NATIONAL OFFICE
2010 Winston Park Drive, Suite 500, Oakville, Ontario, Canada L6H 5R7
Tel: (905) 829-8805 • *Toll Free:* 1-800-665-MADD • *Fax:* (905) 829-8860 • *Web:* madd.ca • *Email:* info@madd.ca

MEMORANDUM

To: **The Right Honourable Justin Trudeau, P.C., M.P., Prime Minister of Canada**
From: **R. Solomon, National Director of Legal Policy MADD Canada**
Re: **The Opposition of Smart Approaches to Marijuana Canada (SAMC) to Bill C-46**
Date: **August 4, 2017**

Introduction

SAMC's opposition to the drug-impaired driving provisions in Bill C-46 and the accompanying email of Mr. E. Wood are disappointing for several reasons. First, their assertion that Bill C-46 may make matters worse for drug-impaired driving victims is unfounded. Second, their proposed alternative, the "tandem *per se* [drug-impaired driving] legislation," would pose major enforcement problems and would likely be subject to serious legal challenges under the *Canadian Charter of Rights and Freedoms* (*Charter*).

Prior to addressing these issues, it is important to respond to Mr. Wood's statement that "proper justice for DUID [driving under the influence of drugs] victims is not possible when perpetrators are not found guilty of driving under the influence and are sentenced to a lesser crime." Having worked with MADD Canada for 20 years and with its grassroots predecessors for 10 years prior to that, I can understand the sense of frustration and injustice felt by impaired driving victims. Nevertheless, Mr. Wood has set a standard for DUID enforcement and prosecution that is noble, but unrealistic.

Our expectations in regard to DUID enforcement should be considered in the context of our experience with alcohol-impaired driving legislation. Unfortunately, due to evidentiary, procedural and *Charter* issues, the majority of drinking drivers in Canada who kill or injure an innocent third party are not charged with impaired driving causing death or bodily harm. Of those charged, only about 40% are convicted. The protocols and instruments for investigating alcohol-impaired driving are far more accurate, cost effective and readily accepted by the Canadian courts than those presently available for drug-impaired driving. Consequently, it is not surprising that DUID charge and conviction rates are considerably lower than those for alcohol-impaired driving. In my view, the issue should not be framed in terms of whether Bill C-46 will ensure justice for all drug-impaired driving victims, but rather whether it will improve current DUID charge and conviction rates.

The tone of Mr. Wood's email is also troubling, in that he suggests that support for Bill C-46 is based on myths or ignorance about cannabis. With respect, Mr. Wood is not alone in understanding the nature of cannabis, its distribution in bodily fluids, the current limits in cannabis-testing technology, and the relevant traffic safety research. Supporting Bill C-46 because it will strengthen Canada's drug-impaired driving law is not inconsistent with appreciating the unique challenges in cannabis-related impaired driving enforcement.

(a) Bill C-46 will not make matters worse for victims.

As will be explained, the current drug-impaired driving provisions are largely unworkable. MADD Canada supports Bill C-46 because it would improve drug-impaired driving enforcement and prosecution. The Bill would also create a framework within which advances in drug-testing technology could be readily adopted by regulation. As testing technology improves and related costs decrease, DUID charge and conviction rates will rise, thereby increasing the law's deterrent impact.

Nevertheless, it should be acknowledged that DUID enforcement will remain more time-consuming, expensive and vulnerable to legal challenge in the near future than drinking and driving enforcement. Put simply, there is currently no inexpensive, non-intrusive, quick, and highly accurate means of screening large numbers of drivers for drug impairment.

(b) The tandem *per se* [DUID] legislation would be largely unenforceable and pose significant *Charter* problems.

SAMC and Mr. Wood have advocated that the proposed *per se* limits for cannabis be dropped in favour of tandem *per se* legislation. Based on this approach, a driver would be guilty of driving while impaired by a drug if:

- "the driver was arrested by an officer who had probable cause, based on the driver's demeanor, behavior and observable impairment to believe that the driver was impaired; and
- proof that the driver had any amount of an impairing substance in his/her blood, oral fluid, or breath."

Regardless of its merits in the context of the American state penal codes, the tandem *per se* legislation is unlikely to have a positive impact in Canada. As illustrated by the evolution of drug-impaired driving enforcement in Canada, tandem *per se* legislation would reintroduce an evidentiary standard that the police in Canada had rarely been able to meet.

Although drug-impaired driving has been a criminal offence in Canada since 1925, the police were not given any specific means of enforcing the law until 2008. To lay a charge, the police had to have reasonable and probable grounds to believe, based on the suspect's driving, demeanor and behaviour, that his or her ability to drive was impaired by a drug. While no drug-impaired driving enforcement statistics were available prior to 2008, there is every reason to believe that drug-impaired driving charges were rarely laid. This was acknowledged by the House of Commons Standing Committee on Justice and Human Rights in 1999.

Except for the occasional egregious case, the Canadian courts were reluctant to convict drivers based on an officer's unaided assessment of an accused's impairment. Indeed, a 2003 Department of Justice report indicated that prosecuting a drug-impaired driving offence based on the observations of a non-expert police officer, such as one who would make an arrest on routine patrol, "was nearly impossible."

These problems and the increase in drug-impaired driving prompted the Federal Parliament to enact two new enforcement measures in 2008, namely Standardized Field Sobriety Testing (SFST) and Drug Recognition Evaluation (DRE). The SFST and DRE protocols are exceedingly technical and take about two hours. The DRE, a 12-step procedure, requires the collection of more than 100 separate pieces of information. A DRE can only be conducted by an "evaluating" officer. In order to qualify for this designation, an officer must be accredited and certified by the International Association of Chiefs of Police. Training costs per evaluating officer are high ($17,000), as are the costs of maintaining certification. Among other things, evaluating officers are required to maintain a "rolling" log of all of the evaluations that they have conducted, as well as a current résumé.

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.

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.

The cases to date do not bode well for the ability of the police to meet the first step in tandem *per se* legislation, namely proving beyond a reasonable doubt that they had reasonable and probable grounds to believe that the suspect's ability to drive was impaired. This same problem helps to explain why so few drug-impaired driving charges were laid prior to the 2008 amendments.

The tandem *per se* legislation proposal eliminates the causal link between a suspect's compromised driving ability and the presence of a drug in his or her body. Compelling drivers to submit to drug testing in these circumstances will inevitably be challenged under section 8 of the *Charter*, which prohibits unreasonable search and seizure.

The potentially broad scope of the term "impairment" will also raise significant *Charter* challenges. An expansive range of variables may impair an individual's driving ability. 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.

(c) The need for Bill C-46.

Canadian survey data, roadside screening studies and post-mortem reports indicate that driving after drug use is now far more common than driving after alcohol use. Nevertheless, drug-impaired driving charges constituted only 3.9% (1,917 out of 48,966) of total impaired driving charges in 2016. Similarly, while an estimated 10.4 million trips were made in 2012 by drivers after using cannabis, there were only 1,140 charges in that year for all categories of drug-impaired driving. Assuming that half of these charges involved cannabis, a person could drive after using cannabis once a day for about 50 years before being charged with, let alone convicted of, a drug-impaired driving offence.

Bill C-46 would broaden police powers to investigate drug-impaired driving and would, albeit moderately, increase current charge and conviction rates. Bill C-46 will also provide a framework which will expedite the adoption of new drug-impaired driving technology. The Bill's impact could be significantly increased if the provinces and territories enacted complementary drug-related driving legislation. Under the Canadian constitution, the provinces and territories have broad administrative authority to regulate driving and to impose terms and conditions on the licence of various categories of drivers. These administrative powers are not subject to the same *Charter* requirements as *Criminal Code* offences.

As in the case of alcohol, drivers in the provincial and territorial graduated licensing programs and drivers under the age of 22 or with less than 5 years of driving experience should be prohibited from being positive for cannabis and other specified drugs. Similarly, all drivers who test positive for a drug above the provincial or territorial *per se* limit should be subject to a short-term roadside administrative licence suspension and vehicle impoundment. These drug-related administrative sanctions should parallel those which apply to drinking drivers in every province and territory, except Québec.

Conclusion

Without question, there are major challenges in drug-impaired driving enforcement and prosecution. As indicated, there is currently no inexpensive, non-intrusive, quick, highly accurate means of screening large numbers of drivers for drug impairment. However, despite what SAMC and Mr. Wood believe, Bill C-46 will strengthen Canada's drug impaired driving law. Their suggestion that the Bill will make matters worse for drug-impaired driving victims is unfounded. Even if the tandem *per se* legislation was not struck down under the *Charter*, there is no reason to believe that it would increase drug-impaired driving charges and convictions.