

# Cannabis impaired driving – new laws present new challenges



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Unless you have been residing in a cryogenic chamber for the past two years, you know that Oct. 17, 2018 is going to be a red-letter (green-letter?) day for cannabis consumers.

On the day that cannabis legalization formally kicks in, Canadians are likely to see a haze of marijuana smoke shroud our proud nation. Welcome to the new era — and if you've missed the boat on cannabis investment opportunities, may I suggest purchasing Doritos stock. Happy Cannabis Day everyone, and

may your vape battery always be charged.

OK, once we get past the facile humour, there are significant concerns that are bound to impact everyone, tokers and non-tokers alike.

The most pressing of which is this: if with legalization comes increased consumption by the public, which seems a reasonable supposition, at least in the short term, then the law of averages dictates that there will be a significant cohort of individuals driving while high.

Already, surveys have found a disturbingly high incidence of cannabis users admitting that they drive after consumption. If legalization ushers in higher consumption rates, then it follows that cannabis-impaired driving is going to likely represent a significant risk to public safety.

Anticipating this problem, the federal government has enacted legislation specifically designed to target this risk. The new Criminal Code of Canada provisions modify the existing laws with respect to impaired driving, which up to now have focused primarily on alcohol-driving offences.

The new law sets a "*per se*" limit on a driver's THC/blood concentration of two nanograms of THC per millilitre of blood (harsher penalties are available if the driver has a THC concentration above five ng/ml).

Also, recognizing that the impairing effects of both cannabis and alcohol potentiate each when taken in combination, a further offence has been prescribed where the subject's THC value is above 2.5 ng combined with a blood alcohol concentration of 50 mg/100 ml. (The offence of driving with over 80 mg/100 ml alcohol remains in effect as a distinct offence).

It should also be noted that, even without the Criminal Code modifications, it has always been a criminal offence to operate a motor vehicle while impaired, be it due to alcohol or any other substance. However, while the court dockets have always been replete with impaired-by-alcohol charges, the number of drug-related impaired driving charges has barely registered. The new legislation may change this, for a number of reasons.

First, the new legislation gives police increased powers of investigation. A new screening device has been approved for use in Canada that ostensibly is able to detect the driver's blood-THC level via a saliva sample.

Second, police officers now have the authority to demand drivers provide such a sample or perform roadside sobriety tests where they "reasonably suspect" that a driver is operating a vehicle with "a drug in their body."

It is this provision that ought to be a cause for concern. Unlike alcohol, which usually produces a number of objectively verifiable indicators of consumption, such as odour on breath, slurred speech, changes to facial features and poor balance and co-ordination, cannabis may not have nearly as obvious an effect on people.

The ability of a police officer to objectively evaluate a suspect driver's capacities is going to be questionable in many cases. However, a police officer intent on making an arrest might be predisposed to judge the subject as having "failed" the mandatory roadside physical tests, even where the evidence is weak. Such is the very real risk of confirmation bias.

With the almost unfettered discretion which police officers are now imbued in evaluating suspected drug-impaired drivers, we may soon witness a sharp spike in highly questionable arrests.

A more general difficulty with the new legislative scheme is the application of the *per se* THC limit of 2 ng/ml. While this approach mirrors the long-standing approach to alcohol driving offences by setting an upper limit on blood/substance concentration, blood/THC concentration is not strictly analogous to blood-alcohol concentration.

In the case of chronic users, THC levels can be elevated in the subject's system for an extended period, but even if above the 2 ng limit, it may not produce a psychoactive effect. Thus, there is good reason to be concerned that persons will be prosecuted who truly do not present a public safety risk.

Conversely, the impairing effects of THC can be quite long lasting for some individuals, even after the person's blood THC level has dropped below the 2 ng limit. Thus, the *per se* limit could have the effect of over-charging the innocent and under-charging the guilty.

Other enforcement issues abound. There are genuine concerns that the saliva test screener recently approved is less than reliable and may not function well outside of optimal temperature ranges (this could be a problem for the police trying to test a driver in Moose Jaw in February).

Even if working properly, the devices risk producing false positives in people who have recently smoked pot. Charges of "refuse sample" might occur if a subject is incapable of producing an adequate saliva sample. Bear in mind that persons subjected to a police demand may be nervous and therefore experience very dry mouths.

It will also be up to individual police forces as to whether they equip themselves with these devices. Budgetary constraints (the non-reusable mouthpieces cost \$40 a piece) will impact such expenditure decisions, leading to highly variable enforcement policies across the country.

Finally, the number of police officers who have Drug Recognition accreditation (DRE), a legal requirement for the administering of physical evaluation testing of subjects, is currently well below the necessary level required for consistent enforcement to be effective. Thousand more officers will have to be designated as DREs for there to be sufficient coverage nationally.

Canada has arguably taken a bold and progressive step forward in legalizing marijuana. But it is naïve to think that legalization will be a seamless, trouble-free exercise. The road-safety concerns attendant with legalization are troubling and do not lend themselves to simple solutions.

The public can expect to see an increased level of cannabis-impaired drivers to be operating on the roads. The ability of the police to enforce the new law presents multiple challenges and the law itself is flawed in that it is premised on certain questionable assumptions.

Lawyers, prosecutors, judges, and law enforcement would be well advised to closely monitor the effectiveness of the law during the first few years of inception.