



Bureau of Nutritional Sciences, Food Directorate
251 Sir Frederick Banting Driveway
Tunney's Pasture, Postal Locator 2203E
Ottawa, Ontario K1A 0K9
E-mail: bns-bsn@hc-sc.gc.ca and bpjia-bpaii@hc-sc.gc.ca

June 19, 2023

Re: Comments on Policy update on restricting food advertising primarily directed at children

Please consider the following comments on the proposal.

1. General comments regarding the narrow scope and large loopholes from the restrictions

a) Missing restrictions for other unhealthy foods

Our specific recommendations should be qualified by the disappointment with the fact that the government proposes to restrict advertising to children only if foods of specifically ascertainable nutrient composition are depicted or described in the advertisement (and only in relation to foods that are high in added saturated fat, sodium and total sugar), and only in some advertising channels.

This implicitly condones advertising of, for instance,

- white, refined grain bread,
- red meat,
- butter, coconut and palm oil, and high-fat milk (even whipping cream)

which, alone, collectively cause double the number of deaths attributed to foods high in saturated fat, sodium, and sugar. (See appended chart.)

Although these foods are not currently widely advertised to children, the focus on foods that cause only 20% of diet-related deaths and perpetuating the view that the only nutritional shortcomings of, for instance, a white-bun hamburger (both of which are generally also exempt from front-of-pack nutrition labelling warnings) are the added-sugar and added-salt condiments does not comport with independent, peer-reviewed nutrition science and can mislead consumers about the nutritionally recommended diet.

(b) Scope of television and digital media is too narrow

The proposal indicates that restrictions apply to television/movies and websites/social media, but do not restrict advertising on packaging, in sports sponsorship, physical settings such as schools, recreation centres or cinemas, or in other forms of media such as radio and magazines.

These loopholes for media channels of communication appear like a five-year invitation for food companies to shift their share of the total spending of \$629 million in advertising spending from

digital and television to spending to sport sponsorship, schools, recreation centres, radios and magazines.

The so-called targeted approach admits a great deal of tolerance of exploiting the vulnerability of children and teens which is illustrated most vividly by excluding schools from the scope of the law. If so, the government should be transparent about its desire to prioritize commercial interests over the health and dignitary interests of children.

c) Loopholes possible with using images of nutritionally ambiguous foods

For the foods most frequently advertised to children currently—especially, fast food restaurants and sugary soft drinks—the proposed regulations will require only a modification of companies’ approach to advertizing, not a true restriction. What benefit will accrue to parents and children if companies only switch from ads with specifically depicted or named foods to ads with nutritionally ambiguous foods (like Happy Meals and brown pop which could be regular or sugar-free Coke), or ads featuring mascots such as Ronald MacDonald, Santa Claus, or other mascots?

d) Health Canada proposes to allow companies to continue to allow advertise on package labels, such as those of sugary cereals.

Sugary breakfast cereal is notorious for using food labels for promotional advertising, partly because such foods are sold in large boxes with plenty of available label space to display ads, mascots, and promote contests, etc. and the likes cartoon Count Chocula, Toucan Sam, Captain Crunch, and Tony the Tiger? The health impact of the effectiveness of such label ads is significant because these foods are generally consumed daily and often purchased at grocery stores by parents accompanied by impressionable children and during unsurpassed opportunities to exert pester power at the point of product choice.

Provincial governments lack the constitutional authority to regulate food labels so Health Canada’s refusal to do so is tantamount to offering manufacturers’ food labels as a conduit to manipulating children, regardless of the nutritional merits of the food, except to the extent that doing so violates section 5 of the *Food and Drugs Act*:

5 (1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

2. The proposal failed to consider the harmful precedent set by condoning large categories of commercial manipulations in major media channels, age of the target market, nutrition risk feature, and method of manipulation.

Allowing some forms of advertising appears to deprive the government of the most reliable legal defence of restrictions on advertising to children, the Supreme Court of Canada judgement in the historic freedom of expression case in which the court opined that children are vulnerable to manipulation: *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927, Available at: <<https://canlii.ca/t/1ft6g>>.

Allowing children to be exposed to so much advertising implies that the federal government condones much more commercial manipulation of children than the Quebec government and, by extension, is not relying on the policy of preventing manipulation to justify the federal law if it were challenged in court.

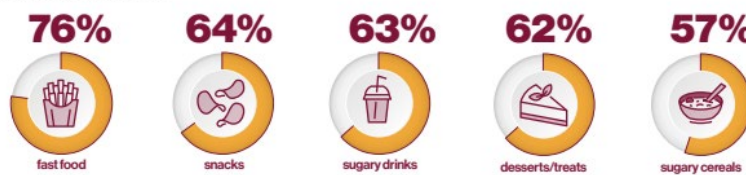
3. The “targeted approach” seems contrary to the purpose of the enabling statute (the *Food and Drugs Act: to protect consumer health and prevent deception*) and the implied purpose of the proposed *Bill C-252* that spurred interest in this issue (to protect children who are vulnerable to manipulation and protect their health).

Health Canada expressly recognizes that children and teenagers are vulnerable to manipulation by advertising, yet it expressly authorizes such manipulation when targeted to all teenagers, and expressly authorizes it for all ages, indefinitely, on package labels, in movie theatres, in children’s festivals, and in print and radio communications.

The proposed approach will prohibit a small number of forms of advertising for some products in some advertising channels and only in regards to manipulating pre-teens children into pestering their parents to buy so-promoted commercial foods. (Pre-teens generally do not make purchases directly.)

Considering the findings reported by Health Canada’s monitoring infographic, the proposed exemptions seem conspicuously defined to provide relief to the most prolific advertisers to children:

These percentages of children and teens reported seeing ads for these products at least once a week:⁷



According to the proposal, exemptions for ads for restaurants that do not feature specific foods, ambiguously identified soft drinks, and package labels (esp. for breakfast cereal), and allow logos and mascots so wisely known as synonymous with junk food generally can proceed unfettered.

The targeted approach seems strange and ironic; the purpose should be to protect children from being targeted by commercial food companies. Instead, it is festooned with loopholes that can only be explained by unacknowledged capitulations to industry pressure related to the exemptions.

There does not appear to be a counterpart for limitations on advertising to adults. For instance, misleading and deceptive advertising is prohibited for all products to all adults anywhere, not permitted for certain products, in certain media, or using certain techniques. Likewise, for bait-and-switch, price-fixing, food safety, etc.

The rationales provided for the exemptions include “taking a targeted approach,” and “being consistent with the approach in other [unnamed] jurisdictions.” These explanations are bare assertions that lack meaningful explanatory power.

The explanation that Health Canada wishes “minimizing impacts on advertising [of nutritionally risky foods] to adults” does not seem to be a valid rationale for exemptions under the *Food and Drugs Act*. Parliament did not authorize the government to use its exempting authority to worsen the health of sub-populations (adults & children), or elevate concern for adult consumers or industry above children, or promote certain business interests (as a reward for lobbying forcefully).

As the comment at page three of the Question & Answer noted, the proposal:

“aligns with the legislative framework proposed by Bill C-252, an Act to amend the Food and Drugs Act (prohibition of food and beverage marketing directed at children), which is currently being considered in Parliament.”

To be clear, the proposed Governor-in-Council regulations are authorized by Parliament under section 30 of the current *Food and Drugs Act*, though apparently only for the purposes of health-protection and prevention deception.¹ If passed by both Houses of Parliament and proclaimed in force, *Bill C-252* will also authorize regulatory restrictions on advertising of certain foods to some children in some media, however, that bill does not purport to narrow the amount of protection that the Governor-in-Council could confer on children pursuant to the broad regulatory authority conferred on the Government by section 30, nor does it narrow the scope of prohibitions on misleading and deceptive advertising in sections 52 and 74 of the federal *Competition Act*.

While consideration of *Bill C-252* may have served as a political impetus for the Minister to consider elaborating regulations to limit advertising food to children, the bill is entirely dependent on regulations to be implemented by the Governor-in-Council to be operative and, in no way binds the Governor-in-Council. The courts generally apply a presumption of consistency except where compliance with both is not possible.²

Likewise, while administrative law challenges to regulations in Canada are much rarer than in the United States and much rarer in Canada than challenges to administrative decisions made in respect of individuals, some courts have ruled that exemptions from regulations must comport with the purpose of the enabling statute.³

4. More effectively bringing restaurant advertising within the scope of the Regulations

The failure to block advertising targeting children for restaurant places or ambiguously described foods essentially allows companies to escape child protection measures by obscuring the identity of the threat.

It is ascertainable from publicly available menu nutrition data, for instance, that the vast majority of food sold at McDonald's (and most fast-food restaurants) is high in sugar, sodium, and/or saturated fat, with the nutrient-poor exception of diet soft drinks, as well as this low-volume sales of bottled water, unsweetened milk, carrots, and fruit slices. The same is true for the fare at Tim Horton's, the largest restaurant chain in Canada. No matter what Tim Horton's might advertise, the clear expectation is that young children exposed to ads for those places will consume the sodium, sugar, and saturated fat-rich sandwiches, doughnuts, drinks, and other nutrient-poor treats.

Health Canada should consider developing an overall assessment of restaurant menu options to determine whether restaurant ads directed at children for those places is prohibited regardless of whether a specific single food or meal is featured.

The Q&A recognizes, at least, the importance of assessing each component of a meal featured in advertisements to determine if the ad is permissible:

In the case of restaurant meals, each component would be assessed separately. The entrée, side dish and drink would each need to be assessed against the nutrient thresholds to determine if the meal could be advertised to children.

5. Prohibiting advertising to children of nutritionally ambiguous foods.

Likewise, the regulations could stipulate that any ambiguity about the identity of other foods that prevents the viewer from determining amounts of sodium, saturated fat, or sugar should be presumed to disqualify that food from exemption from the regulatory limits on advertising to children, including general branding advertising.

6. Consider conclusions of experts such as INFORMAS & a Child Rights Impact Assessment.

The Q&A cites an INFORMAS survey of schools as a useful method for monitoring advertising practices. INFORMAS (International Network for Food and Obesity/Non-communicable Diseases Research, Monitoring and Action Support) is a global network of public-interest organisations and researchers that aims to monitor, benchmark and support public and private sector actions to increase healthy food environments and reduce obesity and NCDs and their related inequalities.

In 2023, INFORMAS continued its updates and evaluation of the state of food and nutrition law and policy in Canada at the federal and provincial level with expert meetings in Toronto and online. Consider reflecting on the conclusions of experts in that process in shaping any regulatory measures before proposing regulations in *Canada Gazette, Part I*.

Legal restrictions that are approached in a way that only makes minor changes to advertisements for a small number of products posing a small risk, in only a few advertising channels will have a foreseeably puny impact on children's health and fundamentally fail to protect children.

This government came to power on a promise of giving due consideration to experts and data, but if the civil service only provides data that glorify the pre-set Ministerial mandate letter commitments, then there is little point in valorizing science or employing scientists.

Please also consider whether this "targeted approach" would survive a child rights impact assessment analysis.

7. Compliance

Question response #32 on page 12 states:

Our responses to non-compliance could include non-compliance letters and other responses available under the Food and Drugs Act, including in some cases, prosecutions and fines of up to \$250,000 for those convicted of an offence.

The Regulatory Impact Assessment predicted to be published in the *Canada Gazette, Part I* in the spring of 2023 should indicate, for the purposes of transparency, how many times in the previous five years or longer any food company had been fined and by how much for all food-related offences and for nutrition-related offences. Food companies have supplied Canadians with nearly one trillion dollars worth of food during that five-year period, but ordered to pay [fines](#) or [administrative monetary remedies](#) for violating all food-related laws in the low millions of dollars range and nutrition-related offences penalties likely near zero dollars.

Respectfully submitted,



Bill Jeffery, BA, LLB, Executive Director and General Legal Counsel
Centre for Health Science and Law

Risk Factor	2019 Deaths in Canada	Red meat, whole grains (substitutes for refined grains)	Salt, sugar, and added Saturated fat (a substitute for polyunsaturated fat),
Dietary risks	35,833		
Diet low in whole grains	9,228	9,228	
Diet low in legumes	5,715		
Diet high in red meat	5,436	5,436	
Diet high in sodium	4,296		4,296
Diet low in fruits	3,645		
Diet high in processed meat	3,139		
Diet low in vegetables	2,251		
Diet low in fiber	2,112		
Diet low in polyunsaturated fatty acids	1,764		1,764
Diet high in sugar-sweetened beverages	1,358		1,358
Diet low in seafood omega-3 fatty acids	1,303		
Diet low in milk	1,263		
Diet low in calcium	863		
Diet low in nuts and seeds	296		
SUB-TOTALS		14,663	7,418

Institute for Health Metrics and Evaluation (IHME). Global Burden of Disease Study 2019 (GBD 2019) Results. Seattle. USA. Available at: <https://vizhub.healthdata.org/gbd-results/>

ENDNOTES

¹ The regulation-authority in the Act reads, in part: “**30 (1)** The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect, and, in particular, but without restricting the generality of the foregoing, may make regulations...

(b) respecting

(i) the labelling and packaging and the offering, exposing and advertising for sale of food, drugs, cosmetics and devices,...

to prevent the purchaser or consumer thereof from being deceived or misled in respect of the design, construction, performance, intended use, quantity, character, value, composition, merit or safety thereof, or to prevent injury to the health of the purchaser or consumer;”

See: <https://laws-lois.justice.gc.ca/eng/acts/f-27/page-4.html#h-234432>

² Stéphane Beaulac, *Handbook on Statutory Interpretation - General Methodology, Canadian Charter and International Law*. LexisNexis: Markham, 2008 at pages 179-183.

³ For instance, see: *Friends of Simcoe Forests Inc. v. Minister of Municipal Affairs and Housing*, 2021 Ontario Superior Court 3813 (CanLII). Available at <https://canlii.ca/t/jg409> which states: “I appreciate that governing is not the role of the courts, hence the strong presumption in favour of the *vires* of a regulation. However, interpreting laws in a way that upholds, rather than undermines, the rule of law is fundamental to the court’s mandate.”