. See *id.* at 9 (statement of Hon. Christopher Hart, Acting Chairman, National Transportation Safety Bd.); *id.* at 24–25 (statement of Jeffrey P. Michael, Assoc. Adm'r of Research & Program Development, National Highway Traffic Safety Admin., U.S. Dep't of Transp.); *id.* at 42 (statement of Patrice M. Kelly, Acting Dir., Office of Drug & Alcohol Policy and Compliance, U.S. Dep't of Transp.); *id.* at 44 (statement of Ronald Flegel, Dir., Division of Workplace Programs, Center for Substance Abuse Prevention, Substance Abuse & Mental Health Services Admin., U.S. Dep't of Health & Human Servs.); see also NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS 808 939, MARIJUANA, ALCOHOL AND ACTUAL DRIVING PERFORMANCE 4–15 (1999).

³⁹ See, e.g., INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 4 (Janet E. Joy et al. eds., 1999); NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., DRUGFACTS: DRUGGED DRIVING 2 (2013) (“Considerable evidence from both real and simulated driving studies indicates that marijuana can negatively affect a driver's attentiveness, perception of time and speed, and ability to draw on information obtained from past experiences.”); WORLD HEALTH ORG., *supra* note 33, at 15–16; JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 33 (2d ed. 2016); ROBIN ROOM ET AL., CANNABIS POLICY: MOVING BEYOND STALEMATE 28-19 (2010) (“Better-controlled epidemiological studies have recently supplied credible evidence that cannabis users who drive while intoxicated are at increased risk of motor vehicle crashes. . . . A convergence of fallible evidence thus suggests that cannabis use increases the risk of motor vehicle crashes 2–3 times . . .”).

⁴⁰ See MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE 214 (2002) (“Obviously, no one should operate dangerous machinery of any kind under the influence of a mind-altering drug.”); Paul Armentano, *Should Per Se Limits Be Imposed for Cannabis? Equating Cannabinoid Drug Concentrations with Actual Driver Impairment: Practical Limitations and Concerns*, 35 HUMBOLDT J. SOC. RELATIONS 35 (2013) (criticizing zero tolerance and per se rules for measuring driving under the influence of marijuana, but assuming that no one should drive while impaired by it).

⁴¹ See Stanford Chihuri & Guohua Li, *Trends in Prescription Opioids Detected in Fatally Injured Drivers in 6 US States: 1995-2015*, 107 AM. J. PUB. HEALTH 1487, 1487 (2017) (“Currently, about one third of fatally injured drivers

case of alcohol and marijuana.⁴² Alcohol and marijuana are the two most frequently used substances that degrade a driver's ability to operate a vehicle. Their combination can have an additive, if not synergistic, effect on a driver, leaving him incapable of driving safely even though neither drug alone might impair his abilities to handle a vehicle.⁴³ A person can be incapable of driving safely even though his BAC level is only 0.05 g/dL if he has also recently consumed marijuana and there is THC in his brain. The result is this: Studies indicate that the combination of alcohol and THC can be impairing even though the amount consumed of either drug by itself might not cause the same degree of deterioration in an average driver's skills.⁴⁴

Unfortunately, there is no easy solution to the DUID problem. Nonetheless, there are some reasonable steps that can be taken to reduce the risk of drug-involved collisions. Below are proposals that should occasion a consensus among parties interested in addressing DUID, as well as bipartisan support in legislatures and elsewhere in government. Each one will take a step toward improving roadway safety. Each one deserves serious consideration at all levels of government.

Proposal 1: Apply to every driver under 21-years-old who tests positive for any illicit or impairing drug, including marijuana, the same zero tolerance standard specified for alcohol, the use of which in this age group is illegal.

Proposal 2: Apply to every driver found to have been impaired by drugs, including marijuana, the same remedies that are specified for alcohol-impaired drivers, including administrative or judicial license revocation.

in the United States test positive for nonalcohol drugs, including prescription opioids, and 20% test positive for 2 or more drugs.") (footnote omitted).

⁴² See JONATHAN P. CAULKINS ET AL., RAND CORP., *CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS* 44 (2015) ("The descriptive statistics concerning overlap in use are clear. Marijuana users are much more likely than are nonusers to drink and to abuse alcohol. For example, current marijuana users are five times as likely as nonusers to meet DSM-IV criteria for alcohol abuse or dependence (26 percent versus 5 percent); that is, one in four current marijuana users is a problem drinker (calculated using 2012 NSDUH data using the SAMHSA online tool). Indeed, simultaneous use is common. The national household survey asks people what, if any, other substances they used the last time they drank alcohol. Among the 15.4 million people who used both alcohol and marijuana at some time in the past 30 days, 54 percent reported using marijuana along with alcohol the last time they drank, a proportion that rises to 83 percent among daily or near-daily marijuana users."); see also, e.g., KOOB ET AL., *supra* note 23, at 283-84; ROOM ET AL., *supra* note 39, at 15, 17-19; Larkin, *Drugged Driving*, *supra* note 3, at 473-80 & nn. 87-109.

⁴³ See, e.g., BRITISH MED. ASS'N, *THERAPEUTIC USES OF CANNABIS* 73 (1997) (noting the "additive effect" when marijuana and alcohol are combined); EARLEYWINE, *supra* note 40, at 201-11 ("Driving after consuming alcohol, particularly in combination with cannabis, is extremely dangerous and ill-advised. Thus, users who wish to reduce the drug's harm should never operate a motor vehicle during intoxication."); Eugene W. Schwilke et al., *Changing Patterns of Drug and Alcohol Use in Fatally Injured Drivers in Washington State*, 51 J. FORENSIC SCI. 1191, 1195 (2006) ("Combined marijuana and alcohol use are a concern in the driving population because of the marked synergism demonstrated between these two drugs, particularly in inexperienced users[.]") (citation omitted); see generally Larkin, *Drugged Driving*, *supra* note 3, at 478-79 & n.105 (collecting studies so concluding).

⁴⁴ See, e.g., Stanford Chihuri et al., *Interaction of Marijuana and Alcohol on Fatal Motor Vehicle Crash Risk: A Case-Control Study*, 4 INJURY EPIDEMIOLOGY 8 (2017) (online); Guohua Li et al., *Role of Alcohol and Marijuana Use in the Initiation of Fatal Two-Vehicle Crashes*, 27 ANNALS OF EPIDEMIOLOGY 342 (2017). *But cf.* Julian Santaella-Tenorio et al., *US Traffic fatalities, 1985-2014, and Their Relationship to Medical Marijuana Laws*, AM. J. PUB. HEALTH (Jan. 11, 2017) (finding a decrease in traffic fatalities in states with medical marijuana laws).

Proposal 3: Test every driver involved in a crash resulting in a fatality for alcohol and impairing drugs, including marijuana.

Proposal 4: Test every driver arrested for driving while impaired for alcohol and impairing drugs, including marijuana.

Proposal 5: Use reliable oral fluid testing technology at the roadside for every driver arrested for impaired driving.

In the United States, federal law requires each of the 50 states to have age 21 as the minimum drinking age. There is no reason to treat differently someone under that age who tests positive for THC, since it too can impair a driver's ability to operate a vehicle. If a state automatically suspends a driver's license for 30, 60, 90, or 180 days (or longer) if he is convicted of driving under the influence of alcohol, the state should use the same penalty for someone convicted of DUID. Polydrug use is sufficiently common that an arresting officer should test every driver involved in a crash resulting in a fatality or arrested for impaired driving not only for alcohol, but also for impairing drugs. The principal objection to testing for a wider range of drugs is financial, not legal, and Congress can authorize American states to use federal highway funds for that purpose. Finally, development of technology for roadside oral fluid testing, via (for example) a buccal swab, would enable an arresting officer to obtain proof or disproof of the presence of an impairing substance in an expeditious, relatively nonintrusive manner.⁴⁵

Drugs differ in important ways from alcohol. The pharmacodynamics (what a substance does to the body) and pharmacokinetics (how the body processes a substance) of drugs are not the same as the corresponding features of alcohol. That makes it difficult automatically to apply the same protocols and procedures to both problems.⁴⁶ But the above proposals do not make that attempt. Instead, they seek to treat alcohol and impairing drugs alike for purposes of the law of impaired driving, not for medical or scientific purposes, and make that effort only insofar as they can endanger highway safety.

CONCLUSION

Bill C-45 could have adverse ramifications for Canada's relationship with the international community and the United States in three respects. I urge the committee members to consider those potential problems in deciding how to act on the bill pending before you.

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⁴⁵ For examples of other proposals, see GOVERNORS HIGHWAY SAFETY ASS'N, DRUG-IMPAIRED DRIVING: A GUIDE FOR STATES (Apr. 2017); NAT'L HIGHWAY TRAFFIC SAFETY ADM'N, DEP'T OF TRANSP., DRUGGED DRIVING (2017); OFFICE OF NAT'L DRUG CONTROL, NATIONAL DRUG CONTROL STRATEGY 2010, at 24 (July 2010).

⁴⁶ See, e.g., Larkin, *Drugged Driving*, *supra* note 3, at 483-515.

APPENDIX



Colorado Marijuana Bill: Banning Weed-Infused Gummy Bears, WEEDLEX (July 4, 2016, 9:20 AM), <http://weedlex.com/colorado-marijuana-bill-banning-weed-infused-gummy-bears>.



Robert J. MacCoun & Michelle M. Mello, *Half-Baked—The Retail Production of Marijuana Edibles*, 372 N. ENG. J. MED. 989, 990 (2015).



Veronika Bondarenko, *This 59-year-old Mother of 2 is Making Millions Selling Legal Marijuana Gummies*, BUS. INSIDER (July 31, 2017, 3:00 PM), <http://www.businessinsider.com/wana-brands-nancy-whiteman-colorado-legal-marijuana-industry-edibles-entrepreneur-2017-7>.