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BY EMAIL

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Attention:

The Honourable Senator Rosemary Moodie
Chair, Standing Committee on Social Affairs, Science and Technology
Senate of Canada
Ottawa, ON K1A 0A4

RE: BILL C-252

Dear Senator Moodie and members of the Standing Committee on Social Affairs, Science and Technology (SOCI),

Further to the Hearings before your distinguished SOCI Committee, FHCP and the other industry witnesses who attended the Hearing session of this last Thursday have requested that I respectfully provide you with these views below, in advance of your Committee's clause by clause review this coming Wednesday. Additional Supporting information will also be sent to the Committee later on to provide further clarification on important issues raised by the Committee members during the Hearings.

I thank you for your kind attention to the following important concerns as raised. Please know as well that we would welcome any further questions you may have or the opportunity to meet again at your convenience.

Sincerely and respectfully,

Me Pierre Savoie
Partner, Lawyer / LJT Lawyers L.L.P.

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Issues Requiring Further Attention re Bill C- 252

Overview

Bill C-252, *An Act to amend the Food and Drugs Act (prohibition of food and beverage marketing directed at children)* raises several serious concerns not only about its scope and its practical application, but its fundamental fairness and its very validity. The Bill does not appear on its face to meet the basic and essential requirements to constitute valid legislation, especially in the context of a proposed restriction on freedom of expression. Indeed, the bill's complete vagueness and failure to define when the restriction would apply (i.e. which advertising is considered primarily directed to children) not only translates into a full delegation of legislative responsibilities to a regulatory body (Health Canada), but arguably renders the enabling act void from its inception. In our view, the Bill constitutes not only an unreasonable restriction on the freedom of expression protected by the Canadian Charter of Rights and Freedoms (the "Charter"), but it also denies those facing potentially serious consequences under it of protections against excessively vague legislation. Neither the proposed restriction nor the denial of fundamental justice associated with the Bill can be justified under the tests of reasonability the Supreme Court of Canada established in the Oakes case.

Regrettably, industry was not consulted before the Hearings and therefore did not have the opportunity to inform the Committee on the important concerns Bill C-252 raises. We were also denied an opportunity to make the constructive suggestions and submissions presented in this letter. In our opinion, any such legislation is premature and not necessary in view of the actions that industry has taken to address responsible advertising. It is our respectful submission that government should only proceed with this Bill if it is amended to incorporate the *Code for the Responsible Advertising of Food and Beverage Products to Children* (the "Code"). Such a measure is, at a minimum, essential to alleviating fundamental concerns related to the Bill.

Legal issues of concerns

Laws must have a sufficient degree of clarity to ensure their validity. In the case of Bill C-252 and as was the case with its predecessor (Bill S-228), it is far too vague. The Bill fails to define what will be subject to the restriction and when and where the restriction would apply.

In fact, discussions before this committee about the Bill highlight the confusion it creates by failing to address its scope and application. The restriction deals specifically and only with advertising to children. Advertising, as defined and regulated in the host legislation, the Food and Drugs Act, does not include aspects like packaging. However, contrary to the French version of the Bill which uses the term "publicité" (advertising), the Bill's English title uses the word "marketing", a reference to a much broader scope of activities, that we believe has contributed to confusion about the Bill's scope.

It is unclear whether Bill C-252 makes this critical distinction. Even in our discussions with Health Canada, it was acknowledged that the terms were not synonymous or interchangeable. The Food and Drugs Act also clearly defines and distinguishes between advertisement, package and label. The use of the words advertising and marketing interchangeably in the English version creates confusion around what Bill C-252 is intended to restrict, fundamental to the ability of a regulator to enact regulations. It also denies anyone subject to the legislation the ability to understand their rights or potential liability.

Based on a speech given as Committee Chair before the Senate on April 2024 (where the word ***marketing*** was used repeatedly when referring to the Bill's restriction and its mandate) and based on the questions and comments made during the Standing Committee on Social Affairs, Science & Technology (SOCI) sessions held on November 7, 20 and 21, it is apparent that there is a critical misconception that persists that goes to the heart of the Bill's scope and application. Indeed, even the senators on the Committee reviewing the Bill appear to be labouring under the belief it would namely cover product shape, product placement and packaging although none of these would be considered advertising. These distinctions are also critically important since many marketing activities more properly fall within provincial heads of power and jurisdiction.

Contrary to sections 248 and 249 of the Quebec consumer protection act which inspired Bill C-252, the Bill is completely silent on the criteria to be applied to make the determination that a food is being "advertised … in a manner that is primarily directed at persons who are under 13 years of age". The Quebec legislation was the subject of a Charter challenge, and the presence of such explicit criteria was relevant to the court's finding that it constituted a reasonable restriction. The Bill leaves advertisers and those in charge of enforcing it without direction or sufficient understanding of its scope and intended application to interpret it and comply with it.

Bill C-252 contains a trademark protection section presumably for cases where the use of a trademark would be prohibited by application of the restriction against advertising to children. However, the Bill contains no provisions regarding trademark use or express restriction on their use. We point out that a restriction on the use of a trademark would *per se* constitute a serious encroachment on the freedom of expression protected under the Charter, as addressed by the Supreme Court of Canada in the Irwin Toy case and others. The reasonable limits of such a restriction would in our view require the restriction to be expressly stated rather than merely implied, and the scope of the restriction would need to be appropriately circumscribed.

Not only is Bill C-252 excessively vague, it also contains a provision completely outside its purview. Indeed, section 7.3 provides for a review process regarding the effects of the Bill but not only as they relate to any decrease (or increase) in the number of obese children of the age group the restriction is intended to protect, but rather focusing "on whether there is an increase in the advertising of foods referred to in section 7.1 in a manner that is primarily directed at persons who are 13 years of age or

older but less than 18 years of age". This review has no correlation to the stated objective of the Bill which is to address obesity concerns in children under 13 years of age. Furthermore, the Bill does not (and could not according to the Irwin Toy decision) impose any restriction on food advertising to any other age group. Accordingly, the creation of a review process regarding advertising to other age groups through a bill, especially one enacted in regard advertising directed primarily to persons under 13 years of age, would certainly be out of scope and beg further serious questions about its validity.

Conclusion

It appears that Bill C-252 was drafted to be an empty shell. It is ill-drafted legislation where the legislators appear to have deliberately delegated their authority. Giving Health Canada a mandate to "legislate" is outside the boundaries of the appropriate legislative process and an improper delegation of authority. In other words, it is a bill that seeks to impose a ban without making it possible to understand exactly what it is banning and asking Health Canada to set the rules without parameters and without legislative oversight or accountability; essentially delegating the powers reserved to elected officials to an unelected official.

By passing this Bill as it is presently drafted, we submit that Senate would be sanctioning a bill they know or should know would not withstand the scrutiny of our courts. Health Canada's time and resources to continue working on regulations to support such a poorly drafted, defective and arguably invalid bill could therefore be viewed by the population as a likely and avoidable waste of public and taxpayer money.

Unfortunately, industry was not included in the review process until last week when it was finally invited to testify before the SOCI. Although it is the role of Senate to review proposed bills in an objective manner, industry was met with strong unfavorable and ill-informed bias, including a shocking allocation that the Code itself constituted a blatant act of bad faith. A member "testifying" instead of asking questions, constantly interrupting answers, and above all, applying undue pressure for quick adoption of the Bill without any amendments gave the November 21 Hearing a rather uneasy tone, and one that was very uncharacteristic of a Senate Hearing. More importantly, it took away precious time out of the very limited time given to us to provide clarification and bring to light the evident flaws outlined above and contribute to a better understanding of the concerns the Bill raises.

That being said, we reiterate our position that there is no need to legislate on the subject of food and beverage advertising primarily directed to children since the Code is mandatory and meets or exceeds the guidelines in Health Canada's very own 2018 Guidance document and 2023 policy update. The Code also meets or exceeds Health Canada's targeted approach on broadcasting and digital media.

However, if the government insists on legislating, it should certainly not be through C-252 as drafted. In fact, should Bill C-252 pass in its present form notwithstanding its fundamental flaws, it would be impossible to enforce until regulations are adopted and this is likely to take months or years judging from the testimony given by MP Patricia Lattanzio (who introduced the Bill) and by Dr. Joyce Boye (Director General, Food Directorate, Health Canada) during the November 7 session of the SOCI, since the consultations leading to the elaboration of these regulations will be exhaustive and involve all stakeholders.

Instead, we propose that government, if it proceeds, amend Bill C-252 by incorporating the Code by reference instead of spending taxpayer money and government resources to reinvent the wheel; especially when the new wheel contemplated - Bill C-252- is so fatally flawed. Not only would this solution be cost efficient, it would ensure faster implementation with an efficient and trustworthy pre-clearance and complaint-based enforcement mechanism. It would also afford advertisers and their media partners the predictability associated with the application of the Quebec model which is well established and universally understood.