

Centre for Health Science and Law

**Deputation of
Bill Jeffery, LLB, Executive Director
of the Centre for Health Science and Law (CHSL)**

**to the Toronto Board of Health
regarding the Toronto Public Health staff report,
“Stop Marketing to Children: A Window of Opportunity”**

**April 25, 2016
at Toronto City Hall**

I am the Executive Director of the new Centre for Health Science and Law (CHSL) headquartered in Ottawa. I have testified before this Board previously on behalf of the, now defunct, Canadian branch of the Centre for Science in the Public Interest. Like CSPI, the Centre for Health Science and Law is a non-profit health advocacy organization specializing in food and nutrition issues. We do not accept funding from industry or government and our work will soon be funded by subscription revenues from an advertisement-free magazine, the *Food for Life Report*.

Nutrition-related illnesses cause more than 50,000 deaths annually in Canada, largely due to heart disease, stroke, diabetes, and certain cancers caused mainly by consuming too many calories, way too much sodium, trans and saturated fat, and refined sugars, and far too little fruits and vegetables.¹ More than 60% of adults and 25% of school-aged children are overweight or obese.² The economic burden of obesity and overweight has been estimated to range from \$5 billion to \$30 billion annually, all estimates of which are based on some conservative assumptions.³ Last summer, Health Canada estimated that employees with poor nutritional health are 11% less productive than counterparts who ate a healthy diet which suggests that the potential indirect health benefits of better nutrition in a \$2 trillion economy could be in the tens of billions of dollars per year.⁴

I hasten to add that physical inactivity is also a major driver of ill-health even if it likely plays a minor role in the obesity epidemic compared to poor diet. This is important because, by far, most products commercially advertised to children promote sedentary leisure, much more than junk foods. Every major report on obesity published by the Ontario 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, Senate Standing Committee on Social Affairs, Science and Technology, and the Ontario government’s Healthy Kids Panel.⁵ The Seattle, Washington-based Institute for

Health Metric and Evaluation’s disease risk factor calculator estimates that low physical activity causes more than 13,500 deaths per year in Canada. The World Cancer Research Fund’s exhaustive review of research on the relationship between diet, physically activity and cancer concluded that physical inactivity directly contributes to colorectal cancer (the second leading cause of cancer death in Canada) and probably breast and endometrial cancers. These points warrant emphasis in the Canadian context because the vast majority of peer-reviewed research has been conducted in the United States and has focused on food advertising and the US regulatory environment.

I support the main recommendation, 1(a), of the April 11, 2016 Toronto Public Health staff report entitled “Stop Marketing to Children: A Window of Opportunity” with one caveat: that I believe using an age cut-off of 18 is more in line with federal and Ontario consumer protection law, including the Ontario *Age of Majority Act* and the federal *Competition Act*. As you know, section 1(a) of the Board proposal states:

The Board of Health request the Government of Canada to:

a. implement a ban on all commercial marketing to children aged sixteen years and under, in order to provide the most comprehensive protection of child and youth rights and health;

I support a ban on all commercial advertising directed at children and youth as the Quebec *Consumer Protection Act* has done since April 1980,^{*} but I do not support recommendations 1(b) and 2 in Toronto Public Health April 2016 staff report which state:

b. as an important first step, act swiftly to implement recommendations on commercial marketing of all foods and beverages to children signalled in both the Minister of Health's Mandate Letter of November 12, 2015 and the Senate Report on Obesity in Canada;[†]

2. The Board of Health request the Ontario Minister of Health and Long Term Care to support the Government of Canada in implementing restrictions on marketing to children, as per the recommendations in the provincial Healthy Kids Panel (HKP) report;[‡]

^{*} n.b., The Senate recommendation and federal health minister’s mandate letter are slightly misleading about the scope of the Quebec approach.

[†] The federal [Minister of Health’s Mandate letter from Prime Minister Trudeau](#) charges Minister Jayne Philpott with: “introducing new restrictions on the commercial marketing of unhealthy food and beverages to children, similar to those now in place in Quebec;”

And, the Senate Report on Social Affairs, Science and Technology [Obesity in Canada](#) urges her to:

“Recommendation 2 The committee recommends that the federal government:

- Immediately conduct a thorough assessment of the prohibition on advertising food to children in Quebec; and,
- Design and implement a prohibition on the advertising of foods and beverages to children based on that assessment.”

[‡] The [Healthy Kids Panel report No Time to Wait](#) recommended:

“2.1 Ban the marketing of high-calorie, low-nutrient foods, beverages and snacks to children under age 12.”

While the sentiment of restricting marketing of all food to children (as the Senate report and the Stop Marketing to Children coalition propose) is commendable and I generally agree with the so-called “Ottawa Principles”, the regulatory reforms that both parties advocate are, in my view, especially vulnerable to constitutional legal challenge (so are steps backward, not steps forward) for at least the following reasons:

- A ban on all foods advertisements targeting children is unprecedented in the world (and therefore not tested in courts or scientific literature as effective),
- A ban on all food advertisement targeting children is logically not supportable by Supreme-Court-of-Canada-endorsed evidence of the vulnerability of children to manipulation by commercial advertising because it exempts all non-food products and services which exemption would be unconscionable if the government believed that those ads also trick children,
- A ban on all foods advertisements targeting children does not appear to be based on a coherent health rationale because, for instance, it prohibits ads for nutritious foods and permits ads for screen-time and other products that hinder healthy development and disease protective lifestyles.

Likewise, the approach of restricting advertising for only nutrient-poor foods that was advocated by the Healthy Kids Panel suffers from the first two defects as the Senate Committee/Coalition approach noted above as well as the following defects:

- A ban on nutrient-poor foods does not effectively curb promotions even for ads that most aggressively target children and teens by categorically failing to restrict ads for fast food restaurant “places” (e.g., restaurant mascots or trophy nutritious foods sold as such salads) and sugary soft drinks (e.g., by absolving nearly identical-looking ads for diet drinks or brand logos), which collectively account for as much as 60% of such ads in children and teens according to the US Federal Trade Commission; and
- A ban on nutrient-poor foods requires stipulating complex nutrition standards that are almost certain to partially contradict existing nutrition policies (such as permissible nutrition label claims and *Canada’s Food Guide*), potentially fuelling legal challenges to which public food procurement (including school nutrition standards), food tax rules, and reformulations are not as vulnerable.

Accordingly, in my view, these two approaches could foreseeably result in utterly failed efforts to protect children and, in that sense, could be expensive and time consuming delays, not stepping stones toward progress.

In recent years, federal Parliament has passed a large number of bills that have not survived constitutional scrutiny in the courts and the previous federal government established a generally diminished *Charter of Rights and Freedoms* review of legislative proposals that is currently under review by the [Federal Court of Appeal](#) in connection with a challenge brought by a government legislative drafter and whistle-blower. (Mr. Schmidt filed his appeal of the Federal Court trial judge’s 146-page decision earlier this month.)⁶ By the same token, it is unwise for health law reform advocates to be cavalier about the constitutionality of reforms they advocate.

Likewise, especially in light of the recent, failed efforts by the New Brunswick, Ontario and Federal governments to regulate favoured tobacco products (tobacco companies re-sized products to easily skirt weight-based regulations) and menu labelling litigation in New York City, public health advocates like the Toronto Board of Health should not assume that regulated companies and their industries associations will passively respond to regulatory restrictions. Ensuring proposals are legally defensible and free from loopholes is vital to ensuring the credibility and effectiveness of legislators.

Since 1980, the Quebec *Consumer Protection Act* has specifically prohibited all advertising directed at children under the age of 13 (e.g., TV, Internet, children’s festivals, billboards⁷). Parti Quebecois and Liberal governments in Quebec successfully defended the popular law for nearly a decade culminating in a landmark 1989 freedom of expression ruling in which the Supreme Court said that advertising to children is:

*...per se manipulative. Such advertising aims to promote products by convincing those who will always believe.*⁸

In fact, [developmental psychology research](#), [Canadian legal tradition](#), and the [Supreme Court of Canada](#) (in the 1989 *Irwin Toy* decision) concur that children lack the cognitive maturity to properly interpret commercial advertising. As such, advertising to children is simply systematically tricking children on the scale of mass marketing. Media literacy training of children or their parents doesn’t work for children and has not been studied on teenagers, making it a poor substitute for forcing companies to behave ethically by directing their advertising to parents instead of children. The same year that the Supreme Court of Canada ruled in *Irwin Toy v. Quebec*, the Government of Canada adopted the *UN Convention on the Rights of the Child*,⁹ committing to ensure that policy and legislation prioritize the best interests of children over other interests. Since then, four expert literature reviews have shown that the scientific justification for limiting marketing to children has become even more compelling.¹⁰ The federal *Competition Act* and *Food and Drugs Act* prohibit misleading and deceptive advertising. Though neither statute expressly limits marketing to children, *per se*, section [9\(1\) of the Competition Act](#) stipulates that a resident of Canada must be at least 18 years old to officially complain about a misleading or deceptive ad.

In the 1990s, Norway enacted legislation like Quebec’s, and Sweden banned TV advertising to children under 12.¹¹ The United Kingdom restricts television ads directed at children under 16 for foods that are high in fat, sugar and salt—an outdated approach to nutrition standards in not focusing on reducing saturated and trans fats, and not focusing on reducing “free sugars”. Evaluations of the U.K. regulation indicate that it led only to a reduction from 4-in-5 food ads seen by children being for foods that are high in fat sugar and salt (HFSS) to 3-in-5.¹² And, a more recent review by the World Health Organization’s European Office found that, while spending on HFSS ads targeting children declined over the period 2008-2012, the volume of children’s exposures to advertising actually rose during that period,¹³ again indicating that regulators should anticipate marketers’ next moves to best protect children. Also importantly, the UK’s main public television broadcasters (BBC1, BBC2, BBC3, etc.) have remained advertising-free for children and adults for decades. The narrower nutrient-based children’s advertising ban was an effort to deal with new speciality private television channels.

While the Government of Ontario has not taken any action to address advertising to children since Deputy Premier Minister of Health Deb Matthews, when she was Minister of Health, in 2013 sought “[advice on how to reduce the marketing of unhealthy food and beverages aimed at kids](#)” in a consultation that was [convened by an advertising firm, FleishmanHillard that serves the food industry](#). The fall 2013 invitation-only consultation never produced the consultation report promised.

It is important for the Toronto Board of Health to advocate a clear message about effective public health nutrition law reform in Canada as provincial and federal governments still espouse reforms that could needlessly and foreseeably bring us back to the drawing board in a few years.

Respectfully submitted on behalf of the Centre for Health Science and Law by Bill Jeffery.

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 Based on an average of measured obesity and overweight from surveys conducted in 2008 and 2007-2009 reported in Shields M, Gorber SC, et al. “Bias in self-reported estimates of obesity in Canadian health surveys: An update on correction equations for adults.” Statistics Canada, Catalogue no. 82-003-XPE *Health Reports*, 2011 Vol. 22(3) 2011 at Table 4. Available at: <http://www.statcan.gc.ca/pub/82-003-x/2011003/article/11533-eng.pdf> For children, see: Component of Statistics Canada Catalogue no. 82-625-X no. 2010001. Health Fact Sheets. Body Mass Index (BMI) for Children and Youth 2007 to 2009. Available at: <http://www.statcan.gc.ca/pub/82-625-x/2010001/article/11090-eng.pdf>

³ Public Health Agency of Canada. *Obesity in Canada*. 2010. Ottawa at 28-29. Available at: <http://www.phac-aspc.gc.ca/hp-ps/hl-mvs/oic-oac/assets/pdf/oic-oac-eng.pdf> Anis AH, Zhang W, et al. Obesity and overweight in Canada: An updated cost-of-illness study. *Obesity Reviews*. 2009;11(1):31-40. Behan DF, Cox SH, et al., *supra*, which estimated the cost of overweight and obesity in Canada at \$30 billion annually, assumed a 13% rate of hypertension, but figures published in 2011 indicate that 23% is more accurate. See: Robitaille C, Dai S, et al. Diagnosed hypertension in Canada: incidence, prevalence and associated mortality. *Canadian Medical Association Journal*. 2012;184(1):E49-E56 at E51.

⁴ *Canada Gazette, Part I*, Vol. 149, No. 24. Saturday June 13, 2015 on pages 1192-1265 at p. 1203: <http://www.canadagazette.gc.ca/rp-pr/p1/2015/2015-06-13/pdf/g1-14924.pdf>

⁵ See, for instance:



⁶ *Edgar Schmidt v. Attorney General of Canada*, 2016 Canlii 269 (Federal Court, Trial Division). Mr. Schmidt appealed to the Federal Court of Appeal in April 2016. Available at <http://www.canlii.org/en/index.html>

⁷ The Quebec *Consumer Protection Act* has protected Quebec children against such marketing since 1980. *Attorney General of Québec v. Irwin Toy, Ltd.*, [1989] 1 *Supreme Court Reports* 927 at 988-9 held that: “...*per se* manipulative. Such advertising aims to promote products by convincing those who will always believe.”

⁸ *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).

⁹ 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

¹⁰ See, for instance, three comprehensive expert literature reviews: Gerald Hastings et al., Centre for Social Marketing. University of Strathclyde & Food Standards Agency. *Review of Research on The Effects of Food Promotion to Children* (2003). London, United Kingdom, available at: <http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf> ; Institute of Medicine of the National Academies of Sciences. *Food Marketing to Children and Youth: Threat or Opportunity* (J. Michael McGinnis, et al., ed.) 2006. Washington, D.C.; American Psychological Association. *Report of the APA Task Force on Advertising and Children* (Brian Wilcox, Chair). 2004. Washington, D.C., available on at: <http://www.apa.org/pi/families/resources/advertising-children.pdf> ; and World Cancer Research Fund. *Policy and Action for Cancer Prevention— Food, Nutrition, and Physical Activity: a Global Perspective*. 2009. Washington, D.C., available via <http://www.dietandcancerreport.org/>

¹¹ Hawkes, C. (Ed.). (2004). *Marketing food to children: The global regulatory environment*. Geneva: World Health Organization. Retrieved from <http://whqlibdoc.who.int/publications/2004/9241591579.pdf2004b>

¹² United Kingdom Office of Communications. *HFSS advertising restrictions. Final review*. 2010 at 32. Available on-line at: <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/hfss-review-final.pdf>

¹³ WHO Regional Office for Europe. *Marketing of foods high in fat, salt and sugar to children: update 2012–2013*. 2013 at 22 and 24. Available at: http://www.euro.who.int/_data/assets/pdf_file/0019/191125/e96859.pdf