

# Cannabis arrest exposes flaws in new impaired driving laws

By Randy O'Donnell, AdvocateDaily.com Associate Editor



The arrest of a Nova Scotia motorist whose saliva tested positive for cannabis demonstrates an inherent flaw in Canada's new impaired driving legislation, Toronto criminal lawyer [Jacob Stilman](#) tells AdvocateDaily.com.

Stilman, partner with [Lo Greco Stilman LLP](#), says the woman had a prescription for medical marijuana, and her frequent use would have produced a positive test for tetrahydrocannabinol, or THC, the psychoactive ingredient in cannabis. However, it was not indicative of her level of impairment.

"The difficulty is that cannabis — and THC specifically — can have a significant half-life in your system. So a chronic user is always going to have an elevated THC level in their blood. It could be benign, but they are going to be testing positive," he says.

"Police are getting positive results that may have zero correlation to impairment, especially for someone who is using all the time. There is a huge false-positive problem, but there is also a false-negative problem because someone with a lower tolerance level could be as high as a kite yet still register below the presumptive level."

The Canadian Press (CP) reports that the female motorist told police conducting a roadside check in January that she had one alcoholic drink over a two-hour period before she got in her car to drive home.

The officer then said he could detect the smell of cannabis coming from her car. That's when she told him she used medical cannabis to treat multiple sclerosis.

Though she passed a roadside alcohol test, a subsequent saliva test showed trace amounts of THC.

She was arrested and taken to police headquarters, where she was subjected to a Drug Recognition Expert Evaluation, which includes balance and co-ordination tests.

Police told her she had passed the tests, which proved she was not impaired.

However, the results from the initial saliva test resulted in police suspending her licence for a week and impounding her car — leaving her with a \$400 bill. She also missed four days of work, CP reports.

"When you arrest someone who consumes cannabis because it is medically necessary, and therefore will inherently always test positive, it's troubling that it isn't taken into account," Stilman says.

"Anyone who turned their mind to this when the legislation was enacted would have seen the problem with the testing coming from a mile away."

The lawyer for the Nova Scotia motorist tells CP his firm will use the case to launch a constitutional challenge of Canada's revamped impaired driving laws under s. 7 of the Charter, which deals with life, liberty, and the security of the person.

He tells the news agency that the case shows the law is too broad and too vague, mainly because the driver was penalized even though police testing later determined she was not impaired.

Stilman anticipates that the majority of constitutional challenges surrounding the impaired driving legislation will revolve around s. 7, but he can also see search and seizure issues (s. 8) being argued at the Supreme Court level.

“If it can be proven that the legislation is both scientifically and factually misguided — that the tests are both random and arbitrary and people are being charged that shouldn’t be — then it is going to be subject to successful challenge. Any challenge is going to have to be based on empirical evidence, and it won’t necessarily mean all the legislation will be thrown out,” Stilman says.

“I think the most vulnerable portion is going to be the relatively low threshold at which police can turn around and make these testing demands. There is virtually no limit now to when police can make them, and that is problematic.”

*- with files from The Canadian Press*