



Coverage in the Era of Legal Weed

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Roadmap

1. Federal legislation;
2. Public perceptions;
3. THC ≠ ng;
4. Insurance implications:
 - Auto
 - Home
 - Home-sharing

Former framework

Illegal to possess, sell, produce, import or export cannabis unless authorized under the *Controlled Drugs and Substances Act*, SC 1996, c. 19.

% of Canadian voters who approved of cannabis legalization?

- A - 5%
- B - 17%
- C - 38%
- D - 59%

Answer:

- D - 59% of Canadian voters approved of cannabis legalization.

Approximate number of Canadians who used cannabis at least once per month prior to legalization?

- A – 1 million
- B – 5 million
- C – 12 million
- D – 18 million

Answer:

- B – 5 million Canadian voters used cannabis at least once prior to legalization

Up to how many grams of cannabis can adults legally possess in public?

- A – 5 g
- B – 10 g
- C – 20 g
- D – 30 g

Answer:

- D – Adults can legally possess up to 30 g of cannabis in public.

What is the legal age to possess cannabis in NL, NS, NB and PEI?

- A – 16
- B – 18
- C – 19
- D – 21

Answer:

- C – The legal age to possess cannabis in NL, NS, NB and PEI is 19.

How many cannabis plants are permitted to be grown per household without a permit/ license?

- A – 0
- B – 4
- C – 16
- D - unlimited

Answer:

- B – Permitted to grow 4 cannabis plants at home per household.

Cannabis Act Highlights

- Adults can legally possess up to 30 grams of cannabis in public;
- A minimum legal age of 18 (provinces and territories have the option to increase this age);
- Legal age in NL is 19; NS, NB, & PEI is 19;
- It will be a criminal offense to provide cannabis to those under 18;
- Permitted to grow up to 4 cannabis plants at home per household without permit/license, subject to provincial limitations;
- Production and sale of cannabis is permitted in certain circumstances.
- Permitted to make cannabis products at home as long as organic solvents not used.

Based on survey data, how many non-users were expected to be very likely to partake following legalization in October 2018?

- A - 4%
- B – 8%
- C – 19%
- D – 24%

Answer:

- A – 4% of non-users were expected to be very likely to use cannabis following legalization in October 2018.

Legalization will increase consumption

The survey says that after legalization, some non-users will partake:

- 4% are very likely to use it;
- 9% are somewhat likely to use it;
- 29% are not very likely to use it;
- 54% are not at all likely to use it; and
- 4% don't know.

Public perceptions of drug-impaired driving

The risks of driving while impaired by cannabis are not as well recognized as with alcohol:

- 25% believe that driving under the influence of cannabis is less risky than driving under the influence of alcohol;
- 17% believe that driving under the influence of cannabis poses no real risk;
- 28% report they have operated a vehicle while under the influence.

It is difficult to gauge impairment:

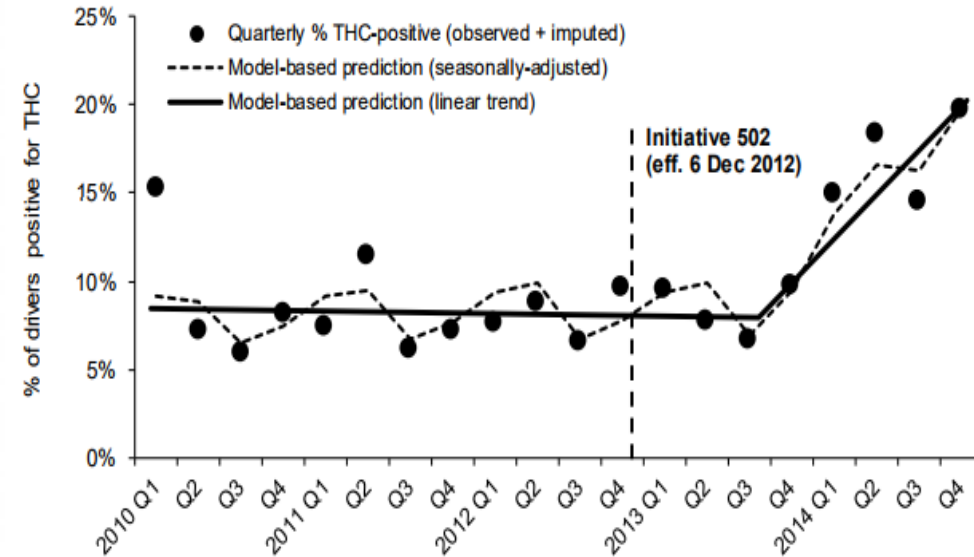
- 65% agree that cannabis users often fail to realize that they are impaired from using cannabis;
- 44% of youth say it is easy to tell if someone is too high to drive.

Health Canada indicia of impairment

- Slower reaction time;
- Decreased ability to concentrate;
- Hyper-focus;
- Increased difficulty judging distances and time.

The astounding results

Figure 1. Quarterly average proportion of drivers involved in fatal crashes who were positive for THC and modeled seasonally-adjusted linear trend before and after Washington Initiative 502 took effect on 6 December 2012 legalizing recreational use of marijuana for adults aged 21 years and older, Washington, 2010 – 2014



Data: Washington Traffic Safety Commission, 2010 – 2014.
Drivers positive for THC based on results of blood toxicological tests. Results imputed 10 times when driver was not tested or test results were unknown; results reflect averages from 10 imputed values for each driver. Model-based predictions are from binomial regression model with identity link function, indicator variables for seasons, and a two-part linear spline with change in slope on 5 September 2013 (39 weeks after effective date of Initiative 502).

Source: Tefft, B.C., Arnold, L.S. & Grabowski, J.G. (2016).
Prevalence of cannabis Use Among Drivers in Fatal Crashes:
Washington, 2010-2014. *AAA Foundation for Traffic Safety*.

Former regime for drugged driving

1. Reasonable suspicion;
2. Standard field sobriety test;
3. Drug recognition evaluation
 - *R v Bingley*, 2017 SCC 12: the officer's opinion can be admitted as expert evidence.

New regime for drugged driving

1. Reasonable suspicion;
2. Standard field sobriety test OR roadside saliva test;
3. Blood test.

Results of blood test determine offence

Three new offences for drugged driving (Section 320.14(1) of the Criminal Code of Canada):

1. Summary Offence = 2-5 nanograms/mL THC (not directly linked to impairment);
2. Hybrid Offence = Greater than 5 nanograms/mL THC;
3. Hybrid Offence = Greater than 2.5 nanograms/mL of THC and 50 milligrams of alcohol.

THC impairment – It's no .08

Disagreement about the 5 nanogram/mL limit

- Owner of THC measuring device: “The inference is that at or above 5 (ng/mL), you’re high, but there should be no inference that below 5 you’re sober...”
- Cannabis lobbyist: “The science on cannabis metabolism doesn’t support the legal 5 ng/mL limit in Colorado, which can be present for days and weeks after consumption.”

The forensic conclusions

Report from Canadian Society of Forensic Sciences Drugs and Driving Committee (September 2017):

- Setting a per se limit does not mean that all drivers below that concentration are not impaired and all drivers above that concentration are impaired;
- Individuals who use cannabis products daily or multiple times throughout the day may have THC blood concentrations above the per se limit despite having had a period of cessation for hours or possibly days;
- Unlike alcohol, the effects of THC do not correlate well with THC blood concentrations.

Coverage and liability implications

Cannabis legalization will impact the following insurance policies (amongst others):

1. The Standard Automobile Policy;
2. Homeowner Policy; and
3. Home-Sharing Policy.

Automobile coverage

Ricky just got his driver's license back so he stopped off at Julian's place and got really wasted on weed with Julian and Bubbles. On the way to buy some pepperoni and chicken fingers, Ricky was in a car accident with Cyrus and both sustained injuries. Officer Green attended the scene, smelled marijuana and charged Ricky with impaired driving. Ricky had the case thrown out because Officer Green did not advise him of his right to counsel. Ricky is now being sued by Cyrus. Ricky is looking for indemnity and claiming massage therapy costs and the cost of repairing his car.

Automobile coverage

Do you have an obligation to defend Ricky against Cyrus' claim?

- A – Yes
- B - No

Automobile insurance

Are you obligated to reimburse Ricky for his massage therapy bills?

- A – Yes
- B – No

Automobile insurance

Are you obligated to pay for Ricky's car repairs?

- A – Yes
- B – No

Auto coverage – Section “A”

Insurers unlikely able to deny coverage for the drugged driving collisions of their insureds:

- Section “A” does not exclude coverage for impaired driving;
- There is a general prohibition against driving, or allowing another to drive, unless they are either “authorized by law” or “qualified” (statutory conditions 2(1) and 2(2));
- Two lines of authority?

Auto coverage – Section “A”

Hobbs v. General Accident Assurance Co. of Canada, (1988, PE SCAD):

- “Qualified to Drive” relates to the authority or qualifications to drive in a general sense. It has nothing to do with the actual physical or mental condition of such a driver at the time of an accident or during any particular driving episode.

Auto coverage – Section “A”

Moore v. Co-operative Fire Casualty Company (1979, NLCA)

- “Authorized to drive” meant having a valid driver’s license or permit to drive, issued by a proper authority;
- “Qualified to drive” means competency to drive, and one who was under the influence of alcohol was incompetent to drive;
- The terms are disjunctive so insured need only meet one of the two conditions.

Auto coverage – Section “A”

“Yes”, you have to defend and indemnify Ricky against Cyrus’ Claim:

- Per *Hobbs*: Ricky had a valid license and “qualifications” do not relate to impairment at the time of the MVA
- Per *Moore*: While Ricky was not qualified to drive due to impairment, he had a valid license, so he was authorized to drive.

Auto coverage – Section “A”

- If Ricky was in the accident before he got his license back (ie not authorized to drive”) there may or may not be a duty to indemnify:
- Per *Hobbs*: Probably still have to indemnify because “qualified to drive” means the general skill and ability to drive a car;
- Per *Moore*: May be no obligation to indemnify because cannabis impairment meant he was not competent to drive at the time of the accident, and therefore, not qualified to drive.

Auto coverage – Section “B”

- Insurers will not have to fund medical or loss of income benefits under Section “B” if insured driver convicted of an offence under section 253 or 254 of the Criminal Code (see exclusion 3(b)(i));
- Insurer will not have to fund medical or loss of income benefits where person driving the automobile is neither “authorized by law” nor “qualified to drive”.

Auto coverage – Section “B”

“Yes”, Ricky gets reimbursed for his massage therapy:

- Where the criminal charges were dropped, he has not been convicted of an offence, so exclusion 3(b)(i) does not apply;
- Ricky has a license so he is “authorized by law”; therefore exclusion 3(b)(ii) does not apply;
- But if Ricky had no license, coverage depends on whether *Hobbs* or *Moore* applies.

Auto coverage – Section “C”

Insurers will not have to cover property loss if:

- Insured under the influence of intoxicating liquor or drugs to such an extent that he or she is incapable of proper care and control of the vehicle (1(g)(i)); OR
- Insured convicted with an offence under section 253 or 254 of the Criminal Code (1(g)(ii)).

Auto coverage – Section “C”

“No”, Ricky does not get reimbursed for vehicle repairs.

- Ricky was not convicted, but got really wasted, so it is clear he was not capable of proper care and control;
- But what if, owing to his tolerance levels, Ricky was above the legal limit of 5 nanograms/ml THC but still able to drive without any problems?
- Where onus is on insurer, denying coverage in the absence of a conviction could be difficult.

Homeowners policy

Scenario:

- Cannabis plants being grown out in the open in a dwelling's front yard;
- Plants stolen;
- Theft claim made under homeowners policy.

Homeowners policy

Would the following policy exclusion apply: “any property illegally acquired, used, kept, stored, imported or transported or any property subject to forfeiture.”?

- A – Yes
- B – No

Cultivation and storage rules vary

In New Brunswick – Cannabis Control Act requires:

- Storage of cannabis in a “secure space that is inaccessible” to a minor (s. 12(a));
- Outdoor cultivation must be surrounded by a locked enclosure having a height of at least 1.52 metres (s. 16(1)(b)(i));
- Indoor cultivation must be in a separate locked space (s. 16(1)(b)(ii)).

Contrast with Nova Scotia:

- “There will be no restrictions on how much cannabis you can keep at home or how you need to store cannabis in your home. Extra care is encouraged around how cannabis is stored, especially in a home with children and pets.”
- “Extra care is encouraged around how cannabis is cultivated, especially in a home with children and pets.”

Cultivation and storage rules vary

In Newfoundland and Labrador the *Cannabis Control Regulations* provide:

- Up to 4 plants can be cultivated (+ 4 more if medicinal);
- Person must be ordinarily resident in the dwelling house and can only be ordinarily resident in one premises at a time;
- Plants cannot be grown outdoors;
- Plants must not be within view from a public place without the use of visual aides (excluding corrective lenses); and
- Person must take reasonable steps to ensure plants not accessible to a person under 19.

Cultivation and storage rules vary

- In Prince Edward Island the *Cannabis Control Act and Regulations* require that any cannabis stored in a private dwelling be stored in a secure space that is inaccessible to any person under 19 years of age who resides in the private dwelling.
- Cannabis must be cultivated in a space that is inaccessible to any person under 19 years of age who resides in the private dwelling.
- If cannabis is cultivated outdoors, the person shall ensure that the cannabis is surrounded by an enclosure that is at least 1.52 m high and kept securely locked and ensure that the cannabis is not visible from any public space outside the boundary of the property

Coverage Depends on Provincial Rules

In New Brunswick, Newfoundland and Labrador and PEI, arguably the plants are being “kept” illegally because they were growing outside without an enclosure.

In Nova Scotia, growing the plants in plain sight does not appear to break the law.

Conclusion: No coverage for the theft in NB and NL, but the very same theft in NS would result in coverage.

A step further

What if the thief consumes the cannabis and then causes an MVA?

Consider: *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19:

- A minor stole an unsecured vehicle from a commercial garage;
- The vehicle crashed on the highway;
- The passenger sustained a catastrophic brain injury.

Did the garage have any liability?

Jury's liability apportionment

- Garage = 37% liable;
- Driver = 23% liable;
- Driver's mother (whose home the boys had been drinking at and smoking cannabis) = 30% liable;
- Passenger = 10% liable.

SCC foreseeability analysis

- Plaintiff's argument: the garage was storing an "inviting target" that is potentially dangerous in the hands of minors;
- Majority's decision: Although minors could very well be inexperienced or reckless drivers, there was nothing to suggest that minors, in particular, would steal cars from this garage;
- Not foreseeable that a failure to secure a vehicle would result in personal injury;
- Majority distinguished *Holian v. United Grain Growers Ltd.* (1980), 112 D.L.R. (3d) 611 (Man. Q.B.), rev'd on other grounds (1980), 114 D.L.R. (3d) 449 (Man. C.A.) where defendant's employees knew that minors frequented the premises.

Returning to our scenario

- Cannabis is an “inviting target” for minors because access is prohibited;
- Assume a household with unsecured cannabis plants was near a school or the household had children;
- *Rankin’s Garage* will be distinguishable;
- Potential for a claim based on failure to secure cannabis plants from theft and/or negligent supervision.

Home-sharing policies

- Homeowners that rent their home through a home rental network can obtain home-sharing insurance;
- This covers liability arising out of a short-term rental;
- Would this include coverage for a “Bud and Breakfast”?

Scenario:

- Guest stays at a *Bud and Breakfast*;
- Guest becomes impaired;
- Guest causes MVA;
- Commercial host liability: *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, and **long** line of subsequent cases;
- Where host is making a profit, the host owes a duty to the intoxicated person and the public at large;

Scenario

Is the home-sharing insurer covering this liability?

- A – Yes
- B – No

First party property claims

- Courts have shown a willingness to uphold marijuana exclusions, as long the exclusions are clear and unambiguous
- Defence of material change of risk may also be available

Conclusions

Cannabis legalization may increase the volume of losses and introduce new types of risks.

Novel disputes about coverage, liability and contributory negligence will arise.

A determination of these issues will depend on:

- New insurance policy wording;
- Federal, provincial and municipal legislation;
- Developing case law.



Questions?



Nutrition Break (2:10-2:25pm)

Food and Beverage Area

Dr. Allan Abbass: “Evaluation and
Treatment of Emotional Factors in
Somatic Presentations” (2:25pm-3:25pm)

Argyle Suite



These materials are intended to provide brief informational summaries only of legal developments and topics of general interest.

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