



Cannabis Legalization: Where are we now?

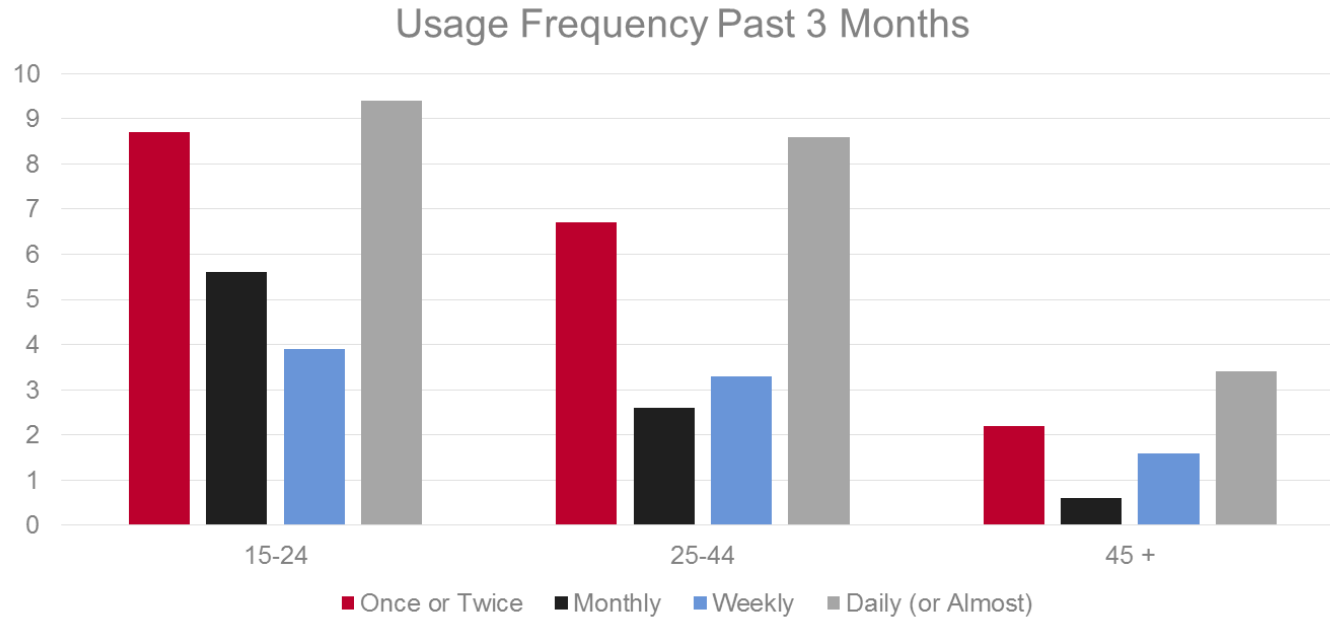
Brian Johnston, Q.C.
Chad Sullivan

Cannabis basics

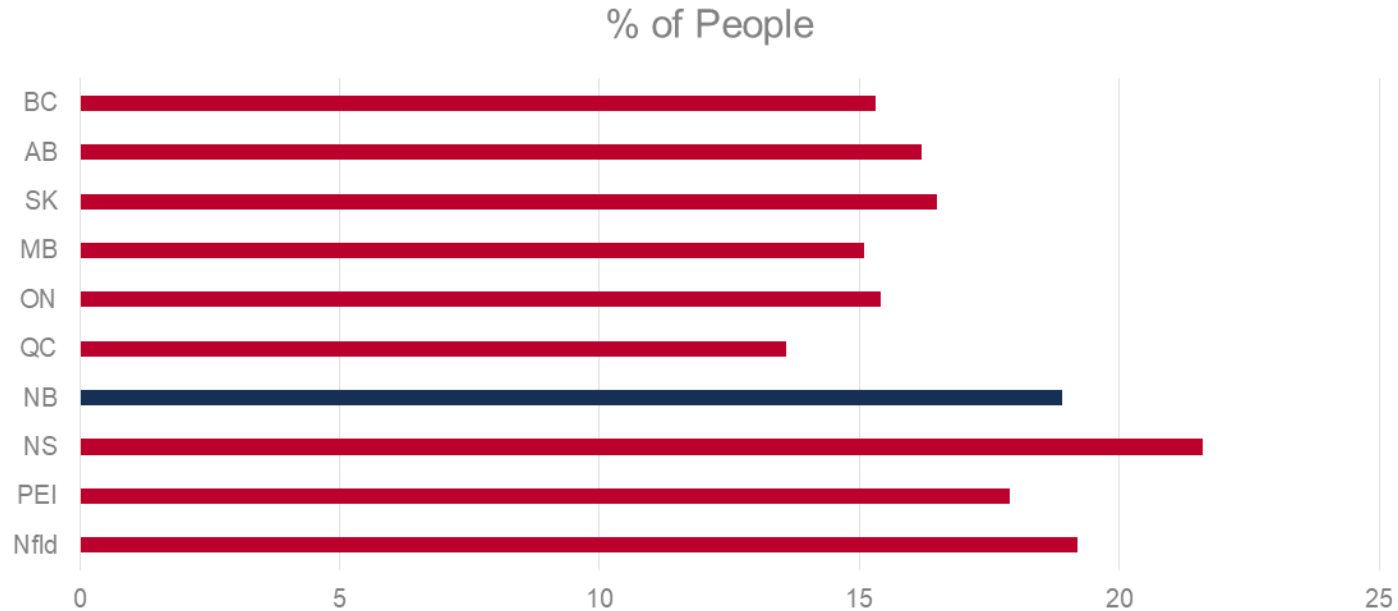
- THC vs CBD
- THC % on the rise
- Cannabis use in Canada is already very high



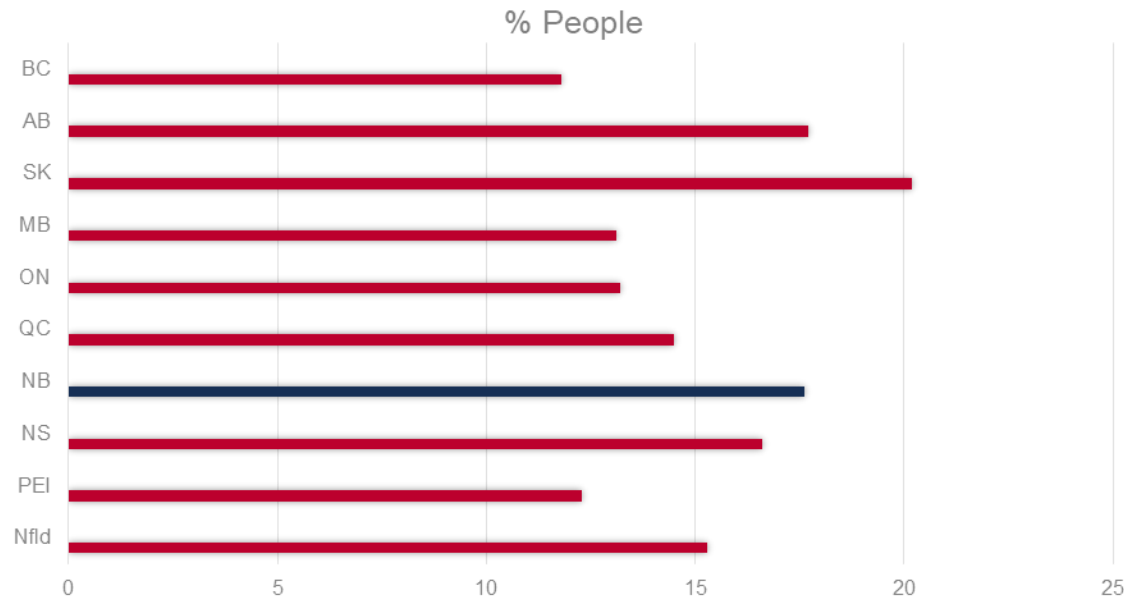
Usage & frequency by age



Use by province, Q4 2018



Driving within 2hrs of cannabis



Use likely to rise: Q2 2018

Current users and non-users	
Might try or increase consumption	17.8
Might try new products	22.9
Current users only	
Intend to purchase from another source	48.1
Intend to increase consumption	27.5
Non-users only	
Intend to try	5.7

Legalization overview



- Cannabis for medical purposes since 1999 (*Controlled Drugs and Substances Act*)
- Recreational cannabis since October 17, 2018 (Federal and Provincial cannabis legislation)

Legalization in NB

- Legal age = 19
- Can possess up to 30g dried cannabis in public
- In the home, must be kept secured and inaccessible to minors
- Can grow 4 plants
- Retailer: Cannabis NB
- **No use in vehicles**



Consumption

- In New Brunswick, consumption of cannabis in any form is prohibited anywhere but in a private dwelling or on land adjacent to a private dwelling

New criminal offences

- 3 new offences for having THC in the blood within two hours of driving
- summary conviction offence for 2 ng but less than 5 ng of THC / ml
- hybrid offence for 5 ng or more of THC / ml
- hybrid offence for a combination of 50 mg of alcohol / 100 ml + 2.5 ng or more of THC / ml

Roadside – Drager DrugTest 5000

- First roadside test approved for cannabis impairment
- Red flags:
 - Determines THC levels (not direct impairment correlation)
 - Optimal working temperature is 4-40°C
 - Lots of false positives and negatives - wrong 15% of the time
 - Eating, drinking within 10 min may skew results



Challenges to measuring impairment

- Intoxication (an acute state) and impairment are different
- Cannabis is different from alcohol - more subtle and longer lasting
- THC is stored in brain and fatty cells; released over time

Residual impairment

- Some indications that symptoms and side effects peak within 5 minutes and gradually decrease over the next few hours – impairment can last up to 24 hours
- Symptoms from ingesting marijuana in an edible form:
 - 0.5 - 2 hours to take hold and
 - last from 6 - 8 hours and sometimes beyond 24 hours
- Potential effects will vary depending on the individual, amount of use, concentration of the cannabinoids in the product, frequency of use, age, any existing medical condition, and the use of alcohol or other prescription/non-prescription drugs

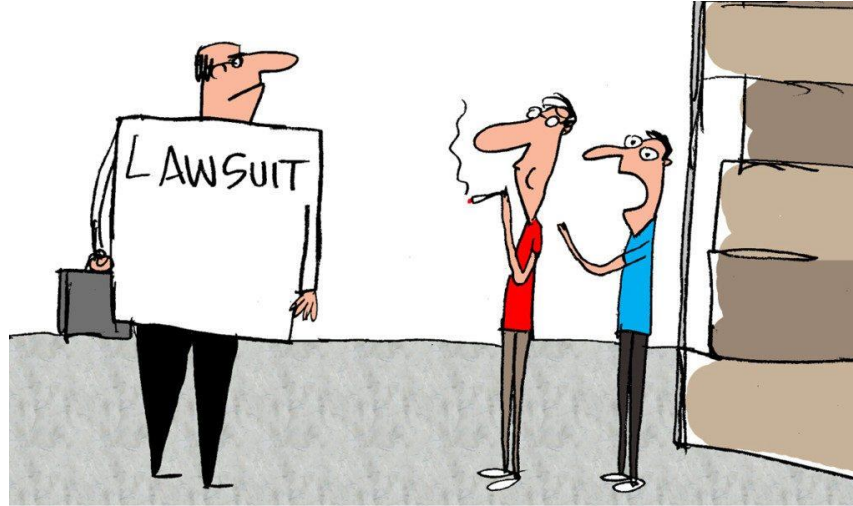
Residual Impairment

- Impairment can last a long time according to a 2015 World Health Organization study:
- *There is ample evidence indicating that neurocognitive impairment from cannabis persists from hours to weeks. A return to a non-intoxicated state does not ensure a full return of neurocognitive function in the workplace.....ensuring safety of workers who are under the influence or who recently consumed cannabis is not possible.*

Residual impairment

- Arbitrator in *Lower Churchill Transmission Construction Employers' Association and IBEW, Local 1620* dismissed a grievance on April 30, 2018
- Grievor held out of service because of his authorized use of medical cannabis
- Cannabis use created risk of impairment at the jobsite
- Employer was unable to readily measure impairment from cannabis, based on currently available technology and resources
- Consequently, inability to measure and manage risk of harm constituted undue hardship for the Employer

Impairment at work



"Is it my imagination, or has that guy been hanging around once we were allowed to start smoking pot here at work?"

Impairment at work

- Employers can require employees to show up fit to work and remain free from impairment
- OHS legislation mandates a safe workplace
- Obligation to ensure safe work environment under the *Criminal Code (R. v. Metron)*

Legalization and drug policies

- Just because it's legal doesn't mean it has to be permissible at work!
 - Workplace social functions
 - Client entertaining
 - Workplace smoking areas



Workplace drug policies

- Employers should have a Policy that is tailored to their workplace
- Policy should contain:
 - Reinforce safe and productive workplace
 - Prohibition on impairment
 - Testing protocol (if applicable)
 - Obligation to disclose use of medical cannabis and accommodation protocol
 - Discipline process (with discretion to deviate)

Workplace drug policies

- Searches
 - *Old Dutch Foods Limited and Unifor, Local 2001 NB* 2016 Carswell NB 250
 - *Tech Cominco v. USWA Local 480*, 2004 CarswellBC 2163
- Both safety and non-safety sensitive

Halifax Employers Association v. Council of International Longshoremen's Association, 2014 CanLII 77081

Marijuana/THC	10 ng/ml
Amphetamines, Methamphetamine	50 ng/ml
Cocaine	8 ng/ml
Opiates Morphine, Codeine, Hydrocodone, Hydromorphone, Oxycodone 6-Acetylmorphine	40 ng/ml 4 ng/ml
Phencyclidine (PCP)	10 ng/ml

Workplace testing

- Oral fluid testing is preferred because:
 - shows present impairment (urine tests do not)
 - minimally invasive (e.g. cotton swab inside the mouth)
- But there is no currently reliable instantaneous oral fluid test
- In 2017, the Ontario Superior Court found that a cut off level of 10 ng/ml detected through oral fluid identifies impairment

Pre-Employment Testing

- Available with caution
- The unilateral imposition of mandatory pre-employment testing may not require the same exacting level of proof of enhanced safety risk as that which is required to justify random testing (*BC Hydro and Power Authority and IBEW, Local 258 (Alcohol & Drug Testing), Re, 2018 CarswellBC 1549 (B.C. Arb.)*)

Pre-Employment Testing

- Employers may not be required to accommodate medicinal marijuana use in the context of safety-sensitive work, in cases where the inability to measure current impairment is itself indicative of undue hardship (*IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, 2019 NLSC 48)

Post-incident testing

Weyerhaeuser Co. v. C.E.P., Local 447 (2006), 154 L.A.C. (4th)
3 (Alta. Arb.)

1. The incident must meet the threshold level of seriousness to justify testing
2. Some degree of inquiry is necessary before the decision to test is made
3. Resulting from such inquiry, the employer must conclude that there is the necessary link between the employee's situation and the incident in order to justify the testing

Post-incident testing

*Hibernia Platform Employers' Organization v.
Communications, Energy and Paperworkers Union of
Canada, Local 2121, 2018 NLSC 1 / 2018 NLCA 45*

Random Testing

No change. Leading case is still *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34

- a) Are privacy rights infringed and to what degree?
- b) If so, is there a general, demonstrable, systemic problem which would justify infringement of privacy rights?
- c) If so, is the random testing a proportionate response to the problem, balancing the needs served by the random testing against the employees' privacy rights?
 - (i) Does the random testing solve the problem by enhancing employee safety?
 - (ii) If so, can the problem be solved by less intrusive measures?
 - (iii) If not, is the benefit gained by solving the problem proportional to the harm random testing poses to employee privacy rights?

The future of medical cannabis?

- Not changing upon legalization
- But will be reviewed in 5 years
- Canadian Medical Association had pushed to abolish medical stream – lack of research



Accommodation

- Is cannabis medically required?
- What level of use is required and when?
- Can impact of use be determined?
- When is the point of undue hardship reached?
 - No duty to accommodate impairment
 - No duty to accommodate recreational use
 - Addiction complications

Accommodation of Medicinal MJ

- Zero-tolerance policies in safety-sensitive workplaces must provide a meaningful process of accommodation for medically authorized use of cannabis, and other narcotics and controlled substances.
- Zero-tolerance policies that only make allowances for drug and/or alcohol addictions are not compliant with the *Canadian Human Rights Act (Airport Terminal Services)*.

Accommodation of Medicinal MJ

- (a) The employee's restrictions or limitations;
- (b) The employee's daily or scheduled consumption of cannabis;
- (c) The strain and the strength of the cannabis;
- (d) The safety-sensitive nature of the workplace; and
- (e) The employer's obligation to maintain a safe workplace.

Accommodation of Medicinal MJ

- Employers have a right to know
- The employer's right to determine what information the employee's physician had about the employee's treatment, whether recommendations were made about the strain potency and frequency of use and whether alternative treatments were available was upheld in [United Steel Workers, Local 7656 v Mosaic Potash Colonsay ULC](#), 2016 CanLII 18320 (SK LA).

Accommodation of Medicinal MJ

- *Kindersley (Town) v. CUPE, Local 2740*, 2018 CarswellSask 186 (Hood)

Letter to Physician

- Not entitled to underlying diagnosis
- Importance in crafting detailed letter to physician
- Variety of opinions from experts
- Careful what information is provided to physician –
Calgary City

Letter to Physician

- Attach job description
- Do they have current authorization to use?
- Schedule for use including dosage amount (i.e. time of day)
- Do you track usage? Ever exceed dosage?
- Familiar with effects of marijuana on cognitive functioning? Motor Functioning? Does it change based on frequency of use? Does this individual experience these effects?

Letter to Physician

- Given working hours and job duties when do you recommend that the individual ingest marijuana and at what dosage level?

Letter to Physician

- Any risk that will be unable to perform any of the duties outlined in job description safely and effectively? If no – why not?
- If yes – explain and what length of time after ingestion will be unable to perform such duties safely?
- If yes – are there alternative medicines that could be prescribed that would not adversely impact ability to perform such duties safely?

Duty to accommodate

- Up to the point of undue hardship
- Process component v. merits
- Much easier if employee frustrates the accommodation process

Accommodation of addiction – Post test disclosure

- Stewart v. Elk Valley Corp., 2017 SCC 30
- Recent Canadian Railway Office of Arbitration & Dispute Resolution decisions
 - Disclosure during investigative process
 - Rehabilitative efforts in assessing just cause

Benefit plans

- Some decision-makers have considered whether it is necessary for benefit coverage to include medical cannabis
- Generally, not a legal requirement in the absence of specific plan wording
- Coverage often denied because not approved by Health Canada and no Drug Identification Number (“DIN”)

Skinner decisions

- *Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31
 - Trustees made policy decision not to cover medical cannabis - Not approved by Health Canada, no “DIN”.
 - Human Rights Board of Inquiry found that was discriminatory.
 - Court of Appeal found not discriminatory and need not cover “the sun, the moon and the stars”.
- *Skinner v Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2018 NSCA 23 - Court upheld WCAT decision that WCB did not have to cover Skinner’s medical cannabis.

Considerations for the future

- All of the following limitations could shift once recreational cannabis is legalized:
 - DIN assignment
 - Inclusion on the provincial formulary
 - Production licenses issued by Health Canada
 - Scope of allowed individual producers under the Access to Cannabis for Medical Purposes Regulations

Immigration/Cross-border

- Cannabis is a prohibited drug under U.S. Federal law on par with heroin, although legal in several States
- Canadians (and others) can be barred for life from the U.S. if a border officer decides that they are:
 - A user of cannabis (at any time)
 - Anyone involved (including business/employment) in the legal cannabis industry in Canada
- Pre-legalization cannabis convictions could prevent someone from entering the U.S
- The purchase of cannabis will generate consumer data – if the data is on a U.S. server, can be accessed by U.S. border officials (*US Patriot Act*)

Immigration/Cross-border

- US Customs and Border Protection updated their position statement to clarify:

A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S. however, if a traveler is found to be coming to the U.S. for reason related to the marijuana industry, they may be deemed inadmissible.



Questions?



Thank you!



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