

Legalized marijuana brings complex driving-related challenges

By AdvocateDaily.com Staff



While there are several compelling arguments in favour of legalizing marijuana, this shift in drug policy also ushers in a number of challenges, particularly those related to highway safety, Toronto criminal lawyer [Jacob Stilman](#) writes in [The Lawyer's Daily](#).

“As critics have long pointed out, cannabis is demonstrably less harmful, from a both a social and physical health standpoint, than is alcohol, tobacco and a host of legal prescription medications. Its status as an illegal substance is therefore illogical, unscientific and, to the extent that it remains the most ubiquitous recreational drug available, futile from a law-enforcement perspective,” says Stilman, partner

with [Lo Greco Stilman LLP](#).

As a result, he explains, Canada’s drug laws have left thousands of Canadians with criminal records for minor possession offences, resulting in lifelong implications.

At the same time, Stilman says there are a number of risks associated with legalization that cannot be ignored.

“It is reasonable to assume that with legalization will come augmented consumption rates. The law of averages dictates therefore a much higher incidence of people operating motor vehicles while high. This new reality presents complex challenges,” he says.

Although the government’s legislative response attempts to address public safety concerns, Stilman says it may also strain well-entrenched *Charter* principles, which protect against unreasonable search, seizure, detention and arrest.

“The proposed legislation, which overhauls the impaired driving provisions of the *Criminal Code*, will set prescribed limits for blood-drug concentration of THC. It will further authorize police to demand a saliva sample which ostensibly will be able to determine the presumptive THC level in a subject’s blood, or to conduct roadside physical co-ordination tests.

“A positive result on a saliva test or the failure of the roadside physical tests will provide the legal basis for a more intrusive demand for a blood sample and for the subject to submit to tests conducted by a drug recognition expert (DRE).”

The potential for the “highly subjective application” of these evaluative techniques in the field are certain to trigger robust *Charter* challenges, writes Stilman, although the government is likely to claim they mirror the “screening” provisions of alcohol driving offences, which have long existed in the *Criminal Code*.

The current concern, he says, is whether the methodologies are reliable to detect and prosecute drivers impaired by marijuana.

“There are obvious differences between alcohol impairment and cannabis impairment. The effects of alcohol intoxication on the operation of motor vehicles has been exhaustively studied and quantified.

“Blood alcohol concentration can be measured with high precision using instruments which have been proven to be scientifically reliable. Impairment by alcohol, while requiring a qualitative assessment, is still easily articulable, as it manifests with readily identifiable features: alcoholic odour issuing from the subject, slurred speech, poor balance, flushed appearance, etc,” he writes.

Conversely, the indicia of impairment by cannabis can be much more discrete and variable, he says.

“Reliance on roadside physical tests to justify an arrest for cannabis impairment is vulnerable to criticism that these tests may simply reflect the subject’s normal physical limitations, or the police officer’s preconceptions.”

Standard field sobriety tests will take on a more significant role in drug-impairment cases, but they are subject to the same criticism, says Stilman.

“The saliva sample test may not correlate to actual blood-drug concentration because a person who has recently smoked a joint will have a high THC concentration in their oral cavity. And while THC-blood concentration will correlate to the degree of impairment, again the individual effects of it on the subject are highly variable,” he writes.

Ultimately, while the legalization of marijuana will almost certainly lead to more drug-impaired drivers on the road, Stilman says the new powers granted to the police bring the potential for abuse and overreach.

“Police officers will be granted new investigative authority, with few guarantees that they are adequately qualified to carry them out properly.

“The proposed drug screening tests are likely to produce many false positives, resulting in an uptick in unjustified arrests, detentions and blood seizures. Greater reliance on the evidence of DREs will imbue the subjective opinions of police officers with far more weight than is merited,” writes Stilman.