

## Addressing the Impacts of Marijuana Legalization on Workplace Safety

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### Background

As part of his party's 2015 election platform, Prime Minister Justin Trudeau committed to “legalize, regulate and restrict access to marijuana.”<sup>137</sup> Following through on this commitment, Justice Minister Wilson-Raybould announced the creation of a Task Force on Cannabis Legalization and Regulation (The Task Force), led by former Deputy Prime Minister Anne McLellan. The Task Force published its recommendations to government on December 13, 2016, with legislation expected to follow in Spring 2017.

### *Prevalence of Marijuana Use*

Regardless of its legal status, marijuana use is prevalent in Alberta. Health Canada data shows that 44.3% of Albertans have tried marijuana, with 11.4% having used at least once in the past year.<sup>138</sup> Health Canada data also shows the rapid rise of legal medical marijuana use – from 7,914 individuals in June 2014 to 98,460 by September 2016.<sup>139</sup> While the pending legalization creates greater awareness around the issues with marijuana use in the workplace, these statistics make clear that employers have been dealing with marijuana use for some time.

### *Safe Workplaces*

In safety-sensitive workplaces, drug use can lead to serious injury or death. In its submission to the Task Force, national oil and gas safety association EnForm stated that “marijuana use is incompatible with working in a safety-sensitive environment.”<sup>140</sup> Employers have both a legal and a moral obligation to provide safe workplaces. This legal requirement is enshrined provincially by the Occupational Health and Safety Act, and federally by Section 217.1 of the Criminal Code. Ensuring workers in safety sensitive roles are not impaired by legal or illegal substances is a key component of fulfilling that obligation.

### *Limitations on Testing*

Marijuana is a substance with complicated effects on the body, and legal substances like alcohol do not provide useful comparisons. Testing for alcohol impairment is straightforward – the quantity of alcohol in the bloodstream is a reliable indication of how intoxicated an individual is at the moment of testing. THC, the primary psychoactive component of marijuana, can remain in the blood stream of users for days or weeks after the intoxicating effects have worn off. Furthermore, there is no “breathalyzer” equivalent for marijuana, which would provide a clear indication of current intoxication and impairment. Complicating

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<sup>137</sup> <https://www.liberal.ca/files/2015/10/New-plan-for-a-strong-middle-class.pdf>

<sup>138</sup> [http://www.hc-sc.gc.ca/hc-ps/drugs-drogués/stat/\\_2012/tables-tableaux-eng.php#t2](http://www.hc-sc.gc.ca/hc-ps/drugs-drogués/stat/_2012/tables-tableaux-eng.php#t2)

<sup>139</sup> <http://www.hc-sc.gc.ca/dhp-mps/marihuana/info/market-marche-eng.php>

<sup>140</sup> [http://www.psac.ca/wp-content/uploads/Ltr-Marijuana\\_legalization\\_commission.pdf](http://www.psac.ca/wp-content/uploads/Ltr-Marijuana_legalization_commission.pdf)

matters further, there is no “.08” for marijuana, no standard legal limit or cutoff that can be used in impaired driving cases, for example.

The limits of testing technology have significant impacts on Canadian workplaces. *Entrop v. Imperial Oil* allowed random alcohol testing for safety sensitive positions, but not random drug testing – as a breathalyzer can reliably prove current impairment, whereas drug testing techniques cannot.<sup>141</sup> This is further confirmed by the Canadian Human Rights Commission’s (CHRC) Policy on Alcohol and Drug Testing, which considers random drug testing an unreasonable infringement of privacy rights, as it cannot reliably determine current levels of impairment.<sup>142</sup> Under these guidelines, drug testing can only be carried out as a bona fide occupational requirement in safety-sensitive positions, with reasonable cause or after an accident has occurred.<sup>143</sup>

### *Enforcement Measures Needed*

As federal and provincial governments have not yet researched and established legal limits for marijuana impairment, or the necessary testing protocols, the validity of workplace testing has largely been left to the courts to decide. Given the implications that legalized recreational marijuana use will have on law enforcement and impaired driving, it is highly likely that a standard roadside testing protocol, and a legal limit for marijuana impairment will be developed – similar to a 0.08 BAC for alcohol impairment. The Task Force recognized the need for this limit, and recommends further investment and research into both a *per se* impairment limit and the development of a roadside testing protocol.<sup>144</sup> These innovations would serve as a major step towards rationalizing the conflicts that currently exist between an employer’s obligation to provide a safe workplace, and an employee’s right to privacy. We recommend that the research and development of impairment limits roadside testing protocols be used to develop legal limits and testing protocols for safety-sensitive workplaces.

### *The Importance of Workplace Drug and Alcohol Policies*

Another key recommendation from the Task Force recommended that the government implement an “evidence-informed public education campaign” as soon as possible.<sup>145</sup> In our view, this must include encouraging adoption of workplace drug and alcohol policies. Given the normalizing effect of legalizing marijuana use, we can expect employers will see increased instances of use in the workplace. This will create difficulty for employers, who have a legal duty to accommodate medical marijuana users, a duty to accommodate individuals struggling with addiction, and a duty to provide a safe work environment. In *Calgary v CUPE, Local 37* management’s poor understanding of medical marijuana considerations, and poor application of workplace drug policies, led to a medical marijuana user being reinstated as a heavy equipment operator.<sup>146</sup> This case demonstrates the importance of a workplace drug and alcohol policy that is reasonable, clearly sets out expectations to employees, and is consistently enforced.

### *Intergovernmental Collaboration*

Marijuana legislation will be introduced federally, and occupational health and safety legislation falls under provincial jurisdiction. Both levels of government will need to collaborate with industry to ensure

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<sup>141</sup> <http://www.canlii.org/en/on/onca/doc/2000/2000canlii16800/2000canlii16800.html>

<sup>142</sup> [http://publications.gc.ca/collections/collection\\_2009/ccdp-chrc/HR4-6-2009E.pdf](http://publications.gc.ca/collections/collection_2009/ccdp-chrc/HR4-6-2009E.pdf)

<sup>143</sup> *ibid*

<sup>144</sup> <http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/index-eng.php>

<sup>145</sup> *ibid*

<sup>146</sup> <http://www.canlii.org/en/ab/abgaa/doc/2015/2015canlii61755/2015canlii61755.pdf>

that workplace safety considerations are met. The Task Force highlighted this need for cooperation within its recommendations on workplace safety – which encourage further research on impairment, collaboration between industry and both levels of government to understand occupational health and safety considerations, and the development of workplace impairment policies<sup>147</sup>.

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**The Alberta Chambers of Commerce recommend the Government of Canada and the Government of Alberta:**

1. Create a standard testing protocol to detect marijuana impairment, with legal limits for both traffic safety and workplace safety prior to the legalization of marijuana.
2. Engage in Government-funded education programs for employers, outlining their rights and responsibilities related to marijuana use.
3. Encourage the adoption of workplace drug and alcohol policies.
4. Allow a two-year implementation window to address the workplace safety recommendations contained within the *Framework for the Legalization and Regulation of Cannabis in Canada*.

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<sup>147</sup> <http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/index-eng.php>