



Technical Brief of Bill Jeffery, LLB,
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before the
Senate Standing Senate Committee on Social Affairs, Science and Technology regarding
[Bill S-228, An Act to amend the Food and Drugs Act](#)
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The Ottawa-based Centre for Health Science and Law publishes *Food for Life Report* and advocates stronger public health nutrition policies. CHSL does not accept funding from industry or government.

A. INTRODUCTION

I will begin by emphasizing that I support efforts to protect children from commercial advertising, especially junk food advertising because nutrition-related illnesses cause approximately 50,000 deaths in 2015 in Canada due to heart disease, stroke, diabetes, and cancers caused mainly by consuming too many calories, too much sodium, trans and saturated fat, and refined sugars, and too little fruit and vegetables.¹

However, legislated safeguards should be as effective as possible at protecting children's health and should be designed in a way that anticipates that industry will take full advantage of regulatory loopholes and constitutional legal vulnerabilities inherent in nutrition-based advertising restrictions.

The world's first ban on advertising to children was implemented in Quebec.² Since 1980, the Quebec *Consumer Protection Act* has prohibited all advertising directed at children under the age of 13, not just food ads. Parti Quebecois and Liberal governments in Quebec successfully defended the popular law for nearly a decade in the courts culminating in a landmark 1989 freedom of expression ruling in which the Supreme Court of Canada said that advertising to children is:

*...per se manipulative. Such advertising aims to promote products by convincing those who will always believe.*³

The *Irwin Toy* decision has become a pillar of Canadian constitutional law, having been followed approximately 200 times, including by more than two dozen subsequent Supreme Court judgements and nine appeal courts in three decades. This April, Justice Canada listed [Irwin Toy as #8 in the top 35 decisions](#) when marking the 35th anniversary of the *Charter of Rights and Freedoms*.

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Also, many of the recommendations of this Committee's report [Obesity in Canada](#) pertain to the health benefits of physical activity and health disadvantages of excess screen-time. Indeed, every major report on obesity published by the provincial government, federal government, and international authorities concerning obesity prevention have stipulated a causal role of decreased physical activity and a remedial role for increased physical activity, including reports published by the World Health Organization, World Bank, Organization for Economic Cooperation and Development, World Cancer Research Fund, House of Commons Standing Committee on Health, and the Ontario government's Healthy Kids Panel.⁴ The Seattle, Washington-based Institute for Health Metric and Evaluation's [Global Burden of Disease database](#) estimates that low physical activity caused more than 10,000 deaths in Canada in the year 2015.

Advertising to children probably promotes physical inactivity even more than poor diet due to the sheer volume of advertisements, which are likely to rise following a junk-food-only advertising ban.

The Minister of Health's mandate letter instructs her to pass legislation that would restrict advertising to children—an election platform commitment—though she has no direct authority over most non-food advertising. Obviously, this Committee is not confined in this way.

Proponents of the junk-food-only ad-ban approach have been perhaps too optimistic about the resilience of that approach against even numerous legal challenges by food companies, of the sort that toy, tobacco, and a host of food companies have used repeated in recent years in Canada and the U.S. to undermine public health regulations.

That said, the combined health risks of junk food marketing are likely greater than for any other products and it makes sense for children to benefit from the authority and vigilance of CFIA inspectors and the *Food and Drug Regulations* is a good place to prevent food companies from using food labels to entice kids. So I want to emphasize two reforms to strengthen the public health impact of *Bill C-228* and to help defend it against legal challenge:

1. PROTECT MINORS FROM BEING MISLED, REGARDLESS OF THE PRODUCT:

The vulnerability of minors—both children *and* teens—to influence by commercial advertising for all products (not just food) has been noted by researchers, developmental psychologists, and the Supreme Court of Canada in the *Irwin Toy* decision. Rather than imply that it is ok to trick minors with non-food ads or food company logos (so long as nutritionally inferior foods are not shown), *Bill S-228* should expressly recognize the vulnerability of all children and adolescents to commercial advertising for all types of products. This conclusion is already indicated, indirectly, by recital #11 in the preamble.

By focusing on only some foods (and ignoring ads for all other products), *Bill S-228* may also deprive the government of the justification for curbing advertising to children that has already been accepted by the Supreme Court of Canada, namely that children are vulnerable to such manipulation. This justification is important, and could become essential to defend *Bill S-228* if it were attacked by a food company as *Irwin Toy* attacked Quebec's law in 1980.

Also, a nutrient-based ban on advertising may be incapable of shielding children from ads for:

- sugary soft drink and restaurant logos/mascots,
- nearly identical-looking ads for diet drinks,
- fast food restaurant “places,” and

- “trophy” nutritious foods sold as restaurants (such as salads)

which collectively account for as much as 60% of products currently advertised to teens according to the US Federal Trade Commission and some Canadian estimates as other witnesses will attest.

Prohibiting all advertising directed at children (as Quebec has done) is much more legally defensible, than an exclusively food, or nutrient-based limit. Making amendments to the *Competition Act* in addition to the *Food and Drugs Act* could ensure that the spirit of the law—child protection—is better realized. So, I propose adding the following two sections to Senator Greene Raine’s Bill:*

5.1 The Competition Act is amended by adding the following after subsection section 52(4)

(4.1) For the purposes of section 52(1), any representation directed to a minor, as defined by provincial law and, at least, anyone under age 18, shall be deemed to be knowingly or recklessly making a representation to the public that is false or misleading in a material respect.†

5.2. The Competition Act is amended by adding the following after subsection 74.01(1)

74.01 (1.1) For the purposes of subsection 74.01 (1), any representation directed to a minor as defined by provincial law and, at least, anyone under age 18, shall be deemed to be false, misleading, and reviewable.‡

2. RAISE THE AGE OF PROECTION TO 18 OR 19, PER APPLICABLE PROVINCIAL LAW

Teenagers also lack the cognitive maturity and life experience to interpret commercial advertising and deserve protection from merchants by legislators.

According to [A Review of Food Marketing to Children and Adolescents](#) published by the U.S. Federal Trade Commission (the counterpart to Canada’s Competition Bureau) using evidence extracted from food companies by subpoena, the typical American adolescent is targeted by approximately double the advertising spending compared to pre-teens. Comparable Canadian data is proprietary, expensive to purchase, and therefore not publicly available.

Provincial law sets the age of majority as 18 in six provinces and 19 in seven provinces and territories.

* The title of *Bill C-228* and recital #11 in the preamble could help reflect this amendment as follows:

BILL S-228, An Act to amend the Food and Drugs Act ~~and the Competition Act~~ (prohibiting ~~food and beverage~~ marketing directed at children)

Preamble recital #11: Whereas the protection of vulnerable children from the manipulative influence of marketing of food, ~~and~~ beverages, ...and other products, many of which promote sedentary leisure, is predicated on a pressing and substantial concern and calls for a federal legislative response;

† Section 52 (1) of the *Competition Act* currently states:

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect...(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

‡ Section 74.01 (1) currently states:

A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, (a) makes a representation to the public that is false or misleading in a material respect;

Canada is a signatory to the *International Convention on the Rights of the Child*⁵ which defines a child as someone younger than 18. Ironically, subsection 9(1) of the federal *Competition Act* stipulates that, to formally request that a misleading advertisement be investigated, an applicant must be at least “eighteen years of age.” *Irwin Toy*⁶ also summarized the legal position of children in the marketplace as follows: “to protect a group that is most vulnerable to commercial manipulation ... [is] reflected in general contract doctrine.... Children are not as equipped as adults to evaluate the persuasive force of advertising and advertisements directed at children would take advantage of this.”⁷

There is no compelling public policy justification to for companies to target children aged 16-19, let alone 13-19 with commercial advertising. Appeasing commercial advertisers comes at the expense of the politically less powerful teenagers and their parents. Companies whose business model depends on bypassing parents do not deserve the protection of the federal government.

3. A NOTE ABOUT NUTRITION CRITERIA

The lion’s share of ill-health caused by poor diet relates to inadequate consumption of fruit, vegetables, legumes, nuts, seeds and whole grains, none of which would necessarily be advertised under a system focused on blocking only products high in saturated fat, sugar, or salt.

Senator Greene Raine stated her plans to let the Minister of Health define “nutritious” in subordinate regulations. However, to my understanding, no such definition has ever been proposed by Health Canada and Senator Greene Raine’s bill was originally drafted to restrict child-directed ads for *all* foods on the widely held belief that such a definition is elusive. More concerning is that nutrient-based nutrition standards could do nothing to prevent, for example, Pepsi or Coca-Cola from doing brand advertising or marketing diet drinks to children unless, for instance, permissible ads were restricted to unprocessed non-starchy fruits and vegetables with little or no added sugar, saturated fat or salt, or to companies and restaurants that sell mostly such unprocessed fruits and vegetables. Would children’s health be well served by rules that led to a proliferation of advertisements for:

- diet pop,
- roast beef lunch meat,
- white bread, pasta, and rice,
- logos and mascots for soft drink manufacturers,
- restaurants,
- Rice Crispies,
- video games, and
- TV shows and movies?

Without minimum healthful ingredient requirements (in addition to maximum nutrient limits), nutrition-based ad limits would do little to curb fast food restaurants from promoting their eating place or indirectly their entire menu by featuring, for example, a salad or bottle of water during Saturday morning cartoons.

Be forewarned, limiting ads for all but highly nutritious foods and restaurants selling mostly nutritious foods will partially contradict existing nutrition regulations (such as weak criteria for label claims for cancer risk reduction, food that are low in fat, etc.) and policies such as the current version of *Canada’s Food Guide* (which promotes cheese, beef, juice, and white bread) could fuel legal challenges to which

public food procurement (including school nutrition standards), food tax rules, and sodium/trans fat reformulation rules would not be as vulnerable.

Thus, weak nutrition standards for advertising food to children and failing to recognize the vulnerability of children to all advertising could result in an utterly failed effort to protect children and, in that sense, could lead to expensive, time-consuming litigation and rampant exploitation of loopholes, not stepping stones toward progress. These risks can be avoided by relatively simple reforms to *Bill S-228*.

References

¹ See the Seattle, Washington-based Institute for Health Metrics and Evaluation’s disease risk factor calculator, the Global Burden of Disease report, which uses country data compiled by the World Health Organization, to estimate, e.g., that approximately 51,000 deaths in Canada in the year 2013 were due to dietary risks: <http://vizhub.healthdata.org/gbd-compare/>. Also, World Health Organization. *Global Health Risks: Mortality and burden of disease attributable to selected major risks*. 2009. W.H.O. Geneva. See, esp. p. 17. Available at: http://www.who.int/healthinfo/global_burden_disease/GlobalHealthRisks_report_full.pdf
Statistics Canada. *Mortality, Summary List of Causes, 2008*. 2011. Ottawa. Catalogue no. 84F0209X which indicates the total number of deaths in 2008 was 238,617, 20% of which is: 47,723. Available at: <http://www.statcan.gc.ca/pub/84f0209x/84f0209x2008000-eng.pdf>

² Food advertisements are outnumbered by ads for TV shows, movies, video games and other products that promote sedentary play. Furthermore, the most comprehensive legally binding limits on marketing to children in the world (esp., in Quebec, Sweden,² Norway,² and Brazil) are based on the principle that children are vulnerable to manipulation by marketing. The United Kingdom has a nutrient-based ban on marketing of certain foods target at children under the age of 16. However, several evaluations of it conducted by the UK Government, the World Health Organization, and independent British academics have found a very small benefit, and one study even found a slight rise in exposure of children to such advertising following the implementation of the UK regulation. Importantly, the hope that a market for advertising nutritious foods would be created has not been realized in the UK. So much TV programing in the UK is already commercial-free for all ages anyway, unlike in Canada (i.e., BBC1, BB2, BBC3 and other channels broadcast commercial-free to children as well as adults).

³ *Attorney General of Québec v. Irwin Toy, Ltd.*, [1989] 1 *Supreme Court Reports* 927 at 988-9. See also: Bill Jeffery, “The Supreme Court of Canada's Appraisal of the 1980 Ban of Advertising to Children in Quebec: Implications for "Misleading" Advertising Elsewhere.” 39 *Loyola of Los Angeles Law Review* 237-276 (2006).

⁴ See, for instance:



⁵ Article 1 of the United Nations *International Convention on the Rights of the Child* states: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” United Nations Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Available at: http://www.canadiancrc.com/UN_CRC/UN_Convention_on_the_Rights_of_the_Child.aspx

⁶ [1989] 1 *Supreme Court Reports* 927 at 988-9.

⁷ [1989] 1 *Supreme Court Reports* 927 at 990.

Att. #1: Permeability of a nutrient-based ad ban may leave exposure to ads for junk food & sedentary leisure products unchanged.

Applying sat-fat, free sugar, and sodium nutrition criteria as a regulatory limit to products advertised to children

CAN restrict ads for these nutrient-poor foods: But likely can **NOT** restrict ads for places, hints & logos:



Att. #1: 1981 Canadian public support for banning ads to kids was even higher than for, now-banned, tobacco ads.

Q: Would you say you favour greater control (than governments already exert in 1981) over:

advertising **cigarettes** and other tobacco products?

49%
agreed

advertising which is **directed at children?**

59%
agreed

Source: 1981 Decima Quarterly survey of 1,500 Canadians.