Canadian Alcohol Policy Evaluation (CAPE) Community of Practice Event Series

Alcohol Warning Labels: Informing Canadian Consumers

Event #2: March 16, 2022

Presenters: Dr. Norman Giesbrecht, Dr. Thomas Gremillion, Dr. Erin Hobin, Dr. Jacob Shelley, & Prof. Robert Solomon

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Event agenda

- Welcome and introductions
- Alcohol warning labels overview
- Warning labels in the US context
- Questions
- 1. Canadian constitutional authority 2. Civil liability
- Questions / discussion + potential follow-up roundtable

We acknowledge and respect the lək̓ʷəŋən peoples on whose traditional territory the University of Victoria stands and the Songhees, Esquimalt and W̱SÁNEĆ peoples whose historical relationships with the land continue to this day.

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Webinar Housekeeping

- Presentation today = 1.5 hours
- Please use the chat function for questions
- Optional: turn on live transcript if you prefer
- We will circulate presentation materials after (slide decks, recordings, summaries, French versions when possible)
- We will be recording presentations, but not Q&A sessions; if you do not want to be visible on the recording, please turn off your camera.
- For persons with lived/living experience stipends: email capecopcoord@uvic.ca
- Questions? www.alcoholpolicy.cisur.ca or capecopcoord@uvic.ca

Aperçu de l'événement : en français

- Veuillez noter que l'événement sera en anglais.
- Nous enregistrerons les présentations, mais pas les sessions de questions-réponses ; si vous ne souhaitez pas être visible sur l'enregistrement, veuillez éteindre votre caméra.
- Les documents disponibles en français (après traduction) comprendront des:
  - diapositives de présentation
  - des résumés d'événements

In memoriam

Harold Johnson 1957-2022

Storyteller, writer, advocate, elder and so much more

"We change the world with what we do."
-Harold R. Johnson

Meet your Presenters…

Dr. Erin Hobin, Senior Scientist,
Public Health Ontario

Dr. Thomas Gremillion, Director of Food Policy,
Consumer Federation of America

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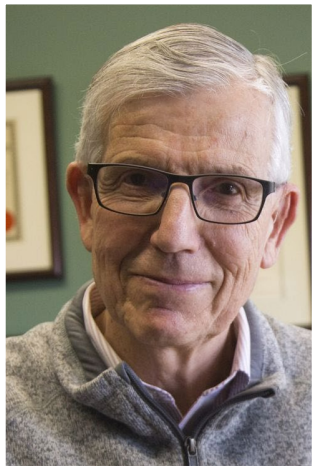
Meet your Presenters…



Professor Robert Solomon, Faculty of Law, Western University

Dr. Jacob Shelley, Faculty of Law, Co-Director, Health Ethics, Law & Policy (HELP) Lab, Western University

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Overview of alcohol warning labels

Dr. Erin Hobin (PHO)

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Mandatory alcohol labelling: an international overview

Erin Hobin, PhD

March 16, 2022

CISUR/CAPE Alcohol Labels Webinar

Canada is a world leader in well-designed product labels for tobacco and cannabis

Source: Hammond, D. (2011) Health warning messages on tobacco products: a review. Tob Control. 20(5):327-37.

Alcohol is largely exempt from food labelling legislation in Canada

Labelling requirements for alcoholic beverages

Nutrition labelling – Alcoholic beverages

Beverages with an alcohol content of more than 0.5% are usually exempt from carrying a Nutrition Facts table [B.01.401(2)(b)(i), FDR].

This exemption may be lost in certain situations, for example when a nutrient content claim is made or when an unstandardized alcoholic beverage contains added sucralose, aspartame or acesulfame-potassium. For more information, refer to Reasons for losing the exemption. Alcoholic beverages with added sweeteners are also required to meet the labelling requirements for these artificial sweeteners.

Canada's food guide **Alcohol**

There are health risks linked to drinking alcohol.

On this page

- Benefits of limiting alcohol
- Alcohol guidelines

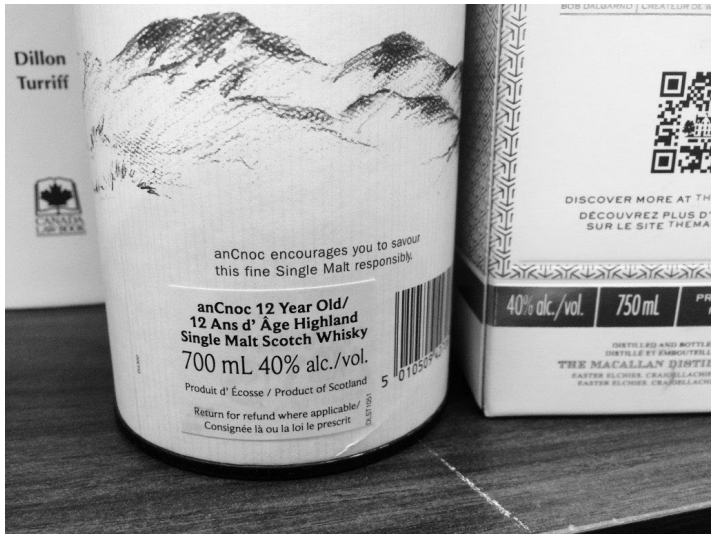
Benefits of limiting alcohol

Alcoholic drinks can add a lot of calories and offer little to no nutritional value. When alcohol is served with syrups, sugary drinks or as cream-based liquors, these drinks can have a lot of:

- sodium
- sugars
- saturated fats

Sources: https://www.canada.ca/en/health-canada/programs/consultation-front-of-package-nutrition-labelling-cgi/summary-of-proposed-amendments.html; https://inspection.canada.ca/food-label-requirements/labelling/industry/labelling-requirements-for-alcoholic-beverages/eng/1392909001375/1392909133296?chap=5

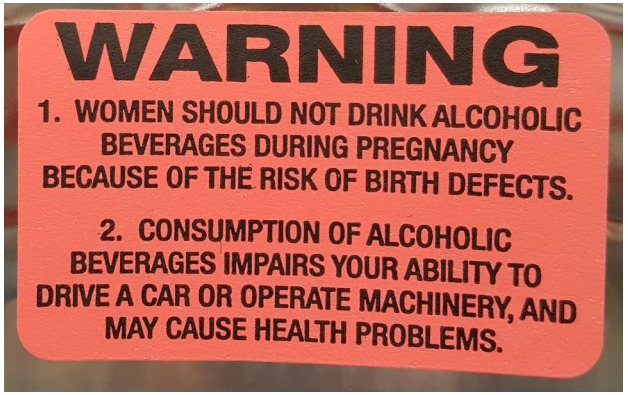
Canada: alcohol labelling requirements



Alcohol containing ≥1.1% alcohol by volume must show alcohol by volume declaration on the principal display panel of the container

Warning label in Yukon

Warning label in NWT



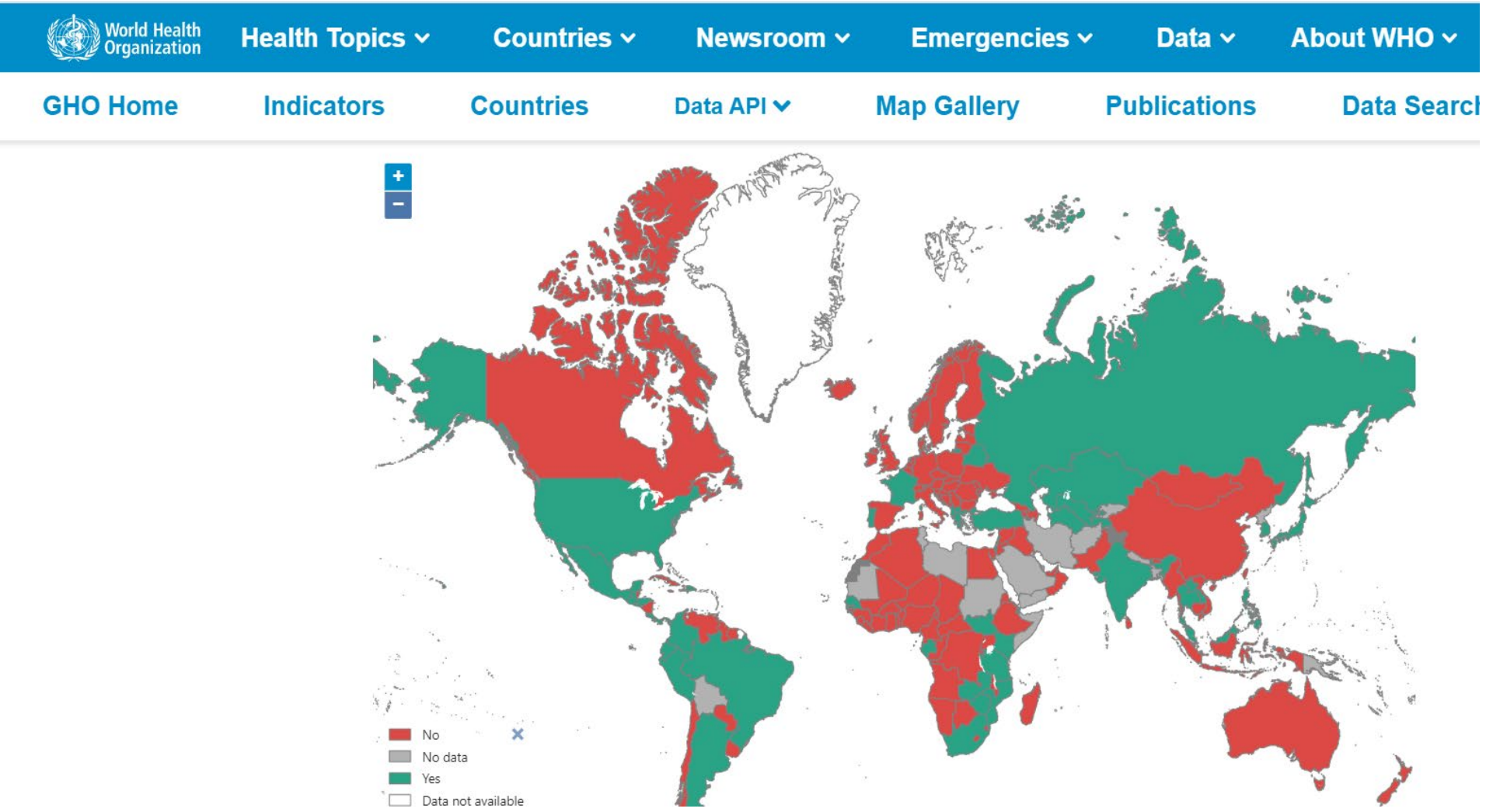
Sources: https://inspection.canada.ca/food-label-requirements/labelling/industry/labelling-requirements-for-alcoholic-beverages/eng/1392909001375/1392909133296?chap=6

WHO recommendations for alcohol container labels

- Warnings of health and safety risks
  - Alcohol-caused harm relevant to whole population (e.g., cancer)
  - Pregnancy-caused harm
  - Harm to minors
  - Drinking and driving
- # of standard alcoholic drinks in a container
- Nutrition information
  - Ingredients list, and
  - Calorie and nutrients (e.g., fat, sugars, carbohydrates, sodium)

Source: Jane-Llopis et al., 2020. WHO Health Evidence Network synthesis report 68. What is the current alcohol labelling practice in the WHO European Region and what are the barriers and facilitators to development and implementation of alcohol labelling policy? https://www.ncbi.nlm.nih.gov/books/NBK558550/pdf/Bookshelf_NBK558550.pdf

GISAH: Health warning labels on alcohol containers (N=194 countries)

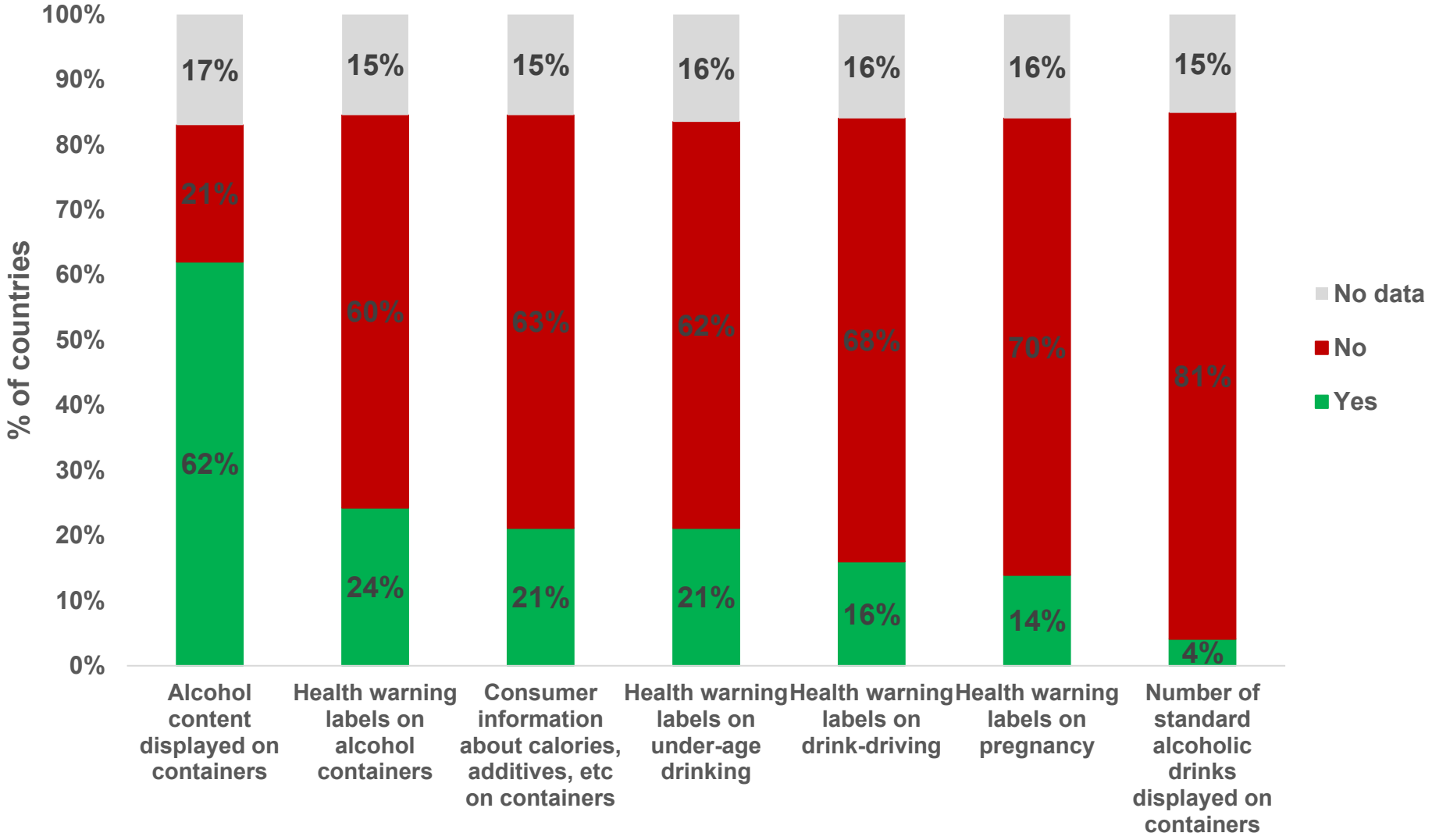


https://www.who.int/data/gho/data/themes/global-information-system-on-alcohol-and-health

(As of 2016)

GISAH: alcohol container label indicators

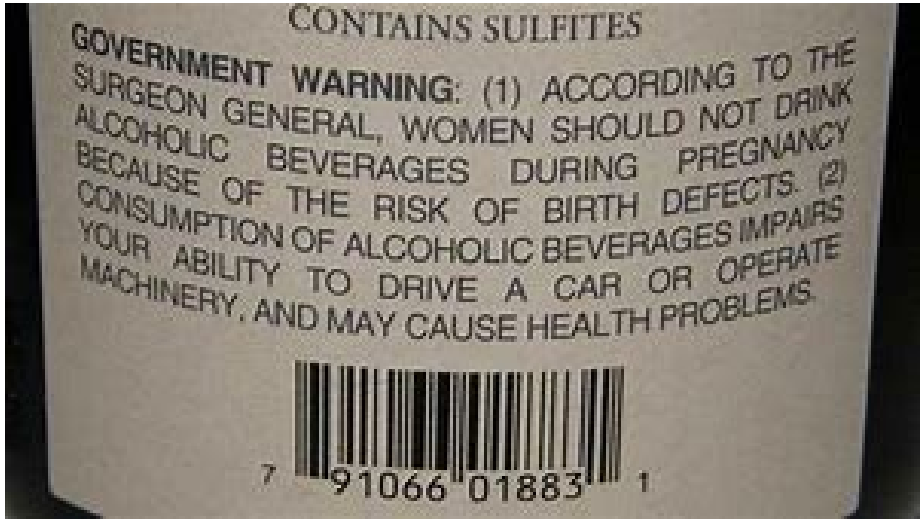
(N=194 countries; updated in 2016)



https://www.who.int/data/gho/data/themes/global-information-system-on-alcohol-and-health

US: Mandatory health warning label

- Mandated federally in 1989
- Real-world evaluations indicate some possible effects e.g. among pregnant women but no general population level effects on drinking behaviour
- Experts purport limited impacts due to poor design



Source: Greenfield, T. (1997). Warning labels: Evidence of harm reduction from long-term American surveys. In M. Plant, E. Single, & T. Stockwell (Eds.), *Alcohol: Minimizing the harm* (pp. 105–125). London, England: Free Association Books

Australia/NZ: Mandatory standard drink and pregnancy warning alcohol labels

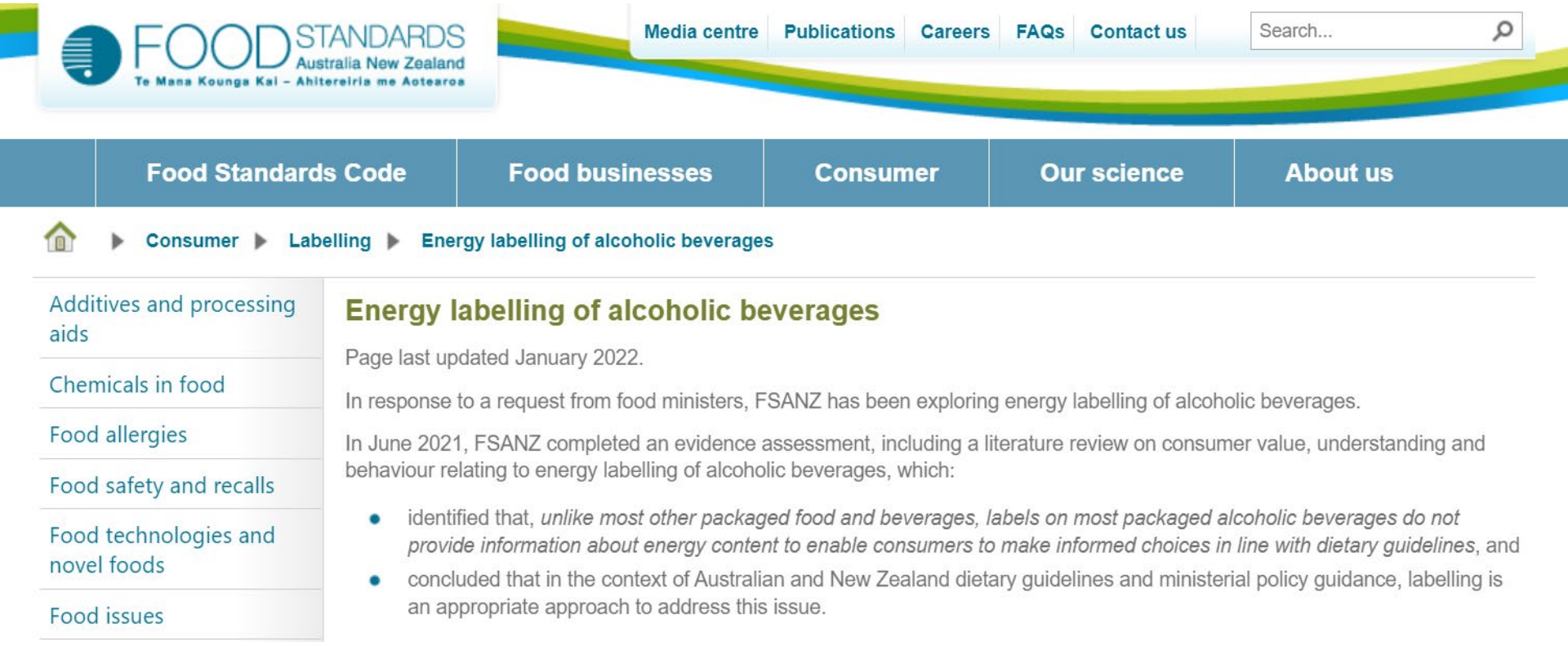
- >0.5% ABV must include on the label a statement of the number of standard drinks

- Size, font, colour, border, message *requirements*

New requirements for mandatory pregnancy warning labels on packaged alcoholic beverages containing more than 1.15% ABV were gazetted in the *Australia New Zealand Food Standards Code* (the Code) on 31 July 2020. Businesses have three years from July 2020 to implement these requirements.

Source: https://www.foodstandards.gov.au/consumer/labelling/Pages/Labelling-of-alcoholic-beverages.aspx

Australia/NZ: Mandatory calorie labelling on alcoholic beverages being reviewed



Source: https://www.foodstandards.gov.au/consumer/labelling/Pages/Energy-labelling-of-alcoholic-beverages.aspx

Ireland: legislation passed in 2018 mandating enhanced alcohol labels

Labelling of alcohol products and notices in licensed premises

12. (1) Subject to *subsection (2)*, it shall be an offence for a person to sell, to a person who is in the State, an alcohol product the container of which does not bear in the prescribed form—

(i) a warning that is intended to inform the public of the danger of alcohol consumption,

(ii) a warning that is intended to inform the public of the danger of alcohol consumption when pregnant,

(iii) a warning that is intended to inform the public of the direct link between alcohol and fatal cancers,

(iv) the quantity in grams of alcohol contained in the container concerned,

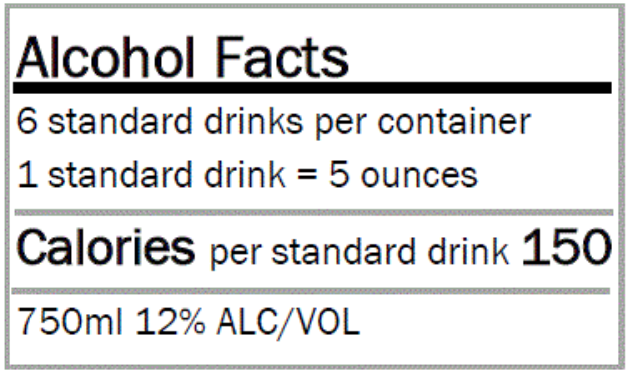
(v) the energy value expressed in kilojoules and kilocalories contained in the container concerned, and

(vi) details of a website, to be established and maintained by the Executive, providing public health information in relation to alcohol consumption.

Source: https://data.oireachtas.ie/ie/oireachtas/act/2018/24/eng/enacted/a2418.pdf

Labels are not one size fits all

Different types of alcohol container labels should not be perceived as single solutions or substitutes for each other, **but as potentially complementary tools which provide distinct information**



Alcohol container label examples

Contact Information

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Alcohol labels in the US context

Dr. Thomas Gremillion

Consumer Federation of America (CFA)

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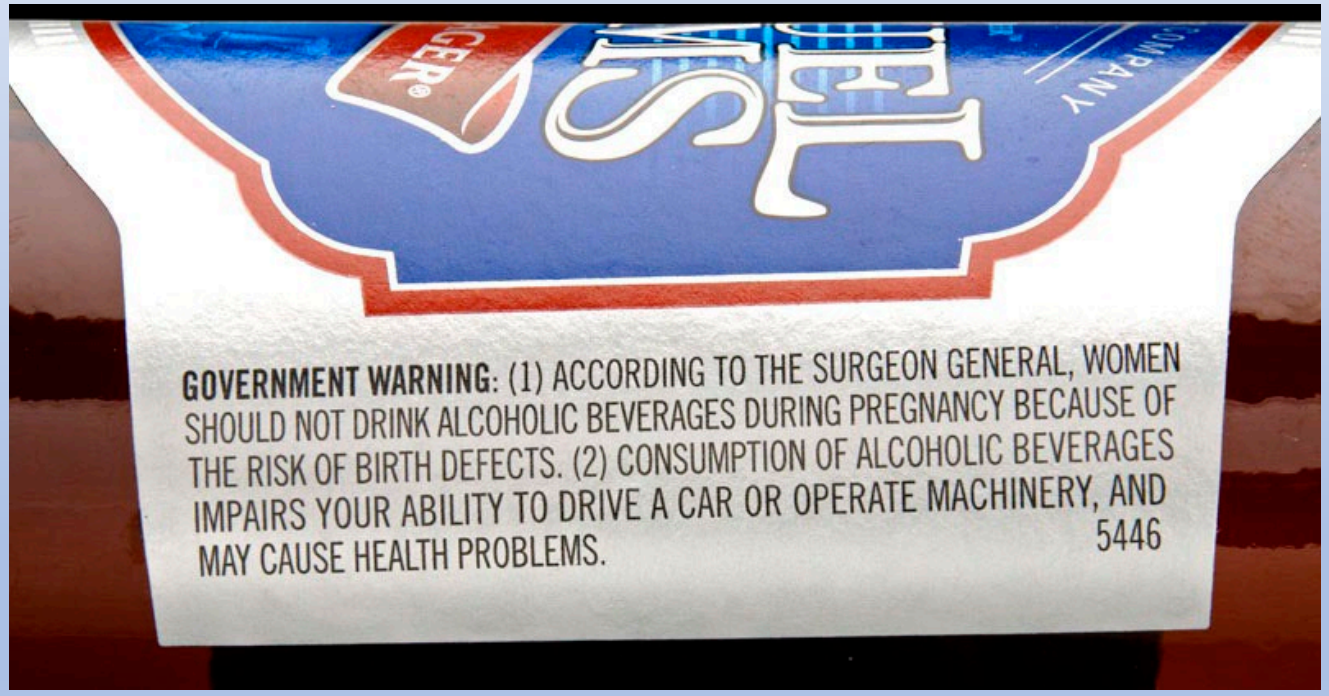
Alcohol Labeling in the U.S.

Thomas Gremillion

Director of Food Policy, Consumer Federation of America

tgremillion@consumerfed.org

Warning required on alcohol in U.S. since 1990



Alcohol versus food labeling

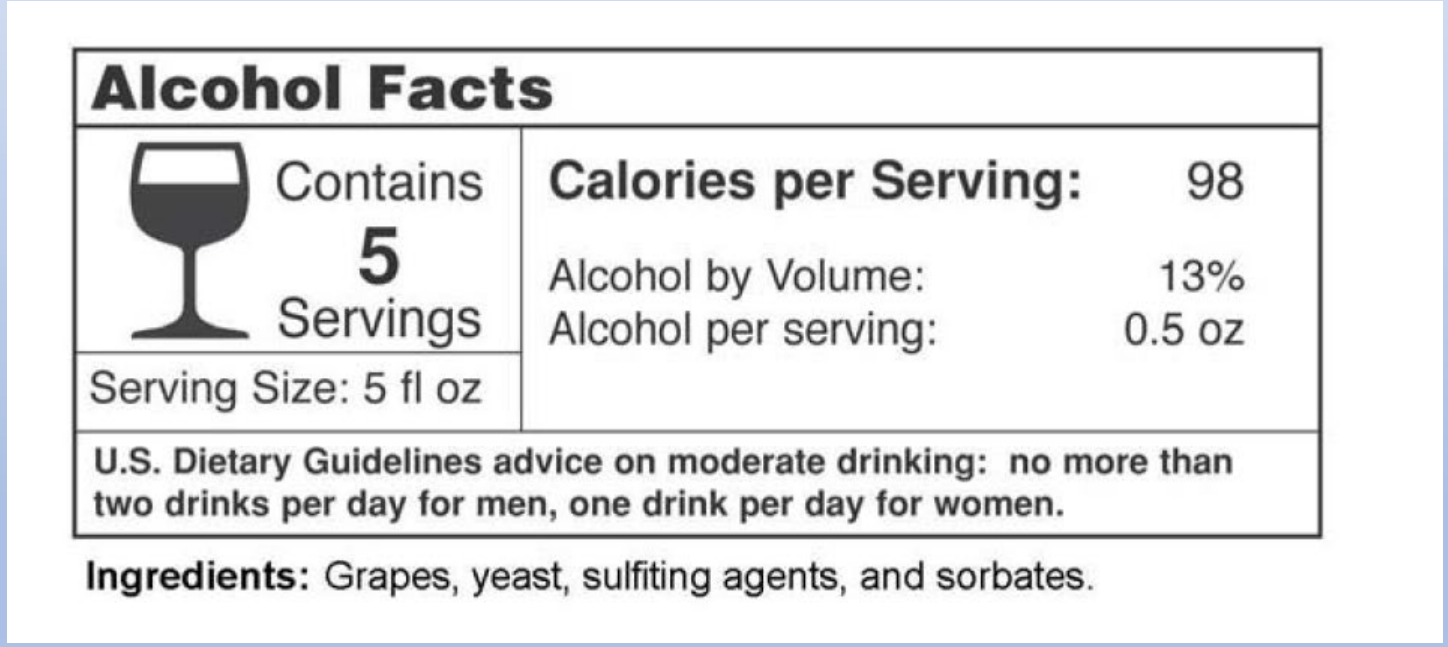
- Federal Alcohol Administration Act (FAA) of 1935
- Nutrition Labeling and Education Act (NLEA)

The curious case of hard seltzer…

Alcohol versus other carcinogens

Consumer Group Advocacy on Alcohol: Some Recent History

- 2003 petition



Alcohol Facts

Contains **5** Servings

Serving Size: 5 fl oz

Calories per Serving:	98
Alcohol by Volume:	13%
Alcohol per serving:	0.5 oz

U.S. Dietary Guidelines advice on moderate drinking: no more than two drinks per day for men, one drink per day for women.

Ingredients: Grapes, yeast, sulfiting agents, and sorbates.

"Many wineries argued that nutrition is not a concern for consumers when choosing an alcohol beverage, and they questioned whether consumers were interested in either ingredient or nutrition labeling on alcohol beverage products."

Alcohol and Tobacco Tax and Trade Bureau (TTB), 2007

Center for Science in the Public Interest (CSPI) Poll (2003)

- 94 percent support for alcohol-content labeling on alcoholic beverages;
- 91 percent support for ingredient labeling
- 89 percent support for labeling of calorie content;
- 84 percent support for serving size information

Want to Know the Calorie Content of Your Favorite Drink?

By By Steven Reinberg
HealthDay Reporter
July 1, 2008, 5:20 AM • 4 min read

July 1 -- MONDAY, June 30 (HealthDay News) -- A punishing run in the summer sun deserves an ice cold beer, right?

And the just reward for a strenuous afternoon whipping your garden into postcard perfection -- how about a slightly chilled chardonnay?

Well, before you pop that top or twist off that cork you might want to consult a new report, called *Alcohol Facts*, that has the lowdown on the amount of calories and carbohydrates -- and alcohol -- in America's top-selling brands.

"This is information consumers don't have right now," said Chris Waldrop, director of the Food Policy Institute at the Consumer Federation of America, which published the report. "This is a way to try to get that information about the alcohol content and calories and carbs to consumers."

Signs of progress…

- 2010: Menu labeling
- 2013: TTB ruling allows voluntary placement of Serving Size Facts labels, "pending completion of rulemaking."

But…not all voluntary labeling is equal…

Figure 1. Voluntary Serving Facts label on Cans of Bud Light and Coors Light

Food for Thought

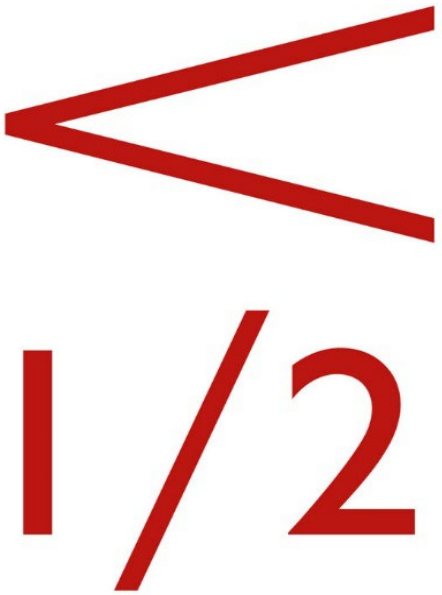
- “When we see a cancer warning, many of us greatly exaggerate the size of the risk. It’s not in the public interest to produce unjustified fear.”

-Cass Sunstein, former head of White House Office of Information and Regulatory Affairs (OIRA)

The argument for a cancer warning on alcoholic beverages in two numbers…

Outsized contribution to cancer cases…

Widespread lack of awareness…



2020 Consumer Group Petition

- Asks TTB to report to Congress
- Recommends rotating warning statements, including:
- **GOVERNMENT WARNING: According to the Surgeon General, consumption of alcoholic beverages can cause cancer, including breast and colon cancers.**

Supporting Arguments

- Scientific consensus on alcohol-cancer connection
- Not just heavy drinking
- Cancer warnings outside of the U.S.
- Abysmal public awareness
- Lessons from tobacco

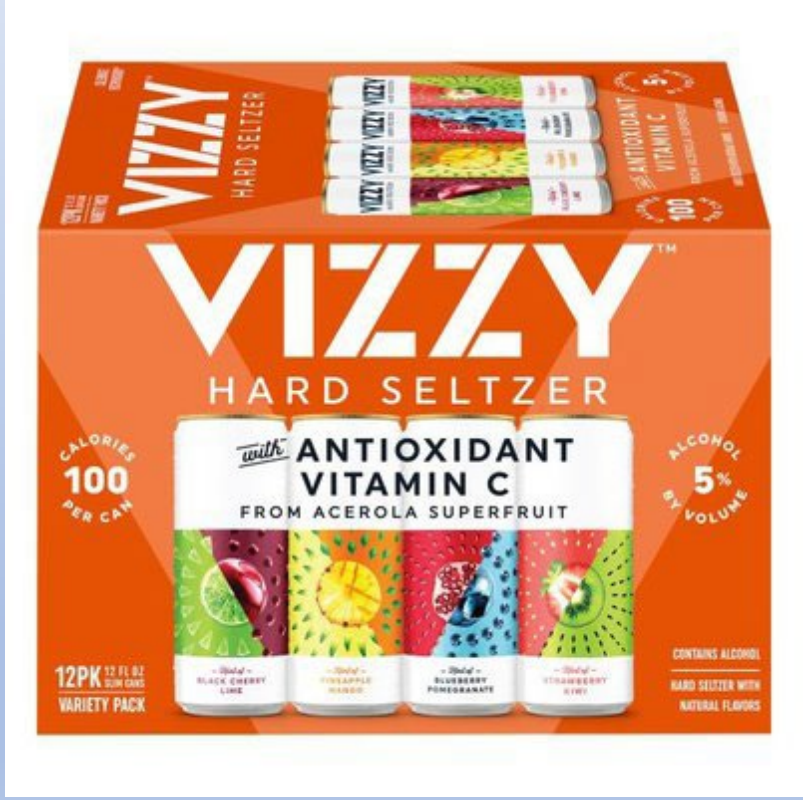
First Amendment Concerns?

- R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012)
- *Central Hudson* standard applied to graphic warnings on cigarettes
- Reducing smoking was a "substantial interest" but FDA failed to provide "substantial evidence" that the graphic warnings would "directly" reduce smoking rates by a "material degree."

First Amendment Concerns (cont.)

- *National Association of Wheat Growers, et al. v. Xavier Becerra*, Case No. 17 Civ. 2401, 2020 WL 3412732 (E.D. Cal. June 22, 2020)
  - Applied *Central Hudson* standard to cancer warning on glyphosate, as required by CA Prop 65 regulations.
  - Found that cancer warning on glyphosate would be misleading (IARC was only regulatory body to classify chemical as carcinogenic), and so no substantial interest to advance

Meanwhile…


VIZZY
HARD SELTZER
with ANTIOXIDANT VITAMIN C
FROM ACEROLA SUPERFRUIT
CALORIES 100 PER CAN
ALCOHOL 5% BY VOLUME
12PK 12 FL OZ SLIM CANS
VARIETY PACK
CONTAINS ALCOHOL
HARD SELTZER WITH NATURAL FLAVORS


I LOVE QUESTIONS
QUESTIONS ARE MY FAVORITE

Questions

Dr. Jacob Shelley

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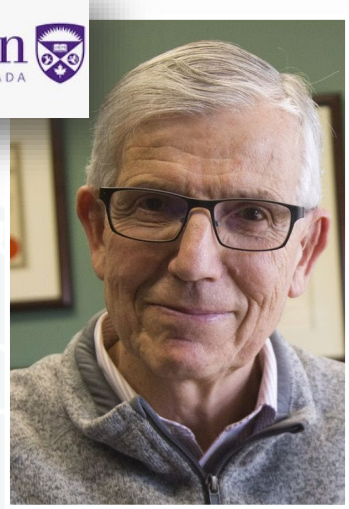
Canadian constitutional authority and Civil liability



Prof. Robert Solomon (UWO)

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Alcohol, Health Labels, Manufacturers' Duty to Inform, and Canadian Law

Wednesday, March 16, 2022

Robert Solomon,
Distinguished University Professor,
The Faculty of Law, Western University and
Senior Legal Research Affiliate, CISUR
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Part I: Government Mandated Alcohol Labels: The Constitution and the Canadian *Charter*

Does the federal government have constitutional authority to enact legislation requiring alcohol manufacturers and suppliers to include health information and warnings on their products?

- The federal government could enact legislation mandating the inclusion of alcohol labels under several different heads of power.
- The federal criminal law power provides the most viable basis for enacting alcohol labelling and warning legislation governing all alcohol products.
- To be a valid criminal law, the legislation would have to take the form of a prohibition, coupled with a sanction that serves a traditional criminal purpose, which includes protecting public health.
- Violating the legislation would constitute a federal criminal offence and those convicted would have a federal criminal record.

Do the provincial governments have constitutional authority to enact legislation requiring alcohol manufacturers and suppliers to include health information and warnings on the products that they manufacture and sell within the province?

- The provinces have broader constitutional authority and more regulatory options regarding health information and warning legislation than the federal government.
- The provinces could enact the legislation under their powers over property and civil rights, health or "matters of a merely local and private nature."
- Unlike the federal government, the provincial governments are not limited to creating a prohibition coupled with a sanction.
- Each province could create its own unique regulatory scheme which included various licensing and administrative sanctions, with or without creating related provincial offences.

Would alcohol manufacturers and suppliers be required to comply with both the federal and provincial health information and warning legislation?

- If there was an "express contradiction" between the two laws, the federal law would be paramount and the provincial law would be rendered inoperative to the extent of the contradiction.
- An express contradiction only arises if complying with one law makes complying with the other law impossible. If the laws simply overlap or one law is more onerous than the other, there is no express contradiction and both laws are valid.
- Despite the costs and inconvenience of being governed by a hodgepodge of federal and provincial health information and warning legislation, alcohol manufacturers and supplies would be required to comply with both sets of legislation in any one province.

Would federal and provincial health information and warning laws violate an alcohol manufacturer's and supplier's freedom of opinion and expression under section 2(b) of the *Charter*?

- Legislation requiring manufacturers and suppliers to attach health information, warnings or images to their products would infringe their freedom of opinion and expression.
- However, the rights and freedoms in the *Charter* are not absolute, but rather may be limited under section 1, when doing so is demonstrably justifiable in the circumstances.
- Consequently, alcohol manufacturers and suppliers would have no *Charter* remedy if the government could establish that the mandated health information, warnings and graphics constituted a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society."
- While commercial speech is protected under the *Charter*, it is viewed as less important than political or other types of expression.

- In 2007, the Supreme Court of Canada unanimously upheld federal legislation banning almost all tobacco advertising and requiring the prominent display of health warnings and large, disturbing images, such as the one below, as a justifiable limit on the tobacco companies' freedom of opinion and expression.

- Legislation requiring alcohol products to display far more modest health information and warnings would clearly be "demonstrably justifiable," given the annual toll of deaths and social costs that alcohol generates.
- With the increase in alcohol consumption during the pandemic, the current number of alcohol-related deaths and social costs likely considerably exceed the 2017 estimate (*i.e.*18,320 deaths and $16.6 billion in social costs).
- Provided it was made clear that the health information and warning labels were expressions of the government, alcohol manufacturers and suppliers would have no viable claim under section 2(b) of the *Charter*.

Part II: Potential Civil Liability for Failing to Inform Consumers of the Risks of Alcohol Use

(a) What is the nature of the duty to inform?

- Canadian manufacturers and suppliers, except in Quebec, have a broad common law duty to inform consumers of the risks inherent in the use of their products.
- In Quebec, liability is governed by the *Civil Code*, which appears to be equally broad in scope.
- The duty is defined in terms of what manufacturers and suppliers know or ought to know.
- Manufacturers are expected to be experts in their field and undertake research or at least keep current with the existing scientific, academic and industry literature.
- The duty to inform is ongoing and consumers must be informed of new risks of which the manufacturer is, or ought to be, aware.

- Generally, the duty is limited to informing consumers of the risks inherent in the **foreseeable** use of a product.
- However, if manufacturers know or ought to know that their products are misused, they must inform consumers of the risks inherent in the foreseeable misuses of their products.
- The inclusion of a warning label is only one factor in deciding if consumers have been adequately informed.
- The totality of the manufacturer's marketing activities are assessed, including any advertising, promotions or counter-vailing messages that might undermine any health information or warnings that had been provided.
- Manufacturers and suppliers are not required to inform consumers of obvious or well-known risks (*e.g.* knives will cut).

In summary, Canadian alcohol manufacturers and suppliers have a duty to warn consumers of the wide range of injuries and illnesses associated with both the moderate and heavy consumption of alcohol.

(b) What principles govern the standard of disclosure?

- The courts have established that the standard of disclosure:
  - is very stringent for products intended for consumption;
  - increases with the probability and severity of the risks;
  - increases for products that are mass-marketed to the general public, particularly if the consumers include youth or other vulnerable constituencies; and
  - increases for any risks that are not generally known to the public (*e.g.* the cancer risks posed by alcohol).
- The information and warnings must be sufficiently specific, detailed, and prominent to alert consumers to the probability and severity of each known risk.
- Vague general warnings are not sufficient (*e.g.* immoderate alcohol consumption may be hazardous to your health).
- Manufacturers and suppliers must tell the whole truth and not gloss over or discount the risks.

- As stated in one of the leading duty to inform cases:

  "Once a duty to warn is recognized, it is manifest that the warning must be adequate. It should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard, and it should not be neutralized or negated by collateral efforts on the part of the manufacturer."

- In Canada, manufacturers and suppliers that have complied with a federal or provincial health information and warning statute can still be held civilly liable for breaching their common law duty to adequately inform consumers of the risks inherent in using their products.

In summary, Canadian alcohol manufactures and suppliers have long been in breach of their duty to inform consumers of the many serious harms associated with their products.

(c) What must the plaintiff prove to establish causation?

- The plaintiff must prove on the balance of probability that the alcohol manufacturer's or supplier's breach of their duty to inform was a cause of their injury or illness.
- Thus, plaintiffs must prove that:
  - alcohol was a cause of their injury or illness (easy with fetal alcohol syndrome *etc.,* but a barrier if less than 50% of the particular illness or injury is attributable to alcohol); and
  - they would have stopped or reduced their drinking to the point that their illness or injury would not have occurred.
- The analysis is complicated for illnesses that develop over time, because of the ongoing changes in the relevant variables upon which liability is based.

In summary, proving causation poses the greatest challenge to suing the alcohol industry for failing to inform consumers of the risks inherent in their products.

(d) Conclusion

- It is only a matter of time before alcohol manufacturers and suppliers (including the provincial liquor boards) are sued for failing to inform consumers of some of the more serious and direct risks of alcohol consumption.
- The number of successful suits would be far greater if legislation were enacted, permitting proportional recovery based on the percentage of the harms attributable to alcohol.
- It is important to emphasize that civil litigation is incredibly protracted and expensive.
- As the tobacco litigation demonstrates, even if the plaintiff wins, he or she may only be able to recover a small fraction of the damages that have been awarded.
- While the alcohol industry should be held accountable through litigation, it is merely one means of protecting the public. The prospect of civil liability should not deflect attention from the need for far stricter and effective regulation of the industry.

Questions / discussion
Participant polls

Dr. Jacob Shelley

CAPE Community of Practice Funding and Support acknowledgment

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- Social Sciences and Humanities Research Council (SSHRC) Connection Grant
- Public Health Agency of Canada (PHAC)
- In-kind funding from co-investigator institutions
- In-kind support and incredible enthusiasm from knowledge users & government stakeholders

The views and opinions expressed in this presentation are those of the authors alone and do not necessarily represent those of our funders

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CAPE Community of Practice Website

www.alcoholpolicy.cisur.ca

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French: https://bit.ly/rejoindreCdeP

Event Feedback Form

English: https://bit.ly/CAPEevents
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CAPE 3.0 Stakeholder Input Survey

English: https://bit.ly/CAPEinput
French: https://bit.ly/ÉPCA

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