

How Canadians can be charged with driving under the influence of cannabis without ever smoking a joint

Brian Hutchinson | November 29, 2013



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Derek Kowalenko. He has the words "24-hour prohibition — DRUGS" stamped on his driver's abstract, just for smoking a flavoured tobacco product.

Derek Kowalenko doesn't use marijuana. But he's been designated as an illegal drug user, and he can't find a job, and he's stressed out, all because RCMP officers in Kelowna, B.C., believed he was stoned on pot while he sat in his truck in a local Walmart parking lot.

In fact, says Mr. Kowalenko, he was smoking a grape-flavoured cigarillo. He showed it to the two Mounties when they walked up to his parked truck. "What are you smoking?" Mr. Kowalenko recalls being asked.

He held up his cigarillo, still lit.

According to an RCMP document, one of the officers "detected a very faint smell of marijuana under much cigar smoke in the cab of the truck." Police found no marijuana on their suspect; they didn't conduct a search. Mr. Kowalenko offered to produce blood and urine samples but the arresting officers weren't interested. Instead, they ordered him to recite the alphabet backwards, and to stand on one foot, with the other foot pointed out, and to hold the pose while they talked.



He didn't perform well, he admits. He says he was nervous. "How many people can say the alphabet backwards on command, anyhow?" Mr. Kowalenko asks.

His driver's licence was suspended on the spot. Unlike drivers caught drunk behind the wheel of a car, in B.C., an alleged drug-impaired driver has no means to contest a 24-hour suspension, aside from going to court, a lengthy and costly process.

Rather than hire a lawyer, Mr. Kowalenko appealed to the RCMP and to the Commission for Public Complaints against the RCMP; both complaints were dismissed.

It's not an isolated incident. While laws prohibiting simple marijuana possession are seldom enforced in some Canadian jurisdictions, provincial

motor vehicle divisions and courts are constantly dealing with people accused of driving while high on pot.

Cannabis use among drivers in B.C. is “particularly high,” according to a 2011 study published in the B.C. Medical Journal. It quoted from an earlier survey that found 4.6% of drivers in the Vancouver area and on Vancouver Island tested positive for cannabis. The study reported that there “is clear evidence that cannabis, like alcohol, impairs the psychomotor skills required for safe driving.” Cannabis-impaired drivers tend to drive more slowly and cautiously than drunk drivers, but evidence shows they are also more likely to cause accidents than drug and alcohol-free drivers, the study notes.



But drug impairment is notoriously difficult to prosecute. “There is an evidentiary problem with drug cases,” a provincial court judge in Ontario said recently, as he acquitted a man whom police said was drug impaired, based on his clumsy, fumbling manner. “There is no standard and no norm as there is with blood-alcohol [levels].”

In cases where blood and urine samples are taken and traces of cannabis are found, there’s no way to determine when the drug was consumed. Cannabis can remain in a person’s system for days, even weeks.

At what point is the marijuana smoker too impaired to drive? How much pot is too much? There is no hand-held device, no pot-detecting Breathalyzer that police can use to measure the amount a suspect has consumed, or to determine insobriety. Nor is there any standard blood-cannabis limit in Canada.



Cpl. Ronald Francis/CBC In this supplied video Cpl. Francis is shown smoking what appears to be marijuana

Some marijuana users claim the drug doesn't impair them at all. Ron Francis, the RCMP corporal stripped of his uniform this week for openly smoking legally prescribed medicinal marijuana, told *National Post* reporter Jen Gerson that he smokes one joint with his morning coffee, and it doesn't get him "high." But it does relieve him from post-traumatic stress. "It calms me down," said Cpl. Francis. "I'm not getting high [from one joint]. If I smoke multiple joints, I'm getting high."

Cpl. Francis is restricted to desk duty at his Fredericton, N.B., detachment; presumably, he still drives to and from work. It's not known if he's ever been pulled over and tested for impairment. Like other police forces in Canada, the RCMP has dozens of specially trained drug recognition and evaluation [DRE] officers. They can detect whether or not a driver is drug impaired, by putting suspects through physical examinations and coordination tests. Or so it is claimed.



KEITH MINCHIN FOR NATIONAL POSTRCMP Cpl. Ron Francis, as he arrives at RCMP J Division Headquarters to turn in his red serge uniform.

Darren Duhamel was driving slowly along a snow-covered road in northern Ontario when provincial police pulled him over; they thought they smelled marijuana smoke in his vehicle, and they suspected he was stoned. He told them he was not. They put him through the usual roadside exams, including the “one leg stand,” the “walk and turn,” and the horizontal nystagmus [crossing the eyes] tests. According to court documents, he bungled some tests and performed adequately in others.

He was taken to the police detachment and ordered to provide a urine analysis; it proved inconclusive. Regardless, Mr. Duhamel was charged with driving under the influence of cannabis.

He was acquitted in the Ontario Court of Justice in 2011. According to Judge P.T. Bishop, Mr. Duhamel “is really overweight,” which could explain his difficulties with certain co-ordination tests. As for the accused’s alleged mumbling and reticence, said the judge, “I had an opportunity to look at

Mr. Duhamel [at trial] and he speaks very slowly, he thinks about, he thinks very slowly and processes information very slowly.”

He was not impaired by cannabis when pulled over, the judge concluded. He was just slow.

He appeared to have to think about everything he said

Randy Duplessis was convicted of impaired driving two years ago, after a routine check by Miramichi City police in New Brunswick. According to a court documents, Mr. Duplessis and two others were observed sitting in a parked vehicle outside a Miramichi public library. Mr. Duplessis was behind the wheel.

An officer noticed “an odour of ‘freshly burnt’ marijuana in the vehicle,” and observed that Mr. Duplessis had “slow speech, pinkish eyes and ‘jerky’ head movements,” the court document reads. “He appeared to have to think about everything he said before speaking.”

Mr. Duplessis was detained, taken to a police station and evaluated by another officer, a DRE expert. She found he had “poor co-ordination, slow speech, a flushed face, dilated pupils and eyelid tremors.”



Jeff Bassett for National Post Derek Kowalenko of Winfield, B.C. stands with his truck on Nov. 28, 2013. After police accused him of smoking pot while sitting in his truck, Derek Kowalenko's driver's license was suspended for 24 hours.

Mr. Duplessis was ordered to perform a series of physical co-ordination tests, including the “walk and turn” and “the one leg stand.” He failed, according to police. He was also “unable to accurately differentiate 30 seconds from 45.”

A urine sample volunteered by Mr. Duplessis showed he had marijuana in his system; however, the RCMP toxicologist who examined the sample testified at trial that “it is impossible to determine when the marijuana had been consumed by Mr. Duplessis as that drug can remain in the human body for up to one month after it is ingested,” the court document reads.

Mr. Duplessis admitted in court that he is a frequent marijuana smoker, but denied having consumed pot the evening of his arrest. One of his colleagues from the grocery store where they worked testified that the accused “was

slow by nature and spoke with a drawl.” Another co-worker “testified that he thought Mr. Duplessis was mentally challenged because his speech was slow and sluggish, and he was not well coordinated.”

How many people can say the alphabet backwards on command?

Mr. Duplessis was found guilty nonetheless. But a Court of Queen’s Bench of New Brunswick judge struck down the conviction last year, noting the trial judge had failed to apply requirements of credibility assessment, and had, in effect, relied too much on dubious physical co-ordination tests.

Back in B.C., the province’s Superintendent of Motor Vehicles, Sam MacLeod, says he’s still confident in police and their abilities to detect pot-addled drivers, even though “there is currently no instrument-based roadside test for drug impairment.” Mr. MacLeod told the *National Post* in a statement that his department “is looking at options for introducing a more formal review process for 24-hour prohibitions for drugs in the future.”

Cold comfort for Derek Kowalenko. He has the words “24-hour prohibition — DRUGS” stamped on his driver’s abstract, just for smoking a flavoured tobacco product. A heavy-equipment operator by trade, he can no longer find work in his field. He doesn’t drive much anymore, he says, because he’s been forced onto welfare and can’t afford to put gas in his truck.