

The Proposed Cannabis Act R.S.C.2018 A Commentary by John W. Conroy QC

In 2012 the Canadian government amended the **Controlled Drugs and Substances Act (CDSA)** that replaced the **Narcotic Control Act (NCA)** in 1996. In so doing, while it left intact the maximum sentence available of life imprisonment if prosecuted on indictment for the offenses of trafficking or possession for the purpose of trafficking in a schedule II drug i.e. cannabis, it increased the penalties for the production of cannabis from 7 years to 14 years imprisonment on indictment and also legislated specific mandatory minimum penalties for production of cannabis from 6 months imprisonment to 2 years depending on the number of plants produced from 5 to 500. However, a court is not required to impose such a minimum punishment unless it is satisfied that the offender, before entering a plea, was notified of the possible imposition of a minimum punishment (see s.8 CDSA).

With respect to **simple possession of cannabis**, the 2012 amendments provide for a maximum of 5 years less a day imprisonment on indictment, as well as the option to proceed summarily and if the amount is under 30 g the offense could only be prosecuted on summary conviction. Consequently, a person charged with simple possession of more than 30gm prosecuted by way of indictment is not entitled constitutionally to the benefit trial by jury, as **section 11 (f) of the Canadian Charter of Rights and Freedoms**, that forms part of our Constitution, limits that right to where the maximum punishment for the offense is imprisonment for 5 years or more severe punishment. Could there be any other reason for making it 5 years less one day? For a schedule I offense (an opiate, cocaine or amphetamines) the maximum is 7 years imprisonment, so the right to a jury trial remains. For schedule III (LSD) the maximum is 3 years. I wonder why the government then and now doesn't want a jury decide a serious cannabis possession case?

The 2012 amendments also amended **section 742 of the Criminal Code of Canada** in relation to Conditional sentences of imprisonment (CSO's) that enable a court that imposes a sentence of imprisonment of less than 2 years to enable the offender to serve the sentence in the community, subject to conditions. **S. 742.1** was amended to provide that such a CSO is not available any longer, where the offense carries a minimum term of imprisonment where the offense is prosecuted by indictment and the maximum term for the offense is imprisonment for 14 years or life. It would appear, even if the Crown does not give notice under **section 8 of the CDSA** that it is seeking a mandatory minimum or having given such a notice, decides to withdraw it, a CSO still remains unavailable. While the government now proposes to eliminate the mandatory minimums for cannabis offenses next year, why does it wish to maintain a limitation on a judge's ability to impose a CSO in circumstances where the court determines that a sentence of 2 years is fit, regardless of the maximum on indictment and even if the Crown proceeds summarily?

It is submitted that the Federal government should instruct the Department Of Justice and the Public Prosecution Service of Canada to not seek any mandatory minimums for cannabis offenses between now and the passing of Cannabis Act as an interim measure pending legalization.

It is further submitted that the Federal government should take immediate steps to repeal the 2012 amendments increasing the maximum penalties on indictment above 10 years and should restore the

previous maximums pending legalization so as to enable a court to impose CSO's between now and legalization.

With respect to **Possession** the proposed **Cannabis Act**, scheduled to become law on July 1, 2018, makes it legal for a 12 to 15-year-old to possess up to 5 g of dried cannabis or equivalents anywhere and those over 18 years of age to possess up to 30 g of dried cannabis or equivalents in a public place, among other things. Once again, the penalty on indictment for a person 18 years of age or older is imprisonment for a term of not more than 5 years less a day and for a younger person a sentence in accordance with proceedings under the **Youth Criminal Justice Act**. Consequently, once again, no constitutional right to a jury trial is available if prosecuted by indictment. However, if the amount possessed is no more than 50 g a person 18 years of age or older may be proceeded with in the discretion of the police officer under a ticketing scheme that carries a maximum penalty of \$200 plus a victim surcharge. Also, the Crown has the option to proceed by way of summary conviction instead of by indictment and then the maximum fine is \$5000 or 6 months imprisonment or both and the proceedings remain in the provincial court, with no option to be tried by a higher court or judge and jury.

The new Act then makes a distinction between **“distribution”** and **“selling”**. Using its common phrase, “Unless authorized under this Act...” the proposed Act goes on to provide for **“distribution”**. Section 9 makes It is an offense for a person over 18 to distribute more than 30 g, to distribute to any person under 18 or to an organization and to distribute “illicit cannabis”. Bearing in mind that a “young person” is defined for purposes of section 9 to be 12 years of age or older, but under 18 years of age, such a young person can distribute no more than 5 g without committing an offense but not to an organization. This presumably is to simply recognize the reality that many 12 to 18-year-olds will possess and share between them, and should not be prejudiced by being processed through the criminal justice system. However, there is no legal source of supply for them as no one is allowed to distribute or sell to anybody under 18 years. S. 9 goes on to prohibit distribution of flowering budding plants, distribution by an organization and a distinct offense of possession for the purpose of distribution. It is a defense for an adult to distribute to a person under 18 years if they took reasonable steps to ascertain the individuals age.

The offense of breaching the distribution section is once again a “hybrid” and the Crown can elect to proceed by indictment or summarily subject to the ticketing scheme applying if the amount is up to 50 g. The penalty for violating the distributing section is a maximum of 14 years imprisonment if you are 18 years of older, a youth sentence under the Youth Criminal Justice Act if under 18 and a fine in the discretion of the court if you're an 'organization'. Consequently If the Crown proceeds summarily the penalties are essentially fines between \$5000 and \$15,000 and if you are an organization the maximum fine is \$100,000.

“Selling” unless authorized under the Act is prohibited by section 10 and simply makes it unlawful to sell cannabis or any substance represented or held out to be cannabis to a person over 18 or under 18 or an organization and to possess such for the purpose of selling it. The defense of taking reasonable steps to ascertain the individual's age applies.

The offense is again a hybrid with a maximum of 14 years imprisonment on indictment and fines of \$5000-\$15,000 or imprisonment up to 6 months if you sell to another adult and 18 months if you sell to a young person.

“Importing and exporting” and “possession for the purpose of exporting” is governed by section 11 and is again a hybrid with a maximum of 14 years imprisonment on indictment and a \$5000 fine or up to 6 months imprisonment for an individual and a fine of \$100,000 maximum for an organization.

“Production” is governed by section 12(1) – (3) and is distinct from **“cultivation”** governed by (4) through (8). “Production refers to obtaining or offering to obtain cannabis by any method or process, including by manufacturing or by synthesis or altering the chemical and physical properties and (2) appears to allow this to be done by an individual if lawfully in possession of the cannabis that is to be altered but alteration by an “organic solvent” is prohibited by (3).

“Cultivation” on the other hand, includes cultivating, propagating or harvesting from a seed, or plant material that is known to be from illicit cannabis or more than 4 cannabis plants at any one time in their “dwelling house” by a person over 18 years of age. This limitation applies to the “dwelling house” and it does not matter whether you have more than 2 people over the age of 18 years in the dwelling house – the limit is 4 plants. Further, the plants must not be more than 100cm in height from the ground up and no cultivation is permitted at a place other than the dwelling house.

Interestingly, a **“dwelling house”** is defined in subsection (8) for the purposes of this section, to include the house and any land that is subjacent to it and the immediately contiguous land that is attributable to it, including a yard, garden or any similar land and any building or structure on any such land. Consequently, it would appear that one can produce the 4 plants inside or outside and in an outbuilding, as opposed to the residence. However, one is not permitted to cultivate, propagate or harvest “any living thing, other than a cannabis plant,” from which cannabis may be extracted or otherwise obtained or to offer to do so, and subsection (7) specifically prohibits a young person or an organization from doing so as well.

Again, the offense is a hybrid, allowing the Crown to proceed summarily or by indictment if it doesn’t fall within the ticketing scheme that appears to cover the production of 5 to 6 plants and up to 150 cm in height. Once again on indictment, the maximum penalty is 14 years imprisonment. On summary conviction, it is a fine up to \$5000 or 6 months imprisonment or both. In the case of an organization the fine is up to \$100,000.

A young person is also subject to prosecution either on indictment or summarily, but their sentence is to be one available under the **Youth Criminal Justice Act**.

Section 13 makes it an offense to possess, produce, sell, distribute or import anything with the intention that it will be used to produce, sell or distribute **illicit cannabis**. This is also a hybrid offense with a maximum of 7 years imprisonment on indictment and the usual \$5000 fine or up to 6 months or both on summary conviction and \$100,000 fine in the case of an organization.

Section 14 makes it expressly an offense **to use the services or to involve young person in the commission of any of the above offenses** under sections 9 through 13. It is a hybrid offense to do so and again, the maximum on indictment is 14 years imprisonment and on summary conviction a \$15,000 fine or imprisonment up to 18 months or both and in the case of an organization up to \$100,000.

Section 15 deals with **sentencing** and factors to be taken into consideration and it lists carrying or using or threatening to use a weapon or violence or selling or distributing or possessing for purpose of sale, distribution in or near a school or school grounds or public place usually frequented by young persons as aggravating factors in addition to a prior conviction. If any of these factors exist and the court does not impose imprisonment, it must give reasons for not doing so. Provision is also made for a drug treatment court program.

Consequently, apart from the offenses of possession and involving oneself in illicit cannabis, the maximum penalties on indictment for distribution, selling, production or cultivation, and involving young person carry a maximum penalty on indictment of 14 years.

It is submitted that in the context of purported “legalization of cannabis” providing for prosecution on indictment is unnecessary and excessive and at least disproportionate if not grossly disproportionate in all of the circumstances, bearing in mind that cannabis has no lethal dose and can’t kill, unlike tobacco and alcohol, and certain other prescribed drugs. The Federal legislative schemes in relation to tobacco, alcohol and other prescribed drugs provide for penalties on summary conviction or indictment but with a usual maximum of 2 years and the odd provision for up to 3 years. **(see appendices – comparing the provisions of the Federal Tobacco Act and the Excise Act)**

A simple Google search online reveals, that in relation to **Tobacco**, current cigarette smoking among U.S. adults aged 18 Years and older remains the single largest preventable cause of death and disease in the United States. Cigarette smoking kills more than 480,000 Americans each year, with more than 41,000 of these deaths from exposure to secondhand smoke. Tobacco use is the leading cause of preventable disease, disability, and death in the United States. Nearly 40 million US adults still smoke cigarettes, and about 4.7 million middle and high school students use at least one tobacco product, including e-cigarettes. Every day, more than 3,800 youth younger than 18 years smoke their first cigarette. Each year, nearly half a million Americans die prematurely of smoking or exposure to secondhand smoke. Another 16 million live with a serious illness caused by smoking. Each year, the United States spends nearly \$170 billion on medical care to treat smoking-related disease in adults.

In Canada tobacco use is also the leading cause of preventable death. Tobacco use has no safe level of consumption, is highly addictive and is the only known consumer product that kills one-half of its long term users when used as intended. Smoking is responsible for more than 85% of lung cancer deaths in Canada. In 2010, more than 20,000 Canadians died of lung cancer. It's estimated that at least 25,000 more Canadians were diagnosed with lung cancer in 2011. Overall, smoking causes approximately 30% of cancer deaths in Canada.

In health care, tobacco use costs Canada billions of dollars each year. Health care costs related to smoking have increased steadily since 1966. In 2002, tobacco use accounted for \$4.4 billion in

direct health care costs and an additional \$12.5 billion of indirect costs such as lost productivity, longer-term disability and premature death.

In Productivity Terms the Conference Board of Canada has estimated that the additional cost of employing a smoker is roughly \$3,400 per year.

On the other hand 30 year longitudinal studies in the USA have determined that smoking cannabis expands the small airways compared to tobacco, which plugs them up and the evidence does not support that the smoking of cannabis causes either emphysema or cancer as it does for those who consume tobacco. See Dr D.P. Tashkin et al. links below.

<https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwii3dLSnorUAhVJIFQKHRofCVUQFghTMAg&url=http%3A%2F%2Fwww.laweekly.com%2Fmusic%2Fucla-professor-finds-marijuana-is-safer-to-smoke-than-tobacco-5658317&usg=AFQjCNExGs7l91Cfc8D76LqWPMnTXtWIPg>

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Below is a graph available on the Internet that provides a snapshot of the use, costs and consequences of the consumption by Canadians of all manner of drugs and showing the excessive consequences of the consumption of alcohol and tobacco in relation to all other drugs.

A review of the Federal **Tobacco Act** discloses that a lot has been borrowed from this Act and put into the **Cannabis Act**, but that it is only an offense to furnish tobacco to a person under the age of 18 years in a public place and all other offenses appear to be in relation to promotion, advertising, packaging, labeling, etc. Importantly, the maximum penalties, while mostly involving substantial fines, include proceeding by indictment but the maximum penalties are 2 years imprisonment. The maximum penalties for furnishing to a young person are substantial fines with no provision for imprisonment (s.45). Interestingly, that Act contains the following provisions focusing on taking illegal profits away instead of the use of imprisonment at substantial cost to the taxpayer and the use of other constructive sentencing options directed at the specific mischief in issue instead of simply making people worse by incarceration..

58. If an offender has been convicted of an offence under this Act and the court is satisfied that as a result of the commission of the offence the offender acquired any monetary benefits or that monetary benefits accrued to the offender, the court may order the offender to pay, despite the maximum amount of any fine that may otherwise be imposed under this Act, an additional fine in an amount equal to the court's estimation of the amount of those monetary benefits.

59. When the court is sentencing an offender who has been convicted of an offence under this Act, in addition to any other punishment that may be imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:

- (a) prohibiting the offender from doing any act or engaging in any activity that is likely to result in the continuation or repetition of the offence;
- (b) prohibiting the offender from selling tobacco products for a period of not more than one year, in the case of a subsequent offence under section 8, 9, 11, 12 or 29;
- (c) directing the offender to publish, in the manner directed by the court, the facts relating to the commission of the offence;
- (d) directing the offender to post any bond or pay any amount of money into court that will ensure compliance with an order made pursuant to this section;
- (e) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the act or omission that constituted the offence; and
- (f) directing the offender to pay an amount for the purposes of conducting research into any matters relating to tobacco products that the court considers appropriate.

When it comes to **Alcohol (beer, wine and spirits)** governed federally by the **Excise Act** the general penalties are in the 3 to 6 month range, including mandatory minimums of 3 months with provision for up to 3 years for taking away goods seized and there is a provision that a court can add up to 2 years imprisonment and not less than one month in certain circumstances. In default of payment of the substantial fines that are usually available the maximum is 3 months and a minimum of one month in prison.

Specifically with respect to **“distilleries”** the maximum is 12 months imprisonment for distilling without a license (s.158) or for unlawfully selling (s.163).

With respect to **“breweries”** section 176 permits one to produce beer for oneself and others as long as you don't sell it. A violation carries a fine and in default a maximum of 3 months in prison with a minimum of one month for a 1st offense and for a 2nd offense a maximum of 6 months with hard labor and a minimum of 2 months. If one sells beer without a license the penalty is up to 3 months imprisonment and a minimum of one month for a 1st offense and up to 6 months imprisonment and a minimum of 3 months for a 2nd offense. The same is true if one brews beer and sells it without a license.

With respect to **Tobacco** it is s. 220 that allows a person to grow up to 15 kg of tobacco for himself and in addition the same amount for any other adult person on the farm or premises . If one sells without a license the penalty is a fine and in default up to 12 months imprisonment and the same is true if you violate section 220. Offenses in relation to selling without paying duties carry penalties on Indictment up to 5 years and on summary conviction up to 2 years. The maximum in default of payment of a fine is 5 years imprisonment on Indictment and 2 years imprisonment on summary conviction.

Under our **Food and Drugs Act** the maximum penalty on Indictment is up to a \$5000 fine or 3 years imprisonment and on summary conviction up to 3 months for a 1st offense and 6 months for a 2nd offense.

Other drug offense penalties are contained in the **Controlled Drugs and Substances Act**, as indicated above, pertaining to schedules III (LSD, DMT, Psilocybin, among others) and IV (barbiturates, benzodiazepines, diazepam and Catha Edulis Fork, among others) generally carry penalties not exceeding 10 years on Indictment and up to 18 months on summary conviction.

Consequently, the question arises as to why the government of Canada proposes to have any penalties on Indictment in the context of a “legalization scheme” for a substance that cannot kill and does not create the massive burdens attributable to society in relation to tobacco, alcohol and other drugs. Further, if they propose to have such an indictable scheme why do they make the maximum 14 years imprisonment, which has the effect of taking away a court’s power to impose a conditional sentence order if the court believes that a penalty of up to 2 years imprisonment is warranted and that it can be served in the community. This option is available in relation to all offenses involving tobacco, alcohol and other drugs so why is it unavailable case of cannabis?

It is submitted that the indictable scheme in the **Cannabis Act** should be eliminated or at the very least, the maximum penalty on Indictment should be reduced from 14 years to no more than 2 years imprisonment. The imposition of a 14 year period of imprisonment for a Cannabis offense would likely be a violation of **section 12 of the Canadian Charter of Rights in imposing a grossly disproportionate sentence that amounts to cruel and unusual treatment or punishment** and/or is at least arbitrary, overbroad and will result in grossly disproportionate effects contrary to **section 7 Charter (see Canada (Atty. Gen.)v. Bedford 2013 SCC 72, Carter v. Canada) Atty. Gen.) 2015 SCC5 and R v. Safarzadeh-Markhali [2106] 1 S.C.R.180)**

With respect to mandatory minimums the **Cannabis Act** proposes to, by **section 204** repeal item1 in schedule II thereby removing cannabis from the CDSA completely and specifically by **section 197(2) to repeal section 7 (2)(b) of the CDSA** that applies specifically to Cannabis and imposes the mandatory minimums brought in by the 2012 amendments. However, this is not likely to occur until on or after July 1, 2018, at least another year away. Consequently, as indicated above, it is submitted that as an interim measure Canada should instruct all federal

Prosecutors to not exercise their existing powers under **section 8 of the CDSA** and not give notice of an intention to impose a mandatory minimum and if a notice has been given to withdraw it.

Further, Canada should instruct its federal prosecutors to only seek actual imprisonment in very serious cases of abuses and generally to seek noncustodial sentences which can include up to 3 years' probation with house arrest and other terms substantially equivalent to the unavailable CSO. Alternatively, it could amend **section 742.1 of the Criminal Code of Canada** by deleting the unavailability of the CSO were mandatory minimums exist or were the maximum is 14 years to life and ensure that they eliminate at least all of the 14 year maximums in all of the provisions in the proposed **Cannabis Act**.

Meanwhile, according to the recent edition of **The Economist (May 12 - 19, 2017)** 33,091, Americans died from opiate overdoses in 2015, almost 3 times the number compared to 2002. Nearly as many Americans were killed by opioids in 2015 as were killed by guns (36,032) or in car crashes (35,0(2). Ordinary folks get into car accidents and end up suffering chronic pain and their doctors prescribe them opiates to which they become addicted over time. As they want more and more there comes a time when the doctor feels obliged to cut them off and in the result they go to the street. They meet the dealer secretly in a dark alley to get more OxyContin or heroin, and now fentanyl and carfentanyl. They shoot up quickly and often miss their veins and don't get primary health care for their abscesses. Some go off and have sex with others and spread diseases, creating a public health crisis. Many are ashamed and don't avail themselves of help by way of what little treatment options available and are often too ashamed to even take advantage of the supervised injection facility. It is the prohibitionist law that drives them into this situation and it will continue to do so until we recognize that this is not a criminal justice problem but a healthcare problem. Importantly, we now know through double blind placebo-based studies that Cannabis is a major exit strategy drug to help get people off opiates. Many former opiate dependent patients have found that Cannabis is effective for their chronic pain and they have stopped using all their opiates and are leading a much more pleasant and productive life with no negative side effects as experienced with the opiates and at a significant reduction in cost to them and to the medical system. The recent **National Academy of Science, Engineering and Medicine (2017)** report reviewed some 10,700 of the studies out of some 24,000 available on PubMed on Cannabis as medicine and concluded that there was conclusive evidence that it is effective to treat chronic pain. <https://www.nap.edu/read/24625> . The "Gateway Theory" of drugs has been proved to be false, and gates both open and close and it is now known that Cannabis leads the way for hard drugs, as one of the best exit strategies.

<http://www.alternet.org/drugs/evidence-overwhelming-cannabis-exit-drug-major-addictions-not-gateway-new-ones>

Canadian drug use

Alcohol, tobacco, caffeine, marijuana, cocaine, heroin, hallucinogens, and various prescription drugs are all examples of psychoactive drugs. In Canada, alcohol is the most widely consumed psychoactive drug (see [Figure 1](#))^{Footnote1} except for caffeine. After water, coffee (which contains caffeine) is the second most consumed beverage in Canada.^{Footnote40}

Figure 1: What psychoactive drugs are Canadians using?

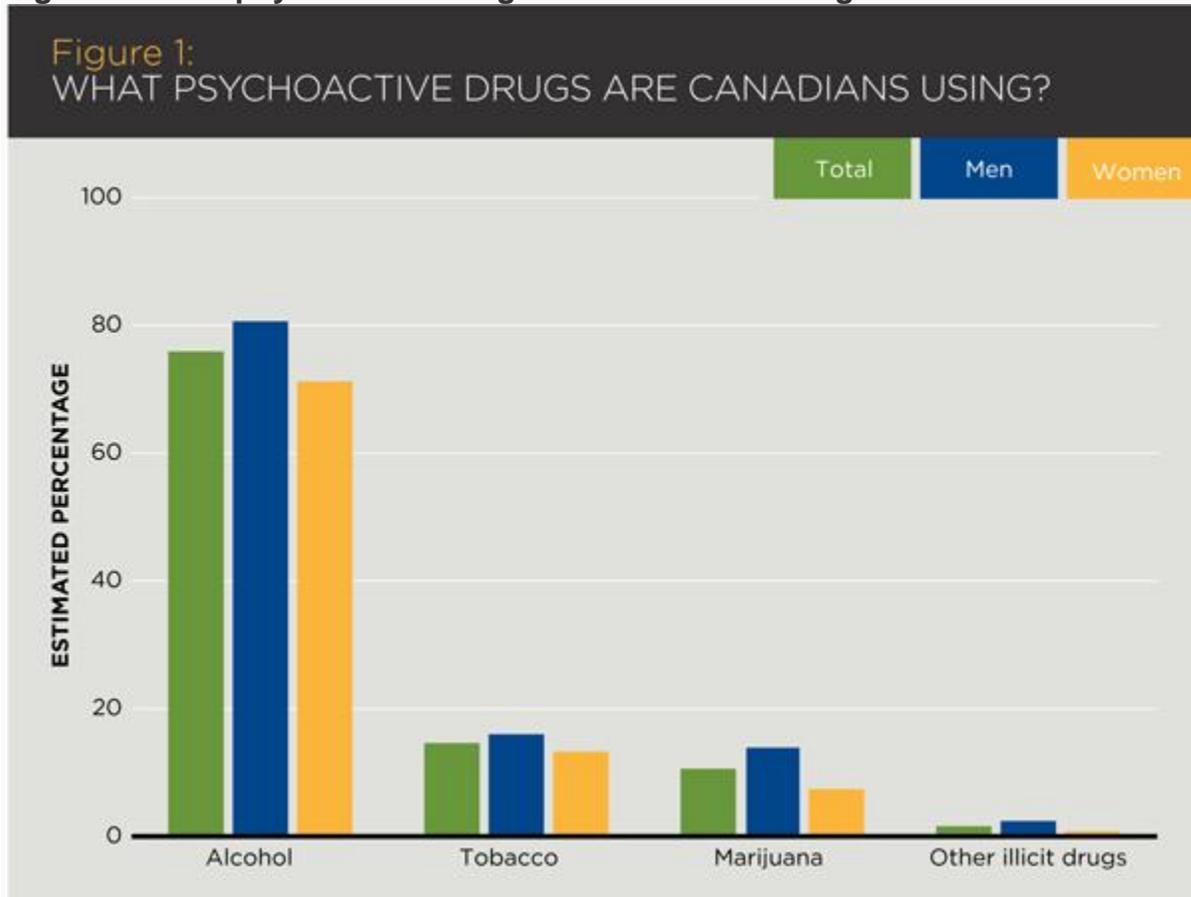


Figure 1 - Text Equivalent

Estimated percentage of Canadians 15 years of age and older in 2013 who consumed alcohol, marijuana and other illicit drugs in the past year and/or regularly smoke tobacco.^{Footnote1}

How can **alcohol be harmful**? Drinking alcohol was the third highest risk factor for global disease burden in 2010, moving up from being ranked sixth in 1990. It was also the top risk factor for poor health in people ages 15 to 49 years.^{Footnote41}

A snapshot of alcohol's impacts on Canadians:

- In 2002, **4,258 deaths** in Canada were related to alcohol abuse, representing 1.9% of all deaths.^{Footnote6}

- Costs related to alcohol in Canada equalled approximately **\$14.6 billion** in 2002. [Footnote6](#)
- From April 2013 to March 2014, **\$20.5 billion** worth of alcohol was sold in Canada. [Footnote7](#)
- In 2008, impaired driving was the **leading cause of criminal death** in Canada. [Footnote8](#)
- Among psychoactive drugs, alcohol-related disorders were the **top cause of hospitalizations** in Canada in 2011. [Footnote9](#)

Risky drinking can result in a wide range of negative impacts on society, including increased rates of premature death, disability and disease, impaired driving, reduced productivity, a burdened health care system, and high financial burden to both the individual and society. e.g., [Footnote6Footnote8Footnote9Footnote42-48](#)

Globally, alcohol was linked to over 3 million deaths per year in 2012, slightly more than lung cancer and HIV/AIDS combined. [Footnote48-50](#)

At the individual level, alcohol affects a wide variety of biological systems in a dose-dependent manner, leading to impacts on health, well-being, and behaviour over both the short and long term (see [Table 1](#)).

For example, the International Agency for Research on Cancer (IARC) of the World Health Organization (WHO) has classified alcoholic beverages, ethanol in alcoholic beverages and acetaldehyde associated with the consumption of alcoholic beverages as carcinogenic to humans. This means that alcohol consumption is capable of increasing the incidence of cancer in a population. It can also reduce the length of time cancer is present but inactive in the body, increase cancer's severity, and increase the number of tumours or types of cancer present. [Footnote51](#)

The IARC's [World Cancer Report 2014](#) and the [Canadian Cancer Society](#) state that **there is no "safe limit" of alcohol consumption** when it comes to cancer prevention.