# Analysis of the problem construction of cannabis-impaired driving in the parliamentary debates of Bill C-46.

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# Abstract

This thesis examined Bill C-46 as a case study of the constructed nature of public policy as inspired by Foucault's (1982) argument that this construction, over time, can become "truth." Our main research question was if the Canadian governments' construction of the problem of cannabis-impaired driving, which was used to justify the necessity and the content of new offences in Bill C-46, was contested in whole or in part during the parliamentary debates that resulted in the adoption of this law or, was the construction of cannabis-impaired driving accepted without contest by most of the parliamentarians and witnesses? This thesis used Bacchi and Goodwin's (2016) *What's the Problem Represented to be* (WPR) framework to answer this question. Our two main findings of this thesis were first, that the construction of the problem was not substantially contested by parliamentarians or witnesses during the debate and second, that inequality is embedded in the content of Bill C-46. Our analysis presented the constructed division between "*good citizens"* who are not punishable by criminal sanctions for impaired driving or problematic driving behaviours such as driving while fatigued, or distracted driving. On the other hand, the *"bad citizens"*, including drivers who had consumed cannabis, were perceived as deserving of criminal punishment despite not necessarily being impaired. The Liberal Party was concerned more with political viability of cannabis legalization resulting in a problem construction that generates ineffective solutions to the objective of promoting road safety.

**Keywords**: Cannabis; impaired driving; public policy; drugs.

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# Introduction

On June 21st, 2018, Bill C-45, otherwise known as the *Cannabis Control Act*, was passed in Parliament, which legalized and regulated the sale and consumption of cannabis in Canada. Until Bill C-45 was passed, cannabis was only legally accessible for therapeutic purposes with medical authorization. Access to cannabis for therapeutic purposes followed two court decisions in 2000, *R. v. Parker* from the Ontario Court of Appeals and *R. v. Krieger* from the Alberta Court of Appeals, which resulted in Health Canada instituting a medicinal cannabis framework in 2001 (Potter, 2019, p. 16). When discussions about legalizing and regulating the sale of cannabis began in 2016, the Task Force on Cannabis Legalization and Regulation prepared the content of Bill C-45 by carrying out consultations with various stakeholders. During this consultation period, it was evident in the polls (CROP, 2017; Nanos, 2018; Potter, 2019, p. 19) and the media, and finally in the report of this Task Force (Health Canada, 2016a), that two subjects were of particular concern to the Canadian public: the use of cannabis by youth, and the effects of cannabis while operating a motor vehicle. While the first concern resulted in creating two new criminal offences set out within Bill C-45, the second concern resulted in the introduction of Bill C-46, *An Act to Amend the Criminal Code,* which contained offences concerning cannabis while driving (Charron-Tousignant & Valiquet, 2018). Bill C-46 was introduced in Parliament the same day as Bill C-45 and then adopted on the same day of this Bill, indicating the importance of these new penalties for the government to reassure the population the government intended to penalize cannabis-impaired drivers. The penalties laid out in Bill C-46 for cannabis and driving vary depending on the amount of the psychoactive ingredient in cannabis -tetrahydrocannabinol (THC)- detected in the driver's body and

whether cannabis consumption is combined with the consumption of alcohol, resulting in a more severe penalty. Further, each provincial and territorial government has the authority to increase the penalties laid out by the federal government on cannabis consumption and driving.

The first question about Bill C-46 pertains to how the government justified the new cannabis-specific driving offences. The medical use of cannabis has been legal in Canada since 2001 through the medical authorization program, and by April 2018, before the legalization of 'recreational cannabis', over 307 000 Canadians already had medical authorizations to use cannabis (Health Canada, 2019). With so many Canadians legally accessing the drug since 2001, why were cannabis specific impaired driving laws considered necessary only seventeen years later with Bill C-46?

This question leads us into the central question of this thesis: was the Canadian governments' construction of the problem of cannabis-impaired driving, which was used to justify the necessity and the content of new offences in Bill C-46, contested in whole or in part during the parliamentary debates that resulted in the adoption of Bill C-46 or, was the construction of cannabis-impaired driving accepted without contest by most of the parliamentarians and witnesses? This question is essential because the punitive sanctions in Bill C-46, which begin penalizing drivers at 2 ng THC/ ml blood, mean individuals do not need to be impaired to be charged with a cannabis-impaired driving offence (Grotenhermen et al., 2007, p. 1916). Heavy users, including those using cannabis for therapeutic purposes, will be automatically over this legal limit of THC and are not necessarily impaired because THC is stored in the body's fatty tissues for several days after consumption, without the lingering psychotropic effect (Stilman, 2019, p. 107).

Given that the government proposed a threshold limit for THC content in the blood, it was necessary also to put forward a method of detection and measurement, which was the saliva or oral fluid testing system. Many studies have demonstrated why saliva tests are not a reliable measure of impairment (Stilman, 2019, p. 105)[1]. It is also necessary to question whether parliamentarians or witnesses contested as a whole or in part these sanctions, particularly considering the saliva tests the government proposed to determine a driver's THC level.

We will use Bacchi and Goodwin's (2016, p. 20) poststructural policy analysis framework to answer this question. Inspired by Michel Foucault's "governmentality" approach and critical analysis, Bacchi and Goodwin (2016) identify six questions on the foundations of the problem as constructed by public policy: 1) How is the problem to be solved presented by the government in this law? 2) What are the presuppositions and assumptions underlying this problem? 3) Where does this representation of the problem come from? 4) What is not problematized about this problem that would have allowed us to see the issue differently? 5) What effects have been produced by this representation of the problem? 6) By whom was it defended or contested? (Bacchi & Goodwin, 2016, p. 20)

In Chapter 1, our literature review will answer the first five questions helping us understand the origin of this problem construction. To answer the last question, the central question of our thesis, we will analyze the parliamentary debates, including the witness testimonials, which resulted in the adoption of

[1] Ironically, one of the government's arguments against mandatory cannabis drug testing in the workplace was insufficient evidence to reliably determine impairment with drug testing (Health Canada, 2016, p. 29).

Bill C-46. We want to know if this construction of impaired driving has become a 'truth' in the Foucauldian sense of the term, that has become unquestioned and taken for granted through the compounding of public policies. We will also examine the distinction between medically authorized cannabis users and users outside medical supervision to understand why the issue of impaired driving with cannabis did not arise before C-45. All these elements will make it possible to identify, with the help of this specific law, how a 'truth' can be constructed and imposed through public policies.

Our first hypothesis is that the construction of impaired driving as put forward by the government - the 'non-negotiable' aspect of the problem to be solved- will not be contested in the national debates on Bill C-46. In other words, the discussions on Bill C-46 will focus mainly on 'negotiable' aspects of the government's construction of this problem, such as the severity of offences, THC level, saliva tests, and training for police officers.

Our second hypothesis is related to the fictitious division between 'medical' and 'recreational' cannabis users. Negative perceptions of the cannabis user, who remains outside the purview of medicinal supervision, persists despite legalization. At the same time, medically authorized users are perceived as slightly more legitimate, which would account for why cannabis impaired driving was not considered problematic before Bill C-45. The constructed 'recreational' group of users will be seen easily punishable in the debates, regardless of impairment, contrary to the authorized users for medical purposes.

Chapter 1 presents the epistemological basis of our research questions; the critical approach in criminology combined with contextual constructivism. Following this, we will use Bacchi (2009, 2015)

and Bacchi and Goodwin's (2016) poststructural policy analysis *What is the Problem Represented to be* (WPR) framework. The first five questions of the WPR framework will be used to identify the crucial steps for our analysis. We will also analyze the origin of the construction of two categories of cannabis users: the first category being medically authorized users – the legitimate users - and non-medically authorized users – the suspicious users. Highlighting this construction is essential to understand if non-medically authorized users will be seen as a more punishable category. Afterward, we will explain the context of Bill C-46 and its main characteristics regarding cannabis and impaired driving and how the federal government justified it when the Bill was introduced. Finally, this literature review and this presentation of Bill C-46 will allow us to establish our sub-questions for our documentary corpus to answer Bacchi and Goodwin's (2016, p. 6) last question: By whom has this representation been defended or contested?

In Chapter 2, we will explain the scope and limits of the document analysis chosen as a method to answer our research questions and the content analysis process used to collect our data. We will explain the specificity of the documents in this corpus. Finally, we will present the coding of these documents whose categories derive from our literature review.

In Chapter 3, we will present the data collected. In Chapter 4, we will analyze the data in light of the elements put forward in the first chapter. In this way, we will answer our research questions and will be able to see to what extent our initial hypotheses are validated or not. We will subsequently interpret these results referring to our theoretical framework.

# Chapter I: Theoretical Framework and Literature Review

## 1.1 Epistemological stance: Critical criminology

There is no single definition of critical criminology, rather the discipline is linked by a broad rejection of a certain kind of positivism (DeKeseredy, 2010), and focuses on structural social transformation (Carrington & Hogg, 2002, p. 3). Further, critical criminology acknowledges that social research is inherently value-laden, and that researchers are inherently involved and linked to the production and reproduction of power structures (DeKeseredy & Dragiewicz, 2007, in DeKeseredy, 2010, p. 9).

The critique of a certain kind of positivism is apparent throughout critical criminology, by rejecting the biological and otherwise individualistic theories and explanations of crime and deviance (Carrington & Hogg, 2002, p. 3). Critical approaches reject biological and individualistic theories of crime and behaviour because they do not recognize that criminalized behaviours are a construction resulting from political and economic power relations. On this issue, Bessant (2002) argues many positivist studies on crime are based on the ontological assumptions that:

> there [is] a single, unitary and consistent social order and a moral consensus; those transgressions, such as delinquency and corruption, are accurately identified and measured against that social order; that violations like deviance and criminality are objective phenomena susceptible to scientific study; and that the characteristics that make behaviour deviant or criminal are inherent in the behaviour in and of itself (Bessant, 2002, p. 221).

Critical theorists focus on and question the process by which specific acts are defined as criminal and deviant (Ugwudike, 2015, n.p.). Michalowski (2009) argues that we must shift "from the study of crimes by individuals against individuals to a more structural analy[sis] of crimes by institutions against social groups" (p. 311 in Criger, 2011, p. 990). Critical theorists focus on a higher-level analysis of crime and

criminality, observing crime as socially constructed phenomena that can be understood by analyzing power dynamics rather than specific individual actions or behaviours.

Further, critical theorists argue that actions that are defined as “criminal” in a particular context may be non-criminal in another context (Pires & Digneffe, 1992, pp. 9–10). For example, stationery stolen from a store could be described as theft more quickly than the same stationery stolen from the office by a government official. This power dynamic within the law and its application results in disadvantaged classes being more vulnerable to arrest by the police and incarceration. Critical criminology critiques mainstream theories and resulting practices for providing a ‘scientific' basis for controlling specific populations by the state and upholding the established social order (Ugwudike, 2015, n.p.).

However, rejecting positivist assumptions does not necessarily mean an outright rejection of empirical work in critical criminology, but to do a critical analysis of this pre-existing knowledge (Bessant, 2002, p. 221). The critical criminological lens reintroduces context to understand certain criminalized behaviours, analyzing the construction of the behaviour as problematic or criminal through analyzing power dynamics. For this reason, one of the essential areas of study in critical criminology is understanding how the law is constructed to enforce and reproduce the taken-for-granted assumptions about the nature of crime and criminality. Power is inextricably linked to the nature of law, legislation and policies; power also allows groups to lobby for the production of policies and legislation in their interests or aligns with their values (Goode & Ben-Yehuda, 1994; Scraton, 2002, p. 27).

Foucault's work has been essential for the critical approach to legislation and policies, showing how institutions construct and disseminate the 'truth.' Foucault argues that truth is inherently political in its construction and dissemination to the population by groups in power (Foucault 1980, p. 131, in Scraton, 2002, p. 28). What society considers true cannot be extricated from the systems of power that construct this truth. In this sense, failing to recognize this construction of reality by the law, legislation and policies reproduce it (Scraton, 2002, p. 28). Bacchi (2009, 2015) and Bacchi and Goodwin's (2016) approach to public policy, which form the theoretical framework for this thesis, were strongly inspired by Foucault's work (see section 1.3). Social constructionism studies, to be discussed next, will also influence the epistemological perspective in this thesis, naturally complementing the critical approach in criminology by putting forward the construction of social problems.

## 1.2 Contextual constructionism

Social constructionism presents the idea that empirical observations cannot be taken as a direct reflection and representation of 'reality'; the world is constructed through social meanings (Burr, 2004, pp. 3–4; Gergen, 2001). The constructed nature of social problems is pertinent to this study within social constructionism, rejecting the idea that social problems are objective facts.

Goode and Ben-Yehuda (2009) argue there are two main ways of understanding social problems and how they emerge: the objectivist and the constructionist views. The objectivist defines social problems in terms of the condition's consequences; objective analysis of social problems requires a measurable

condition that harms human life (Goode & Ben-Yehuda, 2009, p. 150). On the other hand, the constructionist perspective analyzes social problems through the subjective process of defining a particular phenomenon as a 'problem.' There may or may not be an objective condition that accompanies this constructed problem. Spector and Kitsuse (1977; 2001) present a constructionist approach with this definition of social problems:

> Our definition of social problems focuses on how members of a society define a putative condition as a social problem. Thus, we define social problems as individuals or groups' activities, making assertions of grievances and claims concerning some putative conditions (Spector & Kitsuse, 2001, p. 76).

What is essential for the constructionist approach to social problems is the formulation of the condition, rather than requiring an 'objectively real' condition. Therefore, the constructionist analysis of social problems focuses on the social processes, or claims-making activities, that construct social problems (Goode & Ben-Yehuda, 2009; Spector & Kitsuse, 2001).

There are two types of constructionism, hard and contextual: "Where they differ is in the relevance of the objective dimension" (Goode & Ben-Yehuda, 2009, p. 156). Contextual constructionism does not entirely exclude the objective condition. Instead, contextual constructionism views the subjective definition of the social problem as separate from the objective condition (Goode & Ben-Yehuda, 2009, p. 156). Strict constructionism, on the other hand, views "All claims to objective reality [as] equally subjective, equally motivated by the impulse to define conditions as social problems" (Goode & Ben-Yehuda, 2009, p. 156). Contextual constructivism allows for analyzing social problems without minimizing the objective harm caused by a condition (Goode & Ben-Yehuda, 2009, p. 152).

We have selected the contextual constructionist approach for this thesis because we do not contest the objective harm posed by impaired driving. Instead, we intend to understand how the social problem of cannabis-impaired driving could have been understood differently, following Bacchi and Goodwin's fourth question of the *What's the Problem Represented to be* (WPR) framework (Bacchi & Goodwin, 2016a, p. 20). Any given problem is constructed in a variety of ways, such as through "social movement activity, legislation, a prominent ranking on the public's list of society's most serious problems and media attention…each of which needs to be investigated" (Goode & Ben-Yehuda, 2009, p. 159). Each of these avenues contributes to constructing a social problem in a particular way. However, in so doing, other avenues are silenced in favour of a dominant discourse regarding a particular problem.

The primary focus of the constructionist perspective is what Spector and Kitsuse (1977; 2001) define as 'claims-making activities,' which is the "process by which members of a society define a putative condition as a social problem" (2001, p. 75). This type of analysis does not put the existence and validity of the condition in question; instead, it focuses on *how* the problem emerged and *by whom* the problem was defined (Spector & Kitsuse, 2001, p. 76). This type of analysis intends to expose the interests invested in the particular definition of a social problem, as the problem definition will also define the subsequent solutions. The constructionist analysis aims to create a theory of claims-making and construction of social problems (Spector & Kitsuse, 2001, p. 76). The way that problems or concepts are defined can have problematic implications for individuals or groups of people.

The critical perspective in criminology and contextual constructionism is the epistemological foundation of this thesis, which led to the research questions. We will consider laws as constructs in power relations

applied differently according to social groups. This perspective is why we believe that the social problem presented in Bill C-46 and the solutions proposed to solve are the result of a process of construction that began long before this law.

Let us now look at the theoretical framework for analyzing the problem of driving while 'impaired by cannabis' presented by the federal government and the proffered solutions to address it in Bill C-46.

## 1.3 Theoretical Framework: The WPR approach

### 1.3.1 Poststructuralism

Bacchi and Goodwin's (2016) *What's the Problem Represented to be* (WPR) approach is based on poststructuralist theory, and the work of Michel Foucault. While poststructuralism is a broad term that refers to several theoretical traditions, there are some shared key features, such as "a questioning [of] Enlightenment assumptions concerning reason, emancipation, science, and progress, and disquiet regarding connections between this thinking and social inequality" (Bacchi & Goodwin, 2016, p. 4). Bacchi and Goodwin argue that poststructuralist thinking in "seeing knowledges as constructed or "made" can dislodge some of the certainties and orthodoxies upon which conventional policy approaches are based" (2016, p. 5). The WPR approach is based on the idea found in poststructuralism that while 'things' are understood as being 'made,' they may also be 'unmade' and reconstituted (Bacchi & Goodwin, 2016, p. 109). Bacchi and Goodwin propose that we are governed through

'problematizations' or specific representations of a 'problem' (2016, p. 108). The WPR approach "make[s] it possible to identify and interrogate governmental problematizations via these understandings of practices, events, and relations" (Bacchi & Goodwin, 2016, p. 34).

### 1.3.2 WPR Concepts and Foucault

Bacchi and Goodwin's (2016) WPR framework draws on several of Foucault's concepts, which will be discussed in this section. One concept Bacchi and Goodwin derive from Foucault is power, which serves as an essential distinction between Bacchi and Goodwin's WPR approach and mainstream theories and ways of thinking about power (2016, p. 28). Adopting a Foucauldian conception of power as in the WPR approach means that "the terms we use (e.g., "power," "resistance," etc.) are simply the names we assign to 'things'" (Bacchi & Goodwin, 2016, p. 28). In this sense, power is 'productive' as power relations create identities and meanings, thereby shaping reality (Clegg & Haugaard, 2009, p. 112). The concept of power in WPR analysis is more complex than repression and possession; instead, "power relations make "things" come into existence" (Bacchi & Goodwin, 2016, p. 29).

Another concept Bacchi and Goodwin adopt from Foucault's work are the concept of practices, which refers to the location where assumptions, rules, and intentions converge (Foucault, 1991, p. 75, in Bacchi & Goodwin, 2016, p. 32). Practices operate at localized levels to produce 'objects' and 'subjects' (Bacchi & Goodwin, 2016, p. 32). The WPR analysis approach seeks to interrogate the relationships and the process of 'making' a particular 'object' or 'thing' or 'problem' (Bacchi & Goodwin, 2016, p. 33). This concept is found in the WPR questions to "make it possible to identify and interrogate governmental problematizations via these understandings of practices, events, and relations" (Bacchi & Goodwin,

2016, p. 34). As policies often result from practices, policy analysis allows for questioning the problematizations that govern behaviour (Bacchi & Goodwin, 2016, p. 34).

Bacchi and Goodwin draw upon the Foucauldian understanding of discourse and discursive practices to build the WPR framework. While discourse is often understood in linguistics, Foucault's understanding of discourse refers to knowledge that "both constrain and enable what we can know" (McHoul & Grace, 2015, p. 37). However, discourse, or knowledge, cannot be separated from Foucault's understanding of power, as knowledge and power are inherently connected (McHoul & Grace, 2015, p. 39). Examining discourses allows for understanding how a particular thing, object, or problem comes to be known and constructed as a "truth" (Bacchi & Goodwin, 2016, p. 36). This concept is found in Question 2 of the WPR approach (What are the presuppositions and assumptions underlying this problem?), which examines the knowledge that allows for making the 'problem' in question in a particular policy (Bacchi & Goodwin, 2016, p. 35). This concept also comes back in Question 3 of the WPR approach (Where does this representation of the problem come from?), which examines where precisely the problem representation emerged (Bacchi & Goodwin, 2016, p. 37).

Based on poststructuralism and Foucault, Bacchi and Goodwin's WPR framework understands problems as 'made' through policies (Bacchi & Goodwin, 2016, p. 39). As used in this framework, problematization refers to the idea that taken-for-granted assumptions that often operate unchallenged and uncontested can be challenged and questioned (Bacchi & Goodwin, 2016, p. 38). The purpose of the WPR framework then is to "*trouble* rather than to cultivate *consensus*" among policy analysts investigating government policies and problem representations (Bacchi & Goodwin, 2016, p. 39).

Further, Bacchi and Goodwin draw upon Foucault's work on governmentality in the WPR analysis, referring to the idea that subjects are governable through systems and nuanced practices rather than by force or overt domination (Bacchi and Goodwin, 2016, p. 42). In the WPR analysis, governmentality can be used as an analytic tool to "interrogate the problematizations in policies" (Bacchi & Goodwin, 2016, p. 45). Governmentality also allows the WPR framework to look beyond the state as the only place of governance; rather, it allows for a more sophisticated line of questioning regarding the emergence of a particular problem representation (Rose et al., 2006, p. 85).

Genealogy is another concept drawn on from Foucault that Bacchi and Goodwin use in their framework. Foucault conceptualized genealogies as examining the production of an absolute “truth” (Foucault, 1980, p. 98, in Bacchi & Goodwin, 2016, p. 46). Genealogies play a crucial role in the WPR analysis in Question 3, which looks at the emergence of the problem representation. Further, genealogies allow for examining subjugated knowledge (knowledge that the consensus has dominated) to understand (Question 4) how the ‘problem’ could have been represented differently (Bacchi & Goodwin, 2016, p. 47-48). Question 6 (By whom was the problem representation defended or contested?) also concerns genealogies, looking at the challenges “over knowledge” (Bacchi & Goodwin, 2016, p. 48).

Finally, Bacchi and Goodwin draw upon the concept of subjectification, or “the production, or *making* of particular kinds [of subjects] through policy practices" (2016, p. 49). Bacchi and Goodwin argue that recognizing the political subject within a policy is necessary to know how it creates a particular political subject (2016, p. 49). Policies often adopt a neoliberal conception of the political subject as a taken-for-

granted assumption of how subjects behave; Question 2 (What are the presuppositions and assumptions underlying this problem?) attempts to challenge this (Bacchi and Goodwin, 2016, p. 49).

### 1.3.3 Steps and Questions in the WPR Analysis

We will now go through each question to understand their specific function in this theoretical framework.

Question 1, "How is the problem to be solved presented by the government in this law?", allows for an investigation of the policy or concept in question and begins the WPR analysis. Bacchi and Goodwin (2016) explain that the first question intends to start the process by "questioning something that appears natural and obvious" (p. 20).

Question 2, "What are the presuppositions and assumptions underlying this problem?" requires Foucauldian archaeology to determine the unexamined modes of thinking and production that underlie the problem representation (Bacchi & Goodwin, 2016, p. 21). This question also serves to deconstruct how the problem representation has been constructed by analyzing the ‘‘concepts and binaries" (Bacchi & Goodwin, 2016, p. 6) present within the problem representation. This question intends to examine the discourses or knowledge often taken for granted and left unquestioned (Bacchi & Goodwin, 2016, p. 36).

Question 3, "Where does this representation of the problem come from?" invokes the use of a Foucauldian genealogy, examining the genesis of the problem representation in question (Bacchi & Goodwin, 2016, p. 22). Bacchi and Goodwin note that "the intent is to disrupt any assumption that what

*is* reflects *what has to be"* (2016, p. 22). This question relates to Foucault's conception of power and how power relations produce and constitute problem representations (Bacchi & Goodwin, 2016, p. 22). Further, Question 3 seeks out "subjugated knowledges" to understand where the problem representation emerged and how and where it may be contested (Bacchi & Goodwin, 2016, p. 22-24).

Question 4, "How the 'problem' could have been represented differently" requires analytical and creative thinking about how the problem could be constructed differently, inviting comparisons (Bacchi & Goodwin, 2016, p. 22). Bacchi and Goodwin argue, "comparing problematizations of selected issues, across time and cross-culturally, provides a particularly powerful intervention to promote an ability to 'think otherwise'" (2016, p. 22).

Question 5, "What is not problematized about this problem that would have allowed us to see the issue differently?" examines the interconnected effects of the particular problem representation in question (Bacchi & Goodwin, 2016: 23). Bacchi and Goodwin explain that these three effects, discursive, subjectification, and lived consequences, result in what Foucault coined as "dividing practices" (Foucault, 1982, p. 777). Dividing practices serve to "separate groups of people from one another and which can also produce "governable subjects" divided within themselves" (Bacchi & Goodwin, 2016, p. 23).

Question 6, "By whom was the problem representation defended or contested?" examines the "existence and possibility of contestation, to destabilize taken-for-granted "truths."" (Bacchi & Goodwin, 2016, p. 23-24). This question looks at how the problem representation became accepted and also

examines the other side, looking at how the problem representation can be contested (Bacchi & Goodwin, 2016, p. 24).

The final stage of Bacchi and Goodwin's WPR analysis is a reflexive exercise. It applies the six questions in the WPR analysis to one's work, challenging the problem representations (Bacchi & Goodwin, 2016: 24). This exercise allows for understanding and challenging the problem representations based on "one's location within historically and culturally entrenched forms of knowledge" (Bacchi & Goodwin, 2016, p. 24). Bacchi and Goodwin argue that the WPR analysis aligns with Foucault's argument that governance should require minimal domination (Foucault, 1987, p. 129, Bacchi & Goodwin, 2016, p. 25). This stage allows the WPR approach to go "beyond easy-to-make *declarations* of the need to become "reflexive" to endorse a practice and demanding *activity* - subjecting one's recommendations and proposals to a WPR analysis" (2016: 24), thereby ensuring no further domination on the part of the researcher.

The next section of this thesis will seek to understand the construction of 'impaired driving' as a problem that needs to be managed by the penal law. This object of the federal policy in Bill C-46 appears evident and consensual. Yet, it has a history that we must first understand identifying the constructs that have been imposed in representing this 'problem.'

## 1.4 Constructing the problem of Impaired Driving

This section will examine how impaired driving emerged as a problem and how it was constructed, answering Question 3 of Bacchi and Goodwin's (2016, p. 20) WPR framework: “Where does this representation of the problem come from?” The claims makers (those who participate in constructing this problem frame) and shifts in political and social thinking that allowed the problem to emerge will be identified. This will also be tied to Bacchi and Goodwin’s Question 5: “What effects has this problem frame produced?” More specifically, which kind of solutions will be put forward in the law to resolve this problem? This section aims to understand the government's reaction to claims about how impaired driving should be understood and how this reaction results in a particular 'truth' about what constitutes impaired driving and what solutions are appropriate.

The construction of this problem can be divided into four periods. The first period begins with alcohol being associated with social problems, and when automobiles emerge on the road, the alcohol-impaired driver becomes the focus of the road safety problem. The second period is marked by the government legitimizing the use of the Breathalyzer technology to deter and prevent alcohol-impaired driving, shifting the focus of the problem from 'the guilty mind to the guilty body' (Marquis, 2012, p. 51). The third period begins in the 1980s, with citizen activist groups acting as claims makers of the problem frame, putting pressure on the government to act on the problem of alcohol-impaired driving by imposing harsher penalties. The fourth period begins in the 1990s and brings drugs other than alcohol into the construction of impaired driving.

### 1.4.1 The Emergence of the Alcohol-Impaired Driver in the Law

Alcoholic beverages have been a staple in human diets across civilizations for millennia. Nearly as ancient as alcohol consumption is the concept of temperance, which is defined as "the practice of always controlling your actions, thoughts, or feelings" (Merriam-Webster, n.d.). Temperance has been encouraged for centuries by many religions, including Christianity, against excesses, including alcohol. The Enlightenment and the Industrial Revolution in the 18th and 19th centuries sparked massive social, economic, and political change worldwide. Many social problems following these changes would be linked to alcohol and the working class. Great Britain was the birthplace of the Industrial Revolution in the early eighteenth century. With the urbanization of London during 1700-1750 due to industrialization, concern grew among the upper classes over the gin consumption of the lower classes. Over the years, alcohol became an obvious target as the root of many social problems associated with urbanization (Yokoe, 2019).

By the mid-18th to early 19th century, the Industrial Revolution had spread from Great Britain across the globe, rapidly changing rural, agrarian societies into urban, industrial ones with the invention of factories, machinery, and steam-powered railway systems (Pilcher, 2014; Roberts, 1984). Many parts of Western Europe and North America were undergoing massive social, political, and economic changes associated with the Industrial Revolution that had gripped urban Britain in the early 18th century. By the 19th century, there was a global increase in alcohol consumption, and correspondingly, the perception that alcohol was the root of social problems in the lower classes began to take hold in many countries (Brennan, 1989; Pilcher, 2014, p. 160).

In the early 19th century, calls for personal temperance and abstinence toward alcohol originated in the American Calvinist clergy and upper classes to solve social problems that emerged from industrialization and urbanization in the lower classes (Gusfield, 1986; Pilcher, 2014; Sulkunen & Warpenius, 2000). This campaign sparked the first phase of what would become a global Temperance movement aiming to reduce or eliminate the consumption of alcohol spreading from the United States across the globe with the assistance of American missionaries. Anglo-Saxon, Protestant countries including Canada and the United States, Germany, France, Russia, and the Scandinavian countries were heavily influenced by this first Temperance movement (Bengtsson, 1938; Gusfield, 1986; Marquis, 2004; Pilcher, 2014; Roberts, 1984; Warsh & Lockwood, 1993).

A second Temperance movement emerged in the mid to late 19th century. Like the first, this movement originated in the United States, but within the entrepreneurial and nationalistic middle classes, rather than the clergy and upper classes (Gusfield, 1986, p. 5–6). This phase of the Temperance movement focused on using the legal system to restrict alcohol production and sales. The middle classes of the second Temperance movement were eventually successful in many countries, including the United States, Canada, Germany, France, and the Nordic countries in the early twentieth century (Bengtsson, 1938; Gusfield, 1986; Marquis, 2004; Pilcher, 2014; Roberts, 1984; Warsh & Lockwood, 1993).

However, restrictions and even prohibition responses varied greatly depending on the country and produced different cultural attitudes toward alcohol. In some areas, alcohol was associated with particular groups of marginalized people and prohibition became an attempt by the majority to assert domination over minority groups. In the United States, the Eighteenth Amendment was passed in 1919,

prohibiting the sale and production of alcohol on a national level (Gusfield, 1986). The consumption of alcohol was associated with the Catholic immigrant minority, and prohibition became the means through which the Protestant, rural, middle-class Americans could reinforce their dominance and control over the legal system to coerce assimilation among Catholic immigrants to the dominant culture (Gusfield, 1986, p. 7). Similar to the United States, alcohol was associated with the Catholic immigrants that began to populate British North America (now Canada) in the 19th century. American Loyalist settlers and established colonists in British North America feared losing their dominant social status during the 1830s and attempted assimilation efforts by calling for alcohol prohibition (Warsh & Lockwood, 1993, p. 44). Canadian provinces passed prohibition orders starting in 1917, prohibiting alcohol sales, but "prohibition statutes did not outlaw possession of alcohol by adults in their own homes" (Marquis, 2004, p. 315). All provinces except Prince Edward Island repealed prohibition by 1930 in favour of strict government regulations (Marquis, 2004, p. 309). In Scandinavian countries, prohibition laws initially focused on distilled spirits but expanded to include beer and wine. Scandinavian temperance was centred around reforming the working class to become responsible and community-oriented citizens (Sulkunen & Warpenius, 2000, p. 432).

Roughly around the same time as many countries moved to restrict the usage or prohibit alcohol at the turn of the 20th century, production of affordable, personal and commercial automobiles began to accelerate in the United States, followed by Canada, Germany, France, and Great Britain (Eckermann, 2001). Many of the social and economic developments of the 20th century are linked to the increased dependence on the automobile for personal and commercial transport and required redesigning city

space to accommodate this type of transportation, reducing urban viability of other modes of transportation (Walks, 2014, p. 3–5). The economic reliance on automobiles and road systems required finding ways to reduce the incidence or negate the impact of roadway accidents as even today, the ‘‘reduction of accident rates is one of the priority issues regarding transport costs” (Sakhapov & Nikolaeva, 2017, p. 579). Auto dependence for both the economy and personal leisure is critical for the emergence of alcohol-impaired driving as a problem; without the automobile, and auto dependence, there cannot be an impaired driving problem (Gusfield, 1984, p. 113).

At the beginning of the 20th century, while middle-class Temperance movements were succeeding in lobbying governments to pass prohibition laws or restrictions on alcohol use, and the automobile for commercial and personal use was on the rise, the first alcohol-impaired driving criminal laws began to pass in the United States, Canada, Great Britain, and Scandinavian countries. Alcohol consumption was already perceived as the cause of much violence and 'vices,’ and drunk driving was a natural addition to this list. In the United States, New Jersey was the first state to pass drinking and driving legislation in 1906, followed by New York in 1910 (Jones et al., 2019, p. 110). In 1912, Norway passed its first-impaired driving laws (Ross, 1975, p. 288). Canada passed its first law prohibiting “driving while intoxicated” in 1921 (Koles, 2003, p. 213), and Sweden passed legislation in 1925 that criminalized alcohol-impaired driving (Ross, 1975, p. 288). Particularly in Scandinavian countries, alcohol-impaired driving legislation is openly rooted in Temperance ideology to curb problematic drinking behaviours (Ross, 1975, p. 292; Roth, 2015, p. 859).

Despite the introduction of criminal alcohol-impaired driving laws in the early 20th century, the initial focus of the road safety problem was not on the drinking driver alone but a range of issues such as driver education, road conditions, and universal traffic laws (Marquis, 2012, p. 52). However, as legal prohibitions and restrictions on alcohol began to fall away in the 1920s and 1930s, the punishment for alcohol-impaired driving became increasingly harsh in the United States, Scandinavian countries, and Canada. Attention turned to the individual 'bad' driver, including the 'drunk driver,' as the crux of the road safety issue (Gusfield, 1984; Koles, 2003; Ross, 1975). However, despite the increased punishment for alcohol-impaired driving allowed through the law, these punishments remained challenging to apply in court due to a lack of consistent, reliable evidence and a universal standard of impairment (Gusfield, 1984, p. 63). Both a means of collecting evidence of impairment and a standard definition of what constituted impairment was necessary.

### 1.4.2 The *'per se'* law and the emergence of bodily testing technology

Attention turned to science to determine a universal level at which a driver was impaired by alcohol. By the late 1910s, alcohol could be measured in the blood and the Swedish doctor Erik M.P. Widmark discovered the equation that determined blood alcohol concentration (BAC), considering factors such as body weight, time of consumption, and the speed at which alcohol left the body (Roth, 2015, pp. 851–852). In 1922, Widmark created a blood test to measure blood alcohol concentration, and in 1935, drivers were required to submit to blood testing in Norway even though it was not yet determined at what level blood alcohol concentration posed a danger to the public (Ross, 1975, p. 288). *Per se* legislation would emerge as a solution to this problem.

*Per se* legislation mandates that reaching a particular concentration, or threshold level, of alcohol in a driver's system constitutes an offence without necessarily requiring proof of impairment. Typically, *per se* laws have two different threshold values, an upper and lower limit, as increased blood alcohol concentration correlates to a higher degree of impairment, and so the thresholds "reflect varying degrees of impairment and corresponding risk and translate into varying levels of punishment" (Grotenhermen et al., 2007, p. 1911). The introduction of *per se* laws meant proving a driver was impaired and posed a danger to the public was no longer necessary. The fact that the driver had a specified amount of alcohol in their blood was sufficient to invoke a criminal penalty, with the severity of the penalty corresponding to alcohol level in the blood.

Norway enacted the world's first *per se* legislation in 1936, which "defines the offence in terms of attaining a specified blood alcohol concentration," allowing the state to punish an individual who exceeds it, regardless of whether the individual is impaired (Ross, 1975, pp. 286–288). The Norwegian blood alcohol concentration, set at 0.5 blood alcohol concentration (BAC), constituted an offence under the first *per se* legislation in 1936 (Ross, 1975, p. 288). Sweden followed shortly thereafter in 1941 with *per se* legislation, which criminalized drivers with a BAC of 1.5 BAC or higher (Ross, 1975). Further, a secondary offence was created in Sweden for drivers who tested above 0.8 BAC but below 1.5 BAC, which resulted in fines (Ross, 1975, pp. 287–288).

Early Scandinavian *per se* legislation derived legitimacy from a robust moral temperance movement in the region that was more concerned with pointing to alcohol as the root of social problems than protecting individual rights and civil liberties (Roth, 2015, p. 859). In Scandinavian countries, the act of

drinking was deemed immoral in and of itself and served as the justification of the harsh driving laws (Roth, 2015). Unlike what would later be seen in North America, the Scandinavian *per se* laws punished low levels of alcohol in the body justified by a movement toward moral reformation and assimilation to a temperance-based society, rather than a driver posing increased risk to public safety as a particular level of blood alcohol had not yet been scientifically connected to increased risk of injury or fatality. This legislation would eventually become the basis for alcohol-impaired driving legislation worldwide. Still, two main problems with early Scandinavian *per se* legislation required resolution before being enacted elsewhere, particularly in democratic countries (Marquis, 2012). The first problem was that the blood alcohol limits set out in the early Scandinavian *per se* laws were not connected to a scientific measure of impairment. Without this connection, it appears that the population in many countries would not be willing to recognize the legitimacy of this type of law (Luckin, 2010b, p. 356). The justification for the current *per se* laws in North American countries is based on scientific studies demonstrating a correlation between a particular alcohol concentration and the corresponding level of impaired driving ability. The second problem was that early *per se* laws required blood testing to identify the blood alcohol concentration, an invasive and problematic procedure for law enforcement in many democratic countries.

Blood testing was not only invasive but proved to be logistically challenging, as blood testing has to be administered by a medical professional, and many practitioners were unwilling to cooperate with law enforcement, citing ethical and liability concerns (Roth, 2015, p. 852–853). The courts could not justify using invasive measurement tools on those driving without self-evident impairment, and law

enforcement had difficulty identifying drivers that were subtly impaired (Jones et al., 2019). Focus then shifted to breath testing, an avenue that offered less invasive measurement than blood tests and that would allow police to conduct roadside testing (Roth, 2015, pp. 852–853).

In 1931, the first breath testing machine that could estimate the blood alcohol concentration from breath alcohol concentration levels was invented in Indiana by Dr. Rolla Harger (Roth, 2015, p. 853). Dr. Harger's "Drunk-O-Meter" machine was tested on the road by law enforcement on New Year's Eve in Indianapolis in 1938, and in 1939, Indiana passed the first *per se* drinking and driving law in the United States using this breath testing machine (Marquis, 2012, p. 52; Roth, 2015, p. 853). This first law defined "a level of 0.05-0.15%" as "supporting evidence for intoxication, and a level of more than 0.15% was proof of guilt" (Marquis, 2012, p. 52).

The early breath testing machine supported police testimony in cases where the accused was evidently intoxicated; which had previously been problematic without scientific means to corroborate their reports (Gusfield, 1984; Roth, 2015, p. 855). However, the unclear relationship between blood alcohol concentration and impairment was still an impediment to the widespread adoption of *per se* laws in the United States, Canada, and Britain. Outside of Scandinavia, "DUI [Driving Under the Influence] alcohol laws, at least for adults, have never been justified on the argument that any drinking whatsoever is dangerous or otherwise morally blameworthy" (Roth, 2015, p. 848). In cases where the driver was not demonstrably impaired, the population required an association between the levels tested on the breath machine and the driver's potential harm posed to public safety to secure a conviction (Roth, 2015, pp. 855–856). This attitude comes from the fact that people became increasingly reliant on the automobile,

and a large proportion of the population drove after consuming alcohol. Proof of potential harm was required to justify criminal punishment of such a widespread and normalized behaviour (Marquis, 2012; Roth, 2015).

Focus shifted toward determining the connection between a particular BAC (blood alcohol concentration) level and collision potential (Roth, 2015, p. 855). It was imperative to assure the population that the punishment for impaired driving was not perceived as arbitrary but that BAC limits were scientifically correlated to an unacceptable level of diminished driving capacity. The breath testing machine had to be perceived as accurate in identifying those who posed a significant danger to the public (Marquis, 2012, Roth, 2015).

In 1934, Dr. Herman Heise in Milwaukee published a study showing that drivers with low levels of alcohol in their blood demonstrated diminished capacity to drive; however, this study did not pinpoint the point at which alcohol in the blood increases the risk of accident or injury (Roth, 2015, p. 857). In 1938, Richard Holcomb in Illinois published a study that linked the likelihood of collision to blood alcohol concentration (Roth, 2015, p. 858). In part, based on this study, the American National Safety Council (NSC) and the American Medical Association (AMA) published a report that called on states to adopt laws that exempted "temperate" drivers from criminal punishment, operating at a 0.05 BAC or lower. In contrast, automatic punishment should be considered appropriate for operating at 0.15 BAC or higher (Roth, 2015, p. 859). It remained unclear what punishment was appropriate for drivers operating with a BAC between these two levels.

In the mid-1950s, in Great Britain, studies began to show that a large number of road accidents were caused by mild intoxication; however, there were very few convictions for impaired driving (Luckin, 2010b, p. 360). The low rate of convictions for impaired driving in the United States, Canada, and Great Britain in the early to mid-1950s can be partially explained by the growing recognition that the 'Drunk-O-Meter' was not as accurate for determining BAC levels as once believed (Roth, 2015). In 1954, Robert Borkenstein invented the Breathalyzer. This breath-testing machine was argued to be more accurate than its predecessor, although this technology also drew criticism out of concern for potential manipulation by law enforcement (Roth, 2015). Further, the relationship between the BAC levels and impairment, or threat to public safety, was not yet clear, making it challenging to justify criminal punishment for impaired driving. A Canadian study conducted in 1955 was unsuccessful in determining a universal measure of blood alcohol concentration as impairment, citing further study be conducted on the "impact of beer consumption on impairment, the impact of beer and spirits on drivers between eighteen and twenty-five and the influence of alcohol on the driving performance of women" (Marquis, 2012, p. 53).

Around this time, the American Research Foundation also concluded that a specific amount of alcohol does not affect all persons equally (Marquis, 2012, p. 54). Despite these concerns, Ontario had begun a Breathalyzer program based on voluntary samples in 1956 (Marquis, 2012, p. 53). Following suit, the U.S. Supreme Court decided in 1957 that despite the flaws in testing and the unclear correlation between BAC level and impairment, the threat of the drunk driver was too severe not to implement mandatory bodily testing for suspected impaired drivers (Roth, 2015, p. 861). In 1960, the British government sent

senior government officials to Scandinavia to study the compulsory testing system for impaired drivers. Based on Scandinavian legislation, the refusal to submit to a breath test would be used against the defendant in court in Great Britain after 1962 (Luckin, 2010a, p. 1541). Support was also growing in Canada, the United States, and Britain for mandatory breath testing to detect and punish the alcohol-impaired driver who had continued to drive while moderately impaired by alcohol (Luckin, 2010b; Marquis, 2012; Roth, 2015). Coupled with mandatory breath testing, *per se* legislation offered a solution to moderately intoxicated drivers who posed a threat to road safety but had remained challenging to punish in the courts.

In 1964, Borkenstein, inventor of the Breathalyzer, published the results of the Grand Rapids study, which would come to be known as one of the most important studies in correlating BAC to impairment. Borkenstein compared drivers involved in car crashes to a control group of drivers who had not crashed on the road at the same time and place (Roth, 2015, p. 866), and determined that:

> those with a BAC of 0.08 percent were nearly twice as likely to be in a crash than similarly situated sober drivers; those at 0.15 percent were over ten times more likely. Finally, Borkenstein found that injury from a crash increased with the driver's BAC level, starting at 0.08 percent (Roth, 2015, p. 866).

This study would become the basis for passing *per se* legislation on impaired driving that criminalized the driver for their blood alcohol concentration instead of observable indications of impairment. Based in part on results of the Grand Rapids study, in 1967, Great Britain passed the Road Safety Act, which simultaneously adopted a *per se* BAC limit of 80 mg/ 100 mL and made testing mandatory; failure to provide a breath sample resulted in a criminal offence (Jones et al., 2019, p. 111). Canada followed suit with *per se* legislation in 1969 that would punish drivers with 0.08 BAC; breath testing became

mandatory, making failure to submit to a breath test a summary offence[2] (Koles, 2003, p. 216). In 1972, the federal National Highway Traffic Safety Administration (NHTSA) in the United States recommended that every state adopt *per se* legislation (Voas & Fell, 2013, pp. 662–663). Although most states had adopted "presumptions of impairment for BACs over 0.15 percent" by 1969, it would not be until the 2000s that every state in the United States would have *per se* legislation (Roth, 2015, p. 867). This delay was partly due to the competing problem frames in North America surrounding the road safety problem.

### 1.4.3 Competing problem frames in North American public consciousness

Despite being discussed in the public health arena and even in criminal law, alcohol-impaired driving received little attention from North American citizens until the late 1970s and into the 1980s (McCarthy, 1994). Overlapping, competing frames can partially explain this apathy around the road safety problem; the public health frame, the 'bad car' frame, and the "drunk" driver frame were all prominent at this time (Fell & Voas, 2006; Gusfield, 1988; McCarthy, 1994). The three problem frames resulted in the fracturing of public and media attention to any one particular problem definition until the end of the 1970s and early 1980s, when the "drunk driver" problem frame of road safety became dominant with the assistance of citizen activist groups (McCarthy, 1994).

The public health approach was the first problem frame of road safety to emerge, beginning in the 1940s lasting into the 1970s. The public health frame constructed the road safety problem as a public health

[2] A summary offence is the least severe type of criminal sanction in Canada and the penalties resulting from a summary offence conviction.

and safety crisis. The solution was preventative measures such as restrictions on alcohol consumption and sales (Roth, 2015, p. 863). The rapid development of highway systems in North America and dependence on automobiles for economic meant that traffic accidents were highly problematic for efficiency in economic development. But public opinion during the 1960s and 1970s in North America was unwilling to consider mild intoxication while driving a morally blameworthy or criminal behaviour (Marquis, 2012; Roth, 2015, p. 863).

Within a broader social context of alcohol liberalization, public health advocates began to shift the understanding of alcohol-impaired accidents toward a rhetoric of safety and prevention (Roth, 2015, p. 866). Prevention discourse in the public health approach located the problem in alcohol as a dangerous and 'abusive substance'. Policies to restrict and control the sale and consumption of alcohol emerged as the solution to this problem frame (Gusfield, 1988, p. 119). Although impaired driving gained significant traction in the public consciousness during this period between the 1940s and 1970s, it constituted only one of a plethora of alcohol problems addressed through the public health frame. Alcohol was treated as a "dangerous commodity" that must be controlled through public institutions and campaigns to reduce alcohol consumption entirely and was not limited to impaired driving (Gusfield, 1988, p. 117). However, the medicalization of alcohol problems and the rise of the treatment industry during this period resulted in fewer and less severe penalties for chronic alcohol abusers in Canada. The intent became to divert rather than criminalize and incarcerate individuals with alcohol problems (Marquis, 2012, p. 48-49).

In the mid-1960s in North America, another problem frame emerged for a short time, overlapping the public health period. The ‘bad car’ problem frame shifted attention away from the individual driver as the crux of the road safety problem toward the car itself needing safety reforms (Gusfield, 1984; McCarthy, 1994). Under this problem frame, road safety could be achieved through improvements in automobile design to reduce the number of crashes and the severity of road injuries and fatalities. (Gusfield, 1984; McCarthy, 1994). For a short time, the ‘bad car’ frame would redirect public attention on automobile design:

> The “unsafe car thesis” directed attention away from the motorist and toward the automobile, away from the accident and toward its effects, away from the driver and toward the manufacturer. It turned the headlights on the design of the car and its capacity to withstand the impact, to protect the occupant after impact, and to eliminate the trauma connected with crashes (Gusfield, 1984, p. 46).

As a result of this shift toward the car as the locus of the road safety problem in 1966, in the United States, the NHTSA (National Highway Transportation Safety Administration) was created to lobby the auto industry for safety reforms and imposing safety standards by car manufacturers (Gusfield, 1984; McCarthy, 1994, p. 140).

In the mid to late 1970s, the public began to embrace the idea that road accidents were preventable, and one aspect of prevention was the deterrence of impaired driving (McCarthy, 1994, p. 135). Support for the 'bad car' problem frame fell away in favour of the drunk driver problem frame, setting the stage for citizen activist groups' efforts in the 1980s. Citizen activist groups in the 1980s would soon create the necessary moral blameworthiness in the impaired driver to warrant severe legal penalties.

### 1.4.4 Citizen Activist Groups

In the late 1970s, citizen activist groups emerged to push for the impaired driver problem frame of road safety problems. The first group to emerge was Removing Impaired Drivers (RID) in New York State in 1978, marking the first group dedicated to bringing awareness and legislative changes to how impaired drivers should be treated in society and the law (Fell & Voas, 2006, p. 197). However, it would not be until 1980 that citizen activist groups in the United States and Canada gained widespread public and media attention (Fell & Voas, 2006, p. 197; Marquis, 2012). In California in May of 1980, Candy Lightner's 13-year-old daughter was struck and killed by an impaired driver who fled the scene; later, it was discovered the driver had been charged and convicted multiple times for impaired driving offences (Fell & Voas, 2006, p. 197). That same year, Lightner founded Mothers Against Drunk Drivers (MADD)- later changed to Mothers Against Drunk Driving- as a group to lobby legislators to make significant changes to how impaired drivers should be punished in the law (Fell & Voas, 2006, p. 197; Reinarman, 1988, p. 104). By the end of 1980, MADD had several chapters in California and Maryland and had garnered significant media attention.

#### *1.4.4.1 The alcohol-impaired driving problem frame*

The frame of the problem brought to the forefront of public and media attention in the 1980s with citizen activist groups was the drunk driver as the root of road safety problems. Unlike previous constructions of road safety problems, the drunk driver frame emphasized the moral blameworthiness of the individual actor for causing harm to victims of impaired drivers. In particular, MADD drew on and further developed

the symbolic character of the devoted mother who suffered the loss of innocent children due to the "killer drunk" driver (Gusfield, 1984). Even though data on impaired driving and fatalities had long been known, they were given little attention before the 1980s. However, in the 1980s, the symbolism and claim to the problem made MADD impossible for the media and the government to overlook, making them prominent claims makers to the problem of impaired driving (Reinarman, 1988).

#### *1.4.4.2 Claims makers of the drunk driver problem frame*

The first group of claims makers who supported and pushed for the redefinition of road safety problems in terms of the "killer drunk" driver were citizen activist groups, of which MADD is the most widely recognized. However, several activist groups emerged, most of which did not achieve the status that MADD still holds today. In Canada, organizations such as Counter Attack (B.C.), Checkstop (A.B.), RAID in Nova Scotia and PRIDE (People to Reduce Impaired Driving Everywhere) in Ontario emerged, as did MADD Canada and Students Against Impaired Driving (SADD) (Marquis, 2012, p. 60). Most citizen activist groups would take the form of victims' rights groups who had experienced personal loss or injury in an incident involving an impaired driver (Ross, 1991). These claims makers were critical to the emergence of the drunk driver movement. They undeniably held credibility to the harms of impaired driving, which attracted and maintained the media's attention (Reinarman, 1988, p. 92). Citizen activist groups became a crucial element in driving forward and maintaining "a climate of political and legal escalation against the drinking driver" (Marquis, 2012, p. 46). The drinking driver discourse pushed by these citizen activist groups portrayed impaired drivers in terms of "moral responsibility, social pathology, alcohol dependency, and general irresponsibility" (Marquis, 2012, p. 61).

Although the victim's credibility is evident, Reinarman (1988) draws attention to the fact that these claims only emerged in the 1980s, despite previous attempts to bring drunk driving to the forefront of public policy. In the late 1960s, Marilyn Sugg attempted and failed to bring widespread attention to the issue after losing a child to a drunk driver, but it would not be until the 1980s that the problem could be understood in the context of the dominant public discourse (McCarthy, 1994; Reinarman, 1988). Citizen activists were not prompted by a sudden increase in fatalities or incidence of drinking and driving in the 1980s, but because they found echoes by additional claims makers such as the alcohol industry, law enforcement, government agencies, and some alcohol experts.

In the early 1980s, the alcohol industry in the United States was under attack by the Center for Science in the Public Interest (CPSI) which:

> had launched a campaign to ban all alcohol advertising in the electronic media (Stop Marketing Alcohol on Radio and Television, or SMART), which had gained endorsements and momentum by 1985. In the context of such developments, the alcohol industry began to see the movement against drinking and driving as the lesser of evils (Reinarman, 1988, p. 102).

MADD was focused on increasing penalties and enforcement of individual impaired drivers, rather than lobbying for restrictions on alcohol or pushing for the alcohol industry to take responsibility for the harms caused by their products (Reinarman, 1988). The alcohol industry backed citizen activist groups such as MADD to protect their financial interests which allowed the alcohol industry to escape taking responsibility for any harms caused by the substance or their advertisement practices and legitimized their claims to be 'socially responsible industry'. Rather, the alcohol industry was content to join citizen activist groups such as MADD and blame incidents on the individual drinker who chose to drive. The

alcohol industry easily adopted a claims maker role in constructing the problem of alcohol-impaired driving as framed by citizen activist groups, financially supporting these groups in their efforts to lobby legislators for more punitive sanctions for individuals caught driving impaired (Reinarman, 1988; Ross, 1991).

In the United States, the NHTSA (initially created to ensure auto manufacturers adhered to safety regulations) began developing and implementing programs intended to control the drunk driver (McCarthy, 1994, p. 140). By the 1970s, the NHTSA had become "the major institutional advocate of the drunk driving frame and, through its state and local programs, created a vast interlinked constituency of supporters for it" (McCarthy, 1994, p. 139). By the time MADD emerged, the NHTSA had already been pushing for this frame of the problem for over ten years and became an early supporter of MADD's efforts early on, awarding the organization a grant in 1980 to support the founding of additional chapters in the United States (Reinarman, 1988, p. 97).

Law enforcement agencies were also quick to become claims makers in the war against the drunk driver. The drunk driver problem frame allowed law enforcement to justify their demands for additional personnel and equipment to do their jobs in fighting the war against drunk drivers (Ross, 1991). Framing the problem as an individual issue of violent criminal activity perpetrated primarily against mothers and children led to the need to detect and punish impaired drivers through a rigorous law enforcement approach (McCarthy, 1994, p. 139). Law enforcement agencies were eager to become claims makers when government agencies in the United States adopted the drunk driver frame of the problem.

Many alcoholism experts also benefitted from the drunk driver problem frame. While addiction treatment frameworks leading up to the 1980s had focused on the client's readiness to accept treatment, new punishments for impaired driving often included court-mandated treatment, creating a large market for a coercive treatment industry (Reinarman, 1988, pp. 108–109). The public health frame that pushed for preventative measures against impaired driving and taking a medicalized approach to problematic drinkers had limited success in the 1940s-1970s (Gusfield, 1988). The drunk driver frame sought to replace this view with a blameworthy individual responsible for the reprehensible action of driving while impaired. It is important to note there was not a unified discourse among addiction experts; other experts continued to push for a medicalized approach and treatment of alcoholism as a disease (Marquis, 2012, p. 60).

The redefinition of the act of driving after drinking as criminal had significant implications for upper- and middle-class individuals in North America (Marquis, 2012, p. 46). Previously considered ‘social drinkers’, upper and middle classes who often drove after drinking and socializing were now defined as a problem and at risk of receiving criminal sanctions (Marquis, 2012; Roth, 2015). Such a redefinition resulted in opposition to this problem frame. Some groups challenged the legality of these new laws in Canada and the United States, making this period “highly negotiated” (Marquis, 2012, p. 46; Reinarman, 1988). However, the punitive drinking-driving laws had widespread public support and generated only marginal resistance (Gusfield, 1984, p. 160).

#### *1.4.4.3 Problem solution and reaction of the government*

In both Canada and the United States, the problem frame of the individual "killer" drunk driver led to the posited solution of increased penalties and enforcement for impaired driving offences, decreasing the minimum legal limit for blood alcohol concentration, and in the United States, in particular, increasing the minimum legal age to purchase and consume alcohol (Marquis, 2012; Reinarman, 1988). In 1983, President Reagan initiated a Presidential Commission to explore possible solutions to the drunk driving problem under pressure from MADD (Reinarman, 1988, pp. 99–100). The commission recommended that the federal government mandate a nationwide drinking age of 21 years, overruling state authority due to the severity of the drinking and driving problem. While President Reagan was reluctant until three weeks before signing this legislation in 1984, he finally signed it due to widespread public consensus (Reinarman, 1988, pp. 99–100). Drinking and driving legislation became more punitive in all fifty states between 1981 and 1985, with over 230 new laws passed at the state and local levels (Reinarman, 1988, p. 100). Citizen activists were also successful in the United States in lowering the minimum BAC threshold required for the violation of *per se* laws from 0.10% BAC to 0.08% BAC (Reinarman, 1988, p. 108).

In Canada, although citizen activist groups, including MADD Canada lobbied the government in the 1980s to lower the threshold from 0.08% BAC to 0.05% BAC, these attempts were unsuccessful (Marquis, 2012). However, other legal penalties were invoked and enforced in Canada, which would punish the drinking driver more harshly. In 1984, Justice Minister John Crosbie enabled police officers to demand a blood sample from drivers suspected of impaired driving, and that refused or could not perform a breath

test, and "required mandatory loss of driving privileges for three months for anyone convicted under Breathalyzer provisions" (Marquis, 2012, p. 62). Further, in 1986 the Canadian government passed Bill C-18, effectively increasing the scope of criminal responsibility (Marquis, 2012, p. 62). In the 1972 Supreme Court of Canada decision, *Curr v. The Queen*, Justice Ritchie made the argument that the newly instated Canadian Charter of Rights and Freedoms "did not protect against incriminating conditions of the body" (*Curr v. The Queen*, 1972, in Marquis, 2012, p. 60). The potential danger posed by the drinking driver, and therefore the need to control the drinking driver, was elevated above the civil liberties of the Canadian citizenry.

### 1.4.5 The addition of other drugs in the impaired driving problem

While drugs other than alcohol entered impaired driving law at nearly the same time as alcohol-impaired driving, convictions for drugs other than alcohol remained low. Ambiguous legislation lacking appropriate technology for enforcement culminated in subjective evidence presented by the police to the courts. Drug testing became increasingly possible in the late 1960s and early 1970s, opening a new avenue for collecting objective evidence; however, there remained a missing link between drug concentration and actual impairment (Jones et al., 2019). In court, medical professionals were called on to provide corroborative evidence to police testimony to prove impairment, but it remained difficult to secure a drug-impaired driving conviction (Jones et al., 2019; Solomon & Chamberlain, 2014). A new procedure would emerge in the United States beginning in the 1970s as a possible solution to facilitate the detection and punishment of the drug-impaired driver.

In the late 1970s, the Los Angeles Police Department piloted the Drug Recognition Expert (DRE) program to train police officers to identify signs of drug impairment, focusing mainly on illegal drugs. The evaluating officer must first rule out the presence of alcohol, determined by administering the Breathalyzer. The officer may also conduct a reflex test to determine the driver's level of impairment. This test consists of walking in a straight line for ten steps, follow a pencil with the eyes without moving the head, and maintaining balance while arms are outstretched. Suppose the police officer finds the person cannot correctly perform the test and has cause to believe a drug other than alcohol is the cause of the driver's impairment. In this case, the driver is brought to the police station where a trained DRE officer evaluates whether the driver is impaired and, if so, by which drug or combination of drugs (Solomon & Chamberlain, 2014, p. 687). A toxicological analysis of the driver's bodily fluid is then used to confirm or deny the presence of the suspected drug or drugs (Solomon & Chamberlain, 2014, p. 687). Despite the spread of the DRE program in the 1980s, drug-impaired driving remained challenging to prosecute in the courts as no clear link was established between the drug consumption and impairment (Solomon & Chamberlain, 2014, p. 689).

Amid the War on Drugs in the United States in the 1980s and 1990s, the federal government pushed states to adopt 'use and lose' laws. Individuals convicted of illegal drug offences would have their driver's license revoked or suspended (Marcus, 2003). 'Use and lose' laws were adopted as a pre-emptive measure in the United States against the *potential* illegal drug-impaired driver, altogether avoiding the need to prove charges against drivers in court. However, in 1990, another way to punish drivers who used illegal drugs emerged.

Starting in 1990, twelve U.S. states adopted zero-tolerance laws for driving after using illegal drugs (Roth, 2015, p. 889). Under a zero-tolerance impaired driving law, driving is prohibited with any illegal drug in the driver's body (Roth, 2015, p. 889). Like a *per se* law where the driver is punished automatically after reaching a particular concentration of a substance, the zero-tolerance law shifts attention away from the behavioural signs of impairment toward a specific condition of the driver's body that can be detected with toxicological drug testing analysis. Impairment is not a necessary condition of punishment through a zero-tolerance or *per se* law, despite the fact these laws are still called impaired driving laws. The bodily condition of having an illegal drug in a driver's system is conflated with the condition of being impaired in zero-tolerance laws. Roth explains that "under a prohibitionist logic, these laws [zero tolerance] made sense: if having an illegal drug in one's system is itself morally blameworthy, it follows that driving while having the drug in one's system is morally blameworthy, even without proof of any impairing effect" (Roth, 2015, p. 889). Zero tolerance laws for driving with illegal drugs in one's system were passed in twelve U.S. states in the 1990s without public resistance.

The zero-tolerance law for illegal drug use that emerged out of the United States in the 1990s has since spread to Sweden, which implemented a zero-tolerance law for illegal drugs in 1999. In Finland, a zero-tolerance law was also implemented (Jones et al., 2019, pp. 116–117). Other countries have adopted *per se* legislation for drugs in which reaching the stated threshold constitutes an offence, regardless of impairment status. In 2015, a *per se* law was adopted in England and Wales that covered 17 drugs, setting threshold blood concentrations for these drugs (Jones et al., 2019, p. 117). In 2017, the Netherlands followed suit and enacted a *per se* law that set thresholds for several drugs, most of which were illegal

(Jones et al., 2019, p. 118). Some legal drugs were covered under this legislation, with an important caveat discussed in the next section of this paper.

The DRE programs that emerged in the 1980s in the United States have since been implemented in Canada, Australia, and Europe as an integral part of drug-impaired driving convictions (Owusu-Bempah, 2014, p. 222). In Canada, the first DRE program was piloted in British Columbia in 1995 (Royal Canadian Mounted Police, 2017), and in 2000, the maximum penalty for impaired driving causing death was increased to life imprisonment (Koles, 2003, p. 218). In 2008, Section 254 of the Canadian Criminal Code was amended to allow police the ability to enforce non-alcohol drug-impaired driving using DRE's, copying the American procedure that goes as follows:

> Si un policier soupçonne quelqu'un d'avoir les facultés affaiblies par la drogue, il peut l'obliger à passer le test de sobriété (test de sobriété normalisé – TSN) au bord de la route – le policier doit bien sûr avoir reçu la formation nécessaire –, et il peut même filmer ce test pour diminuer la subjectivité d'évaluation des résultats. Le TSN consiste à faire passer certaines « épreuves de coordination de mouvements » [aideerd.ca/tests-de-sobriete-normalises/]. Si la personne échoue à ce test et que la drogue en cause est l'alcool, l'alcootest est alors utilisé. Si une autre drogue est soupçonnée, la personne est amenée au poste de police pour subir une évaluation par un « expert en reconnaissance de drogue » (ERD), un policier qui a suivi une formation à cet effet. Si ce dernier le juge nécessaire, il peut procéder à des tests plus intrusifs (analyses de la sueur, de l'urine, du sang) afin de recueillir de la preuve qui servira devant les tribunaux. Refuser le TSN ou ces analyses est une infraction au criminel, tout comme refuser de passer l'alcootest si le policier le demande. Comme un lien entre une certaine quantité déterminée de drogue autre que l'alcool et la conduite avec facultés affaiblies ne peut être validé scientifiquement, et ce, même en laboratoire, il faut jumeler les résultats de ces tests et l'échec au TSN devant les tribunaux.
>
> Cette procédure est fort complexe, coûteuse et généralement peu appliquée à cause du manque de formation des policiers pour devenir ERD (Beauchesne, 2018, p. 212).

In 2012, only 491 Canadian police officers were trained and available to perform the DRE test (Solomon & Chamberlain, 2014, p. 687). This change in the law in 2008 solidified the position of DRE procedures as acceptable evidence in court despite the lack of trained officers and despite the hesitation to accept DRE evidence in many Canadian courts until this point (Solomon & Chamberlain, 2014, p. 687).

In summary, over the years, impaired driving has been constructed as a problem where alcohol or illegal drugs are the leading *causes*. Furthermore, the *objective* of decreasing impaired driving has been lost in the logic of zero-tolerance impaired driving laws where the driver is punished for consuming an illegal drug. Like the zero-tolerance law, with *per se* impaired driving laws, a particular concentration of alcohol or drugs in a driver's body is associated with certain penalties rather than a specific impairment of driving ability. In this construction of the problem, severe criminal penalties and technologies to enforce these laws become the *solution* because drivers guilty of consuming alcohol or illegal drugs are the target.

### 1.4.6 What has been left unquestioned about this framing of the problem

This section will focus on the fourth question of the WPR approach: "What is left unproblematic in this problem representation? Where are the silences? Can the "problem" be conceptualized differently?" (Bacchi & Goodwin, 2016, p. 20).

We will start with a more global perspective on the cause- the dependence on automobiles for transportation- which is why so many drivers are on the road, some of whom may not be fit to drive. Secondly, we will discuss the objective, protecting road safety for all drivers and passengers, and the discrepancy between the objective as it is stated and the reality that many factors can impede this

objective- such as fatigue, medication, illness, and age-related reflex loss, or distractions, particularly the cellular phone. Thirdly, we will discuss possible alternative solutions when accounting for all these causes of impairment, the use of behavioural impairment - the reflex test already used on the side of the road by police- and increased surveillance on the use of the cellular phone. Additionally, when accounting for all the causes of impaired driving to include citizens perceived as 'good', we will see that the solutions to the problem are already constructed differently.

#### *1.4.6.1 The causes: societal auto-dependence*

The role of the automobile is a significant causal factor in the problem of impaired driving. In fact, "The absence of alternative modes of transportation is logically as much a cause of drinking-driving as is the use of alcohol" (Gusfield, 1984, p. 8). Yet despite being a major cause of the impaired driving problem, dependence on the personal automobile for transportation, or auto-dependence (Walks, 2014), is largely silenced in the discourse of impaired driving. The necessity of driving in auto-dependent societies has ultimately resulted in drivers who are in no condition to drive on the roadways.

This lack of concern over the societal level cause falls under the broader pattern of shifting responsibility onto individual drivers for road safety problems. Individual drivers have been made to bear the responsibility for road safety, whereas "Institutional explanations and loci of responsibility were eloquently absent from the consciousness of officials, observers, and offenders" (Gusfield, 1984, p. 7). Under this broader problem frame of road safety, laws and policies target the individual driver to reduce their chances of being involved in an automobile accident (Gusfield, 1984, 1988). Impaired driving also

falls under this individualized response to the problem of road safety; rather than focusing on the broader societal structures, such as auto-dependence, and the lack of other modes of transportation that have resulted in the necessity to drive, impaired driving legislation targets individual drivers (Gusfield, 1984; Walks, 2014).

Furthermore, impaired driving legislation and enforcement efforts have focused on drug consumption (including alcohol) far more than on other sources of impairment, further narrowing who is held responsible for road safety problems. In focusing only on one group of problematic drivers, the objective of reducing the number of impaired people who pose a danger to themselves or others on the road has been lost in favour of detecting and punishing somebody who consumes alcohol or other drugs, particularly illegal drugs. This objective will be further explored in the next section.

#### *1.4.6.2 The loss of the safety objective on the road*

In this construction of the problem, drivers who are impaired by 'acceptable' drugs such as prescriptions drugs, and those who are impaired by drugs that are unacceptable, regardless of their legal status, such as alcohol, or illegal drugs, are treated differently in the law. This difference is demonstrated in zero-tolerance laws, which cannot rationally be upheld for drugs that are legal for consumption, as having consumed a legal drug cannot be considered a crime in and of itself (Carcieri, 2012; Roth, 2015). Whether a drug is perceived as being used for 'medicinal' or 'recreational' purposes has a significant role in the application of *per se* laws.

For example, in Norway in 2017 and England and Wales in 2015, *per se* laws were extended to many legal prescription drugs for drivers. But in these *per se* laws, those targeted are people consuming these drugs without a prescription or in higher than prescribed doses (Jones et al., 2019, pp. 117–119). In the case that a driver has a valid prescription for a legal drug, it is often still required to demonstrate the drug caused behavioural impairment to justify an impaired driving conviction. If a driver has consumed a drug as directed and holds a valid prescription, the courts must consider how the patient was directed by their physician and pharmacist (Voas et al., 2013). However, the driver who uses a legal drug without a prescription or not using the drug as prescribed is subject to punishment under the *per se* law (Jones et al., 2019; Voas et al., 2013). The drug itself is not automatically problematic, but the perceived motivation for using the drug renders the subsequent impairment either problematic or not; legitimate medical users being those who consume the drug as directed, and illegitimate 'recreational' users consume the drug apparently for pleasure. The differentiation between drivers who consume 'recreational' drugs and those who consume 'medicinal' drugs results in the loss of the objective of impaired driving laws, which is to focus on drivers who are impaired, regardless of which drug, or perceived motivation for drug use, caused the impairment.

In addition to the 'acceptable' use of drugs, other forms of impairment are also considered acceptable, such as fatigue, intense emotional states, or even certain age-related disabilities, all of which can produce driving impairment (Gusfield, 1984; Hole, 2018). These 'acceptable' impairments further exacerbate the divide between the stated objective and practice of impaired driving enforcement. Additionally,

> The state of "under the influence" is singular and special to its relation to automobile accidents. Other conditions of the person, although often viewed as increasing risk of accident, are not designated as legal offences. Driving while sleepy, after ingestion of sedatives, during periods of acute depression, or following intense emotional trauma is not per se a declared misdemeanour… Legislatures have not assayed statutes which even fix appropriate standards of the physical and/or mental condition required at all times for driving (Gusfield, 1984, p. 127).

Another source of driver threat to road safety left unquestioned by this frame of impaired driving is the use of the cell phone while driving. Despite texting and driving being a known source of severe and fatal injuries (Caird et al., 2014), it often falls under the less punitive sanction of distracted driving than the harsh sanctions for impaired driving. For example, in Ontario, distracted drivers face no jail time, and penalties are laid through fines, license suspensions and/or driving demerit points, an accumulation of which can result in license suspensions (Government of Ontario, 2016). It is the same in the United States (National Conference of State Legislatures, 2020).

This discrepancies in the solutions for different types of problematic roadway behaviour creates a problematic dichotomy between types of impairment that are acceptable, such as fatigue, prescription drugs, or intense emotional states, and unacceptable types of impairment caused by illegal drugs, cannabis, or alcohol (Beauchesne, 2020b). While all sources of impairment unquestionably have the potential to produce harm, it should be noted that under *per se* and zero-tolerance laws, the driver who ingests 'unacceptable' drugs does not necessarily need to be impaired to be convicted of an offence. On the other hand, where a driver is impaired by 'acceptable' means, the prosecution must prove that the driver was impaired to warrant a conviction. This representation of the problem has resulted in increased criminal sanctions and technologies focused on detecting and measuring the level of drugs in a driver's

body, rather than focusing broadly on all causes of impairment or distraction. This lack of concern for all sources of impairment has resulted in the loss of the objective of road safety by punishing only those who are impaired through 'illegitimate' means.

#### *1.4.6.3 The solutions: the use of the criminal law and technologies to detect and punish the drug user*

Because this problem representation views impaired drivers as problematic 'recreational' drug users, the posited solution is the development of technologies for detecting and determining the concentration of a drug or combination of drugs in a driver's body (Solomon & Chamberlain, 2014). On the other hand, if the problem representation were to focus on all causes of impairment, prevention strategies and reflex tests to determine the driver's fitness would have been put forward as the solution, rather than proof of impairment:

> Pour prévenir la conduite avec les facultés affaiblies, quelle qu'en soit la cause, il faudrait investir davantage dans la prévention pour apprendre aux citoyens la multiplicité des causes qui peuvent affaiblir la capacité de conduire. Ensuite, il serait important de leur donner des moyens d'évaluer leurs réflexes; un test de réflexes simple (incluant la mesure de la capacité visuelle) pourrait aider les personnes à évaluer leur capacité de conduire un véhicule motorisé et ainsi améliorer leur prise de décision. Enfin, quand on doit prendre des mesures policières, il faut le faire en fonction de l'ensemble de ces causes. Pour cela, pas besoin de réinventer la roue. Le test de sobriété normalisé existe déjà et, administré au bord de la route, permet à un policier de vérifier si la personne est en état de conduire ou non. On doit toutefois le perfectionner pour s'assurer de sa validité à mesurer le manque de réflexes pour conduire un véhicule motorisé et former l'ensemble des policiers afin qu'ils puissent l'utiliser. D'ailleurs, tous les tribunaux canadiens exigent, en complément de la preuve de consommation de drogue, l'échec au TSN pour confirmer les facultés affaiblies (Beauchesne, 2020, p. 203).

However, enlarging the definition of impaired driving to include all causes would have also created another consequence. Like with the use of the cellular phone while driving, criminal sanctions would not have been considered a viable solution punishing a wide range of citizens.

> Éviter l'usage du droit pénal pour résoudre un problème au profit de mesures moins complexes et moins lourdes est bénéfique selon de nombreuses études en criminologie. Elles démontrent clairement que, pour modifier un comportement, des peines sévères rarement appliquées parce que les suivis sont complexes sont beaucoup moins efficaces que des sanctions administratives plus simples et plus souvent appliquées. Pourquoi? Parce que cela augmente la perception chez la personne du risque d'être prise et d'en subir les conséquences, puisqu'elles seraient plus immédiates et connues. Si une personne échoue au test de réflexes, elle ne peut continuer sa route, tant pour la protection du public que pour la sienne. On saisit le véhicule et on le remorque à la fourrière. On peut suspendre temporairement son permis, donner des points d'inaptitude, et les assurances feront le reste en augmentant les primes. Comme ces interventions policières seraient plus faciles à appliquer et qu'elles engloberaient sans discrimination l'ensemble des causes de la conduite avec facultés affaiblies, le message à la population serait beaucoup plus clair : on ne conduit pas avec les facultés affaiblies, peu importe la cause de cette situation (Beauchesne, 2020, p. 204).

As we can see, the problem of impaired driving could have been constructed very differently. However, the punitive focus on 'recreational' motivations to use drugs in the impaired-driving construction of the problem brings us to another critical element to consider, which is related to our sub-questions: why were specific sanctions for cannabis while driving created simultaneously with Bill C-45 (the legalization of cannabis) in 2017 when the therapeutic use of cannabis has been permitted since 2001 in Canada?

To answer this question, we need to understand the false distinction between 'recreational' and 'medicinal' users of cannabis, where one group is still perceived as suspicious, and the other group is perceived as legitimate.

## 1.5 The construction of the “recreational cannabis user”

Cannabis has a long history of being used for medicinal and therapeutic purposes and a contested history under drug prohibition regimes. In Canada, cannabis was added to the list of scheduled drugs at the last minute in 1923 with no parliamentary debate. In the United States, cannabis was removed in 1941 from the list of therapeutic medications intended to be moved to a prescription control structure and was prohibited instead (Grinspoon, 1999, p. 146). Under the United Nations Convention, the non-medical use of certain drugs (including cannabis) is prohibited, however, the state can authorize narcotics for distribution for medicinal purposes (United Nations Office on Drugs and Crime, 2013, p. 23). Under these provisions, cannabis can be authorized under international law for medicinal purposes.

Between the 1970s and 1990s, more and more users of cannabis for therapeutic purposes in Canada and the United States pushed for legal access to this drug. In the context of the War on Drugs and the stigma on illegal drugs, including cannabis, these claims makers needed to make their use of cannabis distinct from others ‘recreational’ uses to appear more legitimate and taken seriously in court (Bottorff et al., 2013). When the courts started to support the legitimacy of these ‘medicinal’ claims, the judges took up this distinction from users between ‘medical users’ and ‘recreational users’ to justify their decision. Following these court decisions- or referendum on the issue articulated on this distinction, the states reinforced it to permit access to cannabis for the users with medical authorization. They had no choice because

> À l'exception de l'Uruguay et de l'Alaska, tous les pays et régions qui ont permis un certain accès au cannabis autorisé médicalement l'ont fait en conservant prohibé l'usage du cannabis sans suivi médical. Ainsi, politiquement, il a fallu construire des consommateurs médicaux de cannabis dont l'usage de cette drogue devenait légitime, tout en maintenant illégal l'usage de cette drogue sans suivi médical (Beauchesne, 2020, p.42).

However, this division between the users of cannabis is artificial for several reasons. First, the motivations to use this drug are insufficient grounds to justify a separation between 'medicinal' and 'recreational' users. Studies of motivations for cannabis use indicate there is no clear distinction between these two groups of cannabis users. Rather "there is significant overlap between medicinal and recreational cannabis users in that many cannabis users who define themselves as medical users also report recreational use" (Hakkarainen et al., 2019, pp. 250–251). Also, many users report cannabis use for 'medicinal' purposes even if they don't have medical authorization: the main reasons cited for cannabis use are to relax, diminish stress, gain appetite, sleep better, decrease pain, and as a coping mechanism. While the recreational motivations for cannabis exist, they are far from being the main reasons for use (Cooper et al., 2015).

Second, the justification in separating 'medicinal' from 'recreational' users is based on a false assumption that there is a clear physiological distinction between the relief from pain and other medical symptoms and the experience of pleasure. Under this assumption, if we define recreational users of cannabis as people who use it for 'pleasure' – which is the non-legitimate reason to use it- the medicinal use of cannabis should not give any 'pleasure' derived from the well-being it brings. However, this is not the case, and there is no clear boundary between the 'recreational' when it is primarily and loosely defined as experiencing pleasure from the use of a drug, and 'medicinal' in the improvement of well-being

through the relief from pain or other medical symptoms (Lancaster et al., 2017). Not only is there a clear distinction to be made between feeling better and pleasure, but it also assumes that pleasure is immoral. Pleasure has been constructed as immoral due to the perceived incompatibility of pleasure and loss of bodily control of the rational, disciplined neoliberal body (Moore, 2008, p. 356). This morality debate in the separation of 'medicinal' and 'recreational' cannabis use has made it easy for politicians to justify the separation between legitimate uses and non-legitimate uses. Further, since 'medicinal' users themselves initially created this distinction in cannabis use to fight for access to cannabis under the argument for therapeutic purposes, it was an easy political distinction to endorse. After that, it was reinforced in the law and became common vocabulary, even in the scientific community and the institutions, to distinguish medically authorized from non-authorized users (Beauchesne 2020).

Thirdly, the discourse that separates 'medicinal' and 'recreational' users has resulted in terminology that separates 'recreational' from 'medicinal' cannabis as if they are different products. With the legalization and subsequent commercialization of cannabis, users with medical authorization and users without have primarily been using the same products. The black market, particularly illegal websites for cannabis products, helped expand the variety of cannabis products consumers used years before the legalization in Canada. In the last few years, the cannabis industry has enlarged this variety for both categories of users, with and without medical authorization (Beauchesne, 2020). With both medically authorized and non-medically authorized cannabis users consuming the same products, the type of product cannot be used to justify the separation of 'medicinal' and 'recreational' users.

This distinction between medically authorized and non-medically authorized cannabis users had a significant impact on the population because of the prohibitionist baggage associated with non-medically authorized users:

> Il faut comprendre que le consommateur de cannabis récréatif demeure d'autant plus suspect aux yeux de la population que cette drogue était auparavant illégale. Toute une littérature a servi et sert encore à justifier la prohibition de certaines drogues, et le cannabis en fait partie. Plusieurs éléments de celle-ci, particulièrement certaines affirmations très médiatisées, ont laissé des traces profondes dans la population sur les perceptions des drogues illégales en général et sur le cannabis en particulier. Cela participera à la justification d'une prohibition 2.0 à l'intérieur même des lois et des réglementations pour encadrer l'usage du cannabis (Beauchesne, 2020, p.92).

In addition to the construction of the impaired driving problem, we will have to consider this distinction in our grid of analysis for the parliamentary debates. The legitimacy of the user authorized to use cannabis for therapeutic purposes is likely significant in the explanation for the timing of specific sanctions for cannabis while driving, occurring only with the legalization of cannabis in 2018.

## 1.6 Bill C-46: context and content regarding cannabis

### 1.6.1 The main elements of this bill

Bill C-46 covers the entirety of impaired driving legislation, including offences related to alcohol-impaired driving to increase several of the maximum penalties for these offences. However, the focus of this thesis is limited to the offences contained in C-46 that are specific to cannabis-impaired driving.

There are two parts to Bill C-46; the first contains an amendment to the Criminal Code to "strengthen the legislative provisions relating to driving while impaired by drugs, including cannabis" (Charron-Tousignant & Valiquet, 2018, p. 1). Two new specific offences related to cannabis-impaired driving were included in Part 1 of Bill C-46, and another offence was created to account for the combination of cannabis and alcohol, which are the following:

- 2 nanograms (ng) but less than 5 ng of tetrahydrocannabinol (THC) per *milliliter* (mL) of blood: an offence punishable on summary conviction with a maximum fine of $1,000;
- 5 ng or more of THC per mL of blood: a hybrid offence liable to the punishments currently set out in section 255(1) of the Code; and
- more than 2.5 ng of THC per mL of blood combined with a blood alcohol concentration (BAC) of 50 milligrams (mg) of alcohol per 100 mL of blood (0.05): a hybrid offence liable to the punishments currently set out in section 255(1) of the Code (Charron-Tousignant & Valiquet, 2018, p. 2).

These offences are *per se* laws in which a threshold level is set and being over the legal limit constitutes an offence. These offences have also mandatory minimum sanctions established by the section 255 (1) of the Criminal Code, which are as follows:

> 255 (1) Everyone who commits an offence under subsection 253(1), paragraph 253(3)(a) or (c) or section 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
> (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
> (i) for a first offence, to a fine of not less than $1,000,
> (ii) for a second offence, to imprisonment for not less than 30 days, and
> (iii) for each subsequent offence, to imprisonment for not less than 120 days;
> (b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and
> (c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.

In addition to these new offences, Part 1 of Bill C-46 also introduces new tools, the oral fluid screening devices, for police detection of drugs in a driver's body on the roadside (Charron-Tousignant & Valiquet, 2018, p. 1). With reasonable grounds to suspect a driver has drugs in their body, an officer can demand an oral fluid sample.

### 1.6.2 The construction of the problem

The government justifies Bill C-46 and the introduction of cannabis-specific impaired driving offences based on the objective of "*reducing the significant number of deaths and injuries caused by impaired driving, a crime that continues to claim innocent lives and wreak havoc and devastation on Canadian families*"[3]. The government goes further and argues Bill C-46 is justified on the basis that impaired driving is "one of the most common criminal offences and continues to be among the leading criminal causes of death in Canada" (Charron-Tousignant & Valiquet, 2018, p. 3). Although alcohol-impaired driving remains the most common impaired driving offence by a vast margin, the government puts forward that the "proportion of such cases involving drugs doubled between 2009 and 2015 (from 2% to 4%)" (Charron-Tousignant & Valiquet, 2018, p. 3). The government has put forward an increase in non-alcohol drug-impaired driving offences and the concern regarding the impact of cannabis legalization has been put forward by the government as justification for Bill C-46.

[3] Hansard, House of Commons, 42nd Parliament, 1st Session, May 19th, 2017, par. 1005.

### 1.6.3 The solution put forward: a *per se* law

To understand why the government put forward a *per se* law as a solution to the problem with a low minimum quantity of THC, we will now turn to the major speech at the second reading in the House of Commons by Jody Wilson-Raybould, as the Attorney General of Canada who was the sponsor for Bill C-46. During this speech, Wilson-Raybould argued that the threshold levels proposed, starting at 2 ng THC/ml blood, came in part from other jurisdictions [4]. In Colorado and Washington, where cannabis is legal, the threshold limit for cannabis-impaired driving is set at 5 ng THC/ml. On the other hand, in Nevada, where cannabis is also legal, and the United Kingdom where cannabis remains illegal, the threshold is set at 2 ng THC/ml. In choosing 2 ng THC/ml, the government chose to enact an "*impaired driving regime [… that] would be among the strongest in the world*"[5]. Selecting the starting threshold limit of 2 ng THC/ml blood was also justified as a "*precautionary approach*" [6] by Wilson-Raybould, as the government's way to demonstrate severe concern regarding cannabis and driving.

### 1.6.4 The objective of this bill regarding the problem put forward

Jody Wilson-Raybould explains, "the many reforms proposed in Bill C-46 will be enormously effective in deterring drug and alcohol-impaired driving"[7]. Despite the fact alcohol is a drug, this bill is described as "alcohol and drug-impaired driving," thereby separating alcohol from other drugs in the context of this

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[4] Ibidem.
[5] Ibidem.
[6] Idem, par. 1005.
[7] Idem, par. 1015.

bill. Cannabis is part of the 'drug' category, attaching cannabis to other illegal drugs to be tested for impaired driving, keeping the negative connotations associated with the use of illegal drugs. Moreover, this speech justified the severity with which to treat drug impaired driving, specifically pointing to "*drivers impaired by drugs and alcohol caus[ing] devastation on our roads and highways*" [8]. Meanwhile, other forms of impairment (fatigue, illness, age related reflex deterioration, etc.) are absent and, therefore, silenced in this speech.

## 1.7 Sub-questions based on the literature review

We now return to the main research question of this thesis, which is: was the Canadian government's construction of the problem of cannabis-impaired driving – as used to justify the necessity and the content of new offences in Bill C-46 - was contested in whole or in part during the parliamentary debates leading to the adoption of this bill or was this construction accepted by most of the parliamentarians and witnesses? This question comes from the sixth and final question of Bacchi & Goodwin's questions used in the WPR framework to understand the construction of problems and solutions put forward through public policy (2016, p. 20). Based on the review of the literature, the following sub-questions were identified.

[8] Idem, par. 1005

1) The cause of the problem. The government put forward in Bill C-46 the necessity of specifically targeting cannabis users driving a motor vehicle because they will cause injuries and deaths on the road. Did some parliamentarians or witnesses raise:
    a. A more global perspective on the cause of impaired driving than the 'bad driver' who uses cannabis, raising the argument that the necessity of driving in auto-dependent societies (lacking alternative transportation options) ultimately results in drivers who are in no condition driving on the roadways?
    b. A more global perspective on the cause of impaired driving or risk for road safety (e.g., fatigue, illness, age-related reflex issues) and/ or distractions (e.g., cellular phones) other than the use of drugs (alcohol, prescriptions, cannabis, illegal drugs, etc.)?
2) The solution to the problem. The government put forward in Bill C-46 the necessity of specifically targeting cannabis users driving a motor vehicle (with or without medical authorization) to reduce impaired driving using a *per* se law rather than using proof of impaired driving. Did some parliamentarians or witnesses raise:
    a. The loss of the road safety objective by not targeting all impaired drivers, regardless of the cause of impaired (fatigue, illness, etc.), *and*/*or* distracted driving (use of the cellular phone)?
    b. The loss of the safety road objective not targeting all impaired drivers regardless of the cause of impaired driving is (fatigue, illness, etc.)?
    c. The loss of the road safety objective with a *per se* law, particularly with cannabis, where a link cannot be established between a certain THC level and impaired driving?

   d. The loss of the objective of road safety by distinguishing between the 'good' motivations and the 'bad' motivations to use cannabis, asking that the law be less severe or not apply to users with a medical authorization without contesting the punishment of users that do not have a medical authorization?

3) The objective of this Bill. The government put forward in Bill C-46 the necessity of using the criminal law and technologies (mainly saliva testing) to detect and punish the cannabis user over a certain THC level or combining cannabis use and alcohol. Did some parliamentarians or witnesses raise:

   a. The fact that reflex tests to check the aptitude of a person to drive should have been privileged as a means of detection by the police because the driver's ability is all we need to know to improve road safety.

   b. That criminal sanctions are not the most effective means to reduce impaired driving, and administrative sanctions would have been more effective (vehicle seizure for a few days, fines, demerit points, etc.)?

   c. That a specific law for cannabis and impaired driving is not at all necessary?

Now that we identified or sub-questions, we will present the methodology to collect our data.

# Chapter II: Methodology

We will now discuss our research methodology, namely qualitative research, and explain the content analysis process and how these methods allow us to answer the proposed research question. Next, we will present the documentary corpus, which consists of the parliamentary debates of Bill C-46 and the witness briefs submitted to parliamentary committees. Finally, the coding matrix will be introduced.

# 2.1 The nature of qualitative research and documentary analysis

### 2.1.1 Documentary analysis

Document analysis is defined as "a systematic procedure for reviewing or evaluating documents- both printed and electronic (computer-based and Internet-transmitted) material." (Bowen, 2009, p. 27). This section will explore the advantages and disadvantages of document analysis for qualitative research and the role of the researcher in the documentary analysis process.

Document analysis is an advantageous research method because when an event can no longer be observed or the details are lost, documents retain information pertinent to understanding these events (Bowen, 2009, p. 31). Document analysis is used as a primary method of analyzing historical events and can be used to "inform understanding of past influences on present policies, legislation, service systems and/ or programmes" (Mackieson et al., 2019, p. 968). In this regard, the parliamentary debates are a very high-quality data source due to accurate record keeping and the origin of the documents (Mackieson et al., 2019, p. 968). Document analysis is an accessible research strategy, especially when using parliamentary debates, as the documents are all published online for the public. As the documents

are pre-existing, document analysis provides a non-invasive and low reactivity option for researchers (Bowen, 2009, p. 31). Further, due to the nature of public documents such as the parliamentary debates, and the high quality of the data, there is often less cause for concern regarding the reliability and validity of the research findings compared to other types of qualitative research.

But there are also several significant limitations of documentary analysis that require consideration (Bowen, 2009). First, there may be insufficient detail presented in the documents for the researcher to draw an interpretation. Documentary analysis does not allow the researcher to further question the research participants and must work within the constraints of this limitation. Second, low retrievability may be an issue in some documentary analyses. However, with the publishing of the parliamentary debates online, this is not an issue for our research. Third, biased selectivity of the documents may be possible in documentary analysis. However, it is more often a flaw of the research design than a limitation. Bowen (2009) argues that the advantages of document analysis outweigh the possible limitations.

The role of the researcher is also different in documentary analysis from other forms of qualitative research in that the data is pre-existing and "have been recorded without a researcher's intervention" (Bowen, 2009, p. 27). However, the researcher still plays a prominent role in document analysis in interpreting and denoting significance to the selected documents. As in other methods of qualitative research, "document analysis requires that data be examined and interpreted to elicit meaning, gain understanding, and develop empirical knowledge" (Bowen, 2009, p. 27). As with other qualitative research methods, document analysis "requires robust data collection techniques and the

documentation of the research procedure. Detailed information about how the study was designed and conducted should be provided in the research report" (Bowen, 2009, p. 29). Therefore, the researcher is responsible for ensuring the research project's design is outlined in sufficient detail to meet the quality criteria of qualitative research.

### 2.1.2 Quality criteria

Qualitative research is often critiqued in terms of concerns surrounding validity. Validity refers to the coherence of the research, as "the rigour, and the transparency of a chain of scientific decisions related to the object of study, the problem related to this object, the research questions, the possible answers, the methods of data collection and analysis, and the conclusion" (Gaudet & Robert, 2018, p. 6). However, the ontological perspective of most qualitative research is that "the nature of reality is not unique or objectively verifiable but relative (ontologically relativist) and created by our interpretations of it." (Johnson & Rasulova, 2017, p. 265). The strengths of qualitative research, such as "the depth and closeness of the researcher to the research topic and the data" have been identified in the quantitative tradition as 'weaknesses,' under the argument that qualitative research is "subjective and lacks rigour" (Johnson & Rasulova, 2017, p. 265). On the other hand, quantitative research has been defined by a realist ontology and a set of criteria that aims to achieve internal validity, objectivity, reliability, and generalization (Johnson & Rasulova, 2017, p. 266). Although some qualitative researchers argue that universal quality criteria are inappropriate given the research subject and ontological and epistemological position, the main criteria of the quantitative tradition are a useful starting point for developing a valid qualitative framework (Johnson & Rasulova, 2017, p. 266).

Four main criteria of quantitative research can generate a starting position for a qualitative framework. The first quantitative criteria is internal validity, which refers to "the suitability of a chosen method to measure what it used to measure" (Johnson & Rasulova, 2017, p. 266). The second criteria is objectivity, which refers to the researcher's position as separate from the research and research subjects and the degree to which the researcher can reduce or eliminate sources of potential bias (Johnson & Rasulova, 2017, p. 266). The third criteria to be used is reliability, which refers to consistent research results when repeated using the same methods (Johnson & Rasulova, 2017, p. 266). The fourth and final essential criteria for evaluating quantitative research is generalizability. However, generalizability is often in conflict with the goals of qualitative research designs. Generalizability refers to the idea that "findings can be legitimately generalized to a wider population of which the sample is representative" (Bryman, 2004, p. 35). However, the goal of generating generalizable findings is to discover universal laws, such as in the natural sciences (Bryman, 2004, p. 35); this goal conflicts with the goals of qualitative research when taking a relativist ontological stance. Credibility is often argued to be a more suitable measure of quality, a qualitative criteria with a similar role to internal validity in quantitative research (Johnson & Rasulova, 2017, p. 266).

**Credibility**

In qualitative research, credibility refers to "when the researcher has confidence in the truth of the findings with regard to the subjects of research and the context where it was conducted" (Johnson & Rasulova, 2017, p. 266). Credibility rather than internal validity considers the fact that there are multiple truths and realities. This assumption lies at the heart of most qualitative research and in stark contrast

to quantitative research that assumes there is one truth and reality (Johnson & Rasulova, 2017, p. 266). Qualitative researchers attempt to retain the integrity of these multiple realities and acknowledge the researcher's part in the interpretation of the findings.

**Dependability**

Closely linked to credibility is dependability, which is "to ensure consistent data collection without unnecessary variations to ensure repeatability of the research process" (Johnson & Rasulova, 2017, p. 268). Dependability refers to the deliberate and careful research process documentation, including data, methods, and fieldwork decisions (Johnson & Rasulova, 2017). Establishing the dependability of the research process is the basis for establishing the credibility of the research.

**Confirmability**

The qualitative position often operates on the assumption that research is inherently subjective and cannot operate with quantitative criteria. As a measure of quality, qualitative researchers opt for confirmability that ensures the "research process and findings are not biased; hence it refers to both the researcher and the interpretations" (Johnson & Rasulova, 2017, p. 268).

**Transferability**

Similar to generalizability or external validity, qualitative research often uses transferability to measure the quality of the research process (Johnson & Rasulova, 2017, p. 268). Unlike quantitative research, the results of qualitative research are rarely generalizable to a broad population due to the smaller sample

size and the specific context in which the research has taken place. Rather, transferability in qualitative research ensures that the "research descriptions and findings are sufficient to draw similarities with another context. To achieve this context, the researcher needs to provide detailed descriptive information" (Johnson & Rasulova, 2017, p. 268). While qualitative research aims not to produce generalizable findings, the researcher must provide enough information for a reader to determine whether there are possible connections to other contexts (Johnson & Rasulova, 2017, p. 268).

**Social and political impact**

A final measure of quality in qualitative research within the critical posture is the researcher's and research's possible social and political impacts on marginalized and disadvantaged groups. The transformative aspect is an essential part of critical research, as "the aim of the inquiry is the critique and transformation of the social, political, cultural, economic, ethnic, and gender structures that constrain and exploit humankind" (Guba & Lincoln, 2004, p. 30). The social researcher is responsible for ensuring that the research has a minimal negative impact on the research subjects. The social researcher must also recognize the ethical challenges of benefitting from researching by, for, or with, marginalized or disadvantaged populations (Gohier, 2004, pp. 13–14).

While critical research has a role in furthering social transformation, it is crucial to acknowledge the limitations of the research and especially within the qualitative tradition where the goal is not to produce generalizable results but rather is bound within the particular context in which it was found. Rather,

qualitative research often leads to localized knowledge that should adhere to the standards of credibility within the research context in which it is conducted (Gaudet & Robert, 2018)

This thesis aims to contribute to the literature on the socially constructed nature of impaired driving and the continued criminalization of cannabis users through the impaired driving framework in Canadian law. Understanding the impact of these constructions in the political staging of parliamentary debates helps to understand how we come to favour punitive solutions against specific groups, in this case, the cannabis user, rather than retaining the objective of reducing impaired driving using the most effective means possible.

## 2.2 Presentation of the documentary corpus

The documentary corpus for this thesis includes all transcripts of the parliamentary speeches and witnesses as heard in the House of Commons and the Senate through Bill C-46. This also includes all the briefs and the reports of the Standing Committees of the House of Commons and the Senate. In Appendix A, Table A1 contains the body of the parliamentary debates from Bill C-46, including the meetings of the Standing Committees and the chronology of events. Found in Appendix B are the names and positions of the witnesses heard at the Standing Committees that examined cannabis in Bill C-46. In Appendix B, Table B1 contains the names and titles of witnesses heard at the House of Commons Standing Committee on Justice and Human Rights; Table B2 contains the names and titles of witnesses

heard at the Senate Standing Committee on Legal and Constitutional Affairs. In Appendix B the witnesses heard at both Standing Committees in Table B1, and Table B2 have been categorized by their affiliation as a representative of the government, a government agency, citizen activist group, various organizations, or as an individual. Further, Appendix C contains the party breakdown of Members of Parliament in the House of Commons and the Senate at the time Bill C-46 was debated, as well as their political affiliation. This section will explore the nature of parliamentary debates as data and the context in which these parliamentary debates took place.

As previously mentioned, using parliamentary debates to conduct a document analysis is highly advantageous. One significant advantage of using parliamentary debates as the source of data is accessibility. Due to the digitization of these records through the Hansard system, debates are easily accessible for this study and for future research studies or confirmation of the research findings.

But given that the data will be retrieved from the online Hansard system, rather than verbatim transcripts, it should be noted the Hansard reports of the parliamentary debate are transcribed and reviewed and scanned for any errors such as redundancies, grammatical errors, factual errors, and slips of the tongue (Parliament of Victoria, 2017, in Mackieson et al., 2019, p. 971). Therefore, the Hansard documents cannot be assumed to be verbatim transcriptions and should not be treated as such.

Parliamentary debates are inherently political and thus cannot be extracted from this context of political power, persuasion, and political theatre.

### 2.2.1 Nature of the data

The political nature of parliamentary debates means that the text cannot be taken as representative of the speaker's genuine opinion but rather as part of a strategic debate to support the position of the speaker's political party. In addition to document analysis not being able to further interrogate the participants, for the analysis of parliamentary debates, "if a politician's intended message in a speech reflects a strategic, rather than sincere, position, the researcher can, at best, recapture the intended message, not the sincere policy position" (Benoit, Laver & Mikhaylov, 2009, in Proksch & Slapin, 2015, p. 24). Given this difficulty in separating genuine opinion from parliamentary debate, we will state what has been said by the parliamentarians rather than associate debate transcripts with individual beliefs or opinions.

The nature of parliamentary debates and how they are formulated, first in a parliamentary speech to published reports, must also be explored to understand how this process affects the data set and its limitations.

### 2.2.2 Parliamentary procedure

The parliamentary procedure contains three primary goals; for the government to be interrogated and defend its position; several positions and opinions to be heard; and, for establishing a timeline for discussions to end and move to the next issue of debate (Franks, 1996, pp. 116–117). A bill can be introduced either in the House of Commons or the Senate however, most legislation originates in the government. Once the bill has been introduced, it is sent to Parliament for a First reading, and then to

Second reading in the same House. It is then decided whether the bill will proceed to a legislative, standing, or special committee or Committee of the Whole. At the committee stage, witnesses and experts are summoned and asked to provide a brief and/ or testimony to improve the bill (Campbell, n.d.). At the Report stage, the committee reports the bill to the House and proposes any amendments where the House will consider the amendments and vote in favour or opposition. At the Third reading stage, the House votes and makes any amendments and then sends the bill to the Senate for consideration, and the same process is followed. When the Senate has reviewed the bill, it is sent to the Governor General for Royal Assent, and once received, the bill becomes law (Campbell, n.d.).

However, government debates are subject to the context in which they are performed as institutions, and political parties are factors in party unity (Proksch & Slapin, 2015, p. 24). Parliamentary procedure is fundamental to the constitution and the application of democracy, as it is intended to allow minority voices to question the government's legislation. However, despite the necessity of opposition being recognized in Parliamentary procedure, "Procedure creates not only the opportunities for the minorities to have their say, but the mechanism by which discussion ends, and the majority gets its way" (Franks, 1996, p. 116). This is important to note, as "MP's usually vote in accordance with the party line and sometimes against their better judgement" (Fairclough & Fairclough, 2012b, p. 205). One crucial factor in understanding the context of Bill C-46 is that the Liberal Party had won a majority government in the preceding 2015 election, meaning that the government could pass legislation with relative ease as members vote almost exclusively in line with their party affiliation.

In addition to a majority vote in the House of Commons, the Liberal Party *framed the problem* in the initial presentation of Bill C-46 in Parliament. Before its introduction to Parliament, the bill has already undergone significant deliberation within the presenting party itself. At the point of the proposal to the House of Commons, the government has already formed a construction of what the bill should look like and how the problem it intends to solve should be framed (Bacchi, 2015, 2018; Bacchi & Goodwin, 2016; Fairclough & Fairclough, 2012). The debates allow for discussion and questioning; however, it is more difficult for other political parties to question a construction that is already put forward, especially if this construction of a problem and the solutions put forward have strong popular support.

### 2.2.3 Senate reforms

Immediately prior to the debates on Bill C-46, Prime Minister Justin Trudeau initiated reforms to the Senate, which resulted in further discussion between the Senate and the House of Commons than was seen previously.

In 2014, as leader of the Liberal Party, Justin Trudeau removed all senators from the Liberal caucus, so they no longer had formal ties or responsibilities to the Liberal Party and "focus on their legislative work as independent parliamentarians" (Dion, 2015). Since taking office in 2015, Trudeau has named senators recommended by an advisory committee to return the Senate to its intended role as an independent body of parliament (Bryden, 2018). In 2016, the Independent Senators Group (ISG) was formed, and by December of 2016, the Senate began to include the ISG members on committees in "numbers reflecting the proportionality principle" (Independent Senators Group, n.d.). Where the House of Commons tends

to vote along party lines, the Senate reforms led to additional discussions between the Senate and the House of Commons in the negotiation of legislation, as reflected in the messages, and amendments to bills by the Senate. Between June 2016 and May 2017, 20% of the bills receiving Royal Assent were amended by the Senate. In the previous 35 years, only 4.5% of government bills given Royal Assent were amended by the Senate (Independent Senators Group, n.d.). Trudeau's reform has resulted in additional discussions between the Senate and House of Commons, where the Senate has a more prominent role in determining the content of a Bill.

## 2.3 Content Analysis

### 2.3.1. Stages of content analysis

We will utilize content analysis to analyze the data collected from the documentary corpus for this thesis. Content analysis is defined "as a family of research techniques for making systematic, credible, or valid and replicable inferences from texts and other forms of communication." (Drisko & Maschi, 2015, p. 7). Content analysis can be mobilized in a deductive or inductive approach (Elo & Kyngäs, 2008, p. 109). For this thesis, we will primarily use deduction. Still, we will allow for induction if there are additional aspects to the construction of the problem that appears in the data that were not anticipated by the literature review.

Deductive content analysis "is used when the structure of analysis is operationalized on the basis of previous knowledge and the purpose of the study is theory testing" (Elo & Kyngäs, 2008, p. 109). The

deductive approach to this analytic strategy allows for developing research questions and strategies in the researcher's area of interest to answer specific questions drawn from the existing literature and research (Drisko & Maschi, 2015, pp. 21–22). On the other hand, the inductive approach requires the researcher first to read the data and develop the theoretical framework and categories by collecting and coding the data rather than having constructed these categories based on the literature. Inductive content analysis is advantageous where there is a lack of knowledge about the phenomenon or where gaps in the knowledge exist (Elo & Kyngäs, 2008, p. 109). By allowing room for induction in this thesis, we are open to unexpected findings in the data should they emerge.

However, regardless of the analytic strategy, any content analysis aims to classify a large amount of data into smaller categories. Although there are no specific rules for content analysis (Elo & Kyngäs, 2008, p. 109), "all good content analysis must be systematic, methodologically based, and transparently reported" (Drisko & Maschi, 2015, p. 4). There are three main phases of content analysis, whether it be inductive or deductive, or in our case, a mix of both approaches if necessary. The first phase is the preparation phase, the second is the coding and organization phase, and the third and final phase is the reporting phase (Elo & Kyngäs, 2008, p. 109).

### 2.3.1 Pre-analysis and preparation phase

The preparation phase of content analysis includes making decisions regarding the unit of analysis and data sampling to ensure representative data collection (Elo & Kyngäs, 2008, p. 109). It is in this phase that the researcher "must also decide whether to analyze only the manifest content or the latent content

as well" (Elo & Kyngäs, 2008, p. 109). A content analysis of interview material may refer to the participants' body language, silences, or laughter. However, given the nature of the transcripts from parliamentary debates, the latent content will not be accessible for our analysis. Rather, we are interested in the arguments put forward by the parliamentarians and the witnesses, but also in significant silences in what is not said in the debates. These silences will constitute part of the analysis of the data that will be seen in the final chapter.

In the preparation phase, a first reading was completed to identify the segments pertinent to our research sub-questions and initial breakdown of the categories of interest. In the House of Commons, 398 pages were retained out of 1054, including briefs and reports at this stage. In the Senate, 605 pages were retained out of 1433, including the briefs and reports at this stage. From the messages between the House of Commons and the Senate, 12 pages were retained out of 121 pages. Out of a total of 2724 pages, 1015 have been retained for analysis. The first reading also allowed for a reduction in the number of witnesses. Out of 62 witnesses appearing in the House of Commons debates, 41 were retained. Similarly, out of 62 total witnesses presenting to the Committee, 43 were retained in the Senate.

### 2.3.2 Coding and organization phase

The second phase requires preparing a "categorization matrix to code the data according to the categories" (Elo & Kyngäs, 2008, p. 111). The coding matrix is "generally based on earlier work such as theories, models, mind maps, and literature reviews" (Elo & Kyngäs, 2008, p. 111). This coding matrix is then used to code the data into the categories developed from the literature review. The structured

coding matrix allows the researcher to select only those aspects in the data that correspond to the categorization matrix and test hypotheses. However, "aspects that do not fit the categorization frame can be used to create their own concepts, based on the principles of inductive analysis" (Elo & Kyngäs, 2008, p. 112). In this way, aspects of the data that do not fit into the coding matrix developed from the literature review may be analyzed using inductive content analysis in this thesis.

The following coding matrix was used to code the data, drawing from the main questions presented in the literature, namely, what is said about the cause, objective, and solutions put forward:

| Question | | Coding (example) |
|---|---|---|
| 1) Who is speaking? | • Parliamentarian- which party?<br>• Witness- in what capacity? | Parliamentarian- Jody Wilson-Raybould, LPC<br>Witness- Andrew Murie, CEO MADD Canada |
| 2) What is being said about the *cause* of the problem? | In support or disagreement with these?<br>• The 'bad driver.'<br>• Non-drug impairments<br>  ○ Fatigue<br>  ○ Illness<br>  ○ Age<br>  ○ Distractions (i.e., use of the cellphone) | BD- Bad driver<br>NDI- non- drug impairments<br><br>-1- Unfavourable<br>+1- Favourable |
| 3) What is being said about the *objective* of the law considering the problem? | In support or disagreement with these:<br>• The loss of the road safety objective in NOT targeting:<br>  ○ Impaired driving of any cause and distracted drivers (i.e., using cell phones)<br>  ○ Impaired drivers (any impairment)<br>• The loss of the road safety objective in using a *per se* law where THC levels have not been linked to impairment<br>• Distinguishing 'good' and 'bad' motivations to use cannabis<br>  ○ Punishment of non-medically authorized user<br>  ○ Punishment of medically authorized users | DD- distracted drivers and impaired drivers<br>ID- impaired drivers<br>PS- *Per se* law<br>NMA- Punishment of Non-medically authorized users<br>MA- Punishing Medically Authorized users<br><br>-1- Unfavourable<br>+1- Favourable |

| | | |
|---|---|---|
| 4) What is being said about the *solution* to the problem? | In support or disagreement with the following:<br>• Reflex tests as the sole determinant of impairment<br>• Criminal sanctions for impaired drivers<br>• Specific legislation for cannabis-impaired driving<br>• Oral fluid screening devices | RF- Reflex tests<br>CS- Criminal sanctions<br>SL- Specific legislation<br>OFD- Oral Fluid Devices<br><br>-1- Unfavourable<br>+1- Favourable |
| 5) Did any parliamentarians or witnesses contest the problem of cannabis-impaired driving as put forward by the government? | What arguments are used to support or contest the problem of cannabis impaired driving as put forward by the government? | |

In the next chapter, we will present the results of this second reading with the coding, reporting our data (third phase) and in the fourth chapter, it will be the analysis of these data regarding the literature review and our research questions.

# Chapter III: Presentation of the data

In this chapter, we will introduce our data as collected from the parliamentary debates and witness briefs on Bill C-46. We will introduce the arguments presented in the debates following the coding matrix introduced in the previous chapter, as well as the arguments that emerged through our inductive analysis. We will analyze these arguments in the fourth and final chapter.

## 3.1 Cause of the problem: the 'Bad driver'

The 'bad driver' as the cause of impaired driving was touched on 196 times in the debates. Of these, only 4 interactions questioned the nature of the 'bad driver' as the cause of impaired driving, while 192 argued in favour of the 'bad driver' as the cause of impaired driving.

Of those who argued in favour of the 'bad driver' as the cause of impaired driving, many placed responsibility for impaired driving incidents on individual drivers who made a choice to consume drugs (including alcohol). This view was sustained by members of the Liberal Party but also by most other parties and witnesses.

> First, unlike many other offences that can be committed in a number of different ways and capture a broad range of offenders, impaired driving offences always require voluntary consumption of alcohol or an impairing drug and then making the deliberate decision to get behind the wheel, which puts all users of the road at risk (Don Davies, NDP).[9]
>
> Referring to drug- or alcohol-impaired driving that causes bodily harm or death as an "accident" implies that the criminal conduct and consequence happened for no apparent reason when, in reality, it was a person's decision to drive impaired. We ask

[9] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 184, Second Reading, May 31st, 2017, par. 1905

> that the committee consider changing the terminology to "collision" to recognize this fact (Michael Stewart, Program Director, Arrive Alive DRIVE SOBER ).[10]

> Numerous lives are tragically cut short by impaired drivers who make the decision to be reckless in their actions. They make the willful choice to put others at risk on our roadways and highways by driving while being impaired by either drugs or alcohol. Somewhere today in other communities, there is the next victim of impaired driving (Markita Kalius, President, Families for Justice). [11]

Yvan Clermont of Justice Statistics at Statistics Canada, accentuates this image of the "bad driver" by showing that this criminal choice of driving after consumption of cannabis is often accompanied by other anti-social behaviours, as shown by the statistics.

> Impaired driving is not a behaviour in isolation. It is often one of a number of at-risk behaviours. Those who drive faster and more aggressively, without seatbelts, or while using a cellphone without a "hands-free" function and, above all, those who ride as passengers of an impaired driver, all report driving while impaired in significantly higher numbers than others (Yvan Clermont, Statistics Canada).[12]

Members of the Conservative Party (CPC) argue that these drivers are so 'bad', that they are impervious to rehabilitation efforts, and repeatedly drive impaired even after being caught. These members of the CPC use this argument to justify harsh sanctions, arguing that less stringent sanctions will not be an effective deterrent to these 'bad' drivers. Further, if an impaired driver kills somebody, they must be held responsible for their choice to drive while impaired by labelling the offence "vehicular homicide".

> Mr. Jim Eglinski (CPC): Mr. Speaker, we have been hearing from members across that having a fixed penalty for impaired driving causing death is not a deterrent.
> […]

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[10] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 65, September 25th, 2017, par. 1645
[11] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 62, September 18th, 2017, par. 1710
[12] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee, Meeting 63, September 19th, 2017, par. 1535-1540

> Mrs. Cathy McLeod (CPC): Mr. Speaker, not only if they know that there is a consequence will it be a deterrent, but, importantly, some of our most habitual, chronic, drug and alcohol abusers who drive impaired, who have the fines and a penalty, get out and drive again. If we have them off the road with a mandatory minimum, then it might be two years or five years when they are not out there using their vehicle to kill or injure other people. (Exchange between CPC and CPC). [13]

> If a person kills someone using a car, a 2,000-pound or 3,000-pound weapon, while impaired, the individual choosing to become intoxicated through a drug or a drink, driving a vehicle knowing that he or she is putting the community at risk, and then kills someone, there should be a consequence much more serious than a few months in jail. It asked for mandatory minimum sentencing and for calling it what it is: vehicular homicide (Mark Warawa, CPC).[14]

Members of the CPC are strongly against the legalization of cannabis put forward in Bill C-45, a bill tabled at the same time as Bill C-46 in Parliament. As a result, members of the CPC consistently remind the government that the debates on Bill C-46 are only necessary because the government is legalizing cannabis, resulting in an increased number of cannabis impaired drivers compared to before legalization.

> First, the bill [C-45] compromises the safety of every single Canadian who uses a vehicle to commute. As I have stated, impaired driving is the leading criminal cause of death and injury in Canada. Marijuana- impaired driving is yet another red flag about this legislation. Recreational marijuana use is illegal today, but we know the Liberals' agenda to legalize marijuana. I suspect that the Liberals are recklessly trying to rush through this legislation in order to make it easier to pass their legislation legalizing recreational marijuana. This is a dangerous precedent to be setting. Thousands of lives will be at risk if we allow this to pass. The safety of our citizens is my top concern. Let us please put safety ahead of recreation (Stephanie Kusie, CPC). [15]

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[13] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 219, Report Stage, October 27th, par. 1325
[14] Hansard, House of Commons, 42nd Parliament, 1st Session, Chamber Sitting 182, Second Reading, May 21st, 2017, par. 1735
[15] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 184, Second Reading, May 31st, 2017, par. 2150

In our data, the "bad driver" as the cause of impaired driving is accepted and reinforced by nearly all the parties and witnesses. Even further, it is used by members of the CPC to demand even more stringent penalties than those proposed in Bill C-46 and to contest the Bill C-45 legalizing cannabis.

Very few interactions presented a challenge to the 'bad driver', and most that did pose a challenge simply underlined that increased accessible public transportation would improve road safety. Other interactions were focused on prevention and education being more effective than the criminal law to prevent "*people from driving in an unsafe manner*" [16]. However, these interactions didn't count much in the debate.

### 3.1.2 The 'Bad Driver' must have used drugs (including alcohol)

When discussing the objective of the law, the question of distracted driving as part of the problem of road safety arose in six interactions.

Four of these interactions insisted that distracted driving posed a problem for road safety. Among these four, Yvan Clermont of Statistics Canada was the most prominent voice, insisting particularly on the use of the cell phone as being part of a set of problematic driving behaviours that were more likely to be connected to impaired drivers[17]. The others were Byron Boucher, Assistant Commissioner Contract and

[16] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, February 28th, 2018, p. 38

[17] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee, Meeting 63, September 19th, 2017, par. 1535

Aboriginal Policing from the RCMP[18], Ian Jack, Managing Director, Communications and Government Relations CAA[19] and Senator Murray Sinclair (ISG), interacting with Chief Mario Harel of the Canadian Association of Chiefs of Police and Chuck Cox, Chief Superintendent and Co-Chair of the CACP Traffic Committee, Canadian Police Association [20] . But their arguments fell short of questioning the government's construction of the problem, treating cannabis impaired driving as a problematic driving behaviour necessitating the use of the criminal law. On the other hand, distracted driving was treated as a behaviour that only warranted an administrative sanction. Only one exchange between Senator Boisvenu (CPC) and Don Stewart, Professor, Faculty of Law, Queen's University questioned the rationality of this division. However, they concluded that the public would not accept distracted driving as a criminal offence, and it will necessarily be an arbitrary law related to distracted driving. These reasons were given to explain why distracted driving should not be in Bill C-46, even if this Bill was justified to improve road safety.

> For example, I was reading the material that's coming out now on distracted driving killing more people than impaired driving. The next thing we do is move into distracted driving and have something arbitrary there. I don't think that's how the law should work. I think it's working relatively well. I agree that there are a fair number of overly complex parts of impaired driving cases, and if I was prepared to answer this carefully, I would actually say I agree with a lot of it, but not this (Don Stewart, Professor, Faculty of Law Queen's University) [21].

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[18] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 36, February 14th 2018, p. 27

[19] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 43, May 9th, 2018 p. 26

[20] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 36, February 15th 2018, p. 78

[21] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 44, May 24th, 2018, p. 57

There were also eight interactions in which parliamentarians and witnesses raised the point that non-drug impairment could cause impaired driving. However, in all these interactions, the parliamentarian or witness argued that the drug (including alcohol) impaired driver was more problematic and more punishable than the driver impaired by non-drug impairments such as fatigue, stress, or distractions. Such was the case in an intervention by Mark Warawa (CPC) where non-drug impairments were recognized but not considered problematic enough to debate [22]. Further, an interaction between Senator Murray Sinclair (ISG), Mario Harel, President of the Canadian Association of Chiefs of Police, and Chuck Cox (Chief Superintendent and Co-Chair of the CACP Traffic Committee, Canadian Police Association) concludes that although distracted driving is the leading cause of death on the road, impaired driving is considered the leading *criminal* cause of death, thus emphasizing once again that only the driver who takes drugs is 'bad' enough to be considered a 'criminal' [23].

To illustrate this position, Ed Wood, representing DUID Victim's Voices, argued in favour of a *tandem per se* law, which rather than focusing on the threshold levels of THC, focuses on detecting drivers that are behaviourally impaired, regardless of the cause of the impairment. Upon a positive finding of behavioural impairment, finding any detectable level of drugs in the driver's system would result in a criminal sanction. In other words, differences should be made between people found to be behaviourally impaired; those who have taken drugs and those who have not. MADD Canada's brief and the Barreau

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[22] Hansard, House of Commons, 42nd Parliament, 1st Session, Chamber Sitting 182, May 29th, 2017, par. 1735

[23] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 36, February 15th, 2018, p. 78

du Québec went one step further in this direction and explains the *tandem per se* law is problematic because it will remove the link between drugs and impaired driving and leave many non-criminal drivers (i.e., drivers that did not take drugs) susceptible to impaired driving charges that they do not deserve:

> Unless more narrowly defined, the first element of the "tandem per se legislation" would encompass, among others: drivers who are older, tired or uncoordinated; and drivers who have physical, visual and emotional impairments. The courts may be reluctant to criminalize these individuals simply because they also happen to have a negligible amount of any potentially impairing drug in their body. The tandem per se legislation does not criminalize drug-impaired driving. Rather, it would make it a federal Criminal Code offence to drive while one's ability to do so is impaired regardless of the cause, while positive for any potentially impairing drug regardless of the amount (Witness brief submitted by MADD Canada).[24]

> The criminal offence is not driving while impaired—impairment which can be caused by fatigue, stress, a physical or mental disability, etc.—but rather driving while impaired by the consumption of drugs or alcohol (Witness brief submitted by Barreau du Québec). [25]

> […] driving while impaired by the consumption of drugs or alcohol is the problem the Criminal Code is intended to punish and eradicate, nothing else (Witness brief submitted by Barreau du Québec).[26]

### 3.1.3 This use of drugs excludes prescribed drugs

Thirteen interactions manifest an opposition to the use of the *per se* law to punish drivers with a valid prescription medication. Rather, their team of healthcare professionals should be involved in the

[24] MADD Canada witness brief submitted to the House of Commons JUST Committee, August 4th, 2017, p. 3
[25] Hansard, House of Commons 42nd Parliament, 1st Session, Standing Committee on Justice and Human Rights (JUST) Meeting 63, September 19th, 2017, par. 1745
[26] Barreau du Québec Witness Brief Submitted to the House of Commons JUST Committee, 2017, p. 4

interpretation of this situation; they must be given the benefit of the doubt in terms of their intention to drive impaired. Those who make this argument want to ensure the new procedure under Bill C-46 will prevent prescribed drug users from being punished *unfairly*. For these parliamentarians and witnesses, the 'bad driver' uses drugs other than prescription drugs.

> Senator Jaffer (ISG): […] Some people may have prescription drugs that have nothing to do with cannabis, which may show different results in the tests. Do you have anything in place to take into account people's prescriptions? What are the safeguards?
>
> Ms. MacRae (Executive Director, Human Resources, Toronto Transit Commission): Of course. I'll echo the comments from our colleague who spoke earlier with respect to the United States and the program that's been in place since 1995. DOT regulations have rigorous processes in place to safeguard against that very concern.
> How that works is when the initial test gets reported from the laboratory, it gets reported to a third party that's called a medical review officer. This medical review officer, upon receiving what we call a laboratory positive, will contact the employee and ask the employee if there is a reason why oxycodone showed up in their system. The employee has the opportunity to discuss and provide a medical certificate as justified reason why that would have taken place. If, for example, someone has knee surgery or dental surgery and the medical review officer is satisfied, that gets reported to the employer as a negative.
> This is where I say we guarantee against false positives due to the rigor of not just the testing mechanism but the process we have in place. Certainly, for something like medical marijuana, for example, in a scenario like that, they're obliged under our policy to make us aware. Should they be taking it and operating safety-sensitive machinery, for example, the same process will apply. The medical review officer will contact. If there is a justified authorization, it will get reported to the employer as a negative with a safety-sensitive flag. That signals to us that something is happening and to make sure the employee is sent for medical support to understand when they can safely come back to work. It is not held against them in a disciplinary fashion (Exchange between ISG and Executive Director, Human Resources, Toronto Transit Commission). [27]

[27] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 42, May 1st, 2018, p. 22

An exchange between Pierre A. Paquette (BQ) and Senator Pate (ISG) also extended the necessity for a separation between use of drugs and prescription drugs to workplaces because these people have a legitimate justification for using drugs[28]. This argument will also be reflected by some parliamentarians and witnesses who argue medically authorized cannabis users should be treated differently than non-medically authorized users under an impaired driving law. But the distinction between the "good" and the "bad" driver as it relates to medically authorized cannabis users was not as unanimous within the debates as was the distinction with prescribed users. To understand this difference, it is worth noting that cannabis is authorized by a doctor, not prescribed, and also noting the debates around the proposed solution for the problem of cannabis impaired drivers put forward by the government: a *per se* law.

## 3.2 Solution to the problem: *Per se* law

The government's solution to the impaired cannabis drivers, as we mentioned, is a *per se* law where a mandatory minimum criminal sanction is applied where a certain threshold of THC is detected in a driver's body. There were 172 interactions that touched on the *per se* law as the solution to cannabis impaired driving in Bill C-46, 112 of which rejected this solution, and 60 argued in favour.

[28] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 42, May 1st, 2018, p. 47

### 3.2.1 Those who reject the *per se* law.

Of those who rejected the premise of the *per se* law, one argument put forward, but only by Ed Wood of the DUID Victim's Voices, is that we must put forward a *tandem per se* law to ensure that those who are criminalized are in fact impaired, but also that whatever the quantity of a drug taken, they can be charged under the law.

> Tandem per se requires a sequence of events to prove a driver guilty of driving under the influence of drug per se. Number one is that the driver was arrested by an officer who had probable cause, based upon the driver's demeanour, behaviour, and observable impairment, to believe that the driver was impaired. Number two is proof that the driver had any amount of an impairing substance in the driver's blood, breath, or oral fluid (Ed Wood of the DUID Victim's Voices).[29]

Wood's position is essentially a zero-tolerance approach with the addition of confirming impaired driving, because he is concerned that other approaches allow people who take drugs and drive to escape penalties.

> We had a case that occurred just last year in Boulder County, Colorado, of a little eight-year-old girl riding a bicycle and being killed by a driver who was determined by the DRE [Drug Recognition Evaluation] on the scene to be impaired. The prosecutor said he had enough evidence to convict that person of vehicular homicide due to driving under the influence. The laboratory results came back. The person was below the .08 alcohol level and below five nanograms THC level. The prosecutor said that in spite of that, with the DRE evidence, they had enough to convict (Ed Wood, DUID Victim's Voices).[30]

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[29] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 64, October 24th, 2017, par. 1540
[30] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 64, October 24th, 2017, par. 1550

Another argument that was put forward against the use of the *per se* law was by police organizations. They were preoccupied with the enforcement of the *per se* law, arguing that there was no way to reliably measure THC content currently available to their organizations. Further, police organizations also argued that driving while impaired by drugs was already an offence under the law which was being enforced, and they would prefer to continue to use the DRE (Drug Recognition Expert) test to evaluate impaired drivers without using tools to measure the quantity of THC in a driver's body. With cannabis, like other illegal drugs, under the Criminal Code prior to Bill C-46, they did not need a specific quantity to charge the driver.

> Under the current Criminal Code, police are under no obligation to prove the type of drug that is the cause of the impairment but only that the accused is impaired by a drug.
> The CACP submits that the inclusion and codification of these drug categories will pose challenges for policing and recommends that the provision be removed (Canadian Association of Chiefs of Police).[31]

> While police officers are well equipped to determine whether a person's ability to operate a motor vehicle is impaired by alcohol, a drug or a combination of both, front line officers have no means of determining whether a motorist's blood drug concentration exceeds any of the prescribed limits. Therefore, the roadside blood demand cannot practically be made on grounds to believe the motorist has an unlawful blood drug concentration. The CACP recommends removing the latter portion of the provision that reads "or if the person's blood drug concentration exceeds any of the limits prescribed by regulation" (Canadian Association of Chiefs of Police).[32]

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[31] Canadian Association of Chiefs of Police, Witness Brief submitted to the House of Commons JUST Committee, September 20th, 2017, p. 3
[32] Canadian Association of Chiefs of Police, Witness Brief submitted to the House of Commons JUST Committee, September 20th, 2017, p. 4

Another argument that arose in the data against the use of the *per se* law pertains to separating those deserving of punishment and those who are not. As THC can remain in the driver's body for a long time, particularly for frequent users, the NDP, among others, argue that this *per se* law will create a situation where those who "make the responsible decision not to drive after consumption"[33], will be captured under this law because they will still have traces of THC in their body without the impairing effects. Members of the NDP are also concerned that this *per se* law will open the door for racial profiling if implementing mandatory random tests is permitted for cannabis as this law intends to allow with alcohol.

> It is difficult for me to fathom a situation where someone might use marijuana recreationally, in what will then be a legal and appropriate way in the privacy of their own home, make the responsible decision to save lives and not go behind the wheel. Then a couple of days later, while driving into work, could potentially be found as having a false positive, even though he or she is no longer under the influence and is at 100% of his or her mental faculties and physical abilities to drive a vehicle without putting anyone's life in danger. That is extremely problematic, particularly when we connect that with some of the issues and concerns we have with regard to certain types of profiling that might happen with these random mandatory tests. We are extremely concerned about that. […]
> If someone who had allegedly consumed a substance long before being stopped, according to the proposed criteria, this individual could be caught and suffer some serious lifelong consequences, even if he or she is a responsible citizen. This person could end up with a criminal record and could even go to prison. This could even lead to some very complicated legal proceedings that will have an impact on the legal system (Matthew Dube, NDP). [34]

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[33] Hansard, House of Commons 42nd Parliament, 1st Session, Third Reading, Sitting 224, October 4th, 2017, par. 1215
[34] Hansard, House of Commons 42nd Parliament, 1st Session, Third Reading, Sitting 224, October 4th, 2017, par. 1215-1225

Ultimately, NDP members reject the bill at the Third Reading, making the argument that the risks outweigh the benefits of Bill C-46 passing. In particular, they argue that frequent cannabis users will be unfairly punished due to the nature of THC remaining in their bodies, and this problem will disproportionately impact racialized groups with the exacerbation of racial profiling. This concern about profiling[35] was not only seen among NDP members, but rather was also a concern for some ISG members[36] and witnesses.

> It seems likely that this new unrestricted breadth screening power will be used by some officers against racial and other vulnerable groups. It is telling how the Bill relies on a test of reasonable suspicion to limit the new power to demand the oral fluid screening sample in the first step towards identifying non-alcoholic drugs such as cannabis.
> Impaired driving is a huge problem raising important needs for strong laws to protect the public. But if we go too far there is a danger of a untrammeled police power (Don Stewart, as an individual) [37]

Some were particularly concerned that Indigenous peoples will be targeted due to not only their status as disproportionately represented in the criminal justice system, but due to also widespread exclusion from Western healthcare practices including medical authorizations for cannabis.

> It is foreseeable that the lack of equal access to health care, the use of Indigenous traditional medicines, and purchase of marijuana through the recreational market, to avoid exorbitant prices, will lead to an increasing number of Indigenous frequent users of marijuana. The fact that this group of individuals could foreseeably be presumed guilty of an offence by virtue of their blood drug concentration, without demonstrating any impairment whatsoever is aggravated by the inherent likelihood that this group of

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[35] The question of profiling was added by induction in our grid.
[36] Hansard, Senate, 42nd Parliament, 1st Session, Standing Committee on Constitutional and Legal Affairs, Issue 35, February 7th 2018, p. 36
[37] Don Stewart's (individual) witness brief to the Senate Standing Committee on Constitutional and Legal Affairs, April 16th, 2018, p. 4

> individuals are more likely to be the target of police stops. The benefit of the doubt is a privilege in society that most Indigenous people do not enjoy, not only in their interactions with police, but also after they have been charged (Hensel Barristers).[38]

Further, one consequence of this *per se* law is that permanent residents are at risk of deportation for offences that are not indictable 'serious' offences. Despite this concern, some of the parliamentarians and witnesses that put this argument forward are not clearly in favour of or against the *per se* law, even if they are preoccupied by the sanctions and their consequences on these people.

> Senator Jaffer (ISG): […] the challenge is criminality and IRPA, the Immigration and Refugee Act. Even if let's say you have been convicted of exchanging joints, the fact is it triggers the Immigration and Refugee Act and the inadmissibility of landed immigrants.
> My question is to share with you the concern that this will disproportionally impact landed immigrants. Have you looked at this? May I have your opinion on it?
>
> Mr. Yost (Counsel, Criminal Law Policy Section, Department of Justice): The underlying approach to penalties in this bill is to treat impaired driving as the serious offence that it is, the one that kills and injures more Canadians than any other criminal offence. It is reflected in several ways, not the least of which is raising the penalty for impaired driving causing bodily harm to 14 years and the increase in penalty to 10 years on indictment for routine no bodily harm and no death injuries (Exchange between ISG and Greg Yost, Counsel, Criminal Law Policy Section, Department of Justice).[39]
>
> Recognize that all forms of impaired driving are dangerous and that those who chose to drive while impaired should face serious consequences, but also recognize that permanent residents and foreign nationals are deemed inadmissible to Canada on grounds of serious criminality under section 36(1) of the Immigration and Refugee Protection Act when convicted of an offence punishable by a maximum term of imprisonment of at least ten years. As Bill C-46 would increase the maximum penalties for offences not causing bodily harm or death (simpliciter offences) prosecuted on indictment from five to ten years of imprisonment, the committee encourages the

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[38] Hensel Barrister's witness brief to the Senate Standing Committee on Constitutional and Legal Affairs, February 27th, 2018, p. 8

[39] Hansard, Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 43, May 10th, 2018, p. 57

> government to consider making changes to ensure that permanent residents and foreign nationals who drive while impaired are not disproportionally affected (Senator Munson, ISG).[40]
>
> However, Bill C-46 has an additional unintended, severe and disproportionate impact for permanent residents in Canada. Colleagues, just to remind you, every year, Canada permits 300,000 permanent residents to come into the country. Count that over three years, and you're looking at close to 1 million people. I believe that if any of these permanent residents break the law in terms of drunk driving, then they should pay the price like any other Canadian, because we cannot afford to jeopardize the lives of innocent people on the streets.
> But I don't believe that permanent residents should bear an added punishment, not just another punishment, not just another fine, but a sledgehammer of a punishment of inadmissibility and deportation. This is exactly what Bill C-46 will do if we allow it to leave this chamber without this amendment (Ratna Omidvar, ISG).[41]
>
> By crossing the ten-year threshold, permanent residents and foreign nationals who are convicted under this provision will be susceptible to inadmissibility and eventual deportation on the grounds of serious criminality pursuant to ss. 36(1) of the Immigration and Refugee Protection Act. This applies whether or not the Crown elects to proceed by way of summary conviction.
> While most individuals convicted of such an offence would not be actually sentenced in accordance with the maximum, the inadmissibility provisions of the IRPA still apply. Moreover, even if a person will have a right to appeal the deportation order if sentenced to less than 6 months in custody, the appeal process before the Immigration Appeal Division is time consuming and leaves families in limbo about whether or not the deportation will take place following an appeal. This will not only impose massive costs on families and individuals subject to deportation, but it will make it far less likely for a person in such circumstances to resolve their criminal matter by way of a guilty plea (Criminal Lawyers Association). [42]

At the Third Reading in the Senate, Mobina Jaffer (ISG) put forward an amendment to address this issue:

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[40] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 44, May 24th, 2018, p. 122

[41] Hansard Senate, 42nd Parliament, 1st Session, Third Reading, Sitting 219, June 12th, 2018, par. 1750

[42] Criminal Lawyers Association, witness brief submitted to the Senate Standing Committee on Constitutional and Legal Affairs, February 28th, 2018, p. 6

I support the goal of this bill because it protects the lives of Canadians, both on and off the road. However, Parliament and Canadians have established a framework in criminal law that distinguishes between offences based on seriousness. These categories are indictable offences, which are considered more serious, and summary offences, which are considered less serious.

Bill C-46 erases the lines between these categories and subjects all summary offences to serious and unintended consequences. It deals with all offences as if there were one category. It lumps all offences together. That is why I am tabling the amendment before you.

The amendment states:

A conviction for an offence committed under section 9, 10, 11, 12 or 14 does not constitute serious criminality for the purposes of subsection 36(1) of the Immigration and Refugee Protection Act unless the person was sentenced to a term of imprisonment of more than six months in respect of that offence.

As we remember, honourable senators, the Social Committee recognized that these provisions were inconsistent and amended Bill C-45. As such, this amendment also exists for policy coherence between Bill C-46 and Bill C-45.

We go further in Bill C-46. My amendment goes further. Alongside this amendment, we will have a sunset clause of two years. Therefore, this amendment is not permanent. It simply signifies to the government that embedded within this legislation is an inconsistency between how we are labelling certain penalties and how we are punishing them. The sunset clause will give the government two years to recognize and deal with these inconsistencies. In the meantime, this amendment ensures that we are punishing according to the crime and not clogging the federal court system, which is already overburdened.

[…]

Honourable senators, I agree that if a permanent resident commits a serious crime, he should be deported. In our country, we have made the decision under our immigration system that we welcome immigrants, but if they commit a serious crime, they should be deported. But that goes for indictable offences; it does not talk about summary offences. We are also a country that gives people who make a mistake another chance, as long as it's not a serious offence. If it is a serious offence, we all agree that person should be deported. What I am speaking about, this act doesn't deal with, which are summary offences.

However, because the government has raised the potential penalty for impaired driving to 10 years under Bill C-46, even summary offences committed by people will trigger serious criminality under the immigration act. This means that less serious offences that carry, for example, a simple fine or a short prison sentence will trigger the deportation of permanent residents.

[…]

> Bill C-46 creates a system where the punishment does not fit the crime. It creates a system that recognizes that all impaired driving offences are not equal. It classifies them according to blood alcohol level or impact on others. However, despite this division, all permanent residents are subject to the worst possible punishment under immigration law, regardless of their circumstances, whether they have committed a summary offence or an indictable offence.
> […]
> I am certain; I have no hesitation in telling you that I do not believe that our federal court system would ever deport a person like Steven, whom I was describing to you. That is the reason why I'm tabling this amendment. In Canada, in our framework, we should never deport somebody for committing a summary offence. That is something Parliament decided many years ago. It would not align with our Canadian values (Mobina Jaffer, ISG). [43]

Specifically, Senator Jaffer proposed the following:

> That Bill C-46, as amended, be not now read a third time, but that it be further amended in clause 15, on page 19, by adding the following after line 6:
> "(4.1) A conviction for an offence committed under subsection 320.14(1) or 320.15(1) does not constitute serious criminality for the purposes of subsection 36(1) of the Immigration and Refugee Protection Act unless the person was sentenced to a term of imprisonment of more than six months in respect of that offence.
> (4.2) Subsection (4.1) expires two years after the day on which it comes into force unless, before then, the Minister of Justice extends its application for up to two years.
> (4.3) The Minister may, before the expiry of each extended period, extend the application of subsection (4.1) for up to two years." (Mobina S.B. Jaffer, ISG). [44]

Senator Omidvar (ISG) strongly supported this amendment at the debate[45], however, Peter Harder, as the government representative, came to the Senate to manifest the opposition of the government on this amendment:

> Colleagues, it has been my practice when appropriate to indicate to colleagues in the Senate the views of the government on matters before you vote, and it is in that spirit

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[43] Hansard Senate, 42nd Parliament, 1st Session, Third Reading, Sitting 219, June 12th, 2018, para. 1740-1750
[44] Hansard Senate, 42nd Parliament, 1st Session, Third Reading, Sitting 219, June 12th, 2018, par. 1750
[45] Hansard Senate, 42nd Parliament, 1st Session, Third Reading, Sitting 219, June 12th, 2018, par. 1750-1800

> that I want to briefly speak today to indicate that the government does not support the amendment as presented and that this is not, from the government's point of view, an unintended consequence. It is the framework of the bill we have before us.
> […]
> I do want to point out, though, that there is also an inconsistency, should this amendment be adopted, with respect to those who are found guilty of serious driving offences that are not related to impaired driving, but serious criminality and the like.
> So where do we want to draw the line for inconsistency? The government has chosen, as a policy matter, to draw the line where it has, and that is in respect of the treatment of serious criminal offences including those involving impaired driving.
> The other perspective from the government has also been raised by the senators, and I give them credit for both their amendments and their speeches. It would certainly be the view of the government that amendments of the Immigration Act should be done through the Immigration Act, not through the Criminal Code, and that the inconsistencies which are always part of the balancing of an Immigration Act amendment process — having lived through a number of them as the deputy minister I can tell you it's not an easy process of balance — ought to be done willfully and deliberately in the face of an amendment to the IRPA as opposed to the Criminal Code.
> And it is the view of the government that Bill C-46, as presented by the government, is the appropriate approach to deal with driving under the influence and impaired driving and that the consequences were not skipped but, rather, deliberately understood by the ministry and by the cabinet when they moved forward with this legislation.
> I think it's important for all senators to understand that to govern is to choose, and this government has chosen, yes, a rather strict approach to impaired driving to reinforce the message of Bill C-46, which is that with impaired driving we ought to have robust tools, […]. (Peter Harder, LPC). [46]

Senator Eggleton (CPC) found the intervention by Peter Harder puzzling, given the government's position on a similar issue in Bill C-45:

> I find Senator Harder's intervention somewhat puzzling because this is a similar motion — certainly the first part — that was passed on Bill C-45 and he supported it. It came in the committee report and he supported the adoption of the committee report. He did not get up and make a similar kind of statement here that this is something that should be a change in the Immigration Act. And maybe ultimately it should, but getting changes in the Immigration Act is like pulling teeth. It's a very difficult thing to do.

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[46] Hansard Senate, 42nd Parliament, 1st Session, Third Reading, Sitting 219, June 12th, 2018, par. 1800-1810

> Meanwhile, this is going to go into effect very soon. To put people into the jeopardy of a double punishment, particularly an even more severe punishment than the act intends and the punishment that may be meted out by the courts, is a very unfair circumstance (Senator Eggleton, CPC). [47]

On the vote, the amendment proposed by Senator Jaffer was agreed to upon division with 47 in favour, 26 against, and 5 abstentions [48]. However, the amendment was disagreed upon at the House of Commons, "because it indirectly amends the immigration legal framework through a criminal law statute and would treat impaired driving offences differently from other serious criminal offences, including other transportation offences"[49]. On this point, the Senate voted not to insist on its amendment, and the amendment was not adopted in the Bill.

### 3.2.2 Those in favor of per se law.

The *per se* approach introduced in Bill C-46 focuses on thresholds rather than impairment. This is justified by the government on the basis that it is a precautionary approach to road safety and, like alcohol, means that some people will be punished even if they're not impaired, because they are over the limit fixed by the law.

> Ms. Rachelle Wallage: […] If you smoke, regardless of your concentration, it's ill-advised to drive a car. There is a window during which I would expect that drug to have an effect.
>
> Mr. Ron McKinnon (LPC): I note that the charge we're talking about here would be driving in excess of a per se limit, not an impairment charge. I guess the argument there

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[47] Hansard Senate, 42nd Parliament, 1st Session, Third Reading, Sitting 219, June 12th, 2018, par. 1810
[48] Hansard Senate, 42nd Parliament, 1st Session, Third Reading, Sitting 219, June 12th, 2018, par. 1850
[49] Hansard Senate, 42nd Parliament, 1st Session, Messages, Sitting 224, June 20th, 2018, par. 1700

> is that if you're driving over this limit, you're not safe, so the per se limit, whether or not it denotes impairment, would go towards fulfilling a public good. Would you agree with that?
>
> Ms. Rachelle Wallage: I would agree with that, yes (Exchange between Chair, Drugs and Driving Committee, Canadian Society of Forensic Science, and LPC).[50]

Others put forward the positive impact of the *per se* law with alcohol as a reason to do the same with cannabis, like the Centre for Addiction and Mental Health witness brief submitted to the House of Commons[51], or Jeff Brubaucher (Medical Doctor, Department of Emergency Medicine, Faculty of Medicine, University of British Columbia).

> Per se limits would be a far more streamlined and more efficient way of gathering evidence. Going back to the 1960s when *per se* limits were introduced for alcohol, there were dramatic decreases in alcohol-impaired driving. My hope would be that setting *per se* limits for THC would have the same effect for driving impaired by cannabis (Jeff Brubaucher, Medical Doctor, Department of Emergency Medicine, Faculty of Medicine, University of British Columbia). [52]

Further, Ron McKinnon (LPC) responds to a question by Richard Cannings (NDP) who underlines that we cannot delimit a universal THC rate at which a person is impaired by arguing that the *per se* law does not intend to measure impairment, but as with alcohol, the government had determined a threshold limit of THC to ensure road safety.

> Mr. Speaker, the contemplated roadside testing for THC is not to test for impairment but for THC levels. It is a legislated requirement under this bill that one of the requirements for exercising the right to operate a motor vehicle is to have a blood

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[50] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 66, September 27th, 2017, par. 1820

[51] Centre for Addiction and Mental Health, witness brief submitted to the House of Commons JUST Committee, September 18th, 2017, p. 2

[52] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 62, September 18th, 2017, par. 1855-1900

> alcohol level below a certain level of THC. That is a legislated requirement. That is what per se limits are all about.
> It is not a statement of impairment, although the scientists we talked to at committee said there was no safe level of THC in the blood. We need to establish a level that we can measure in a reasonable way to set a bar under which we can operate in a legal manner (Ron McKinnon, LPC). [53]

Robert Kitchen (CPC), like many other interventions by the CPC on this issue, argued that the Liberal government's plan to legalize cannabis would exacerbate the problem of cannabis use and driving. Ron McKinnon (LPC) responded to this using the same argument made by the Liberal government when introducing Bill C-46: this law upholds the road safety objective by increasing the tools afforded to police for detecting impaired driving, rather than criminalizing impaired driving, which is already illegal under the Criminal Code.

> Mr. Speaker, this legislation does not legalize driving under the influence of any drug. It is already illegal to drive in any impaired state.
> What this law does is to provide additional tools for police officers to detect such driving circumstances. I think we would all be naive to believe that people are not driving under the influence of marijuana or other drugs. It is happening now.
> This bill provides excellent tools for police to engage that problem, and to do so in a meaningful way (Ron McKinnon, LPC). [54]

Jody Wilson Raybould (LPC) added that the thresholds in the *per se* law were based on the recommendations of the Drugs and Driving Committee (DDC) and in that sense, follows "the best scientific evidence" currently available[55], repeating that this *per se* law is precautionary.

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[53] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 219 Report Stage, October 27th, 2017, par. 1310
[54] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 219 Report Stage, October 27th, 2017,. par. 1310
[55] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 61, June 13th, 2017, par. 1605

> Some witnesses who appeared before the standing committee did not support this proposed approach. They expressed concern that the science with respect to THC, in particular, was not clear enough to justify setting legal limits. However, let me be perfectly clear. One thing that all witnesses agreed on was that THC is an impairing drug.
>
> Our government is aware that unlike alcohol, it is difficult to correlate the blood concentration of THC with impairment. That is why a summary conviction offence was proposed for the two to five nanogram range.
>
> As indicated by the drugs and driving committee in its final report to the government on this issue, setting the legal limit at two nanograms of THC per millilitre of blood would reflect a precautionary and public safety approach, one that would strike the right balance between the science of measuring THC impairment with the real risks associated with driving after consuming THC. By adopting this lower THC level through Bill C-46 and the regulations, our government would be signalling that Canada will not tolerate driving after consuming impairing drugs.
>
> I would like to add that the new per se offences for drug-impaired driving would contain several inherent protections to avoid charging drivers who were not actually impaired. These protections would include the requirement that the officer in question develop reasonable suspicion of drugs in the body of the driver before administering the roadside drug screeners or other roadside sobriety tests. Where the driver failed the drug screening test, this itself would be highly indicative of recent consumption. Ultimately, the officer would have to have reasonable grounds to believe that an impaired driving offence had been committed before arresting the individual and carrying out further testing at the station.
>
> To sum up, the drug levels that are proposed for these new offences are consistent with the approach taken in other jurisdictions, and I am confident that they reflect the best available scientific evidence while at the same time ensuring that we are proceeding in a manner that protects the safety of the public (Jody Wilson-Raybould, Attorney General of Canada, LPC).[56]

The *per se* law was an issue that was heavily debated. While LPC members argued the *per se* law was meeting the objective of road safety by taking a precautionary approach, members of the CPC reiterates that the legalization of cannabis in Bill C-45 itself is problematic for road safety. The NDP members were

[56] Hansard, House of Commons 42nd Parliament, 1st Session, Third Reading, Chamber Sitting 224, October 17th, 2017, par. 1025

concerned about the punishment of individuals who are not impaired – particularly frequent users - and worry about racial profiling. Among those frequent users at risk for undue punishment will be many medically authorized users. We will now return to the question of the legitimacy, or not, to sanction cannabis users who have a medical authorization.

## 3.3 Cannabis users with or without medical authorization: who should be punished?

A total of 71 interactions touched on the question of whether a distinction should be made in the application of the law between cannabis users with or without medical authorization, generating many debates among parliamentarians and witnesses, including several groups defending users 'rights of cannabis for medical purposes'.

Members of the CPC and groups representing medically authorized users want to establish the same distinction between users with or without medical authorization that was put forward between people using prescribed drugs and other drug users, distinguishing 'good' and 'bad' motivations to take drugs in the law.

> For those who are prescribed medical cannabis users, the purpose is not to 'get high', but rather to achieve effective symptom management. The testing of THC within a regular medical cannabis consumer's system is not a reliable or scientifically proven measure of impairment. As explored below, blood levels of THC can remain within a regular user/patient's system for days after last consumption – meaning patients may

> exceed the proposed per se limits even when not impaired and acting responsibly (Witness brief submitted by Canadians for Fair Access to Medical Marijuana). [57]
>
> Many patients use cannabis daily or near daily to manage symptoms associated with their illness and are expected to follow advice from health care providers, including safe-use guidelines to ensure impairment is minimized. Key differences between recreational and medical cannabis use include intent, tolerance, and how effects are experienced. Failing to consider medical users as a distinct group in developing policy may lead to the unfair criminalization of this population or prejudicial restrictions on driving. It is essential to understand potential policy considerations for medical cannabis would not give patients a license to drive impaired, but rather, could recognize the distinct nature of responsible medical cannabis use (Witness brief submitted by Canadians for Fair Access to Medical Marijuana). *[58]*
>
> I don't think that society has any interest in criminalizing people who, say, are medical marijuana users. We know that those people can have high levels of THC remaining in their system for long periods of time even after they've ingested marijuana. They don't drive after they've ingested it, but a few days later they get in their car to drive to the grocery store. They get pulled over and they're undergoing a blood test and they have between two and five nanograms in their blood. I don't think society's interest is served there. I don't think it is a deterrent. It's more arbitrary, and it won't have the effect we wish it to have when it comes to the general population and attitudes around impaired driving (Sarah Leamon, Associate Lawyer at Acumen Law Corporation). [59]

In addition, Senator Marc Gold (ISG) makes the argument that severely punishing the cannabis user who has a medical authorization will be challenged on the basis of the Canadian Charter of Rights and Freedoms. However, Gold does not believe this challenge will be applicable for 'recreational' users who are not perceived to have the same motivations and legitimacy to use cannabis: medically authorized

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[57] Canadians for Fair Access to Medical marijuana, submitted to the House of Commons JUST Committee, September 30th, 2017, p.1

[58] Canadians for Fair Access to Medical marijuana, submitted to the House of Commons JUST Committee, September 30th, 2017. p. 3

[59] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 42, May 1st 2018, p. 70

users have a right to medical treatment, while non-medically authorized users are perceived to 'simply make the choice', without obligation, to use cannabis.

> For reasons underlined by Senator Saint-Germain in her remarks yesterday, this raises the possibility that the bill may infringe the Charter rights of those who are using cannabis for medical reasons. Why? Because THC can remain detectable within a regular user's blood for days and even weeks after it was last consumed. Medical users have this Hobson's choice: either they need to stop their consumption for many days prior to operating a vehicle or simply forego forever their ability to drive. Moreover, a medical cannabis user will tend to have a higher tolerance level than a less frequent user and, therefore, will not demonstrate the same level of impairment as the occasional user even if both have the same level of THC in their systems. As such, a medical marijuana user may fail the *per se* test but in no way be impaired.
>
> I acknowledge that the latter point can be said to apply equally to regular recreational users of cannabis. However, there seems to be a difference between the case of a person who has chosen to ingest drugs sometime before driving, notwithstanding the law, and one who is prescribed cannabis for medical reasons, as is their constitutional right, rightly or wrongly, and is therefore unable to drive without committing an offence.
>
> We must ask ourselves whether or not there is a way to achieve the objectives of the bill without penalizing those who are exercising their constitutional rights to medical treatment.
>
> There are several possible approaches that may be considered, honourable senators, either alone or in combination, although I acknowledge quickly and frankly that they may create as many problems as they solve.
>
> One would be to create an exception to the *per se* rules for medical users. Of course, it would still remain a crime to drive when impaired by drugs. Whether it is prescription drugs or not, it always has been and will continue to be so.
>
> Another option would be to create a due-diligence exception, putting the burden on the medical user to establish that they waited a reasonable time between consumption and driving and that they had a valid reason to believe that they would no longer be impaired by the drug.
>
> Yet another option might be to remove the possibility of imprisonment for medical users. In this way, section 7 would no longer be engaged, as our courts have held that a mere imposition of a fine or the suspension of one's driver's licence is not a deprivation of liberty under the Charter.
>
> I would hope that these issues would be considered and taken up within the committee. Unlike the case of random testing for alcohol, the constitutional issues

> posed by the *per se* offences as applied to medical users did not appear to have been fully addressed in the other place.
> Honourable senators, let me conclude as I began. Bill C-46 addresses a serious social problem, and it does so in a prudent and responsible manner and I support it in principle. But it is a complex bill that clearly engages our constitutional rights under the Charter. As such, it deserves our careful scrutiny both in committee and here in the chamber (Marc Gold, ISG).[60]

This position was sustained by Sarah Leamon and Kyla Lee of Acumen Law Corporation:

> Canadians should not have to choose between taking their medicine and operating a conveyance. The legislation as proposed fails to protect the rights of those individuals who need their cannabis products for their health. This violates Section 7, by putting medical users in a position of having to choose between taking their medicine or abstaining for days or even weeks before operating a conveyance. This is not a compromise people should be required to make (Kyla Lee and Sarah Leamon, Acumen Law Corporation). [61]

The argument in favour of treating medically authorized users differently in the law received support in the debates from members of the NDP. However, members of the NDP insist that because of the way cannabis is metabolized, *all* frequent users, without necessarily being impaired, will now be at risk of being charged under this *per se* law for cannabis. Further still, the threshold levels are arbitrary without any measurement of impaired driving.

> Despite the great need for going after impaired drivers, because we have an epidemic of impaired driving deaths and injuries across Canada, here we have marijuana, which is going to become legal, and there is no good test for marijuana impairment. There are great tests for THC levels in the blood, but they do not mean anything with regard to impairment. We heard in committee that this was a problem.
> We are going to have people with THC levels in their blood, because they are using it for medical purposes or are using it legally for recreational purposes, but they will not

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[60] Hansard Senate, 42nd Parliament, 1st Session, Chamber Sitting 161, Second Reading, November 23rd, 2017, par.1500-1510
[61] Acumen Law Corporation witness brief submitted to the Senate Standing Committee on Legal and Constitutional Affairs, 2018, p. 13-14

> be impaired. They may have used it a day or two ago. They will not be impaired, yet they will be criminalized if they are pulled over and tested using a per se limit for THC (Richard Cannings, NDP).[62]

Other witnesses add to this argument the fact that for many years Indigenous people have used cannabis frequently for medical reasons, but most of the time, outside the purview of occidental medicine. In other words, many Indigenous cannabis users are not medically authorized but they are frequent users. For this reason, they argue that separating medically authorized and non-medically authorized users in the law is irrational and discriminatory.

> Without some type of defence for frequent users of marijuana, the per se limits will have a grossly disproportionate effect without necessarily achieving the object of road safety. Even with a defence for frequent users, that may still not go far enough to protect Indigenous frequent users of marijuana.
> In the First Nations Child and Family Caring Society case in Canada, the Canadian Human Rights Tribunal relied on findings of Dr. Amy Bombay, a neuroscientist who studied the impact of colonialism on Indigenous peoples and found evidence of collective trauma suffered by Indigenous peoples in Canada.
> The upcoming legalization of marijuana recreationally will have the side effect of providing widespread access to a natural, effective medicine. Marijuana is particularly useful for treatment of trauma-related symptoms, including chronic pain, post-traumatic stress disorder, panic disorder, anxiety and depression.
> While there is little research on Canada's Indigenous population and the consumption of marijuana, a 2014 Ontario study noted that Indigenous peoples have rates of marijuana use significantly higher than that of the general population.
> Although Indigenous peoples across Canada are extremely diverse in respect of their beliefs, laws, practices and customs, powerful herbs, roots, herbs and other medicines have been used in combination with ceremony since time immemorial. Indigenous peoples have maintained their own ways when it comes to healing that are not regulated by non-Indigenous laws or institutions.
> The availability of legal marijuana will add an additional ingredient to the host of traditional herbs already being used across Canada to treat Indigenous peoples outside the context of western medicine. In particular, it will be a viable alternative to opioids.

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[62] Hansard, House of Commons 42nd Parliament, 1st Session, Report Stage, Chamber Sitting 221, June 14th, 2018, par. 1255

> Given the greater need for symptomatic relief among Indigenous populations that could benefit from marijuana, an offence that appears to disproportionately target users of cannabis would do so considerably more against Indigenous medical patients. It is foreseeable that the lack of equal access to health care, the use of traditional Indigenous medicines and purchase of marijuana through the recreational market to avoid exorbitant prices will lead to Indigenous frequent users of marijuana (Josephine Whydell of the Indigenous Bar Association).[63]
>
> Even if acting responsibly, within guidelines provided by Health Canada, a medical patient would potentially have to refrain from using their medication for a week just to be able to drive their car without fear of criminal repercussions for being mistakenly identified as impaired. Without some type of defence for frequent users of marijuana, the per se limits have a grossly disproportionate effect, without necessarily achieving the objective of road safety. Even with a defence for frequent- users, that may still not go far enough to protect Indigenous frequent users of marijuana (Josephine Whydell and Katherine Hensel, Hensel Barristers).[64]

However, other parliamentarians and witnesses are not in favour of this distinction. One argument against the distinction is made by Gary Kay, who argues that the fact a precise link with THC and impaired driving cannot be made necessitates the message that if you use cannabis, you don't drive. For this reason, Kay argues for a label on all cannabis products to send a strong message to cannabis users on a legal market, regardless of medical authorization status, that cannabis should not be consumed before driving.

> Bill C-46 doesn't just deal with cannabis. It deals with drug-impaired driving. For drug-impaired driving, we are talking about even over-the-counter things which impair people. We need to put proper labelling.
> When we had the NTSB [National Transportation Safety Board] meetings, which are also available from 2001, those recommendations basically said we need to give better

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[63] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, February 28th, 2018, p. 39-40

[64] Hensel Barrister's Witness Brief submitted to the Senate Standing Committee on Legal and Constitutional Affairs, 2018, p. 6

> labelling on products, whether over-the-counter or prescription products or, in this case, a recreational product. When you will go into a High Times cannabis store in Toronto in a few months and buy your cannabis cigarette, do you know what you are getting? Do you know what the concentration is? Do you know when it is safe to resume driving? If you are a responsible citizen of Canada, will you know when it is safe to get back in your car and drive? I would say we don't know (Gary Kay, President, Associate Professor of Neurology, Georgetown University School of Medicine).[65]
>
> People know that one of the risks is not just crashing. They may think, "I'm a great driver when I have smoked cannabis, but I don't want the legal liability of getting caught." If you set a low limit, a low 2 or 5 or even 1, then in fact you are saying to people, "I don't care how impaired you are. We don't want you driving and using cannabis, or you are going to have to wait a long time." That is unfair to frequent users because, as you've heard, their levels are going to be at that level when they have not acutely been using the drug.
> I would say that is a really good label, I was thinking about earlier today, for this cannabis product in the store that you just bought to just say, "Use Uber." That would be fine. You don't want them to drive (Gary Kay, President, Associate Professor of Neurology, Georgetown University School of Medicine).[66]

Members of the LPC sustain throughout the debates that regardless of a cannabis user's medical authorization status, for road safety, no distinction should be made in the application of the *per se* law.

> In terms of medicinal cannabis, if we look at other drugs, whether opioids or other types of drugs that would impair, people still should not get behind the wheel. If they are impaired, they are impaired whether it is prescribed as a medicine or not. It does not matter if it is a drug like an opioid or if it is cannabis; there will be scientific tests to determine whether an individual is impaired by a drug and should not be behind the wheel (Chris Bittle, LPC).[67]

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[65] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 42, May 3rd, 2018, p. 95
[66] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 42, May 3rd, 2018, p. 96
[67] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 184, Second Reading, May 31st, 2017, par. 1600

However, reacting to the Liberal's argument that impairment is not necessary for criminal charges under Bill C-46, members of the CPC insist on the fact that the government is responsible for having a proper test of impairment because scientific evidence shows no direct correlation between THC levels and impaired driving. They also claim that it is irresponsible for the government to legalize cannabis without first developing the technology to measure impairment.

> […] it is extremely troubling that there is no test for impairment.
> The Liberal government always talks about being fact and evidence-based and taking a science-based approach. Well, here is what the science can do. Today, it can detect THC in the saliva and in the blood, but there is no research or correlation indicating whether that is related to impairment. There are a number of factors at play. For example, someone taking a huge dose of medicinal marijuana on a long-term basis might always have THC show up but may be so used to it that they are not impaired. Other people who may have experienced second-hand smoke, for example, may have THC show up in their blood, but are also not impaired. By coming before the science we need to test for marijuana impairment, this legislation is just irresponsible (Marilyn Gladu, CPC). [68]

The necessity of measuring impairment, rather than THC, was a concern for many parliamentarians and witnesses in the debates.

[68] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 224 Third Reading, October 17th, 2017, par. 1235

# 3.4 Identification of impaired driving

## 3.4.1 Oral Screeners

A total of 102 interactions touched on the use of the oral fluid screeners, with 74 in favour and 28 against their use for cannabis-impaired driving detection. The main argument posed against the oral fluid screeners is an extension of the argument against the *per se* law; that it will be used to detect and punish people who are not actually impaired. Another argument was that the use of the oral fluid screeners removes the presumption of innocence, an argument that was brought forward also with the Breathalyzer.

> Finally, we raise concerns about the evidentiary presumptions of drug-impaired driving. The underlying tests that these provisions rely upon – bodily fluids results and DRE evaluations – are fallible and the science to support the use of these tests is still developing. The reverse onus provisions that these presumptions create serve to undermine the most fundamental presumption of all – the presumption of innocence. In our view, further study is required before considering whether the equipment and methods are consistent and accurate enough to support such presumptions
> […] the presence of THC does not necessarily reflect psychoactive influence the same way the presence of alcohol does. Finally, it presumes that cannabis impairment equates to road dangerousness, which is not proven" (Witness brief submitted by Canadian Criminal Justice Association).[69]

> The dual standard for roadside testing seems to suggest that the law will be ripe for constitutional challenge, both in relation to alcohol screening and drug screening. There are arguments to be made that neither test is conducted in a reasonable manner

[69] Canadian Criminal Justice Association witness brief, submitted to the Senate Standing Committee on Constitutional and Legal Affairs, February 18th, 2018, p.1, 3

> as set out in Bill C-46, and that motorists Charter rights will be breached as a result (Witness brief submitted by Acumen Law Corporation).[70]

However, other parliamentarians and witnesses are concerned with the fact that not all drug users will be punished with these devices. This is the case for several members of the CPC who underlined the fact that oral screeners can only detect the presence of cannabis and upon a positive reading, another step is necessary to identify the quantity. The time taken by police to follow the oral screening procedure will allow time for the blood drug concentration to dissipate and, as the CPC members argued, will allow impaired drivers to go free and give Canadians a false sense of security as it pertains to road safety.

> Let's take the example of a police officer who stops someone. He will ask him to submit a sample in order to detect cannabis. The offence occurs in the two hours after he stops driving. At least two hours may have gone by. The person is asked for a saliva sample which is inserted into a device. The device detects the presence of a substance, but not the quantity. How can we have reasonable grounds to believe that there is an offence in the presence of five nanograms if the device does not measure the quantity? So the officer concludes that there is an offence, and then the investigation proceeds a bit further. The individual is asked for a blood sample. So now the person has stopped driving for more than three hours. According to certain studies, we know that the level of THC in the blood may drop by 75 per cent in 30 minutes. We still have not seen the link between the blood sample and the offence. Afterwards, we have an offence prescribed by regulations. I have not often seen criminal offences where the actus reus was in the regulations rather than in an act adopted by Parliament.
> Correct me if I am mistaken, but I think that this way of doing things is completely arbitrary. We are creating a false sense of security due to the fact that a law exists. However, the principle will be rhetorical, as the accumulation of arbitrary circumstances and irrational elements will mean that the courts will annul that part of the proceedings (Claude Carignan, CPC). [71]

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[70] Acumen Law Corporation witness brief, submitted to the Senate Standing Committee on Legal and Constitutional Affairs, 2018, p. 3-4

[71] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, February 28th, 2018, p. 20-21

Of those who argued in favour of the oral screeners, most subscribe to the Liberal government's view; these devices will enlarge the tools available to the police to fight impaired driving, improving road safety, and other countries are doing the same thing and it works.

> […] the amendments proposed in Bill C-46 include a new legal limit for drug-related offences and new tools to allow for better detection of impaired drivers.
> To make it all possible, the bill provides for the use of roadside screening devices using oral fluid samples. This is a first in Canada when it comes to drug screening. This type of device is already used in a number of countries, including the G7 countries, such as France.
> As we speak, the police have few if any ways of immediately determining the blood concentration of THC, the active ingredient in cannabis, for drivers stopped at the roadside.
> We must take action, and bill C-46 will enable police officers who legally stop drivers at the side of the road to ask them to provide an oral fluid sample, if they have reasonable suspicions and believe that drugs are present in a driver's body (Linda Lapointe, LPC).[72]

> The United Kingdom, for example, introduced legislation last year that created legal limits for drugs and authorized screeners that detect THC and other drugs, which has resulted in more effective enforcement. Other countries, including Australia, France, Germany, and many more, have similar legislation in place and have also found it effective in preventing drug-impaired driving (Raj Grewal, LPC).[73]

Some witnesses also argued in favour of the use of the oral fluid screeners to uphold road safety, because with cannabis the police have difficulty detecting impairment, particularly where THC levels are very low. With these oral screeners, it is possible to detect the presence of cannabis immediately at the roadside.

> My second point is that I agree with using roadside screening devices to measure drugs in saliva to help police identify drivers who use drugs.

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[72] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 184, Second Reading, May 31st, 2017, par. 1600

[73] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 184, Second Reading, May 31st, 2017, par. 1835-1840

> Police have a very difficult time detecting drivers who are impaired by cannabis. I think they need help to do that, and I think roadside oral fluid screening devices would be a valuable tool for police to help them detect these drivers (Jeff Brubaucher, Medical Doctor, Department of Emergency Medicine, Faculty of Medicine, University of British Columbia). [74]
>
> As a background to these statements, particularly for THC, we know that the drug recognition experts [DRE] have been involved in the United States, and more recently in Canada, with the apprehension and prosecution of drug-impaired drivers, whereas in many other places in the world, notably in Europe and Australia, the use of oral fluids has been the predominant choice. If we look at, in the case of THC, the time course of occurrence, we see that within minutes of smoking a joint, or a cigarette containing a modest amount of cannabis, one can peak well into 140 to 150 nanograms per millilitre of THC in the blood. Then you'll see the time course where it drops to less than 20% of its peak within an hour. Within two or three hours, there's relatively little left in the body to be detected. So if one is relying solely on field sobriety tests and the work of DREs, one is limiting the opportunity to collect evidence at the roadside (Félix Comeau, Chairman and Chief Executive Officer, Alcohol Countermeasure Systems Corp).[75]
>
> The CACP recognizes that oral fluid devices cannot be used as the sole ground upon which to base a blood/DRE demand as they do not detect impairment. However, we recognize the possible utility of these tools and require funding for procurement and training for oral devices. The CACP also supports the scientific community's efforts in developing a more robust instrument down the road (Canadian Association of Chiefs of Police).[76]

Other people argued in favour of extending the use of saliva testing to the workplace, particularly where workers drive motor vehicles or otherwise operate heavy machinery. What was important for these

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[74] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 62, September 18th, 2017, par. 1855-1900

[75] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 66, September 27th, 2017, par. 1535

[76] Canadian Association of Chiefs of Police Witness Brief, submitted to the House of Commons JUST committee, September 20th, 2017, p. 2

parliamentarians and witnesses was the detection of impairment, rather than simply determining the presence of cannabis.

> […] it's well established that you need to deal with impairment in the workplace. That's the issue. If you start getting into your analysis and into too low a cut-off, then you're dealing with someone's personal recreational habits, whatever those might be, whether you agree with them or not. That's not our business at TTC. It is our business, though, when you show up at work impaired. […]
> Oral fluid is the test that shows that. Urinalysis doesn't and some other tests don't. But oral fluid shows a very high likelihood with marijuana, for example. The cut-off shows that you've smoked within four hours and there's a high concentration. So, we're looking for a set of regulations and legislation at the federal government level for the federal sector employees in safety sensitive positions […] (Brian Leck, Head of Legal and General Counsel, TTC). [77]

Other groups view the saliva testing devices as a possible deterrent for using cannabis and driving, like the Breathalyser and the *per se* law with alcohol.

> First of all, I see the oral fluid tester, and I commend the government for this approach because I see it as the equivalent of the Breathalyzer at the roadside. […] But, through being able to hold up a device and say that police are now authorized to use that, that deterrent will come (Andrew Murie, MADD).[78]

> CAMH scientists estimated that Canada's per se law, introduced in 1969 and setting the legal limit in this country at 0.08%, prevented over 3,000 deaths in Ontario alone between 1970 and 2006 (Wickens et al, 2013). This experience suggests that that introduction of a per se or legal limit law, along with enabling the use of roadside oral fluid drug screeners, should be central to our efforts to prevent DUIC-related collisions (Centre for Addiction and Mental Health). [79]

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[77] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 66, September 27th, 2017, par. 1705-1710

[78] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, March 1st 2018, p. 91

[79] Centre for Addiction and Mental Health, witness brief submitted to the House of Commons JUST Committee, September 18th, 2017, p. 2

Following the meetings of the Senate Standing Committee on Constitutional and Legal Affairs, the committee's final report approved the saliva devices, but noted that "The committee often heard that, in the case of cannabis, there is a lack of clear scientific evidence on the correlation between consumption, impairment of cognitive abilities, and the proposed concentrations". [80]

**3.4.1.1 Mandatory testing regime for alcohol and cannabis**

In the debates surrounding the pertinence of oral screening devices, one question that was raised in 13 interactions was the distinction made in Bill C-46 between the protocol for alcohol testing (the Breathalyzer) and for other drugs including cannabis (oral screeners). While operating roadblocks under Bill C-46 for alcohol testing, the police are not required to develop reasonable suspicion of alcohol impaired driving to compel the driver to submit to a Breathalyzer test. On the other hand, with the introduction of oral screening devices for cannabis, the police must develop reasonable suspicion to compel a driver to submit to an oral screening device. The government justified this distinction between alcohol and other drugs by arguing that more experience with the new oral fluid screening devices was needed for a mandatory testing system to be legitimate. Some parliamentarians and witnesses argued that the government's position confirmed the lack of scientific evidence that these devices measure impaired driving, a discussion that even went on regarding the Breathalyser for some people.

> A troubling aspect of the legislation is the double standard created by the searches. Unlike the proposed amendments to ASD [Alcohol Screening Device] testing, saliva testing for drug samples demands a reasonable suspicion component. Why should

[80] Hansard, Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 44, May 23rd, 2018, p. 23

> suspected alcohol-impaired drivers be given fewer rights than suspected drug-impaired drivers?
> The answer seems to lie in the reliability of testing mechanisms at the roadside.
> It is generally accepted that alcohol screening devices are more reliable than drug screening devices.
> However, this presumes that alcohol screening devices are used and maintained in a manner that is consistent with reliability, each and every time they are used. It does not account for human error or for mechanical malfunction.
> Moreover, this justification appears to accept that oral fluid testing devices are not a reliable mechanism to determine anything other than the mere presence of a drug in the subject's body. They do not test for drug impairment or even the level of drug present in the bloodstream. The information that they generate is limited and their accuracy has yet to be tested.
> The dual standard for roadside testing seems to suggest that the law will be ripe for constitutional challenge, both in relation to alcohol screening and drug screening. There are arguments to be made that neither test is conducted in a reasonable manner as set out in Bill C-46, and that motorists Charter rights will be breached as a result (Witness brief submitted by Kyla Lee and Sarah Leamon, Acumen Law Corporation) [81]

But representatives of the CPC saw this distinction as a loophole in the law that must be corrected. In particular, the Conservatives asked for an extension of mandatory random testing to all possible drugs, and to be expanded to the workplace, especially in occupations at high risk from impaired driving incidents. On this issue, they even proposed an amendment in the Senate to extend the possibility of random testing not only on the road but for all public transportation:

> That Bill C-46 be amended in clause 15, on page 24, by adding the following after line 27:
> "(3) A peace officer may, in the course of a lawful exercise under an Act of Parliament, an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a vessel, an aircraft, any railway equipment, a bus, a heavy-load truck or a taxi cab to immediately provide the following samples that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an

[81] Acumen Law Corporation witness brief submitted to the Senate Standing Committee on Constitutional and Legal Affairs, 2018, pp. 2-4

> approved device or the approved equipment and to accompany the peace officer for that purpose:
> (a) samples of breath, if the peace officer has in his or her possession an approved screening device; and
> (b) samples of a bodily substance, if the peace officer has in his or her possession the approved drug screening equipment.".
> We are adding random testing for drugs and alcohol for the other modes of transportation, hence, anywhere public transportation is concerned (Claude Carignan, CPC) [82]

There was some debate over this amendment, supported by some, mainly CPC, who claimed that what is good for alcohol is good for other drugs, but opposed by others, mainly ISG, who adhere to the government's position that the devices were too new to go in this direction yet [83]. Ultimately the amendment was rejected.

### 3.4.2 Reflex Tests

A total of 47 interactions touched on the use of the reflex tests at the roadside, with 14 against and 33 in favour.

Of those in favour was Ed Wood of DUID Victim's Voices, who argues in favour of a tandem *per se* law, as mentioned earlier. Wood argues that the behavioural reflex test is a crucial factor to identify if a person is impaired. With Wood's proposed tandem *per se* law, once a person has been identified as behaviourally impaired, if any impairing drug is found at any detectable level, the person is charged by

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[82] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 44, May 24th, 2018, p. 89.
[83] Ibidem. P. 89-90

the police[84]. Some members of the NDP and even of the Conservative Party are favorable to the behavioural impairment approach to detect impaired driving, arguing it will avoid criminalization and blood testing of drivers who are not acutely impaired but return a positive saliva sample.

> So, even if you set serum level limits, a person who took a legal dose may be completely unaffected, while another person who took the same dose may be totally dysfunctional and impaired. Some people could take a quarter of the legal dose and be extremely dangerous on the road. So, if we set an arbitrary limit, we might not be able to convict drivers who did not exceed the legal dose but who are still impaired and in no condition to drive. We also risk convicting drivers who are not impaired because their body has developed a tolerance.
> By establishing a serum level limit, I think this bill will cause problems with cases that go to court. I spoke with a few defence attorneys, and they told me that no scientific studies have been able to establish a specific dose that can determine whether a person is impaired. […]
> In this case, the level does not matter. We would merely have to detect the presence of drugs, which we could prove, then we could administer standardized tests like the ones used for drunk drivers. For example, we could ask the person to walk a straight line or recite the alphabet backwards. There are a number of similar tests that we could use to prove that the person is impaired.
> If we relied more heavily on these tests, which, incidentally, can be filmed using body cameras, we would be able to prove that a person is impaired because he or she does not have the cognitive or physical ability to perform certain tasks that a person who is not impaired could. This might be an option that would carry more weight in court (Christine Moore, NDP). [85]

> Frequent users can have more than two nanograms of residual THC in their system even if they haven't used the substance for several weeks. Does this mean that those individuals will be driving illegally until they abstain for months? (Claude Carignan, CPC).[86]

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[84] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 64, October 24th, 2017, par. 1540-1545

[85] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 221, Report Stage, October 24th, 2017, par. 1535

[86] Hansard Senate, 42nd Parliament, 1st Session, Chamber Sitting, 173, Second Reading, December 14th, 2017, par. 1500

On the other hand, some find that saliva testing is redundant in detecting impaired driving, but also that the reflex tests used for alcohol are not sufficient for detecting cannabis impairment. However, for certain witnesses, it is possible to reimagine the reflex test using scientific study and technological advances to be appropriate for cannabis impaired driving detection.

> I think the world of technology is such that you could have a program that tests how quickly people respond to stimulus, how quickly they...just by hitting a computer screen. How long does it take you to hit the button after something flashes yellow? If you're impaired with marijuana, is there a delayed reaction? Then you're talking about real impairment, not just levels of substance in the bloodstream (Catherine Latimer, Executive Director of the John Howard Society).[87]

> Unlike alcohol, where impairment readily presents itself physiologically, such as staggering and difficulty walking, cannabis effects are primarily cognitive and a current DRE evaluation includes only modest assessments of these abilities (Thomas Marcotte, Co-Director, Assistant Professor, Department of Psychiatry, University of California, Center for Medicinal Cannabis Research).[88]

Marcotte, more like Ed Wood, views the reflex tests as a complement to the saliva test due to the fact they're easy to administer, and to ensure detection of all impaired drivers with drugs: *"At least for screening, oral fluid instruments hold some promise, they're easy to administer, relatively non-invasive, and may help identify individuals who recently used cannabis."* (Thomas Marcotte, Co-Director, Assistant Professor, Department of Psychiatry, University of California, Center for Medicinal Cannabis Research)[89].

> I'm also aware from attending many meetings that prosecutors remain concerned that a cut point designating impairment may lead the public to assume that a driver below

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[87] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 65, September 25th, 2017, par. 1710-1715

[88] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 65, September 25th, 2017, par. 1845

[89] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 65, September 25th, 2017, par. 1850

> that cut point is not impaired or is less impaired. As seen in the DRE data I presented earlier, low levels do not necessarily mean low impairment.
> Some individuals have also expressed concern that the DRE evaluations may not be adequately sensitive to the effects of cannabis and that one should use fluid levels to identify impairment. I would argue that it is very important to continue to use behaviour as a key indicator of driving-related impairment given the uncertainty in interpreting fluid levels.
> Last, I encourage you to support additional research into identifying new methods that might help law enforcement identify both those who are impaired and those who are not impaired due to cannabis. This includes biological, psychophysical, and behavioural approaches (Thomas Marcotte, Co-Director, Assistant Professor, Department of Psychiatry, University of California, Center for Medicinal Cannabis Research).[90]

Police organizations recognized the utility of the reflex tests, with many arguing that these tests have been the primary means of detecting impaired drivers prior to Bill C-46 [91] and will continue to be the primary tool in the detection and investigation of impaired driving [92]. Government representative Kathy Thompson (Assistant Deputy Minister, Community Safety and Countering Crime Branch, Department of Public Safety and Emergency Preparedness) argued that relatively few police have received SFST training [for Drug Impaired Driving Detection Skills certification], and fewer still the DRE [Drug Recognition expert] training to be ready to do it at the roadside and the government intends to provide funding to police to receive this training in addition to the oral screeners.[93]

On the other hand, representatives of MADD reject the necessity of the reflex tests with the introduction of the oral screeners. This argument is justified on the basis that the reflex tests are time consuming,

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[90] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 65, September 25th, 2017, par. 1850
[91] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 36, February 15th, 2018, p. 76
[92] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 66, September 27th, 2017, par. 1630
[93] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 66, September 27th, 2017, par. 1620

and the THC level in a driver's body has time to diminish during this procedure. MADD argues that the *per se* law coupled with the saliva testing devices acts as a stronger deterrent to impaired driving than the reflex tests. Further, having to prove impairment in court is challenging when compared proving violation of a *per se* law, which cannot be done using a reflex test despite the indication of impairment. Finally, the training required for police officers to conduct reflex tests at the roadside can be very costly.

> We think that Bill C-46 capturing the three different limits has done an excellent job of what we would consider a good beginning with *per se* levels for drugs. Having between the two and five nanograms as a summary offence, again there are a lot of studies out there.
> […] the rapid dissipation as it goes through the body, very unlike alcohol, so at time of driving the *per se* levels were probably much higher than by the time you fail a standard field sobriety test or an oral fluid test, make the demand for the blood, and get somebody to a place that can draw the blood […] (Andrew Murie, the Chief Executive Officer of MADD).[94]

> Unfortunately, the DRE and the Standardized Field Sobriety Test [SFST] don't serve as that deterrent because it's hard to describe that procedure. But, through being able to hold up a device and say that police are now authorized to use that, that deterrent will come (Andrew Murie, CEO of MADD Canada).[95]

> Defence counsel have routinely challenged the basis of an officer's demand for a SFST, and the accuracy of SFST and the DRE in determining whether an individual's ability to drive is impaired by a drug. The Canadian courts remain skeptical about the link between the mere presence of drugs in a driver's system and the actual impairment of driving ability. Some courts have rejected the DRE evidence out-of-hand. Other courts have demanded detailed expert evidence on the 12 steps of the DRE, the evaluating officer's qualifications and the relationship between the drug in issue and the accused's ability to drive. Even if all of the evaluating officer's testimony is accepted, the court may simply not be convinced beyond a reasonable doubt that the accused's driving ability was impaired by a drug when arrested.

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[94] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 61, June 13th, 2017, par. 1615
[95] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, March 1st 2018, p. 91

> The 2008 amendments have proven to be problematic on several grounds: the cost of training evaluating officers is high; and the processing of drug-impaired driving suspects is complex, technically exacting and time-consuming. Perhaps more importantly for current purposes, the Canadian courts have been reluctant to accept police testimony that a suspect's ability to drive was impaired, even if he or she has failed SFST and the DRE and tested positive for a drug (Witness brief submitted by MADD Canada).[96]

The representatives of government echoed MADD's arguments [97] and reiterated that the *per se* law is a precautionary approach, and an effective deterrent to cannabis impaired driving. However, if this procedure remains, some parliamentarians and witnesses challenge the utility of the criminal law to sanction impaired drivers.

## 3.5 Criminal Sanctions

A total of 97 interactions touched on this part of the analytical grid, with many more in favor of the use of criminal sanctions (78) than against (19).

One of the arguments presented against the use of criminal sanctions came from Savannah Gentile of the Canadian Association of Elizabeth Fry Societies. Gentile presented the argument that the criminal penalties in Bill C-46 would disproportionately impact marginalized communities and youth, as well as reinforce racial profiling practices:

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[96] MADD Canada Witness Brief submitted to the House of Commons JUST Committee, August 4th, 2017, p. 3
[97] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 219, Report Stage, October 27th, par. 1225

> Our concern is that coming out with a bill that creates harsher punishments and penalties will capture those who are struggling with mental health and addiction, and it is our position that prison is never a useful response to drug-related crimes. It is an intervention that comes too late and fails to treat the source of the problem.
> We're further concerned about access to justice. CAEFS is concerned that Bill C-46 will disproportionately impact members of racialized and marginalized groups, who are more likely to be traffic stopped, to be charged, and to receive convictions and harsher penalties. And this is if they don't plead out in the first place.
> We are further concerned that a bill of this nature will lead to an increase in the criminalization of our youth. It is our position that more resources need to be diverted to communities to address and better equip them to educate and to heal (Savannah Gentile, Canadian Association of Elizabeth Fry Societies).[98]

Representatives of MADD argued both in favour and against the use of criminal sanctions (later in this section we will explain when they're favorable to criminal sanctions). The argument presented against the use of criminal sanctions by MADD was based on the principle of deterrence; they argued that provincial administrative sanctions are more likely to deter impaired driving than criminal sanctions. What is referred to here is this situation at the provincial level.

> Plusieurs provinces et territoires ont implanté la loi fédérale en matière de facultés affaiblies, mais en utilisant des sanctions administratives plutôt que pénales, la procédure fédérale étant jugée trop lourde et coûteuse. En fait, ce sont les sanctions que l'on privilégie déjà pour l'alcool. […] ces sanctions administratives qui étaient initialement des avertissements aux conducteurs sont devenues des pratiques de travail de plus en plus usuelles en matière de facultés affaiblies, et ce, d'autant plus que les données des études indiquent qu'elles sont plus efficaces à changer les comportements des conducteurs parce que plus régulièrement appliquées (Beauchesne, 2020, p. 253).[99]

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[98] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 66, September 27th, 2017, par. 1545

[99] To know the administration sanctions taken by the provinces related to cannabis, ignoring the federal procedure, see (MADD Canada, n.d.)

MADD underlines the effectiveness of administrative sanctions, as shown by studies measuring the deterrence of impaired driving.

> We also have the ability in Canada to have provincial sanctions at the administrative level that support this. Our alcohol programs kick in. They can be very effective. If you look at the situation in British Columbia, where they do a three-day vehicle impoundment and three-day licence suspension for somebody in the "warn" range, it has reduced alcohol-related deaths by 50% (Andrew Murie, CEO of MADD Canada).[100]

Members of the NDP, and some members of the ISG are also favorable to administrative sanctions and against the use of criminal sanctions for the same reasons as MADD. They are concerned about the mandatory minimum sentences posed in Bill C-46. Members of the NDP point out the hypocrisy of the LPC's use of mandatory minimum sentences after the Liberals openly criticized the previous Conservative government's use of mandatory minimum sentences for certain drug offences on the basis that these types of sentences do not make communities safer.

> Mandatory minimum sentences will not prevent impaired driving, and they will not save lives. There can be no doubt that we must address issues at the root of impaired driving, issues of inequality, issues of public education, and issues of access to health care, particularly treatment for addictions — drug and alcohol addictions alike (Kim Pate, ISG).[101]

> […] Finally, I'll quote the Prime Minister, something I do from time to time. The Prime Minister did say prior to the last election, in referring to mandatory minimums:
> It's the kind of political ploy that makes everyone feel good, saying, "We're going to be tough on these people", but by removing judicial discretion, and by emphasizing mandatory minimums, you're...not necessarily making our communities any safer.

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[100] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 65, September 25th, 2017, par. 1605
[101] Hansard, Senate, 42nd Parliament, 1st Session, Second Reading, Chamber Sitting 169, December 8th, 2018 par. 1030

> Also, around the same period in 2015, in an interview with Tom Clark in The West Block, he said, "we have concerns" about the "overuse and, quite frankly, abuse of mandatory minimums." (Peter Julian, NDP).[102]

Peter Julian presented amendment (NDP-2) to abolish the minimum mandatory sanctions in favour of establishing a maximum penalty for the offences in Bill C-46[103]. This amendment was met with resistance from the LPC:

> Well, I take the point, and obviously we did have a discussion earlier about mandatory minimum. However, what this amendment does in effect is that it replaces the minimum with a maximum, which is problematic in my view. You're saying that for a first offence, it is a fine of not more than $1,000. That would be the mandatory minimum that we're talking about. We're taking the discretion away from the judge to say, well, in this case you actually should have a fine greater than $1,000, for all kinds of reasons or aggravating factors or other things that need to be taken into account (Colin Fraser, LPC).[104]

The NDP's amendment was ultimately rejected with 1 vote in favour and 8 against.

Further, Kim Pate (ISG) suggests treatment programs, drug courts and ignition interlock devices.

> But what was very interesting is some of the research showed that, in fact, the best way to prevent impaired driving currently has been the use of ignition interlock devices. Most of the advocates for stopping impaired driving, whether it was, as the minister mentioned, MADD Canada or other groups, have actually advocated ignition interlock devices.
> I'm curious whether your negotiations with the provinces and territories have included discussion about a regulatory scheme that could apply to car manufacturers and licensing bodies to look at the use of interlocking devices. Given all the evidence, it seems the overall purpose of the bill is to stop impaired driving and to prevent harm. It seems to me all the research shows that as the most effective device to date.

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[102] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 68, October 4th, 2017, par.1725-1730
[103] Hansard, House of Commons JUST Committee Meeting 68, October 4th, 2017, par. 1725
https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-68/minutes
[104] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 68, October 4th, 2017, par. 1730

> Have you looked at the impact? Is there anything similar in terms of drug detection with interlock devices? I couldn't find anything about that in the research (Kim Pate, ISG).[105]

In response to Kim Pate (ISG), Greg Yost (Counsel, Criminal Law Policy Section, Department of Justice) argued that alternatives to criminal sanctions such as treatment programs, drug courts, and interlock devices would be too expensive to implement across the country. Further, these interlock devices for drugs other than alcohol don't yet exist.

> Regarding the use of interlock in vehicles, first let me say that I've never heard of anything like interlock for drugs. I'm unaware of it. Perhaps the scientists when they're here, will have heard of something, but I certainly have not.
> When you get to the issue of the drug courts, Bill C-46 is very much modelled on the legislation under the Controlled Drugs and Substances Act. Where there are drug courts, and you're in a drug court program, that's fine. There are a lot of places that do not have drug courts.
> But the installation of those things in vehicles, et cetera, would be a decision for Transport Canada, perhaps, and it is certainly not envisaged at all in Bill C-46.
> The program is quite expensive, actually; it's $150 a month or thereabouts. You have to show up and get your information downloaded. It's quite inconvenient and expensive (Greg Yost, Counsel, Criminal Law Policy Section, Department of Justice). [106]

Josephine Whydell, from Hensel Barristers and part of the Indigenous Bar Association made the same argument as Kim Pate that preventing problematic driving does not require the use of the criminal law. Rather, access to health care, rehabilitation centres, and affordable public transportation would be more effective for preventing impaired driving than criminal sanctions[107].

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[105] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 35: February 7th, p. 25

[106] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 35: February 7th, p. 25pp. 25-26

[107] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, February 28th, 2018, p. 38

Kyla Lee of Acumen Law Corporation connects the argument opposing criminal sanctions to the problems associated with the *per se* law; the use of criminal sanctions, particularly with mandatory minimum sentences are problematic due to the fact, well demonstrated by experts in the debates, that many people who are not impaired will be charged under the *per se* law proposed in Bill C-46.

> Another problem I have identified with this legislation that I think is particularly troubling is with respect to the drug impairment provisions. Proposing a minimum blood THC level of two nanograms per millilitre is very problematic. Not only is this completely unsupported in the science, but the government's position on why they proposed this is particularly troubling to me. The notion is they don't believe that two nanograms per millilitre is impairing or that it's criminal conduct, but the creation of the summary offence to reflect this will require that anybody who is convicted of having a blood-alcohol level at or in excess of that amount will have a criminal record. There's no opportunity for a discharge because there is a mandatory minimum penalty associated even with the summary offence.
>
> The result is that more Canadians will be left with criminal records. I also predict that because more people will be left with criminal records for something that's not criminal, the overall stigma in our criminal justice system associated with a criminal record will eventually become decreased, and it will have an unexpected effect on the severity of punishment in other offences and in other arenas. So, this bill has the possibility of affecting people coming before the courts not just for impaired driving offences but also for other offences (Kyla Lee, Acumen Law Corporation).[108]

Katherine Hensel and Josephine Whydell are particularly concerned about the effect of these mandatory minimum sentences on Indigenous people.

> There are other ways that Parliament could achieve its objective of reducing impaired driving and improving road safety without potentially infringing Charter rights and overburdening Indigenous peoples with the fear of criminalization and imprisonment. For example, improving public transport, improving access to health care, access to

[108] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, March 1st 2018, p. 54

> free counselling services, rehabilitation centres, and removing obstacles to Indigenous advancement (Hensel Barristers Witness Brief).[109]

Those in favour of criminal sanctions were, without surprise, mainly from the LPC who put Bill C-46 forward. Members of the LPC repeated the initial argument when presenting the Bill; criminal penalties were necessary as impaired driving made up the leading cause of criminal death and injury in Canada[110]. However, many Conservative members and citizen activist groups fighting impaired driving were also in favour of the use of criminal sanctions. The principle of deterrence was invoked by many who argued in favour of criminal sanctions for impaired driving in Bill C-46, such as Families for Justice.

> Drivers of all ages still risk the chance and drive after consuming alcohol or taking drugs, and only very strict deterrents would impact the crucial thoughts of a driver before they drink or do drugs. Tougher laws must be implemented to enforce deterrence (Markita Kalius, President, Families for Justice). [111]

James Palangio (Crown Counsel, Canadian Association of Crown Counsel) also argues that criminal sanctions have a deterrent effect specific to impaired drivers compared with other behaviours, because impaired driving is an offence that is by and large committed by those who are otherwise "law abiding citizens". This segment of the population is typically more susceptible to the effects of deterrence, unlike most other criminal offences.

> Courts have said for 30 or 40 years now that impaired driving is a different kind of criminal offence than most other criminal offences. They've recognized it is the type of offence that may be committed by otherwise law-abiding citizens who come from

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[109] Hensel Barrister's witness brief, submitted to the Senate Standing Committee on Constitutional and Legal Affairs, February 27th, 2018, p. 12

[110] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 184, Second Reading, May 31st, 2017, par. 1600

[111] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 62, September 18th, 2017, par. 1715

> good backgrounds. That's the demographic that is potentially much more liable to be deterred by the possibility of stiff sentences and consequences.
> The deterrent aspect of impaired driving law covers more than the penalty phase. Part of it is the certainty of being caught if you're doing it. The second is the certainty of being convicted if you have been caught doing it. The third aspect of it is the certainty of a harsh penalty if you've been convicted of doing it.
> All of that works together, and the courts have recognized that in this area mandatory minimum sentences have had a significant impact in reducing impaired driving (James Palangio, Crown Counsel, Canadian Association of Crown Counsel). [112]

Peter Braid (Chief Executive Officer, Insurance Brokers Association of Canada) also expressed support for increased criminal penalties under Bill C-46 for impaired driving, making the argument that there are 'loopholes' in the current system allowing some people escape criminal penalties. Braid argues we must close these loopholes and increased penalties would act as a deterrent for impaired driving.

> We are also in favour of measures to close loopholes, which allow some impaired drivers to avoid penalties, and in favour of the enforcement of stiffer penalties to act as deterrents. The legalization of marijuana of course raises a number of concerns with respect to drug-impaired driving. Many in society expect that marijuana use may become more prevalent and socially acceptable, so there could potentially be a corresponding increase in drug-impaired driving.
> […] Again, we support the initiatives that will reduce the number of deaths and injuries caused by impaired drivers and believe that the following considerations will be of utmost importance: one, increased penalties and the removal of defence loopholes; two, further research into roadside tests for drug impairments; and three, public awareness campaigns. We are confident that with stronger laws and regulations in place, real progress can be made (Peter Braid, Chief Executive Officer, Insurance Brokers Association of Canada).[113]

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[116] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, February 28th, 2018, p. 29

[113] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee, Meeting 63, September 19th, 2017, par. 1650

While many Conservative members were in favour of criminal penalties for impaired drivers, even for increasing these penalties, some members raised again the point that the real problem is the legalization of cannabis and Bill C-45.

> Let us return to the thrust of the matter. The government wants to legalize marijuana. That is why it tabled this bill. It is not a good thing. Anyone who has even taken a slight interest in this matter knows that wherever this has been tried, whether in Colorado or Washington, there has been an increase in crime, the consumption and illegal production of drugs, accidents, social problems, and deaths on the road (Gerald Deltell, CPC).[114]

MADD, while supportive of the use of administrative sanctions for the purpose of deterrence, supports the use of criminal sanctions for the punishment of drivers who are proven to be impaired.

> Fewer impaired drivers would evade criminal responsibility due to factors unrelated to their criminal conduct, and those convicted would be subject to more onerous sanctions (Andrew Murie, CEO MADD).[115]

## 3.6 Specific legislation for cannabis impaired driving

A total of 68 interactions touched on this part of the analytical grid, 9 interactions considered a specific legislation to deal with cannabis impaired driving unnecessary, and 59 were in favor of passing specific legislation for cannabis-impaired driving.

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[114] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 221, Report Stage, October 24th, 2017, par. 1200

[115] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, March 1st, 2018, p. 76-77

Of those interactions in favour, without surprise, the majority came from the LPC, repeating that previous legislation did not have enough of a preventative and deterrent effect. The significant and increasing number of drug-impaired driving incidents is used by the LPC as justification to invoke the criminal law and increase the tools available to the police[116], and that specific legislation is necessary whether cannabis is legalized or not. Peter Harder (LPC) argues that (illegal) drug-impaired driving incidents are on the rise in Canada, not only with cannabis[117], and whether cannabis legalization is adopted or not, Bill C-46 is necessary.

> We understand many of you may have concerns about the pending legalization of marijuana, but we encourage you to consider Bill C-46 separate and apart from the proposed legislation around legalization. Drugged driving is a problem right now; too many Canadians are being killed or injured in crashes where drugs are present. The measures contained in Bill C-46 are needed to address the drugged driving problem in Canada, independent of the legalization of marijuana (Peter Harder, LPC).[118]

Members of CPC are in favour for the same reason but think that legalization of cannabis will worsen the problem of impaired driving with this drug [119]. However, some witnesses and parliamentarians argued against legislation that specifically targets cannabis impaired driving, considering that the tools are already available to address this situation. Further, expanding the criminal law with specific legislation for cannabis impaired driving and harshly punishing those who are not impaired (through the *per se* law), will not decrease the incidence of impaired driving.

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[116] Hansard, House of Commons 42nd Parliament, 1st Session, Chamber Sitting 219, Report Stage, October 27th, par. 1225
[117] Reminder: C-46 invokes harsher sentences for impaired driving using all drugs, including alcohol.
[118] Hansard Senate, 42nd Parliament, 1st Session, Chamber Sitting 166, Second Reading, par. 1510
[119] Hansard, House of Commons, 42nd Parliament, 1st Session, Report Stage, Chamber Sitting 221, October 27th, 2017, par. 1130-1135

> I don't mean to say that we don't have a problem with impaired driving. It's that we don't have a problem that needs a solution because we already have a solution that is working. If you look at the Statistics Canada numbers, the rates of impaired driving, and the way that the provinces are also collaborating to address the issue, you will see that it's a problem that doesn't need a solution. There's already a legislative scheme in place that works. […]
> Statistics and studies into decreasing rates of impaired driving have found that really the only mechanisms that consistently work are consistent, visible enforcement of whatever law is in place, and education of the public about the law and the fact that if you violate it you will get caught. It's that perception that has the most significant effect. It doesn't matter what the law is.
> Changing the law is not going to solve impaired driving. Changing the law is not going to, in my view, make a difference. All it's going to do is create a different, unnecessary solution (Kyla Lee, Acumen Law Corporation). [120]

The witnesses and NDP that were concerned that Bill C-46 presents a risk for increasing racial profiling were also against a specific law for cannabis-impaired driving.

> I also have concerns, as my colleague does, about how this law will be applied on our roadways. We know there is a real risk that implicit and outright racism could cause visual minorities to be more disproportionally affected. It's an uncomfortable truth that no amount of in-class sensitivity training will be able to correct for that kind of bias if and where it does exist.
> Police officers already have what they need to detect and remove impaired drivers from our roads. They have almost limitless powers to stop vehicles, and the threshold for issuing an ASD demand is very low. Concerns about impaired drivers escaping detection on the roadside are better addressed through more comprehensive police training. They already have the tools necessary to remove impaired drivers, which are in line with our law and consistent with Charter rights (Sarah Leamon, Acumen Law Corporation).[121]

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[120] Hansard, House of Commons 42nd Parliament, 1st Session, JUST Committee Meeting 64, October 24th, 2017, par. 1705
[121] Hansard Senate, 42nd Parliament, 1st Session, Standing Committee on Legal and Constitutional Affairs, Issue 37, March 1st 2018, p. 56

In the next chapter we will present our analysis of the data using our literature review and proceed to answer our main research question and validate, or not, our two hypothesis. We will finish Chapter 4 with an interpretation of the results and avenues of further research.

# Chapter IV: Analysis of the data

In the first part of this chapter, we will return to Bacchi and Goodwin's (2016) sixth and final question in their WPR framework (What is the Problem Represented): "How and where has this representation of the problem been produced, disseminated, and defended? How has it been and/or can it be disrupted and replaced?" (Bacchi & Goodwin, 2016b, p. 20) to answer our main research question. Answering Bacchi and Goodwin's (2016) final question will allow us to further explore our main research question which is as follows: was the Canadian governments' construction of the problem of cannabis-impaired driving, which was used to justify the necessity and the content of new offences in Bill C-46, contested in whole or in part during the parliamentary debates that resulted in the adoption of this law, or was the construction of cannabis-impaired driving, accepted without contest by most of the parliamentarians and witnesses?

The second section of this chapter will be dedicated to answering our sub questions related to whether parliamentarians or witnesses raised any debate regarding the *cause, objective,* or proposed *solutions* to the problem and will allow us to verify our two hypotheses. Our first hypothesis in this thesis was that the construction of impaired driving, as the government put it forward - the 'non-negotiable' aspect of the problem to be solved- would not be contested. Our second hypothesis was related to the fictitious division between 'medical' and 'recreational' cannabis users; the constructed 'recreational' group of users would be seen easily punishable in the debates, regardless of impairment, contrary to the authorized users for medical purposes.

Finally, we will return to critical criminology and Foucault's thesis about the production of "truth" by the government to situate our findings in the context of the broader implications for penal law, which is how inequality is produced and reproduced in penal law.

## 4.1 Data processing

In the first chapter, we outlined the history of the 'bad driver' problem frame and how it came to be the dominant discourse over other problem frames during the 1940s to the 1970s that viewed the problem as a result of the 'bad car' or as a 'public health' approach. In the debates on Bill C-46, the 'bad driver' construction continues to be disseminated and defended as the dominant discourse for understanding road safety problems. Auto-dependence of Canadian society was not envisaged in the parliamentary debates on Bill C-46. While some parliamentarians and witnesses argue in favour of increasing access to public transportation, there is no questioning of the second half of the equation of road safety problems, which is the dependence on the personal automobile for transportation. In this sense, parliamentarians and witnesses remain within the problem frame 'box' of the 'bad driver' that became dominant in the 1980s.

Further, there is no serious consideration of the problem as the 'drug impaired' driver as being the 'bad driver', as opposed to other causes of problematic driving behaviour, such as fatigue, age-related reflex and vision issues, or distracted driving, especially with the cell phone. Although many parliamentarians and witnesses claim to treat 'all forms' of impaired driving as a serious issue, the drug-impaired driver remained the primary concern, and no one argues in favour of treating other forms of impaired driving

by criminal sanctions as drug impaired driving. In fact, some witnesses explicitly argued *against* the use of criminal sanctions for other forms of impaired driving as for the prescribed drugs. Their arguments echoed the arguments seen in the literature regarding prescription medication and *per se* laws; many people are unwilling to criminalize valid prescription medication holders under *per se* laws, as long as they are using their medication as directed by their physician (Jones et al., 2019; Voas et al., 2013). In cases where the prescription medication user is determined to be driving while impaired, and is using their prescription as directed, while subject to punishment, the medical community is also found to be responsible for how they directed the prescription holder. Prescription medications have only recently been added to *per se* laws in Europe, and most countries still waive criminal charges where a patient complies with their treatment orders (Jones et al., 2019, p. 117-118).

It becomes clear in the debates with prescribed drugs that what is problematic and deserving of criminal punishment is the perceived motivation for taking a drug, rather than the use of drug itself, that is automatically punishable. In particular, the *voluntary* act of taking a drug (including alcohol) to elicit *pleasure* is perceived as punishable. Consistent with the literature review, parliamentarians and witnesses in the debates on Bill C-46 argued that Canadians have a 'right to consume their medication'. As such, *per se* laws can only be valid against prescription medication users if they are intentionally overdosing on their medication, not holding a valid prescription, or proven to be driving while impaired. Prescription medication users, using the drug as prescribed, are not considered to be in the same construction as the "bad driver". The distinction is on the motivation of prescribed drugs for *medical* purposes vs. *pleasurable* drugs. Disrupting and replacing this problem representation of the 'bad driver'

who consumes drugs for pleasure would have required treating all impairments as dangerous to road safety, rather than narrowly focusing on the drug user. It is why members of the NDP, CPC, and ISG agreed that medically authorized cannabis users should not be punished under the proposed *per se* law because they are using a drug for 'medicinal' purposes and after consumption cannabis remains in the body for an extended period of time. Medically authorized users are more at risk of testing positive for THC without being impaired. Those who make this argument in the debates are also concerned that medically authorized users have grounds to bring a Charter challenge against Bill C-46 on the basis that they have a right to their medication, and if they are not impaired, they should not be liable to a criminal offence.

Finally, these parliamentarians and witnesses are concerned with the impact of this law on immigrants and the rights of marginalized, racialized, and Indigenous people who are most likely to be disproportionately affected by the application of this law. One aspect with immigrants and permanent residents is the "double penalty" under the IRPA, even if they are not impaired. These arguments emerged from the NDP, some members of the ISG and some witnesses. The NDP members ultimately reject the Bill at Third Reading in the House of Commons for this reason, and because attaching criminal records to individuals through the *per se* law where the driver is not necessarily impaired was seen as extremely problematic. Such concern was also prevalent among many ISG members in the Senate, but they ultimately approved the Bill. To all these arguments, the LPC maintained that the 'preventative' approach taken under the *per se* law legitimizes the possible punishment of cannabis users driving a motor vehicle, medically authorised or not.

While the literature review revealed that MADD was the primary claims maker to the problem of alcohol impaired driving beginning in the 1980s, in the case of cannabis impaired driving in Bill C-46, the CPC make up the largest claims maker in the media. The CPC, and many witnesses, criticizes this *per se* law because the government does not have the proper technology, like the Breathalyzer, to proceed quickly at the roadside, and for this reason, some cannabis impaired drivers will not be detected and punished. The CPC repeatedly also argued that this situation is particularly dramatic, because the legalization of cannabis going on simultaneously will enlarge the number of impaired cannabis drivers.

Finally, another argument put forward opposed to the *per se* law was against its application. This was the argument presented by police organizations, who insisted that the training and tools to proceed quickly on the roadside were not available yet. They argued that prior to Bill C-46, it was unnecessary for them to determine the type and concentration of illegal drugs consumed by a driver, only that the person was in fact impaired by a drug.

Some parliamentarians and witnesses also questioned the use of criminal penalties. Some, like MADD, argued in favour of using administrative sanctions for deterrence, which will be more effective than criminal sanctions because they are more easily applied, as the studies of administrative sanctions on alcohol and driving by the provinces are showing (Canadian Centre on Substance Abuse, 2016; Mann et al., 2000; Zador et al., 1989). But MADD saw administrative sanctions as useful for the deterrence of people who are not impaired and wish to maintain criminal sanctions for the drivers that are impaired.

However, even though many parliamentarians and witnesses opposed criminal sanctions because of the unjust punishment of the non-impaired driver or authorized medical users of cannabis, most of them accepted the necessity of using criminal sanctions to punish drivers who were proven to be impaired to convey a strong message to deter cannabis users from consuming cannabis and driving. In this sense, most parliamentarians and witnesses remained confined to the governmental proposed construction of the problem not only in terms of the cause of impaired driving, the "bad driver", but also to the solutions put forward, criminal sanctions.

Finally, we turn to the necessity of a specific law for cannabis impaired driving. Without surprise, the LPC was the most prominent voice to justify the necessity of this law, considering that drug-impaired driving was a significant and increasing problem in Canada. However, other parties soon agreed to the necessity of a specific law pertaining to cannabis impaired driving, only some police organizations contested the necessity of the law, arguing they already have the tools to deal with drug impaired driving.

Members of the CPC argued that Bill C-46 is only necessary due to the legalization of cannabis in Bill C-45. However, the LPC members argued that regardless of legalization, Bill C-46 was necessary. Still, there was no consideration that cannabis use with a medical authorization was legal since 2001, apparently without serious concern about impaired driving. The LPC also did not mention that the severity of Bill C-46 will allow Bill C-45 to pass by diminishing the widespread concern regarding an increase in cannabis-impaired driving, as shown by many polls on the legalization of cannabis (Potter & Weinstock, 2016). The principle of deterrence was often cited as the justification for harsh criminal sanctions, with the LPC arguing that the law is precautionary and preventative to justify that some drivers who are not impaired

will also be affected by these criminal sanctions. The LPC members mentioned many times that these sanctions would send a strong message to Canadians that cannabis impaired driving is being taken very seriously by the government, a message intended to resonate with the public's concerns. The LPC intended to thwart the most vocal claims makers to the problem of cannabis and driving, the CPC and citizen activist groups such as MADD, because it is one of the two major concerns in the legalization of cannabis (the other being cannabis and youth, which was dealt with by creating two new offences within Bill C-45 itself). As such, the LPC could not demonstrate "leniency", even for medically authorized cannabis users.

Now, if we return to our main research question, the answer is quite clear. The LPC built their construction on the previous 'bad driver' cause of the problem and the criminal sanctions that deal with the person who has 'bad' motivations for using drugs (with the exception of prescription users). This construction of the impaired driver problem was already widely accepted and was only reinforced and reproduced in the debates on Bill C-46. While some parliamentarians and witnesses questioned how this law will be applied – the risk of punishing non-impaired drivers, or not to catch them all or to complicate a procedure that was easier before, there was no debate on the central tenets of the problem representation itself.

In the next section, we will reinforce our answer to our main question by developing the answer to our sub-questions, returning to our literature review to provide an analysis of the data.

# 4.2 Data analysis

## 4.2.1 The *cause* of the problem: the 'bad driver'

As discussed in the previous section, we saw in the data that no one questioned the cause of the problem, the 'bad driver', someone who is perceived to consume drugs for pleasure.

The assumption that the driver is responsible for road safety problems has been dominant since the 1920s, with accident prevention programs focused on training and educating the driver (Gusfield, 1984), and punishing the driver that violates these rules and regulations. Other road safety discourses such as the 'bad car' and the 'public health' approach that for a short while challenged this assumption didn't last (McCarthy, 1994; Reinarman, 1988). The focus on the individual 'bad driver' have broad and problematic implications for public policy and law enforcement strategies. By adopting this framework of the problem, government agencies and law enforcement strategies target individual drivers, rather than possible broader societal causes of the problem as seen in the first chapter, such as the construction of safe roadways, improving auto industry standards and public transportation (Gusfield, 1984), or even targeting the drug industry (Reinarman, 1988). While some parliamentarians and witnesses in the debates on Bill C-46 argued in favour of increasing public transportation, none put forward an argument that challenged the assumption that the individual driver was responsible for road safety problems. Further, arguments in favour of prevention, driver education, and drug education are also seen within this problem construction, as the assumption that the individual driver is responsible for preventing road

safety problems remained at the root of this construction. We will further discuss the implications of this problem frame as it relates to the solutions proposed in a later section.

Since the 1980s, the 'bad driver' thesis has shifted onto the 'bad driver who uses drugs', leaving other forms of impaired driving out of the public discourse about road safety problems. One reason for this shift is MADD and other citizen activist groups were able to draw on symbolic characters of the grieving mother and the killed innocent child (Gusfield, 1984). This moral debate was also seen in the debates on Bill C-46, with many parliamentarians and witnesses drawing on this symbolic caricature of the drug-impaired driver. The image of the driver impaired by drugs is one of the 'killer impaired drivers', eliciting a reaction in the public, media, and politicians to 'combat' this issue, (Gusfield, 1984, p. 152). Stripping the individual driver of their context and assigning them 'deviant' status has the effect of dehumanizing the driver, justifying, and legitimizing criminal punishment. The exception to the 'bad driver who takes drugs' construction is the valid prescription drug user, as previously discussed, and the ones who can be impaired or at risk on the road without taking drugs (use of cellular phone while driving, fatigue, etc.). This argument rests on the assumption that drug users put others at risk by choice, for personal gain (pleasure) and without necessity. However, the public is not willing to punish other problematic drivers the same way.

However, a question remains: why were medically authorized cannabis users categorized as 'bad drivers' rather than be included in the legitimate prescription user category for many parliamentarians and witnesses and the LPC? Even if cannabis has been used for medical purposes for many years, it has a contested and ambiguous history as a medical product, and it is still perceived by many as attached to

the illegal drugs category. Cannabis is extremely ambiguous in terms of the social and political meanings attached to it, making it extremely difficult to maintain a distinction between 'medicinal' and 'recreational' purposes (Lancaster et al., 2017, p. 118).

It should be noted that historical concerns regarding non-alcohol drug-impaired driving first arose related to *illegal* drugs through zero-tolerance laws and the establishment of the Drug Recognition Evaluation program in the late 1970s. But the main reason why the PLC made no exception for medically authorized cannabis users is probably linked to the way the debates went on about this issue. Most of the parliamentarians and witnesses who argued in favour of an exception to the *per se* law for cannabis users with medical authorizations tied this question to the concerns regarding all frequent users, including illegal users, regardless of medical authorization status, because they were contesting the punishment of non-impaired drivers. In mixing motivations to use drugs, the "good" and the "bad" ones, it became impossible for the LPC to make any exceptions for the cannabis users with medical authorizations, considering them as 'good' motivations to use the drug. In this context, it was easier for the LPC to maintain the 'precautionary' approach argument to justify this law as it was and treating medically authorized users as part of the 'bad driver' category. The LPC's argument rested on the prohibitionist discourse on drugs, supporting this argument without many contestations in the debates.

### 4.2.2 The objective

We asked in our sub questions whether some parliamentarians or witnesses questioned the nature of the solution as failing to meet the objective of improving road safety, as put forward by the government

in Bill C-46 using any of the following arguments: Bill C-46 failed to meet the road safety objective by not targeting all impaired drivers (regardless of the cause) and/ or distracted drivers? Or this *per se* law fails to meet the road safety objective, particularly for cannabis, where a link between a certain threshold THC level and public safety cannot be established? Or with Bill C-46, the road safety objective is lost by distinguishing between 'good' and 'bad' motivations to use cannabis and that punishment only applies to 'bad' motivations.

Some parliamentarians and witnesses argued effectively that this *per se* law for cannabis was problematic for road safety. The proposed *per se* law did not measure road safety risk, inadvertently criminalizing some people who are not impaired, and letting others who may be problematic for road safety escape detection and punishment. However, despite the discussion generated by this concern, this argument didn't go far, because it would have opened a similar discussion with the *per se* law on alcohol, and where some people on the road can be punished without being a risk, and others who pose a risk won't be detected. Some witnesses discussed this link, but without generating any discussion on other ways of dealing with road safety with more efficiency. Reimagining the objective of road safety by evaluating a driver's capacity to drive safely (for example, using roadside tests reflex for *all* problematic drivers), would also have opened the door to include some prescription drug users, and people who didn't take drugs.

The justification proposed by the LPC government to maintain the *per se* law bears a striking resemblance to the original Scandinavian *per se* laws for alcohol. These first *per se* laws were introduced before the scientific community had established the blood alcohol level at which a driver posed an

unacceptable risk to road safety (Roth, 2015). Rather, these early Scandinavian *per se* laws were based on the moral temperance movement, which was more concerned with the association between alcohol as the root of social problems than civil liberties and individual rights (Roth, 2015, p. 859). Even though alcohol was legal in Scandinavian countries, the justification for punitive *per se* laws in the early to mid-20th century was based on the attempt to prevent the *normalization* of alcohol use, focusing on punitive laws to coerce assimilation of the alcohol user to become the temperate, ideal citizen. The LPC's 'precautionary approach' argument echoed this concern regarding cannabis. This is a recurring theme in the debates on cannabis in Bill C-46, as many parliamentarians (particularly the CPC) and witnesses are concerned that cannabis use will be normalized with legalization in Bill C-45. The LPC had to send a strong message that despite the new legal status of cannabis with Bill C-45, the use of cannabis should not be normalized and considered acceptable. This message from the government was already explicitly sent to the public and the experts in the discussion document for the Working Group responsible for doing the consultation on the cannabis law (Bill C-45):

> Au point 3.1 du document de discussion, le gouvernement explique que, afin de « minimiser au mieux les méfaits associés à la consommation de marijuana, il faut se pencher sur les deux approches différentes utilisées dans le contrôle du tabac et de l'alcool ». Dans le cas du tabac, explique-t-il, « l'objectif général est de réduire, voire d'éliminer sa consommation chez tous les Canadiens. En revanche, pour ce qui est de l'alcool, l'objectif général est de promouvoir une consommation responsable chez les adultes et d'en interdire la consommation chez les jeunes. […] la consommation d'alcool est grandement normalisée au sein de la société canadienne » (notre soulignement).
> Son choix? « Il est très important d'empêcher l'usage répandu ou la *normalisation*, surtout si l'on tient compte du fait qu'il faut diminuer le taux de consommation chez les jeunes Canadiens. » Ainsi, le modèle du tabac est privilégié, pour idéalement « réduire, voire éliminer sa consommation chez tous les Canadiens » (notre soulignement). […]

> Ici, la question n'est pas de savoir si les intentions du gouvernement sont trompeuses, considérant, comme nous le verrons en troisième partie, qu'il a aussi comme objectif de consolider l'industrie canadienne de cannabis. L'idée est qu'en problématisant la réglementation à mettre en place sur le cannabis sur les objectifs des politiques en matière de tabac, expliquant qu'il ne s'agit pas de normaliser l'usage du cannabis comme on l'a fait pour l'alcool, le gouvernement s'inscrit très bien dans la perspective prohibitionniste, tout en légalisant cette drogue (Beauchesne, 2020, p.124-125).

Keeping cannabis in this prohibitionist moral perspective assisted the LPC government in two ways. First, it allowed Bill C-45 to pass so the government could legalize cannabis while continuing to fight this "bad" drug. And secondly, maintaining the perception that cannabis as a "bad" drug helped the LPC construct the cannabis user as a 'bad driver' who is deserving of punishment through criminal sanctions. However, the LPC's focus on the cannabis user's driving behaviour allowed the government to avoid the broader debate on a strategy that would encompass all causes of dangerous roadway behaviours and bodily states. This brings us to the proposed solutions to improve road safety.

### 4.2.3 The proposed solutions

In our sub questions, we asked whether parliamentarians or witnesses questioned the solutions put forward in Bill C-46 in upholding the objective of improving road safety, as put forward by the government using any of the following arguments. First, that the reflex test would be sufficient to determine impaired driving. Second, that criminal sanctions are not the most effective means to reduce impaired driving. Or third, that a specific law for cannabis was not necessary to achieve this objective.

In the previous section, we discussed the fact that the reflex test was dismissed by many parliamentarians and witnesses as being sufficient as a standalone means of detecting and evaluating

cannabis impairment. They required an objective measure of the driver's guilt, which can only be accessed through the use of technology. This discourse originated at the emergence of the Breathalyzer to prove a person was a "bad driver" through their "guilty body". The Breathalyzer

> tested not *mens rea* (guilty mind) but the guilty body. The Breathalyzer and its portable cousin introduced a few years later for roadside screening joined fingerprinting systems and lie detection equipment as part of police department's technology of detection and surveillance… these technologies incriminated suspects by measuring and analyzing the body (Marquis, 2012, p. 51).

This argument is echoed in the debates on Bill C-46; parliamentarians and witnesses require proof of a "guilty body" for cannabis impairment which can be even less conspicuous than alcohol impairments. While some parliamentarians and witnesses are opposed to the oral fluid screeners, few are willing to rely on the reflex tests as an adequate test of impairment. Their refusal of fluid screeners proposed by the government is due the weakness of this technology, which cannot measure and prove a "guilty body". The oral fluid screening device can only detect the presence of cannabis, indicating the person took cannabis prior to driving. If most parliamentarians and witnesses argued against reflex tests as they are fallible due to the "subjective" nature of the test, it was to claim new technologies for "objective" measurements of the body to determine impairment. Some parliamentarians and witnesses argued in favour of developing technology that records and measures the driver's performance on the reflex test, removing the interpretation of these tests from the hands of the police. Further still, some rejected the use of the reflex test entirely because people could fail them without having used drugs (an argument was made by MADD and the Barreau du Quebec) meaning that "good" citizens could be accused. However, the people they want to punish are drug users (illegal drugs, cannabis, and alcohol), and only technology can prove the "guilty body" rendering the reflex test unnecessary for this purpose.

In the previous section, we answered our main question by sustaining that the government's construction of the problem was not truly challenged by any parliamentarians or witnesses. In other words, no one went beyond the box presented by the government. Although the nature of criminal sanctions was discussed, and some questioned the utility of punishment, there was a silence in the debates regarding other ways of viewing the problem, meaning there was also a silence regarding other possible solutions. Although many parliamentarians and witnesses discuss the necessity of proper driver education for preventing impaired driving, it is important to note the individual nature of that solution. Targeting the individual driver as the locus of the road safety problem in Bill C-46 is consistent with historical policies (Gusfield, 1984). However, as seen in the literature review, this focus on the driver makes other problem frames and solutions difficult to sustain.

Our first hypothesis in this thesis was that the construction of impaired driving as the government put it forward - the 'non-negotiable' aspect of the problem to be solved- will not be contested, that the discussions on Bill C-46 will focus mainly on 'negotiable' aspects of the government's construction of this problem, such as the severity of the offences, THC level, saliva tests, and training for police officers. This hypothesis was revealed to be true.

Our second hypothesis was related to the fictitious division between 'medical' and 'recreational' cannabis users. Our hypothesis was that the constructed 'recreational' group of users would be perceived in the debates as easily punishable, regardless of impairment. In contrast, we proposed that medically authorized users would be associated with prescribed drug users rather than other cannabis users. This was because the legitimate justification for using drugs (medical purposes) likely explains why

medically authorized cannabis users were not considered a road safety risk before Bill C-45. However, the answer to this hypothesis was more complex. We discovered there was rarely a separation between medically authorized and other frequent (illegal) cannabis users in the debates due to the way cannabis is metabolized in the body. This lack of separation between authorized cannabis users and other users makes it impossible for the Liberal Party to justify an exemption for medically authorized users in the law in the same way as for prescription users. We think it is this lack of separation between these groups of users that this false distinction was not apparent in the debates. In other words, this second hypothesis didn't find its place in the debates.

## 4.3 Inequality enshrined in law

As you will recall from our first chapter, Foucault (1982) argued that over time certain norms established by the government are no longer questioned or negotiated and are accepted as 'truth'. Foucault argues that "techniques of government, which are established systems for regulating the conduct" (Bacchi & Goodwin, 2016b, p. 29) of citizens are essential to understand, as "it is often through this kind of technique that states of domination are established and maintain themselves" (Bacchi & Goodwin, 2016b, p. 29). Critical criminology, where we draw our theoretical framework from, is concerned with the production and reproduction of assumptions regarding the nature of crime and criminality, often taken for granted to be scientifically 'objective' in the law (Goode & Ben-Yehuda, 1994; Scraton, 2002, p. 27). Examining the power dynamics inherent in the law exposes the taken for granted assumptions that build the basis of this 'truth' over time. This thesis sought to examine and expose the underlying assumptions and techniques of government used to establish a new norm -the bad driver using cannabis

and driving- by answering the six questions of the WPR framework presented by Bacchi and Goodwin (2016). In our first level of analysis, we discovered that the norm of the 'bad driver' as responsible for road safety, had been reinforced through public policy over time. It was no longer questioned that the 'bad driver', in particular the 'bad driver' who used drugs for pleasure, was the source of road safety problems. This finding was identified in our literature review and reinforced by our data analysis using Foucault's theory of the construction of 'truth' in public policy.

The second level of analysis that emerged from our data was that *'good'* impairments were linked with certain groups of people deemed '*good citizens'* and consequently not perceived as deserving of punishment through criminal sanctions. In contrast, '*bad'* impairments were linked with '*bad citizens'* or those who use drugs, deserving of criminal punishment. However, prescription drug users were an exception and are '*good citizens*' and not deserving punishment by criminal sanctions. On the other hand, illegal drugs, and by extension illegal drug users, "threaten the liberal body and its disciplined pleasures. They are incompatible with rationality and discipline" (Moore, 2008, p. 356). Addiction recovery discourse points out that drug policies have often focused on the individual as responsible for their choice to consume drugs and the consequences for their condition, overlooking any contributing societal or structural factors (Lancaster et al., 2015). Notably absent in responsibility discourse are the possible societal or structural contributions to the drug user's condition and decisions regarding drug use, limiting the possible solutions to the problem. Responsibility discourse is also apparent in Bill C-46 with the message the LPC intends to send Canadians not to consume cannabis and drive and the harsh consequences of 'irresponsible' cannabis use. This discourse is not to be overlooked, as "The concept of

individual responsibility for one's drug use, health, and well-being is closely related to ideas about citizenship, productive roles, and what it means to make a meaningful contribution to society" (Lancaster et al., 2015, p. 621). This argument is related to the perception of *choice* to consume drugs and the failure on the part of the individual to take proper measures to protect one's health and social responsibilities by choosing to use illegal or 'recreational' drugs.

On the other hand, prescription users are perceived to be using drugs to *improve* their health and social contributions which makes these users 'productive' members of society meaning their behaviour is justifiable. Further, this idea also extends to those who engage in problematic driving without using drugs, such as being distracted by using a cell phone while driving. This was seen in the data by some parliamentarians and witnesses who noted that distracted driving, use of cellular phone while driving was the leading cause of roadway fatalities but was not the leading *criminal* cause of death on the road. Choosing to use a cell phone while driving or driving while fatigued does not make a person a '*bad citizen'*. Stemming from the problem representation put forward by the government in Bill C-46, 'bad citizens' are *made* through the solutions presented to control their behaviour (Bacchi and Goodwin, 2016).

The result of this dichotomy between the *'good'* impairments and *'bad'* impairments is that there are currently different legal responses for different types of road safety concerns. Criminal sanctions are reserved for '*bad citizens',* those who are found to have used drugs to elicit pleasure and do not require proof of impairment to be charged. Administrative sanctions are perceived as sufficient for those who are '*good citizens'* who are engaged in less morally problematic actions, but still engage in dangerous

roadway behaviours such as distracted driving, driving while in a state of fatigue, or with traces of prescription drugs in their system with a valid prescription. Driving as a '*good citizen'* requires proof of behavioural impairment to invoke criminal sanctions. This leads us to ask who is considered a '*good citizen'* and who is considered a '*bad* citizen'. We will draw on our theoretical framework in critical criminology to answer this question.

Research in critical criminology analyses crime as a socially constructed phenomenon, analyzing the power dynamics inherent in the law that construct the norm. Critical theorists view crime as a constructed phenomenon that serves to uphold and reproduce the existing social order built to serve and protect certain interests of those in positions of social, economic, and political power (Bessant, 2002). Inequality is not only found in the *application* of the penal law but can also be embedded within the law, as it can be seen in the construction of whom should be punished for threatening road safety in Bill C-46. Policies based on the control or regulation of unwanted or undesirable behaviour such as cannabis use and driving requires a belief that "people involved with drugs do pose a threat to the social order, in particular in terms of public safety and public health, and that the problem can be addressed by controlling or regulating the behaviour or activity of the people involved" (Brownstein, 2013, p. 28). We argue based on our data that what the LPC, and other governments in the past, are concerned with is not overall road safety, but rather their concern is with *morally* problematic roadway behaviours. This question of "good" and "bad" citizens grouped by the type of risk posed to road safety results in what Foucault coined as "dividing practices" (Foucault, 1982, p. 777) which serve to "separate groups of people from one another and which can also produce "governable subjects" divided within themselves"

(Bacchi & Goodwin, 2016, p. 23). If overall road safety were the concern, other problematic driving conditions or behaviours would have been considered in the debates and the solutions proposed would have been consistent for all problematic roadway behaviour.

Another level of inequality exists in the application of drug policies, against whom the law will be enforced. Critical criminological analysis has repeatedly demonstrated the disparity found in the application of drug policies. Historical cannabis policies in Canada have resulted in disproportionate arrest and detention of racialized and disadvantaged groups in society, despite similar rates of drug use among the population (Owusu-Bempah et al., 2019, p. 122). The unequal application of drug policies reproduces the perception that illegal drug users are "bad" citizens. What emerged from the analysis of Bill C-46 was the finding that the legal status of cannabis, soon to become legal, did not change the fact that cannabis users were "bad citizens driving". The cannabis user is not a 'bad driver' due to their impairment. Rather, they are a morally problematic drug user that must be punished. This "truth" emerged unchallenged in the debates as most parliamentarians and witnesses took the problem construction for granted. In a similar vein as the zero tolerance laws that emerged out of the War on Drugs era in the 1990s, the government constructs the cannabis user in Bill C-46 as morally blameworthy for their drug use, rather than for driving impaired. Therefore, a cannabis user does not need to be impaired to be charged with an offence under the new *per se* law in Bill C-46.

The structural nature of inequality toward cannabis users within Bill C-46 would exacerbate existing discrimination in the application of the law, particularly for socio-economically marginalized people, people of colour, permanent residents, and Indigenous people, as it was underlined by some

parliamentarians and witnesses. The specific policy decision on the part of the LPC to move ahead with this bill despite these concerns reflects the fact that even if the LPC was presented as moving away from criminal sanctions with cannabis, the LPC was not moving away from drug prohibitionist discourse. Rather, the LPC deliberately chose to remain within the prohibitionist drug policy discourse, based on morality regarding pleasure and the perceived "bad" choice to use drugs. By taking this approach, the LPC clearly focuses on who can be punished with criminal sanctions, rather than overall road safety, when political gains are at stake. The LPC was legalizing cannabis with Bill C-45, and the price paid for Bill C-45 was the reassurance to the public with Bill C-46 that when a drug user's 'bad habits' threaten society, the government is still there to protect the "*good citizens*" from drug users.

# Conclusion

Our main research question in this thesis was whether the Canadian governments' construction of the problem of cannabis-impaired driving, which was used to justify the necessity and the content of new offences in Bill C-46, was contested in whole or in part during the parliamentary debates that resulted in the adoption of this law or if the construction of cannabis-impaired driving problem was accepted without contest by most of the parliamentarians and witnesses. What motivated this question is the idea in the literature that when a problem is constructed by a government, the representation of the problem may be unquestioned and over time become 'truth'.

In the first chapter, we first explained our roots in critical criminology. We presented our theoretical framework based on Bacchi and Goodwin (2016)'s *What's the Problem Represented to be* (WPR) framework, Foucault (1982) and Spector and Kitsuse (2001). Spector and Kitsuse (2001) allowed us to understand social problems as a construct, and Foucault's (1982) work allowed for understanding public policies as constructed and becoming, over time, 'truth' in the sense that it is unquestioned and taken for granted. By examining historical drug policies, particularly alcohol policy, we examined the genealogy of impaired driving legislation from which certain assumptions became adopted as 'truth'. Further, Bacchi and Goodwin's (2016) WPR framework allowed us to examine how the problem came to be constituted, exposing these assumptions, and examine the "underlying politics of these productive practices" (Bacchi and Goodwin, 2016, p.14).

We presented two hypotheses on our analysis of the parliamentary debates on C-46. The first hypothesis was that the construction of impaired driving as the government put it forward - the 'non-negotiable' aspect of the problem to be solved- will not be contested, that the discussions on Bill C-46 will focus

mainly on 'negotiable' aspects of the government's construction of this problem, such as the severity of the offences, THC level, saliva tests, and training for police officers. This hypothesis was revealed to be true.

Our second hypothesis was related to the fictitious division between ‘medical’ and ‘recreational’ cannabis users. We hypothesized that the constructed ‘recreational’ group of users would be seen as easily punishable in the debates, regardless of impairment, contrary to the authorized users for medical purposes. The answer we found to this hypothesis was more complex. During the debates, there was rarely a separation between medically authorized cannabis users and other frequent (legal or illegal) users of cannabis in the arguments of those contesting certain aspects of the law who put at risk of punishment users of cannabis who are not impaired. The lack of separation between these two groups offered no clear path for the government to separate medically authorized users of cannabis from other users to justify an exemption for medically authorized users in the same way that prescription users are exempt. For this reason, we think this false division between these two groups was not brought forward in the debates, reproducing the division between illegal drug users and prescribed drug users. In other words, this second hypothesis didn’t find its place in the debate.

The third and final major finding of this thesis was that inequality was embedded within Bill C-46. Critical criminological analysis has repeatedly demonstrated the inequality in the application of drug policies and laws. Particularly with cannabis, the police and justice system have targeted racialized or disadvantaged groups in society, despite similar rates of drug use among the population. This perpetuates the assumption that illegal drug users are *‘bad citizens’*. Further, our analysis demonstrated

that this perception did not change with the legalization of cannabis; cannabis users remained *'bad citizens driving'* in Bill C-46. The cannabis user is not a *'bad driver'* by nature of their impairment, rather they are a morally problematic drug user. In a similar vein as the zero tolerance laws that emerged out of the War on Drugs era in the 1990s, Bill C-46 takes the approach that the cannabis user is morally blameworthy for their drug use, rather than for driving while impaired. This "truth" emerged unchallenged in the debates because most parliamentarians and witnesses took the problem construction of impaired driving for granted. Therefore, it was not necessary for a cannabis user to be impaired to be charged with an offence under the new *per se* law in Bill C-46. This thesis supports the findings of critical criminological analyses of drug policies that found that the application and enforcement of drug policies have historically disproportionately affected marginalized and racialized populations and that this inequality is *embedded* in the law.

Future research will be needed to analyze how the provinces and territories apply the federal sanctions and what administrative measures they will enact, as is the case for alcohol, whether these administrative measures are more often applied than are the criminal ones. Future studies may also examine whether the discrimination feared by some parliamentarians and witnesses in the application of Bill C-46 will be found to be true. Another area of further research would be whether there is a challenge to this law based on the Canadian Charter of Rights and Freedoms. Several parliamentarians and witnesses pointed out the possibility of users with medical authorizations for cannabis having grounds to challenge the law, and it will be interesting to see how this is applied for users without

medical authorizations. Finally, further research could be conducted on developing technologies to detect and punish ‘the guilty ‘body’.

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# Appendices

# Appendix A

## Table A1: Chronology of Bill C-46

| C-46 42nd Parliament 1st Session<br>An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts | |
|---|---|
| House of Commons | |
| **Session** | **Dates** |
| **First Reading** | |
| Chamber sitting 166 | April 13, 2017 |
| **Introduction and First Reading** | **April 13, 2017** |
| **Second Reading** | |
| Chamber sitting: 181, 182, 184 | May 19, 21, 31, 2017 |
| **Second reading and referral to committee** | **May 31, 2017** |
| Standing Committee on Justice and Human Rights | |
| Committee meeting: 61-66, 68 | June 13, 2017, September 18, 19, 20, 25, 27, October 4, 2017 |
| Chamber sitting: 215 | October 16, 2017 |
| **Committee Reporting the Bill with Amendments** | **October 16, 2017** |
| **Report Stage** | |
| Chamber sitting: 219, 221, 222 | October 20, 24, 25, 2017 |
| **Concurrence at Report Stage** | **October 25, 2017** |
| **Third Reading** | |
| Chamber sitting: 224, 226 | October 27, 31, 2017 |
| Senate | |
| **First Reading** | |
| Chamber sitting: 154 | November 1, 2017 |
| **First Reading** | **November 1, 2017** |

| | |
|---|---|
| **Second Reading** | |
| Chamber sitting: 156, 160, 161, 163, 166, 169, 173 | November 7, 22, 23, 29 and December 5, 8, 14 2017 |
| **Second Reading and Referral to Committee** | **December 14, 2017** |
| **Standing Committee on Legal and Constitutional Affairs** | |
| Committee meeting: 83-90, 100-104 | January 31, February, 1, 7, 8, 14, 15, 28, March 1, May 2, 3, 9, 10, 23, 2018 |
| Chamber sitting: 212 | May 31, 2018 |
| **Committee Report Presented with Amendments** | **May 31, 2018** |
| **Consideration of Report Stage** | |
| Chamber sitting: 214 | June 4, 2018 |
| **Committee Report Adopted** | **June 4, 2018** |
| **Third Reading** | |
| Chamber sitting: 215, 218-221 | June 5, 11-14, 2018 |
| **Third Reading** | **June 14, 2018** |
| **Consideration of Messages between the Senate and the House of Commons** | |
| Message sent to the house of commons | June 14, 2018 |
| Consideration of House of Commons Amendments | June 20, 2018 |
| Concurrence in House of Commons Amendments | June 20, 2018 |
| Concurrence in the motion respecting Senate Amendments | June 29, 2018 |
| **Royal Assent** | |
| **Royal Assent Statutes of Canada: 2018, c. 21** | **June 21, 2018** |

# Appendix B: Witnesses heard at Committee

## Table B1: Witnesses heard at Standing Committee on Justice and Human Rights who have spoken on the issue of cannabis

| Name | Title and name of the group/ organization represented |
|---|---|
| **As Government/ political representative** | |
| William F. Pentney | Deputy Minister of Justice and Deputy Attorney General of Canada |
| Hon. Jody Wilson-Raybould | Minister of Justice and Attorney General of Canada, House of Commons |
| **Representatives of government agencies** | |
| Kathy Thompson | Assistant Deputy Minister, Community Safety and Countering Crime Branch, Department of Public Safety and Emergency Preparedness |
| Rachel Huggins | Manager, Policy and Development, Serious and Organized Crime Strategies Division, Community Safety and Countering Crime Branch, Department of Public Safety and Emergency Preparedness |
| Daniel Therrien | Privacy Commissioner of Canada, Office of the Privacy Commissioner of Canada |
| Samuel Perreault | Analyst, Canadian Centre for Justice Statistics, Statistics Canada |
| **As a representative of impaired driving organizations** | |
| Andrew Murie | Chief Executive Officer, Mothers Against Drunk Driving |
| Michael Stewart | Program Director, Arrive Alive DRIVE SOBER |
| Ed Wood | President, DUID Victim Voices |
| Arthur Lee | Community Liaison, Students Against Drinking and Driving of Alberta |
| **As a representative of various organizations** | |
| Rachelle Wallage | Chair, Drugs and Driving Committee, Canadian Society of Forensic Science |
| Megan MacRae | Executive Director, Human Resources, Toronto Transit Commission |
| Brian Leck | Head of Legal and General Counsel, Legal Department, Toronto Transit Commission |
| Gérald Gauthier | Vice-President, Railway Association of Canada |
| Simon-Pierre Paquette | Labour and Employment Counsel, Railway Association of Canada |
| Catherine Latimer | Executive Director, John Howard Society of Canada |
| John Gullick | Chair, Canadian Safe Boating Council |
| Marc Paris | Executive Director, Drug Free Kids Canada |
| Douglas Beirness | Senior Policy Advisor, Subject Matter Expert Impaired Driving, Canadian Centre on Substance Use and Addiction |
| Scott Treasure | President-Elect, Insurance Brokers Association of Canada |
| Jeff Walker | Chief Strategy Officer, National Office, Canadian Automobile Association |
| Gaylene Schellenberg | Lawyer, Legislation and Law Reform, Canadian Bar Association |
| Kathryn Pentz | Treasurer, Criminal Justice Section, Canadian Bar Association |
| Greg DelBigio | Director, Canadian Council of Criminal Defence Lawyers |
| Robert Mann | Senior Scientist, Institute for Mental Health Policy Research, Centre for Addiction and Mental Health |
| Markita Kaulius | President, Families for Justice |
| Chris Halsor | Founder and Principal, Understanding Legal Marijuana |

| | |
|---|---|
| Thomas Marcotte | Co-Director, Assistant Professor, Department of Psychiatry, University of California, Center for Medicinal Cannabis Research |
| **As a representative of a police force or police organization** | |
| Kevin Brosseau | Deputy Commissioner, Contract and Aboriginal Policing, Royal Canadian Mounted Police |
| Doug Fryer | Assistant Commissioner, Road Policing Command, Victoria Police |
| John Bates | Chief of Police, Saint John Police Force |
| Charles Cox | Co-Chair, Traffic Committee, Chief Superintendent, Highway Safety Division, Ontario Provincial Police, Canadian Association of Chiefs of Police |
| Mario Harel | President, Director, Gatineau Police Service, Canadian Association of Chiefs of Police |
| Tom Stamatakis | President, Canadian Police Association |
| **As an individual** | |
| Jeff Brubacher | Medical Doctor, Department of Emergency Medicine, Faculty of Medicine, University of British Columbia |
| Robert Solomon | Distinguished University Professor, Faculty of Law, Western University |
| Jan Ramaekers | Professor, Maastricht University |
| Randy Goossen | Psychiatrist |
| Barry Watson | Adjunct Professor, Faculty of Health, Queensland University of Technology |
| Louis Hugo Francescutti | Professor, School of Public Health, University of Alberta |

## Table B2: Witnesses heard at Standing Committee on Legal and Constitutional Affairs who have spoken on the issue of cannabis

| Name | Title and name of the group/ organization represented |
|---|---|
| **As Government/ political representative** | |
| François A. Daigle | Associate Deputy Minister |
| **Representatives of government agencies** | |
| Carole Morency | Director General and Senior General Counsel, Criminal Law Policy Section, Policy Sector, Department of Justice |
| Greg Yost | Counsel, Criminal Law Policy Section, Department of Justice |
| Rachel Huggins | Manager, Policy and Development, Serious and Organized Crime Strategies Division, Community Safety and Countering Crime Branch, Department of Public Safety and Emergency Preparedness |
| Yvan Clermont | Director, Canadian Centre for Justice Statistics, Statistics Canada |
| Catherine McKinnon | Senior Counsel, Public Law and Legislative Services Sector, Judicial Affairs, Courts and Tribunal Policy, Department of Justice Canada |
| Ann Sheppard | Senior Counsel, Policy Sector, Criminal Law Policy Section, Department of Justice Canada |

| | |
|---|---|
| Trevor Bhupsingh | Director General, Law Enforcement and Border Strategies, Public Safety Canada |
| **As a representative of impaired driving organizations** | |
| Andrew Murie | Chief Executive Officer, Mothers Against Drunk Driving |
| **As a representative of a police force or police organization** | |
| Lara Malashenko | Member, Traffic Committee, Legal Counsel, Ottawa Police Services, Canadian Association of Chiefs of Police, Law Amendments Committee |
| Mario Harel | President, Canadian Association of Chiefs of Police |
| Tom Stamatakis | President, Canadian Police Association |
| Byron Boucher | Assistant Commissioner Contract and Aboriginal Policing, Royal Canadian Mounted Police |
| Wade Oldford | Chief Superintendent and Director General, Forensic Services, Royal Canadian Mounted Police |
| D'Arcy Smith | Special Advisor, Drug Evaluation and Classification Program, Royal Canadian Mounted Police |
| Chuck Cox | Chief Superintendent and Co-Chair of the CACP Traffic Committee, Canadian Police Association |
| Chris Rheaume | Superintendent Support Services, Ottawa Police Services |
| Lieutenant Jean-François Grégoire | Shift Supervisor, Gatineau Police |
| Lennard Busch | Vice President West and Chief of Police of the File Hills First Nations Police Service, First Nations Chiefs of Police Association |
| **As representative of an organization** | |
| Daryl Mayers | Chair, Alcohol Test Committee, Canadian Society of Forensic Sciences |
| Amy Peaire | Chair, Drugs and Driving Committee, Canadian Society of Forensic Sciences |
| Jonathan Leebosh | Member, Immigration Law Section, Canadian Bar Association |
| Kathryn Pentz | Q.C., Secretary, Criminal Justice Section, Canadian Bar Association |
| Michael Bryant | Executive Director and General Counsel, Canadian Civil Liberties Association |
| James Palangio | Crown Counsel, Canadian Association of Crown Counsel |
| Howard Bebbington | Chair, Policy Review Committee, Canadian Criminal Justice Association |
| François Boillat-Madfouny | Member of the CCJA Policy Review Committee, Canadian Criminal Justice Association |
| Michael Edelson | Member and Lawyer, Edelson and Friedman LLP, Criminal Lawyers' Association |
| Leo Russomanno | Ottawa Director and Lawyer, Russomanno Criminal Law, Criminal Lawyers' Association |
| Josephine A. de Whytell | Barrister and Attorney-at-Law, Indigenous Bar Association |
| Markita Kaulius | Founder and President, Families for Justice |
| | |
| Megan MacRae | Executive Director, Human Resources, Toronto Transit Commission |
| Nathalie Léveillé | Coordinator, Legal Affairs and Compliance, Association du camionnage du Québec<br>(By videoconference) |

| | |
|---|---|
| Gérald Gauthier | Acting President, Railway Association of Canada |
| Simon-Pierre Paquette | Legal Counsel, Canadian National Railway, Railway Association of Canada |
| Derrick Hynes | Executive Director, Federally Regulated Employers Transportation and Communications |
| Serge Buy | Chief Executive Officer, Canadian Ferry Association |
| Gary G. Kay | President, Associate Professor of Neurology, Georgetown University School of Medicine, Cognitive Research Corporation |
| Marc Paris | Executive Director, Drug Free Kids Canada |
| Ian Jack | Managing Director, Communications and Government Relations, Canadian Automobile Association |
| **As Individuals** | |
| Kyla Lee | Lawyer, Acumen Law Corporation |
| Sarah E. Leamon | Criminal Defence Lawyer, Acumen Law Corporation |
| Don Stuart | Professor, Faculty of Law, Queen's University |

# Appendix C: Members of Parliament

## Table C1: House of Commons Members

| Political Party | Total |
|---|---|
| Liberal (LPC) | 183 |
| Conservative (CPC) | 96 |
| New Democratic Party (NDP) | 41 |
| Bloc Québécois (BQ) | 10 |
| Independent | 2 |
| Green Party (GP) | 2 |
| People's Party (PPC) | 1 |
| Co-operative Commonwealth Federation (CCF) | 1 |
| Vacant | 4 |
| Total | 338 |

**Table C2: Senate members**

| Political Party | Total |
|---|---|
| Independent Senators Group (ISG) | 46 |
| Conservative (CPC) | 32 |
| Liberal (LPC) | 11 |
| Non-Affiliated (NA) | 7 |
| Vacant | 9 |
| Total | 105 |

**Table C3 House of Commons Standing Committee on Justice and Human Rights**

| Name and position | Political Affiliation |
|---|---|
| Anthony Housefather (Chair) | Liberal Party of Canada (LPC) |
| Randy Boissonnault | LPC |
| Ali Ehsassi | LPC |
| Colin Fraser | LPC |
| Iqra Khalid | LPC |
| Rob McKinnon | LPC |
| Arif Virani (Parliamentary Secretary- non-voting member) | LPC |
| Hon. Lisa Raitt (Vice-Chair) | Conservative Party of Canada (CPC) |
| Michael Barrett | CPC |
| Dave McKenzie | CPC |
| Tracey Ramsey (Vice-Chair) | New Democratic Party (NDP) |

## Table C4 Senate Standing Committee on Legal and Constitutional Affairs[122]

| Name | Political Affiliation |
|---|---|
| Joseph A. Day | Liberal Party of Canada (LPC) |
| Terry M. Mercer | LPC |
| Lillian Eva Dyck | LPC |
| Serge Joyal (Chair) | LPC |
| Denise Batters | Conservative Party of Canada (CPC) |
| Pierre-Hugues Boisvenu (Deputy Chair) | CPC |
| Claude Carignan | CPC |
| Paul E. McIntyre | CPC |
| Larry W. Smith | CPC |
| Yonah Martin | CPC |
| Grant Mitchell | CPC |
| Peter Harder | CPC |
| Gwen Boniface | Independent Senator's Group (ISG) |
| Pierre J. Dalphond | ISG |
| Renée Dupuis (Deputy Chair) | ISG |
| Marc Gold | ISG |
| Frances Lankin | ISG |
| André Pratte | ISG |
| Yuen Pau Woo | ISG |
| Raymonde Saint-Germain | ISG |
| Diane Bellemare | Non-Affiliated (NA) |

[122] Some changes of representatives were made during the debates