



**Technical Brief of Bill Jeffery, LLB,
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To the
Standing Senate Committee on Social Affairs, Science and Technology regarding
Bill S-252, An Act to amend the Food and Drugs Act
November 15, 2024

I support efforts to protect children from commercial advertising, especially junk food advertising because nutrition-related illnesses cause approximately 26,000 deaths in 2021 in Canada due to heart disease, stroke, diabetes, and cancers caused mainly by consuming too many calories, too much sodium, red and processed meat, and too little whole grains, fruits and vegetables, and polyunsaturated fat (instead of saturated fat) and, to a lesser extent, too much refined sugars.¹

The problem with promoting nutrition-poor foods to children is that it can lead to lifelong dietary patterns that cause premature death and illness in late adulthood, and contribute to precursors health risks that are detectable in childhood in childhood, like weight-gain, that is extremely difficult to reverse.²

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.

Please consider the following comments:

1. Progress on Bill C-252, its precursors, and parallel health regulations has been slow.

It has been more than eight years since an earlier version of the bill, *Bill S-228*³, was introduced in the Senate and eventually proposed to provide more protection for children before being passed by both chambers of Parliament. However, that bill failed to become law.⁴

Restricting advertising for certain foods to children has been in the Health Minister's mandate letter since 2015. Section 30 of the *Food and Drugs Act* currently authorizes (and has for decades) the government executive branch to promulgate regulations to, among other things:

Regulations

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;⁵
[underscoring emphasis added)

Health Canada confirmed this in a “policy update” emailed to stakeholders on June 5, 2023 by stating:

“Health Canada’s policy update is separate from Bill C-252, in that the policy could be implemented under existing regulatory authorities under the Food and Drugs Act, or new authorities if Bill C-252 receives Royal Assent... This policy will form the basis of a draft regulatory framework that would be proposed in the Canada Gazette, Part I for public consultation (currently anticipated for Spring 2024)” [underscoring emphasis added]

According to a further policy update from Health Canada posted on Health Canada’s website on October 11, 2024, those regulations have not yet been proposed in *Canada Gazette, Part I*.⁶

2. The child protection measures promised in Bill C-252 are meagre and could be enhanced by revisions that seem consistent with the principles of the bill and its ambitious-sounding title.

The protections in *Bill C-252* are limited to young children, a narrow concept of nutritional inadequacy, and an approach that allows the biggest purveyors of junk food to only tweak their ads to comply.

While passing *Bill C-252* in its current form could provide a small benefit to children it leaves the impression that Parliament believes that it is acceptable to:

- manipulate teenage children with commercial advertising even though the Supreme Court of Canada has made clear that determining whether advertising is misleading should consider the vulnerability of the “credulous and inexperienced consumer;” even when targeting adults;⁷
- merely study the manipulation of the impact of commercial advertising to older children;
- manipulate pre-teen children with commercial advertising for the vast majority of products and services—such products that promote sedentary play, diet energy drinks, violent video games—except those high in saturated fat, sodium, or sugar; and
- promote familiar brands such as Coca-Cola, Red Bull, McDonald’s, Happy Meal boxes, Dairy Queen, Tim Hortons, etc., and any place where non-nutritious food is sold.

I encourage the Standing Senate Committee on Social Affairs, Science and Technology to propose improvements to this House Bill to the full extent of its constitutional authority. The “chamber of sober second thought” should ensure that children are effectively protected in the little time remaining in this Parliament by:

- proposing amendments to this bill to raise the age of protection to cover all children;
- give Health Canada the regulatory mandate and flexibility to ensure that companies are prevented from promoting all foods that are health-eroding, not just ones that are harmful due to the amounts of sodium, saturated fat, and sugar; and
- take other legislative measures to protect children from manipulation by all forms of commercial advertising.

Invite MPs to accept such revisions or reveal publicly why weak features of the Bill should be preserved, if they are so inclined.

3. Possible reforms to *Bill C-252* or approaches for supplementary children-protection legislation.

A. Raise the age of child protection to the age that childhood ends.

Protecting teenagers as well as young children seems viable within the scope of the current bill and is consistent with harm to teenagers recognized in the preamble. 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 US 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, subject to non-disclosure agreements, and not publicly available.

Provincial law sets the age of majority as 18 in six provinces and 19 in seven provinces and territories. Canada is a signatory to the *International Convention on the Rights of the Child*⁸ 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." The Supreme Court of Canada, in *Irwin Toy*, 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."*⁹

There is no compelling public policy justification for allowing companies to target children aged 13-18 or 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 or the Senate.

Because most children under the age of 13 do not make their own food purchases without adult supervision, and elementary schools typically do not even have vending machines and cafeterias, restrictions on advertising to such young children mainly protect parents from the nuisance of pestering by their children, and only indirectly protect children. Teenagers often manage some of their own funds and make some purchases on their own, so sheltering them from commercial marketing of all types would be more respectful of their vulnerability to advertising.

In its current form, the overbroadly named *Child Health Protection Act* only proposed to protect pre-teen children and observe the experiences of teenage children. Expanding the scope of advertising restrictions to all children aged 0-17 (rather than the subset of children aged 0-12) is more consistent with both the bill's short and long titles and Canadian Supreme Court jurisprudence.

If nothing else, the title of the bill should be changed from the vastly overbroad “*Child Protection Act*” to the “*Protect Some Vulnerable Children from Some Ads for Some Foods Act*.”

B. Add a clause to delegate Health Canada the authority to create advertising restrictions that consider the evidence of healthfulness that relates other food features (not just sodium, saturated fat, and sugar).

Parliamentarians from both houses are not experts in nutrition policy so limiting the scope of the government regulators to sodium, saturated fat, and sugar features of food is a recipe for poor public policy. 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. The Seattle-based Institute for Health Metrics and Evaluation’s Global Burden of Disease Database provided estimates of the population-attributable risks for dozens of risk factors (including dietary components) for most countries, including Canada. The following chart illustrates the number of deaths estimated to be attributable to various aspects of the Canadian diet; the features specified in *Bill C-252* (highlighted in green) comprise approximately one-quarter of the total risk of poor diet and are inadequately attentive to several more important risk factors, some of which could be addressed by rules prescribing amount minimum amounts of healthful ingredients like whole grains, fruits, and vegetables.

Dietary Risk	Estimate Deaths in 2021	Deficiencies of Bill C-252 approach
Dietary risks	26,212	
Diet low in whole grains	6,482	No reference to refined grains
Diet high in red meat	4,331	No reference to red meat
Diet low in fruits	3,857	
Diet high in sodium	3,646*	
Diet low in polyunsaturated fatty acids	3,290	Though Bill C-252 aims to reduce saturated fat, promotion of PUFA is not precisely promoted.
Diet low in vegetables	3,095	
Diet high in processed meat	2,835	Most processed meats are high in sodium
Diet low in fiber	1,782	No reference to low-fibre foods
Diet low in seafood omega-3 fatty acids	1,400	
Diet low in legumes	1,377	
Diet low in milk	1,120	
Diet high in sugar-sweetened beverages	499	Canada's use of total sugar limits may be insufficient
Diet low in calcium	451	
Diet low in nuts and seeds	406	
* IHME estimates of high-sodium risks are under review.		

Also concerning is that nutrient-based nutrition standards could do nothing to prevent, for example, Pepsi or Coca-Cola from doing brand advertising so long as no nutritionally ascertainable food is depicted.¹⁰ 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.

Children's health would be poorly 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 and fast-food restaurants,
- Rice Crispies,
- video games, and
- TV shows and movies.

C. Expand the scope of advertising restrictions to non-food products and services.

The Minister of Health's mandate letter instructs him to pass legislation that would restrict advertising to children—an election platform commitment—though he has no direct authority over most non-food advertising. Similarly, the scope of the *Food and Drugs Act* does not extend to relevant non-food items.

Obviously, this Committee is not confined in this way.

The world's first ban on advertising to children was implemented in Quebec.¹¹ 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.*¹²

The *Irwin Toy* decision has become a pillar of Canadian constitutional law, having been followed more than 200 times, including by more than two dozen subsequent Supreme Court judgements and nine appeal courts in three decades.

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.¹³

Advertising to children may promote 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.

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 children.

In *R. v. Time Inc.*, the Supreme Court has expressed its view that, in considering whether commercial advertising is misleading, it must consider it from the perspective of a “credulous and inexperienced consumer;” presumably that standard would be especially unforgiving for advertisements targeted or received by children, regardless of what specific impact they may have on physical or mental health.¹⁴

The Standing Committee on Social Affairs, Science and Technology could help, at least, correct the record by ensuring that nothing in *Bill C-252* is intended to interfere with any additional legal protections that children may have at common law or the broad restrictions on misleading and deceptive advertising in the *Food and Drugs Act* and the *Competition Act*. As the preamble to *Bill C-252* notes, for instance,

“Whereas children are particularly vulnerable to marketing and its persuasive influence over their food preferences and consumption; And whereas persons who are between 13 and 17 years of age are also vulnerable to marketing and its persuasive influence over their food preferences and consumption...”

Expanding advertising safeguards for children to non-food items may exceed the scope of *Bill C-252* even though it is well within the scope of its short and long titles. However, a Senator could certainly advance this approach in a separate private member’s bill. 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-252* should expressly recognize the vulnerability of all children and adolescents to commercial advertising for all types of products in the Preamble or the Committee report.

By focusing on only some foods (and ignoring ads for all other products), *Bill S-252* 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-252* if it were attacked by a food company as the *Irwin Toy* company attacked Quebec’s Consumer Protection Act from 1980 to 1989.

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 at least as legally defensible as an exclusively food, or nutrient-based restriction. 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. For instance, the federal *Competition Act* could be amended as follows to clarify the law, rather than depending on a public interest or child-protection organization using litigation to urge the Commissioner of

Competition or courts to adopt this view in a dispute likely to be resisted by massive companies with large litigation budgets. For instance, the Competition Act could be amended as follows:

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.¹⁵

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.¹⁶

Respectfully submitted,



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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 26,000 deaths in Canada in the year 2021 were due to dietary risks: <https://vizhub.healthdata.org/gbd-results?params=gbd-api-2021-permalink/6af09c6ece1cc1b47b2884cf898e87bc> 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

² Though many dieting programs lead to temporary weight loss, weight is almost universally regained by three years according to a systematic review of non-surgical and non-pharmacological obesity treatment studies seeking at least 5% loss in body mass (i.e., generally less than 5 KG) with a minimum 3-year follow-up, and no continued interventions in the follow-up period, and less than 30% attrition by the start of the follow-up period. The researchers noted that some unsustainably labour-intensive interventions and poorly evaluated studies reported weight-loss.

Nordmo M, Danielsen YS, Nordmo M. The challenge of keeping it off, a descriptive systematic review of high-quality, follow-up studies of obesity treatments. *Obesity Reviews*. 2020 Jan;21(1):e12949. Epub 2019 Nov 1. PMID: 31675146. Available at: <https://onlinelibrary.wiley.com/doi/10.1111/obr.12949>

In a peer-reviewed scientific report entitled "Tackling overweight and obesity: does the public health message match the science?" concluded:

"when caloric intake is cut the body naturally responds by both stimulating hunger and reducing basal energy expenditure so that less energy is expended...although restriction of energy intake and increased physical activity energy expenditure can achieve short-term weight loss, it does not provide a successful long-term treatment for excess weight as many people regain the lost weight as the body adapts to new levels of energy intake and expenditure. This is supported by the existing literature, which has shown that early weight loss, achieved by energy restriction and increased activity, is rarely maintained over the long term...Maximizing an individual's ability to lose and maintain weight should be the aim of any weight-loss intervention...body weight is centrally regulated with peripheral hormonal signals released from the gastrointestinal tract, pancreas and adipose tissue integrated primarily in the hypothalamus to regulate food intake and energy expenditure...The failure of research in the field of public health to incorporate the concept of homeostatic feedback mechanisms

into interventions is reflected in the current dietary guidelines, public health policy, and population-wide interventions aimed at targeting overweight and obesity...

Hafekost K, Lawrence D, Mitrou F, O'Sullivan TA, Zubrick SR. Tackling overweight and obesity: does the public health message match the science? *BMC Medicine*. 2013 Feb 18;11:41.. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3626646/pdf/1741-7015-11-41.pdf>

Other Canadian researchers characterized the findings of weight-loss program evaluation studies as follows:

“...up to 50% of lost weight is typically regained by 1-year follow up, with nearly all remaining lost weight regained thereafter in the vast majority of individuals. This almost ubiquitous weight regain is witnessed in virtually every clinical weight loss trial, including those specifically aimed at improving weight loss maintenance. Even the most well executed and empirically driven efforts to improve the sustainability of behavioral interventions have met with little success.”

Ochner CN, Barrios DM, Lee CD, Pi-Sunyer FX. Biological mechanisms that promote weight regain following weight loss in obese humans. *Physiol Behav*. 2013 Aug 15;120:106-13. Epub 2013 Aug 1. PMID: 23911805; PMCID: PMC3797148. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3797148/pdf/nihms-512177.pdf>

³ [Bill S-252, An Act to amend the Food and Drugs Act](#)

⁴ See: <https://openparliament.ca/bills/42-1/S-228/?page=2>

⁵ *Food and Drugs Act, R.S.C., 1985, c. F-27*. Available at: <https://laws-lois.justice.gc.ca/eng/acts/f-27/page-5.html#h-234432>

⁶ Health Canada. Policy update on restricting food advertising primarily directed at children: Overview. October 11, 2024. Available at: <https://www.canada.ca/en/health-canada/services/food-nutrition/healthy-eating-strategy/policy-update-restricting-food-advertising-primarily-directed-children.html>

⁷ *Richard v. Time Inc.*, [2012] 1 SCR 265. Available at: <https://canlii.ca/t/fq9tg>

⁸ 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

⁹ [1989] 1 *Supreme Court Reports* 927 at 990.

¹⁰ Health Canada “Policy update on restricting food advertising primarily directed at children: Proposed policy” April 25, 2023. See: Available at: <https://www.canada.ca/en/health-canada/services/food-nutrition/healthy-eating-strategy/policy-update-restricting-food-advertising-primarily-directed-children/proposed-policy.html>

¹¹ 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,¹¹ Norway,¹¹ 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 programming 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).

¹² *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).

¹³ See, for instance:



¹⁴ The Supreme Court stated:

[45] Section 218 [of the Quebec Consumer Protection Act] guides the application of all these provisions of Title II. It explains the approach to be used to determine whether a representation is to be considered a prohibited practice. Its wording is based to a large extent on that of s. 52(4) of the Combines Investigation Act, R.S.C. 1985, c. C-23, a slightly different version of which can now be found in s. 52(4) of the Competition Act, R.S.C. 1985, c. C-34 ...

[78] For all these reasons, ... A court asked to assess the veracity of a commercial representation must therefore engage, under s. 218 C.P.A., in a two-step analysis that involves — having regard, provided that the representation lends itself to such an analysis, to the literal meaning of the words used by the merchant — (1) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (2) determining whether that general impression is true to reality. If the answer at the second step is no, the merchant has engaged in a prohibited practice. [emphasis added]

Richard v. Time Inc., 2012 SCC 8, [2012] 1 SCR 265. Available online at: <https://canlii.ca/t/fq9tg>

¹⁵ 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.

¹⁶ 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;